The Department of Fair Employment and Housing filed a complaint that alleged numerous causes of action. The Department moved for summary adjudication. The trial court entered judgment in favor of the Department on the first and second causes of action, which alleged violations of the Unruh Civil Rights Act (Civ. Code, § 51) and Civil Code section 51.5, and assessed over $6 million in statutory damages pursuant to Civil Code section 52, subdivision (a). The court dismissed the fifth, sixth, and seventh causes of action, which alleged violations of Government Code section 12940, subdivisions (i) and (k) of the Fair Employment and Housing Act (FEHA) (§ 12900 et seq.). Defendants appealed and the Department cross-appealed.

The Court of Appeal held that the court erred in dismissing the fifth cause of action (that M&N "knowingly compelled and coerced its employees to engage in practices that violated" FEHA and Civil Code sections 51 and 51.5, in violation of section 12940, subdivision (i)."). The Court of Appeal explained:

> The trial court ruled, and we agree, that it is unlawful under section 12940, subdivision (i) for any employer to coerce an employee to violate Civil Code sections 51 and 51.5. (See § 12948.) Nonetheless, the court ruled that Etemadi and former and current M&N employees were not aggrieved within the meaning of section 12965, subdivision (a).
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> An "aggrieved" party is a person who has standing to sue.
>
> To have standing, a party must be beneficially interested in the controversy; that is, he or she must have some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. The party must be able to demonstrate that he or she has some such beneficial interest that is concrete and actual, and not conjectural or hypothetical. The prerequisites for standing to assert statutorily[-]based causes of action are determined from the statutory language, as well as the underlying legislative intent and the purpose of the statute.
>
> We hold that employees who are coerced by their employer to violate Civil Code sections 51 and 51.5 are "aggrieved" within the meaning of section 12965, subdivision (a) and have standing to sue their employer pursuant to section 12940, subdivision (i). As discussed, it is an unlawful practice under this part for a person to deny or to aid, incite, or conspire in the denial of the rights created by Sections 51, 51.5, 51.7, 51.9, 54, 54.1, or 54.2 of the Civil Code." (§ 12948.) Liability for violations of Civil Code sections 51 and 51.5 extends beyond the business establishment

> itself to the business establishment's employees responsible for the discriminatory conduct. Thus, Etemadi and other employees of M&N who were coerced by M&N into violating Civil Code sections 51 and 51.5 could be individually liable for sex discrimination. These employees would necessarily be "aggrieved" by their employer's unlawful employment practice as their personal interests would be affected by their employer's misconduct. The Department therefore was authorized to file a civil action on behalf of these employees and the trial court erred by dismissing the fifth cause of action.

Department of Fair Employment & Housing v. M&N Financing Corp., 69 Cal.App.5th 434, 444 (2021).

D.C. Circuit Holds That Job Transfers Can Constitute Title VII Discrimination Without A Showing Of Objectively Tangible Harm

In *Chambers v. District of Columbia*, 2022 WL 1815522 (D.C. Cir. 2022), the D.C. Circuit held that an employer that transfers an employee or denies an employee's transfer request because of the employee's race, color, religion, sex, or national origin violates Title VII by discriminating against the employee with respect to the terms, conditions, or privileges of employment – there is no need for the employee to show that he or she suffered objectively tangible harm. In so holding, the D.C. Circuit rejected the arguments on amicus counsel that, by eliminating the need for the employee to show that he or she suffered "objectively tangible harm," the court would subject employers to "judicial micromanagement of business practices." Amicus counsel argued that with the "suffering objectively tangible harm" requirement, a female employee could make a federal case out of being transferred from the sporting goods department to the power tools department or vice-versa. The D.C. Circuit explained why amicus counsel was wrong – "We disagree with the amicus that refusing to let women work in the power tools department because of gender stereotypes, for example, is part of the 'minutiae of personnel management' that escapes Title VII's notice. To the contrary, it is exactly the sort of workplace discrimination Title VII aims to extinguish."

Court Of Appeal Rejects "Academic Deference" Defense To FEHA Claim Finding That Predominant Relationship Between A Medical Resident And A Hospital Residency Program Is An Employee-Employer Relationship, And So Academic Deference Does Not Apply

In *Khoiny v. Dignity Health*, 76 Cal.App.5th 390 (2022), the Court of Appeal addressed an issue of first impression under California law: whether a medical

resident's claim that she was dismissed from her residency program due to gender discrimination and in retaliation for complaints about discrimination and workplace safety is subject to the rule of academic deference. The Court of Appeal held that "the predominant relationship between a medical resident and a hospital residency program is an employee-employer relationship, and so academic deference does not apply to the jury's determination whether the resident was terminated for discriminatory or retaliatory reasons."

District Court Holds That Employee Who Was Not Allowed To Work By Employer Because She Had COVID-19 Was Not "Disabled" Under California Law Because Her Symptoms Were "Mild"

In *Roman v. Hertz Local Edition Corp.*, 2022 WL 1541865 (S.D.Cal., 2022), Michelle Roman sued Hertz for disability discrimination contending that the auto rental agency fired her because of her disability – COVID-19. The district court granted Hertz' motion for summary judgment holding that Roman did not have a disability because her COVID-19 symptoms were "mild." The district court also rejected Roman's alternative argument that Hertz, by refusing to allow her to work because of her positive COVID-19 status, transformed her COVID-19 infection into a disability – "Roman's positive COVID-19 test does not qualify as a disability under FEHA because the positive test did not make it physically difficult for her body to perform the functions needed for her work. Here, Roman's limitation on working was not caused by her illness but by Hertz's COVID-19 policy." Finally, the district court rejected Roman's related argument that Hertz regarded or treated her as having a disability precisely because of her COVID-19 diagnosis and refused to allow her to work on that basis. The district court rejected this argument, in part, because Hertz did not request any medical information from Roman that would have indicated a presence or absence of a potentially disabling effect from her COVID-19 infection.

VI. First Amendment & 42 U.S.C. § 1983

Teacher Allowed To Proceed On Section 1983 Claim Where Principal Refused To Allow Teacher To Bring His MAGA Hat With Him To Teacher-Only Trainings

In *Dodge v. Evergreen School District #114*, 2022 WL 17984059 (9th Cir. 2022), the Ninth Circuit was presented with the question of whether the First Amendment was violated when a principal told a teacher he could not bring his Make America Great Again (MAGA) hat with him to teacher-only trainings on threat of disciplinary action. Plaintiff Eric Dodge was a long-time teacher in the

Evergreen School District #114 (District) in Vancouver, Washington. Before the 2019–2020 school year began, he attended two days of teacher training and brought with him a MAGA hat. His principal, Caroline Garrett, considered the hat inappropriate. After consulting with the District's Chief Human Resource Officer Jenae Gomes, Principal Garrett told Dodge at the end of the first day that he needed to exercise "better judgment." When Principal Garrett learned that Dodge brought his hat with him again the second day, she called him a racist and a homophobe, among other things, and said that he would need to have his union representative present if she had to talk to him about the hat again.

Dodge sued Principal Garrett, HR Officer Gomes, and the District under 42 U.S.C. § 1983 for retaliating against him for engaging in protected political speech in violation of the First Amendment. The district court held that the individual defendants were entitled to qualified immunity and granted summary judgment in their favor. The district court also granted summary judgment for the District, concluding that Dodge failed to show a genuine issue of material fact that the District was liable. Dodge appealed. The Ninth Circuit affirmed the district court's grant of summary judgment for HR Officer Gomes and the District, but reversed and remanded as to Principal Garrett:

> Dodge contends that Principal Garrett's entire course of conduct related to his MAGA hat was an adverse employment action because her actions were reasonably likely to deter him (indeed, her goal was to deter him) from engaging in protected speech. Viewing the facts in the light most favorable to Dodge, we agree that, at a minimum, there are triable issues of fact regarding whether Principal Garrett took adverse employment action against him.
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> The first day, Principal Garrett, who was Dodge's supervisor, told him that he needed to use "better judgment" and not have his MAGA hat at Wy'east. The second day, she called him a racist, a bigot, a homophobe, and a liar, and swore at him for having his MAGA hat with him again. By itself, such criticism or "bad-mouthing" does not constitute an adverse employment action sufficient for a First Amendment retaliation claim. But Principal Garrett went beyond criticizing Dodge's political views. She suggested that disciplinary action could occur if she saw Dodge with

> his hat again by referencing the need for union representation: "The next time I see you with that hat, you need to have your union rep. Bring your rep because I'll have my own." It is hardly controversial that threatening a subordinate's employment if they do not stop engaging in protected speech is reasonably likely to deter that person from speaking.
>
> Principal Garrett claims that she was "[s]imply advising Mr. Dodge of his right to have a representative at any future conversations about the hat," which is his right under his collective bargaining agreement. This characterization undersells the import and implications that a reasonable employee would attribute to such a statement. The power of a threat lies not in any negative actions eventually taken, but in the apprehension it creates in the recipient of the threat.
>
> Here, Dodge's principal, who had authority over his employment, stated that the next time he had his MAGA hat, they would have a meeting in which he would need his union representative. The purpose of summary judgment is to determine if there are material factual disputes, not to resolve them. At a minimum, there is a genuine issue of fact regarding whether Dodge reasonably interpreted Principal Garrett's statement as a threat against his employment. While Principal Garrett also had First Amendment rights, she may not use her position of authority over Dodge as a means to retaliate for [his] expression.

Dodge v. Evergreen School District #114, 2022 WL 17984059, *7-8 (9th Cir. 2022)(cleaned up).

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VII. Harassment

California Supreme Court Holds Failure to Promote Claims Brought Under FEHA's Harassment Provision Accrues When Employee Knows or Reasonably Should Know They Were Denied Promotion

When does the statute of limitations period begin to run on a FEHA harassment claim?

In *Pollock v. Tri-Modal Distrib. Servs., Inc.*, 11 Cal.5th 918 (2021), Associate Justice Goodwin H. Liu, writing for a unanimous California Supreme Court, held that such a claim accrues, and thus the statute of limitations begins to run, at the point when an employee knows or reasonably should know of the employer's allegedly unlawful refusal to promote the employee. The California Supreme Court also addressed whether Government Code section 12965(b)'s directive that a prevailing FEHA defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so, apply to an award of costs on appeal? The Supreme Court answered "yes," holding that a prevailing-party employer may only recover costs on appeal if the action was "frivolous, unreasonable, or groundless when brought."

Ninth Circuit Holds That Disability-Based Harassment Claim Is Available Under The ADA And The Rehabilitation Act

In Mattioda v. Nelson, 2024 WL 1710665 (9th Cir. 2024), the Ninth Circuit, as matter of first impression, held that disability-based harassment claims are available under the ADA and the Rehabilitation Act.

Court Of Appeal Provides Excellent Discussion Regarding The Adoption Of Government Code Section 12923 And Its Impact On Hostile Work Environment Claims, Particularly In The Context Of Summary Judgment Motions

Beltran v. Hard Rock Hotel Licensing, Inc., 97 Cal. App. 5th 865 (2023), is a case that must be cited by plaintiff and defense counsel in any summary judgment addressing claims of harassment.

In *Beltran*, the Court of Appeal provided a thoughtful and comprehensive discussion regarding the adoption of Government Code section 12923 and its impact on hostile work environment claims, particularly in the context of summary judgment motions.

The opinion also provides an excellent discussion regarding the use and misuse of separate statements and how motions for summary judgment should be denied if the moving party fails to file a code-compliant separate statement.

Ninth Circuit Resoundingly Rejects The Completely Made Up "Equal Opportunity" Harasser Defense And Calls Into Question Continuing Viability Of California Supreme Court's Lyle v. Warner Bros. Case

In *Sharp v. S&S Activewear, LLC*, 69 F.4th 974 (9th Cir. 2023), the Ninth Circuit examined and thoroughly rejected the the completely employment defense counsel manufactured "equal opportunity" harasser defense. Stephanie Sharp and seven of her former colleagues (six women and one man) worked for S&S Activewear, LLC. They sued S&S alleging that the company created a sexually hostile work environment in violation of Title VII by permitted its managers and employees to routinely blast from commercial-strength speakers placed throughout the warehouse "sexually graphic, violently misogynistic" music throughout its 700,000-square-foot warehouse in Reno, Nevada. According to Sharp, the songs' content denigrated women and used offensive terms like "hos" and "bitches." Songs like "Blowjob Betty" by Too $hort, Sharp alleged, contained very offensive lyrics that glorified prostitution:

> Gettin' real funky with the motherfuckin'
> Dangerous Crew, bitch, with that old school
>
> Too $hort baby, I'm so hard
> Pimpin' these hoes on the boulevard
> But I'm not here to tell ya bout me
> I got a little story bout a nasty freak
> She's the kind of girl you think about in bed
> Blow job Betty givin' real good head
> Bust a left nut, right nut in her jaw
> Sperm on her cheeks is all ya saw
> She could blow more head than a whale blows water
> Blow job Betty make your dick get harder

See https://www.lyrics.com/lyric/9900264/Too+Short/Blowjob+Betty.

Likewise, "Stan" by Eminem, Sharp alleged, described extreme violence against women, detailing a pregnant woman being stuffed into a car trunk and driven into water to be drowned:

> shut up bitch! I'm trying to talk!

> Hey, Slim, that's my girlfriend screaming in the trunk,
> But I didn't slit her throat, I just tied her up. See, I ain't like you
> 'Cause if she suffocates she'll suffer more, and then she'll die, too
> Well, gotta go, I'm almost at the bridge now

See https://www.azlyrics.com/lyrics/eminem/stan.html.

The District Court granted S&S's motion to dismiss and denied leave to amend the music claim, reasoning that the music's offensiveness to both men and women and audibility throughout the warehouse nullified any discriminatory potential. The District Court countenanced S&S's argument that the fact that "both men and women were offended by the work environment" doomed Sharp's Title VII claim.

On appeal, the Ninth Circuit disagreed specifically rejecting the "equal opportunity harasser) defense:

> We disagree. In this preliminary posture, plaintiffs should have had their allegations taken as true or, at minimum, been granted leave to amend. We vacate the decision below and instruct the district court to reconsider the sufficiency of Sharp's pleadings in light of two key principles: First, harassment, whether aural or visual, need not be directly targeted at a particular plaintiff in order to pollute a workplace and give rise to a Title VII claim. Second, the challenged conduct's offensiveness to multiple genders is not a certain bar to stating a Title VII claim. **An employer's "status as a purported 'equal opportunity harasser' provides no escape hatch for liability."** *Swinton v. Potomac Corp.*, 270 F.3d 794, 807 (9th Cir. 2001).

Sharp v. S&S Activewear, LLC, 69 F.4th 974, 977 (9th Cir. 2023)(Emphasis added).

The Ninth Circuit's holding recognized what some have called the "radioactive" theory of sexual harassment – that is, sexually offensive conduct at work – pornographic music, or pictures, or videos, or conduct – can create a sexually hostile work environment in violation of Title VII even if not directed at a specific person:

> A workplace saturated with sexually derogatory content can constitute harassment "because of sex." We have consistently sustained Title VII claims challenging a workplace "polluted with insult and intimidation."

Sharp v. S&S Activewear, LLC, 69 F.4th 974, 977 (9th Cir. 2023).

This holding in Sharp seems directly at odds with the California Supreme Court's unfortunate *Lyle v. Warner Brothers Television Productions*, 38 Cal.4th 264, 272 (2006), suggesting that a plaintiff could not make out a sexual harassment claim under FEHA if the sexually harassing conduct/language at issue was not aimed at the plaintiff:

> Here, the record discloses that most of the sexually coarse and vulgar language at issue did not involve and was not aimed at plaintiff or other women in the workplace.
>
> . . . .
>
> A hostile work environment sexual harassment claim is not established where a supervisor or coworker simply uses crude or inappropriate language in front of employees or draws a vulgar picture, without directing sexual innuendos or gender-related language toward a plaintiff or toward women in general.

Lyle v. Warner Brothers Television Productions, 38 Cal.4th 264, 272 & 282 (2006)(clean-up).

In light of the facts that (1) "California courts frequently seek guidance from Title VII decisions when interpreting the FEHA and its prohibitions against sexual harassment" (*Lyle v. Warner Brothers Television Productions*, 38 Cal.4th 264, 220 (2006); *Miller v. Department of Corrections*, 36 Cal.4th 446, 463 (2005)) and (2) Title VII sets a floor and not a ceiling for FEHA, the *Lyle* holding should no longer be seen as good law.

Off Duty Sexual Text Messages By Supervisor With Subordinate With Whom He Was Previously Friends Creates No Liability For Employer Because Supervisor Was Not Acting In His Capacity As A Supervisor

In *Atalla v. Rite Aid Corporation*, 89 Cal. App. 5th 294 (2023), the Court of Appeal was confronted with a claim of sexual harassment by someone who was friends with the harasser prior to the time they worked together at Rite Aid regarding conduct that took place outside of work and outside of work hours. Late one Friday night after meeting with his "wine group," defendant Erik Lund sent Hanin Atalla a "Live Photo" of himself masturbating, followed shortly thereafter by a photo of his penis. Lund texted an apology to Atalla the next day to which she did not respond. A few days thereafter, Atalla's attorney sent a letter to Rite Aid alleging that Lund had harassed her. Rite Aid conduct an investigation, fired Lund, and assured Atalla that she was welcome to return to work. Atalla refused to return to work; instead, she sued. The trial court granted summary judgment to Rite Aid, and the Court of Appeal affirmed, holding that the evidence did not support an inference that "the text

exchange culminating in the inappropriate photos was work-related. The Court of Appeal also held there was no constructive termination of Atalla's employment because "Rite Aid immediately took action, terminated Lund, and invited plaintiff back to work."

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.

Favoring A Paramore Is Not Sexual Harassment

In *Maner v. Dignity Health*, 9 F.4th 1114 (9th Cir. 2021), the Ninth Circuit affirmed summary judgment in favor of the employer in a plaintiff's sexual harassment case, holding that an employer who singles out a supervisor's paramour for preferential treatment does not discriminate against other employees "because of [their] sex." The Court reasoned that "the motive behind the adverse employment action is the supervisor's special relationship with the paramour, not any protected characteristics of the disfavored employees."

Manager's Failure To Take Immediate And Corrective Action Might Have Independently Created A Hostile Work Environment

In *Fried v. Wynn Las Vegas*, 18 F.4th 643 (9th Cir. 2021), the Ninth Circuit considered an appeal by Vincent Fried with regard the the district court's grant of summary judgment on his sexually hostile work environment claim. Fried, a manicurist at a salon in the Wynn Hotel in Las Vegas, alleged that Wynn created a sexually hostile work environment by:

- Allowing the female manicurists to receive most of the appointments.
- A manager commented to Fried the he was working in a "female job related environment" and suggested that he look for employment in the culinary field.
- A female coworker told Fried and another male manicurist that if they wanted to get more clients, they should wear wigs to look like women. Other coworkers then began making similar comments.

- A male customer having a pedicure asked Fried to come to the customer's hotel and give him an oil massage. The same male customer asked if Fried wanted to have sex and rub the customer′s] penis. And the customer told Fried "it [is] wonderful to have sex with another man."
- Fried reported the male customer's remarks to his manager and the manager told him to go back and finish the customer's pedicure. Fried did as he was instructed and the customer continued to make inappropriate sexual references to Fried.
- Co-workers subsequently told Fried that he should be flattered by the attention and that they knew he really wanted to have sex with the customer.

As the district court did, the Ninth Circuit also inappropriately disaggregated Fried's allegations and weighed them separately.

With respect to the comment from his manager suggesting that he should consider finding a job in which the clientele is not mostly female and the comments from co-workers suggesting that he wear a wig, the Ninth Circuit held that the statements were insufficiently severe or pervasive to support a hostile work environment claim.

With regard to Fried's managers response to Fried's complaint about the male customer propositioning him, the Ninth Circuit held that the district court erred by ruling on summary judgment that the manager's response to Fried′s report of the customer′s harassment was insufficient as a matter of law to create a hostile work environment:

> A reasonable factfinder could conclude that the manager′s response to Fried′s report of a customer′s overt sexual proposition subjected Fried to a hostile work environment. We therefore reverse the district court′s order granting summary judgment in favor of Wynn on Fried′s hostile work environment claim. On remand, the district court shall reconsider the cumulative effect of the related comments by Fried′s coworkers that he should take the customer′s sexual proposition as a compliment or that he welcomed it.

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Summary Judgement In Disability Discrimination Case Affirmed Where Employer Presented Evidence Of Nondiscriminatory Reasons For Terminating Employee's Employment And Employee Failed To Establish Pretext

In *Wilkin v. Community Hosp. of the Monterey Peninsula*, 71 Cal. App. 5th 806 (2021), Kimberly Wilkin, a registered nurse, was employed by Community Hospital of the Monterey Peninsula. The Hospital fired her after discovering she had violated the Hospital's policies governing the handling and documentation of patient medications. Wilkin sued the Hospital, alleging her discharge constituted disability discrimination, violation of the Moore-Brown-Roberti Family Rights Act, and retaliation.

