LABOR AND EMPLOYMENT LAW

CALIFORNIA LAWYERS ASSOCIATION

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Employment Law Year in Review

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Speakers:

Andrew Friedman

Anthony Oncidi

***Conference Reference Materials***

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# California Lawyers Association – Labor & Employment Law Section: Annual Review of Recent Employment Law Cases & Statutes

## Concise(ish) Summary Of Employment Laws & Decisions January 2020 – July 2024


**By: Andrew H. Friedman** [1]

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[1] These materials contain concise(ish) summaries of the employment law decisions and new statutes from January 2020 to July 2024 which I consider to be of particular interest to employment litigation attorneys. These materials are designed to be used in conjunction with Andrew H. Friedman, *Litigating Employment Discrimination Cases* (James Publishing 2005 - 2024) which can be purchased at https://jamespublishing.com/product/litigating-employment-discrimination-cases/. Some of the case summaries in these materials come from Andrew H. Friedman, Ramit Mizrahi & Anthony J. Oncidi, *Top Employment Cases of 2023*, Cal. Lab. & Emp. L. R. Vol. 38, No. 1 (2024), accessible at https://www.helmerfriedman.com/docs/Law-Review-Top-Employment-Cases-of-2023.pdf; Andrew H. Friedman, Ramit Mizrahi & Anthony J. Oncidi, *Top Employment Cases of 2022*, Cal. Lab. & Emp. L. R. Vol. 37, No. 1 (2023), accessible at https://www.helmerfriedman.com/docs/top_cases_2022_mizrahi_friedman_oncidi.pdf; Andrew H. Friedman, Ramit Mizrahi & Anthony J. Oncidi, *Top Employment Cases of 2021*, Cal. Lab. & Emp. L. R. Vol. 36, No. 1 (2022), accessible at https://www.helmerfriedman.com/docs/Top-Employment-Law-Cases-2021.pdf; And, still other summaries come from Andrew H. Friedman & Erin Kelly, *2023's New Employment Laws (With A Bit Of Color Commentary)*, The Advocate Magazine (February 2023), accessible at https://www.helmerfriedman.com/docs/Friedman-Kelly-2023-New-Employement-Laws.pdf; and Andrew H. Friedman & Taylor Markey, *The Best and Worst Employment Cases of 2021*, The Advocate Magazine (April 2022), accessible at https://www.helmerfriedman.com/docs/Cases-Shaped-Employment-Law-2021.pdf.

# I. INTRODUCTORY MATTERS

***Justice Stephen Gerald Breyer Resigns – Ketanji Brown Jackson, President Joseph Robinette Biden Jr.'s Nominee, Confirmed To Be The First Black Woman To Sit On The Supreme Court***

On January 26, 2022, Justice Stephen Gerald Breyer notified the White House that he would retire at the end of the 2021-2022 term. Justice Breyer was nominated to the Supreme Court by President Bill Clinton on May 17, 1994. Breyer was confirmed by the Senate on July 29, 1994, by an 87 to 9 vote, and received his commission on August 3, and replaced retiring justice Harry Blackmun. During his tenure on the Supreme Court, Justice Breyer played a key role in protecting the rights of employees. For example, in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), Justice Breyer authored the majority opinion rejecting the holdings of the Third, Fourth, Fifth, and Eighth Circuits that Title VII's retaliation provision is limited to employer's actions that affect the employee's compensation, terms, conditions, or privileges of employment. Instead, Justice Breyer's majority opinion broadly interpreted the antiretaliation provision holding that it extends beyond workplace-related or employment-related retaliatory acts and harm to any action that a reasonable employee would have found materially adverse – *i.e.,* action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. Similarly, in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011), Justice Breyer wrote the majority opinion holding that the anti-retaliation provision of the FLSA protects oral as well as written complaints of violation of the Act. Additionally, in *CBOCS W., Inc. v. Humphries*, 553 U.S. 442 (2008), Justice Breyer, authoring the majority opinion, held that Section 1981 encompasses employment-related retaliation claims and includes claims by an individual, whether black or white, who suffers retaliation because he has tried to help a different individual, suffering direct racial discrimination, secure his § 1981 rights. Likewise, in *Heffernan v. City of Paterson*, 578 U.S. 266 (2016), Justice Breyer, writing for the majority, held that the

First Amendment generally prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected political activity even if the officials are mistaken and the employee did not, in fact, engaged in protected political activity. Unfortunately, with an increasingly conservative Supreme Court, Justice Breyer frequently found himself in dissent in more recent years such as in *National Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661 (2022), where he explained why the majority was incorrect to issue a stay preventing the Occupational Safety and Health Administration (OSHA) from issuing an emergency temporary standard designed to protect America's workers from COVID-19.

To replace Justice Breyer, President Joseph Robinette Biden Jr., on February 25, 2022, nominated Ketanji Brown Jackson to the Supreme Court, beginning a historic confirmation process for the first Black woman to sit on the highest court in the nation in its 223-year history.

During the confirmation process, Judge Jackson was forced to fend off an orchestrated barrage of Republican attacks that alternated between the disrespectful, the misleading, and the absurd (Senator Ted Cruz, R-Texas, for example, asked the Judge whether she thinks "that babies are racist" and Senator Marsha Blackburn, R-Tenn., asked the Supreme Court nominee: "Can you provide a definition for the word 'woman'?").

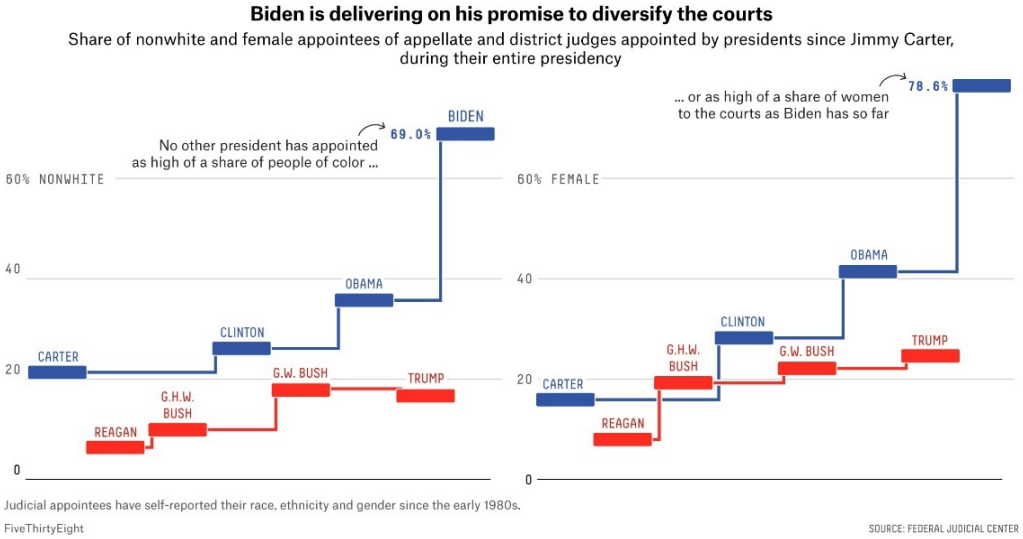

On April 7, 2022, by a vote of 53-47, the Senate confirmed Judge Jackson as the 116th Justice of the U.S. Supreme Court. Three principled and courageous Republican Senators (Senators Susan Collins of Maine, Lisa Murkowski of Alaska and Mitt Romney of Utah) joined all of the Democratic Senators to confirm Judge Jackson.

Justice Jackson will become the first Black woman to serve on the Supreme Court, fulfilling a campaign promise by then-candidate Biden during the 2020 presidential campaign.

President Biden has, thus far, not only honored his campaign promises to nominate the first Black woman to the Supreme Court and the first Black woman (Kamala Harris) to serve as Vice President but he has also accomplished a historic number of other firsts in terms of diversifying the federal government – nominating the first Hispanic judge to sit on the 7th Circuit (Nancy Maldonado), nominating the first Latino (Bradley Garcia) to sit on the D.C. Circuit, the first woman of color (Dana Douglas) to sit on the Fifth Circuit, the first woman (Janet Yellen) to serve as U.S. Treasury Secretary, the first Black Secretary of Defense (Lloyd Austin), the first Black woman (Lisa Cook) to serve on the Federal Reserve Board, the first Native American (Lynn Malerba) to serve as U.S. Treasurer, the first woman to command a military branch (Adm. Linda Fagan to serve as the next commandant of the U.S. Coast Guard), the first woman (Christine Wormuth) to serve as the Secretary of the Army, the first woman to command an aircraft carrier (Captain Amy Bauernschmidt to command the USS Abraham Lincoln, a Nimitz-class aircraft carrier), the first openly gay cabinet member (Pete Buttigieg to serve as the Secretary of Transportation), the first Native-American woman cabinet member (Deb Haaland to serve as the Secretary of Interior), the first Black person (Michael E. Langley) to become a four-star Marine Corp. General since the founding of the U.S. Marine Corps 246 years ago, the first Indian-American and female of color (Neena Tanden) to serve as the Director of the

Office of Management and Budget, the first Native American federal judge in California, and just the fifth Indigenous woman in U.S. history to serve on a federal court (Sunshine Suzanne Sykes).

President Biden has also fulfilled his campaign promise to diversify the federal judiciary. As of April 2022, "President Biden has nominated the most demographically diverse set of judicial candidates in history, including the first LGBTQ woman to serve on a Court of Appeals, the first Muslim American to serve as a federal judge, and the first Black woman to ever serve on the Supreme Court. Twenty-six percent of all Black women currently serving as active judges were nominated by President Biden." Caroline Fredickson and Alan Neff, *Diversity in Federal Judicial Selection During the Biden Administration*, Brennan Center For Justice (April 5, 2022), accessible at https://www.brennancenter.org/our-work/analysis-opinion/diversity-federal-judicial-selection-during-biden-administration.




As of November 5, 2023, of the 145 judges confirmed by the Senate in the last three years, 66% are women, including Supreme Court Justice Ketanji Brown Jackson, and just over 66% of the appointees are from a racial or ethnic minority group. *See* John Gramlich, *Most Of Biden's Appointed Judges To Date Are Women, Racial Or Ethnic Minorities – A First For Any President*, Pew Research Center (December 4, 2023)("As of Nov. 5 – exactly a year before the 2024 presidential election – Biden had appointed 145 judges to the three main tiers of the federal judicial system: the district courts, the appeals courts and the U.S. Supreme Court. Women accounted for just over 66% of those judges (95 of 145). The 95 women judges Biden had appointed as of Nov. 5 far

exceed both the number and share any other president had appointed at the same point in their term. For example, then-President Donald Trump had appointed 36 women judges by the same point four years ago (24% of his total at the time), while then-President Barack Obama had appointed 54 women judges (47% of his total at the time). The pattern is similar when it comes to judges who are racial or ethnic minorities. Nearly two-thirds of the judges Biden had appointed as of Nov. 5 (96 of 145, or just over 66%) are Black, Hispanic, Asian American or members of another racial or ethnic minority group. That is far more than any other president had appointed at the same point in their tenure. Trump, for instance, had appointed 22 minority judges by the same stage (14% of his total at the time), while Obama had appointed 42 (37% of his total at the time).”), accessible at https://www.pewresearch.org/short-reads/2023/12/04/most-of-bidens-appointed-judges-to-date-are-women-racial-or-ethnic-minorities-a-first-for-any-president/. *See also Biden Builds Judicial Legacy With Diversified Federal Courts,* Bloomberg Law (December 27, 2022), accessible at https://news.bloomberglaw.com/us-law-week/biden-builds-judicial-legacy-with-diversified-federal-courts; Candice Norwood, *Biden’s judicial nominations have set records for diversity, but several remain unconfirmed,* PBS.org (December 13, 2022)(“About 74 percent of the president’s 95 confirmed nominees to federal courts are women, and about 46 percent are women of color, more than for any other president. Democrats have also confirmed 11 Black women to serve as appellate judges, more than doubling the previous total number of Black women to serve on the country’s second-highest courts. Most notably, Biden appointed Justice Ketanji Brown Jackson, the first Black woman to join the U.S. Supreme Court.”), accessible at https://www.pbs.org/newshour/politics/bidens-judicial-nominations-have-set-records-for-diversity-but-several-remain-unconfirmed; Candice Norwood & Jasmine Mithani, *Two years in, Biden has prioritized nominating women of color as judges*, 19thNews.org (January 26, 2023)(“Biden’s judicial appointees are the most diverse of any U.S. president to date in terms of race, gender and professional background. Of the judges appointed by Biden in the past two years, 75 percent are women, 47 percent are women of color and 67 percent are people of color.

**Women account for 66% of the judges Biden had appointed as of Nov. 5**

*Women federal judges appointed through the first 1,019 days of each president’s tenure*

Republican
Democrat

| PRESIDENT | NUMBER OF WOMEN JUDGES APPOINTED | WOMEN AS A SHARE OF PRESIDENT’S JUDICIAL APPOINTEES |
|---|---|---|
| Joe Biden | 95 | 66% |
| Donald Trump | 36 | 24 |
| Barack Obama | 54 | 47 |
| George W. Bush | 33 | 20 |
| Bill Clinton | 50 | 30 |
| George H.W. Bush | 14 | 13 |
| Ronald Reagan | 8 | 7 |
| Jimmy Carter | 28 | 16 |
| Gerald Ford | 1 | 2 |
| Richard Nixon | 1 | 1 |
| Lyndon B. Johnson | 1 | 1 |
| John F. Kennedy | 1 | 1 |
| Dwight D. Eisenhower | 0 | 0 |

Note: Excludes judges confirmed to certain specialized or territorial courts.
Source: Pew Research Center analysis of Federal Judicial Center data.

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As of May 17, 2024, President Biden has not only installed more non-White federal judges than any president in history but his slate of judges is also majority female — another first. *See* Nick Mourtoupalas, *Biden has installed the most non-White judges of any president: Additionally, 6 in 10 Biden judges are women, data show*, The Washington Post (May 17, 2024), accessible at https://www.washingtonpost.com/politics/2024/05/17/biden-trump-judges-diversity/; John Gramlich, *Most of Biden's appointed judges to date are women, racial or ethnic minorities – a first for any president*, Pew Research (December 4, 2023), accessible at https://www.pewresearch.org/short-reads/2023/12/04/most-of-bidens-appointed-judges-to-date-are-women-racial-or-ethnic-minorities-a-first-for-any-president/.

**How presidents compare on the racial, ethnic diversity of their appointed judges**

*Federal judges appointed by each president, by race/ethnicity*

Republican Democrat

| PRESIDENT | JUDGES | WHITE | BLACK | HISPANIC | ASIAN | OTHER | TOTAL NON-WHITE | % NON-WHITE |
|---|---|---|---|---|---|---|---|---|
| Donald Trump | 226 | 189 | 9 | 9 | 13 | 6 | 37 | 16% |
| Barack Obama | 320 | 205 | 58 | 31 | 17 | 9 | 115 | 36 |
| George W. Bush | 322 | 264 | 24 | 30 | 4 | 0 | 58 | 18 |
| Bill Clinton | 367 | 277 | 61 | 23 | 5 | 1 | 90 | 25 |
| George H.W. Bush | 187 | 168 | 11 | 8 | 0 | 0 | 19 | 10 |
| Ronald Reagan | 358 | 335 | 7 | 14 | 2 | 0 | 23 | 6 |
| Jimmy Carter | 261 | 204 | 37 | 16 | 2 | 2 | 57 | 22 |

Note: Totals exclude judges confirmed to certain specialized or territorial courts. White, Black and Asian Americans include only single-race non-Hispanics. Hispanics are of any race. "Other" includes those who identify as Native American, Pacific Islander or Chaldean, as well as those who are multiracial or multiethnic.
Source: Pew Research Center analysis of Federal Judicial Center data.

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All of this stands in stark contrast to his predecessor, former (and twice impeached and twice popular vote losing) President (and convicted felon) Donald Trump, who appointed mostly white males to the federal bench. *See Diversity of the Federal Bench: Current statistics on the gender and racial diversity of the Article III courts* (American Constitution Society)("During the Trump administration, there were 234 confirmed Article III judges: 3 justices to the U.S. Supreme Court, 54 circuit court judges, 174 district court judges, and 3 judges to the U.S. Court of International Trade. ***Of the judges nominated by President Trump, most were white and male.***")(Emphasis added), accessible at https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/.

Justice Jackson, who clerked for Justice Breyer, has worked as a public defender, a corporate attorney, a U.S. District Court judge, and was sitting on the U.S. Court of Appeals for the District of Columbia at the time of her nomination. "If I'm fortunate enough to be confirmed as the next associate justice of the Supreme Court of the United States," Judge Jackson commented in her prepared remarks about her nomination, "I can only hope that my life and career, my love of this country and the Constitution and my commitment to upholding the rule of law and the sacred principles upon which this great nation was founded, will inspire future generations of Americans."

Justice Jackson won't alter the Supreme Court's ideological radical far right conservative tilt, because the overall makeup of the court will continue to include six conservatives and three liberals. Unfortunately, despite Democratic presidential candidates winning the popular vote in an astonishing 7 of the last 8 presidential elections, the Republicans have rigged the system to achieve a radical conservative Supreme Court majority. Indeed, when Justice Antonin Gregory Scalia died in February of an election year (2016), President Barack Hussein Obama's nomination of Merrick Garland would have, if confirmed by the Senate, flipped the then five-to-four conservative court to a five-to-four liberal one. But Senator Mitch McConnel and his Republican caucus refused to even hold a hearing on Garland's nomination, on the theory that court vacancies that arise during presidential election years should remain unfilled until the next president takes office. Then, when Justice Ruth Bader Ginsburg died in an election year (September 2020, less than two months before the presidential election), Senator Mitch McConnel and his Republican cronies hypocritically changed their unilaterally made-up rules and confirmed President Donald John Trump's nomination of Amy Coney Barrett with lightning speed.

"And just like that," as Carrie Bradshaw would say, what should have been a 6 – 3 liberal Court majority became not only the most radical right-wing conservative Court since the *Lochner* era of 1897 to 1937 but also the most activist Court in U.S. history willing to not only overturn long established precedents (precedents repeatedly affirmed by not only by various permutations of the Supreme Court over many years but also by Republican-nominated justices) but also to use its "Shadow Docket" – *aka* its "Political Docket" – to resolve politically-charged disputes via what had been previously reserved for true emergency relief. The conservative majority's inappropriate use of the "Shadow Docket" has become so pronounced that even conservative Chief Justice Roberts has joined in the liberal minorities' dissents bemoaning how the majority is effectively using the "shadow docket" for merits determinations:

> The case will be fully briefed in the Court of Appeals next month. The applicants have given us no good reason to think that in the remaining time needed to decide the appeal, they will suffer irreparable harm.
>
> By nonetheless granting relief, the Court goes astray. It provides a stay pending appeal, and thus signals its view of the merits, even though the applicants have failed to make the irreparable harm showing we have traditionally required. That renders the Court's emergency docket not for emergencies at all. The docket becomes only another place for merits determinations—except made without full briefing and argument. I respectfully dissent.

*Louisiana v. American Rivers*, 596 U. S. _____ (2022)(Kagan dissenting).

Recently, the radical, activist far right-wing conservatives on the Supreme Court did something that even the uber conservative *Lochner* era Supreme Court didn't do. The (Trump) Supreme Court, in a 5-4 decision authored by Justice Alito in *Dobbs v. Jackson Women's Health Organization*, 2022 WL 2276808 (2022), reversed *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), and took away a fundamental constitutional right (the right to choose) – the first time such a right has been taken away in the history of America. Perhaps most surprising about the *Dobbs* decision is that the right to choose was cavalierly stolen from the Country even though it was repeatedly affirmed and re-affirmed year-after-year for nearly 50 years in opinions written by and/or concurred in by 10 different Republican Justices nominated by 5 different Republican Presidents including those participating in the following seminal right-to-choose cases:

***Roe v. Wade*, 410 U.S. 113 (1973)**

- Harry Blackmun (Nixon, R)
- Warren Burger (Nixon, R)
- Lewis Powell (Nixon, R)
- William Brennan (Eisenhower, R)
- Potter Stewart (Eisenhower, R)

***Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)**

- Sandra Day O'Connor (Reagan, R)
- Anthony Kennedy (Reagan, R)
- David H. Souter (George H.W. Bush, R)

- John Paul Stevens (Ford, R)
- Harry Blackmun (Nixon, R)

***Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016)**

- Anthony Kennedy (Reagan, R)

***Dobbs v. Jackson Women's Health Organization***, 2022 WL 2276808 (2022)

- John Roberts (George W. Bush, R)

Every Justice appointed by a Democrat has voted in favor of upholding the constitutional right to choose including: Thurgood Marshall (Johnson, D), Byron White (Kennedy, D), Ruth Bader Ginsburg (Clinton, D), Stephen Breyer (Clinton, D), Sonia Sotomayor (Obama, D), and Elena Kagan (Obama, D).

Yet, the far-right activist Trump Justices abandoned the reasoning of their Republican (and Democratic) predecessors and threw *stare decisis* to the wind in an effort to enact their bleak vision for the future of America and its constitution.

Justice Thomas, in his concurring decision, advocated for the Supreme Court to go even further toward a dystopian world straight out of The Handmaid's Tale[2] and reverse all of the Court's prior substantive due process decisions such as *Griswold v. Connecticut*, 381 U. S. 479 (1965), *Lawrence v. Texas*, 539 U. S. 558 (2003), and *Obergefell v. Hodges*, 576 U. S. 644 (2015), and thereby eliminate the fundamental constitutional rights to:

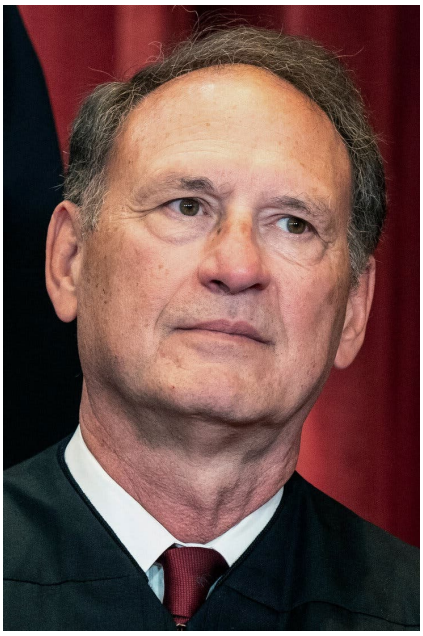
- Contraception.
- Private, consensual sexual acts between adults.
- Same-sex marriage.

[2] Ominously, according to press reports, Justice Amy Coney Barrett actually served as a "handmaid" in the Christian group People of Praise and that group sanitized its web presence to conceal that fact. *See e.g.,* Emma Brown, Jon Swaine and Michelle Boorstein, *Amy Coney Barrett served as a 'handmaid' in Christian group People of Praise*, The Washington Post (October 6, 2020), accessible at https://www.washingtonpost.com/investigations/amy-coney-barrett-people-of-praise/2020/10/06/5f497d8c-0781-11eb-859b-f9c27abe638d_story.html.

Self-servingly, Justice Thomas did not advocate overturning *Loving v. Virginia*, 388 U.S. 1 (1967), which might have negatively impacted his marriage to Virginia "Ginni" Thomas who, press reports have stated, vigorously pressed Arizona lawmakers and Mark Meadows (President Trump's Chief of Staff) to unlawfully overturn President Biden's victory in the 2020 election. Virginia Thomas also corresponded with one of President Trump's lawyers, John Eastman, who played a key role in efforts to pressure Vice President Mike Pence to illegally block the certification of Joe Biden's victory, according to press reports. Interestingly, Justice Thomas did not recuse himself and was the lone dissent in the Supreme Court's January 2022 order rejecting Trump's bid to withhold documents from the January 6 Committee. *See Trump v. Thompson*, 142 S.Ct. 680 (Jan. 19, 2022). One wonders what Justice Thomas was afraid that the January 6th Committee would find.

One also wonders why Justices Thomas and Alito failed to recuse themselves from matters involving wealthy conservatives who either had business directly before the Supreme Court or who stood to benefit generally from the court's decisions when those conservatives had gifted them with tens of thousands of dollars. *See* Alexander Bolton, *Schumer calls out Thomas, Alito for accepting 'lavish gifts and vacations' from billionaires*, The Hill (July 9, 2023), accessible at https://thehill.com/homenews/senate/4087830-schumer-calls-out-thomas-alito-for-accepting-lavish-gifts-and-vacations-from-billionaires/; Antonio Pequeño IV, *Senate Finds Clarence Thomas Received Three More Undisclosed Trips From GOP Megadonor Harlan Crow*, Forbes (June 13, 2024), accessible at https://www.forbes.com/sites/antoniopequenoiv/2024/06/13/senate-finds-clarence-thomas-received-three-more-undisclosed-trips-from-gop-megadonor-harlan-crow/.

Like Justice Thomas, Justice Alito has not recused himself from multiple cases involving former President Trump and the January 6th insurrectionists even though, according to the New York Times (and not denied by Justice Alito) a "Stop the Steal" symbol (an upside-down U.S. flag) flew at his home as the Supreme Court was considering an election case:



*See* Jodi Kantor, *At Justice Alito's House, a 'Stop the Steal' Symbol on Display*, The New York Times (May 16, 2024), accessible at https://www.nytimes.com/2024/05/16/us/justice-alito-upside-down-flag.html.

And, like Justice Thomas, Justice Alito justified his refusal to recuse himself by blaming his wife - "I had no involvement whatsoever in the flying of the flag . . . It was briefly placed by Mrs. Alito."

After Justice Alito blamed his wife for flying a 'Stop the Steal' Symbol at their primary residence, evidence surfaced that the Alito's beach house also flew a pro-January 6th insurrection flag. *See* Jodi Kantor, Aric Toler and Julie Tate, *Another Provocative Flag Was Flown at Another Alito Home: The justice's beach house displayed an "Appeal to Heaven" flag, a symbol carried on Jan. 6 and associated with a push for a more Christian-minded government,* The New York Times (May 22, 2024), accessible at https://www.nytimes.com/2024/05/22/us/justice-alito-flag-appeal-to-heaven.html.

A clarion call demands ethics reforms at the Supreme Court. Something is wrong when Justices are allowed to decide cases where their actions (or the purported actions of their spouses) create such a blatant appearance of bias.