The Hospital filed a motion for summary judgment included evidence showing that Wilkin violated policies governing the handling of medication, and, for over a year before she was discharged, had been regularly counseled for her chronic absenteeism and other issues. The Hospital also argued that Wilkin's failure to reasonably accommodate a disability claim and the claim for failure to engage in the interactive process failed because Wilkin had already engaged in the misconduct that formed the basis of her legitimate, nondiscriminatory discharge before she requested a reasonable accommodation on the eve of her termination meeting.

The trial court concluded that the Hospital carried its burden of producing evidence showing its decision was based on legitimate, nondiscriminatory reasons and granted summary judgment in favor of the Hospital.

On appeal, the Court of Appeal affirmed concluding that Wilkin failed to present any evidence that the Hospital's stated reasons for terminating her employment were either false or pretextual, or evidence that the Hospital acted with discriminatory animus, or evidence of each which would permit a reasonable trier of fact to conclude the employer intentionally discriminated.

Fact Questions Precluded Summary Judgment On Discrimination And Wrongful Termination Claims, But Not Retaliation Claim

In *Zamora v. Security Indus. Specialists, Inc.*, 71 Cal. App. 5th 1 (2021), David Zamora worked for Security Industry Specialists, Inc. ("SIS") as a "standard deployment field supervisor" assigned by SIS to provide security at Apple's main campus in Cupertino, California. SIS employed 19 supervisors at Zamora's worksite. The supervisors reported to watch commanders, and according to Zamora, there were three watch commanders, one for each shift. The watch commanders in turn reported to the site manager, Marty Vaughn.

Eight days after he was hired—while running to answer a medical call with four coworkers, Zamora tripped over a curb, twisted his left knee, heard a loud popping noise, and "immediately experienced severe pain in his left knee." Zamora claims his supervisor, Watch Commander Jim Mazon, witnessed the incident. Zamora told Mazon he was having pain in his left knee, and Mazon suggested he ice the knee and elevate it when he got home. Mazon did not report the injury to SIS as required by company policy or instruct Zamora to report the injury.

Subsequently, Zamora claims that, on more than one occasion, he asked Mazon or Vaughn for work that involved less standing and physical activity, consistent with the work restrictions given by his doctor. He alleges that both Mazon and Vaughn told him there was no other work for him to do and that SIS's failure to provide modified work in 2010 aggravated his knee injury.

Eventually, Zamora stopped working because he could not tolerate the pain any longer and went on disability leave. While on disability, Zamora kept Vaughn and SIS human resources apprised of his disability status and updated them every time he went to a doctor.

While Zamora was on leave, Apple told SIS that it planned to cut its budget for SIS's services by $7 million. This affected all of SIS's Apple worksites and prompted a reduction in force of approximately 10 percent. SIS eventually laid off 48 employees nationwide, including 14 employees at the site where Zamora worked. The reduction in force affected four of the 19 supervisory positions at that site. After SIS determined that it would have to lay off four supervisors, Vaughn worked with human resources and senior management to develop merit-based criteria to evaluate the supervisors to determine who would be laid off. Vaugh and four watch commanders later evaluated the supervisors on a scale of zero to five in seven categories: customer service, performance, critical thinking, communication, initiative, tenure, and availability. Zamora ranked 16th of the 19 supervisors, and since he was among the four lowest-rated supervisors, his position was selected for the lay-off. According to Vaughn, the evaluators understood that they could not consider Zamora's disability or workers' compensation claim and gave him a "high score" of four for availability. Zamora received a low score for communication because he occasionally tried to handle security matters on his own when he should have involved his superiors. After the reduction in force, the supervisors who remained at the site absorbed Zamora's duties.

After SIS eliminated the four supervisory positions as part of the reduction in force, it found other positions for two of the supervisors (Murillo and Lopez) who had ranked lower than Zamora in its evaluation process. Rather than lay them off, SIS retained them, but demoted them to patrol officers. Thus, only two of the four lowest-ranked

supervisors (Zamora and one other) were laid off in the reduction in force, along with 12 other employees at the Cupertino site.

Zamora sued SIS alleging, among other claims, five causes of action based on alleged violations of the FEHA, including: (1) disability discrimination (§ 12940, subd. (a)); (2) failure to accommodate (§ 12940, subd. (m)); (3) failure to engage in a good faith interactive process (§ 12940, subd. (n)); (4) retaliation (§ 12940, subd. (h)); and (5) wrongful termination. The complaint also alleged a common law cause of action for wrongful termination in violation of public policy based on the FEHA violations.

SIS filed a motion for summary judgment arguing that it was entitled to summary adjudication of the disability discrimination claim because Zamora could not establish a *prima facie* case of disability discrimination since there was no evidence that SIS had subjected him to any adverse employment action *because of* his disability and Zamora was not a "qualified individual capable of performing the essential functions of the job." SIS also argued that it had a legitimate, nondiscriminatory reason for terminating Zamora's employment based on the reduction in force and that Zamora did not have any evidence of pretext to rebut that reason. SIS also argued that it was entitled to judgment on Zamora's retaliation claim (§ 12940, subd. (h)) because Zamora could not establish that he had engaged in any "protected activity" under FEHA because as a matter of law, requesting reasonable accommodation is not a "protected" activity.

Zamora opposed the motion arguing, among other things, that SIS's reasons were pretextual because: (1) he was terminated shortly after his doctor released him to return to modified work; and (2) two of the supervisors that ranked lower than he did were reassigned rather than terminated.

The trial court granted summary adjudication of Zamora's disability discrimination, retaliation, and wrongful termination claims. The trial court held that "as a matter of law, the mere timing of an adverse employment action is insufficient to raise an inference that the employer took such an action for an unlawful purpose." As for the retention of the two lower-ranked supervisors, the court stated that "[w]hile this evidence does cast some doubt on SIS's reason for [Zamora's] termination, it [was] insufficient on its own to establish a triable issue of material fact as to whether [his] termination was based on his disability." The trial court held that Zamora "simply provide[d] no evidence from which a reasonable fact finder could infer that his knee injury or the physical restrictions attendant to the injury played any role in his termination."

On appeal, the Court of Appeal initially provided a lengthy explanation of how disability discrimination claims are to be handled on summary judgment, noting that that disability discrimination claims are fundamentally different than other types of discrimination claims because no the plaintiff in a disability case does not have to prove that the employer had any type of animus or ill.

After thoroughly examining Zamora's claim that he possessed direct evidence of discrimination and rejecting that claim, the Court of Appeal looked to whether he could survive summary judgment under the McDonnell-Douglas burden-shifting test.

Although the parties stipulated to the dismissal, with prejudice, of Zamora's failure to accommodate and failure to engage in the interactive process claims, the Court of Appeal held that the trial court should have considered Zamora's allegations that SIS failed to accommodate his disability and failed to engage in the interactive process in ruling on SIS's motion for summary adjudication of his disability discrimination claim. Weighing Zamora's allegations that SIS failed to accommodate his disability and failed to engage in the interactive process along with other evidence, the Court of Appeal held that the trial court erred in ruling in favor of SIS on its motion for summary adjudication of his disability discrimination claim.

The Court of Appeal also found that summary judgment was inappropriate because SIS failed to articulate a legitimate, nondiscriminatory reason for the termination of Zamora. That is, the Court of Appeal found that SIS, in articulating its rational for terminating Zamora (*i.e.,* a layoff), failed to explain why Murillo and Lopez, two of the four supervisors whose positions were eliminated, both of whom ranked lower than Zamora, were reassigned to other positions. Nor did SIS explain why it failed to offer him a vacant position.

VIII. Health & Safety

Supreme Court's Conservative Republican Nominated Justices Preclude OSHA From Taking Steps To Ensure The Health And Safety Of America's Workers

In *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*, 2022 WL 120952 (2022), the Supreme Court addressed whether or not the Occupational Safety and Health Administration had the power to take steps to ensure the health and safety of America's workers against COVID–19.

By way of background, OSHA is charged by Congress with protecting employees from the "grave danger[s]" that comes from "new hazards" or exposure to harmful agents. 29 U. S. C. § 655(c)(1). In order to protect America's workers, OSHA sensibly enacted a vaccine mandate for much of the Nation's work force. The mandate, which employers must enforce, applies to roughly 84 million workers, covering virtually all employers with at least 100 employees. It requires that covered workers receive a COVID–19 vaccine, and it pre-empts contrary state laws. In issuing the mandate, OSHA took into consideration that it would save over 6,500 lives and prevent over 250,000 hospitalizations in just six months' time.

In response to the vaccine mandate, a group of employers filed an emergency application for a stay of the mandate. Notably, multiple groups representing employees (*i.e.,* those who would be protected by the vaccine mandate) including major unions (American Federation of Labor & Congress of Industrial

Organizations and eight other national, regional and local labor organizations) and pro-employee organizations (National Employment Lawyers Association, Jobs With Justice Education Fund, Disability Rights Network, and the Judge David L. Bazelon Center for Mental Health Law) opposed the application for the stay.

Notwithstanding OSHA's charge to protect American workers, in a 5 – 3 decision, the Supreme Court's conservative Republican nominated Justices granted the stay finding the vaccine mandate to be a "significant encroachment into the lives—and health—of a vast number of employees."

Justice Gorsuch (who elected to not wear a face mask at oral argument even though most Justices are elderly and some have significant underlying medical conditions) issued a concurring opinion (in which Justices Thomas and Alito) joined to state that OSHA does not have the power to respond to the COVID-19 pandemic.
In dissent, Justices Breyer, Sotomayor, and Kagan pointed out the obvious – COVID–19 poses a grave danger to the citizens of this country – and particularly, to its workers – having killed almost 1 million Americans and hospitalized almost 4 million and OSHA's vaccine mandate would do precisely that which the agency was charged – protecting America's workers.
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Supreme Court Allows Biden Administration To Enforce A Nationwide Rule That Requires All Health Care Workers At Facilities That Participate In The Medicare And Medicaid Programs To Be Fully Vaccinated Against COVID-19 Unless They Qualify For A Medical Or Religious Exemption (Over The Objections Of Justices Thomas, Alito, Gorsuch, And Barrett)

In *Biden v. Missouri*, 2022 WL 120950 (2022), the U.S. Supreme Court, in a 5 – 4 decision, denied a request for a stay of the Biden administration's decision that, in order to receive Medicare and Medicaid funding, facilities participating in the Medicare and Medicaid programs must ensure that their staff—unless exempt for medical or religious reasons—are vaccinated against COVID–19. In so holding, the Supreme Court found that core mission of the Medicare and Medicaid program is to ensure that the healthcare providers who care for Medicare and Medicaid patients protect their patients' health and safety.

Justices Thomas, Alito, Gorsuch, and Barrett dissented apparently contending that the health and safety provisions of the Medicare and Medicaid programs did not expressly authorize a vaccine-mandate.

California Court of Appeal Upholds Emergency Temporary Standard Promulgated By California Occupational Safety And Health Standards Board To Combat The COVID-19 Pandemic

In *Western Growers Association v. Occupational Safety and Health Standards Board*, 2021 WL 6426429 (2021), the Superior Court, rejecting arguments made by California Business Roundtable and others that: (1) the Board failed to properly make a finding of an emergency; and (2) there was no immediate need for additional regulations, uphold the emergency temporary standard promulgated by California Occupational Safety and Health Standards Board to combat the global COVID-19 pandemic:

> No federal or state court in the country has blocked emergency public health orders intended to curb the spread of COVID-19, and the illnesses, hospitalizations, and deaths that follow in its wake.... This Court will not be the first. Lives are at stake.

The Court of Appeal affirmed.
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IX. Miscellaneous Employment Law Decisions

Ninth Circuit Affirms Dismissal Of Employment Case Due To The Plaintiff's Intentional Spoliation Of Electronically Stored Information

In *Jones v. Riot Hospitality Group LLC*, 2024 WL 927669 (9th Cir. 2024), the Ninth Circuit affirmed the district court's dismissal, under Federal Rule of Civil Procedure 37(e)(2), of an employment discrimination action because of the intentional spoliation of electronically stored information by the plaintiff.

Court of Appeal Opinion Contains An Excellent Discussion Regarding Use Of Admissible Versus Inadmissible Use Of "Character Evidence"

In *Argueta v. Worldwide Flight Services, Inc.*, 97 Cal. App. 5th 822 (2023), the Court of Appeal addressed a common evidentiary issue in employment (particularly retaliation) cases – whether the admission of complaints about the plaintiff's conduct constitute inadmissible character evidence.

Eunices Argueta sued her former employer, Worldwide Flight Services, Inc., for sexual harassment. At trial, the Superior Court, overruling Argueta's motions in limine, allowed into evidence the entirety of written complaints made about her by several co-workers who accused her of of bullying, harassment, retaliation, yelling, making threats and other bad behavior, including discriminating against a pregnant subordinate. The Superior Court reasoned that the complaints were admissible to show Argueta's motive for making the complaints of sexual harassment. Specifically, the motive was that Argueta feared for her job because the complaints had been made against her. The trial court gave a short limiting instruction when the complaints were read to the jury.

In her motion for a new trial, Argueta contended that the trial court erred in admitting the substance of the "bad behavior" complaints against her because 1) the evidence was improper and irrelevant character evidence, 2) motive is not an element of a sexual harassment claim, 3) defendant would be strictly liable for any sexual harassment, and 4) defendant's HR person admitted Nguyen committed acts of sexual harassment and so made "motive" irrelevant. She also contended that even if the evidence had some minimal relevance, that relevance was far outweighed by its high potential for undue prejudice. Argueta further contended Worldwide counsel improperly used the evidence as bad character evidence in closing argument.

The trial court denied the new trial motion and found that its ruling "does not constitute an order that deprived Argueta of having a fair trial as Worldwide submitted evidence that complaints made against Argueta amounted to evidence relating to what Worldwide asserts was her actual motive for filing her complaint against Nguyen, and as such, were relevant to supporting Worldwide's defenses, including that Argueta never complained about Nguyen's alleged conduct prior to filing the complaints because she never believed it to be severe or pervasive.

On appeal, Worldwide argued that Argueta simply repeated the arguments of her new trial motion on appeal, and that that was not sufficient. The Court of Appeal, however, found her arguments sufficient agreeing with Argueta that the high potential for undue prejudice from admission of the substance of the complaints far outweighed the very minimal probative value of that evidence, and that a limiting instruction would not be effective under the circumstances of this case. Accordingly, the Court of Appeal found that the trial court abused its discretion in admitting the substance of the complaints and that the effect of the error was prejudicial: it materially affected appellant's substantial rights and prevented her from having a fair trial:

> The substance of the complaints was not relevant at all to assessing whether Argueta was offended by Nguyen's actual conduct or whether she did not perceive it as severe and pervasive or whether she had a motive to fabricate or embellish the severity or pervasiveness of Nguyen's conduct. If Diaz told Argueta she would be terminated if her behavior did not improve, that is the motive to lie. The lies could involve outright fabrication of conduct or embellishment of actual conduct, *i.e.,* its severity or pervasiveness. It could also involve claiming to be offended when she was not, or claiming she found the conduct severe and pervasive when she did not. The substance of the employee complaints sheds no light on which might have occurred.
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> But again, the substance of the prior complaints against Argueta (that she was a bad boss and a bad person) does not shed any light on what form any deception might take, that is, whether it involved outright fabrication or embellishment of the severity of Nguyen's conduct, or fabrication of Argueta's own response.

Argueta v. Worldwide Flight Services, Inc., 97 Cal.App.5th 822, 836 (2023)(cleaned-up).

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California's Board of Directors Quota Law May Be Unconstitutional

In 2018, the California Legislature In 2018, the California Legislature passed and Governor Jerry Brown signed into law Senate Bill 826 (SB 826) which required all corporations headquartered in California to have a minimum number of females on their boards of directors. The law further provided that corporations that do not comply with SB 826 may be subject to monetary penalties. In November 2019, Creighton Meland, a shareholder of OSI Systems, Inc. - a corporation headquartered in California, brought an action against California's Secretary of State (Shirley N. Weber) challenging the constitutionality of SB 826 on the ground that it requires shareholders to discriminate on the basis of sex when exercising their voting rights, in violation of the Fourteenth Amendment. In December 2019, OSI shareholders elected a female to fill a vacant board-member seat. California then moved to dismiss Meland's complaint for lack of Article III standing. The district court granted the California's motion, reasoning that Meland had not suffered an injury in fact, because SB 826 imposed requirements and potential penalties on corporations, not shareholders. Moreover, the district court held that SB 826 did not prevent Meland from voting for a male director. And the district court concluded that, even assuming Meland had established an individualized injury, his injury was not actual or imminent, because OSI was in compliance with SB 826. Finally, the district court held that Meland did not have prudential shareholder standing, because he had not suffered a direct injury separate from any injury to OSI. Meland timely appealed. In *Meland v. Weber*, 2 F.4th 838 (9th Cir. 2021), the Ninth Circuit reversed, holding that because Meland had plausibly alleged that SB 826 requires or encourages him to discriminate on the basis of sex, he has adequately alleged that he has standing to challenge SB 826's constitutionality.

In *Swenberg v. Dmarcian, Inc.*, 68 Cal.App.5th 280 (2021), Charles E. Swenberg, a minority shareholder of Dmarcian, Inc., incorporated in Delaware and registered with the California Secretary of State as a foreign corporation with its "principal executive office" in California, sued, among others, Martijn Groeneweg (a Dutch citizen) for various claims related to his ownership interest in and employment with Dmarcian. Groeneweg, who had lived in the Netherlands all his life, did not own or operate a business in California, did not conduct business in California, and did not own property in California, filed a motion to quash service for lack of personal jurisdiction over him in the State of California. The trial court granted Groeneweg's motion. On Appeal, the Court of Appeal reversed finding that Swenberg presented compelling evidence that Groeneweg publicly presented himself as one of the leaders of Dmarcian, with no hint there was a distinction between Dmarcian and another entity with which Groeneweg was actually associated (Dmarcian EU, Dmarcian's related European company). In that regard, the Court of Appeal noted that Dmarcian and

Dmarcian EU shared a website, and on the Dmarcian website, Groeneweg appeared immediately below the CEO of the California-based entity. The Court of Appeal also highlighted the fact that Groeneweg's LinkedIn profile describes him as "General Manager Europe at Dmarcian" without reference to Dmarcian EU or any other entity.

Applicants For Employment Are Not Entitled To Reimbursement For The Time And Travel Expenses Required To Take A Drug Test

In *Johnson v. WinCo Foods, LLC*, 2022 WL 2112792 (9th Cir. 2022), the Ninth Circuit was confronted with a lawsuit brought by a class of employees seeking reimbursement for the time and travel expenses required by a prospective employer for them to take a pre-employment drug test. The district court entered judgment in favor of the employer on the ground that under California law, plaintiffs were not yet employees when they took the drug test. Plaintiffs appealed contending that they were employees. The Ninth Circuit affirmed:

> WinCo Foods requires a drug test of successful applicants for employment before they can begin the duties of the job. Plaintiff Johnson represents a class of employees seeking reimbursement for the time and travel expenses required to take the test. The district court entered judgment in favor of WinCo on the ground that under California law, plaintiffs were not yet employees when they took the drug test. Plaintiffs appeal contending that they were employees. We affirm.
>
> The same issues have arisen in a number of similar cases removed from California state courts to federal district court. The other district courts in those cases have also ruled in favor of the employer. There is as yet, however, no authoritative California state court decision. We therefore affirm in a published opinion.
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> Plaintiffs have two principal contentions. First they argue that because the tests were administered under the control of the employer, plaintiffs must be regarded as employees, as California law applies a control test to determine whether an employment relationship exists. Second, and alternatively, they contend that under California law the test should be regarded as a "condition subsequent" to their hiring as employees. See Cal. Civ. Code § 1438.
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> Neither contention can succeed. The control test relates to control over the manner of performance of the work itself, not the manner of establishing qualifications to do the work. There was no condition

> subsequent because plaintiffs were not hired until they established they were qualified.

Johnson v. WinCo Foods, LLC, 2022 WL 2112792, at *1–2 (9th Cir. 2022)(cleaned up).

Ninth Circuit Reverses Summary Judgment In Favor Of Employer And Allows Trafficking Victims Protection Reauthorization Act Claim To Proceed

In *Martínez-Rodríguez v. Giles*, 2022 WL 1132809 (9th Cir. 2022), the Ninth Circuit considered an appeal from the grant of summary judgment to an employer sued under the forced labor provision of the Trafficking Victims Protection Reauthorization Act ("TVPRA"), 18 U.S.C.A. §§ 1589(a), 1590(a), 1595(a), which imposes criminal punishment on whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the the following: (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person; (2) by means of serious harm or threats of serious harm to that person or another person; (3) by means of the abuse or threatened abuse of law or legal process; or (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.

In *Martínez-Rodríguez*, the plaintiffs, six citizens of Mexico, alleged that they were recruited in Mexico by Funk Dairy to come to the United States to work as "Animal Scientists" at the dairy under a visa program for "professional" employees but, when they arrived at the dairy, they were instead required to work as general laborers. Plaintiffs alleged that defendants' bait-and-switch tactics violated not only TVPRA's prohibition on forced labor but also the visa program under which they were brought to America. Specifically, the plaintiffs alleged that, after representing to them and to U.S. consular officials that they were being hired to perform the "professional activities" of an "Animal Scientist," 8 C.F.R. § 214.6(c), (d)(3)(ii)(B), Funk Dairy required them, upon arrival in America, to work substantially as general laborers.