Although the majority in general and Justice Kavanaugh in his concurrence suggest that *Dobbs* does not threaten or cast doubt on *Griswold*, *Lawrence*, and *Obergefell*, it is important to remember that, according to Senators Susan Collins (R-Maine), Lisa Murkowski (Alaska), Joe Manchin (D-West Virginia), Kirsten Gillibrand (D-New York), Nancy Pelosi (D-California), among many other Senators and Congressmen, some of the Justices – including Alito, Gorsuch and Kavanaugh – lied to them about *Roe v. Wage*, in particular, and on the abortion issue, in general, in their sworn public confirmation testimony and in private meetings. *See also Dobbs v. Jackson Women's Health Organization*, 2022 WL 2276808, at *72 (2022)(Breyer, Sotomayor & Kagan dissenting)("And no one should be

confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. They are all part of the same constitutional fabric, protecting autonomous decision-making over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does casts doubt on precedents that do not concern abortion. But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not "deeply rooted in history." Not until *Roe*, the majority argues, did people think abortion fell within the Constitution's guarantee of liberty. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, there was no support in American law for a constitutional right to obtain contraceptives. So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.")(cleaned up).

Some highly-regarded legal commentators, as well as the author of this update, believe that the Supreme Court is well on its way toward reviving anti-employee cases such as *Lochner v. New York*, 198 U.S. 45 (U.S. 1905), which held that the 14th Amendment of the U.S. Constitution protects "the right of contract between the employer and employees" such that government is powerless to protect employees with wage and hour laws guaranteeing minimum working conditions. *See e.g.,* James B. Stewart, *Did the Supreme Court Open the Door to Reviving One of Its Worst Decisions? Lochner v. New York, a 1905 decision on labor law, is imprinted on today's law students as an example of bad jurisprudence. But those old days could be returning*, The New York Times (July 2, 2022), accessible at https://www.nytimes.com/2022/07/02/business/scotus-lochner-v-new-york.html.

Ironically, with some conservative commentators blaming the liberal justices and/or their law clerks for leaking Justice Alito's draft of the *Dobbs v. Jackson Women's Health Organization* decision to Politico in order to torpedo it, The New York Times reported that the Rev. Robert L. Schenck wrote a letter to Chief Justice John Roberts alleging that Justice Alito had earlier leaked the outcome of another landmark case involving contraception and religious rights – the 2014 *Burwell v. Hobby Lobby* decision – that he had authored to *See* Jodi Kantor and Jo Becker, *Former Anti-Abortion Leader Alleges Another Supreme Court Breach: Years before the leaked draft opinion overturning Roe v.*

*Wade, a landmark contraception ruling was disclosed, according to a minister who led a secretive effort to influence justices,* The New York Times (November 19, 2022), accessible at https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html?smid=tw-nytimes&smtyp=cur. One wonders whether Justice Alito or his law clerks or another conservative Justice leaked the draft opinion in order to ensure that none of the other conservative Justices reversed course before the opinion became final. To date, neither the Supreme Court nor Justice Roberts has provided any update regarding any possible investigations into the leaks of the *Burwell v. Hobby Lobby* or the *Dobbs v. Jackson Women's Health Organization* decisions and the Chief Justice completed ignored these issues in the Supreme Court's Annual Report. *See* Robert Barnes, *Chief justice ignores controversial Supreme Court term in annual report*, Washington Post (December 31, 2022), accessible at https://www.washingtonpost.com/politics/2022/12/31/supreme-court-roberts-leak-report/.

In one short four-year presidential term, (now twice impeached, twice popular vote losing, convicted felon with 57 felony counts remaining to be adjudicated), Donald Trump managed to tarnish – perhaps irreparably – the Presidency, Congress, the Supreme Court, America's standing in the world, and the very fabric of American democracy. And, with Trump securing the Republican nomination for the 2024 Presidential Election, literally promising to become a dictator (purportedly for one day),[3]


Thursday, May 30, 2024
Today's Paper

The New York Times

TRUMP GUILTY ON ALL COUNTS

Jury Hands Down Historic Conviction in Hush-Money Case

- Donald Trump was convicted on 34 felony counts of falsifying records to cover up a sex scandal that threatened his ascent to the White House in 2016.
- He is the first American president to be declared a felon, a stain he will carry as he seeks to regain the presidency.

The Trump Hush-Money Verdict

Guilty on 34 counts

- 11 counts related to invoices
- 12 counts related to ledger entries
- 11 counts related to checks

Maggie Haberman

[3] *See* Jill Colvin And Bill Barrow, *Trump's vow to only be a dictator on 'day one' follows growing worry over his authoritarian rhetoric*, APNews (December 7, 2023)(" As Donald Trump faces growing scrutiny over his increasingly authoritarian and violent rhetoric, Fox News host Sean Hannity gave his longtime friend a chance to assure the American people that he wouldn't abuse power or seek retribution if he wins a second term. But instead of offering a perfunctory answer brushing off the warnings, Trump stoked the fire. "Except for day one,' the GOP front-runner said Tuesday night before a live audience in Davenport, Iowa."), accessible at https://apnews.com/article/trump-hannity-dictator-authoritarian-presidential-election-f27e7e9d7c13fabbe3ae7dd7f1235c72; Marina Pitofsky, *Donald Trump repeats comment he would be a dictator 'for one day' if reelected in 2024*, USA Today (December 11, 2023)("Former President Donald Trump on Saturday repeated comments that he

promising to stack the courts with more Justices like Thomas and Alito and judges like Aileen Canon, and three-quarters of the Republican electorate fully supportive of Trump being "dictator for a day,"[4] America may very well plunge into a full-blown Trump dictatorship.

Feigning ignorance and rationalizing the reversal of *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), as a "one-off," some management-side attorneys wonder why plaintiff employment attorneys (as well as plaintiff consumer attorneys) focus on the political identity of the President who nominates the judges that decide their cases. However, anyone who litigates can tell you, from the anecdotal experiences of themselves and their colleagues, that the political affiliation of the judge deciding your case is often outcome determinative with judges appointed by Democratic favoring employees/consumers and judges appointed by Republican favoring wealthy corporations. A new law review article demonstrates, empirically, why the anecdotal impressions of attorneys are accurate. *See* Cohen, Alma, *The Pervasive Influence of Political Composition on Circuit Court Decisions*, Harvard Law and Economics Discussion Paper No. 1109 (February 15, 2024)("The evidence supports the hypothesis that the political affiliations of panel judges can help predict outcomes in a broad set of cases that together represent over 90% of circuit court decisions. One noteworthy category of cases involves civil litigation between individuals and institutions. In many such cases, though by no means all, the individual party could be perceived by judges to be the weaker party. My analysis shows that panels with more Democratic judges are more likely than those with more Republican judges to reach a decision that favors the individual party.")(cleaned-up) accessible at at SSRN: https://ssrn.com/abstract=4528999 or http://dx.doi.org/10.2139/ssrn.4528999.

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would be a dictator for "one day" if he's elected to a second term in the White House."), accessible at https://www.usatoday.com/story/news/politics/elections/2023/12/11/donald-trump-dictator-one-day-reelected/71880010007/.

[4] *See* Philip Bump, *Three-quarters of Republicans back Trump being 'dictator for a day,'* Washington Post (February 7, 2024), accessible at https://www.washingtonpost.com/politics/2024/02/07/trump-dictator-authoritarian-democracy/.

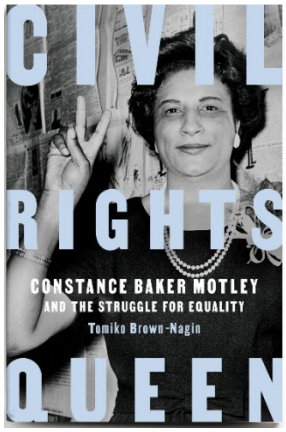
***"Civil Rights Queen: Constance Baker Motley and the Struggle for Equality"***

With the confirmation of Justice Ketanji Brown Jackson, the first Black woman to sit on the Supreme Court, it's the perfect time to highlight a new biography about another Black woman who accomplished a series of firsts and who, in another, more modern, era, would almost certainly have been nominated to serve on the Supreme Court - Constance Baker Motley.

Constance Baker Motley was not only the first Black woman to argue before the Supreme Court (winning an astonishing nine of 10 cases) but she was also the first black woman to be appointed to the federal judiciary - President Lyndon B. Johnson appointed her to the Southern District of New York. Motley began college at Fisk University, a historically black college in Nashville, Tennessee, but subsequently transferred to New York University, where she graduated with a Bachelor of Arts degree. She received her Bachelor of Laws from Columbia Law School and then went to work for the NAACP Legal Defense and Educational Fund as a civil rights lawyer where she wrote the original complaint in the case of *Brown v. Board of Education*. Her first argument before the Supreme Court was in *Meredith v. Fair,* she won James Meredith's effort to be the first black student to attend the University of Mississippi.

Constance Baker Motley with James Meredith and lawyer Jack Greenberg after a 1962 appellate court hearing in New Orleans. Credit: Library of Congress, Prints and Photographs Division

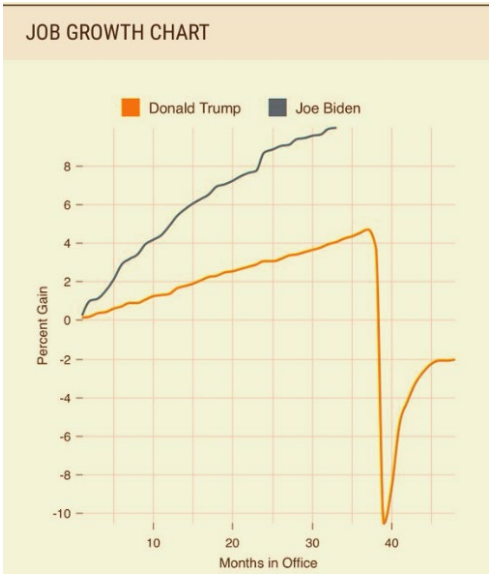
In her terrific new book on Motley's life and legacy - called, "*Civil Rights Queen: Constance Baker Motley and the Struggle for Equality*"- Harvard law professor Tomiko Brown-Nagin poignantly describes Motley's life from the time that she born to a working-class family during the Great Depression, to her role as one of the principal strategists of the Civil Rights Movement and her legal defense of Martin Luther King Jr., the Freedom Riders, and the Birmingham Children Marchers as a civil rights lawyer for the NAACP, to her service in the New York State Senate and then as Manhattan Borough President, to her becoming the first Black woman serving in the federal judiciary.



# II. EMPLOYMENT

As of December 2023, nearly three years into his presidency, President Biden has presided over a historic reduction in the nation's unemployment rate. *See* Lauren Kaori Gurley, Rachel Siegel & Jeff Stein, *Employers added 517,000 jobs in January, astonishing labor market growth: January marked the 25th straight month of solid job growth, and the unemployment rate edged down to 3.4 percent*, Washington Post (February 3, 2023), accessible at https://www.washingtonpost.com/business/2023/02/03/january-jobs-labor-market/.

The current unemployment rate, 3.7%, is significantly lower than the Country's historical average 5.71% unemployment rate. The job growth rate under President Biden is exponentially better than under President Trump:




# III. FEDERAL EMPLOYMENT LAWS, REGULATIONS, MEMORANDA, OPINION LETTERS, AND BOARD DECISIONS

Prior to summarizing the recent federal employment laws, regulations, memoranda, opinion letters, and board decisions, it is necessary to discuss to recent Supreme Court decisions that will likely doom most efforts by federal administrative agency to issue regulations to protect employees, consumers, and the environment – *Loper Bright Enterprises v. Raimondo*, 2024 WL 3208360 (2024) and *Corner Post, Inc. v. Bd. of Govs. of Fed. Reserve*, 2024 WL 3237691 (2024).

In *Loper*, the Supreme Court overturned the 40-year-old precedent of "Chevron deference" noting "…agencies have no special competence in resolving statutory ambiguities. Courts do." "In one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law," wrote Justice Elena Kagan in her dissent from the ruling. "As if it did not have enough on its plate, the majority turns itself into the country's administrative czar."

In *Corner Post*, the Supreme Court to a sledgehammer to the statute of limitations applicable to the Administrative Procedure Act which authorizes lawsuits to challenge a federal agency's action. The applicable statute of limitations was universally deemed to require that any such lawsuit must be filed within six years after the right of action first accrued. 28 U.S.C. § 2401(a). The Supreme Court ruled that the right of action does not first accrue until the plaintiff is adversely affected by the administrative rule or regulation. This decision effectively eliminates the statute of limitations for challenging agency regulations and allows plaintiffs to challenge (almost certainly in those jurisdictions with only federal judge – an uber arch-conservative Trump appointee – available) every administrative rule or regulation every adopted.

The deadly combination of *Loper* and *Corner Post* will not only hamstring federal administrative agencies from issuing regulations to protect employees, consumers, and the environment but also that all regulations already on the books to protect employees, consumers, and the environment will be open to judicial dismantling.

On the federal level, the Republicans in the Senate continued to use the filibuster – a relic of Jim Crow – to stymie the enactment of federal laws designed to protect workers (and consumers). For example, the Senate Republicans used the filibuster to block passage of the CROWN Act which would have banned hair discrimination, including discrimination against natural Black hair, much as they blocked passage of the Paycheck Fairness Act, which would have imposed tougher standards and bigger penalties on companies over claims of pay discrimination based on sex, last year. However, as explained in more detail below, during the first two years of his presidency, President Biden, the most unfairly under-rated president in recent U.S. history, signed into law four important pieces of employment legislation that protect American workers and his administration pushed forward regulations and memoranda that also benefits employees.

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***President Biden Signed Into Law "The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act"***

March 3, 2022 was a good day for justice as President Joseph Robinette Biden Jr. signed into law The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act.

The new law will end forced arbitration in workplace sexual assault and harassment cases, allowing survivors to file lawsuits in court against perpetrators.
The Act was first introduced into Congress in 2017 by Sen. Kirsten Gillibrand (D-N.Y.) and Sen. Lindsey O. Graham (R-S.C.). The measure is retroactive — invalidating any existing forced arbitration clauses in ongoing cases. As the Center For Progressive Reform has noted (*see* Sidney Shapiro, Michael C. Duff, Thomas McGarity and M. Isabelle Chaudry, *Private Courts, Biased Outcomes: The Adverse Impact of Forced Arbitration on People of Color, Women, Low-Income Americans, and Nursing Home Residents*, The Center for Progressive Reform (February 2022), accessible at http://progressivereform.org/our-work/workers-rights/private-courts-biased-outcomes-forced-arbitration-rpt/), forced arbitration harms nearly all U.S. consumers and a growing majority of workers with marginalized groups pay the highest price. This law will take an important step toward ensuring survivors have access to a free and fair trial, a fundamental human right that has eroded in recent decades as employers have increasingly forced workers to file claims of sexual harassment and sexual abuse under a rigged process of arbitration. This widespread and growing practice tilts outcomes in favor of abusers and robs survivors of their right to pursue justice in the courts. This law, however, is only a first step. Courts must interpret it broadly and in a way that doesn't split claims of harassment and assault from other employer harms. Congress must also end forced arbitration in all other cases of corporate harm and abuse against employees and consumers.

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**President Biden Signed Into Law the "Speak Out Act," Curbing Use Of Non-Disclosure Agreements In Harassment Cases**

On December 7, 2022, President Joe Biden signed the Speak Out Act, which bans the use of pre-dispute non-disclosure and non-disparagement contract clauses involving sexual assault and sexual harassment. The new law renders unenforceable non-disclosure and non-disparagement clauses related to allegations of sexual assault and/or sexual harassment and that are entered into "before the dispute arises." The new law does not prohibit the use of these agreements completely. The Speak Out Act exclusively prohibits and nullifies pre-dispute non-disclosure and non-disparagement agreements and does not apply to post-dispute agreements. Accordingly, the act only applies to instances before a sexual harassment or sexual assault dispute arises. The act also does not apply to trade secrets, proprietary information or other types of employee complaints such as wage theft, age discrimination or race discrimination.

**President Biden Signed Into Law The Pregnant Workers Fairness Act**

On December 29, 2022, President Biden signed into law a bipartisan $1.7 trillion omnibus spending bill which contained the Pregnant Workers Fairness Act ("PWFA").

Starting June 27, 2023, the PWFA will help to eliminate discrimination against workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition.

The PWFA prohibits discrimination by extending the framework of the Americans with Disabilities Act ("ADA") to employees with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions regardless of whether the condition meets the definition of a disability specified in the ADA (a "qualified employee").

The PWFA also requires employers with 15 or more employees to make reasonable accommodations for employees who have limitations stemming from pregnancy, childbirth, or related medical conditions, unless the accommodation would impose an undue hardship on the employer.

The PWFA provides that an employer may not force an employee to take a leave if another reasonable accommodation can be provided.

Finally, the PWFA prohibits employers from retaliating against an employee for requesting or using a reasonable accommodation.

**EEOC Issues Final Rule Implementing Pregnant Workers Fairness Act – New Rule Requires Most Employers To Offer "Reasonable Accommodations" To Workers Related To Pregnancy Or Childbirth, Including Providing Time Off For An Abortion – Furious Republicans Immediately Sue To Block Rule's Requirement That Employers Accommodate Elective Abortions**

On April 19, 2024, the EEOC issued its final rule implementing the Pregnant Workers Fairness Act ("PWFA"). *See* https://www.federalregister.gov/documents/2024/04/19/2024-07527/implementation-of-the-pregnant-workers-fairness-act.

The PWFA requires covered employers to provide reasonable accommodations to qualified employees or candidates with a known limitation related to pregnancy, childbirth or related medical conditions absent undue hardship.

The final rule provides the following definition for the terms "Pregnancy, childbirth, or related medical conditions":

> "Pregnancy" and "childbirth" refer to the pregnancy or childbirth of the specific employee in question and include, but are not limited to, current pregnancy; past pregnancy; potential or intended pregnancy (which can include infertility, fertility treatment, and the use of contraception); labor; and childbirth (including vaginal and cesarean delivery). "Related medical conditions" are medical conditions relating to the pregnancy or childbirth of the specific employee in question. The following are examples of conditions that are, or may be, "related medical conditions": termination of pregnancy, including via miscarriage, stillbirth, or abortion; ectopic pregnancy; preterm labor; pelvic prolapse; nerve injuries; cesarean or perineal wound infection; maternal cardiometabolic disease; gestational diabetes; preeclampsia; HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome; hyperemesis gravidarum; anemia; endometriosis; sciatica; lumbar lordosis; carpal tunnel syndrome; chronic migraines; dehydration; hemorrhoids; nausea or vomiting; edema of the legs, ankles, feet, or fingers; high blood pressure; infection; antenatal (during pregnancy) anxiety, depression, or psychosis; postpartum depression, anxiety, or psychosis; frequent urination; incontinence; loss of balance; vision changes; varicose veins; changes in hormone levels; vaginal bleeding; menstruation; and lactation and conditions related to lactation, such as low milk supply, engorgement, plugged ducts, mastitis, or fungal infections. This list is non-exhaustive."

*See* 29 CFR § 1636.3(b).

The rule is scheduled to become effective on June 18, 2024. However, a group of Republican Attorneys General from the following states immediately sued to block the rule's requirement that employers accommodate elective abortions: Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Missouri, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia. Their lawsuit alleges that elective abortions "are not themselves 'medical conditions' arising from pregnancy, but instead voluntary procedures that terminate pregnancy." Not surprisingly, a District Court judge (Judge David Joseph) appointed by Donald Trump granted a preliminary injunction sought by the U.S. Conference of Catholic Bishops, as well as employers in two Southern states, for temporary relief from complying with a federal rule that would have required them to provide workers with time off and other workplace accommodations for abortions. See Alexandra Olson And Claire Savage, *Judge rules that federal agency can't enforce abortion rule in Louisiana and Mississippi*, AP (June 17, 2024), accessible at

https://apnews.com/article/abortion-ruling-pregnant-workers-fairness-act-01d037364fc6ecdf5975bdaa2240b3f7.

**President Biden Signed Into Law The Providing Urgent Maternal Protections for Nursing Mothers Act (the "PUMP" Act).**

Also included in the bipartisan $1.7 trillion omnibus spending bill that President Biden signed on December 29, 2022 is The Providing Urgent Maternal Protections for Nursing Mothers Act (the "PUMP" Act). By way of background, in 2010, Congress passed and President Obama signed into law The Break Time for Nursing Mothers Act, requiring employers to provide reasonable break time and a private, non-bathroom space for non-exempt employees to pump during the work day. The PUMP Act makes several important changes to that landmark legislation including:

(1) Expanding coverage to salaried employees and other types of workers not covered under existing law; and

(2) Clarifying that pumping time must be paid if an employee is not completely relieved from duty.

Although the PUMP Act went into effect immediately when it was signed, however, the enforcement provision included a 120-day delay, making the effective date for that provision April 28, 2023. In addition, there is a 3-year delay in the implementation of the protections for railway workers. Unfortunately, due to significant industry opposition, the law does not apply to flight attendants and pilots.

The PUMP Act also amends the Fair Labor Standards Act ("FLSA") to clarify that the same damages that are available for other FLSA provisions apply to PUMP Act violations, which include, but are not limited to, the payment of back pay, liquidated damages, reinstatement, and reasonable attorneys' fees.

**Biden FTC Issued Final Rule Banning Most Noncompete Clauses – Republican Nominated Commissioners Opposed The Rule**

For decades, employers have used non-competition agreements to not only artificially lower the salaries of their employees but also to render those employees into something akin to indentured servitude.

On January 5, 2023, the Federal Trade Commission, newly reinvigorated by President Biden's appointee to Chair - Lina M. Khan, proposed a new rule that would ban employers from imposing non-competes on their workers, a widespread and often exploitative practice that suppresses wages, hampers innovation, and blocks entrepreneurs from starting new businesses.

On April 23, 2024, in a 3 – 2 decision, the FTC issued a final rule banning most noncompete clauses. *See* https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf. The final rule is somewhat narrower than the proposed rule that the agency issued on January 5, 2023. With one exception, the final rule makes currently existing noncompete agreements unenforceable after the rule's effective date, which is set at 120 days from the rule's publication in the Federal Register. The rule, however, does allow currently existing noncompete agreements for senior executives to remain in force. Senior executives are defined as workers earning more than $151,164 annually who also are in a "policy-making position."

The two Republican nominated commissioners who dissented said they believed the rule to be "unlawful" and "won't survive legal challenge." The US Chamber of Commerce has already said it will sue the FTC for what it views as the agency exceeding its administrative authority as Congress has not given the agency explicit authority to ban non-competes.

There have been several bipartisan bills introduced to reform noncompete agreements, including the Workforce Mobility Act sponsored by Sens. Chris Murphy (D-Conn.), Todd Young (R-Ind.), Tim Kaine (D-Va.) and Kevin Cramer (R-N.D.),

and the Freedom to Compete Act sponsored by Sens. Marco Rubio (R-Fla.) and Maggie Hassan (D-N.H.).

**Biden DOL Publishes Final Rule To Update The Salary Level For Overtime Eligibility - Millions More Salaried Workers Will Be Eligible For Overtime Pay – Not Surprisingly Republicans And Business Groups Plan To Challenge The New Rule**

On April 23, 20224, the Biden Department of Labor issued a final rule -- https://www.dol.gov/sites/dolgov/files/WHD/flsa/ot-541-final-rule.pdf -- raising the salary threshold to qualify for certain overtime exemptions under federal law. Perhaps most importantly, the final rule raises the minimum salary threshold for certain "white collar" workers—executives, professionals, and administrative personnel. The rule will raise the salary threshold for these individuals to $43,888.00 effective July 1, 2024. Then, in January 2025, the rule will raise the salary threshold to $58,656.00. after that, the rule contemplates automatic updates every three years. With respect to highly compensated employees, the new rule will also increase the minimum salary in two stages. First, on July 1, 2024, the salary threshold will rise from $107,432.00 to $132,964.00 per year. Second, on January 1, 2025, it will rise to $151,164.00.

Because the final rule is considered a "major rule," it cannot take effect for 60 days. Thus, the Department announced a July 1 effective date. Perhaps not surprisingly, Republicans are complaining about this new rule and business groups are going to challenge it in court. Indeed, on May 22, 2024, several business groups filed a lawsuit in federal court challenging the new Biden Overtime Rule as exceeding the DOL's authority. *See Plano Chamber of Commerce et al v. Julie Su, Acting Secretary, U.S. Dept. of Labor et al.*, U.S.D.C. E.D. of Texas Sherman Div., Case No.: 4:24-cv-00468. The, on June 3, 2024, the Texas Attorney General filed a second federal lawsuit seeking an injunction to prevent the implementation of the 2024 Biden Overtime Rule. *State of Texas v. U.S. Dept. of Labor, et al.*, U.S.D.C. E.D. of Texas Sherman Div., Case No.: 4:24-cv-00499. Both cases are currently pending in the U.S. District Court for the Eastern District of Texas.

So, this new rule may not take effect at all and it may, instead, end up in the grave yard just like the Obama DOL rule designed to raise the salaries of millions but that was blocked by Republicans and business interests.
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**Biden EEOC Issues New Enforcement Guidance on Workplace Harassment**

On April 29, 2024, the Biden EEOC issued the final version of its new enforcement guidance on workplace harassment including harassment based on race, color, religion, sex (including pregnancy, childbirth or related medical conditions; sexual orientation; and gender identity), national origin, disability, age (40 or older) or genetic information. *See* https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace. In addition to updating, consolidating, and replacing the agency's five guidance documents issued between 1987 and 1999, and serving as a single, unified agency resource on EEOC-enforced workplace harassment law, the new guidance includes updates aimed at addressing workplace harassment in virtual or hybrid work environments and workplace harassment on the basis of sexual orientation, gender identity and pregnancy.


**Biden EEOC Issues Guidance Regarding Hearing Disabilities in the Workplace and the Americans with Disabilities Act**

On January 24, 2023, the EEOC issued formal guidance on how the ADA applies to job applicants and employees with hearing disabilities. The guidance can be accessed here - https://www.eeoc.gov/laws/guidance/hearing-disabilities-workplace-and-americans-disabilities-act?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

**Biden's Presidential Memorandum on Supporting Access to Leave for Federal Employees**

On February 2, 2023, the Biden-Harris Administration, to mark the then upcoming 30th anniversary of the Family and Medical Leave Act ("FMLA"), announced a series of new actions to support and advance America's federal public employees.

In this regard, President Biden issued a Memorandum For The Heads Of Executive Departments And Agencies strongly encouraging those heads to provide access to leave for Federal employees when they need it, including during their first year of service, to ensure employees are able to bond with a new child, care for a family member with a serious health condition, address their own serious health condition, help manage family affairs when a family member is called to active duty, or grieve after the death of a family member.

President Biden further directed the Office of Personnel Management is further directed to provide recommendations regarding "safe leave," to support Federal employees' access to paid leave and leave without pay for purposes related to seeking safety and recovering from domestic violence, dating violence, sexual assault, or stalking. Those may include obtaining medical treatment, seeking assistance from organizations that provide services to survivors, seeking relocation, and taking related legal action.

**Biden DOL Issues Opinion Letter Opining That Employees May Use FMLA Leave for Reduced Work Hours**

On February 9, 2023, the Wage and Hour Division ("WHD") of the Department of Labor issued an opinion letter addressing whether an eligible employee with a serious health condition that requires limited hours may use Family and Medical Leave Act ("FMLA") leave to work "a reduced number of hours per day (or week) for an indefinite period of time" as long as the employee does not exhaust their FMLA leave entitlement.

The summary answer provided by the WHD stated that:

> [A]n eligible employee with a serious health condition that necessitates limited hours may use FMLA leave to work a reduced number of hours per day (or

> week) for an indefinite period of time as long as the employee does not exhaust their FMLA leave entitlement.

The WHD then provided a fuller answer as follows:

> An employee may continue to use FMLA leave for an indefinite period of time as long as they continue to be eligible and have a qualifying reason for leave. In this case, if an employee would normally be required to work more than eight hours a day but is unable to do so because of an FMLA-qualifying reason, the employee may use FMLA leave for the remainder of each shift, and the hours which the employee would have otherwise been required to work are counted against the employee's FMLA leave entitlement. The employee may continue to use FMLA leave until the employee has exhausted their entitlement to FMLA leave. Thus, if the employee never exhausts their FMLA leave, they may work the reduced schedule indefinitely. An employee who exhausts their FMLA leave entitlement by working a reduced schedule would be entitled under the FMLA to reinstatement to the same or an equivalent position, with equivalent pay and benefits, to what the employee held when the leave was initiated, but, in the situation you describe, they would no longer be entitled under the FMLA to work less than the normal schedule of more than eight hours a day.
>
> You suggest that an employee's need to limit their workday to an 8-hour day may be "better suited" as a reasonable accommodation under the ADA. However, as explained above, the requirements and protections of the FMLA are separate and distinct from those of the ADA, and an employee may be entitled to invoke the protections of both laws simultaneously. Nothing in the ADA modifies or limits the protections of the FMLA; nor does the FMLA modify or limit the protections of the ADA. In the case of an employee who needs leave for a serious health condition under the FMLA and is also a qualified individual with a disability under the ADA, requirements from both laws must be observed and applied in a manner that assures the most beneficial rights and protection to the employee. Thus, an employee who has exhausted their FMLA leave and is no longer entitled under the FMLA to work a reduced schedule may have additional rights under the ADA or other laws.
>
> In addition, in your letter, you write that where an employee uses FMLA leave, the leave is deducted from the employee's "480 hours of allowable FMLA time" in the 12-month period. It is important to reiterate that the FMLA provides that an employee is entitled to 12 workweeks of leave per year. 29 U.S.C. § 2612(a)(1). Therefore, if an employee is regularly scheduled to work more than 40 hours per week, they are entitled to more than 480 hours of FMLA leave per 12-month period. For example, an employee who

> ordinarily works 50 hours per week would be entitled to 600 hours of FMLA leave in a 12-month period.

(cleaned up).

The opinion letter is accessible at https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FMLA/2023_02_09_01_FMLA.pdf.

**Biden DOL Issues Final Rule To Improve The Protections for Workers in Temporary Agricultural Employment in the United States**

On April 29, 2024, the Biden DOL announced the issuance of a final rule, "Improving Protections for Workers in Temporary Agricultural Employment in the United States," effective on June 28, 2024. The final rule strengthens protections for temporary agricultural workers by making several changes to H-2A program regulations to bolster the Department's efforts to prevent adverse effect on workers in the U.S. and ensure that H-2A workers are employed only when there are not sufficient able, willing, and qualified U.S. workers available to perform the work. These changes include empowering workers to advocate on behalf of themselves and their coworkers regarding working conditions; improving accountability for employers using the H-2A program; improving transparency and accountability in the foreign labor recruitment process; requiring seat belts in most vehicles used to transport workers; enhancing existing enforcement provisions; improving transparency into the nature of the job opportunity by collecting additional information about owners, operators, managers, and supervisors to better enforce program requirements; clarifying when a termination is "for cause" to protect essential worker rights; and revising provisions and codifying protections that are outdated, unclear, or subject to misinterpretation in the current regulations. The final rule also strengthens protections for temporary agricultural workers when employers fail to properly notify workers that the start date of work is delayed, and clarifies and streamlines procedures to prevent noncompliant employers from using the Employment Service. *See* https://www.federalregister.gov/documents/2024/04/29/2024-08333/improving-protections-for-workers-in-temporary-agricultural-employment-in-the-united-states.

**Biden NLRB Rules That Employers May Not Offer Employees Severance Agreements Containing Broad Confidentiality & Non-disparagement Provisions**

With Democrats now in a majority on the National Labor Relations Board, the Board, on February 21, 2023, issued a ruling that confidentiality and non-disparagement agreements commonly included in employment severance agreements may be deemed unlawful under the National Labor Relations Act (NLRA). In *McLaren Macomb*, 372

NLRB No. 58 (2023) – which can be accessed here, https://www.nlrb.gov/case/07-CA-263041 -- a divided Board found that merely offering severance agreements to employees containing the following confidentiality and non-disparagement provisions violated the NLRA, regardless of whether the employees agreed to sign the severance agreements or the employer attempted to actually enforce the agreements:

> **Confidentiality Agreement.** The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.
>
> **Non-Disclosure.** At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

Lauren McFerran, NLRB Chairman

Perhaps not surprisingly, prior to the Board's ruling in *McLaren*, when it was dominated by Republican appointees, the Board ruled in *Baylor Univ. Med. Ctr.*, 369 NLRB No. 43 (2020), and again in *IGT*, 370 NLRB No. 50 (2020), that an employer may lawfully offer severance agreements containing such provisions, and employees may lawfully accept them, so long as the agreement is entered into knowingly and voluntarily (and subject to other contract law principles).

The NLRB decision is still subject to an appeal and may be vacated sometime in the future by an appeals court. While the NLRB's decisions affect union and non-union employees alike, the Board cannot generally reach independent contractors and/or employees who are exempt from coverage of the NLRA (such as non-managerial employees).

# Biden NLRB Returns The Board's Independent Contractor Standard to Pre-Trump Board Precedent

On June 13, 2023, in *The Atlanta Opera, Inc.,* Case 10–RC–276292, the NLRB returned to the *FedEx Home Delivery*, 361 NLRB 610 (2014)(FedEx II), standard for determining independent contractor status under NLRB, overruling *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019). In its decision, the Board reaffirmed longstanding principles—consistent with the instructions of the Supreme Court—and explained that its independent-contractor analysis will be guided by a list of common-law factors. The Board expressly rejected the holding of the SuperShuttle Board that entrepreneurial opportunity for gain or loss should be the "animating principle" of the independent-contractor test. The Board further explained that entrepreneurial opportunity would be taken into account, along with the traditional common-law factors, by asking whether the evidence tends to show that a supposed independent contractor is, in fact, rendering services as part of an independent business.


Jennifer Abruzzo, NLRB General Counsel

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# In Seismic Shift, Biden NLRB Poised To Rule That College Athletes Are Employees

In September 2021, NLRB General Counsel, Jennifer Abruzzo, issued a memorandum suggesting that college athletes are employees under the National Labor Relations Act and should be afforded all protections under the Act. *See* https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of.

Jennifer Abruzzo, NLRB General Counsel

On February 5, 2024, Laura A. Sacks, the Regional Director for Region 01 of the National Labor Relations Board, concluded that the men's basketball student-athletes for Dartmouth College are employees for purposes of the National Labor Relations Act. *See* https://www.constangy.net/nr_images/deubert-2-8-24-decision-and-direction-of-election-trustees-of-dartmouth.pdf.

On March 5, 2024, the Dartmouth men's basketball team voted to unionize. Apparently realizing that it would lose the vote, Dartmouth attorney Josh Grubman demanded that the NLRB impound the ballots until all the appeals could be held; the demand was denied and a count of the ballots revealed that the players voted 13-2 to join Service Employees International Union Local 560.

# Biden NLRB Issues Guidance Calling For The Need To Secure Full Remedies For All Victims Of Unlawful Conduct

On April 8, 2024, NLRB General Counsel Jennifer Abruzzo issued a Memorandum (GC 24-04 – available for download at https://www.nlrb.gov/guidance/memos-research/general-counsel-memos) providing directing NLRB Regions to secure full remedies for all employees harmed by violations under Section 8(a)(1) of the National Labor Relations Act. GC Abruzzo opined that an employee who has experienced unlawful employer discipline or the effects of an unlawful rule or contract term cannot be made whole through the mere rescission of the rule, contract term, or disciplinary decision. GC Abruzzo reasoned that where "lingering effects" of the employer's conduct remain in place, simple rescission "falls short of the [NLRB]'s capacity to fully redress violations."

# Biden Administration Enacts Tough New Safety Rules On Silica Dust To Protect Miners

On April 16, 2024, the Biden Administration imposed tough new rules to protect coal and other miners from toxic silica dust, a growing problem in mines that has left thousands sick and dying. The new regulation requires mining companies to monitor the air miners breathe while working, and adjust working conditions when excess silica dust is present. Instances of overexposure must be reported to the Mine Safety and Health Administration. Coal mines will have a year to prepare for the new regulation. All other mines, collectively known as metal/nonmetal mines (MNM), have two years.

**OSHA Releases Potential Heat Illness Control Measures For Consideration In Crafting A National Heat Injury And Illness Rule – In Other News, Republican Governor DeSantis Signs Bill Banning Local Heat Protections For Workers**

On August 24, 2023, as part of its ongoing heat illness prevention rulemaking effort, the Occupational Safety and Health Administration (OSHA) released various options for inclusion in a proposed rule to address heat injury and illness prevention in outdoor and indoor work settings. At the same time, Florida Gov. Ron DeSantis (R) signed legislation barring local and municipal governments from requiring their own heat protections for workers. The law, House Bill 433, restricts local authorities from "[r]equiring an employer, including an employer contracting with the political

subdivision, to meet or provide heat exposure requirements not otherwise required under state or federal law."

# IV. CALIFORNIA STATE EMPLOYMENT LAWS

With the California State Legislature firmly in the hands of the Democrats (in the Assembly, Democrats outnumber Republicans 60 to 19 – with one independent, while in the Senate, Democrats outnumber Republicans 31 to 9) and Democrat Gavin Newsom holding the office of California Governor, 2023 – much like 2020-2022 – brought about a cornucopia of new pro-employee employment laws (opposed, of course, by the Republicans and their corporate puppeteers) designed to improve the lives of all of the State's employees regardless of whether they are blue-collar, white-collar, yellow-collar, green-collar, gold-collar, purple-collar, new collar, or no collar.

## New Employment Laws Effective January 1, 2020

### AB 5 – Codification and Expansion of *Dynamex*'s ABC Test for Independent Contractor Status

AB 5 codifies the "ABC" test for employee versus independent contractor classification adopted by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles,* 4 Cal. 5th 903 (2018). While *Dynamex* was limited to California Industrial Welfare Commission Wage Order violations, AB 5 expands the reach of the "ABC" test to Labor Code violations, as well as to California unemployment insurance and workers' compensation proceedings. [**Author's Note:** numerous court challenges have been filed against AB 5 – some have been successful and some have not. *See Castellanos v. State of California*, 89 Cal.App.5th 131 (Cal.App. 1 Dist., 2023)(mostly upholding AB 5, reversing a lower court ruling that the law was unconstitutional); *Parada v. East Coast Transport Inc.*, 62 Cal.App.5th 692 (Cal.App. 2 Dist., 2021)( Federal Aviation Administration Authorization Act (FAAAA) did not preempt applying to carrier the "ABC" test for determining whether a worker was independent contractor); *Quinn v. LPL Financial LLC*, 91 Cal.App.5th 370 (Cal.App. 2 Dist., 2023)(AB 5 did not did not violate equal protection rights of registered securities broker-dealers and investment advisers); *Olson v. California*, 62 F.4th 1206 (9th Cir. 2023)(food delivery services and drivers who used their online platforms pled plausible claim that AB 5 violated Equal Protection Clauses),*rehearing en banc granted, vacated by, Olson v. State* of California, 2023 WL 8707123 (9th Cir. 2023).]

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**AB 9 – Deadline for Filing Complaint with the California Civil Rights Department Extended from One Year to Three Years**

AB extends the time period for a person claiming to be aggrieved by an unlawful practice under the California Fair Employment and Housing Act (FEHA) from one year from the date upon which the alleged unlawful conduct occurred to three years.

**SB 778 – Harassment-Prevention Training Compliance Deadline Extended for Smaller Employers and Nonsupervisory Employees to Jan. 1, 2021**

FEHA requires employers with 50 or more employees to provide sexual harassment prevention training to all supervisory employees within six months of their assumption of a supervisory position and once every two years.

SB 1343, which as passed in the 2017-2018 legislative session, extended training requirements to small employers and to nonsupervisory employees and provided a deadline of January 1, 2020. SB 778 extends training requirements for small employers and to nonsupervisory employees to January 1, 2021.

**AB 51 – Prohibition on Employers' Ability to Force Employees to Sign Arbitration Agreements (or, as Tony Oncidi would say, "Request Arbitration, Go to Jail")**

AB 51, adding Section 432.6 to the Labor Code, prohibits employers from requiring applicants or employees from waiving any rights, forums or procedures (i.e., arbitration agreements) for alleged violations of the FEHA or Labor Code, as a condition of employment, continued employment or the receipt of any employment-related benefit. AB 51 also prohibits threatening, retaliating or discriminating against for refusal to consent to any such waiver. AB 51 applies to agreements entered into or extended on or after Jan. 1, 2020, but does not apply to post-dispute settlement agreements or negotiated severance agreements. AB 51 is not intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act. [**Author's Note:** in *Chamber of Commerce of the United States of America v. Bonta*, 62 F.4th 473 (9th Cir. 2023), the Ninth Circuit held that Labor Code Section 432.6, which prohibited employers from requiring employees and applicants to waive any right, forum, or procedure established in the California Fair Employment and Housing Act or California Labor Code, as a condition of employment or continued employment, was preempted, under obstacle preemption analysis, by the Federal Arbitration Act.]

**SB 707 – Employers Must Timely Pay Arbitration Fees And Costs or Suffer Significant Penalties Including Waiver of Right to Compel Arbitration**

SB 707 creates strict penalties for an employer's failure to comply with the timely payment of any arbitration fees and costs. Specifically, it provides that any drafting party to an arbitration agreement that fails to pay the fees needed to commence or continue arbitration, within 30 days after such fees are due, is held to have materially breached the agreement and, as such, is in default and waives its right to compel arbitration. SB 707 further enables the employee to remove the matter to court or move to compel arbitration - if the drafting party fails to pay the required arbitration fees to continue an arbitration that is currently in progress, the employee can move the matter to court; seek a court order compelling payment of the fees; continue the arbitration and permit the arbitrator to seek collection of their fees; or pay the costs and fees and seek them from the drafting party at the conclusion of the arbitration regardless of the outcome of the arbitration. SB 707 also provides for the tolling of the statute of limitations with regard to all claims brought in the arbitration. SB 707 also imposes mandatory monetary sanctions on any drafting party found to be in default of an arbitration through such a failure to pay the arbitration fees and costs. Most notably, it also allows the court or arbitrator to impose evidentiary, terminating or contempt sanctions. Lastly, SB 707 requires private arbitration companies to collect and report aggregate demographic data of all arbitrators.

**AB 749 – Restrictions on the Use of "No-Rehire" and "No Future Employment" Clauses in Settlement Agreements**

AB 749 sharply restricts, if not precludes, the use "No-Rehire" and "No Future Employment" provisions in settlement agreements by adding Section 1002.5 to the Code of Civil Procedure. Any provision of a covered agreement entered into after Jan. 1, 2020, which violates Section 1002.5 is void as a matter of law and void as against public policy. This section does not preclude the employer from restricting future employment opportunities or rehire eligibility when the employer has made a good-faith determination that the aggrieved employee engaged in sexual harassment or sexual assault. Finally, nothing in this section requires an employer to employ or rehire a person if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person.

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**SB 142 – Expanded Lactation Accommodation Requirements**

SB 142 amends Sections 1030, 1031 and 1033 of the California Labor Code and adds a new Section 1034. At bottom, these changes require all employers to provide an employee with a break to express breast milk for the employee′s infant child each time they need to express milk. To accommodate such breaks, employers must provide the employee with a clean and safe room or other location to express milk in private that is close to the employee′s work area. The room or location must satisfy certain conditions, including 1) contain a surface to place a breast pump and personal items; 2) contain a place to sit; and 3) have access to electricity or another device that enables the use of an electric or battery-powered breast pump. The room cannot be a bathroom. In addition, employers must provide access to a sink with running water and a refrigerator suitable for storing milk (or, if a refrigerator cannot be provided, some other suitable cooling device) that is close to the employee′s workspace. Failure to comply with these new Labor Code requirements constitutes a violation of Labor Code Section 226.7, which requires the employer to pay the employee one additional hour of pay at the employee′s regular rate of pay for each workday that an accommodating break period is not provided. Employers are prohibited from discharging or in any way retaliating against an employee for exercising or attempting to exercise rights under the new Labor Code requirements.

Under new Labor Code Section 1034, employers must also develop and implement a policy regarding lactation accommodation that includes, in part, 1) a statement about the employee′s right to request lactation accommodation and the process to make such a request, and 2) a statement about the employee′s right to file a complaint with the Labor Commissioner for any violation of such right. The policy must be provided in the employee handbook or set of policies the employer provides to employees. Employers with fewer than 50 employees may qualify for an exemption if it can demonstrate that complying with the requirement would impose an undue hardship, but the employer must still make reasonable efforts to provide employees with a room or other location to express milk in private.

**SB 188 – CROWN Act: Race Discrimination Protections Expanded to Traits Historically Associated with Race Such As Hair Textures and Protective Hairstyles**

SB 188, known as the CROWN Act, amends Section 212.1 of the California Education Code and Section 12926 of the California Government Code to expand the definition of "Race" to include traits historically associated with race, such as hair texture and

"protective hairstyles." The term "protective hairstyles" is defined to include, but not be limited to, "braids, locks, and twists."

**Consumer privacy protections for employers under the California Consumer Privacy Act, as amended by the California Privacy Rights Act (CCPA)**

When the California Consumer Privacy Act ("CCPA") originally took effect in 2020, it exempted employees from most of its provisions. This year, the California Privacy Rights Act ("CPRA") finally extends major consumer privacy rights under the CCPA to employees and job applicants of covered employers. In addition to requiring covered employers to provide privacy notices at the time employee personal information is collected, the CPRA grants employees several new rights, including the rights to request what personal information their employers have collected and/or disclosed and to request that their employers delete their personal information, with some exceptions.

Covered employers do not need to – and in some instances may not – delete certain data, including where a business's legal obligations require its retention, such as under California Labor Code Sections 1198.5(c) (retention of personnel files) and 226(a) (retention of payroll records). Among its other provisions, the CPRA also allows employees to opt out of the sale or sharing of their personal information and to limit the use of "sensitive" personal information, a new category of data under the CCPA that includes an employee's social security number, driver's license, and financial information, as well as race, ethnicity, and religion. The CPRA includes an anti-discrimination provision, which prohibits retaliation for the exercise of rights under the Act.

Though its provisions are wide sweeping, the CCPA focuses on larger companies and those engaged in the sale of data. It covers only companies doing business in California that fall within one of 3 categories: (i) businesses having annual gross revenues that exceed $25 million; (ii) those that annually buy, receive, share, or sell personal information of more than 100,000 consumers or households in California; or (iii) companies that derive at least 50 percent of their annual revenue from selling or sharing personal information of residents of California.

# New Employment Laws Effective January 1, 2021

**AB 2257 – Modifications and Additional Carve-Outs to AB 5**

AB 2257 primarily adds exemptions for certain industries to the ABC test and modifies other exemptions. The legislation adds exemptions for, among others, fine artists, freelance writers, translators, editors, advisors, producers, copy editors, illustrators, insurance underwriters, real estate appraisers, home inspectors, those providing professional consulting services, as well as certain occupations involved with creating, marketing, promoting or distributing sound recordings or musical compositions and musicians for the purpose of a single-engagement live performance event and other performance artists. AB 2257 also modifies the exemption for photographers, photojournalists, videographers and photo editors.

**AB 2143 – Loosened Restrictions on "No Re-Hire" Provisions in Employment Settlement Agreements**

California Code of Civil Procedure section 1002.5 prohibits "no-rehire" provisions in settlement agreements. These "no-rehire" provisions prevent, prohibit or otherwise restrict employees from obtaining future employment with the employer or a related entity. These provisions are prohibited from settlement agreements when an employee has filed a claim against an employer in either court or an administrative agency, or made a complaint through some form of alternative dispute resolution (ADR) or employer internal complaint process. This prohibition against "no-rehire" provisions do not apply when an employer has made a "good faith determination" that the former employee engaged in sexual harassment or sexual assault. AB 2143 slightly modifies California Code of Civil Procedure section 1002.5. Specifically, it requires that the aggrieved former employee must have filed the claim in good faith in order for the prohibition against "no-rehire" provisions to apply. It also expands this "no-rehire" exception to allow no-rehire provisions when the former employee engaged in any criminal conduct, rather than limiting the exception to sexual harassment or sexual assault. Finally, AB 2143 clarifies that, in order to qualify for the "good faith determination" exception, an employer's determination must have been made and documented before the aggrieved person filed the claim or complaint.

**SB 973 – New Pay Data Reporting Obligations for Employers with 100 or More Employees**

SB 973 requires employers with 100 or more employees and who are required under federal law to file an annual federal Employer Information Report (EEO-1) to submit an annual pay data report to the California Department of Fair Employment and Housing (DFEH). The report must include the number of employees and the hours they worked by race, ethnicity and gender in 10 federal identified job categories and whose annual earnings fall within the pay bands used by the U.S. Bureau of Labor Statistics in the Occupational Employment Statistics survey.

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**SB 1383 – California Family Rights Act Significantly Expanded to Cover Businesses with Five or More Employees**

SB 1383 amends the California Family Rights Act (CFRA) such that, beginning on January 1, 2021, its family and medical leave requirements will extend to small businesses with five or more employees. Additionally, SB 1383 expands leave rights by allowing CFRA leave for the care of a grandparent, grandchild or domestic partner who has a serious medical condition. The definition of "child" is modified to remove the requirement that the child be younger than 18 years old or an adult dependent child. Further, a "child" will include the child of an employee's domestic partner.

**AB 2017 – Employees Authorized to Designate Paid Sick Leave Taken for Kin Care**

AB 2017 modifies California Labor Code section 233 to provide that an employee has can designate sick leave taken for kin care, *i.e.,* caring for a sick family member. Specifically, this law was designed to prevent an employer's designation of an employee's usage of sick days as kin care, which would intentionally or erroneously deplete the employee's available kin care leave. Accordingly, pursuant to AB 2017, employees are provided with the right to designate what type of sick days they wish to take.

**AB 2992 – Expanded Protections for Employee Victims of Crime or Abuse**

AB 2992 expands protections for employees who are victims of domestic violence, sexual assault or stalking by broadly defining "victim" as (1) a victim of stalking, domestic violence or sexual assault, (2) a victim of a crime that caused physical injury or that caused mental injury and a threat of physical injury, and (3) a person whose immediate family member, as defined, died as the direct result of a crime. AB 2992 defines "crime" as "a crime or public offense as set forth in Section 13951 of the Government Code, and regardless of whether any person is arrested for, prosecuted for, or convicted of, committing the crime." Employers are prohibited from discharging, discriminating against or retaliating against employees who are victims of domestic violence, sexual assault or stalking for taking time off from work to obtain or attempt to obtain a temporary restraining order, restraining order or other injunctive relief or to help ensure the health, safety or welfare of the victim or the victim's child.

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**AB 1947 – Time for Filing Complaints with California Division of Labor Standards Enforcement (DLSE) Extended to One Year, and Prevailing Plaintiffs in Whistleblower Retaliation Claims Can Recover Reasonable Attorneys' Fees**

AB 1947 expands the deadline for employees who believe they have been discriminated against in violation of any law enforced by the California Labor Commissioner to file a complaint with the California Division of Labor Standards Enforcement (DLSE) from six months to one year after the alleged violation.

AB 1947 also amends California's whistleblower retaliation statute, California Labor Code section 1102.5, to provide for an award of reasonable attorneys' fees to a plaintiff who brings a successful action under Section 1102.5.

**AB 3075 – Expansion of Successor Liability for Labor Code Judgments**

AB 3075 adds new Section 200.3 to the California Labor Code, which provides that "[a] successor to a judgment debtor shall be liable for any wages, damages, and penalties owed to any of the judgment debtor's former workforce pursuant to a final judgement, after the time to appeal therefrom has expired and for which no appeal therefrom is pending." A "successorship" is a company that 1) uses substantially the same facilities or substantially the same workforce to offer substantially the same services as the judgment debtor, 2) has substantially the same owners or managers that control the labor relations as the judgement debtor, 3) employs as a managing agent any person who directly controlled the wages, hour or working conditions or the affected workforce of the judgement debtor, and 4) operates a business in the same industry and the business has an owner, partner, officer or director with an immediate family member of any owner, partner, officer or director of the judgment.

# New Employment Laws Effective January 1, 2022

**SB 189 – DFEH Renamed to CRD**

Effective July 1, 2022, the Department of Fair Employment and Housing's name changed to the Civil Rights Department. According to the CRD, the name was changed "to more accurately reflect the Department's powers and duties, which include enforcement of laws prohibiting hate violence, human trafficking,

discrimination in business establishments, and discrimination in government-funded programs and activities, among others."

The mission of the CRD is to protect the people of California from unlawful discrimination in employment, housing and public accommodations (businesses) and from hate violence and human trafficking in accordance with the Fair Employment and Housing Act (FEHA), Unruh Civil Rights Act, Disabled Persons Act, and Ralph Civil Rights Act. The employment antidiscrimination provisions of the FEHA apply to public and private employers, labor organizations and employment agencies. "Housing providers" includes public and private owners, real estate agents and brokers, banks, mortgage companies, and financial institutions.

The Fair Employment and Housing Council's name has also changed, and it is now referred to as the California Civil Rights Council.

**SB 1044 – Employees Excused from Work During "Emergency Conditions"**

SB 1044 allows employees to leave work or refuse to report to work during an "emergency condition," defined as disaster or extreme peril to the safety at the workplace caused by natural forces or a crime, or an evacuation order due to a natural disaster or crime at the workplace, an employee's home, or their child's school. The law specifically excludes health pandemics from the definition of emergency condition.

The law also prohibits employers from taking adverse action against an employee for refusing to report to or leaving work during an emergency condition.