The Ninth Circuit reversed summary judgment in favor of the dairy finding disputed issues of material fact as to whether Funk Dairy obtained the nonprofessional labor that plaintiffs were tasked with performing "by means of" the pressure created by Funk Dairy's abuse of the TN Visa program. 18 U.S.C. § 1589(a)(3).
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Elected Public Officials Lack Standing To Bring A Pre-Enforcement Challenge To California Government Code Section 3550, Which Prohibits Public Employers From Deterring Or Discouraging Public Employees From Becoming Or Remaining Members Of An Employee Organization

In *Barke v. Banks*, 2022 WL 351239 (9th Cir. 2022), the Ninth Circuit considered a challenge ostensibly brought by a group of elected local government officials seeking to assert a pre-enforcement First Amendment challenge to California Government Code section 3550, which states in part that "[a] public employer shall not deter or discourage public employees ... from becoming or remaining members of an employee organization." Cal. Gov't Code § 3550.

Represented by the Center for Individual Rights, a conservative D.C. nonprofit law firm funded, in part, by the Bradleys of Milwaukee (who fund groups that traffic in misleading or baseless claims about "election integrity" or widespread "voter fraud") – *see* Andy Kroll, *Revealed: The Billionaires Funding the Coup's Brain Trust: Conservative mega-donors including the DeVoses and Bradleys are pumping big money into the Claremont Institute think tank that fueled Trump's election-fraud fantasies*, RollingStone (January 12, 2022), accessible at https://www.rollingstone.com/politics/politics-news/devos-bradley-claremont-trump-election-fraud-insurrection-1274253/ - the plaintiffs argued that their speech had been chilled because they fear the State of California Public Employment Relations Board ("PERB") will erroneously attribute the anti-union statements they wish to make in their individual capacities to their public employers, thereby causing their employers to be sanctioned and damaging their reputations as a result.

PERB, joined by the Union defendants, moved to dismiss on the ground that the district court lacked subject matter jurisdiction over the case because the plaintiffs lacked standing to bring a pre-enforcement challenge and their claims were not ripe for adjudication.

The district court granted the motion to dismiss on both grounds. With respect to standing, the district court emphasized that section 3550 could only be enforced against public employers, not the plaintiffs individually. Rejecting plaintiffs' argument that the statute created a line-drawing problem because it was impossible to know in advance whether their speech would be attributed to their public employers, the court held that plaintiffs had "presented no concrete plan to violate Section 3550, let alone one in which it would not be clear whether a plaintiff was speaking in their official or individual capacity." For the same reason, the court found plaintiffs had failed to show that there was a reasonable likelihood the government would enforce the law against them in the future. Alternatively, the district court held that plaintiffs' claim

was not ripe for review. The court explained that the challenge was not constitutionally or prudentially ripe for largely the same reasons that plaintiffs lacked standing, plus the fact that plaintiffs had not identified any hardship that would result if they could not obtain pre-enforcement review of the statute. The plaintiffs appealed.

The Ninth Circuit affirmed.

Prevailing Defendant Employer's Cost Memorandum Was An Ineffective Means Of Requesting A Discretionary Award Of Costs

In *Neeble-Diamond v. Hotel California By the Sea, LLC*, 2024 WL 414243 (Cal.App. 4 Dist., 2024), the Court of Appeal held that a prevailing defendant employer's cost memorandum was an ineffective means of requesting a discretionary award of costs and that, since defendant employer failed to file a noticed motion requesting a discretionary cost award, the trial court erred when it ordered that costs be added to the judgment.

Employer Not Liable For Shooting By Non-Employee At An Off-Site Meeting Place For Coworkers And Business Associates

In *Colonial Van & Storage, Inc. v. Superior Court of Fresno County*, 2022 WL 819115 (2022), a young man suffering from a mental health condition suddenly fired a handgun at family members and guests inside his family home. The family home was owned Carol Holaday and her husband Jim Willcoxson who were both employed by Colonial Van & Storage, Inc. Among the injured were an employee of Colonial, Crystal Dominguez, and an employee (Rachel Schindler) of a company that did business with Colonial. Both Dominguez and Schindler were involved in work-related activities at the time.

Dominguez and Schindler each filed a lawsuit against Colonial for personal injury damages. Dominguez's operative complaint alleged causes of action for negligence and intentional infliction of emotional distress against Colonial and Holaday and negligent supervision against Holaday alone. As to all causes of action, Dominguez alleged Colonial was vicariously liable for Holaday's misconduct pursuant to the doctrine of respondeat superior. Schindler's separate complaint filed on behalf of herself and her baby daughter pleaded the same causes of action against Colonial and Holaday, alleging substantially the same allegations. Colonial moved for summary judgment on plaintiffs' direct negligence claim for lack of duty because Colonial did not own, possess, or control the home where the shooting occurred, and on all claims because the shooting was an unforeseeable event. As to the claims of direct negligence and intentional infliction of emotional distress against Colonial, plaintiffs asserted there

were triable issues whether Colonial owed plaintiffs a duty to protect because Colonial controlled the home where the shooting occurred; Colonial knew or should have known of the dangers Kyle posed and the corresponding risks associated with using the home as a work site. Both plaintiffs also contended there were triable issues whether Colonial was vicariously liable for Holaday's alleged negligent and intentional misconduct under the doctrine of *respondeat* superior. Following a hearing, the trial court denied summary judgment finding as disputed facts: (1) the extent to which Colonial employees performed work in Holaday's home; (2) the purpose of Dominguez's presence at the home on the evening of the shooting; (3) how long the shooter had lived at the home; and (4) whether plaintiffs were friends with the shooter.

The defendants filed a petition for writ of mandate urging the Fifth District Court of Appeal to vacate the trial court's order denying the motion for summary judgment and enter a new order granting summary judgment. The Court of Appeal granted the petition:

> An employer has an affirmative duty to provide employees with a safe place to work. Does this duty include ensuring that an off-site meeting place for coworkers and business associates like an employee's private residence is safe from third party criminal harm? We hold the answer is "No."

In A Duo Of Cases, California Supreme Court Reiterates Strong Presumption Against Liability for Companies Hirers Of Independent Contractor Are Typically Not Liable For Injuries Sustained By The Independent Contractor Or Its Workers While On The Job

In *Gonzalez v. Mathis*, 12 Cal.5th 29 (2021), the California Supreme Court applied the *Privette* doctrine (*see e.g., Privette v. Superior Court*, 5 Cal.4th 689 (1993); *SeaBright Ins. Co. v. US Airways, Inc.*, 52 Cal.4th 590 (2011)) noting that there is a strong presumption under California law that a hirer of an independent contractor delegates to the contractor all responsibility for workplace safety and held that a hirer is typically not liable for injuries sustained by an independent contractor or its workers while on the job.

Similarly, in *Sandoval v. Qualcomm Incorporated*, 12 Cal.5th 256 (2021), also held that a hirer of an independent contractor is typically not liable for injuries sustained by an independent contractor or its workers while on the job:

> Strong public policy considerations readily acknowledged in our past decisions generally support a straightforward presumption about the responsibilities of hirers and contractors for worker injuries: A person or entity hiring an independent contractor (a "hirer") ordinarily delegates to that independent contractor all responsibility for the safety of the contractor's workers. This presumption is rooted in hirers' reasons for employing contractors in the first place, and society's need for clear rules about who's responsible for avoiding harms to workers when contractors are hired. We have therefore generally avoided subjecting hirers to tort liability for those workers' injuries. But that presumption gives way to two recognized exceptions: where the hirer either withholds critical information regarding a concealed hazard; or retains control over the contractor's work and actually exercises that control in a way that affirmatively contributes to the worker's injury.

(cleaned up).

Family Member Providing Supportive Services Is Not Eligible For Unemployment Benefits

In *Skidgel v. California Unemployment Ins. Appeals Bd.*, 12 Cal.5th 1 (2021), the California Supreme Court held that a family member (minor child, parent, or spouse) rendering in-home services to a disabled or elderly person through the In-Home Supportive Services (IHSS) program is not covered by the state's unemployment insurance program.

At-Will Status Renders Any Reliance On Employer's Representations Of Long Term Employment Unreasonable As A Matter Of Law But At-Will Employment Provision Does Not, As A Matter Of Law, Establish That An Employee's Reliance On An Employer's Promises Regarding The Kind, Character, Or Existence Of Work The Employee Was Hired To Perform Is Unreasonable

In *White v. Smule, Inc.,* 2022 WL 247925 (2022), the Court of Appeal held that the existence of an executed integrated employment agreement providing for "at-will" employment that could be terminated "any time and for any reason" (and stating that "Any promises or representations, either oral or written, which are not contained in this letter are not valid) precluded employee from pursuing a Labor Code Section 970 claim based on allegations that the employer made promises of long-term employment. However, the Court of Appeal held that the integrated agreement providing for "at-will" employment did ***not*** preclude the employee from pursuing a

Labor Code Section 970 claim based on the employer's promises regarding the kind, character, or existence of work the employee was hired to perform – *i.e.,* an employer may still violate Section 970 by mischaracterizing job duties, job title, reporting structures, compensation, working hours, benefits, or other terms and conditions of employment.

Hours Credits And Elevation In Longshore Worker Status, As Set Forth In A Collective Bargaining Agreement, Qualify As "Benefits Of Employment" Under USERRA – Summary Judgment In Favor Of Employer Reversed

In *Belaustegui v. International Longshore and Warehouse Union*, 2022 WL 2036385 (9th Cir. 2022), Leon Belaustegui left his job as an entry-level longshore worker to enlist in the U.S. Air Force. After nine years of active duty, he returned to work as a longshoreman and requested a promotion to the position he claimed he likely would have attained had he not served in the military. He based his claim on the fact that the Collective Bargaining Agreement between the Pacific Maritime Association and the International Longshore and Warehouse Union, which contains provisions that implement USERRA's protections for servicemembers, provides that eligible longshore workers who leave to serve in the military are entitled to reinstatement to the position, along with applicable benefits including hours credits, that an employee would have held had s/he not taken Uniformed Services Leave. When his request was denied, he filed suit alleging discrimination under the USERRA, 38 U.S.C. § 4301, *et seq.,* a federal law that, among other things, protects servicemembers in their reemployment following service in the armed forces. The district court dismissed the case on summary judgment finding that because the relevant CBA provision does not grant hours' credits to workers who are on leave for a reason other than military service, the denial of hours' credits under the CBA does not constitute a "benefit of employment" that was denied on the basis of Belaustegui 's military service.

On Appeal, the Ninth Circuit reversed:

> The district court focused its analysis on whether the hours credits available to returning servicemembers constituted "benefits of employment." It determined that they did not, reasoning that those credits are available just to servicemembers, whereas USERRA protects only employment benefits provided to both military and non-military employees. This analysis was mistaken.
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> . . . .
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> In this context, it is thus no answer, as defendants argue, that the hours credit is available only to servicemembers. That premise is flawed

> because hours credits are part of a collective bargaining agreement intended to implement USERRA's statutory requirements for reemployment. Under defendants' reasoning, when an employer adopts a policy to implement USERRA's guarantees, the policy's protections cannot be "benefits of employment" under § 4303(2) because they are available only to servicemembers. That logic is circular.

Belaustegui v. International Longshore and Warehouse Union, 2022 WL 2036385 (9th Cir. 2022)(cleaned up).

Employer School District Is Not Liable For Employees's Sexual Relationship With Student

In *Doe v. Anderson Union High School Dist.*, 78 Cal.App.5th 236 (2022), a high school student, who had engaged in sexual activity with teacher when the student was 17 years old, brought an action against the school district, the district superintendent, and the school principal, alleging negligent hiring and negligent supervision. The trial court granted the defendants' motion for summary judgment, finding that there was no evidence that the district or any of the other defendants knew or should have known that the teacher posed a risk of harm to students. The Court of Appeal affirmed the dismissal on summary judgment, fining that the risk of harm posed to students by teacher was not foreseeable.

XI. Non-Competition & Non-Solicitation

Non-solicitation Clause Does Not Violate Sherman Antitrust Act

In *Aya Healthcare Servs. v. AMN Healthcare, Inc.*, 9 F.4th 1102 (9th Cir. 2021), the Ninth Circuit addressed a Sherman Antitrust Act challenge to a non-solicitation clause. AMN Healthcare, Inc. contracted with Aya Healthcare Services, Inc. to provide travel nursing services to hospitals and other healthcare facilities. That contract included a non-solicitation provision prohibiting Aya from soliciting AMN's employees. The Ninth Circuit concluded that the non-solicitation provision is both ancillary to the parties' broader agreement to collaborate, and a reasonable, pro-competitive restraint – "The district court did not err in granting AMN's motion for summary judgment. The non-solicitation agreement is an ancillary restraint and therefore is subject to the rule-of-reason—not the per se rule. The agreement does not violate the rule-of-reason because Aya failed to carry its burden of proving the agreement has a substantial anticompetitive effect that harms consumers in the

relevant market. Aya's claim for retaliatory damages also fails because it did not present any evidence of a cartel or a concerted action in the termination of its agreement with AMN."

Customer Non-solicitation Agreement Is Lawful As Part Of An Employee's Sale Of A Business

In *Blue Mountain Enterprises, LLC. v. Owen*, 2022 WL 263398 (2022), Gregory S. Owen sold his ownership interest in several real estate and construction-related firms he had founded to a new entity, Blue Mountain Enterprises, LLC, as part of a joint venture with Acolyte Limited. As part of the transaction, Owen became the Blue Mountain's Chief Executive Officer. As part of his employment contract, Owen agreed to abide by certain restrictive covenants, including a covenant barring him from soliciting Blue Mountain's customers for a three-year period following the termination of his employment. Blue Mountain fired Owen and then sued him for violating the covenant barring him from soliciting Blue Mountain's customers when he established a competing business.

Among other things, Owen defended himself arguing that California law precluded Blue Mountain from enforcing a non-solicitation covenant that is contained in an employment agreement rather than the agreement by which he sold his ownership interest to Blue Mountain. The Court of Appeal affirmed the trial court's decision that he trial court correctly found that Business and Professions Code Section 16601 applies as a matter of law because Owen disposed of all of his ownership interest while concurrently agreeing under the employment agreement to "refrain from carrying on a similar business within a specified geographic area in which the business so sold. The Court of Appeal found that while the sales agreement and the employment agreement do not cross-reference each other, both contracts were drafted to accomplish the Blue Mountain joint business venture – accordingly, rules of contract interpretation require that when several contracts relating to the same matters are made between the same parties and as parts of substantially one transaction, the contracts are to be construed together.

Owens also argued that he did not "solicit" Blue Mountain's customers because he merely sent a non-actionable advertisement on behalf of his new company – Silvermark – to those customers. The Court of Appeal disagreed:

> Owen next asserts that the trial court erred in holding as a matter of law that the Silvermark letter he sent to Blue Mountain's customers constituted a "solicitation," contending that a fact finder could

> conclude that the letter was merely a nonactionable advertisement. We disagree.
>
> The trial court found the letter was clearly a solicitation: In this case, it is undisputed that the letter emailed by Owen was not sent to the public at large, but targeted to business members of the building trade who purchase HVAC systems which included Legacy Customers of Blue Mountain. Further, the evidence shows the emails were not sent generically to the businesses, but were emailed to multiple individuals within each business. This individualized and targeted contact is not consistent with an advertisement or promotional activity directed to the public at large. The court concluded the letter constituted a solicitation as a matter of law because it does more than simply announce a new affiliation; it petitions, importunes and entreats to targeted individual employees of past customers, including Legacy Customers, to leave Blue Mountain for better opportunities at Silvermark.
>
> While there are no cases directly addressing the meaning of "solicit" or "advertisement" in the context of section 16601, at common law, the boundary separating fair and unfair competition in the context of a protected customer list has been drawn at the distinction between an announcement and a solicitation.
>
> The letter was specifically addressed to his "past and potential future clients." He boasted that his new venture, Silvermark, was a superior alternative to Blue Mountain, having "greater perspective, more resources and a much stronger team," including two former Blue Mountain employees "who combined bring over 100 years of experience in the HVAC industry." The letter was a direct appeal for future work and was sent directly to select representatives of Blue Mountain's corporate customers. Thus, the letter constituted a solicitation as a matter of law.

(cleaned up).
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XII. Procedural Issues

Court Of Appeals Affirms Summary Judgment In Favor Of Employer Where Employee Failed To Exhaust His Administrative Remedies By Alleging Gender Discrimination In His Administrative Charge But He Sued For Race And National Origin Discrimination

In *Kuigoua v. Department Of Veteran Affairs*, 2024 WL 1651349 (Cal.App. 2 Dist., 2024), Arno Patrick Kuigoua, a registered nurse working for the Veterans Department, filed an administrative charge alleging that the Department discriminated against him on the basis of his gender. He then filed a lawsuit alleging that he discriminated against on the basis of his race and national origin and that he was sexually harassed. The Department moved for summary judgment on the basis Kuigoua had not exhausted his administrative remedies. The trial court granted the Department's motion. The Court of Appeal affirmed:

> Arno Kuigoua complained about employment oppression to an anti-discrimination agency and to a court. The trouble was he told two divergent stories: one to the agency, but a different one in court. By withholding from the agency the facts he would later allege in his judicial complaint, Kuigoua scotched the agency's ability to learn about, and to conciliate, the dispute Kuigoua sought to litigate in the judicial forum. The court rightly granted summary judgment against Kuigoua for failing to exhaust his administrative remedies.
> Kuigoua loses this appeal because he changed horses in the middle of the stream. His agency complaint was one animal. On the far bank, however, his lawsuit emerged from the stream a different creature. Changing the facts denied the agency the opportunity to investigate the supposed wrongs Kuigoua made the focus of his judicial suit. The court rightly ruled Kuigoua failed to exhaust his administrative remedies.
>
> Kuigoua loses because his judicial claims are not like, and are not reasonably related to, those in his administrative complaint. Nor would an agency investigation based on Kuigoua's administrative complaint necessarily have uncovered the abuses he described in his operative complaint.
>
> We explain each point.

Kuigoua's claims in court were not like his claims in the administrative complaint. The administrative complaint focused on discrimination against men as well as retaliation for Kuigoua's internal complaints. The reasonable interpretation is these internal complaints were about discrimination against men, for Kuigoua identified no other specific basis for a complaint. Kuigoua's identified antagonist was Julian Manalo. The stated interval was three and a half months in 2018. The scene was the veterans facility in West Los Angeles, which was where Manalo was in charge. Nothing in the record connects Manalo with Lancaster.

Kuigoua's operative complaint was unrelated to the claims Kuigoua put in his Commission Form. Julian Manalo disappeared, to be replaced by Mac Smith and Marcelo Quintua. The old claim about sex discrimination against men disappeared, to be replaced by claims of racial and national origin discrimination by Smith and sexual harassment by Quintua. The time frame changed from three and one half months in 2018 to three years, reaching back before Smith's November 2017 retirement. The venue moved 60 miles north.

These claims in court thus were not like, or reasonably related to, the claims in the Commission Form. Kuigoua "concedes that he did not mention anything about race or national origin discrimination in his administrative complaint, nor did he check the boxes for 'race' or 'national origin.' " With candor, Kuigoua admits this omission "certainly does not help" his case.
Turning now to the second part of the exhaustion test, an administrative investigation would not have uncovered the conduct that was the focus of Kuigoua's operative complaint. Investigators working off the Commission Form would have started with Kuigoua's identified antagonist: Julian Manalo. The Department would not have reasonably discovered Kuigoua's alleged issues with Smith and Quintua while investigating the facts on the Commission Form. The one person Kuigoua mentioned on the form -- Manalo -- was not present at the Knight Home, which was the only place Smith and Quintua worked. The investigation thus would have begun in West Los Angeles, where Manalo did work, and would have ended there, for no particular in the Commission Form would have clued in the investigator to the alleged events in Lancaster: Quintua's alleged sexual harassment or Smith's alleged racial epithets.

> In fact, this is how the investigation did work: it never uncovered anything about Quintua or Smith. Investigator Hennig took note of Manalo's supervision of the West Los Angeles facility. Hennig ran down Kuigoua's leads in the Commission Form. Hennig found nothing amiss.

Kuigoua v. Department Of Veteran Affairs, 2024 WL 1651349, *1- (Cal.App. 2 Dist., 2024)(cleaned up).

Ninth Circuit Affirms NLRB's Order Finding That Employer Committed An Unfair Labor Practice By Unilaterally Ceasing Union Dues Checkoff After Expiration Of Collective Bargaining Agreement

In *Valley Hospital Medical Center, Inc. v. National Labor Relations Board,* 2024 WL 678727 (9th Cir. 2024), the Ninth Circuit upheld both the NLRB's rule prohibiting employers from unilaterally ceasing dues checkoff after expiration of a collective bargaining agreement and the NLRB's determination that Valley Hospital engaged in an unfair labor practice.

California Supreme Court Holds Failure to Promote Claims Brought Under FEHA's Harassment Provision Accrues When Employee Knows or Reasonably Should Know They Were Denied Promotion

When does the statute of limitations period begin to run on a FEHA harassment claim?

In *Pollock v. Tri-Modal Distrib. Servs., Inc.*, 11 Cal.5th 918 (2021), Associate Justice Goodwin H. Liu, writing for a unanimous California Supreme Court, held that such a claim accrues, and thus the statute of limitations begins to run, at the point when an employee knows or reasonably should know of the employer's allegedly unlawful refusal to promote the employee. The California Supreme Court also addressed whether Government Code section 12965(b)'s directive that a prevailing FEHA defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so, apply to an award of costs on appeal? The Supreme Court answered "yes," holding that a prevailing-party employer may only recover costs on appeal if the action was "frivolous, unreasonable, or groundless when brought."

Employer Not Allowed To Seek Immigration Status Of Plaintiff

In Manuel v. Superior Court, 82 Cal. App. 5th 719 (2022), the plaintiff alleged that he was fired from his job as an irrigation technician after he suffered an on-the-job back injury. The employer, in turn, claimed that the plaintiff voluntarily failed to return to work after he was identified by Immigration and Customs Enforcement as being ineligible to work in the United States. His complaint sought back and front pay, but his discovery responses made clear that he was no longer seeking lost wages or reinstatement. The trial court granted the employer's motion to compel discovery responses regarding Manuel's immigration status and work eligibility. Manuel filed a petition for a peremptory writ of mandate, which the Court of Appeal granted. It held that Cal. Lab. Code § 1171.5 precludes discovery regarding immigration status absent a showing by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law, a burden the employer failed to meet.

California Court Of Appeal Blasts Discovery Gamesmanship – Upholds Grant Of Summary Judgment Due To Plaintiff's Evasive Discovery Responses – Misses Golden Opportunity To Equally Lambast Defendants For Their Discovery Abuses

In *Field v. U.S. Bank National Association*, 2022 WL 2071074 (2022), a non-employment case, the plaintiff Beth Field answered a key contention interrogatory propounded by Defendant Rushmore with one word: "Unsure." When later confronted with a defense summary judgment motion, however, Field developed belated clarity and finally specified the type of wrongdoing she was accusing the defendant of committing. The Court of Appeal affirmed a grant of summary judgment to the defendant and chastised the plaintiff for her evasive discovery response (*e.g.,* saying "unsure" in her discovery responses regarding whether or not the defendant provided her with notice and then, in opposition to the motion for summary judgment, claiming that she never received notice):

> California's civil discovery process aims to unearth the truth of the case, thus facilitating settlement on the basis of the mutually expected value of the suit. Evasive discovery responses frustrate this goal by concealing the truth. A party cannot evade discovery duties and then try to defeat summary judgment by adding factual claims to create last-minute disputed issues. That was the tactic here, and it fails.
>
> We publish to reiterate you harm your client's interest when you craft or transmit evasive discovery responses. You likewise harm your own prospects if ever you hope for a fee award.
>
> Plaintiff Beth Field answered a key contention interrogatory with one word: "Unsure." When later confronted with a defense summary

> judgment motion, however, Field developed belated clarity and finally specified the type of wrongdoing she was accusing the defendant of committing. We affirm because the trial court properly granted the motion.
>
> A party opposing summary judgment may not move the target after the proponent has launched its arrow. Rushmore's contention interrogatory sought to pin down Field's abstract theory of wrongful disclosure by getting her to specifics. Field's one-word answer was "Unsure." This response was too clever by half. Field had to be diligent and straightforward in responding to discovery. She could not feint with "Unsure" and then later seek to create a disputed issue of fact with assertions she had failed to formulate or to disclose during discovery. Parties prepare interrogatory answers with the assistance of counsel, which justifies a broad duty of response.
>
> Rushmoreasked a simple question to clarify Field's position. Field replied with a cryptic non-answer that could achieve only obfuscation. But the Legislature intended our discovery statutes would take the game element out of trial preparation. Trial courts encountering such an abuse are free to disregard a later declaration that hopes to supplant tactical or slothful ambiguity with tardy specificity.
>
> Field offers a variant of this same argument by saying her failure to receive notice of the trustee's sale prevented her from tendering the balance she owed Rushmore. This branch falls with the tree: Field's untimely and contradictory effort cannot support any attack on this grant of summary judgment, which was proper.

Field v. U.S. Bank National Association, 2022 WL 2071074, at *3 (2022)(cleaned up). Sadly, the Court of Appeal missed a golden opportunity to clearly place defendants on notice that they too engage in discovery gamesmanship at their peril. This, the Court of Appeal, could have accomplished with a few tweaks in its opinion (tweaks in red):

> California's civil discovery process aims to unearth the truth of the case, thus facilitating settlement on the basis of the mutually expected value of the suit. Evasive discovery responses frustrate this goal by concealing the truth. A party cannot evade discovery duties and then try to **obtain or** defeat summary judgment by adding factual claims to **either avoid disputed issues or** create last-minute disputed issues.

California Supreme Court Clarifies Applicability of Anti-SLAPP Statute in Hospital Peer Review Proceedings

In *Bonni v. St. Joseph Health System*, 11 Cal.5th 995 (2021), the California Supreme Court was called upon to determine what types of retaliatory conduct alleged by a doctor stemming from a hospital's medical peer review are subject to dismissal under California's anti-SLAPP statute. In an opinion written by Associate Justice Leondra R. Kruger, the Court held that "[w]hile some of the forms of retaliation—including statements made during and in connection with peer review proceedings and disciplinary reports filed with official bodies—do qualify as protected activity, discipline imposed through the peer review process does not." Thus, the Court held that "while the hospital may seek to strike some of the physician's retaliation claims, the hospital was not entitled to wholesale dismissal of those claims under the anti-SLAPP law."

Ninth Circuit Affirms District Court's Refusal To Enforce Employment Agreement's New Jersey Choice of Law and Non-Competition Provisions

In *DePuy Synthes Sales, Inc. v. Howmedica Osteonics Corp.*, 2022 WL 761495 (9th Cir. 2022), an employer asked the Ninth Circuit to reverse the district court's decisions preventing the employer from enforcing a non-California forum selection clause and a non-competition provision against its former California employee.

When the plaintiff, Jonathan L. Waber, was hired by Howmedica Osteonics Corp. ("HOC") to work as a Joint Replacement Sales Associate in the Palm Springs and Palm Desert areas, he was forced to sign an employment agreement containing: (1) one-year non-competition and non-solicitation provisions; and (2) forum-selection and choice-of-law clauses providing for all disputes between the two to be adjudicated in and resolved under the laws of New Jersey.

When Waber resigned from HOC to go to work for a competitor -DePuy Synthes Sales, Inc. ("DePuy") in the same region he previously serviced HOC's customers, HOC's parent company, Stryker Corporation ("Stryker"), threatened enforcement of the non-compete clause and soon thereafter sent Waber a cease-and-desist letter that threatened legal action. Waber responded with a notice stating that he was exercising his right to void the forum-selection and choice-of-law clauses under California Labor Code § 925. That statute forecloses certain contracts with California employees and renders such agreements "voidable by the employee" under specified conditions.

Having purported to void the forum-selection and choice-of-law clauses, DePuy and Waber, through shared counsel, filed a preemptive declaratory judgment action in the

United States District Court for the Central District of California, seeking a ruling that the forum-selection and choice-of-law clauses were void under § 925, that California law governs the dispute, that the non-compete clause was void as a violation of California Business and Professions Code § 16600, and that DePuy was not subject to a tortious interference claim. In response, Stryker, seeking to enforce the forum-selection clause, filed a motion to dismiss under 28 U.S.C. § 1406 or to transfer to the United States District Court for the District of New Jersey under 28 U.S.C. § 1404(a).

Because Waber satisfied all the prerequisites in § 925, the District Court for the Central District of California concluded that the forum-selection clause "shall not be enforced" under state law. Having found the forum-selection clause unenforceable, the District Court applied the factors normally considered by courts in deciding transfer motions under § 1404(a) and found both the private factors—including the plaintiff's choice of forum and the convenience to the parties—and the public factors—including familiarity with governing law and California's local interest manifest in its strong public policy against enforcing out-of-state forum-selection clauses as reflected in § 925—to weigh against transfer. The District Court therefore denied Stryker's motion. Applying California law, the District Court then granted partial summary judgment in favor of DePuy and Waber, holding that § 925 and § 16600 rendered the forum-selection, non-compete and non-solicitation clauses in Waber's contract void and unenforceable. HOC appealed both the order denying transfer and the judgment. The Ninth Circuit affirmed.

California Court of Appeal Establishes Guidelines By Which Class Action Settlements Are To Be Evaluated

In *Amaro v. Anaheim Arena Management, LLC*, 69 Cal.App.5th 521 (2021), the Court of Appeal, bemoaning a paucity of state law guidance for evaluating class action settlements, published its opinion to fill in that void. While the opinion offers too many nuggets of wisdom to list in this article, some of the more important pieces of guidance include: (1) the release in any class action settlement should be limited to the factual allegations set forth in the complaint; (2) employers may settle FLSA claims within the context of a state law wage and hour class action without requiring opt-ins; (3) a plaintiff may, in the trial court's discretion, release PAGA claims outside the one-year limitations period of her own claim; and (4) the court of appeal addressed what steps are necessary for plaintiffs' counsel to fend off an allegation that the settlement was the product of a collusive reverse auction.

California Court of Appeal Clarifies Standards for Liability For Joint Employer Liability

In *Medina v. Equilon Enterprises, LLC*, 68 Cal.App.5th 868 (2021), the Court of Appeal held that a person can be a joint employer without exercising direct control over the employee: "If the putative joint employer instead exercises enough control over the intermediary entity to indirectly dictate the wages, hours, or working conditions of the employee, that is a sufficient showing of joint employment."

Ninth Circuit Finds That Garmon Preemption Applied To Claims For Intentional Misrepresentation, Fraud, Whistleblower And Wrongful Termination Claims

In *Moreno v. UtiliQuest, LLC*, 2022 WL 816665 (9th Cir. 2022), plaintiff Cesar Antonio Moreno appealed from the district court's dismissal of his lawsuit against his former employer, defendant UtiliQuest. Moreno alleged that UtiliQuest promised him that if he convinced all of his fellow employees to "sign away" their union rights, they would each receive a ten percent raise. Once Moreno obtained signatures from his co-workers releasing their union rights, UtiliQuest gave him a ten percent raise. Moreno soon learned, however, that UtiliQuest did not give any other employees the promised raise. Moreno contends he was terminated after confronting his supervisors about UtiliQuest's breach of its promise. Moreno brought various claims related to his termination, but the district court dismissed them because it found that they were preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 et seq. The Ninth Circuit affirmed the district court's dismissal of Moreno's complaint:

> The NLRA does not contain express preemption provisions, but the Supreme Court held that two categories of state action are implicitly preempted: (1) laws that regulate conduct that is either protected or prohibited by the NLRA (*Garmon* preemption), and (2) laws that regulate in an area Congress intended to leave unregulated or controlled by the free play of economic forces (*Machinists* preemption). UtiliQuest contends that Garmon preemption applies to Moreno's claims.
>
> Sections 7 and 8 of the NLRA provide a private cause of action for claims based on the conduct of labor organizations or their agents that constitute unfair labor practices. Specifically, NLRA Section 7 protects the right of employees "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8 bars unfair labor practices by employers and labor organizations and also makes it illegal "for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7 of the NLRA]." Id. at § 158(a)–(b).

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. *Garmon's* central concern is the potential for conflict with federal policy. The Supreme Court acknowledged that it is not always clear whether a particular activity is preempted, but even when a court is unsure, it should leave the determination to the National Labor Relations Board (NLRB).
>
> Moreno brought several California state law claims relating to his termination: intentional misrepresentation (Count 7); fraud and deceit (Count 8); whistleblowing retaliation (Counts 9 & 10); and wrongful termination in violation of public policy (Count 11). In connection with *Garmon* preemption, it is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction. In *Local 100 of United Ass'n of Journeymen and Apprentices v. Borden*, 373 U.S. 690, 697 (1963), the Supreme Court held that plaintiff's claims were preempted even though his complaint sounded in contract as well as in tort because the facts as alleged in the complaint, and as found by the jury, could arguably support a finding that the conduct violated the NLRA. As the district court correctly found here, all of Moreno's claims arguably implicate NLRA Sections 7 and 8 and are subject to *Garmon* preemption.

Moreno v. UtiliQuest, LLC, 2022 WL 816665, at *3 (9th Cir. 2022)(cleaned up).

California Court of Appeal Holds That Jury's Award Of $3.5 Million In Emotional Distress Damages Was Shockingly Disproportionate To The Evidence Of The Plaintiff's Harm And Could Not Stand

In *Briley v. City of West Covina*, 66 Cal.App.5th 119 (2021), the Court of Appeal held that the jury's award of $3.5 Million in emotional distress damages was "shockingly disproportionate" to the following evidence of the plaintiff's harm and could not stand:

- The plaintiff testified that he was "pretty devastated" by his firing and caused him distress because his livelihood was taken away and because he had dedicated his life to his employer for 8 years.
- The plaintiff testified that he thought about being fired every day and that the ordeal impacted almost every aspect of his life - when asked for details, however, the plaintiff offered little detail regarding the distress he had

experienced or the impact his termination had on his life. He noted only having sleep-related "issues" associated with financial uncertainty, prior worries about his ability to provide for the 17- and 19-year-old children of his romantic partner at the time of his termination, and feeling wronged by the City's unfair process and the false allegations against him.

- There was no evidence that any of the problems that the plaintiff described was particularly severe. He described no physical symptoms beyond his unspecified sleep-related issues. He had seen a counselor once or twice but reported no mental health issues.
- On cross-examination, the plaintiff confirmed he had experienced the gamut of emotions anyone would experience upon his or her termination from employment.

The Court of Appeal held that the plaintiff's emotional distress damages should have been no more than $1.1 million, which it noted was still "high" given that the plaintiff's symptoms of emotional distress.

Section 998 Offer To Compromise Invalid As It Violated Labor Code

In *Wasito v. Kazali*, 68 Cal.App.5th 422 (2021), the Court of Appeal held that "Labor Code sections 206 and 206.5 preclude a section 998 offer that resolves disputed wage claims if there are undisputed wages due at the time of the offer."

An Expert May Rely On Inadmissible Evidence To Form An Opinion If The Source Is Reliable

Rosalinda Zuniga was employed by Alexandria Care as a housekeeper. Zuniga sued alleging, among other things, a PAGA claim for various wage-and-hour violations. At the bench trial, Zuniga planned to rely on the testimony of an expert, Dr. Richard Drogin, who performed a statistical analyses of Alexandria Care's timekeeping and payroll records and the testimony of Dean Van Dyke regarding the conversion of Alexandria Care's timekeeping and payroll records from portable document format into computer-readable spreadsheets by Van Dyke's company, iBridge LLC. Alexandria Care objected to the testimony and documents of Drogin and Van Dyke. The trial court ruled that Van Dyke was not qualified to be an expert and that he did not provide the proper foundation necessary for admitting the spreadsheets, and based on this excluded the spreadsheets and Van Dyke's testimony from evidence. The trial court then ruled that it would not consider Drogin's testimony because it relied on the inadmissible iBridge-prepared spreadsheets. After the close of Zuniga's case,

Alexandria Care filed a motion for judgment pursuant to Code of Civil Procedure section 631.8. The trial court granted the motion.

On appeal, in *Zuniga v. Alexandria Care Ctr., LLC*, 67 Cal. App. 5th 871 (2021), the Court of Appeal reversed the judgment for Defendant and remanded the case for a new trial. The Court of Appeal held that, while was no abuse of discretion in excluding the iBridge-prepared spreadsheets for lack of foundational testimony necessary to authenticate them, the trial court erred by excluding Drogin's testimony, rejecting the contention that Drogin's use of the iBridge-prepared spreadsheets rendered his opinion inadmissible. The court explained that California Evidence Code section 801 does not limit experts to the use of admissible evidence in forming an opinion. Instead, it provides that the basis of the opinion must be reliable. Issues with the accuracy of iBridge's conversion work, therefore, went to the weight of Drogin's testimony, not its admissibility.

Given The High Stakes Involved In Motions For Summary Judgment, Continuances To Conduct Discovery To Contest Such Motions Are Virtually Mandated Upon A Good Faith Showing That A Continuance Is Needed To Obtain Facts Essential To Justify Opposition To The Motion

In *Braganza v. Albertson's LLC*, 67 Cal.App.5th 144 (2021), a slip-and-fall case, the Court of Appeal held that "Given the high stakes involved in motions for summary judgment and summary adjudication, continuances under section 437c, subdivision (h), are virtually mandated upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion." (cleaned up). Such an affidavit of need must "show that (1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain or discover these facts." (cleaned up).

Secretary Of Labor Ordered To Disclose Informant-Employees Testifying At Trial Along With Their Unredacted Witness Statements

In *In re Walsh*, 15 F.4th 1005 (9th Cir. 2021), the Secretary of Labor for the U.S. Department of Labor petitioned the Ninth Circuit for a writ of mandamus to reverse the district court's order requiring the Secretary to disclose the identities of informants who will testify at trial and to reveal their unredacted interview notes. The Ninth Circuit declined to issue the writ finding that the district court had carefully balanced the competing interests of the Secretary of Labor, on the one hand, and the employer, on the other hand, before making its decision and concluded that the employer needed the information before summary judgment motions were due.

Court Of Appeal Upholds Employee's Calculation of Unpaid Wages

In *Morales v. Factor Surfaces LLC*, 70 Cal.App.5th 367 (2021), Byron Jerry Morales sued his former employer, Factor Surfaces LLC, for, among other things, unpaid overtime wages, meal and rest break compensation, statutory penalties for inaccurate wage statements, retaliation, and wrongful termination in violation of public policy. After a bench trial, the trial court entered judgment in favor of Morales in the amount of $99,394.16, which included $42,792.00 in unpaid overtime wages. Factor's sole contention on appeal is that the trial court erred in calculating Morales's regular rate of pay for purposes of determining the amounts owed to Morales for unpaid overtime. The trial court calculated Morales's regular rate of pay by dividing his weekly paychecks by 40, the number of non-overtime hours Morales worked per week. Factor argued that the trial court erred by not isolating the commissions paid to Morales per week, and dividing those commissions by the actual number of hours Morales worked in a workweek (*i.e.,* 50 or 58 hours) as opposed to 40 hours. Morales did not dispute that, all things being equal, the proper method for calculating the "regular rate of pay" for commission workers is to divide the total commission payments for the week by the actual number of hours worked during the week, including overtime hours. However, he argued that because Factor failed to provide records demonstrating the portion of each weekly paycheck attributable to commissions (if any) and the actual number of hours worked by Morales each week, and failed to propose any manner in which the court could accurately estimate the commission payments, the court could properly divide the total weekly paycheck by 40 to approximate Morales's regular rate. The Court of Appeal agreed with Morales.

Plaintiff Entitled To Obtain Testimony Showing That Employer Attempted To Suppress Or Alter A Witness's Testimony

In *Ross v. Superior Court of Riverside Cnty.*, 77 Cal.App.5th 667 (2022), the Court of Appeal, explaining that evidence that a party sought to suppress or alter a witness's testimony may indicate a consciousness of guilt, and courts have found evidence of such efforts admissible when the testimony concerned issues critical to the case, reversed the trial court's order quashing a deposition subpoena aimed at discovering whether the employer's attorneys attempted to convince a witness to alter his testimony.

Plaintiff, A California Resident, May Rely Upon Labor Code § 925 To Challenge Non-Compete

Labor Code Section 925, which went into effect on January 1, 2017, provides that employers cannot force an employee who resides and works primarily in California to

agree, as a condition of employment, to: (1) litigate a claim arising in California in a forum outside of California; or (2) waive the employee's right to the substantive protection of California law with respect to a controversy arising in California. Any provision in a contract that violates these terms is voidable by the employee, and if a violative provision is rendered void at the employee's request, the matter must be adjudicated in California under California law.

In *LGCY Power, LLC v. Superior Court*, 75 Cal. App. 5th 844 (2022), LGCY Power, which is headquartered in Salt Lake County, Utah, employed Michael Jed Sewell as a sales representative and sales manager. In 2015, LGCY Power forced Sewell to sign an employment agreement which included noncompetition, non-solicitation and confidentiality provisions as well as Utah choice of law and forum provisions. In 2019, Sewell and several other executives and managers left LGCY to form a competing solar sales company. Shortly thereafter, LGCY sued Sewell and the other former employees in Salt Lake County for breach of their employment agreements, breach of fiduciary duty, misappropriation of trade secrets and related claims. Four of the defendants (not including Sewell) filed a joint cross-complaint against LGCY in the Utah court proceeding and then unsuccessfully sought dismissal of LGYC's action against them. Sewell filed a complaint against LGCY in California Superior Court, asserting breach of contract, unjust enrichment, and California wage claims and sought declaratory relief. LGCY demurred to Sewell's complaint, contending his causes of action were barred by both California and Utah's compulsory cross-complaint statutes, which both require that a defendant bring any related causes of action he or she has against the plaintiff in a cross-complaint. (Code Civ. Proc., § 426.30, subd. (a); Ut. Rules Civ. Proc., rule 13(a).) The trial court overruled the demurrer, concluding section 925 provided an exception to Code of Civil Procedure section 426.30, subdivision (a), and thus Sewell was not precluded under California law from bringing his claims in California despite there being a pending related suit in Utah.