The law does not apply to first responders; disaster or emergency service workers; health care workers who provide direct patient care or emergency support services; and employees who work on nuclear reactors, in the defense industry, or on a military base.

**AB 2188 – Prohibition of Adverse Action for Off-Duty Marijuana Use**

AB 2188, which takes effect on January 1, 2024, prohibits adverse action based on an employee's use of cannabis off the job and away from the workplace or if a pre-employment drug test finds non-psychoactive cannabis metabolites in the applicant's hair, blood, urine, or other bodily fluids. The law exempts employers in the building and construction industry and applicants and employees in positions requiring a

federal background investigation or clearance. The law also does not preempt state or federal laws applicable to companies receiving federal funding or federal licensing-related benefits, or that have federal contracts.

**AB 1041 – Expands California Family Rights Act**

AB 1041 expands the categories of individuals for whom an employee may take leave under the California Family Rights Act to include a "designated person," defined as "any individual related by blood or whose association with the employee is the equivalent of a family relationship," and includes domestic partners. An employer may limit an employee to one designated person per 12-month period.

**AB 1949 – Bereavement Leave**

AB 1949 requires employers with five or more employees to provide up to five days of unpaid bereavement leave for an employee within three months of the death of a family member.

**AB 2183 – Farm Workers Allowed to Vote by Mail in Union Elections**

AB 2183, the Agricultural Labor Relations Voting Choice Act, gives agricultural workers the option to vote by mail in union representation elections that were previously required to be held in person.

**SB 931 – Civil Penalties Against Public Employers for Deterring Union Membership**

SB 931 permits an employee organization to file a claim against an employer before the Public Employee Relations Board (PERB) alleging violations of Government Code section 3550, which prohibits a public employer from deterring or discouraging public employees or applicants from becoming or remaining members of an employee organization. Fines are $1,000 per affected employee, not to exceed $100,000. The PERB will award attorney's fees and costs to a prevailing employee organization unless the Board finds the claim was frivolous, unreasonable or groundless.

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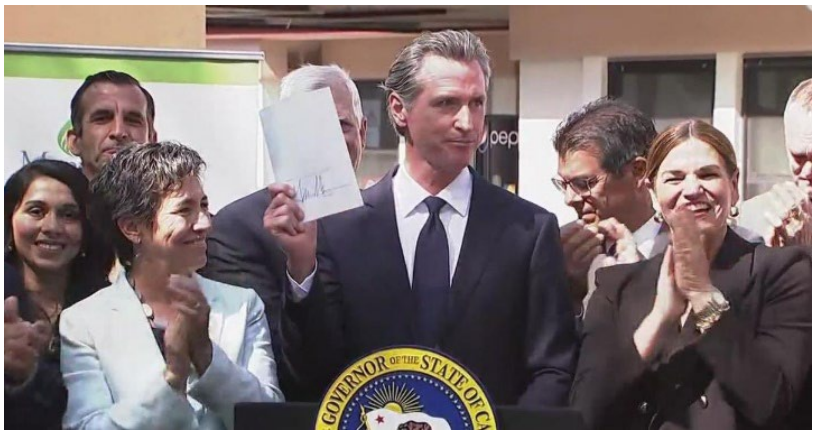
# New Employment Laws Effective January 1, 2023

## SB 523: The Contraceptive Equity Act of 2022

On June 24, 2022, the radical, activist, far-right-wing conservatives on the U.S. Supreme Court did something that even the über conservative *Lochner* era Supreme Court didn't do. The (Trump) Court, in a 5-4 decision authored by Justice Samuel Alito Jr. in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022), reversed a pair of cases that Justice Antonin Scalia acolyte, Judge Michael Luttig, had called "super *stare decisis*" - *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania. v. Casey*, 505 U.S. 833 (1992). In doing so, the five radical right-wing Justices took away a fundamental constitutional right (the right to choose) for the first time in U.S. history. Perhaps most surprising about the *Dobbs* decision is that the right to choose was cavalierly stolen from the Country even though it was repeatedly affirmed and re-affirmed year-after-year for nearly 50 years in opinions written by and/or concurred in by 16 Justices – 10 different Republican Justices nominated by 5 different Republican Presidents and six Democratic Justices.


Justice Clarence Thomas, in his concurring opinion, advocated for the Supreme Court to go even further toward a dystopian world straight out of The Handmaid's Tale and reverse all of the Court's prior substantive due process decisions, including *Griswold v. Connecticut*, 381 U.S. 479 (1965), which held that the right to privacy protected against state restrictions on contraception.

In response to both the horrific *Dobbs* decision and threats by Republicans to take away with other reproductive rights that Americans have taken for granted for decades, Governor Newsom signed SB 523, the Contraceptive Equity Act of 2022, into law on September 27, 2022.



This law amends California's Fair Employment and Housing Act ("FEHA") to add "reproductive health decision-making" as a legally protected category. "Reproductive health decision-making" is defined to include, but not be limited to, "a decision to use or access a particular drug, device, product, or medical service for reproductive health."

**SB 951: Paid family leave wage replacement beginning January 1, 2025**

According to the World Policy Center, the United States is one of only 2 nations in the world without paid family leave, sharing this disgraceful distinction with Papua New Guinea, a nation with a population smaller than Los Angeles County. Since its enactment in 2002, California's Paid Family Leave ("PFL") program has been a model for a country woefully behind the rest of the world in terms of paid leave. Yet, with skyrocketing costs of living in the Golden State, countless workers living paycheck to paycheck, and a paid leave program that covered only a little more than half of workers' regular wages, many Californians still could not afford to take time off. The California Budget and Policy Center estimates that high and middle wage workers have used the State's PFL program at a rate 4 times the rate of lower wage workers. Without adequate wage replacement, lower wage workers, who are disproportionately Latinx, Black, and female-identifying, have put off seeking urgent medical care, lost precious time with newborn and adopted children, and left ailing loved ones home alone to care for themselves.

SB 951 has the potential to make paid family medical leave a reality for all California workers. Starting January 1, 2025, employees who earn 70 percent or less than the average wage in California will be eligible to receive 90 percent of their wages through the PFL and State Disability Insurance ("SDI") programs. Those who make more will receive 70 percent of their pay. With this expansion, California continues to blaze the trail towards fully paid family medical leave.

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**SB 1044: Preventing retaliation during emergency condition**

As climate-related disasters increase in intensity and frequency, employees are regularly expected (and sometimes required) to place their lives in danger by continuing to work through these calamities. For example, during recent tornadoes in Illinois, Amazon not only refused to let workers leave a warehouse in the expected route of a tornado but also refused to allow its workers to access communications devices to track the dangerous conditions. The warehouse was destroyed, and several workers were killed. Similarly, during the Getty Fire, domestic workers and gardeners were required to continue working in Los Angeles evacuation zones. Agricultural workers in Sonoma County were required to continue picking produce during the Atlas/Tubbs fires. There were landscapers and housekeepers, along with children, among the 23 lost and 167 injured in the 2018 Montecito debris flow.

SB 1044 was designed enhance workers' protections during natural disasters by requiring employers to allow workers to have access to their cell phones or other communications devices during these emergencies to seek emergency assistance, assess the safety of the situation, or communicate with a person to confirm their safety and by permitting workers to leave a workplace or worksite within an area affected by an "emergency condition" if they feel that they must do so for their safety.

"Emergency condition" is defined to mean the existence of either of the following: (i) conditions of disaster or extreme peril to the safety of persons or property at the workplace or worksite caused by natural forces or a criminal act; or (ii) an order to evacuate a workplace, a worksite, a worker's home, or the school of a worker's child due to natural disaster or a criminal act. SB 1044 specifically excludes a health pandemic from the definition of "emergency condition."

Sadly, the California Chamber of Commerce designated this common-sense prophylactic as a "job killer," as it routinely does with laws designed to protect employees and consumers, and many Republicans voted against it.

**SB 1126: CalSavers retirement planning expansion**

SB 1126 expands the CalSavers Retirement Savings Trust Act to define an "eligible employer" as a person or entity engaged in a business, industry, profession, trade, or other enterprise in the State that has at least one eligible employee, excluding certain government entities and entities employing only their business owners. The Act previously covered only employers with 5 or more employees. Eligible employers must establish or participate in a payroll deposit retirement savings arrangement, prescribed by the Act.

**SB 1162: Expanded pay data reporting and mandatory pay scale disclosures**

Effective January 1, 2018, California's Equal Pay Act prohibited employers, with one exception, from seeking applicants' salary history information and required employers to supply pay scales upon the request of an applicant.

SB 1162 expands upon these pay transparency measures and counters workplace discrimination by requiring employers of 15 or more employees to: (i) include the pay scale for a position in any job posting; (ii) provide pay scale information to current employees and to applicants upon reasonable request; and (iii) maintain employee records, including job titles and wage rate histories, through the term of each employee′s employment and for 3 years after their employment has ended.

SB 1162 also expands covered employers' pay data reporting obligations. Since 2021, California law has required private employers who have 100 or more employees and who must file a federal EEO-1 to file an annual pay data report with the California Civil Rights Department (formerly the California Department of Fair Employment and Housing) on or before March 31 of each year. SB 1162 broadens these obligations in several significant ways.

First, the bill expands who must file a pay data report so that all private employers with 100 or more employees will be required to file a pay data report regardless of whether they also must file a federal EEO-1, and private employers with 100 or more employees hired through labor contractors will be required to submit a separate pay data report regarding these contracted workers.

Second, in addition to demographic and pay band information, employers' pay data reports will also need to identify, within each job category, the median and mean pay rate for each combination of race, ethnicity, and sex.

**AB 257: Council to regulate working conditions for fast food workers; on hold pending litigation and, potentially, a referendum**

With AB 257, the Legislature will establish a new and powerful Fast-Food Council, the first of its kind in the State. Sponsored by the Service Employees International Union ("SEIU") and inspired by its "Fight for $15 and a Union" movement, the Council will be empowered to regulate wages, hours, and working conditions of California's fast-food employees, a population of workers historically subjected to hazardous working conditions and shamefully low wages.

The Fast-Food Council will be made up of 10 members, appointed by the Governor, Speaker of the Assembly, and the Senate Rules Committee, and will dictate working conditions for employees of chains with at least 100 outlets nationwide. The Council is expected to raise fast food worker wage rates as high as $22 an hour.

Unsurprisingly, the Chamber of Commerce has made destroying the bill a priority. The State has been blocked by a judge from implementing the law as the result of a lawsuit filed by a coalition of giant corporate chain restaurants, which are seeking a referendum on the November 2024 ballot in a bid to overturn the law. The law is now on hold until after the November 2024 referendum.

None of this corporate chicanery would be possible but for the Supreme Court's obsequious decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (holding that the Free Speech Clause of the First Amendment prohibits the government from restricting independent expenditures for political campaigns by corporations). Of course, while the Founders were well aware of the existence of various types of business enterprises (joint-stock companies, corporations such as the East India Company which was incorporated in 1600, and the like), the Founders did not provide for any corporate rights in the Constitution or the Bill of Rights. Rather, the Founders understood that, to the extent that corporations had any type of personhood, it was a legal fiction limited to a courtroom. But we digress.

[**Author's Note:** On January 24, 2023, the California Secretary of State qualified a referendum challenging AB 257 for the November 2024 ballot. At the same time, the Sacramento Superior Court issued a preliminary injunction prohibiting the implementation or enforcement of AB 257. The injunction will remain in effect unless and until a majority of voters defeat the referendum and approve the FAST Recovery Act in the 2024 election.]

**AB 1041: CFRA and paid sick leaves expanded to cover employee's care for a "designated person"**

AB 1041 amends the California Family Rights Act ("CFRA") and the Healthy Workplaces, Healthy Families Act of 2014, also known as the Paid Sick Leave Law, to permit eligible employees of covered employers to take leave to care for a "designated person" who does not have to be a family member. Rather, a "designated person" can be any individual related to the employee by blood or whose association with the employee is the equivalent of a family relationship. The designated person may be identified by the employee at the time the employee requests the leave. An employer may limit an employee to one designated person per 12-month period.

**AB 1576: Superior Court lactation rooms beginning July 1, 2024**

Until AB 1576, nursing parents who visited California Superior Courts had no choice but to pump or feed their babies while sitting on a toilet in the courthouse bathroom or in the hallway across from their adversaries. This includes nursing lawyers, whose work requires them to spend hours tethered to the courtroom in hearings and trials. Fortunately, beginning July 1, 2024, California Superior Courts will be required to provide court users, including lawyers and litigants, with access to a lactation room in any courthouse in which a lactation room is also provided to court employees. The bill requires the lactation room to meet the requirements imposed upon an employer with respect to providing a lactation room for employees.

**AB 1949: New requirement for employers to provide 5 days of bereavement leave**

AB 1949 makes it an unlawful employment practice for a covered employer to refuse to grant a request by an eligible employee to take up to 5 days of bereavement leave (which need not be consecutive) upon the death of a family member. A "covered" employer is: (i) a person who employs 5 or more persons to perform services for a wage or salary; and (ii) the State and any political or civil subdivision of the State, including, but not limited to, cities and counties. An "eligible" employee means a person employed by the employer for at least 30 days prior to the commencement of the leave. A "family member" means a spouse or a child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law as defined in Government Code Section 12945.2

The law provides that the bereavement leave may be unpaid, except that an employee may use vacation, personal leave, accrued and available sick leave, or compensatory time off that is otherwise available to the employee.

The law requires that the leave be completed within 3 months of the date of death.

The law also requires employees, if requested by the employer, within 30 days of the first day of the leave, to provide documentation of the death of the family member.

"Documentation" includes, but is not limited to, a death certificate, a published obituary, or written verification of death, burial, or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution, or governmental agency.
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**AB 2068: Employers required to post Cal/OSHA information regarding citations or orders in English and other specified languages**

Employers must already post Cal/OSHA citations in English in places readily seen by all employees. Now, AB 2068 expands worker access to these disclosures by requiring Cal/OSHA citation notices to be in English as well as the top 7 non-English languages used by limited-English-proficient adults in California, as determined by the U.S. Census Bureau's American Community Survey, as well as Punjabi (if not already included in the top 7). Employers that fail to post citations in all required languages may be subject to (further) citation by Cal/OSHA.

**AB 2134: Information on access to reproductive healthcare for employees of religious employers**

Despite countless offensive and degrading decisions from the U.S. Supreme Court diminishing access to safe and affordable reproductive healthcare over the last several years, California Democrats continue to take measures to secure access to abortion services and contraceptives for their constituents. Under AB 2134, if a religious employer's healthcare coverage fails to provide employees with abortion and contraceptive coverage or benefits, the employer must provide its employees with written information regarding abortion and contraceptive services that may be available to them at no cost through the California Reproductive Health Equity Program. AB 2134 also requires the Department of Industrial Relations to post to its website information regarding abortion and contraception benefits available through the program.

**AB 2183: Card checks for farmworkers**

AB 2183 makes it easier for farmworkers to unionize. Until passage of this new law, union elections usually took place on the growers' properties. The new measure allows farmworkers to vote by mail or fill out a ballot card to be dropped off at Agricultural Labor Relations Board.

**AB 2188: Protections for off-site, off-duty marijuana use beginning January 1, 2024**

The legalization of recreational marijuana in 2016 led many to question the California Supreme Court's decision in *Ross v. RagingWire Telecommunications Inc.*, 42 Cal.4th 920 (2008), which held in part that, despite the legalization of medical marijuana in 1996, an employer could lawfully refuse to hire a job candidate who failed a drug test, even if it was the result of legal marijuana use. Although the passing of Proposition 64

in 2016 did not impact the holding in Ross (in fact, the law explicitly preserved its holding), societal attitudes towards marijuana have shifted significantly since the Court's decision.

Starting on January 1, 2024, AB 2188 will amend FEHA to prohibit discrimination based upon an employee's use of cannabis off the job and away from the workplace, partially superseding Ross. The bill does not prohibit an employer's use and reliance on pre-employment drug screenings that determine current impairment or active levels of tetrahydrocannabinol ("THC"). It also has some exceptions, including for workers in the building and construction trades and applicants and employees subject to federal background investigations or clearances.

**AB 2693: Updated requirements for COVID-19 exposure notification requirements to employees**

AB 2693 extends until January 1, 2024 employers' obligation to provide notice to employees within one day of learning of a potential COVID-19 exposure in the workplace and, as an alternative to providing written notice to employees, now allows employers to post notice of a potential COVID-19 exposure. If an employer elects to post, it must display the notice where notices concerning workplace rules or regulations are customarily displayed.

**Los Angeles' Fair Work Week Ordinance (*aka* Predictive Scheduling)**

Effective, April 1, 2023, covered Los Angeles retail establishments will need to comply with a Fair Work Week Ordinance that has been dubbed a "Predictive Scheduling" law as it attempts to prevent employers from imposing unpredictable, last-minute, and fluctuating work weeks on employees who have no control over their schedules. This new law applies to retail businesses in the City of Los Angeles that employ at least 300 employees worldwide (including those employed through temporary service firms or staffing agencies, retail subsidiaries, and franchisees) and provides protections to the employees of those businesses who qualify for minimum wage and work at least two hours per workweek. The law is extremely detailed but, generally speaking, requires employers to:

- Provide employees with 14 days' written notice of their work schedules.
- Pay an additional hour of pay for each change to employees' date, time, or location of work from the posted work schedule that does not result in a loss of time to the employee or does not result in more than fifteen minutes of additional work time.

- Pay one-half the employees' regular rate of pay for time not worked if the employer reduces the employees' time from that on the posted schedule by at least fifteen minutes.
- Offer extra hours to current employees before hiring new workers.

The ordinance can be accessed at https://clkrep.lacity.org/onlinedocs/2019/19-0229_ord_draft_02-07-2020.pdf.

**Los Angeles' Freelance Worker Protection Ordinance**

For decades, employers used free lancers or independent contractors to perform services peripheral to the core of their business – like hiring a plumber, a janitorial service, or a lawyer. Recently, especially with the advent of the gig economy, employers are now using these free lancers to perform work at the very heart of their business. Accordingly, we need to amend the Labor Code and the Fair Employment and Housing Act to cover free lancers. Until that happens, a brand-new City of Los Angeles ordinance – the Freelance Worker Protections Ordinance – which joins similar ordinances in New York City, Seattle and Minneapolis, is a decent start. ataThis new ordinance, which went into effect on July 1, 2023, provides that:

(1) Hiring entities must enter into written contracts with most freelance workers who work in the city and provide services valued at $600.00 or more.

(2) Hiring entities must provide full payment for the services provided on or before the date specified in the contract, or if the contract does not specify a due date or if there is no written contract, no later than 30 days after the services are rendered;

(3) Hiring entities may not retaliate against a free lancer who complains about violations of the ordinance;

(4) Authorizes the freelancer to sue and recover damages of up to double whatever amount is due and owning under the contract and $250.00 if the hiring entity refused to enter into a written contract; and

(5) Provides that the prevailing free lancers get their attorneys' fees.

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# New Employment Laws Effective January 1, 2024

**SB 848: Reproductive Loss Leave**

Employers with five or more employees must provide up to five days of protected time off to a California employee who has been employed for at least 30 days and suffers a "reproductive loss event," defined as a failed adoption, failed surrogacy, miscarriage, stillbirth, or unsuccessful assisted reproduction. A "reproductive loss event" means the day of, or, for a multiple-day event, the final day of, a failed adoption, failed surrogacy, miscarriage, stillbirth, or an unsuccessful assisted reproduction. Any reproductive loss leave generally must be taken within three months of the event, and pursuant to any existing leave policy of the employer. Employee leave rights are in addition to other leaves under the California Family Rights Act and the Fair Employment and Housing Act.


This bill also provides that if an employee experiences more than one reproductive loss event within a 12-month period, the employer can cap the total amount of reproductive loss leave time at 20 days within a 12-month period. In the absence of an existing employer policy, the reproductive loss leave may be unpaid, but an employee may use certain other leave balances, including accrued and available paid sick leave, during the covered leave.

Finally, SB 848 requires the employer to maintain employee confidentiality relating to reproductive loss leave, and makes it an unlawful employment practice for an employer to retaliate against an individual because of the individual's exercise of the right to reproductive loss leave or the individual's giving of information or testimony as to reproductive loss leave.

This bill adds Section 12945.6 to the Government Code.
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**AB 1076 and SB 699: Noncompete Agreements**

AB 1076 amends Business & Professions Code section 16600 to clarify that California's prohibition on noncompete agreements is to be interpreted broadly and that the prohibition is not limited to contracts where the person being restrained is a party to the contract. AB 1076 also adds Business & Professions Code section 16600.1, which "makes it unlawful to include a noncompete clause in an employment contract or to require an employee to enter [into] a noncompete agreement" unless one of the narrow exceptions applies. In addition, any employer that required a current or former employee who was employed in California after January 1, 2022, to sign a contract that included a noncompete clause must notify the employee that the clause is void. This notice must be in an individualized writing that is delivered by email and by delivery to the employee's or former employee's home address. Failure to deliver the notice is deemed an act of unfair competition.

SB 699 adds section 16600.5 to the Business & Professions Code. This new section clarifies that a noncompete agreement that violates California law is unenforceable in California regardless of where and when the agreement was signed. It further provides that an employer that enters into an agreement with an employee or prospective employee that includes an invalid noncompete clause, or that attempts to enforce an invalid noncompete clause, commits a civil violation. Suit can be brought by an employee, former employee, or prospective employee. Actual damages and injunctive relief can be sought, and attorney's fees and costs can be awarded.

**SB 365: No automatic stay during appeals of motions to compel arbitration decisions**

SB 365 amends the California Code of Civil Procedure so that trial court proceedings are not automatically stayed (*i.e.,* suspended) when a party appeals an order dismissing or denying a petition to compel arbitration. This law will permit courts to exercise discretion in whether to stay trial court proceedings while an appeal is heard. The law may be challenged in court, however, on grounds that it is preempted by the Federal Arbitration Act. *See e.g., Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023)(holding

that, under the Federal Arbitration Act, a district court must stay its proceedings while an interlocutory appeal on the issue of arbitrability is ongoing).

**SB 497: More Protections For Whistleblowers**

SB 497 amends California Labor Code Sections 98.6 and 1197.5 to create a rebuttal presumption of retaliation if an employee is disciplined or discharged within 90 days of certain protected activity. The law also adds a civil penalty of up to $10,000.00 per employee for each violation.

**SB 616: More Paid Sick Leave**


SB 616 increases the amount of paid sick leave employers must provide to California employees from three days (24 hours) to five days (40 hours). Under SB 616, employees must be eligible to earn at least five days or 40 hours of sick leave or paid time off within six months of employment. Further, this bill modifies the alternate sick leave accrual method to additionally require that employees have no less than 40 hours of accrued sick leave or paid time off by the 200th calendar day of employment or each calendar year, or in each 12-month period.

SB 616 does not change the required minimum accrual rate under California's sick leave law, which remains at one hour of sick leave for every 30 hours worked, but does extends procedural requirements on the use of paid sick days to employees covered by a collective bargaining agreement.

This bill amends sections 245.5, 246 and 246.5 of the Labor Code.

**SB 553 and SB 428: Workplace Violence Prevention**

SB 553 requires employers to create a workplace violence prevention plan. The plan must be in writing and accessible by employees. It can be included as a stand-alone section within an existing injury and illness prevention plan, or it can be maintained as a separate document.

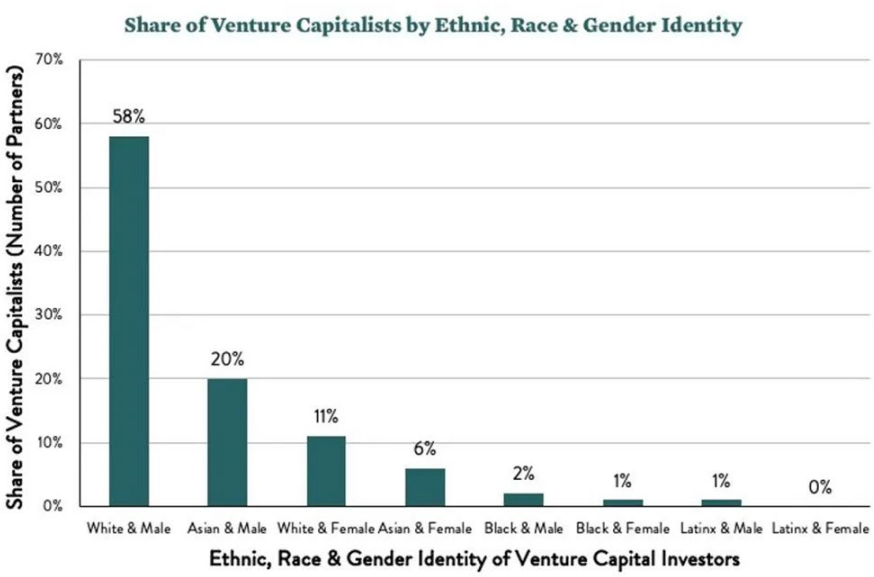
SB 553 also requires employee training, which must be provided when the plan is first established, and once each year thereafter.

The new law also requires employers to maintain records of workplace violence incidents and investigations for a five-year period. The Division of Occupational Safety and Health (CAL/OSHA) is empowered to start enforcing SB 553 beginning on July 1, 2024.

SB 428 provides that, as of January 1, 2025, an employer whose employee has suffered harassment may seek a TRO and an injunction on behalf of the employee. The TRO, however, must not prohibit speech or activities otherwise protected by law.

**SB 54: Venture capital diversity data reporting**

Effective March 1, 2025, SB 54 requires certain venture capital companies, including venture capital funds, to report to the California Civil Rights Department on the diversity of the founding members of companies in which they invest.




**SB 700: Expands Protections For Cannabis Use**

SB 700 expands this protection by making it unlawful for an employer to request information from applicants regarding their prior use of cannabis. The law also prohibits discrimination against applicants based on information about their prior cannabis use obtained from criminal history, unless the employer is otherwise permitted to consider or inquire about that information under the law.
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# New Employment Laws Effective July 1, 2024

**AB 2288 & SB 92: PAGA Reform**

Facing an employer sponsored voter initiative (the so-called "Fair Pay and Employer Accountability Act") that would effectively gut California's Private Attorneys General Act ("PAGA"), Governor Newsom reached out to business and labor groups to hammer out a compromise that amend PAGA to strengthen worker protections, encourage employer compliance, streamline litigation processes, and avert the contentious ballot measure. Governor Newsom's work led to the passage of legislation – AB 2288 authored by Assemblymember Ash Kalra (D-San José) and SB 92 authored by Senator Tom Umberg (D-Santa Ana) – was signed into law on July 1, 2024, after proponents of the PAGA ballot initiative withdrew their measure. According to Governor Newsome, this New PAGA reforms PAGA to:

**Reforms PAGA's penalty structure**

- Encourages compliance with labor laws by capping penalties on employers who quickly take steps to fix policies and practices, and make workers whole, after receiving a PAGA notice, as well as on employers that act responsibly to take steps proactively to comply with the Labor Code before even receiving a PAGA notice.
- Creates new, higher penalties on employers who act maliciously, fraudulently or oppressively in violating labor laws.
- Ensures that mo re of the penalty money goes to employees by increasing the amount allocated to employees from 25% to 35%.