LGCY filed a petition for a writ of mandate challenging the trial court's order overruling its demurrer. LGCY requested that the Court of Appeal issue a writ of mandate directing the trial court to vacate its order overruling the demurrer and enter a new order sustaining the demurrer. As a consequence, the Court of Appeal was required to answer two related questions of first impression. First, does Section 925 provide an exception to California's compulsory cross-complaint statute (Code Civ. Proc., § 426.30) such that an employee who comes within section 925 's purview may file a complaint in California alleging claims that are related to the causes of action their employer has filed against them in a pending action in a sister state? The Court of Appeal concluded that the answer to that question is yes. Second, if a related action was filed first and is still pending in a sister state (here, Utah), does the Full Faith and Credit Clause of the United States Constitution (U.S. Const., art IV, § 1) compel a

state court (here, California) to extend credit to and apply the sister state's compulsory cross-complaint statute? The Court of Appeal determined that the answer to that question is no. Accordingly, the Court of Appeal held that LGCY failed to demonstrate that the trial court erred in overruling its demurrer, and the Court of Appeal therefore denied its petition.

District Court Improperly Remanded Putative Class Action To State Court Based On Calculation Error Regarding Amount In Controversy

In *Jauregui v. Roadrunner Transp. Servs., Inc.*, 28 F.4th 989 (9th Cir. 2022), hourly employees of a transportation company filed a putative class action in state court against their employer, claiming wage and overtime violations of California law. After the employer removed pursuant to Class Action Fairness Act (CAFA), the employees moved to remand. The district court granted the motion to remand. On Appeal, the Ninth Circuit reversed holding that it was error for district court, in determining the amount in controversy under CAFA, to assign zero amounts to some of the employees' claims simply because it disagreed with employer's underlying assumptions regarding the amount in controversy estimates.

Ninth Circuit Holds That: (1) Objector Could Not Appeal PAGA Settlement Because He Was Not A Party To The Underlying PAGA Action Even Though He Was A Member Of The Putative Class Action; And (2) Approval Of Class Action Settlement Reversed Because District Court Employed An Incorrect Legal Standard

In *Saucillo v. Peck*, 25 F.4th 1118 (9th 2022), a trucking company's drivers brought a putative class action against the trucking company, alleging a violation of California's labor law requiring an employer to indemnify his or her employees for all necessary expenditures or losses incurred by the employee in direct consequence of his or her duties, and a representative claim pursuant to the California Private Attorneys General Act. Following the trucking company's removal to federal court, and plaintiffs' filing of consolidated complaint, the parties filed a motion for approval of a class action/PAGA settlement. Lawrence Peck and Sadashiv Mares filed objections to the settlement agreement. Peck objected to the PAGA portion of the settlement, while Mares argued that the monetary award for the class claims was not fair and reasonable. The district court overruled both sets of objections and gave final approval to the settlement.

On appeal, the Ninth Circuit initially held that Peck may not appeal the PAGA settlement because he is not a party to the underlying PAGA action even though he was maintaining a parallel PAGA action, even though he was a class member of the class action, and even though he might ultimately receive a portion of the PAGA

settlement. However, the Ninth Circuit vacated the district court's approval of the class action settlement agreement and remand the class action for further proceedings, as the district court abused its discretion by applying an incorrect legal standard when evaluating the settlement. The district court stated that "the parties engaged in arm's-length, serious, informed and non-collusive negotiations between experienced and knowledgeable counsel … after mediation with a neutral mediator. The settlement agreement is therefore presumptively the product of a non-collusive, arms-length negotiation." The Ninth Circuit determined that the district court should have applied a heightened standard in the absence of a certified class.

Failure To Prevail On Section 132a Claim Does Not Bar Disability And Retaliation-Related Claims

Kaur v. Foster Poultry Farms LLC, 83 Cal. App. 5th 320 (2022), involved an employee who sued her employer for discrimination, failure to accommodate, failure to engage in the interactive process, failure to prevent discrimination, and retaliation under the Fair Employment and Housing Act (FEHA), as well as retaliation under Cal. Lab. Code § 1102.5. She previously filed an unsuccessful Cal. Lab. Code § 132a claim before the Workers' Compensation Appeals Board (WCAB). The trial court granted summary judgment after it determined that her failure to prevail on her section 132a claim barred her disability and retaliation-related claims (it also found that she failed to exhaust her administrative remedies with respect to her race/national origin claims).

The Court of Appeal reversed, holding that the WCAB's decision denying her discrimination claim did not have collateral estoppel effect on disability-related claims under FEHA. It also held that while the plaintiff timely exhausted her administrative remedies as to her race/national origin claims with respect to her direct supervisor, she failed to do so with respect to conduct by two other supervisors.

Venue Proper In County Where Remote Work Was Performed Or Would Have Been Performed But For The Unlawful Practices

Malloy v. Superior Court, 83 Cal. App. 5th 543 (2022), addressed the application of FEHA's venue provision, Cal. Gov't Code § 12965(c)(3), in situations where employees work remotely. It held that, in such cases, the employee can bring a lawsuit in the county where the remote work was performed or would have been performed but for the unlawful practices.

Court Of Appeal Provides Guidance As To When An Individual Could Proceed In Litigation Using A Pseudonym

Dep't of Fair Employment & Hous. v. Superior Court, 82 Cal. App. 5th 105 (2022), provided guidance as to when an individual could proceed in litigation using a pseudonym. In that case, the affected employee had alleged that he was denied opportunities and disparaged because he was Indian and came from the lowest caste, while two of his supervisors were also Indian and came from the highest caste. The DFEH filed suit, and it moved for an order allowing the employee to proceed under a fictitious name out of concern that his family members in India could be subjected to violence if their caste affiliation became known, could hinder his ability to obtain future employment, and might lead to social ostracism. The trial court denied the motion, declining to consider the impact on the employee's family in India, and deeming the potential denial of future employment opportunities and risk of harassment speculative. The DFEH petitioned for a writ of mandate. The Court of Appeal granted the petition. It held that a party's request for anonymity should be granted "only if the court finds that an overriding interest will likely be prejudiced without use of a pseudonym, and that it is not feasible to protect the interest with less impact on the constitutional right of access," and that, in applying this standard, the trial court committed error by expressly declining to consider the employee's concern about safety of family members in India.

XIII. Punitive Damages

California Court Of Appeal Revisits Guidelines For Assessment Of Punitive Damages; Holds A 2:1 Ratio Of Punitive To Compensatory Damages Was Appropriate Based On Defendant's "Moderately Reprehensible" Conduct

In *Contreras-Velazquez v. Family Health Ctrs. of San Diego, Inc.*, 62 Cal.App. 5th 88 (2021), the Court of Appeal considered whether the imposition of $5 Million in punitive damages was constitutionally appropriate. Rosario Contreras-Velazquez sued her former employer, Family Health Centers of San Diego, Inc., alleging disability discrimination and related causes of action after she suffered a work-related injury and Family Health terminated her employment. Family Health prevailed in the initial jury trial but the trial court ordered a new trial as to three of Velazquez's causes of action after finding the evidence was insufficient to support the jury's verdict—a ruling affirmed in a prior appeal. At the ensuing retrial, a jury found in favor of Velazquez. The jury awarded her $915,645 in compensatory damages and $5 million in punitive damages. However, the trial court granted, in part, a motion for judgment notwithstanding the verdict and reduced the punitive damages award to $1,831,290 (a 2:1 ratio of punitive to compensatory damages). The court reasoned that a punitive damages award equal to twice the compensatory damages award was the maximum

amount permissible under the due process clause of the Fourteenth Amendment to the United States Constitution.

Family Health appealed contending that even the reduced punitive damages award remains grossly excessive in violation of its due process rights. Family Health requested that the punitive damages award be further reduced to $915,645 (a 1:1 ratio of punitive to compensatory damages). Velazquez cross-appealed the JNOV order and requested reinstatement of the $5 million punitive damages award.

The Court of Appeal articulated the substantive guideposts that the U.S. Supreme has held reviewing courts must consider in evaluating the size of punitive damages awards: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. With respect to the reprehensibility guidepost, which is the most important of the three, the Court of Appeal repeated the five factors identified by the U.S. Supreme Court – namely, whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident.

The Court of Appeal found that the first reprehensibility factor was present because, as the trial court found, Family Health's conduct caused Velazquez physical harm in the form of emotional and mental distress. The Court of Appeal also found that the second reprehensibility factor was present because Family Health reasonably could have foreseen its discriminatory conduct would affect Velazquez's emotional well–being, and therefore its conduct evinced an indifference to or a reckless disregard of the health or safety of others. The Court of Appeal also found that the third reprehensibility factor was present because Velazquez was a financially vulnerable victim. Regarding the fourth reprehensibility factor, the Court of Appeal found that there was scant evidence Family Health engaged in repeated misconduct of the sort that injured Velazquez. Finally, the Court of Appeal held that the fifth reprehensibility factor is of little value in assessing a California punitive damages award because accidentally harmful conduct cannot provide the basis for punitive damages under California law.

In sum, finding that some reprehensibility factors are present while others were absent or present only to a small extent, the Court of Appeal agreed with the trial court's assessment that Family Health's conduct was moderately reprehensible and held that

the trial court properly reduced the punitive damages award to an amount equal to twice the compensatory damages award.
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Punitive Damages May Be Based On Non-Economic Damages Not Recoverable Because The Plaintiff Died

Maria Teresa Lopez was employed by CIA Wheel Group ("CWG") as a sales representative. Lopez learned that she had cancer and took a three-month medical leave for surgery. Thereafter, she had to undergo chemotherapy and then have follow-up medical appointments. Lopez, who had previously had a good relationship with her supervisor, A.J. Russo, noticed that everything thing changed between them when she was diagnosed with cancer as Russo began to make negative comments to both her and other employees about Lopez taking time off for medical appointments, Russo rolled his eyes and breathed heavily as if frustrated with Lopez, Russo began to complain about some of Lopez's behaviors which had not been an issue before her medical leave, Russo treated Lopez in a poorer manner than he treated her peers, and Russo started taking credit for Lopez's sales. Lopez complained to Human Resources about the disparate treatment but her complaint was ignored as Human Resources told her that she should not "bump heads" with her supervisor. Eventually, Russo informed Human Resources and CWG's Executive Vice President that he wanted to fire Lopez for poor performance. Human Resources and CWG's Executive Vice President authorized the termination even though the firing violated CWG's policy, which required a warning, ordinarily in writing, before termination. Neither Human Resources nor CWG's Executive Vice President checked to see if Russo's claims of poor performance were accurate. With CWG's authorization in hand, Russo fired Lopez citing poor sales. Lopez believed that she was fired due to her cancer because: (1) her personnel file did not include any written performance warnings or disciplinary actions; (2) she was the highest producing sales person in the Los Angeles office; (3) the negative manner in which Russo began to treat her after her cancer diagnosis; and (4) the reason used to justify her firing was false. Lopez sued CWG alleging that it fired her in violation of public policy because she had cancer.

Lopez died during the first trial of this matter, and the court declared a mistrial. The court appointed Lopez's three children as her successors in interest. Following a second trial, the court found that CWG terminated Lopez due to her medical condition and awarded the plaintiffs $15,057 in economic damages. The court determined that punitive damages were warranted, found that Lopez's noneconomic damages were in the $100,000 to $150,000 range but not recoverable by the plaintiffs after Lopez's death due to Code of Civil Procedure section 377.34, and awarded

punitive damages in the amount of $500,000. The court also added another company - Wheel Group Holdings - as a judgment debtor as an alter ego of or successor to CWG. CWG appealed arguing that the punitive damages award was constitutionally excessive because its conduct was not particularly reprehensible and the punitive damages were 33.3 times the amount of the $15,057 economic damages award. In *Rubio v. CIA Wheel Group*, 63 Cal.App. 5th 82 (2021), the Court of Appeal rejected CWG's argument finding that the punitive damages award was only 3.5 times higher than Loez's actual harm (which was in the $115,057 to $165,057 range) even if most of that harm was non-compensable due to the operation of Code of Civil Procedure section 377.34. In so ruling, the Court of Appeal held that "[e]vidence that an employer offered a pretextual explanation to justify its wrongful termination may support a finding of malice or oppression."

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), after five years of litigation, plaintiffs representing a subclass of Apple's retail workers were awarded $2,000,000 in damages for violations of certain California wage-and-hour labor laws. The trial court memorialized this award in its September 2017 judgment, noting that costs would be determined at a later time. Shortly after entry of the judgment, the plaintiffs filed a memorandum of costs. Several months later, the plaintiffs moved for attorney's fees under Code of Civil Procedure section 1021.5. Apple opposed the award of attorney's fees and filed a motion to tax costs. In March 2018, the court granted the attorney's fee motion, awarding over $2,000,000 to class counsel. A month later it partially granted Apple's motion to tax costs, reducing the recoverable amount to about $440,000. These amounts for costs and attorney's fees were ultimately included in the judgment, but the court did not specify when interest on that portion of the judgment would start.

Both parties appealed. But, after participating in the appellate court's settlement program, the parties came to an agreement that dismissed their respective appeals. The matter was remanded to the trial court for "further proceedings on a distribution plan and appropriate notice."

The trial court initially encouraged the parties to work together to determine the details of distribution, but an insurmountable controversy developed regarding the date on which interest for the attorney's fees and costs awarded to plaintiffs should begin to accrue. Apple maintained that interest should only begin when the amounts were made certain—March 2018 for the fees and April 2018 for the costs—whereas

plaintiffs argued both should run from the date the judgment was entered, in September 2017. The court ultimately adopted Apple's position, entering an order that stated the interest would begin accruing on the dates the respective awards were quantified.

On appeal, the Court of Appeal held that the interest began to accrue as of the date of judgment, even though dollar amount had yet to be ascertained.

IXV. Wage & Hour and PAGA

California Supreme Court Holds That If An Employer Reasonably And In Good Faith Believed It Was Providing A Complete And Accurate Wage Statement In Compliance With The Requirements Of Section 226, Then It Has Not Knowingly And Intentionally Failed To Comply With The Wage Statement Law

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,* 2022 WL 2135491 (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; *abrogating Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (20114). In a possible "silver-lining," the Court held that the former employee's non-individual PAGA claims had to be dismissed because "PAGA provides no mechanism to enable a court to adjudicate nonindividual PAGA claims once an individual claim has been committed to a separate proceeding." In her concurring opinion, Justice Sotomayer explained that the FAA poses no bar to the adjudication of a plaintiff's "non-individual" PAGA claims and that should the California courts determine that, or the California Legislature modify 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. 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.

U.S. Supreme Court to Decide Whether Highly Paid Employee Gets FLSA Overtime

In *Helix Energy v. Hewitt* (21-984), the U.S. Supreme Court granted cert to determine whether a supervisor making over $200,000 each year was entitled to overtime pay

because he was paid based on a daily rate, not a salary basis (as required by 29 CFR § 541.601), even though his daily rate was more than twice the weekly minimum.

California Supreme Court Holds That Trial Courts Lack Inherent Authority To Strike PAGA Claims On Manageability Grounds

In *Estrada v. Royalty Carpet Mills, Inc.*, 15 Cal. 5th 582 (2024), the California Supreme Court holds that trial courts lack inherent authority to strike PAGA Claims on manageability grounds.

California Supreme Court Holds That Its Decision in Dynamex Applies Retroactively

In *Dynamex Operations W. v. Superior Court*, 4 Cal.5th 903 (2018), the California Supreme Court held that the "ABC" test applied to the determination of whether drivers were employees or independent contractors under suffer or permit work standard in California's IWC Wage Orders. Under the ABC test, unless the hiring entity establishes (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact, (B) that the worker performs work that is outside the usual course of the hiring entity's business, and (C) that the worker is customarily engaged in an independently established trade, occupation, or business, the worker should be considered an employee and the hiring business an employer under the suffer or permit to work standard in wage orders. In *Vazquez v. Jan-Pro Franchising International, Inc.*, 10 Cal.5th 944 (2021), the California Supreme Court held that its decision in *Dynamex* applies retroactively.

California Supreme Court Issues Significant Wage & Hour Decision: Employers May Not Round Punch Times in the Meal Period Context

In *Donohue v. AMN Servs., LLC*, 11 Cal.5th 58 (2021), Associate Justice Goodwin H. Liu, writing for a unanimous Court, answered two important questions about meal periods:

(1) Can employers engage in the practice of rounding time punches in the meal period context? Answer: No.
(2) Do time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations, including at the summary judgment stage? Answer: Yes.

While the Supreme Court recognized that time rounding was, in general, permitted under federal law and prior California decisions, it decided not to follow that authority

in the case of meal periods. Instead, citing the "health and safety concerns" that underlie meal period requirements, the Court distinguished "the meal period context from the wage calculation context, in which the practice of rounding time punches was developed" and noted that "even relatively minor infringements on meal periods can cause substantial burdens to the employee." The Court went on to endorse a concurrence by Justice Werdegar in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012), oft-cited by plaintiffs' lawyers, in which she suggested that if an employer's records did not reflect a compliant meal period, it would raise a rebuttable presumption that none was provided. However, the Court did provide helpful clarification about how employers could overcome such a presumption: "by presenting evidence that employees were compensated for noncompliant meals or that they had in fact been provided compliant meal periods during which they chose to work."

California Supreme Court Holds That Premium Pay For Violating Labor Code's Meal And Rest Break Provisions Constitutes "Wages" For Purposes Of Waiting Time Penalties

In *Naranjo v. Spectrum Security Services, Inc.,* 2022 WL 1613499 (2022), the California Supreme Court held that: (1) premium pay for violating the Labor Code's meal and rest break provisions constitutes "wages" for purposes of waiting time penalties; (2) an employer's obligation to report wages earned includes an obligation to report premium pay for meal or rest break violations; and (3) statute establishing 10% prejudgment interest rate for contract claims did not apply to claims alleging meal and rest break violations.

California Supreme Court Holds That Meal And Rest Period Premiums Must Be Paid At The "Regular Rate Of Pay"

In *Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal.5th 858 (2021), the California Supreme Court considered whether an employer violated California law by failing to include an employee's nondiscretionary bonuses when calculating meal and rest break premiums. Both the trial court and the court of appeal held in favor of the employer, concluding that the "regular rate of pay" as used in Labor Code Section 510 was not synonymous with the "regular rate of compensation" as used in Section 226.7. The California Supreme Court saw things differently, however. In a unanimous opinion authored by Associate Justice Goodwin Liu, the Court held that "regular rate of compensation" as used in Section 226.7 means the same thing as "regular rate of pay" in this context. Finally, the Court rejected Loews's argument that this opinion should apply only prospectively and determined that the opinion applies retroactively.

Another California Court of Appeal Holds That Epic Systems Was Not Preempted By The FAA

In *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348 (2014), the California Supreme Court had held that individual employees cannot contractually waive their right to bring a representative action under the PAGA, and that this state law rule is not preempted by the FAA. In *Williams v. RGIS, LLC*, 2021 WL 4843560 (Cal.App. 2021), an employer argued that *Iskanian* was subsequently abrogated by the United States Supreme Court's decision in *Epic Systems Corporation v. Lewis*, ––– U.S. ––––, 138 S.Ct. 1612 (2018). The Court of Appeal, agreeing with every published court of appeal decision on this issue, rejected the employer's argument and followed the holding in *Iskanian*.

Court of Appeal Clarifies That A Plaintiff's PAGA Notice Is Not Deficient For Failing To Reference Other Aggrieved Employees Implicated By The Representative Action

In *Santos v. El Guapos Tacos, LLC*, 2021 WL 5626375 (Cal.App. 6 Dist., 2021), the Court of Appeal addressed a wage and hour action, where the trial court had dismissed with prejudice plaintiff Carolina Chavez-Cortez's representative cause of action under PAGA for failure to satisfy the notice requirements under the act. Relying on *Khan v. Dunn-Edwards Corp.*, 19 Cal.App.5th 804 (2018) and *Brown v. Ralphs Grocery Co.*, 28 Cal.App.5th 824 (2018), El Guapos Tacos argued that the plaintiff's PAGA notice was defective because she did not reference either a "group of others" or "other aggrieved employees." The trial court accepted this argument and dismissed the PAGA claims. The Court of Appeal disagreed and reversed: "We do not see how a general reference to 'a group of others' or to 'other aggrieved employees' is necessary to inform the LWDA or the employer of the representative nature of a PAGA claim. While we appreciate that uniquely individual claims would not satisfy the statute, a prefiling notice is not necessarily deficient merely because a plaintiff fails to state that she is bringing her PAGA claim on behalf of herself and others. PAGA claims function as a substitute for an action brought by the government itself. Thus, PAGA claims, by their very nature, are only brought on a representative basis." (cleaned up).