**Reducing and streamlining litigation**

- Expands which Labor Code sections can be cured to reduce the need for litigation and make employees whole quickly.
- Protects small employers by providing a more robust right to cure process through the Labor and Workforce Development Agency (LWDA) to reduce litigation and costs.
- Codifies that a court may limit both the scope of claims presented at trial to ensure cases can be managed effectively.

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**Improving measures for injunctive relief and standing**

- Allows courts to provide injunctive relief to compel businesses to implement changes in the workplace to remedy labor law violations.
- Requires the employee to personally experience the alleged violations brought in a claim.

**Strengthening state enforcement**

- Give the Department of Industrial Relations (DIR) the ability to expedite hiring and fill vacancies to ensure effective and timely enforcement of employee labor claims.

*See* https://www.gov.ca.gov/2024/07/01/governor-newsom-signs-paga-reform/.

New PAGA applies to PAGA civil complaints that are filed after June 19, 2024, and also involve a PAGA notice to the LWDA sent on or after June 19. For all other actions – those currently pending or based on LWDA notices provided prior to June 19 – the prior "Old PAGA" rules will apply.

# II. ARBITRATION

***U.S. Supreme Court Rejects Employer Argument That FAA's Exemption For Transportation Workers Is Limited To Workers Employed In A Transportation Industry***

In *Bissonnette v. LePage Bakeries Park St., LLC*, 2024 WL 1588708 (2024), the Supreme Court was confronted with the question of whether a transportation worker must work for a company in the transportation industry to be exempt under § 1 of the FAA. The Supreme Court concluded that there is no such requirement.

***U.S. Supreme Court Rejects Prejudice Requirement for Waiver of Arbitration Agreement***

For years, the courts (including nine Circuit Courts of Appeal, have invented rules to favor arbitration over litigation. For example, typically when courts examine whether a party has waived a right, they do not ask if its acts caused harm. But, in the arbitration context, these courts have manufactured an arbitration-specific rule requiring that a finding of harm is an essential prerequisite to a finding of waiver: *i.e.,* a party can waive its arbitration right by litigating only when its conduct has prejudiced the other side.

That special rule, these courts have said, purportedly derives from the FAA's "policy favoring arbitration." In *Morgan v. Sundance, Inc.*, 2022 WL 1611788 (2022), in an opinion authored by Justice Kagan, the Supreme Court held that these courts were wrong to condition a waiver of the right to arbitrate on a showing of prejudice.

***U.S. Supreme Court Holds That The FAA Requires Enforcement Of An Arbitration Agreement That Prohibits Representative Claims, Including California's PAGA***

In *Viking River Cruises v. Moriana,* 596 U.S. 639 (2022), the U.S. Supreme Court, in an 8 – 1 opinion authored by Justice Alito (with concurring opinions by Justices Sotomayor and Barrett), held that a former employer was entitled to enforce an arbitration agreement between it and its former employee insofar as the agreement mandated arbitration of former employee's individual PAGA claim. In so holding, the Supreme Court abrogated the California Supreme Court's holding in *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (20114). With respect to the plaintiff's representative PAGA claims, Justice Alito suggested that, under California state law, those claims must be dismissed:

> The remaining question is what the lower courts should have done with Moriana's non-individual claims. Under our holding in this case, those claims may not be dismissed simply because they are "representative." *Iskanian's* rule remains valid to that extent. But as we see it, PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding. Under PAGA's standing requirement, a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action. When an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit. As a result, Moriana lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims.

*Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 662–63 (2022).

"Hold your horses!" Justice Sotomayer exclaimed in her concurring opinion before explaining that the FAA poses no bar to the adjudication of a plaintiff's "non-individual" PAGA claims. Then, providing a blueprint to California to allow representative PAGA claims to proceed in court, Justice Sotomayer explained that PAGA representative claims can move forward in court should either: (1) the California courts determine that PAGA provides a mechanism to enable a court to

adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding; or (2) the California Legislature modifies the statute such that PAGA provides a mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding:

> The Court concludes that the FAA poses no bar to the adjudication of respondent Angie Moriana's "non-individual" PAGA claims, but that PAGA itself "provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding." Thus, the Court reasons, based on available guidance from California courts, that Moriana lacks "statutory standing" under PAGA to litigate her "non-individual" claims separately in state court. Of course, if this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word. Alternatively, if this Court's understanding is right, the California Legislature is free to modify the scope of statutory standing under PAGA within state and federal constitutional limits. With this understanding, I join the Court's opinion.

*Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 664 (2022).

Justice Thomas wisely dissented explaining, as he has done for decades, that the Federal Arbitration Act, 9 U. S. C. § 1 *et seq.,* does not apply to proceedings in state courts.

***Following Justice Sotomayor's Blueprint, California Supreme Court Holds That Plaintiffs Can Pursue PAGA Representative Actions In Court Even After Their Individual PAGA Claims Are Compelled To Arbitration***

In *Adolph v. Uber Technologies, Inc.*, 14 Cal.5th 1104 (2023), the California Supreme Court held that an aggrieved employee who has been compelled to arbitrate claims under PAGA that are premised on Labor Code violations actually sustained by the plaintiff maintains statutory standing to pursue PAGA claims arising out of events involving other employees:

> In *Viking River Cruises, Inc. v. Moriana*, the United States Supreme Court considered a predispute employment contract with an arbitration provision specifying that "in any arbitral proceeding, the parties could not bring any dispute as a class, collective, or representative PAGA action. It also contained a severability clause specifying that if the waiver was found invalid, any class, collective, representative, or PAGA action would presumptively be litigated in court. But under that severability clause, if any

> portion of the waiver remained valid, it would be enforced in arbitration. In light of our state law rule prohibiting wholesale waiver of PAGA claims, the high court construed the severability clause to reflect the parties' agreement to arbitrate any alleged Labor Code violations personally sustained by a PAGA plaintiff — so-called "individual" claims — and held that the Federal Arbitration Act compels enforcement of this agreement. In so holding, the high court declared that the FAA preempted a separate state law rule that PAGA actions cannot be divided into individual and non-individual claims where the parties have agreed to arbitrate individual claims. For consistency, we use the terms "individual" and "non-individual" claims in accordance with the high court's usage in *Viking River*.
>
> The question here is whether an aggrieved employee who has been compelled to arbitrate claims under PAGA that are premised on Labor Code violations actually sustained by the plaintiff maintains statutory standing to pursue PAGA claims arising out of events involving other employees in court. We hold that the answer is yes. To have PAGA standing, a plaintiff must be an aggrieved employee — that is, (1) someone who was employed by the alleged violator and (2) against whom one or more of the alleged violations was committed. Where a plaintiff has brought a PAGA action comprising individual and non-individual claims, an order compelling arbitration of the individual claims does not strip the plaintiff of standing as an aggrieved employee to litigate claims on behalf of other employees under PAGA.

*Adolph v. Uber Technologies, Inc.*, 14 Cal.5th 1104, 1113-1114 (2023)(cleaned up).

***9th Circuit Holds That Adolph Is Not Inconsistent With Or In Conflict With Viking River***

In *Johnson v. Lowe's Home Centers, LLC*, 2024 WL 542830 (9th Cir. 2024), the plaintiff, Maria Johnson, a former employee of Lowe's Home Centers, LLC, signed a predispute employment contract in which she agreed that any controversy arising from her employment by Lowe's would be settled by arbitration. Subsequently, Johnson filed a lawsuit in California state court on behalf of herself and other Lowe's employees under the Private Attorneys General Act of 2004 alleging both individual and non-individual PAGA claims. Lowe's removed the action to federal district court. After the Supreme Court decided *Viking River*, Lowe's moved to compel arbitration of Johnson's individual PAGA claim and to dismiss her non-individual PAGA claims. The district court granted Lowe's motion in its entirety. Johnson appealed.

On appeal, the Ninth Circuit affirmed the district court's order compelling arbitration of Johnson's individual PAGA claim. But, the Ninth Circuit vacated the district court's order dismissing Johnson's non-individual PAGA claims. The Ninth Circuit explained that when the district court dismissed those claims, its dismissal was consistent with California law as then interpreted by the United States Supreme Court in *Viking River*. However, while the case was on appeal to the Ninth Circuit, the California Supreme Court in *Adolph* corrected that interpretation of California law. Accordingly, the Ninth Circuit remanded Johnson's non-individual PAGA claims to allow the district court to apply California law as interpreted in *Adolph*.

***Supreme Court Holds That FAA Requires Federal District Courts To Stay Its Proceedings While An Interlocutory Appeal On The Issue Of Arbitrability Is Ongoing***

In *Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023), a non-employment case, the U.S. Supreme Court held that the FAA mandates that federal district courts stay their pre-trial and trial proceedings while an interlocutory appeal regarding arbitration is ongoing:

> "When a ***federal district court*** denies a motion to compel arbitration, the losing party has a statutory right to an interlocutory appeal. *See* 9 U.S.C. § 16(a). The sole question here is whether the ***district court*** must stay its pre-trial and trial proceedings while the interlocutory appeal is ongoing. The answer is yes: The ***district court*** must stay its proceedings."

*Coinbase, Inc. v. Bielski*, 599 U.S. 736, 738 (2023)(Emphasis added).

While some employment defense attorneys argue that the Supreme Court actually meant "State and federal courts" when it wrote "federal district courts" and "district courts," the Supreme Court certainly knows how to say "State and federal courts" and it did not utter those words.

***Arbitration Agreement From Prior Term Of At Will Employment Does Not Cover A Second Term Of Employment Where No Such Agreement Was Made***

In *Vazquez v. SaniSure, Inc.*, 2024 WL 1430507 (Cal.App. 2 Dist., 2024), the Court of Appeal was confronted with the issue of whether or not an arbitration agreement that an employee executed during her first stint of at-will employment applied during her second stint of employment.

Jasmin Vazquez Vazquez started working for SaniSure through a staffing agency. After a while, she was hired directly by the company as an at-will employee subject to an arbitration agreement. Vazquez terminated her employment with SaniSure when she resigned. Four months later, she negotiated a new employment offer and returned to work for the company. During negotiations the parties did not discuss whether Vazquez would be required to sign an arbitration agreement again or whether claims related to her new employment would be subject to arbitration. When her second stint of employment ended, she filed a class action complaint alleging that SaniSure failed to provide accurate wage statements during her second stint of employment.

SaniSure moved to compel arbitration. The trial court denied the motion finding that all of the claims in Vazquez's complaint arose out of her second stint of employment with SaniSure and SaniSure failed to show that Vazquez agreed to arbitrate claims arising from that stint of employment.

SaniSure appealed the Superior Court's order denying its motion to compel arbitration. The Court of Appeal affirmed:

> An employer and employee can agree to arbitrate claims related to their employment relationship. But termination of that relationship can revoke the arbitration agreement. And when there is no evidence that the parties agreed to arbitrate claims arising from a subsequent employment relationship, any claims arising solely from that subsequent relationship are not subject to arbitration.
>
> Vazquez signed arbitration agreements during her first stint of at-will employment with SaniSure. But she revoked these agreements by terminating her employment. The causes of action in Vazquez's lawsuit are based on events that allegedly occurred only during her second stint of employment with SaniSure. As SaniSure concedes, Vazquez did not sign a second set of arbitration agreements during that stint of employment. Thus, for her claims to be subject to arbitration, SaniSure must show that the parties agreed that the agreements Vazquez signed during her first stint of employment would apply to her second.
>
> SaniSure has not done so. Vazquez testified that she never agreed that the agreements she signed during her first stint of employment would govern her second. She also said that SaniSure never told her that getting rehired was contingent on agreeing to arbitration. And the documents she signed upon rehiring do not mention arbitration. SaniSure points to no evidence to the contrary.

*Vazquez v. SaniSure, Inc.*, 2024 WL 1430507, at *1 (Cal.App. 2 Dist., 2024)(cleaned up).

***Court Of Appeal Defines "Dispute" For Ending Forced Arbitration Of Sexual Assault And Sexual Harassment Act Purposes***

In *Kadar v. Southern California Medical Center, Inc.*, 317 Cal. Rptr. 3d 682 (2024), the Court of Appeal held that a "dispute," for Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act purposes, does not arise from the fact of an injury; rather, for a "dispute" to arise, a party must first assert a right, claim, or demand.

***U.S. Supreme Court Decides That Airline Ramp Supervisors Who Supervise Workers Who Load Or Unload Goods From Vehicles That Travel In Interstate Commerce, But Do Not Physically Transport Such Goods Themselves, Are Interstate 'Transportation Workers' Exempt From The Federal Arbitration Act."***

In *Southwest Airlines v. Saxon*, 2022 WL 1914099 (2022), the U.S. Supreme Court granted *certiorari* to determine: "Whether workers who load or unload goods from vehicles that travel in interstate commerce, but do not physically transport such goods themselves, are interstate 'transportation workers' exempt from the Federal Arbitration Act." The Seventh Circuit has held that such individuals are "transportation workers" exempt from the Federal Arbitration Act while the Fifth Circuit has held that they are not exempt.

The Supreme Court, in an opinion authored by Justice Thomas, held that airline ramp supervisors were engaged in foreign or interstate commerce" and, thus, exempted from Federal Arbitration Act's (FAA) coverage:

> The parties dispute whether a class of airplane cargo loaders are "engaged in foreign or interstate commerce" under § 1. We hold that it is.
>
> As always, we begin with the text. Again, to be "engaged" in something means to be "occupied," "employed," or "involved" in it. "Commerce," meanwhile, includes, among other things, "the transportation of ... goods, both by land and by sea." Black's Law Dictionary 220 (2d ed. 1910) (Black's); Thus, any class of workers directly involved in transporting goods across state or international borders falls within § 1's exemption.

Airplane cargo loaders are such a class. We have said that it is too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it. We think it equally plain that airline employees who physically load and unload cargo on and off planes traveling in interstate commerce are, as a practical matter, part of the interstate transportation of goods. They form a class of workers engaged in foreign or interstate commerce.

Context confirms this reading. In *Circuit City Stores, Inc. v. Adams*, 532 U. S. 105 (2001), we considered whether § 1 exempts all employment contracts or only those contracts involving "transportation workers." *Id.,* at 109. In concluding that § 1 exempts only transportation-worker contracts, we relied on two well-settled canons of statutory interpretation. First, we applied the meaningful-variation canon. We observed that Congress used "more open-ended formulations" like " 'affecting' " or " 'involving' " commerce to signal "congressional intent to regulate to the outer limits of authority under the Commerce Clause." *Circuit City*, 532 U. S., at 115–116, 118. By contrast, Congress used a "narrower" phrase—" 'engaged in commerce' "—when it wanted to regulate short of those limits. *Id.*, at 118. Second, we applied the *ejusdem generis* canon, which instructs courts to interpret a "general or collective term" at the end of a list of specific items in light of any "common attribute[s]" shared by the specific items. As applied to § 1, that canon counseled that the phrase " 'class of workers engaged in ... commerce' " should be "controlled and defined by reference" to the specific classes of " 'seamen' " and " 'railroad employees' " that precede it. *Circuit City*, 532 U. S., at 115.

Taken together, these canons showed that § 1 exempted only contracts with transportation workers, rather than all employees, from the FAA. And, while we did not provide a complete definition of "transportation worker," we indicated that any such worker must at least play a direct and "necessary role in the free flow of goods" across borders. Id., at 121. Put another way, transportation workers must be actively "engaged in transportation" of those goods across borders via the channels of foreign or interstate commerce.

Cargo loaders exhibit this central feature of a transportation worker. As stated above, one who loads cargo on a plane bound for interstate transit is intimately involved with the commerce (e.g., transportation) of that cargo. "[T]here could be no doubt that [interstate] transportation [is] still in

> progress," and that a worker is engaged in that transportation, when she is "doing the work of unloading" or loading cargo from a vehicle carrying goods in interstate transit. *Erie R. Co. v. Shuart*, 250 U. S. 465, 468 (1919).
>
> A final piece of statutory context further confirms that cargo loading is part of cross-border "commerce." The first sentence of § 1 of the FAA defines exempted "maritime transactions" to include, among other things, "agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any *other* matters in foreign commerce." (Emphasis added.) The use of "other" in the catchall provision indicates that Congress considered the preceding items to be "matters in foreign commerce." And agreements related to the enumerated "matte[r] in foreign commerce" of "wharfage," to take one example, included agreements for mere access to a wharf—which is simply a cargo-loading facility. It stands to reason, then, that if payments to access a cargo-loading facility relate to a "matte[r] in foreign commerce," then an individual who actually loads cargo on foreign-bound ships docked along a wharf is himself engaged in such commerce. Likewise, any class of workers that loads or unloads cargo on or off airplanes bound for a different State or country is "engaged in foreign or interstate commerce." In sum, text and context point to the same place: Workers, like Saxon, who load cargo on and off airplanes belong to a "class of workers in foreign or interstate commerce."

*Southwest Airlines v. Saxon,* 2022 WL 1914099 (2022) (cleaned-up).

***Ninth Circuit Holds That Worker Belonged To A "Class Of Workers Engaged In Foreign Or Interstate Commerce," 9 U.S.C. § 1, Since Such Workers Are Exempted From The FAA Even If They Perform Purely Local Job Duties***

Adan Ortiz worked in a warehouse for Randstad Inhouse Services, LLC and GXO Logistics Supply Chain, Inc. The warehouse where Ortiz worked received Adidas watches, apparel, and shoes from mostly international locations, including Asia, South America, and Central America. Products remained at the warehouse for anywhere from several days to a few weeks, after which they are shipped to end-use consumers and retailers in a variety of states. GXO's role in the international supply chain for Adidas products is small but important. It received and stored Adidas products after they arrive from international suppliers, then processes and prepares them for further distribution across state lines. GXO does not move Adidas products to or from its warehouse and Ortiz was not responsible for unloading the products once they arrive or loading them when they are scheduled for departure. Those tasks—like every other

step in the Adidas supply chain—are handled by other employees or entities. Instead, once the products had been unloaded from shipping containers, Ortiz transported the products to other locations within the warehouse, assisted "pickers" in obtaining the products so they could be shipped out, and assisting the "Outflow Department" to prepare packages of the products for shipment.

When Ortiz was hired to work for GXO, he signed an arbitration agreement with Randstad. GXO was expressly designated as an intended third-party beneficiary of the agreement as a Randstad client to whom Ortiz would provide services on assignment. Notwithstanding the arbitration agreement, Ortiz filed a class action in California state court. The complaint alleges various violations of California labor law, all of which are covered by the broad language of the arbitration agreement. Randstad timely removed the case to federal court and filed a motion to compel arbitration, which GXO joined.

The district court declined to compel arbitration. Relying on the Supreme Court's decision in *Southwest Airlines Co. v. Saxon*, 596 U.S. 450 (2022), and the Nonth Circuit's opinion in *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020), it concluded that the FAA did not apply because Ortiz qualified as an exempt "transportation worker."

Randstad and GXO each filed separate interlocutory appeals, which were briefed and argued to the Ninth Circuit on a consolidated basis. The Ninth Circuit affirmed:

> Though the FAA's pro-arbitration mandate is broad, its reach is not universal. Section 1, for example, exempts the contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. 9 U.S.C. § 1. In keeping with the FAA's policy favoring arbitration, the Supreme Court has construed the residual clause in § 1 narrowly, applying it only to contracts of employment of transportation workers.
>
> Especially considering the FAA's admonition that employees must be "engaged in foreign or interstate commerce" to qualify for the exemption, 9 U.S.C. § 1, employees like Ortiz, who do not transport products across great distances and interact with interstate commerce on a purely local basis, present a particularly difficult interpretive issue. Fortunately, the Supreme Court recently confronted such a case in *Saxon v. Southwest Airlines Co.* Saxon worked for Southwest Airlines as a ramp supervisor. Like Ortiz, she did not cross state lines or transport goods across significant distances, and she played only a localized, supporting role in interstate commerce. To determine whether Saxon

nevertheless qualified as an exempt transportation worker, the Court engaged in a two-step analysis. First, the Court defined the relevant class of workers to which Saxon belonged. Then, it determined whether that class of workers is engaged in foreign or interstate commerce.

At the first step, the Court considered Saxon's job description, which included loading and unloading baggage, airmail, and commercial cargo on and off airplanes that travel across the country. In defining Saxon's class of workers, the Court considered the specific nature of her work, not her employer's status as a transportation company more generally. Eschewing an industrywide approach, it directed its attention to the performance of work itself. With that standard in mind, the Court concluded that Saxon belonged to a class of workers who physically load and unload cargo on and off airplanes on a frequent basis.

At the second step, the Court disclaimed any strict requirement that a worker must personally transport goods interstate to qualify as a transportation worker. It then laid out a series of closely related standards detailing the required relationship between the class of workers and interstate commerce. First, any such worker must at least play a direct and necessary role in the free flow of goods across borders. Second, and put another way, they must be actively engaged in transportation of those goods across borders via the channels of foreign or interstate commerce. Finally, workers who are intimately involved with the commerce (e.g., transportation) of the cargo also qualify.

Equally instructive are the categorical standards that *Saxon* declined to adopt. On one hand, the Court rejected Saxon's position that virtually all employees of major transportation providers are exempt. On the other, it rejected Southwest's view that the provision applies only to workers who physically move goods or people across foreign or international boundaries.

Though the Court's different formulations of the test—direct and necessary, active engagement, and intimate involvement—all vary slightly, *Saxon's* bottom line is that to qualify as a transportation worker, an employee's relationship to the movement of goods must be sufficiently close enough to conclude that his work plays a tangible and meaningful role in their progress through the channels of interstate commerce. Ultimately, the Court held that Saxon met the interrelated standards it had just pronounced because when she is doing the work of

unloading or loading cargo from a vehicle carrying goods in interstate transit, there could be no doubt that interstate transportation is still in progress, and that Saxon is engaged in that transportation.

. . . .

Regarding *Saxon's* first step, the district court concluded that Ortiz's job duties included exclusively warehouse work: transporting packages to and from storage racks, helping other employees in obtaining packages so they could be shipped, and assisting the Outflow Department to prepare packages for their subsequent shipment. It rightly assumed that Ortiz was not involved in unloading shipping containers upon their arrival or loading them into trucks when they left the warehouse. It then properly defined Ortiz's class of workers by reference to his job description, as *Saxon* commands, and entirely without reference to GXO's line of business. The district court did not err at the first step.

And as to *Saxon's* second step, the district court correctly concluded that Ortiz's class of workers played a direct and necessary role in the free flow of goods across borders and actively engaged in transportation of such goods. Like Saxon, Ortiz handled Adidas products near the very heart of their supply chain. In each case, the relevant goods were still moving in interstate commerce when the employee interacted with them, and each employee played a necessary part in facilitating their continued movement.

For these reasons, Ortiz's job description meets all three benchmarks laid out in Saxon. Both Ortiz and Saxon fulfilled an admittedly small but nevertheless direct and necessary role in the interstate commerce of goods: Saxon ensured that baggage would reach its final destination by taking it on and off planes, while Ortiz ensured that goods would reach their final destination by processing and storing them while they awaited further interstate transport.

Both were also actively engaged and intimately involved with transportation: Saxon handled goods as they journeyed from terminal to plane, plane to plane, or plane to terminal, while Ortiz handled them as they went through the process of entering, temporarily occupying, and subsequently leaving the warehouse—a necessary step in their ongoing interstate journey to their final destination. Both were actively engaged in the interstate commerce of goods. If Saxon is an exempt transportation worker, Ortiz is, too.

In response, the employers make multiple attempts to isolate Ortiz's job description from any discernable connection to the interstate transportation process. First, the employers emphasize Ortiz's purely intrastate role as a warehouse worker, noting that he did not move goods anywhere but within the facility and did not load or unload them as they were transported to and from the facility. In their view, because Ortiz performed his duties on an entirely intrastate basis, his role did not relate to interstate transportation in any meaningful sense.

The employers are incorrect. If *Saxon* stands for anything, it is that an employee is not categorically excluded from the transportation worker exemption simply because he performs his duties on a purely local basis. In *Saxon*, the plaintiff's job description was physically confined to Chicago's Midway International Airport But that did not preclude the Court from concluding that she was sufficiently connected to interstate commerce. *Saxon* is clear on this issue: what matters is not the worker's geography, but his work's connection with—and relevance to—the interstate flow of goods.

To further illustrate this point, consider the following historical example. In late 1860, the short-lived but nationally famous Pony Express hit full stride. Nevada, with its 47 waystations and 417 miles of trail, sat right in the heart of the route. At maximum, riders rode the trail for 100 miles per shift, meaning that on average, at least five riders were needed to cross Nevada alone. Even though some of these riders would have crossed Nevada's territorial boundaries and others would not, all of them performed the same task (carrying the mail) using the same means (a horse) along the same route. There is no meaningful distinction between the interstate and intrastate riders, all of whom were "actively engaged in, intimately involved with, and played a direct and necessary role" in transporting interstate the very same letters from east to west. The mere fact that some riders' routes were confined entirely within Nevada's borders does not divorce their role from the task of interstate transportation, and concluding otherwise requires willful blindness to the broader supply chain. So too here. Ortiz is perfectly capable of participating in the interstate supply chain for Adidas products even though he fulfills his role entirely within one state's borders.

*Ortiz v. Randstad Inhouse Services, LLC*, 2024 WL 1061287, at *3–6 (9th Cir. 2024)

***Supreme Court Holds That FAA Sections 9 And 10 Do Not Provide "Look-Through" Jurisdiction to Confirm or Modify Arbitral Awards – This Decision Limits The Ability Of Federal Courts To Modify, Vacate, And Confirm Arbitration Awards***

In *Badgerow v. Walters*, 142 S.Ct. 1310 (2022), the U.S. Supreme Court took up the question of how does a federal court determine whether it has jurisdiction to consider a motion to confirm, modify, or vacate an arbitration award. In an 8-1 decision authored by Justice Kagan, the Supreme Court began its analysis by explaining that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, authorizes a party to an arbitration agreement to seek several kinds of assistance from a federal court including, under Section 4, providing for a party to an arbitration agreement to ask the court to compel an arbitration proceeding and, under Sections 9 and 10, authorizing a party to apply to the court to confirm, or alternatively to vacate, an arbitral award. However, the Court added that the FAA does not create a jurisdictional basis – rather, the federal court must have an "independent jurisdictional basis" to consider the matter.