Courts Have An Obligation To Ensure That PAGA Settlements Are Fair – Hence, Where Concurrent PAGA Actions With Overlapping Claims Exist, The PAGA Representative In The Separate Action May Seek To Become A Party To The Settling Action And Appeal The Fairness Of The Settlement

In *Moniz v. Adecco USA, Inc.*, 2021 WL 5578298 (Cal.App. 1 Dist., 2021), the Court of Appeal held that, where there are two concurrent PAGA actions involving overlapping PAGA claims and a settlement of one is purportedly unfair, the PAGA representative in the separate action may seek to become a party to the settling action and appeal the fairness of the settlement as part of his or her role as an effective advocate for the state. Because many of the factors used to evaluate class action settlements bear on a settlement's fairness, these factors can be useful in evaluating the fairness of a PAGA settlement.

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Relation Back Doctrine Applies To PAGA Cases

In *Hutcheson v. Superior Court of Alameda County*, 2022 WL 354628 (2022), the California Court of Appeal considered whether or not doctrine of relation back applies to PAGA claims. The Court of Appeal held in the affirmative:

> This case raises a narrow legal issue at the intersection of PAGA and the judicially created doctrine of relation back, a doctrine which, in certain circumstances, deems the claims in an amended complaint to have been filed on the date of the initial complaint for purposes of the statute of limitations. In this appeal, an aggrieved employee (the first employee) submitted notice of alleged Labor Code violations by his employer to the LWDA in compliance with PAGA and subsequently filed a complaint in superior court alleging a PAGA claim. The first employee later sought to amend his complaint to substitute in as the named plaintiff a different aggrieved employee (the second employee) who had worked for the same employer. The issue before us is whether the amended PAGA complaint (with the second employee as the named plaintiff) can relate back to the original PAGA complaint where the second employee submitted his PAGA notice after the original complaint was filed. At stake is the length of time for which the employer may be liable for statutory civil penalties if the alleged violations of the Labor Code are proven to be true.
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> This issue was presented below in a motion for summary adjudication brought by the employer on stipulated facts. The trial court granted the motion, concluding that the doctrine of relation back does not apply to PAGA claims in these circumstances. Because we conclude that the doctrine of relation back may apply, we reverse.

Labor Code Section 2778 Survives Free Speech Challenge

In order to address the misclassification of employees as independent contractors, California passed Assembly Bill 5, and later AB 2257, which codified a more expansive test for determining workers' statuses, albeit with certain occupational exemptions. Because freelance writers, photographers, and others received a narrower exemption than was offered to certain other professionals, the American Society of Journalists and Authors, Inc., and the National Press Photographers Association (collectively, ASJA) sued, alleging violations of the First Amendment and Equal Protection Clause. In *American Society of Journalists and Authors, Inc. v. Bonta*, 15 F.4th 954 (9th Cir. 2021), the Ninth Circuit affirmed the dismissal of the lawsuit, finding that Labor Code Section 2778 does not implicate either the First Amendment or the Equal Protection Clause, because it did not facially limit what someone could or could not communicate and did "not restrict when, where, or how someone could speak," but instead was aimed at regulating the employment relationship.

Ninth Circuit Reverses $100 Million Wage & Hour Ruling Against Walmart

In *Magadia v. Wal-Mart Assocs., Inc.*, 999 F.3d 668 (9th Cir. 2021), Roderick Magadia filed a class action suit against Wal-Mart, alleging three violations of California Labor Code's wage-statement and meal-break requirements. First, Magadia alleged that Walmart didn't provide adequate pay rate information on its wage statements in violation of Labor Code § 226(a)(9). Next, he claimed that Walmart failed to furnish the pay-period dates with his last paycheck in violation of Labor Code § 226(a)(6). Finally, he asserted that Walmart didn't pay adequate compensation for missed meal breaks in violation of Labor Code § 226.7(c). Magadia sought penalties for these claims under PAGA, which authorizes an aggrieved employee to recover penalties for Labor Code violations on behalf of the government and other employees. The district court at first certified classes corresponding to each of Magadia's three claims. After summary judgment and a bench trial, the district court found that Magadia in fact suffered no meal-break violation and decertified that class. Even so, the district court allowed Magadia to still seek PAGA penalties on that claim based on violations incurred by other Walmart employees. The district court then ruled against Walmart on the three claims and awarded Magadia and the two remaining classes over $100 million in damages and penalties. On appeal, the Ninth Circuit held that Magadia lacked Article III standing to bring the meal-break claim in federal court because he did not suffer injury himself. The Ninth Circuit the remanded the meal period claim to the district court with instructions to return it to state court as state courts are subject to their own body of standing law. As for the two wage-statement claims, the Ninth Circuit also held that Magadia had standing but concluded that Walmart did not breach California law.

After The Third Trial, Court of Appeal Affirms $6 Million Judgment While Disagreeing With Villacorta v. Cemex Cement

In 2008 Maria Martinez filed a lawsuit against her former employer, Rite Aid Corporation, and her former supervisor, Kien Chau. In 2010 a jury returned a special verdict in Martinez's favor and awarded her $3.4 million in compensatory damages and $4.8 million in punitive damages. Following an appeal by Rite Aid and Chau, the Court of Appeal reversed the judgment and remanded the case for a new trial on compensatory damages on Martinez's causes of action for wrongful termination in violation of public policy against Rite Aid and intentional infliction of emotional distress against Rite Aid and Chau.
At the 2014 retrial, the jury awarded Martinez $321,000 on her wrongful termination cause of action against Rite Aid, $0 on her intentional infliction of emotional distress cause of action against Rite Aid, and $20,000 on her intentional infliction of emotional distress cause of action against Chau. Following an appeal by Martinez, the Court of Appeal reversed the judgment and remanded the case for another new trial on compensatory damages on Martinez's wrongful termination cause of action against Rite Aid and her intentional infliction of emotional distress causes of action against Rite Aid and Chau. The Court of Appeal suggested that the trial court use a special verdict form asking the jury to apportion noneconomic damages for intentional infliction of emotional distress between Chau and other Rite Aid employees.

At the 2018 retrial, the jury awarded Martinez $2,012,258 on her wrongful termination cause of action against Rite Aid and $4 million on her intentional infliction of emotional distress causes of action against Rite Aid and Chau. Rite Aid appealed arguing the trial court prejudicially erred by rejecting the Court of Appeal's suggestion that the special verdict form require the jury to apportion noneconomic damages for intentional infliction of emotional distress between Chau and other Rite Aid employees. Rite Aid contended the trial court also erroneously instructed the jury about the damages to be awarded for intentional infliction of emotional distress and about Martinez's post-termination earnings. Rite Aid further asserted the trial court should have reduced the past economic damages award for wrongful termination by the amount of Martinez's post-termination earnings.

In *Martinez v. Rite Aid Corp.*, 63 Cal.App.5th 958 (2021), the Court of Appeal agreed with Rite Aid that Martinez's post-termination earnings should have been deducted from the past economic damages award for wrongful termination but affirmed the judgement in all other respect. In other words, from the judgment, the Court of Appeal held that the $140,840 Martinez earned from post-Rite Aid employment would have to be deducted. In so holding, the Court of Appeal disagreed with the cogent *Villacorta v. Cemex Cement, Inc.*, 221 Cal.App.4th 1425 (2013) and *Rabago-*

Alvarez v. Dart Industries, Inc., 55 Cal.App.3d 91 (1976), decisions holding that wages actually earned from an inferior job may not be used to mitigate damages because if they were used then it would result in senselessly penalizing an employee who, either because of an honest desire to work or a lack of financial resources, is willing to take whatever employment he can find.

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PAGA Claims Are Not Subject To Arbitration Pursuant To Predispute Arbitration Agreements

In *Herrera v. Doctors Med. Ctr. of Modesto, Inc.*, 67 Cal. App. 5th 538 (2021), the Court of Appeal held that PAGA claims are not subject to arbitration pursuant to pre-dispute arbitration agreements: "We again interpret the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 to mean that PAGA representative claims for civil penalties are not subject to arbitration under a predispute arbitration agreement. *Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228. The PAGA claims alleged in the former employees' complaint are owned by the state and are being pursued by the former employees as the state's agent or proxy. *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175. The arbitration agreements in question are not enforceable as to the PAGA claims because the state was not a party to, and did not ratify, any of those agreements. Also, after the former employees became representatives of the state, they did not agree to arbitrate the PAGA claims. Consequently, under the rule of California law recognized in *Esparza* and many other decisions of the Court of Appeal, the PAGA claims cannot be forced into arbitration based on agreements made by the former employees before they became authorized representatives of the state." (cleaned up).

Venue For Employee's PAGA Action Proper In Any County Where Other Aggrieved Employees Worked

In *Crestwood Behavioral Health, Inc. v. Superior Court of Alameda County*, 60 Cal.App.5th 1069 (2021), the Court of Appeal held, as a matter of first impression, that the venue for a former employee's action against employer under the PAGA was proper in any county where other aggrieved employees worked: "Crestwood argues that venue is properly located in the county where the representative plaintiff worked but not counties where other aggrieved employees worked. We hold that venue is proper in any county in which an aggrieved employee worked and Labor Code violations allegedly occurred."

Provision Of Arbitration Agreement Providing For Review By A Second Arbitrator Is Unconscionable But Severable

In *Cisneros Alvarez v. Altamed Health Services Corporation*, 60 Cal.App.5th 572 (2021), the Court of Appeal held that a provision in an arbitration agreement providing for appellate arbitral review was unconscionable but that it should be severed from the arbitration agreement.

Plaintiff Employees Not Required To Establish That Defendant "Hired" Them In Order To Apply The ABC test

In *Mejia v. Roussos Construction, Inc.*, 76 Cal.App.5th 811 (2022), plaintiff Jose J. Mejia is an unlicensed flooring installer, who installed floors on behalf of Roussos Construction, a general contractor. Mejia sued Roussos Construction for misclassifying him as an independent contractor and for wage and hour violations. At trial, a dispute arose largely turning on the status and function of three individuals who stood in between Mejia and Roussos Construction. Mejia called these individuals his "supervisors"; Roussos Construction called them "subcontractors." Those subcontractors/supervisors hired and paid Mejia, and according to Roussos Construction, any mistakes in categorizing the Mejia or complying with labor laws belonged solely the subcontractors. Mejia maintained that Roussos Construction had employed a misclassification scheme, whereby it placed a "man in the middle" between the company and Mejia. In arguing over the jury instructions, Roussos Construction took the position that before the jury could consider the ABC test, it had to determine whether the it had hired Mejia. Mejia argued that the *Dynamex* test has no hiring test and that an employer can include someone who knows persons are working in his business even if he never formally hired them. Mejia further argued that *Dynamex* test, test places the burden on the defense, while the instruction proposed by Roussos Construction places the burden on Mejia to first prove that he was hired by Roussos Construction. The trial court instructed the jury that *before* the ABC test is applied, Mejia must first establish that he was hired by Roussos Construction or its agent. Perhaps not surprisingly given that instruction, Mejia lost. Mejia appealed contending that the trial court erred in its instruction to the jury requiring him to prove that Roussos Construction hired him before the jury could consider the "ABC test" which determines whether a worker is an employee or an independent contractor for purposes of California wage laws. The Court of Appeal agreed with Mejia and reversed.

Employee Whose Individual Labor Code Claim Was Time-Barred May Still Pursue A Representative PAGA Claim

In *Johnson v. Maxim Healthcare Services, Inc.*, 66 Cal.App.5th 924 (2021), the Court of Appeal held that an employee whose individual claim against employer is time-barred may still pursue representative PAGA claim: "It is undisputed that Johnson, at least at one time, was an aggrieved employee under PAGA. However, Maxim argues that Johnson's individual claim is time-barred because she signed the Agreement some three years before she brought suit. Johnson counters that there is no requirement that she be able to recover on her individual claim to continue with the PAGA action against Maxim. Accordingly, the main issue posed by the parties on appeal is whether an employee, whose individual claim is time-barred, may still pursue a representative claim under PAGA. Under *Kim v. Reins International California, Inc.*, 9 Cal.5th 73 (2020), we conclude the answer is yes." (cleaned up).

Ninth Circuit Rules That A Private Arbitration Agreement Does Not Bind The Secretary Of Labor When Bringing A FLSA Action Seeking Relief On Behalf Of One Party To The Arbitration Agreement Against The Other Party To That Agreement

In *Walsh v. Arizona Logistics, Inc.*, 998 F.3d 393 (9th Cir. 2021), the U.S. Department of Labor brought an enforcement action against Arizona Logistics Inc. The DOL alleged that Arizona Logistics violated the FLSA's minimum wage, overtime, record-keeping, and anti-retaliation requirements by misclassifying delivery drivers as independent contractors rather than employees. Arizona Logistics moved to compel arbitration of the Secretary's enforcement action based on arbitration agreements that the company had entered into with its delivery drivers. The district court denied the motion, concluding that the Secretary cannot be compelled to arbitrate based on the Supreme Court's decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). The Ninth Circuit affirmed, holding "Because the Secretary, not the employees on whose behalf relief is sought, has authority to direct an FLSA enforcement action, the Secretary cannot be compelled to arbitrate, even if the employees have agreed to arbitration."

Farm Labor Contracting Company Properly Paid Wages To Discharged Employees

In *Jaime Zepeda Labor Contracting, Inc. v. Department of Industrial Relations*, 67 Cal.App.5th 891 (2021), the Court of Appeal considered whether it was appropriate for the Department of Industrial Relations to impose section 1197.1 citations against farm labor contractor Jaime Zepeda Labor Contracting, Inc. and Zepeda's "client employers" for purported minimum wage violations. It was undisputed that Zepeda paid all of the employees at issue at least the minimum wage by payday. Nevertheless, the Department of Industrial Relations contended that Zepeda violated the law

because it did not promptly pay the final wages of the employees in accordance with the prompt payment mandates of sections 201, 202 and 203.5. In this regard, the Department of Industrial Relations argued that the failure to pay wages on the dates that the employees were discharged (§ 201, subd. (a)), or within 72 hours of when they quit (§ 202, subd. (a)), subjected Zepeda to waiting time penalties under section 203, and constituted independent minimum wage violations even though Zepeda paid final wages that were at or above the minimum wage on or before payday, in accordance with the minimum wage law. Zepeda, however, argued that: (1) there is no legal authority that supports the Department of Industrial Relations' claim that the failure to pay final wages on the date employees are discharged or within 72 hours of when employees quit constitutes a minimum wage violation; and (2) because the existence of a minimum wage violation is a prerequisite to the Department's authority to issue a citation under section 1197.1, the citations must be dismissed. The Court of Appeal agreed with Zepeda.

Courts Of Appeal Battle Over Whether Courts May Strike PAGA Claims On The Grounds That They Will Be Unmanageable At Trial

In *Wesson v. Staples the Office Superstore, LLC*, 68 Cal.App.5th 746 (2021), in matter of first impression, the Court of Appeal for the Second Appellate District held that courts have the inherent authority to ensure the manageability of PAGA claims at trial and to strike unmanageable claims because defendants have a due process right to a fair opportunity to litigate affirmative defenses.

In *Estrada v. Royalty Carpet Mills, Inc.*, 76 Cal.App.5th 685 (2022), the Court of Appeal for the Fourth Appellate District reached the opposite conclusion holding that courts do not have the inherent authority strike PAGA claims on the grounds that they may be unmanageable:

> We publish this opinion primarily due to our discussion concerning unmanageable PAGA claims. Currently, only one published California opinion, *Wesson v. Staples the Office Superstore, LLC* (2021) 68 Cal.App.5th 746, 283 Cal.Rptr.3d 846 (*Wesson*), addresses this issue. It concluded courts have inherent authority to strike unmanageable PAGA claims. While we understand the concerns expressed in *Wesson*, we reach the opposite conclusion. Based on our reading of pertinent Supreme Court authority, chiefly *Arias v. Superior Court* (2009) 46 Cal.4th 969, 95 Cal.Rptr.3d 588, 209 P.3d 923, and *Kim v. Reins International California, Inc.* (2020) 9

> Cal.5th 73, 259 Cal.Rptr.3d 769, 459 P.3d 1123, we find a court cannot strike a PAGA claim based on manageability. These cases have made clear that PAGA claims are unlike conventional civil suits and, in particular, are not class actions. Allowing dismissal of unmanageable PAGA claims would effectively graft a class action requirement onto PAGA claims, undermining a core principle of these authorities. It would also interfere with PAGA's purpose as a law enforcement mechanism by placing an extra hurdle on PAGA plaintiffs that is not placed on the state. That said, courts are not powerless when facing unwieldy PAGA claims. Courts may still, where appropriate and within reason, limit the amount of evidence PAGA plaintiffs may introduce at trial to prove alleged violations to other unrepresented employees. If plaintiffs are unable to show widespread violations in an efficient and reasonable manner, that will just reduce the amount of penalties awarded rather than lead to dismissal.

Estrada v. Royalty Carpet Mills, Inc., 76 Cal.App.5th 685 (2022)(cleaned up).

Workers May Volunteer For Nonprofit Entities Without Becoming "Employees" Under State Law

In *Woods v. American Film Institute*, 2021 WL 5978072 (2021), the plaintiff, Laurie Woods, appealed from an order denying certification of a class of persons who worked without pay for American Film Institute (AFI). AFI presents an annual film festival in Los Angeles for which it uses volunteer workers. Woods contends that those volunteers were actually employees because AFI is not permitted to use unpaid labor under California law. Woods filed a putative class action alleging that such workers were therefore denied benefits that California employers are required to provide to employees, such as minimum and overtime wages, meal and rest breaks, and wage statements.

The trial court denied class certification on the ground that common issues would not predominate over individual ones because a worker cannot be classified as an employee unless the worker expects some compensation and determining whether any particular class members expected compensation would therefore require separate, individual mini-trials. The Court of Appeal affirmed finding that the trial court correctly decided that putative class members who expected no compensation were not employees under California law. Thus, if the case were to proceed as a class action, the trier of fact would need to decide whether each class member expected to

be paid or was in fact a volunteer and the trial court acted within its discretion in finding that the need to decide such individual issues would preclude common issues from predominating.

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Federal Motor Carrier Safety Administration's (FMCSA) Determination That California's Meal And Rest Break Rules Were Preempted By Federal Hours Of Service Regulations Applied To Short Haul Drivers – Personal Liability For Owner Of Company Pursuant To Labor Code § 558.1 Affirmed

Good news, bad news.

First, the good news. In *Espinoza v. Hepta Run, Inc.*, 74 Cal.App.5th 44 (2022), the Court of Appeal affirmed the trial court's decision to find the sole owner of the defendant employer personally liable pursuant to Labor Code § 558.1 because he admitted that he had approved the policy regarding payments to his company's employees and that policy resulted in violations various provisions of the Labor Code.

Second, the bad news. But, by way of background, it is necessary to know that the Motor Carrier Safety Act of 1984 empowers the Secretary of Transportation to "prescribe regulations on commercial motor vehicle safety," including regulations ensuring "the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely." 49 U.S.C. § 31136(a). One such set of regulations, often referred to as the hours-of-service regulations ("HOS") imposes limits on driving time and on duty time for commercial truck drivers. 49 C.F.R. § 395.3. Pursuant to the HOS regulations property-carrying commercial truck drivers are subject to daily and weekly limits on driving time and on-duty time and are mandated to have 10 consecutive hours off duty between shifts. 49 C.F.R. § 395.3 (2020). In addition, long haul truck drivers are required to take a 30-minute rest break for every eight hours worked; short haul drivers are exempted from the 30-minute rest break requirement. 49 C.F.R. § 395.3(a)(ii). The Motor Carrier Safety Act of 1984 gives the Secretary of Transportation the authority to preempt state law if certain criteria are met. 49 U.S.C. § 31141(a). The Secretary has delegated this preemption analysis and determination to the Administrator for the Federal Motor Carrier Safety Administration ("FMCSA"). 49 C.F.R. § 1.87(f).

On December 28, 2018, in response to petitions from two industry groups, the FMCSA issued an order stating the California meal and rest break rules for commercial motor vehicle drivers were preempted by the federal hours of service regulations. It has since been clear that this preemption order applied to long-haul drivers (drivers that generally complete trips outside of a 150-mile radius from their work location) in California.

In *Espinoza v. Hepta Run, Inc.*, 74 Cal.App.5th 44 (2022), the Court of Appeal was called upon to address an open question of whether federal law also preempts California's meal periods and rest break requirements for short-haul drivers (drivers that generally drive within a 150-mile radius from their work location. The Court of Appeal answered this question in the affirmative holding that because short haul drivers are not required to take any specified rest breaks under the federal rules, the Agency's concern over California's additional rest break requirement would be heightened for short haul drivers, not diminished and FMCSA's reasoning supports applying preemption to short haul drivers rather than excluding them.

Plaintiffs Not Entitled To Jury Trial In PAGA Actions & Grocery Store Employer Not Required To Provide Its Cashiers With Seating

In *La Face v. Ralphs Grocery Company*, 75 Cal.App.5th 388 (2022), the Court of Appeal held that PAGA plaintiffs are not entitled to a jury trial because a PAGA claim contains several unique features that make it unlike any pre-1850 common law action and therefore unsuitable for a trial by jury. The Court of Appeal also held that Ralphs was not required to provide seating for its cashiers because Ralphs required them to stay busy (*e.g.,* cleaning, restocking, and fishing for customers) when they were not checking out customers.

Employer Not Allowed To Enforce Arbitration Agreement Between Its Employees And Its Customer

In *Hinkle v. Phillips 66 Company*, 2022 WL 1711660 (5th Cir. 2022), non-party Cypress Environmental Management employed plaintiff Troy Hinkle and other similarly situated employees as pipeline inspectors whom it then sent to work for its clients including defendant Phillips 66 Company. When Hinkle was hired, Cypress had him sign an Employment Agreement that contained an arbitration clause. That arbitration provision read, in relevant part, as follows: "[Hinkle] and [Cypress] agree to arbitrate all claims that have arisen or will arise out of [Hinkle's] employment." Only Cypress and Hinkle signed the agreement, and no other party was mentioned in the arbitration clause. One of Cypress's customers is Phillips 66. Phillips 66 needed some inspectors for its energy facilities, so Cypress staffed Hinkle on the project. Hinkle worked at

Phillips 66's facilities for the next few months. During that time, Hinkle was paid a day rate with no overtime. Alleging that the Fair Labor Standards Act entitled him to overtime pay, Hinkle filed a collective action against Phillips 66. Hinkle sued only Phillips 66; he brought no claims against Cypress. Cypress soon moved to intervene.

Once Cypress was permitted to intervene, it moved to compel arbitration. Cypress and Phillips 66 argued that the delegation clause in Hinkle's arbitration agreement required an arbitrator, not the court, to determine whether Hinkle's claim against Phillips 66 was covered by the agreement. Phillips 66 further asserted that, even if arbitrability were a question for the court, it could enforce the arbitration agreement as a nonsignatory based on intertwined claims estoppel. Cypress alternatively claimed that it was an "aggrieved party" under Section 4 of the Federal Arbitration Act (FAA) and thus could compel arbitration. The magistrate judge rejected all the motions. The district court affirmed. It held that whether the delegation clause applied to Phillips 66 was a question for the court. The court then answered that question, holding that Phillips 66 could not enforce the agreement based on intertwined claims estoppel because it did not have a close relationship with Cypress. The district court also held that Cypress was not an "aggrieved party" under Section 4 of the FAA because Hinkle did not break his agreement to arbitrate with Cypress by suing Phillips 66. Phillips 66 and Cypress both appealed. On appeal, the Fifth Circuit affirmed holding that because Hinkle only promised to arbitrate claims brought against Cypress and he wasn't suing Cypress, Cypress was not an aggrieved party under Section 4 of the FAA and cannot compel arbitration.

Trial Court Erred In Denying Class Certification Based On Argument That Uniform Policies Were Allegedly Applied By Corporate Managers In Different Ways - Credibility Problems Can Be An Appropriate Ground To Reject The Adequacy Of A Class Representative -

In *Meza v. Pacific Bell Telephone Company*, 2022 WL 2186251 (2022), the Court of Appeal reversed the denial of class certification issued by the trial court on the erroneous ground that although the employer had uniform policies, the employer's supervisors allegedly applied those policies in different ways:

> We conclude that the trial court did not apply the proper legal framework when it denied class certification. Meza's theory of liability is that the written guidelines for premises technicians were for the benefit of Pacific Bell and exerted substantial control over the premises technicians during their meal and rest periods in violation of the law. Although the trial court acknowledged that "the policies are undisputed," it concluded that the disparate manner in which

> employees experienced the policy through different managers rendered the claims unsuitable for class treatment. However, the employer's liability arises by adopting a uniform policy that violates the wage and hour laws. The fact that individual inquiry might be necessary to determine whether individual employees were able to take breaks despite the defendant's allegedly unlawful policy is not a proper basis for denying certification.
>
> Thus, while we express no view on the merits of Meza's allegations, we find that the question to be resolved here—whether the undisputed guidelines violate wage and hour law—is not an individualized one.

Meza v. Pacific Bell Telephone Company, 2022 WL 2186251, at *9 (2022)(cleaned up).

Holding that "credibility problems can be an appropriate ground to reject the adequacy of a class representative," the Court of Appeal remanded the matter for the trial court to consider whether Meza was an adequate representative due to allegations that he gave inconsistent deposition testimony and engaged in purportedly dishonest conduct while employed by Pacific Bell.

Finally, the Court of Appeal held that the trial court correctly granted summary adjudication as to Meza's wage statement claim which was based on Meza contention that Pacific Bell violated Labor Code Section 226, subdivision (a)(9) by failing to include the "rate" and "hours" attributable to Pacific Bell's overtime true-up payments. The Court of Appeal held that Labor Code Section 226, subdivision (a)(9) does not require Pacific Bell to list hours and rates next to its calculation of an overtime true-up.

In Class Action Fairness Act Case, Ninth Circuit Finds It Was Error For The District Court To Assign A $0 Amount To Most Of The Claims Simply Because The Lower Court Disagreed With One Or More Of The Assumptions Underlying Roadrunner's Estimates

In *Jauregui v. Roadrunner Transport. Servs., Inc.*, 31.28 F. 4th 989 (9th Cir. 2022), the plaintiff filed a putative class action in state court against Roadrunner Transportation Services on behalf of all current and former hourly workers in California alleging numerous wage and hour violations. Roadrunner removed the case to federal court, invoking the Class Action Fairness Act (CAFA), 32.28 U.S.C. §§ 1332(d), 1453,1711-15. The plaintiff filed a motion to remand on the ground that Roadrunner had failed to establish the requisite $5 million jurisdictional minimum for the amount in

controversy under CAFA. In support of its opposition, Roadrunner provided a declaration from its senior payroll lead that the amount in controversy exceeded $14.7 million. The district court granted the motion to remand after independently evaluating Roadrunner's calculations. It found that Roadrunner had sufficiently demonstrated the claimed amount in controversy for only two of the seven claims and, as for the remaining five claims, the district court assigned a value of $0 where it disagreed with Roadrunner's calculations. The Ninth Circuit reversed, holding that it was error for the district court to assign a $0 amount to most of the claims simply because the lower court disagreed with one or more of the assumptions underlying Roadrunner's estimates.

Court of Appeals Reverses Summary Judgment In Favor Of Defendant Employer In PAGA Seating Case

In *Meda v. AutoZone, Inc.*, 81 Cal. App. 5th 366 (2022), the plaintiff sued her former employer for PAGA violations, asserting that it had failed to provide suitable seating to employees at the cashier and parts counter workstations. The employer obtained summary judgment on the ground that the plaintiff had no standing to bring a PAGA action because it satisfied the seating requirement by making two chairs available to its associates (they were placed outside the manager's office). The Court of Appeal reversed and held that "where an employer has not expressly advised its employees that they may use a seat during their work and has not provided a seat at a workstation, the inquiry as to whether the employer has 'provided' suitable seating may be fact-intensive and may involve a multitude of job-and workplace-specific factors," making resolution at the summary judgment stage "inappropriate."

Employee Allowed To Proceed With Wage & Hour Claims Against Defendant Employer Even Though She Settled Claims Against Staffing Agency

In *Grande v. Eisenhower Med. Ctr.*, 13 Cal. 5th 313 (2022), the plaintiff was a nurse who worked for Eisenhower Medical Center for one week through a staffing agency. She filed a wage and hour class action lawsuit against the staffing agency on behalf of non-exempt employees placed throughout the state, settled that case for $750,000, and then filed another class action lawsuit against the hospital on behalf of all non-exempt employees placed by any staffing agency. The staffing agency filed a complaint in intervention, arguing that Grande could not file suit against Eisenhower because she settled claims against it through her prior action. The trial court ruled that Eisenhower was not a released party under the first lawsuit's settlement agreement, and that there was no claim preclusion. The staffing agency appealed and Eisenhower filed a writ petition. The Court of Appeal affirmed the judgment and denied the writ petition. The staffing agency appealed. The California Supreme Court affirmed. It held that

Eisenhower and the staffing agency were not in privity in the prior action such that there was no claim preclusion; that any contractual indemnification agreement between the staffing agency and Eisenhower did not create claim preclusion, as the staffing agency had not been sued as an indemnitor; and that Eisenhower's liability was not derived from agency so as to create claim preclusion.

XV. Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)

US Supreme Court And Ninth Circuit Confirm Rights Of Service Members Under The Uniformed Services Employment And Reemployment Rights Act Of 1994

Torres v. Texas Dep't of Pub. Safety, 142 S.Ct. 2455 (2022), involved a Texas state trooper and Army Reservist who suffered constrictive bronchitis as a result of his exposure to toxic burn pits while on active duty in Iraq. Unable to return to his old job, he asked to be accommodated by being placed in a different position, but his employer denied the request. He sued under USERRA. Texas moved to dismiss the suit, invoking sovereign immunity. The trial court denied the motion, the appellate court reversed, and the matter made its way to the Supreme Court. In a 5-4 decision—one of the last authored by Justice Breyer—the Court held that states could indeed be sued under USERRA. The States, upon entering the union, agreed that their sovereignty would yield to federal power to build and maintain the Armed Forces. As such, Congress was authorized to exercise its power to permit private lawsuits against States under USERRA.

Belaustegui v. Int'l Longshore & Warehouse, 24.36 F.4th 919 (9th Cir. 2022), is a case involving USERRA's escalator provision. The plaintiff in the case was an entry-level longshore worker who left his job to serve in the Air Force. After nine years of active duty, he returned to his civilian job and requested a promotion to the position he claimed that he likely would have attained if he had not served in the military. When his employer denied the request, he filed suit alleging discrimination under the USERRA. The district court granted the employer's motion for summary judgment, but the Ninth Circuit reversed, holding that the hours credits and elevation rights set forth in the applicable collective bargaining agreement qualified as "benefits of employment" protected under USERRA.

XVI. Wrongful Termination, Retaliation, Whistleblower & 1102.5 Claims

U.S. Supreme Court Holds That An Employee Challenging A Job Transfer Under Title VII Must Show That The Transfer Brought About Some Harm With Respect To An Identifiable Term Or Condition Of Employment, But That Harm Need Not Be Significant

In *Muldrow v. City of St. Louis, Missouri*, 2024 WL 1642826 (2024), the Supreme Court, in an opinion authored by Justice Kagan, held that an employee challenging a job transfer as discriminatory under Title VII does not have to show that the harm incurred was significant, serious, substantial, or any similar adjective suggesting that the disadvantage to the employee must exceed a heightened bar.

Jatonya Clayborn Muldrow, a Sergeant with the St. Louis Police Department, alleged that the Department had transferred her from one job to another because she is a woman in violation of Title VII. As a result of the transfer, while Muldrow's rank and pay remained the same in the new position, her responsibilities, perks, and schedule did not. Instead of working with high-ranking officials on the departmental priorities lodged in the Intelligence Division, Muldrow now supervised the day-to-day activities of neighborhood patrol officers. Her new duties included approving their arrests, reviewing their reports, and handling other administrative matters; she also did some patrol work herself. Because she no longer served in the Intelligence Division, she lost her FBI status and the car that came with it. And the change of jobs made Muldrow's workweek less regular. She had worked a traditional Monday-through-Friday week in the Intelligence Division. Now she was placed on a "rotating schedule" that often involved weekend shifts.

The District Court granted the Department's motion for summary judgment. The court explained that Muldrow needed to show that her transfer effected a "significant" change in working conditions producing "material employment disadvantage." And Muldrow, the District Court held, could not meet that heightened-injury standard as she experienced no change in salary or rank. To the contrary, the District Court found, her loss of the networking opportunities available in Intelligence was immaterial because she had not provided evidence that it had harmed her career prospects. And given her continued supervisory role, she had not suffered a significant alteration to her work responsibilities. Finally, the District Court concluded that the switch to a rotating schedule (including weekend work) and the

loss of a take-home vehicle could not fill the as they appeared to be minor alterations of employment, rather than material harms.

The Court of Appeals for the Eighth Circuit affirmed. It agreed that Muldrow had to—but could not—show that the transfer caused a materially significant disadvantage. Like the District Court, the Eighth Circuit emphasized that the transfer did not result in a diminution to her title, salary, or benefits. And the Circuit, too, maintained that the change in her job responsibilities was insufficient to support a Title VII claim. Overall, the Court of Appeal held, Muldrow's claim could not proceed because she had experienced "only minor changes in working conditions."

The Supreme Court reversed:

> Sergeant Jatonya Clayborn Muldrow maintains that her employer, the St. Louis Police Department, transferred her from one job to another because she is a woman. She sued the City of St. Louis under Title VII, alleging that she had suffered sex discrimination with respect to the "terms [or] conditions" of her employment. 42 U. S. C. § 2000e–2(a)(1). The courts below rejected the claim on the ground that the transfer did not cause Muldrow a "significant" employment disadvantage. Other courts have used similar standards in addressing Title VII suits arising from job transfers.
>
> Today, we disapprove that approach. Although an employee must show some harm from a forced transfer to prevail in a Title VII suit, she need not show that the injury satisfies a significance test. Title VII's text nowhere establishes that high bar.
>
> We granted certiorari to resolve a Circuit split over whether an employee challenging a transfer under Title VII must meet a heightened threshold of harm—be it dubbed significant, serious, or something similar. We now vacate the judgment below because the text of Title VII imposes no such requirement.
>
> Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." § 2000e–2(a)(1). Muldrow's suit, as described above, alleges that she was transferred to a lesser position because she is a woman. That transfer, as both parties agree,

implicated "terms" and "conditions" of Muldrow's employment, changing nothing less than the what, where, and when of her police work. So the statutory language applicable to this case prohibits "discriminat[ing] against" an individual "with respect to" the "terms [or] conditions" of employment because of that individual's sex.

That language requires Muldrow to show that the transfer brought about some "disadvantageous" change in an employment term or condition. The words "discriminate against," we have explained, refer to "differences in treatment that injure" employees. Or otherwise said, the statute targets practices that "treat[ ] a person worse" because of sex or other protected trait. And in the typical transfer case, that "worse" treatment must pertain to—must be "with respect to"—employment "terms [or] conditions." § 2000e–2(a)(1). The "terms [or] conditions" phrase, we have made clear, is not used "in the narrow contractual sense"; it covers more than the "economic or tangible." Still, the phrase circumscribes the injuries that can give rise to a suit like this one. To make out a Title VII discrimination claim, a transferee must show some harm respecting an identifiable term or condition of employment.

What the transferee does not have to show, according to the relevant text, is that the harm incurred was "significant." Or serious, or substantial, or any similar adjective suggesting that the disadvantage to the employee must exceed a heightened bar. "Discriminate against" means treat worse, here based on sex. But neither that phrase nor any other says anything about how much worse. There is nothing in the provision to distinguish, as the courts below did, between transfers causing significant disadvantages and transfers causing not-so-significant ones. And there is nothing to otherwise establish an elevated threshold of harm. To demand "significance" is to add words—and significant words, as it were—to the statute Congress enacted. It is to impose a new requirement on a Title VII claimant, so that the law as applied demands something more of her than the law as written.

And that difference can make a real difference for complaining transferees. Many forced transfers leave workers worse off respecting employment terms or conditions. (After all, a transfer is not usually forced when it leaves the employee better off.) But now add another question—whether the harm is significant. As appellate

> decisions reveal, the answers can lie in the eye of the beholder—and can disregard varied kinds of disadvantage. Take just a few examples from the caselaw. An engineering technician is assigned to work at a new job site—specifically, a 14-by-22-foot wind tunnel; a court rules that the transfer does not have a "significant detrimental effect." A shipping worker is required to take a position involving only nighttime work; a court decides that the assignment does not "constitute a significant change in employment." And a school principal is forced into a non-school-based administrative role supervising fewer employees; a court again finds the change in job duties not "significant." All those employees suffered some injury in employment terms or conditions (allegedly because of race or sex). Their claims were rejected solely because courts rewrote Title VII, compelling workers to make a showing that the statutory text does not require.

Muldrow v. City of St. Louis, Missouri, 2024 WL 1642826, at *3 (2024)(cleaned up)

Labor Code Section 1102.5 Whistleblower Claims Are <u>Not</u> Subject To The McDonnell Douglas Burden-Shifting Framework At Trial Or Summary Judgment

Labor Code Section 1102.5 provides whistleblower protections to employees who disclose wrongdoing to certain authorities (a government agency, a person with authority over the employee, or with another employee who has authority to investigate or correct the wrongdoing). In 2003, the Legislature amended the Labor Code's whistleblower protections in response to a series of high-profile corporate scandals and reports of illicit coverups. the 2003 amendments added a procedural provision, section 1102.6, which states:

> In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.

After section 1102.6 took effect, some California courts identified that provision as supplying the applicable standards for claims of whistleblower retaliation under

section 1102.5, without relying on *McDonnell Douglas's* burden-shifting framework. But other courts continued to rely on the McDonnell Douglas framework without mentioning section 1102.6.

In *Lawson v. PPG Architectural Finishes, Inc.*, 982 F.3d 752 (9th Cir. 2020), the Ninth Circuit gave a homework assignment to California Supreme – Does the evidentiary standard set forth in the California Labor Code replace the *McDonnell Douglas* burden-shifting test as the relevant evidentiary standard for whistleblower retaliation claims brought under Labor Code Section 1102.5.

In *Lawson v. PPG Architectural Finishes, Inc.*, 2022 WL 244731 (2022), the California Supreme Court, in an opinion authored by Justice Leondra R. Kruger, turned in its homework assignment concluding that, both at the summary judgment and trial stages, courts should apply the framework prescribed by statute in Labor Code Section 1102.6 and that employees need *not* satisfy the *McDonnell Douglas* test to make out a case of unlawful retaliation.

In One Of The First Post-Lawson Decisions, Court Of Appeals Clarifies Framework For Evaluating Section 1102.5 Claims

In *Vatalaro v. Cnty. of Sacramento*, 2022 WL 1420599, at *1 (Cal.App. 3 Dist., 2022), the Court of Appeal for the Third Appellate District applied *Lawson v. PPG Architectural Finishes, Inc.*, 2022 WL 244731 (2022) and clarified the appropriate framework for evaluating whistleblower retaliation claims brought under Labor Code Section 1102.5.

After being fired by Sacramento County, Cynthia J. Vatalaro sued the County for unlawful retaliation under Labor Code section 1102.5. The County filed a motion for summary judgment contending, among other things, that it had a legitimate, nonretaliatory reason for terminating her—namely, she had been insubordinate, disrespectful, and dishonest. The trial court, agreeing with the County, granted summary judgment in the County's favor. On appeal, Vatalaro alleged that the County's stated reason for terminating her was merely a pretext for retaliation.

The Court of Appeal affirmed, though on a ground somewhat different than that raised at the trial level as the parties and the trial court relied on the familiar three-part burden-shifting framework under which: (1) the employee must first establish a prima facie case of unlawful retaliation; (2) if the employee makes this showing, the employer then bears the burden of showing it had a legitimate, nondiscriminatory reason for the adverse employment action; and (3) if the employer meets its burden, the burden then shifts back to the employee to show that the employer's offered

reason was merely a pretext for retaliation. That three-part burden-shifting framework, the Court of Appeal explained, is ***not*** applicable to Labor Code Section 1102.5 claims. Rather, there is a two-part burden-shifting test – (1) once the plaintiff establishes, by a preponderance of the evidence, that retaliation for the employee's protected activities was a contributing factor in a contested adverse employment employment action, (2) the burden shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the action in question for legitimate, independent reasons even had the plaintiff not engaged in protected activity.

Next, the Court of Appeal examined what it means when Section 1102.5 refers to employees who had "reasonable cause to believe" that the information they revealed disclosed a violation of the law. The Court of Appeal engaged in this analysis because the trial court, in part, granted summary judgment to Sacramento County based upon a finding that Vatalaro did not show she had a reasonable belief that the law had been violated. Acknowledging that many, perhaps most, decisions interpreting section 1102.5 have interpreted it to mean employees who "reasonably believed" that the information they revealed disclosed a violation, the Court of Appeal suggested that a person may have "reasonable to cause to believe" that something is true, even if she does not in fact believe it to be true. However, the Court of Appeal did not decide this issue.

The Court of Appeal affirmed the trial court's grant of summary judgment to Sacramento County finding that the County met its burden to establish by clear and convincing evidence that it would have made the same employment decision without the alleged protected conduct. In this regard, the County offered three reasons for its decision to release Vatalaro from probation: Vatalaro had been insubordinate, disrespectful, and dishonest. The Court of Appeal found that the County had it demonstrated, by clear and convincing evidence, that it would have released Vatalaro from probation for these reasons even had Vatalaro not engaged in the allegedly protected conduct. What seemed to be particularly persuasive for the Court of Appeal was that Vatalaro had essentially admitted to (or did not really deny) these allegations during her deposition.

Sarbanes-Oxley Whistleblower Need Not Prove That His Employer Acted With Retaliatory Intent; Rather Whistleblower Need Merely Prove That His Protected Activity Was A Contributing Factor In The Unfavorable Personnel Action

In *Murray v. UBS Securities, LLC*, 144 S.Ct. 445 (2024), the U.S. Supreme Court held that a whistleblower bringing a Sarbanes-Oxley retaliation claim need not prove that his employer acted with retaliatory intent; rather, the whistleblower need merely

prove that his protected activity was a contributing factor in the unfavorable personnel action.