The Supreme Court explained that in *Vaden v. Discover Bank*, 556 U.S. 49 (2009), it assessed whether there was a jurisdictional basis to decide a Section 4 petition to compel arbitration by means of examining the parties' underlying dispute and determined the text of Section 4 instructed federal courts to "look through" the petition to the "underlying substantive controversy" between the parties—even though that controversy was not before the court. In other words, if the underlying dispute fell within the court's jurisdiction—for example, by presenting a federal question—then the court may rule on the petition to compel.

In the present case, the question presented was whether that same "look-through" approach to jurisdiction applied to requests to confirm or vacate arbitral awards under the FAA's Sections 9 and 10. The Court held that it does not because those sections lacked Section 4's distinctive language directing a look-through, on which *Vaden* rested. Without that statutory instruction, the Court held, a court may look only to the application actually submitted to it in assessing its jurisdiction. Accordingly, because motions to vacate, modify, or confirm arbitration awards will rarely involve federal questions on their face, federal courts will rarely have "federal question" jurisdiction over such motions. However, federal courts may still have diversity jurisdiction.
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***Ninth Circuit Initially (Mostly) Upholds California's Ban On Arbitration Agreements As A Condition Of Employment But Then Changes Its Mind And Strikes Down The Ban***

AB 51, which was codified at Labor Code section 432.6 and set to take effect on January 1, 2020, prohibits employers from imposing "as a condition of employment, continued employment, or the receipt of any employment-related benefit" the requirement that an individual "waive any right, forum or procedure" available under the FEHA and California's Labor Code.

AB 51 was challenged by several business groups, including the U.S. Chamber of Commerce, as being preempted by the Federal Arbitration Act. Shortly before AB 51 was to go into effect, Judge Kimberly Mueller of the United States District Court of the Eastern District of California granted a TRO and, subsequently, a preliminary injunction barring enforcement of the statute, concluding that the argument that AB 51 was preempted by the FAA was likely to prevail.

In *Chamber of Commerce of United States v. Bonta*, 13 F.4th 766 (9th Cir. 2021), the Ninth Circuit disagreed with the District Court, holding that Labor Code section 432.6 does not conflict with the FAA because it focuses on conduct occurring *prior* to the existence of an arbitration agreement and does not invalidate arbitration agreements that have been voluntarily entered into. The panel observed that the FAA's purpose is to enforce consensual arbitration agreements and Labor Code section 432.6 only prohibits agreements that are not consensual.

The panel partially agreed with the District Court, however, with regard to the statute's imposition of civil and criminal penalties. In that regard, the 9th Circuit held that AB 51's civil and criminal penalty provisions are invalid under the FAA because they only trigger once an employer has entered into a mandatory arbitration agreement. That means that these portions of AB 51 are punishing conduct protected by the FAA — the execution of an arbitration agreement — and therefore cannot be valid under the law.

Begging for Supreme Court intervention, Justice Sandra Segal Ikuta issued a scathing dissent:

> Like a classic clown bop bag, no matter how many times California is smacked down for violating the Federal Arbitration Act (FAA), the state bounces back with even more creative methods to sidestep the FAA. This time, California has enacted AB 51, which has a disproportionate impact on arbitration agreements by making it a crime for employers to

> require arbitration provisions in employment contracts. And today the majority abets California's attempt to evade the FAA and the Supreme Court's caselaw by upholding this anti-arbitration law on the pretext that it bars only nonconsensual agreements. The majority's ruling conflicts with the Supreme Court's clear guidance in *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 1428–29 (2017), and creates a circuit split with the First and Fourth Circuits. Because AB 51 is a blatant attack on arbitration agreements, contrary to both the FAA and longstanding Supreme Court precedent, I dissent.

(cleaned up).

On August 22, 2022, the Ninth Circuit withdraw this opinion as it voted, *sua sponte*, to grant a rehearing. *Chamber of Commerce of United States v. Bonta*, 45 F.4th 1113 (9th Cir. 2022).

On rehearing, in *Chamber of Commerce of the United States of America v. Bonta*, 62 F.4th 473 (9th Cir. 2023), the Ninth Circuit held that: (1) California law prohibiting employers from requiring employees and applicants to waive any right, forum, or procedure established in the California Fair Employment and Housing Act or California Labor Code, as a condition of employment or continued employment, was preempted, under obstacle preemption analysis, by the Federal Arbitration Act (FAA); and (2) enforcement mechanisms sanctioning employers for violating of the California Labor Code could not be severed pursuant to severability clause in preempted section.

***Ninth Circuit Holds That Domino's Drivers Who Deliver To Franchisees Are Exempt From The Federal Arbitration Act***

In *Carmona v. Domino's Pizza, LLC*, 2021 WL 6070564 (9th Cir. 2021), the Ninth Circuit held that Domino's Pizza employees who delivered goods from pizza franchise's supply center in California to franchisees within California were workers engaged in interstate commerce, and thus their action was exempt from arbitration under residual clause of FAA:

> The critical factor in determining whether the residual clause exemption applies is not the nature of the item transported in interstate commerce (person or good) or whether the plaintiffs themselves crossed state lines, but rather the nature of the business for which a class of workers performed their activities. The exemption applies if the class of workers

is engaged in a single, unbroken stream of interstate commerce that renders interstate commerce a central part of their job description.

Domino's does not dispute that the third parties who delivered goods to the Supply Center are engaged in interstate commerce. But it contends that the D&S drivers who deliver goods to individual Domino's franchisees in California are not so engaged because the franchisees, all located in California, place orders with the Supply Center in the state, and the goods delivered are not in the same form in which they arrived at the Supply Center. We disagree.

Our recent opinion addressing the residual clause, *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020), is instructive. In *Rittmann*, we held that Amazon package delivery drivers were engaged in a continuous interstate transportation of goods because they picked up packages that had come across state lines to Amazon warehouses and then transported them for the last leg to their eventual destinations. Amazon coordinated the deliveries from origin to destination, and the packages were not transformed at the warehouses. We emphasized that Amazon's business includes not just the selling of goods, but also the delivery of those goods.

Like Amazon, Domino's is directly involved in the procurement and delivery of interstate goods; the D&S drivers, like the Amazon package delivery drivers, transport those goods for the last leg to their final destinations. Like Amazon, Domino's is involved in the process from beginning to the ultimate delivery of the goods to their destinations and its business includes not just the selling of goods, but also the delivery of those goods.

To be sure, there are some factual differences between this case and *Rittmann*. The customers to whom the Amazon drivers delivered the interstate goods in *Rittmann* initiated the purchases online with Amazon, while the Domino's franchisees order the goods from the Supply Center in California only after Domino's has already purchased them. But this is a distinction without a difference. The issue is not how the purchasing order is placed, but rather whether the D&S drivers operate in a single, unbroken stream of interstate commerce that renders interstate commerce a "central part" of their job description. As with the Amazon drivers, the transportation of interstate goods on the final leg of their journey by the D&S drivers satisfies this requirement.

> Although some of the goods delivered to the Supply Center are from California suppliers, that does not change the outcome.
>
> Nor does the alleged "alteration" of the goods at the Supply Center change the result. Although some of the goods are transformed into pizza dough at the Supply Center, items such as mushrooms are simply reapportioned, weighed, packaged, and stored before being delivered to franchisees by the D&S drivers. Here, the relevant goods are not transformed into a different form and were procured out-of-state by Domino's to be sold to a Domino's franchisee, not to an unrelated third party.
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> (cleaned up).

***Non-individual PAGA Claims Should Be Stayed While Individual Claims Proceed To Arbitration Due To Language In Arbitration Agreement***

In *Diaz v. Macys West Stores, Inc.*, 2024 WL 2098206 (9th Cir. 2024), Yuriria Diaz sued her former employer, Macy's West Stores, Inc. under California's Private Attorneys General Act ("PAGA") for violations of California's labor code. Macy's moved to arbitration of Diaz's individual claims and for dismissal on Diaz's non-individual claims. The district court compelled all of the claims to arbitration. Macy's appealed arguing that the Ninth Circuit should vacate that order in part, ordering arbitration of only the individual PAGA claims—those that relate to Diaz's own employment—while ordering the non-individual claims—claims involving code violations against other Macy's employees—dismissed.

The Ninth Circuit held that under the parties' arbitration agreement, only Diaz's individual PAGA claims should be arbitrated. However, the Ninth Circuit also held that the California Supreme Court's decision in *Adolph v. Uber Technologies, Inc.*, 14 Cal.5th 1104 (2023), foreclosed Macy's request that the non-individual claims be dismissed. Therefore, the Ninth Circuit affirmed the district court's order in part and vacated in part - Diaz's individual PAGA claims were properly ordered to arbitration, but it vacated that portion of the order compelling arbitration of the non-individual claims.

The Ninth Circuit also held that, per the parties' arbitration agreement, the non-individual PAGA claims had to be stayed pending the outcome of the arbitration.
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***Court Of Appeals Affirms Denial Of Petition To Compel Arbitration***

In *Mondragon v. Sunrun Inc.*, 2024 WL 1731764 (Cal.App. 2 Dist., 2024), the Court of Appeal affirmed the denial of petition to arbitrate individual and representative PAGA claims because the agreement to arbitrate "unambiguously" excluded PAGA claims and did not differentiate between individual PAGA claims and PAGA claims brought on behalf of other employees. The Court of Appeal also held that that the mere reference to AAA arbitration rules does not clearly and unmistakably delegate arbitrability decisions to the arbitrator.

***Arbitration Denied Where Employer Failed To Authenticate Employee's Electronic Signature On Arbitration Agreement***

In *Bannister v. Marinidence Opco, LLC*, 64 Cal.App.5th 541 (2021), the Court of Appeal affirmed the trial court's decision to deny arbitration due to the employer's failure to satisfy it burden of proving that the employee signed arbitration agreement. The Court of Appeal cited both conflicting evidence as to whether the agreement was electronically executed by the employee and the fact that there was no employee-specific usernames or passwords required for the execution of the agreement.

***Arbitration Denied Where Employer Failed To Authenticate Employee's Signature On Arbitration Agreement***

In *Gamboa v. Northeast Community Clinic*, 72 Cal.App.5th 158 (2021), the Court of Appeal affirmed the trial court's decision to deny arbitration due to the employer's failure to satisfy it burden of proving that the employee signed the employer's arbitration agreement. The employer provided the trial court with an arbitration agreement that appeared to be signed by a representative of the employer and an employee along a declaration from a human resources official indicating that the plaintiff had signed the arbitration agreement (but lacking any foundational facts such as that the official witnessed the plaintiff signing the agreement). The plaintiff, however, filed a declaration in support of her opposition stating that: (1) she reviewed the arbitration agreement attached to official's declaration but does "not remember these documents at all"; (2) before this case, no one had ever told her about an arbitration agreement or explained what it was; and (3) if she had known about the arbitration agreement and had been told about its provisions, she would not have signed it. In affirming, the Court of Appeal stated: "By not providing any specific details about the circumstances surrounding the contract's execution, defendant's declarant offered little more than a bare statement that plaintiff entered into the contract without offering any facts to support that assertion. This left a critical gap in the evidence supporting defendant's petition." (cleaned up).

***Employer Does Not Have To Authenticate Handwritten Signature Of Employee Unless Employee Affirmative Denies The Signature Is Her's***

*Ramirez v. Golden Queen Mining Company, LLC*, 102 Cal.App.5th 821 (Cal.App. 5 Dist., 2024) held that an individual is capable of recognizing his or her handwritten signature and if that individual does not deny a handwritten signature is his or her own, that person's failure to remember signing the document does not create a factual dispute about the signature's authenticity.

***Two Court Of Appeal Cases Confirmed That Recent Amendments To The California Arbitration Act Meant To Ensure Timely Payment Of Arbitration Fees Are Not Preempted By Federal Law***

*Gallo v. Wood Ranch USA, Inc.,* 81 Cal. App. 5th 621 (2022), held that the FAA does not preempt these provisions setting forth procedures for sharing payment of arbitration-related fees and costs and providing remedies for non-compliance because they further the objectives of the FAA.

*Espinoza v. Superior Court*, 83 Cal. App. 5th 761 (2022), also confirmed that this statutory provision is not preempted by the FAA, and that the deadline for employers to pay arbitration fees must be applied strictly, with no exceptions for inadvertence, substantial compliance, or lack of prejudice.

***Court Of Appeal Affirms Trial Court's Unconscionable Findings And Refusal To Reverse Or Sever Any Portion Of The Arbitration Agreement***

In *De Leon v. Pinnacle Property Management Services, LLC*, 72 Cal.App.5th 476 (2021), the Court of Appeal held that the trial court did not abuse its discretion in either finding that an arbitration agreement contained unconscionable provisions or declining to sever those provisions. The trial court found that the agreement was procedurally unconscionable because the plaintiff was required to sign the arbitration agreement as a precondition to his employment. The trial court found that the agreement was substantively unconscionable because the agreement:

1. Imposed limits on discovery – it only allowed one set of 20 interrogatories which could include a request for all documents upon which the responding party relies in support of its answers to the interrogatories and three depositions by each side. The arbitrator could permit additional discovery upon the request of any party and a showing of *substantial* need but only if the arbitrator found that such additional discovery was not overly burdensome, and would not unduly delay conclusion of the arbitration. In

resolving discovery disputes, the arbitrator would be guided by the Federal Rules of Civil Procedure.

2. Shortened the statute of limitations to one year on all claims

In addressing the limits on discovery, the Court of Appeal noted:

> While superficially neutral, the discovery restrictions favor defendants. Employment disputes are factually complex, and their outcomes are often determined by the testimony of multiple percipient witnesses, as well as written information about the disputed employment practice. Seemingly neutral limitations on discovery in employment disputes may be nonmutual in effect. This is because the employer already has in its possession many of the documents relevant to an employment case as well as having in its employ many of the relevant witnesses.

(cleaned up).

The Court of Appeal agreed with the trial court's decision to not sever the offending provisions because it "contained more than one unlawful provision; it has both an unconscionable statute of limitations provision and an unconscionable discovery provision. Such multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." (cleaned up).

***Court Of Appeal Holds Code of Judicial Ethics Requires Arbitrators, Temporary Judges, and Other Neutrals To Disclose as Quickly as Possible Upon Engagement Other Cases in Which a Lawyer for a Party in the New Matter is Also Counsel of Record***

In *Jolie v. Superior Court of Los Angeles County*, 66 Cal.App.5th 1025 (2021), addressed whether or not a statement of disqualification filed by Angelina Jolie challenging Judge John W. Ouderkirk (Ret.), a privately compensated temporary judge selected by Jolie and Brad Pitt to hear their family law case, was timely. Jolie had based her statement of disqualification on Judge Ouderkirk's failure to disclose, as required by the California Code of Judicial Ethics, several matters involving Pitt's counsel in which Judge Ouderkirk had been retained to serve as a temporary judge.

Orange County Superior Court Judge Erick Larsh, sitting by assignment to decide the issue, ruled Jolie's statement of disqualification was untimely and the new information

disclosed by Judge Ouderkirk would not cause a person aware of the facts to reasonably entertain a doubt that he was unable to be impartial.

In her petition for writ of mandate and supporting papers, Jolie argued that her statement of disqualification was timely; Judge Ouderkirk's failure to make mandatory disclosures violated his ethical obligations; and, under the circumstances, Judge Ouderkirk's ethical breach, when considered with the information disclosed concerning his recent professional relationships with Pitt's counsel, might cause an objective person, aware of all of the facts, reasonably to entertain a doubt as to Judge Ouderkirk's ability to be impartial.

The Court of Appeal agreed with Jolie and directed the Superior Court to vacate its order denying the statement of disqualification and to enter a new order disqualifying Judge Ouderkirk from serving as a temporary judge in the underlying matter. The Court of Appeal explained:

> Pursuant to canon 6D(3)(a)(vii)(C),7 a temporary judge must from the time of notice and acceptance of appointment until termination of the appointment, disqualify himself or herself if, for any reason, a person aware of the facts might reasonably entertain a doubt that the temporary judge would be able to be impartial. This disqualification mandate is reinforced by canon 6(D)(5)(a), which requires a temporary judge, from the time of notice and acceptance of appointment until termination of the appointment, to disclose in writing or on the record "information that is reasonably relevant to the question of disqualification under Canon 6(D)(3), including personal or professional relationships known to the temporary judge that he or she or his or her law firm has had with a party, lawyer, or law firm in the current proceeding, even though the temporary judge concludes that there is no actual basis for disqualification.
>
> Rule 2.831(d), applicable specifically to temporary judges requested by the parties pursuant to Article VI, section 21 of the California Constitution, requires that matters subject to disclosure to the parties under the Code of Judicial Ethics must be disclosed no later than five days after designation as a temporary judge or, as to matters not known at the time of designation, as soon as practicable thereafter."

(cleaned up).

***Ninth Circuit Rejects Attempt To Invalidate Employment Arbitration Agreement***

In *Martinez-Gonzalez v. Elkhorn Packing Co. LLC*, 17 F.4th 875 (9th Cir. 2021), Dario Martinez-Gonzalez, a farm laborer who worked for Elkhorn Packing Company, brought a class action claim for wage and hour violations. Elkhorn moved to compel arbitration. Martinez-Gonzalez argued that the arbitration agreement was unenforceable because it was procured under "economic duress" – one of the few defenses to arbitration agreements allowed by the Federal Arbitration Act which provides that the enforceability of an arbitration agreement is determined using "generally applicable contract defenses, such as fraud, duress, or unconscionability."

The trial court (Judge Edward M. Chen) conducted an extensive bench trial on Martinez-Gonzalez's defenses of economic duress and undue influence and made the following factual findings:

- Elkhorn hired Martinez-Gonzalez while he was living in Mexico.
- Elkhorn assisted Martinez-Gonzalez in securing an agricultural visa.
- Elkhorn transported Martinez-Gonzalez from Mexico to northern California to work in a bus; the journey last 12 hours.
- Elkhorn provided housing to Martinez-Gonzalez and the other workers.
- Elkhorn provided some daily meals to Martinez-Gonzalez and the other workers.
- A few days ***after*** starting work and after working in the field for more than nine hours, Elkhorn required Martinez-Gonzalez, along with 150 other workers, to meet with Elkhorn representatives in a parking lot.
- Elkhorn representatives directed employees to stand in line for up to 40 minutes – with no seating - in order to sign employment paperwork.
- The paperwork was in Spanish.
- The paperwork consisted of a stack of documents including IRS forms, a food safety form, a workers compensation agreement, other documents, and an arbitration agreement.
- This was the very first time that Elkhorn mentioned anything about an arbitration clause.
- Elkhorn representatives did not explain the contents of the arbitration agreement to Martinez-Gonzalez, did not give him a copy of the agreement, and did not tell him to consult an attorney before signing.
- Elkhorn supervisors flipped through the pages of the documents and directed Martinez-Gonzalez where to sign.
- Elkhorn supervisors urged Martinez-Gonzalez and the other migrant workers to hurry so that those still waiting could also sign the documents.

- Although no one from Elkhorn told Martinez-Gonzalez that he had to sign the arbitration agreement, multiple supervisors told him that if he did not follow the rules, he would be sent back to Mexico.
- In the United States, Martinez-Gonzalez was able to earn five times as much as he would earn in Mexico.
- Martinez-Gonzalez supported his wife, his mother, his step-father, and his mother-in-law

Following the bench trial, the district court found in favor of Martinez-Gonzalez's economic duress and undue influence defenses and denied the motion to compel arbitration.

On appeal to the Ninth Circuit, the case was assigned to a Donald Trump appointee (Ninth Circuit Judge Patrick Joseph Bumatay), a George H. W. Bush appointee (Sixth Circuit Judge Eugene Edward Siler Jr.), and a Bill Clinton appointee (Ninth Circuit Judge Johnnie B. Rawlinson). Not surprisingly, the two Republican nominated judges reversed finding no economic duress and undue influence. The two Republican nominated judges blamed Martinez-Gonzalez for failing to ask the company not only whether the arbitration agreement was mandatory but also whether he could take some time to find and consult with an attorney.

In dissent, Judge Rawlinson accused the majority of "gaslighting" and slammed it for diminishing Martinez-Gonzalez's compelling situation as simply the need for "a job and money," and turning a blind eye to the factual findings regarding Martinez-Gonzalez's dire circumstances, as well as the realities of migrant workers.

***Arbitration Agreement Unenforceable Because It Shortened The Applicable Statute Of Limitations Of All Claims Against Employer To One Year And Limited Discovery***

In *De Leon v. Pinnacle Property Management Services, LLC*, 72 Cal.App.5th 476 (2021), the Court of Appeal determined that the trial court's denial of a motion to compel arbitration was warranted where the arbitration agreement was procedurally and substantively unconscionable because:

- The arbitration agreement was procedurally unconscionable because it was a contract of adhesion – *e.g.,* it was presented on a take-it-or-leave-it basis" – and because the plaintiff employee did not understand all of its terms and felt pressured to sign it.

- The arbitration agreement was substantively unconscionable because it included a provision that shortened the applicable statute of limitations of all claims to one year.
- The arbitration agreement was substantively unconscionable because it limited each party to 20 interrogatories and three depositions per side. While the interrogatories could also include "a request for all documents upon which the responding party relies in support of its answers to the interrogatories," it otherwise contained no express provision entitling the parties to propound requests for admission or demands for requests for production of all relevant documents. The arbitrator could order more discovery upon a showing of substantial need but only if the Arbitrator found that such additional discovery is not overly burdensome, and will not unduly delay conclusion of the arbitration. The Court of Appeal found that while the limits on discovery were superficially neutral, the discovery restrictions actually favored the defendant employer because "employment disputes are factually complex, and their outcomes are often determined by the testimony of multiple percipient witnesses, as well as written information about the disputed employment practice. Seemingly neutral limitations on discovery in employment disputes may be nonmutual in effect. This is because the employer already has in its possession many of the documents relevant to an employment case as well as having in its employ many of the relevant witnesses." (cleaned up).
- The Court of Appeal refused to sever the substantively unconscionable terms because in cases such as the present one when an arbitration agreement is rife with unconscionability, the overriding policy requires that the arbitration be rejected

***Fee-Shifting Provision In An Arbitration Agreement Applies To A Motion To Compel Arbitration In A Pending Lawsuit But Employer In A FEHA Action Not Entitled To Fees Unless The Plaintiff's Opposition Was Groundless***

In *Patterson v. Superior Court*, 285 Cal.Rptr.3d 420 (2021), the Court of Appeal held that to recover its attorneys' fees for a successful motion to compel arbitration in a pending FEHA lawsuit, an employer must show that:

1. The agreement either contains a fee-shifting provision providing for an award of attorney fees to the party prevailing on a motion or petition to compel arbitration if the other party is breaching the agreement by refusing to submit to arbitration or the court implies the FEHA asymmetrical rule of attorneys' fees into such an attorneys' fees provision; and

2. The employee's insistence on a judicial forum to determine his or her claims was frivolous, unreasonable, or objectively groundless.

*But see Ramirez v. Charter Communications, Inc.*, 75 Cal.App.5th 365 (2022)(rev. granted - S273802 )(disagreeing with *Patterson* and holding that a provision in an arbitration agreement that awards attorneys' fees to the prevailing party on a motion to compel arbitration is substantively unconscionable and that the courts will not save such a provision by implying into it the FEHA asymmetrical rule of attorneys' fees).

***Arbitration Agreement Unenforceable Because It Was Permeated With Unconscionable Provisions That Would Not Be Severed***

In *Ramirez v. Charter Communications, Inc.*, 75 Cal.App.5th 365 (2022)(rev. granted - S273802)[5], the Court of Appeal affirmed the Superior Court's decision finding an arbitration agreement to be unconscionable and refusing to sever any provisions the court considered unconscionable.

The Court of Appeal concluded that the arbitration agreement was procedurally unconscionable because it was a contract of adhesion – *i.e.,* a standardized arbitration agreement offered by the party with superior bargaining power (the employer) on a "take-it-or-leave-it basis."

The Court of Appeal concluded that the arbitration agreement was substantively unconscionable because it: (1) shortened the statute of limitations; (2) it provided for the prevailing party on a motion to compel arbitration to recover attorneys' fees; (3) it provided for unreasonably limited discovery; and (4) it lacked mutuality by excluding claims likely to be brought by an employer – "We agree with Ramirez and conclude that the arbitration agreement is unfairly one-sided because it compels arbitration of the claims more likely to be brought by an employee, the weaker party, but exempts from arbitration the types of claims that are more likely to be brought by an employer, the stronger party."

[5] Pending review, the opinion of the Court of Appeal, may be cited, not only for its persuasive value, but also for the limited purpose of establishing the existence of a conflict in authority that would in turn allow trial courts to exercise discretion under *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 456(1962) to choose between sides of any such conflict. *Ramirez v. Charter Communications*, 2022 WL 2037698, at *1 (Cal., 2022).

Additionally, citing Civ. Code, § 1670.5, subd. (a), the decision contains helpful language stating that arbitration agreements are to be examined for unconscionability at the time that they are made.

Finally, the Court of Appeal declined to sever the offending provisions because the agreement contained more than one unconscionable provision.

***Arbitration Agreement Unenforceable Because It Was Permeated With Unconscionable Provisions***

In *Nunez v. Cycad Management LLC*, 2022 WL 818994 (2022), the Court of Appeal was confronted with an appeal over the Superior Court's denial of a motion to compel arbitration. Cycad Management LLC employed Jose Merced Nunez as a gardener. It required him to sign an arbitration agreement, which mandates arbitration of "all disputes between Employee and Company relating, in any manner whatsoever, to the employment or termination" of the employee. It limited discovery to "three depositions and an aggregate of thirty (30) discovery requests of any kind, including sub-parts." Nunez is a native Spanish speaker with limited spoken English skills and an even more limited ability to read and write in English. Cycad presented him with a bunch of documents to sign, rushed, while he was working, where he was told that the documents simply referred to a change of company. Nunez had no opportunity to review the documents or idea they included a waiver of his right to sue his employer. The documents were forced on him by manager Dilip Rodrigo, whose assistant told Nunez in Spanish "that I should sign the documents, or my employment would be terminated." Nunez did not receive a copy of the documents. No one gave him the American Arbitration Association (AAA) rules, which govern the Agreement. He believed he had no choice but to sign these documents in order to have and keep his job.

After Cycad fired him, Nunez sued alleging a number of claims including battery, assault, violation of the Ralph Civil Rights Act of 1976 (Civ. Code, § 51.7), violation of the Tom Bane Civil Rights Act (Civ. Code, § 52.1), violations of Labor Code sections 201–203, 1198.5, and 6310, infliction of emotional distress, and wrongful termination in violation of public policy. Cycad filed a motion to stay the litigation and compel arbitration, asserting that the arbitration agreement is enforceable, covers the dispute and is not unconscionable.

The Superior Court determined that the arbitration agreement was procedurally unconscionable because it was presented to Nunez in a manner that rendered it a contract of adhesion, oppression and surprise, especially due to unequal bargaining power of the parties. Cycad drafted it and no evidence suggests that employees could

either reject or negotiate the terms of the provision, which was a condition of Nunez' employment. Further, despite knowing Nunez was not proficient in English, Cycad did not explain the arbitration provision in Spanish or provide a Spanish-language copy of it, which constitutes oppression and surprise. Cycad failed to draw Plaintiff's attention to the arbitration provision or explain its import and there was inadequate evidence that Nunez was instructed to ask questions or seek assistance.

The Superior Court found substantive unconscionability because the Agreement unfairly assigned arbitration fees and costs to Nunez and imposed limitations on discovery. It does not limit the amount of arbitration fees or provide for waiver of fees if they are unaffordable. Further, the Superior Court found that discovery limitations work to the advantage of employers, who possess most of the evidence, and curtail employees' ability to substantiate claims.

The Superior Court concluded, "In light of the pervasiveness of the unconscionable provisions related to arbitration and the fact that the purported scope of the arbitration provisions exceeded the plaintiff's reasonable expectations, there are no isolated provisions that can be severed and the arbitration provisions as a whole are unenforceable." The court denied the motion to compel arbitration.
On Appeal, the Court of Appeal affirmed:

**a. Procedural Unconscionability**

Cycad has superior bargaining power over gardeners who work for it. It drafted the Agreement and presented it to Nunez as a condition of employment, on a take it or leave it basis. Cycad concedes the Agreement is a contract of adhesion but claims there is no other indication of oppression or surprise and Nunez had ample time to review the contract, ask questions, and have his family or Cycad translate it to Spanish.
By contrast, Nunez declares that he had no opportunity to review the Agreement, which was forced on him in a rush while he was working. He was told the English-language Agreement involved a change of company, not that it waived his right to a jury trial, and was instructed to sign it or be fired. The trial court resolved the facts against Cycad. When the court weighs conflicting declarations, we defer to its factual determinations; we have no authority to make new credibility findings. The court found the Agreement was presented to Nunez in a manner that renders it a contract of adhesion, oppression and surprise. Circumstances showing oppression include (1) the amount of time an employee is given to consider a contract; (2) the pressure exerted on him to sign it; (3) its length and complexity; (4) his education and experience; and (5) whether he had

legal assistance. Significant oppression is shown when, as here, an arbitration agreement is presented to an employee while he is working, along with other documents, neither its contents nor its significance are explained, and the employee is told he must sign the agreement to keep his job.

**b. Substantive Unconscionability**

Substantive unconscionability examines the fairness of a contract's terms to ensure that a contract of adhesion does not impose terms that are overly harsh, unduly oppressive, or unfairly one-sided. The court focuses on terms that unreasonably favor the more powerful party, impair the integrity of the bargaining process, contravene public interest or policy, or attempt to impermissibly alter fundamental legal duties. This includes unreasonable or harsh terms or ones that undermine the nondrafting party's reasonable expectations. Where there is substantial procedural unconscionability, even a relatively low degree of substantive unconscionability may suffice to render the agreement unenforceable. This is particularly true if an employer used "deceptive or coercive" tactics.

Substantive aspects of the Agreement militate against enforcement, when combined with unfair and deceptive tactics of giving Nunez an English contract and misrepresenting its contents. The Agreement enables the arbitrator to impose on Nunez all attorney fees plus filing, administrative, and arbitrator's fees. When employment is conditioned on mandatory arbitration, the employee cannot be forced to pay costs that would not be incurred if the case were litigated in court. Absent the Agreement, Nunez could litigate without the prospect of paying Cycad's attorney fees. Nunez alleges violations of civil rights laws. They confer unwaivable statutory rights and prohibit an arbitrator's imposition of attorney fees and costs because it would deter the filing of hate crimes claims. By empowering the arbitrator to impose arbitration and attorney fees on the losing party, the Agreement violates Armendariz.

The Agreement limits discovery to "three depositions and an aggregate of thirty (30) discovery requests of any kind, including sub-parts." This places an employee at a disadvantage in proving her claim while the employer is likely to possess many of the relevant documents and employ many of the relevant witnesses, unfairly preventing Nunez from vindicating statutory claims.

**3. Severability**

A court may sever unconscionable provisions and enforce the remainder of the agreement, or it may refuse to enforce the contract. Cycad presented Nunez with an arbitration agreement in a language he cannot read, misrepresented the nature of the document, denied him an opportunity to review it, included unfair and onerous provisions limiting discovery, and chilled his ability to claim civil rights violations by dangling the financial risk of paying Cycad's attorney fees if he loses. Though public policy generally favors arbitration, when the agreement is rife with unconscionability, as here, the overriding policy requires that the arbitration be rejected. Eliminating unfair clauses in the Agreement cannot save it: Nunez never knew what he signed in the first place, having done so under compulsion, threatened with termination if he failed to sign a document in a foreign language on the spot. The Agreement is not a voluntary means of resolving disputes between the parties. Accordingly, we decline Cycad's invitation to remand the case for reconsideration due to "changed circumstances."

*Nunez v. Cycad Management LLC*, 2022 WL 818994, at *3–5 (2022)(cleaned up).

**Arbitration Agreement Unconscionable – Court, Not Arbitrator Should Decide Issue Of Unconscionability**

In *Beco v. Fast Auto Loans, Inc.,* 2022 WL 17665377 (2022), Bernell Gregory Beco filed a complaint in Orange County Superior Court alleging 14 causes of action relating to the termination of his employment with defendant Fast Auto Loans, Inc., including numerous claims under the Fair Employment and Housing Act, numerous wage and hour violations under the Labor Code, wrongful termination, unfair competition, and additional tort claims. Fast Auto moved to compel arbitration, arguing that Beco had signed a valid arbitration agreement at the time he was hired.

The trial court found the agreement unconscionable to the extent that severance would not cure the defects, and declined to enforce it. The Court of Appeal agreed with the trial court that the agreement was unconscionable, and further rejected Fast Auto's argument that the arbitrator, not the court, should have decided the issue of unconscionability as the Court of Appeal found that the delegation clause was ambiguous and not a "clear and unmistakable" one . Additionally, because the agreement included numerous substantively unconscionable provisions, the Court of Appeal found no abuse of discretion in the trial court's decision not to sever them.

***Two Cases Confirm That Governmental Entities Are Not Bound By The Arbitration Agreements Signed By Workers***

In *Dep't of Fair Employment and Hous. v. Cisco Sys., Inc.*, 82 Cal. App. 5th 93 (2022), the Court of Appeal held that the Department of Fair Employment and Housing (DFEH) (now called the Civil Rights Department or CRD) was not required to arbitrate claims of discrimination and retaliation that it brought against Cisco based on an arbitration agreement the affected employee signed. The court rejected the employer's argument that the DFEH was the employee's proxy in the action and was not acting independently, holding that the DFEH was not a signatory to the agreement between the employer and employee, did not have an agency relationship with the employee, was not his alter ego, and did not assume his obligations.

Similarly, *People v. Maplebear, Inc.*, 81 Cal. App. 5th 923 (2022), involved an enforcement action brought by the San Diego City Attorney against Instacart (the DBA name of Maplebear, Inc.) under the Unfair Competition Law, Bus. & Prof. Code § 17200,based on Instacart's alleged misclassification of its shoppers as independent contractors. Instacart sought to compel into arbitration the City Attorney's requests for injunctive relief and restitution, arguing that, while the City was not a signatory to the shoppers' arbitration agreements, it was still bound by them because the shoppers were the real parties in interest. The trial court denied the motion and Instacart appealed. The Court of Appeal affirmed, holding that the City was acting in its own law enforcement capacity, seeking to vindicate pubic harms and to protect the public, and that no individual shopper had any control over the litigation.

***California Supreme Court To Decide Whether Employees Are Free To Litigate In Court When Employers Fail To Timely Pay Their Arbitration Fees***

In *Hohenshelt v. Superior Court*, 99 Cal.App.5th 1319 (Cal.App. 2 Dist., 2024), the Court of Appeal, as discussed in detail below, held that FAA does not preempt California Code of Civil Procedure Section 1281.97 (*e.g.,* employers are required to pay their arbitration fees with 30 days). On June 12, 2024, in *Hohenshelt v. S.C.*, 549 P.3d 143, 321 Cal.Rptr.3d 633 (Cal., 2024), the California Supreme Court granted a petition for review.

***Annoyed Courts of Appeal Repeatedly Allow Employees To Litigate In Court When Employers Fail To Timely Pay Their Arbitration Fees***

To steal a line from Yogi Berra, "it's *deja vu* all over again."

Notwithstanding the fact that the California Courts of Appeal have repeatedly held that an employer failing to pay its arbitration fees within 30 days, as required by Code of Civil Procedure Section 1281.97, waives its right to arbitration[6], employers continue to insist that arbitration must proceed even when they fail to pay within 30 days. Here are a few of those cases:

In *Cvejic v. Skyview Capital, LLC*, 92 Cal. App. 5th 1073 (2023), a clearly annoyed Court of Appeal (Second Appellate District, Division 8) held that a former employer materially breached its arbitration agreement by failing to pay the required fees within 30 days as required by Code of Civil Procedure Section 1281.98, and thus, a former employee was entitled to withdraw his claim against former employer from arbitration and proceed in court:

> A statute gave Milan Cvejic the option to get out of arbitration if Skyview was tardy in paying its arbitration fees. Skyview was tardy in paying its arbitration fee. Cvejic was entitled to get out.
> The Legislature enacted section 1281.98 in 2019 to curb a particular arbitration abuse. The abuse was that a defendant could force a case into arbitration but, once there, could refuse to pay the arbitration fees, thus effectively stalling the matter and stymying the plaintiff's effort to obtain relief. The Legislature called this "procedural limbo." Our colleagues termed it a "procedural purgatory."
>
> Skyview's fees were due June 4, 2021. By July 9th, Skyview had not paid. Skyview was in material breach of the parties' arbitration agreement. Section 1281.98 entitled Cvejic to withdraw from the arbitration. It is that simple.
>
> **The statute does not empower an arbitrator to cure a party's missed payment. There is no escape hatch for companies that may have an arbitrator's favor. Nor is there a hatch for an arbitrator eager to keep hold of a matter.**

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[6] *See e.g., Keeton v. Tesla, Inc.*, 2024 WL 3175244 (Cal.App. 1 Dist., 2024); *Suarez v. Superior Court of San Diego Cnty.*, 99 Cal.App.5th 32 (Cal.App. 4 Dist., 2024); *De Leon v. Juanita's Foods*, 85 Cal.App.5th 740 (Cal.App. 2 Dist., 2022); *Espinoza v. Superior Court*, 83 Cal.App.5th 761 (Cal.App. 2 Dist., 2022); *Gallo v. Wood Ranch USA, Inc.*, 81 Cal.App.5th 621 (Cal.App. 2 Dist., 2022). *But see Hernandez v. Sohnen Enterprises, Inc.*, 102 Cal.App.5th 222 (Cal.App. 2 Dist., 2024)(when arbitration agreement covered by FAA, Section 1281.97 is preempted).

> In enacting sections 1281.97 through 1281.99, the Legislature perceived employers' and companies' failure to pay arbitration fees was foiling the efficient resolution of cases. This contravened public policy. The Legislature responded by making nonpayment and untimely payment grounds for proceeding in court and getting sanctions. **The point was to take this issue away from arbitrators, who may be financially interested in continuing the arbitration and in pleasing regular clients. The trial court was right to decide this matter of statutory law.**

*Cvejic v. Skyview Capital, LLC*, 92 Cal.App.5th 1073, 1075 (2023)(cleaned-up, emphasis added).

In *Hohenshelt v. Superior Court of Los Angeles Cnty.*, 2024 WL 805658 (Cal.App. 2 Dist., 2024). the Court of Appeal (Second Appellate District, Division 8) confronted an almost identical fact pattern as it dealt with in *Cvejic v. Skyview Capital, LLC*, 92 Cal. App. 5th 1073 (2023) – a recalcitrant employer trying to stay in arbitration even after failing to timely pay its arbitration fees as required by Code of Civil Procedure Section 1281.98. And, its decision was identical to its decision in *Cvejic*:

> We dealt with this exact same situation in *Cvejic*. We held in *Cvejic* that Skyview was "in material breach of the parties' arbitration agreement. Section 1281.98 entitled Cvejic to withdraw from arbitration. It is that simple. **The statute does not empower an arbitrator to cure a party's missed payment. There is no escape hatch for companies that may have an arbitrator's favor. Nor is there a hatch for an arbitrator eager to keep hold of a matter.**

*Hohenshelt v. Superior Court of Los Angeles Cnty.*, 2024 WL 805658 (Cal.App. 2 Dist., 2024)(cleaned-up, emphasis added).

The Court of Appeal then rejected the employer's argument that Code of Civil Procedure Section 1281.97 *et. seq.* is preempted by the Federal Arbitration Act. See also *Espinoza v. Superior Court*, 83 Cal.App.5th 761, 783–784(2022)(FAA does not preempt Code of Civil Procedure Section 1281.97 *et. seq.*); *De Leon v. Juanita's Foods*, 85 Cal.App.5th 740, 753–754 (2022)(same).

In *Suarez v. Superior Court*, 99 Cal. App. 5th 32 (2024), the Court of Appeal rejected an employer's attempt to argue that a statute providing for two-court-day extension of time following service by electronic means applied to the due date by which an employer had to pay its arbitration fee.

In *Doe v. Superior Court*, 95 Cal. App. 5th 346 (2023), the Court of Appeal rejected an employer's attempt to argue that its arbitration fee was timely paid when it placed a check in the mail prior to the expiration of the 30-day deadline prescribed by Code of Civil Procedure Section 1281.97 *et. seq.*

***For Purposes Of CCP § 1281.98, "Agreed Upon By All Parties" Does Not Mean A Claimant's Silence, Failure To Object, Or Other Seemingly Acquiescent Conduct (Not Amounting To Direct Expression).***

In *Reynosa v. Superior Court of Tulare Cnty.*, 2024 WL 1984884 (Cal.App. 5 Dist., 2024), the Court of Appeal allowed a plaintiff to withdraw from arbitration with his former employer where the employer twice failed to pay the fees and costs required to continue arbitration within 30 days after the due date; by materially breaching the arbitration agreement by failing to pay, the employer waived its right to compel the plaintiff to proceed with arbitration. This is true even though employer argued plaintiff agreed to new date for employer to pay – Court of Appeal held that for purposes of CCP § 1281.98, "agreed upon by all parties" does not mean a claimant's silence, failure to object, or other seemingly acquiescent conduct (not amounting to direct expression).

# IV. Attorneys' Fees

***Post-judgment Interest On Award Of Prejudgment Costs And Attorney Fees Begins To Run As Of The Date Of Judgment, Even Though Dollar Amount Had Yet To Be Ascertained***

In *Felczer v. Apple Inc.*, 63 Cal.App.5th 406 (2021), the Court of Appeal held that post-judgment interest on award of prejudgment costs and attorney fees begin to run as of the date of judgment, even though dollar amount had yet to be ascertained.

***Trial Court's Reduction Of Prevailing Plaintiff's Attorneys' Fees Application Because Plaintiff Lost On Discrimination Claims Was An Abuse Of Discretion; Plaintiff's Claims Were Sufficiently Related or Factually Intertwined***

In *Vines v. O'Reilly Auto Enterprises, LLC*, 2022 WL 189840 (2022), Renee Vines, a former employee sued her former employer under FEHA, alleging race- and age-based discrimination, harassment, and retaliation claims. She won on two out of six causes of action, recovering $140,400 on retaliation/failure to prevent retaliation claims, but losing on race discrimination (disparate treatment) and harassment claims. She then moved for $809,681.25 in attorney's fees (lodestar of $647,745 with a 1.25 multiplier).

The Superior Court refused to award a multiplier and made a 75% reduction in the amount requested based on the court's view that work on the unsuccessful claims was not helpful on the successful claims—awarding the plaintiff a fee total of $129,540.44. The plaintiff appealed. The Court of Appeal held that the reduction in attorney fees based on an alleged lack of relation of unsuccessful claims to successful claims was an abuse of discretion:

> We agree the trial court abused its discretion in determining Vines's reasonable attorney fees. The trial court stated it found the claims were not sufficiently related or factually intertwined because "any facts related to [Vines] being retaliated against arose after [he] complained about the discrimination and harassment conduct." That statement reflects a legal error. Evidence of the facts regarding the alleged underlying discriminatory and harassing conduct about which Vines had complained was relevant to establish, for the retaliation cause of action, the reasonableness of his belief that conduct was unlawful.

***Fee-Shifting Provision In An Arbitration Agreement Applies To A Motion To Compel Arbitration In A Pending Lawsuit But Employer In A FEHA Action Not Entitled To Fees Unless The Plaintiff's Opposition Was Groundless***

In *Patterson v. Superior Court*, 285 Cal.Rptr.3d 420 (2021), the Court of Appeal held that to recover its attorneys' fees for a successful motion to compel arbitration in a pending FEHA lawsuit, an employer must show that:

1. The agreement contains a fee-shifting provision providing for an award of attorney fees to the party prevailing on a motion or petition to compel arbitration if the other party is breaching the agreement by refusing to submit to arbitration; and

2. The employee's insistence on a judicial forum to determine his or her claims was frivolous, unreasonable, or objectively groundless.

***Oral Contract Between Employer And In-House Attorney Employee Was Voidable Under Statute Governing Contingency Fee Arrangements Between Attorney And Client***

In *Missakian v. Amusement Industry, Inc.*, 69 Cal.App.5th 630 (2021), the Court of Appeal held that an in-house counsel's oral agreement with his employer for a bonus and a share in recovery from litigation instituted by the employer was void under

Business and Professions Code section 6147, which requires contingency fee agreements to be in writing; a new trial was granted on his promissory fraud claim.

# V. Discrimination

***U.S. Supreme Court Substantially Raises The Bar For Employers To Demonstrate Undue Hardship In Religious Accommodation Cases***

In *Groff v. DeJoy*, 600 U.S. 447 (2023), a unanimous Supreme Court "clarified" *Trans World Airlines, Inc. v. Hardison*'s *de minimis* standard for determining whether providing a religious accommodation is an undue hardship. The new standard is:

> Title VII requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.

***California Court of Appeal Clarifies Standards for Liability For FEHA Aiding And Abetting Claims***

In *Smith v. BP Lubricants USA Inc.*, 64 Cal.App.5th 138 (2021), Robert Smith, an African American, worked for Jiffy Lube for almost two decades. During that time, Smith alleged that he was passed over for promotions, criticized, and harassed because of his race. On one occasion, Jiffy Lube arranged for a third-party vendor – BP Lubricants USA, Inc. dba Castrol – and one of the vendor's employees, Gus Pumarol, to provide a presentation to Jiffy Lube's employees about a new Castrol product. During the presentation, Pumarol made a series of comments that Smith found racially offensive including saying to or about Smith: (1) "You sound like Barry White."; (2) "I don't like taking my car to Jiffy Lube because I've had a bad experience with a mechanic putting his hands all over my car. How would you like Barry White over there with his big banana hands working on your car?"; and (3) in response to a question from Smith, "What, I can't see your eyes, what?" All of the non-African Americans in attendance laughed at each of Pumarol's comments, including three of Smith's superiors. The next day, a Jiffy Lube employee crossed out Smith's name on the company's work schedule and replaced it with "Banana Hands." Smith sued, alleging that BP and Pumarol violated FEHA's prohibition on racial harassment in the workplace by "aiding and abetting" Jiffy Lube's harassment and discrimination against him. He also sued Pumarol for intentional infliction of emotional distress, and sued both Pumarol and BP for racial discrimination under the Unruh Act (Civ. Code, § 51).

BP and Pumarol demurred to Smith's complaint. The trial court sustained the demurrers without leave to amend and entered judgment for BP and Pumarol. Smith appealed, arguing that the trial court erroneously sustained the demurrers without leave to amend. The Court of Appeal disagreed as to Smith's FEHA claim, but agreed as to his IIED and Unruh Act claims.

With regard to Smith's FEHA aiding and abetting claim, the Court of Appeal initially rejected the argument of BP and Pumarol that they could not be liable under FEHA because they were never Smith's employer. In that regard, the Court of Appeal held that individuals and entities who are not the plaintiff employee's employer may nonetheless be liable under FEHA for aiding and abetting the plaintiff's employer's violation of FEHA. The Court then explained that BP and Pumarol could be liable under FEHA for aiding and abetting Jiffy Lube's alleged harassment and discrimination against Smith if he could satisfy each of the following elements:

(1) Jiffy Lube subjected Smith to discrimination and harassment,

(2) BP and Pumarol knew that Jiffy Lube's conduct violated FEHA, and

(3) BP and Pumarol gave Jiffy Lube "substantial assistance or encouragement" to violate FEHA.

The Court held that the demurrer of BP and Pumaral was properly sustained because Smith's allegations failed to satisfy the second and third elements. That is, nowhere in his complaint did Smith allege either that BP and Pumarol knew of Jiffy Lube's alleged harassment and discrimination against Smith or that BP and Pumarol gave Jiffy Lube substantial assistance or encouragement to Jiffy Lube's alleged violations of FEHA.

However, with regard to Smith intentional infliction claims, the Court of Appeal held that, on the facts alleged by Smith, a reasonable jury could find that Pumarol acted intentionally or unreasonably with the recognition that his acts were likely to result in illness through mental distress.

***Ninth Circuit Reiterates That The ADA Does Not Require That An Impairment Be Permanent Or Have Long-Term Effects***

In *Shields v. Credit One Bank, N.A.*, 32 F.4th 1218 (9th Cir. 2022), the Ninth Circuit reiterated that because the actual-impairment prong of the definition of "disability" in § 3(1)(A) of the ADA is ***not*** subject to any categorical temporal limitation, the district court committed legal error in holding that a claim of such an actual "impairment" requires a showing of long-term effects.

***California Court of Appeal Clarifies Standards For FEHA Liability At Trial***

In *Department of Corrections and Rehabilitation v. State Personnel Board*, 2022 WL 354657 (2022), the Court of Appeal explained that, if at trial the plaintiff makes out a *prima facie* case of discrimination and the defendant employer fails to produce evidence of a legitimate, nondiscriminatory reason for the challenged conduct, the plaintiff employee automatically prevails based on the legally mandatory presumption of discrimination and is not required to proceed to the third stage of the analysis and prove causation. Here, Dr. Vickie Mabry-Height sued the Department of Corrections and Rehabilitation, alleging discrimination on the basis of age, race and gender in violation of FEHA. The State Personnel Board sustained Dr. Mabry-Height's complaint on the ground that she had established a *prima facie* case of unlawful discrimination and the Department had failed to rebut the presumption of discrimination by offering evidence that it had a legitimate, nondiscriminatory reason for its conduct. The Department petitioned the trial court for a writ of administrative mandamus seeking an order setting aside the Board's decision. The petition was denied and judgment was entered in favor of Dr. Mabry-Height, which the Court of Appeal affirmed explaining that the Department produced no evidence of a nondiscriminatory reason for its failure to interview/hire Dr. Mabry-Height: "the employer must do more than produce evidence that the hiring authorities did not know why [the plaintiff] was not interviewed." Further, the Court of Appeal added, the Department failed to show the actual reasons why plaintiff's credentialing was revoked. Therefore, the employee was not required to prove that discrimination was a substantial motivating factor for the Department's actions.

***Ninth Circuit Obliquely Suggests That A Plaintiff Must Satisfy The McDonnell Douglas Corp. v. Green Burden-Shifting Test Even If She Possesses Direct Evidence Of Discrimination***

In *Opara v. Yellen*, 57 F.4th 709 (9th Cir. 2023), the Ninth Circuit obliquely (but incorrectly) suggested that a plaintiff must satisfy the McDonnell Douglas Corp. v. Green burden-shifting test even if she possesses direct evidence of discrimination.

***Ninth Circuit Initially Holds That A Plaintiff Can Establish Discrimination In One Of Three Ways – Direct Evidence, Indirect Evidence (Circumstantial), And/or The McDonnell Douglas Corp. v. Green Burden-Shifting Test – Then, Ninth Circuit Botches Discrimination Analysis By Seemingly Suggesting That A Plaintiff With Direct Evidence Of Discrimination Must Use McDonnell Douglas Corp. v. Green Burden-Shifting Test***

*In Hittle v. City of Stockton,* 76 F.4th 877 (9th Cir. 2023), the Ninth Circuit explained that plaintiffs can establish discrimination in one of three ways – direct evidence, indirect evidence (circumstantial), and/or by satisfying the *McDonnell Douglas Corp. v. Green* burden-shifting test:

> We analyze employment discrimination claims under Title VII and the California FEHA using the *McDonnell Douglas Corp. v. Green* burden-shifting test. Under this framework, a plaintiff alleging that an employer engaged in discriminatory conduct adversely affecting plaintiff's employment must establish a prima facie case by demonstrating that: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. A plaintiff may demonstrate an inference of discrimination through comparison to similarly situated individuals, or any other circumstances surrounding the adverse employment action that give rise to an inference of discrimination. Similarly, California courts applying this test in the FEHA context have characterized the fourth element as a showing that some other circumstance suggests discriminatory motive.
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> Should the plaintiff set forth a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged actions." If the defendant does so, the burden "returns to the plaintiff, who must show that the proffered nondiscriminatory reason is pretextual. A plaintiff meets his or her burden either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.
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> Alternatively, a plaintiff can prevail merely by showing direct or circumstantial evidence of discrimination; he or she does not need to use the *McDonell Douglas* framework. Under Title VII, the plaintiff need only demonstrate that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the unlawful employment practice. Thus, Hittle must demonstrate that his religion was a motivating factor in Defendants' decision to fire him with respect to his federal claims and that his religion was a substantial motivating factor for his firing with respect to his FEHA claims.

*Hittle v. City of Stockton, California*, 76 F.4th 877, 887–88 (9th Cir. 2023)(cleaned-up).

Then, for some inexplicable reason, in denying a request for a rehearing *en banc*, the Ninth Circuit issued an amended opinion completely botching up the analysis that courts must perform when analyzing a discrimination claim on summary judgment. In this regard, the Ninth Circuit's amended opinion seems to suggest that a plaintiff with direct evidence of discrimination must satisfy the *McDonell Douglas* framework:

> We analyze employment discrimination claims under Title VII and the California FEHA using the *McDonnell Douglas Corp. v. Green* burden-shifting test. Under this framework, a plaintiff alleging that an employer engaged in discriminatory conduct adversely affecting plaintiff's employment must establish a prima facie case by demonstrating that: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. A plaintiff may demonstrate an inference of discrimination through comparison to similarly situated individuals, or any other circumstances surrounding the adverse employment action that give rise to an inference of discrimination. Similarly, California courts applying this test in the FEHA context have characterized the fourth element as a showing that some other circumstance suggests discriminatory motive.
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> Should the plaintiff set forth a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged actions. If the defendant does so, the burden returns to the plaintiff, who must show that the proffered nondiscriminatory reason is pretextual. A plaintiff meets his or her burden either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.
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> Alternatively, a plaintiff can prevail merely by showing direct or circumstantial evidence of discrimination; he or she does not need to use the *McDonell Douglas* framework to establish a prima facie case. However, whether a plaintiff establishes her prima facie claim of disparate treatment using direct or circumstantial evidence or the *McDonnell Douglas* factors, once a prima face case of discrimination has been made, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action. Moreover, regardless of the approach a plaintiff takes

> — *i.e.,* establishing the *prima facie* case via direct or circumstantial evidence or the *McDonnell Douglas* factors—once an employer articulates some legitimate, nondiscriminatory reason for the challenged action, the employee must show that the articulated reason is pretextual.

*Hittle v. City of Stockton, California*, 101 F.4th 1000, 1011–12 (9th Cir. 2024)(cleaned-up).

The foregoing discussion regarding how a plaintiff can mount a sufficient showing to overcome summary judgment is, to quote the dissent, a "mangling of Title VII law" which is simply inexcusable. The dissent aptly explains the error of the majority:

> Because Hittle introduced direct and circumstantial evidence demonstrating that the City intentionally discriminated against him because of his religion, the panel should have recognized that he had at least created a fact issue as to the City's motives and stopped there. It did not do so. Instead, it proceeded forward with an examination of the City's proffered motives. In doing so, it not only wrongly invaded the province of the jury, but it also demonstrated a misunderstanding of the Supreme Court's religion caselaw.

*Hittle v. City of Stockton, California*, 101 F.4th 1000, 1026 (9th Cir. 2024)(cleaned-up).

The majority's analysis is fundamentally flawed because it relies on two cases – *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004) and *Opara v. Yellen*, 57 F.4th 709, 723 (9th Cir. 2023) – for the purported proposition that a plaintiff must, in order to survive summary, establish a *prima facie* case (via the *McDonell Douglas* framework or circumstantial or direct evidence of discrimination) and then show that the employer's articulated reason for the adverse employment action is pretextual. *McGinest* and *Opara*, however, do not stand for that proposition. Rather, they stand for the proposition that an employment discrimination plaintiff can survive summary judgment in one of three ways – with direct evidence of discrimination, ***or*** with indirect evidence of discrimination (circumstantial), ***or*** by satisfying the *McDonnell Douglas Corp. v. Green* burden-shifting test:

> Although the *McDonnell Douglas* burden shifting framework is a useful tool to assist plaintiffs at the summary judgment stage so that they may reach trial, nothing compels the parties to invoke the *McDonnell Douglas* presumption. Rather, when responding to a summary judgment motion, the plaintiff is presented with a choice regarding how to establish his or her case. McGinest may proceed by using the *McDonnell Douglas* framework, or

> alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated GTE.
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> *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004)(cleaned-up).
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> When responding to a summary judgment motion in a discrimination suit under ADEA or Title VII, the plaintiff may proceed by either using the *McDonnell Douglas* framework, as established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated the defendant's contested conduct.
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> *Opara v. Yellen*, 57 F.4th 709, 721 (9th Cir. 2023).

Indeed, the dissent specifically calls out the majority for "mangling" Title VII summary judgment jurisprudence:

> This court usually analyzes discrimination claims using the burden-shifting standard laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). But "nothing compels the parties to invoke" *McDonnell Douglas*, which is just "a useful tool to assist plaintiffs at the summary judgment stage." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004). "[A]lternatively," a plaintiff "may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated" the discrimination. *Id.* That is what Hittle did here. "[D]iscriminatory remarks ... create a strong inference of intentional discrimination," *Mustafa v. Clark Cnty. Sch. Dist.*, 157 F.3d 1169, 1180 (9th Cir. 1998), and Title VII plaintiffs are usually "required to produce 'very little' direct evidence of the employer's discriminatory intent to move past summary judgment." *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1128 (9th Cir. 2000).
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> After a plaintiff has adduced such evidence, "the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decision. But when a plaintiff introduces direct or circumstantial evidence of discriminatory intent, he will necessarily have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reason for its employment decision.. Such a plaintiff will therefore have at least satisfied his summary judgment

> burden. As explained below, this record includes ample direct and circumstantial evidence of Montes's and Deis's discriminatory intent, which the panel should have recognized as more than sufficient to meet Hittle's burden at the summary judgment stage. It did not do so because, though it recognized its obligation to view the evidence in the light most favorable to the non-moving party, it abandoned that duty wholesale. Its recounting of the facts focused at length on disputed facts favoring the City, repeatedly credited the City's version of events over Hittle's, and ignored other undisputed facts favoring Hittle.
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> *Hittle v. City of Stockton, California*, 101 F.4th 1000, 1022 (9th Cir. 2024)(Lawrence J. C. VanDyke dissenting).

The Supreme Court and every Circuit Court of Appeal to consider this issue has likewise held that an employment discrimination plaintiff does ***not*** have to satisfy the *McDonnell Douglas Corp. v. Green* burden-shifting test in order to survive summary judgment:

> ***Supreme Court***
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> TWA contends that the respondents failed to make out a prima facie case of age discrimination under *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), because at the time they were retired, no flight engineer vacancies existed. This argument fails, for the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination. The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the plaintiff has his day in court despite the unavailability of direct evidence.
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> *Trans World Airlines, Inc. v. Thurston*, 105 S.Ct. 613, 621–22, 469 U.S. 111, 121 (1985)(cleaned-up).
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> ***First Circuit Court of Appeals***
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> Henderson's claim relies on indirect evidence, and so we apply the *McDonnell Douglas* burden-shifting test. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817 (1973).
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> *Henderson v. Massachusetts Bay Transportation Authority*, 977 F.3d 20, 29 (1st Cir. 2020)(cleaned-up).

***Second Circuit Court of Appeals***

To succeed on a Title VII disparate treatment claim, a plaintiff must prove discrimination either by direct evidence of intent to discriminate or, more commonly, by indirectly showing circumstances giving rise to an inference of discrimination. As is well documented in this Court's case law, where an employer has acted with discriminatory intent, direct evidence of that intent will only rarely be available. Circumstantial evidence is often the sole avenue available to most plaintiffs to prove discrimination. When only circumstantial evidence of discriminatory intent is available, courts use the McDonnell Douglas burden-shifting framework to assess whether the plaintiff has shown sufficient evidence of discrimination to survive summary judgment.

*Bart v. Golub Corporation*, 96 F.4th 566, 569 (2nd Cir. 2024)(cleaned-up).

***Third Circuit Court of Appeals***

Age discrimination claims in which the plaintiff relies on circumstantial evidence proceed according to the three-part burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973).

*Willis v. UPMC Children's Hosp. of Pittsburgh*, 808 F.3d 638, 644 (3rd Cir. 2015)(cleaned-up).

***Fourth Circuit Court of Appeals***

The district court granted summary judgment for Fairview on the discrimination claims and retaliation claims under both § 1981 and Title VII by applying the *McDonnell Douglas* burden-shifting framework. This framework was initially developed for Title VII discrimination cases, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), but has since been held to apply in discrimination cases arising under § 1981, , and in retaliation cases under both statutes. The framework applies in employment discrimination and retaliation cases where a plaintiff does not present sufficient direct or circumstantial evidence showing that an adverse employment action was motivated by intentional discrimination aimed at the plaintiff's protected characteristic(s). This is such a case.

*Guessous v. Fairview Property Investments, LLC*, 828 F.3d 208, 216 (4th Cir. 2016)(cleaned-up).

Absent direct evidence of discrimination, this Circuit has applied the *McDonnell Douglas* analytical framework to the analysis of racial discrimination claims under § 1981.

*BNT Ad Agency, LLC v. City of Greensboro*, 837 Fed.Appx. 962, 970 (4th Cir. 2020)(cleaned-up). See also

***Fifth Circuit Court of Appeals***

Because Taylor cannot point to any direct evidence of retaliation, he must satisfy the *McDonnell Douglas* burden-shifting test.

*Taylor v. University of Mississippi Medical Center*, 2024 WL 512559, at *3 (5th Cir. 2024)(cleaned-up).

***Sixth Circuit Court of Appeals***

An employee may establish a claim of discrimination either by introducing direct evidence of discrimination or by presenting circumstantial evidence that would support an inference of discrimination. Where, as here, the claim is based on circumstantial evidence, courts employ the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See also Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981) (clarifying the McDonnell Douglas burden-shifting framework).

*Taylor v. Ingham County Circuit Court*, 2024 WL 3217590, at *3 (6th Cir. 2024)(cleaned-up).

***Seventh Circuit Court of Appeals***

Following our decision in *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760 (7th Cir. 2016), courts must evaluate all evidence together as a whole, whatever the source. A plaintiff may prove but-for causation either by introducing direct or circumstantial evidence that her employer took an adverse action against her because of her age or by invoking the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973).

*Marnocha v. St. Vincent Hospital and Health Care Center, Inc.*, 986 F.3d 711, 718 (7th Cir. 2021).

***Eighth Circuit Court of Appeals***

The touchstone of a claim of disparate treatment under the ADEA, as it is under a number of the other employment-discrimination statutes, is intentional discrimination against the plaintiff. There is, however, more than one method by which an employment-discrimination plaintiff can attempt to demonstrate intentional discrimination to the finder of fact. First and foremost, such a plaintiff may allege that there is direct evidence that the employer discriminated against the employee on the basis of a prohibited characteristic. In such a case, the plaintiff need not resort to alternative methods of proof but may instead choose to rely solely on the purported direct evidence to support the claim of intentional discrimination. In recognition of the fact that explicit, inculpatory evidence of discriminatory intent is rare, the Supreme Court has established an alternative method of proof by which an inference of intentional discrimination can be raised. This inferential method of proof, which involves an elaborate set of shifting burdens of production, was originally set forth in *McDonnell Douglas* and then refined in *Burdine*.

*Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 775–76 (8th Cir. 1995)(cleaned-up).

***Tenth Circuit Court of Appeals***

A plaintiff alleging discrimination on the basis of race may prove intentional discrimination through either direct evidence of discrimination (*e.g.,* oral or written statements on the part of a defendant showing a discriminatory motivation) or indirect (*i.e.,* circumstantial) evidence of discrimination. Kendrick offers no direct evidence of discrimination. We must therefore determine if there is sufficient indirect evidence of discrimination for Kendrick to survive summary judgment. The Supreme Court set forth the framework for assessing circumstantial evidence of discrimination in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973).

*Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d 1220, 1225 (10th Cir. 2000)(cleaned-up).
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***Eleventh Circuit Court of Appeals***

> Title VII of the Civil Rights Act of 1964 outlaws employment discrimination because of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). Likewise, 42 U.S.C. § 1981 prohibits employers from intentionally discriminating on the basis of race in employment contracts. To prove a claim under either statute, a plaintiff can use direct evidence, circumstantial evidence, or both. Early on, though, it became clear that when only circumstantial evidence was available, figuring out whether the actual reason that an employer fired or disciplined an employee was illegal discrimination was difficult and elusive. After all, an employer can generally fire or discipline an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, so long as that action is not for a discriminatory reason. To deal with the difficulties encountered by both parties and courts, the Supreme Court in *McDonnell Douglas* set out a burden shifting framework designed to draw out the necessary evidence in employment discrimination cases. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817 (1973).
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> *Tynes v. Fla. Department of Juvenile Justice*, 88 F.4th 939, 943–44 (11th Cir. 2023)(cleaned-up).

***Ninth Circuit Holds That Integrated Enterprise Doctrine Applies To ADA Claims***

In *Buchanan v. Watkins & Letofsky, LLP*, 2022 WL 1041181 (9th Cir. 2022), in a matter of first impression, the Ninth Circuit held that the integrated enterprise test used in the Title VII context applies to the 15-employee threshold under the ADA:

> The ADA applies to employers with 15 or more employees. 42 U.S.C § 12111(5)(A). In interpreting the analogous 15-employee requirement in Title VII, 42 U.S.C. § 2000e(b), we have held that even when a defendant has fewer than 15 employees, a plaintiff can bring a statutory claim if she can establish that (1) defendant is so interconnected with another employer that the two form an integrated enterprise and (2) the integrated enterprise collectively has at least 15 employees. In the Title VII context, we consider the following four factors to determine whether two entities are an integrated enterprise: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. We also apply the integrated enterprise test to the 20-employee threshold under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. We have not addressed whether

> the integrated enterprise test used in the Title VII context applies to the 15-employee threshold under the ADA.
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> The statutory scheme and language of the ADA and Title VII are identical in many respects. The ADA and Title VII both define employers to include only those entities with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. Likewise, Title I of the ADA incorporates a remedial scheme that is identical to Title VII. Finally, for purposes of determining whether an employer controls a corporation whose place of incorporation is a foreign country, both Title VII and the ADA direct that courts consider the same factors that we use under the integrated enterprise test, i.e. interrelation of operations; common management; centralized control of labor relations; and common ownership or financial control. We have long analyzed anti-discrimination statutes like Title VII and the ADA in parallel fashion. Because Title VII and the ADA include the same 15-employee threshold and statutory enforcement scheme, we hold that the integrated enterprise doctrine applies equally under the ADA.

*Buchanan v. Watkins & Letofsky, LLP*, 2022 WL 1041181, at *2–3 (9th Cir. 2022)(cleaned up).

***Employee's Administrative Complaint Sufficiently Identified Her Employer Despite Erroneous Identification Of Employer***

In *Guzman v. NBA Automotive, Inc.*, 68 Cal.App.5th 1109 (2021), the Court of Appeal held that a former employee adequately exhausted administrative remedies even though she failed to state employer's correct legal name in her administrative complaint where the employee named as her employer "Hooman Enterprises, Inc. dba Hooman Chevrolet of Culver City" when the employer's actual name was "NBA Automotive, Inc. dba Hooman Chevrolet of Culver City." The Court of Appeal held: "To allow NBA Automotive to escape liability for discriminatory conduct merely because Guzman identified her employer administratively with a name that was nearly the same as, but not quite identical to, her employer's actual fictitious business name would be contrary to the purposes of FEHA."

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***Desiring "Someone Younger" For A Different Job Is Relevant To An Age Discrimination Claim***

In *Jorgensen v. Loyola Marymount University*, 68 Cal.App.5th 882 (2021), the Court of Appeal addressed the grant of summary judgment in Linda Jorgensen's age discrimination failure to promote claim against Loyola Marymount University. The University moved for summary judgment contending that Jorgensen was not promoted by Stephen Ujlaki (the Dean of Loyola's School of Film and Television) Jorgensen was a problem employee and the younger employee, Johana Hernandez, who received the promotion was simply more competent. In opposition to the University's motion for summary judgment, Jorgensen submitted a declaration from Carolyn Bauer, a former employee, who declared that, while working at the School, one Belinda Brunelle asked Bauer about an open position there—a position different from anything Jorgensen sought. Bauer mentioned Brunelle's interest to Hernandez, who immediately responded she "wanted someone younger" for the position. The University objected to Bauer's evidence about Hernandez's "someone younger" remark. Its four objections were relevance, conjecture, speculation, and hearsay. The trial court sustained the objections and granted the University's motion for summary judgement. The Court of Appeal, finding that the objections should have been over-ruled, reversed.

With respect to the relevance objection, the Court of Appeal held that it was incorrect under *Reid v. Google, Inc.*, 50 Cal.4th 512 (2010), because Hernandez's remark was relevant as one could infer that Hernandez could influence Ujlaki, the School's top decision maker on all issues, including hiring and promotion.

With respect to the speculation and conjecture objections, there was no speculation or conjecture. Bauer quoted Hernandez word-for-word. That is not speculation or conjecture.

With respect to hearsay, there was no hearsay problem. Hernandez's comment is within the exception for states of mind.

***Ninth Circuit Holds That Claims Brought Under The Anti-Discrimination Provision Of The Federal Mine Safety And Health Act Requires A Showing Of "But-For" Causation***

In *Thomas v. CalPortland Company*, 993 F.3d 1204 (9th Cir. 2021), Robert Thomas, a former dredge operator for CalPortland sued challenging the decision of the Federal Mine Safety and Health Review Commission denying Thomas' discrimination claim under the Federal Mine Safety and Health Act. The Ninth Circuit, in a matter of first

impression, held that a claim under the anti-discrimination provision of the Federal Mine Safety and Health Act required a showing of "but-for" causation.

***Disparate Impact Age Discrimination Claims Under FEHA Not Limited To 40-And-Older Comparisons, And Could Be Based On Subgroups Within Protected Age Class***

In *Mahler v. Judicial Council of California*, 67 Cal.App.5th 82 (2021), the Court of Appeal held that age discrimination claims could be advanced under a disparate treatment or disparate impact theory even if based on a disparate impact to a "subgroup" of the class protected by the FEHA (*i.e.,* persons 40 years of age and over).

***Supreme Court Continues To Dismantle The First Amendment's Separation of Church And State; High Public High School Required To Allow Football Coach To Lead A Public Prayer Session In The Middle Of A Football Field Immediately Following Games Along With His Team Whom He "Invited" To Pray Along With Him***

In *Kennedy v. Bremerton School District* 2022 WL 2295034 (2022), Joseph Kennedy—a public-school football coach—led a majority of his players in a 30 second prayer on the 50-yard line while he was on duty at the end of football games. Kennedy participated with his players in pre-game locker room prayers. Kennedy also delivered delivering inspirational speeches with religious references to his players after games. Some of the football players' parents specifically informed the District that their children felt "compelled to participate." One parent expressed the fear that his son would not get as much time on the field if his son did not participate in the prayer. When the District learned about the prayers, it sent Kennedy a letter warning him that his prayers with the players could constitute a violation of Board policy which seeks to avoid violations of the Establishment Clause by requiring that school staff neither encourage nor discourage students from engaging in religious activity:

> Student religious activity must be entirely and genuinely student-initiated, and may not be suggested, encouraged (or discouraged), or supervised by any District staff.... You and all District staff are free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities. Such activity must be physically separate from any student activity, and students may not be allowed to join such activity. In order to avoid the perception of endorsement discussed above, such activity should either be non-demonstrative (i.e., not outwardly discernable as religious activity) if students are

> also engaged in religious conduct, or it should occur while students are not engaging in such conduct.

Some students and parents expressed thanks for the District's directive that Kennedy cease praying after games, with some noting that their children had participated in the prayers to avoid being separated from the rest of the team or ensure playing time.

In response to the letter, Kennedy ceased praying in the locker room, omitted religious references in his inspirational speech, and prayed on the field only after the stadium had emptied. And the District was okay with that.

Then Kennedy hired lawyers and said that he wanted a religious accommodation to be allowed to say prayers on the 50 yard line immediately following football games and that the District could not prohibit him from praying with students if they voluntarily joined.

The District then attempted to engage in an interactive process to accommodate Kennedy's need to pray while at the same time not putting pressure on his players to participate in his prayers. Among other things, the District offered Kennedy time and space to pray before and after games, in the press box or elsewhere that Kennedy would not be surrounded by the team. And, it invited him to suggest other accommodations that might satisfy him. Apparently more concerned with setting up a legal challenge, Kennedy refused to participate in the interactive process and continued his prior practice of praying with his players at the end of the game on the 50-yard line:


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Kennedy also made media appearances in which he announced his plan to hold midfield postgame prayers. At the end of the game, Kennedy resumed his prayers midfield and was joined by a crush of spectators who ran onto the field to join him—including students, a state legislator, and members of the press as shown in the photo below:

Spectators "jumped over the fence" to reach the field and people tripped over cables and fell. School band members were knocked over. In the commotion, the District was unable to "keep kids safe." The District later "received complaints from parents of students who had been knocked down in the stampede."

After this game, the District instructed Kennedy to stop praying mid-field at the end of the game and, instead, offered him a variety of accommodations, including "a private location within the school building, athletic facility or press box" to pray before and after games, and, should none of those accommodations be satisfactory, invited him to propose other potential accommodations. Kennedy refused and held another mid-field prayer session at the end of the next football game. The District suspended Kennedy and he sued.

After losing at the Ninth Circuit (and failing to convince the Ninth Circuit to grant *en banc* review), Kennedy filed a petition for *certiorari* stating that the questions presented by his petition are:

1. Whether a public-school employee who says a brief, quiet prayer by himself while at school and visible to students is engaged in government speech that lacks any First Amendment protection.

2. Whether, assuming that such religious expression is private and protected by the Free Speech and Free Exercise Clauses, the Establishment Clause

The District opposed the petition stating that Kennedy misdescribed the facts and made up hypothetical questions and that the real questions should be:

1. Did petitioner, who has conceded that he was on duty, deliver his midfield prayers to students in his capacity as a high-school coach?

2. Was respondent constitutionally required to capitulate to petitioner's demand to resume his yearslong practice of praying with students on the 50-yard line at football games, or was it entitled to accommodate his religious exercise in alternative ways that respected the beliefs of students and their families?

The Trump Supreme Court, packed with far right-wing Justices obviously anxious to expand religious rights to the detriment of others, granted the petition for *certiorari*. The Trump Supreme Court then completely mischaracterized the facts of the case as follows:

> Mr. Kennedy prayed during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters. He offered his prayers quietly while his students were otherwise occupied. Still, the Bremerton School District disciplined him anyway.

With a deceptively false description of the facts, the Supreme Court then reversed and held that a public school must permit a school official to kneel, bow his head, and say a prayer at the center of a school event.

Justice Sotomayor issued a blistering dissent (joined by Justices Breyer and Kagan):

> Official-led prayer strikes at the core of our constitutional protections for the religious liberty of students and their parents, as embodied in both the Establishment Clause and the Free Exercise Clause of the First Amendment.
>
> The Court now charts a different path, yet again paying almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion.
>
> To the degree the Court portrays petitioner Joseph Kennedy's prayers as private and quiet, it misconstrues the facts. The record reveals that Kennedy had a longstanding practice of conducting demonstrative prayers on the 50-yard line of the football field. Kennedy consistently invited others to join his prayers and for years led student athletes in prayer at the same time and location. The Court ignores this history. The Court also ignores the severe disruption to school events caused by Kennedy's conduct, viewing it as irrelevant because the Bremerton School District (District) stated that it was suspending Kennedy to avoid it being viewed as endorsing religion. Under the Court's analysis, presumably this would be a different case if the District had cited Kennedy's repeated disruptions of school programming and violations of school policy regarding public access to the field as grounds for suspending him. As the District did not articulate those grounds, the Court assesses only

> the District's Establishment Clause concerns. It errs by assessing them divorced from the context and history of Kennedy's prayer practice.
>
> Today's decision goes beyond merely misreading the record. The Court overrules *Lemon v. Kurtzman*, 403 U. S. 602 (1971), and calls into question decades of subsequent precedents that it deems "offshoot[s]" of that decision. In the process, the Court rejects longstanding concerns surrounding government endorsement of religion and replaces the standard for reviewing such questions with a new "history and tradition" test. In addition, while the Court reaffirms that the Establishment Clause prohibits the government from coercing participation in religious exercise, it applies a nearly toothless version of the coercion analysis, failing to acknowledge the unique pressures faced by students when participating in school-sponsored activities. This decision does a disservice to schools and the young citizens they serve, as well as to our Nation's longstanding commitment to the separation of church and state. I respectfully dissent.

(cleaned up)

***Ninth Circuit Reverses Summary Judgment In Equal Pay Act And Title VII Disparate Impact Lawsuit***

In *Freyd v. University of Oregon*, 990 F.3d 1211 (9th Cir. 2021), the Ninth Circuit reversed the grant of summary judgment on a Title VII disparate impact gender discrimination claim finding that there were genuine issues of material fact as to: (1) whether the fact that female employees earned an average of $15,000.00 less than comparable male employees was attributable to the employer's practice of awarding retention raises without also increasing the salaries of other professors of comparable merit and seniority; (2) whether the employer's retention raise policy and practice represented business necessity; and (3) whether there was viable alternative practice. The Ninth Circuit also reversed the grant of summary judgment on an Equal Pay Act claim finding genuine issue of material fact as to whether male and female employees performed substantially equal work, despite differences.

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***Ninth Circuit Affirms Bench Trial Decision For The Defendant Employer In A Race And National Origin Discrimination Case***

In *Yu v. Idaho State Univ.*, 15 F.4th 1236 (9th Cir. 2021), the Ninth Circuit affirmed the bench trial decision in favor of defendant employer in a race and national origin discrimination case holding that substantial evidence supported the district court's finding that university dismissed the employee due to poor clinical performance. In so holding, two members of the panel specifically declined to address whether implicit bias may be probative or used as evidence of intentional discrimination under Title VI because resolution of that issue was not necessary to the disposition of the appeal, and they could see no benefit that would be served by commenting on it. The third judge on the panel (the Hon. Eric D. Miller, appointed by President Donald J. Trump) issued a concurring opinion to explicitly state that expert testimony regarding aversive racism or unconscious bias will rarely, if ever, be admissible because: (1) it isn't helpful to the trier of fact as required by Fed. R. Evid. 702(a) because it merely tells the jury the obvious – the commonsense fact that people's stated motives are not always their true motives; (2) that type of testimony is similar to purported expert assessments of credibility that courts routinely exclude; and (3) that type of testimony does not appear to rest on the kind of tested scientific principles that the Supreme Court has demanded in cases like *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147, 119 S.Ct. 1167 (1999).

***Employees Coerced By Their Employer To Violate The Business Establishment Provisions Of The Unruh Civil Rights Act Are "Aggrieved" Within The Meaning Of The FEHA, And Have Standing To Sue Under FEHA***

In *Department of Fair Employment & Housing v. M&N Financing Corp.*, 69 Cal.App.5th 434 (2021), the Court of Appeal held that employees who are coerced by their employer to violate the business establishment provisions of the Unruh Civil Rights Act are "aggrieved" within the meaning of the FEHA, and have standing to sue their employer under provision of FEHA making it an unlawful employment practice to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under FEHA, or to attempt to do so. Cal. Civ. Code §§ 51, 51.5; Cal. Gov't Code §§ 12940(i), 12965(a).

In *M&N Financing*, defendants M&N Financing Corporation and Mahmood Nasiry operated a business that purchased retail installment sales contracts from used car dealerships. In deciding how much to pay for the contracts, defendants used a formula that considered the gender of the car purchaser. Specifically, defendants would pay more for a contract with a male purchaser than for a contract with a female purchaser or female coborrower.