Sarbanes-Oxley Anti-Retaliation Provision Does Not Protect A Citizen Of Another Country Employed By An American Company In That Other Country

In *Daramola v. Oracle America, Inc.*, 2024 WL 441113 (9th Cir. 2024), the Ninth Circuit held that Sarbanes-Oxley's anti-retaliation provision does not protect a citizen of another Country employed by an American company in that other Country.

Court Of Appeal Reverses Summary Judgment And Allows Physician's Whistleblower Claims To Proceed – Holds That Labor Code Section 1102.5 Legal Framework Applies To Government Code Section 8547.10 Claims

In *Scheer v. The Regents of the Univ. of Cal.*, 76 Cal. App. 5th 904 (2022), Arnold Scheer, M.D., M.P.H., brought whistleblower claims against three defendants (The Regents of the University of California, Jonathan Braun, and Scott Binder) alleging three causes of action – violations of Labor Code section 1102.5, Government Code section 8547 *et seq.,* and Health and Safety Code section 1278.5. Scheer alleged that the defendants fired him for reporting numerous issues related to patient safety including, but not limited to, recurrent lost patient specimen issues, mislabeling and mix-up of patient samples resulting in misdiagnosis, lost specimens used in NIH funded research, and failure and/or refusal to follow required procedures to investigate, analyze, and formulate action plans to correct patient safety issues. The defendants moved for summary arguing that they fired Scheer for legitimate, nonretaliatory reasons (Scheer purportedly had an overly aggressive attitude concerning certain negotiations, had a harsh and disruptive style at meetings, had become increasingly ineffective, lacked enthusiasm for his position; and was not an effective leader) and that Scheer could not meet his burden of demonstrating those reasons were pretextual, as required by *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). The trial court granted the motion finding that Scheer failed to raise a triable issue of material fact as to pretext.

On appeal, the Court of Appeal initially held that the legal framework that applies to claims under Labor Code Section 1102.5 also applies Government Code Section 8547.10 claims and that reversal of the grant of summary judgment was appropriate on those two claims because the defendants, in seeking summary judgment, relied on a standard inconsistent with *Lawson v. PPG Architectural Finishes, Inc.*, 12 Cal.5th 703 (2022). With respect to Scheer's Health and Safety Code Section 1278.5, the Court of Appeal reversed finding that triable issue of material fact existed as to whether the defendant's stated reasons for termination were pretextual. In this regard, the Court

of Appeal found that Scheer's undisputed evidence showing that he received excellent evaluations over a 12-year period and no one ever advised him of any shortcomings or deficiencies asserted by defendants put in issue defendants' statement that he was terminated for poor performance and conduct.

Court Of Appeal Affirms Judgment In Favor Of Defendant Employer Holding There No Substantial Evidence Of An Adverse Employment Action Under Section 1102.5

In *Francis v. City of Los Angele*s, 81 Cal. App. 5th 532 (2022), *mod. reh'g den.* (July 22,2022), *rev. filed* (Aug. 31, 2022), the Court of Appeal affirmed a judgment in favor of a defendant employer who had prevailed at trial, holding that there was no substantial evidence of an adverse employment action under section 1102.5, such that nonsuit should have been granted.

Ninth Circuit Reverses Summary Judgment In Favor Of Defendant Employer On 1102.5 Claim, Holding Trial Court Erred When It Deemed Disclosures Unprotected Because They Were Made In The Normal Course Of The Plaintiff's Job Duties To A Supervisor Who Did Not Have The Authority To Investigate, Discover, Or Correct The Violations

In *Killgore v. SpecPro Prof'l Servs., LLC*, 51 F.4th 973 (9th Cir. 2022), the Ninth Circuit reversed summary judgment with respect to a plaintiff-employee's Cal. Lab. Code § 1102.5(b) and wrongful termination claims, holding that the trial court erred when it deemed disclosures unprotected because they were made in the normal course of the plaintiff's job duties to a supervisor who did not necessarily have the authority to investigate, discover, or correct the violations, and when it found that the plaintiff did not have a reasonable belief that he was disclosing a violation of law. (It affirmed summary judgment as to the Cal. Lab. Code §1102.5(c) claim because the plaintiff was fired before he had a chance to refuse to act unlawfully.)

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California Employment Law Update

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Anthony J. Oncidi is the Co-Chair of the firm's Labor & Employment Law Department and heads the West Coast Labor & Employment group in the firm's Los Angeles office.

Tony represents employers and management in all aspects of labor relations and employment law, including litigation and preventive counseling, wage and hour matters, including class actions, wrongful termination, employee discipline, Title VII and the California Fair Employment and Housing Act, executive employment contract disputes, sexual harassment training and investigations, workplace violence, drug testing and privacy issues, Sarbanes-Oxley claims and employee raiding and trade secret protection. A substantial portion of Tony's practice involves the defense of employers in large class actions, employment discrimination, harassment and wrongful termination litigation in state and federal court as well as arbitration proceedings, including FINRA matters.

Tony is recognized as a leading lawyer by such highly respected publications and organizations as the *Los Angeles Daily Journal*, *The Hollywood Reporter*, and *Chambers USA*, which gives him the highest possible rating ("Band 1") for Labor & Employment. According to *Chambers USA,* clients say Tony is "brilliant at what he does… He is even keeled, has a high emotional IQ, is a great legal writer and orator, and never gives up." Other clients report: "Tony has an outstanding reputation" and he is "smart, cost effective and appropriately aggressive." Tony is hailed as "outstanding," particularly for his "ability to merge top-shelf lawyerly advice with pragmatic business acumen." He is highly respected in the industry, with other commentators lauding him as a "phenomenal strategist" and "one of the top employment litigators in the country."

Tony is the author of the treatise titled *Employment Discrimination Depositions* (Juris Pub'g 2023; www.jurispub.com), co-author of *Proskauer on Privacy* (PLI 2020), and, since 1990, has been a regular columnist for the official publication of the Labor and Employment Law Section of the State Bar of California and the *Los Angeles Daily Journal.*

Tony has been a featured guest on Fox 11 News and CBS News in Los Angeles. He has been interviewed and quoted by leading national media outlets such as *The National Law Journal*, *Bloomberg News*, *The New York Times*, and *Newsweek* and *Time* magazines. Tony is a frequent speaker on employment law topics for large and small groups of employers and their counsel, including the Society for Human Resource Management ("SHRM"), PIHRA, the National CLE Conference, National Business Institute, the Employment Round Table of Southern California (Board Member), the Council on Education in Management, the Institute for Corporate Counsel, the State Bar of California, the California Continuing Education of the Bar Program and the Los Angeles and Beverly Hills Bar Associations. He has testified as an expert witness regarding wage and hour issues as well as the California Fair Employment and Housing Act and has served as a faculty member of the National Employment Law Institute. He has served as an arbitrator in an employment discrimination matter.

Tony is an appointed Hearing Examiner for the Los Angeles Police Commission Board of Rights and has served as an Adjunct Professor of Law and a guest lecturer at USC Law School and a guest lecturer at UCLA Law School.

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I.

LEGISLATIVE UPDATE

A. Arbitration

- **SB 365** (Wiener; D-San Francisco): In a seemingly clear deviation from existing US Supreme Court precedent and the Federal Arbitration Act ("FAA"), this "Job Killer" statute amends California Code of Civil Procedure § 1294 (based upon a statute that has been on the books since at least 1927) to eliminate the long-standing automatic stay of trial court proceedings that takes effect while an appeal is pending from the denial of a motion to compel arbitration. This means a trial court judge will have the discretion to order an employer to continue litigating in court (including going through with a jury trial) even while the employer is challenging on appeal a denial of its right to arbitrate. Only time will tell if this new law will be struck down by a federal court applying the FAA.

B. COVID-19 & State of Emergency

- **SB 723** (Durazo; D-Los Angeles): In 2021, SB 93 required certain employers in the hospitality and service industries to rehire employees laid off due to the COVID-19 pandemic. SB 723 moves the expiration of this "right of recall" for hospitality and service industry employees from December 31, 2024 to December 31, 2025 and adds a presumption that separation due to lack of business, reduction in force, or other economic, non-disciplinary reasons is due to a reason related to the COVID-19 pandemic.

  Initially, the bill presumed all layoffs were due to the pandemic without the opportunity for employers to submit evidence to the contrary. The Chamber of Commerce withdrew its "Job Killer" tag after amendment.

C. Discrimination, Harassment, & Retaliation

- **SB 700** (Bradford; D-Los Angeles): This bill expands upon AB 2188 which passed last year. With some exceptions, AB 2188 prohibits discrimination in hiring, terminating, or any other term of employment on the basis of: (1) a person's use of cannabis off the job and away from the workplace; and (2) an employer-required drug screening test that has found the person to have non-psychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids. SB 700 also makes it unlawful to discriminate against a job applicant based on information regarding prior use of cannabis that is learned from a criminal history report. Like SB 700, AB 2188 goes into effect on January 1, 2024.

- **SB 497** (Smallwood-Cuevas; D-Los Angeles): SB 497 creates a rebuttable presumption of retaliation under Labor Code sections 98.6 and 1197.5 if an employer engages in any adverse action within 90 days of an employee's protected activity (*e.g.*, making complaints or claims related to rights under the jurisdiction of the Labor Commissioner, making complaints about unpaid wages, or making complaints about equal pay violations). This presumption makes it easier for employees to establish a prima facie

case and significantly more difficult for employers to obtain dismissal of such retaliation claims at the summary judgment stage.

The bill also increases the civil penalty imposed on an employer under section 1102.5 from $10,000 generally to $10,000 per employee per violation.

D. Leave Laws

- **SB 616** (Gonzalez; D-Long Beach): SB 616 amends California's statewide paid sick leave law to significantly increase the amount of leave that employers need to provide and permit employees to carry over from year-to-year.

  Many employers in California's major population centers already provide well in excess of the three days required under current state law. Santa Monica and several cities in the San Francisco Bay Area already mandate that employers provide up to 72 hours of paid sick leave, and California's most populous city—Los Angeles—requires up to 48 hours per year. However, for employers with workers outside these areas, SB 616 will significantly expand their sick leave obligations.

  SB 616 increases the minimum amount of sick leave time eligible employees must accrue each year from 24 hours (three days) to 40 hours (five days). The bill preserves the existing accrual rate—*i.e.*, one hour accrued for every 30 hours worked—but employers may use a different accrual method as long as eligible employees accrue: (a) no less than 24 hours (or three days) of paid sick leave by the end of their 120th day of employment; and (b) no less than 40 hours (or five days) of paid sick leave by the end of their 200th day of employment.

  While the current law permits employers to cap annual sick leave usage to 24 hours or three days per year, SB 616 expands the permissible annual usage cap to 40 hours or five days. SB 616 also raises the total amount of paid sick leave that employers must allow employees to accrue over time and carry over from one year to the next from 48 hours (or six days) to 80 hours (or 10 days).

  Employers who prefer to use an up-front sick leave allocation—a popular method due to its relative administrative ease—will now need to deposit 40 hours (or five days) of sick leave in employees' leave banks each year.

  Although SB 616 continues to include an exception for employers covered by a valid collective bargaining agreement ("CBA") that provides for paid sick leave, subject to certain conditions, it requires that such employees be permitted to use sick leave for the same reasons as employees who are not subject to a CBA.

- **SB 848** (Rubio; D-Baldwin Park): This bill allows for unpaid leaves of absence for reproductive-related losses, such as a failed adoption or surrogacy, miscarriage, stillbirth, or unsuccessful assisted reproduction. The leave must be taken within 3 months of the event. If an employee experiences more than one reproductive loss event in a 12-month period, the employer is not obligated to grant more than 20 days of leave. Unless existing

company policy provides for paid leave, the leave entitlement is unpaid, but employees may still use other leave balances, including accrued available sick leave.

E. Non-Disclosure and Confidential Settlement Agreements

- **SB 699** (Caballero; D-Merced): This bill establishes that any contract that is void under California's non-compete prohibition is unenforceable regardless of when and where the contract was signed. It also prohibits an employer from attempting to enforce a contract that is void, regardless of whether the contract was signed and the employment was maintained outside of California. Thus, SB 699 invalidates non-competes that were signed by employees working in states that allow such agreements, where the employee thereafter moves to California to take a job in California. An employer that enters into or seeks to enforce an unlawful noncompete will be considered to have committed a civil violation. Further, employees may sue for violations of this new law and seek recovery of damages, injunctive relief, and attorneys' fees.

- **AB 1076** (Bauer-Kahan; D-Orinda): This bill codifies the holding in *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008), which states that any non-compete, no matter now narrowly tailored is void. It also clarifies that California's invalidation of noncompete agreements is not limited to contracts in which the person being restrained from engaging in a lawful profession, trade, or business is a party to the contract. Additionally, AB 1076 creates a new notice requirement by which employers must notify current and former employees in writing by February 14, 2024 of any earlier-signed noncompete clause or agreements that are void.

F. Pay and Reporting Requirements

- **SB 525** (Durazo; D-Los Angeles): This new law provides for a multi-faceted statewide minimum wage schedule for healthcare workers employed by certain covered healthcare facilities. The definition of "covered health facility" applies to nearly every type of health care facility, except those owned, controlled, or operated by the California Department of State Hospitals and certain tribal clinics and outpatient facilities. SB 525 consists of 5 separate minimum wage schedules for covered health care employees depending on the nature, size, and structure of the employer's business. The law applies to "covered health care employees," which includes a broad array of positions, from patient care roles like nurses and physicians to support positions such as janitors and clerical workers. It also extends to contracted or subcontracted employees when the healthcare facility has control over their wages, hours, or working conditions. The wage increases go into effect beginning June 1, 2024. Because of amendments that allow for phased minimum wage increases based on hospital size and operations, the Chamber of Commerce withdrew its "Job Killer" tag. The framework of this new law is extremely nuanced, and we suggest reaching out to counsel with questions about its application and interpretation.

G. Miscellaneous

- **AB 647** (Holden; D-Pasadena): Existing law establishes grocery worker retention provisions that require a buyer of an existing grocery store to retain employees for a 90-day transition period, during which an employee may only be discharged for cause and must be considered for continued employment after the transition period. The existing definition of "grocery establishment" means a retail store that is over 15,000 square feet in size and that sells primarily household foodstuffs for offsite consumption. Labelled a "Job Killer" bill, this law broadens the statute to include "distribution centers" owned and operated by a "grocery establishment" regardless of square footage.

  Creating a new private right of action, the new law also grants employees, union representatives and nonprofit corporations the ability to file an action in court for violation of an employee's right under this law. Potential damages include civil penalties, liquidated damages, reinstatement, lost wages and benefits, punitive damages, attorney's fees and costs.

II.

CASE LAW UPDATE

A. Breach of Contract

Stock Options Are Not Wages Under The Labor Code

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

Gautam Shah sued his former employer Skillz, Inc. for breach of contract, alleging that Skillz did not have cause to terminate his employment and wrongfully prevented him from exercising the stock options he had earned as a Skillz employee. The company allegedly terminated Shah "for cause" because he had forwarded a confidential business report to his personal email; Shah, on the other hand, alleged he was terminated in retaliation for asserting his right to vested benefits. The jury found Skillz liable and awarded Shah a total of approximately $11.6 million for the loss of his stock options. The trial court conditioned its denial of Skillz's new trial motion on Shah's accepting a remittitur in the amount of $4.4 million; Shah accepted the remittitur before both sides appealed. The Court of Appeal reversed the judgment with directions that the trial court award damages to Shah in the amount of $6.7 million, which was the value of the lost stock options as calculated by Skillz's expert witness using the average price of Skillz stock after the IPO and the six-month lock-up period had ended (three and a half years after Shah's termination in January 2018). The Court further held that stock options are not "wages" under the Labor Code and, therefore, Shah was not entitled to recover any tort damages, including punitive damages or attorney's fees.

Employees Were Properly Awarded $7.2 Million For Employer's Breach Of Contract

Park v. NMSI, Inc., 96 Cal. App. 5th 346 (2023)

Julie Park and Danny Chung sued their former employer (NMSI, Inc., a residential mortgage lender) for $7.2 million in profit sharing and related amounts associated with NMSI's alleged breach of contract, which the trial court granted in the form of prejudgment right to attach orders. NMSI argued that Park and Chung had failed to establish the probable validity of their claims because the agreements underlying their breach of contract causes of action had been modified through an exchange of emails as well as by the parties' subsequent conduct. The trial court applied the "probable validity standard" and concluded the agreements had not been modified by email or the parties' subsequent conduct. Further, the trial court found that the claims were for a fixed or readily ascertainable amount. The Court of Appeal affirmed the trial court's order in plaintiffs' favor.

B. Public Policy Violation / "Whistleblower"

Whistleblower Protection Laws Do Not Apply Outside the United States

Daramola v. Oracle Am., Inc., 92 F.4th 833 (9th Cir. 2024)

Tayo Daramola is a Canadian citizen who resided in Montreal at all relevant times and who worked for Oracle Canada, a wholly owned subsidiary of Oracle Corporation (a California-based company). Daramola's employment agreement stated that it was governed by Canadian law. During his employment, Daramola, who worked remotely, conducted business and collaborated with colleagues in Canada and the United States and was assigned as lead project manager for the implementation of an Oracle product at institutions of higher education in Texas, Utah, and Washington. In time, Daramola came to believe that by offering this product, Oracle was committing fraud, and he reported same to Oracle and the SEC. Eventually, Daramola resigned his employment based upon his "unwillingness to take part in fraud." He then filed a lawsuit in federal court in California, claiming violations of the Sarbanes-Oxley Act and the Dodd-Frank Act, as well as the California whistleblower protection act, Cal. Lab. Code § 1102.5. The district court dismissed the lawsuit after twice giving Daramola leave to amend his complaint. The Ninth Circuit affirmed dismissal of the action, holding that the anti-retaliation provisions of the state and federal statutes at issue did not apply to Daramola, a Canadian citizen working out of Canada for a Canadian subsidiary of a U.S.-based parent company.

Trial Court Gave Erroneous Jury Instructions In Whistleblower Case

Garrabrants v. Erhart, 98 Cal. App. 5th 486 (2023)

Charles Matthew Erhart was an internal auditor for a financial institution who "blew the whistle" on the employer concerning the actions of the bank's CEO, Gregory Garrabrants. While Erhart's whistleblower case was pending in federal court, Garrabrants sued Erhart in state court for copying, retaining and transmitting to multiple regulatory authorities documents Erhart believed evidenced possible wrongdoing; those documents included personal and confidential information that belonged to Garrabrants. At trial, a jury awarded Garrabrants $1,502 on his claims against Erhart for invasion of privacy, receiving stolen property and unauthorized access to computer data in violation of Penal Code § 502. The trial court awarded Garrabrants more than $65,000 in costs and more than $1.3 million in attorney's fees as the prevailing party. The Court of Appeal reversed the judgment, holding that the trial court erroneously instructed the jury that bank customers have an unqualified reasonable expectation of privacy in financial documents disclosed to banks; that Erhart needed to believe the documents may have been lost or destroyed had he not removed them; and other instructional errors regarding the Penal Code claims. *See City of Whittier v. Everest Nat'l Ins. Co.*, 97 Cal. App. 5th 895 (2023) (Cal. Ins. Code § 533 barring insurer liability for a loss caused by the willful act of the insured does not preclude insurer indemnification of whistleblower claims arising under Cal. Lab. Code § 1102.5).

Court Affirms $7.1 Million Whistleblower Verdict

Zirpel v. Alki David Prods., Inc., 93 Cal. App. 5th 563 (2023)

Karl Zirpel worked as the vice president of operations for Alki David Productions ("ADP") before the principal of ADP, Alki David, fired him for allegedly disclosing information that Zirpel reasonably believed evidenced a violation of safety standards and for disclosing information about ADP's working conditions. The jury returned a special verdict in Zirpel's favor, finding ADP had violated state whistleblower statutes (Cal. Lab. Code §§ 232.5 and 1102.5), and awarded Zirpel $369,000 in economic damages; $700,000 in emotional distress damages; and $6 million in punitive damages. The Court of Appeal affirmed the judgment, holding that substantial evidence supported the jury's finding that Zirpel reasonably believed he had disclosed to ADP and city inspectors unsafe working conditions and code violations at the location in question. Further, ADP did not argue in its post-trial motions that it had sustained its burden under Section 1102.6 to demonstrate by clear and convincing evidence that Zirpel was fired for reasons other than his disclosures concerning the absence of a construction permit and the city inspectors' disapproval of the work done to date on the construction project. The Court also affirmed the punitive damages award on the basis that there was sufficient evidence of reprehensible conduct (e.g., David's verbal abuse of Zirpel, which was "laced with obscenities and homophobic epithets"), which justified a 6:1 ratio of punitive to compensatory damages.

Statute Prohibits Employer Retaliation For Report Of Unlawful Activity Even If It's Already Known To Employer

People ex rel. Garcia-Brower v. Kolla's, Inc., 14 Cal. 5th 719 (2023)

The California Supreme Court has held that an employee who makes a whistleblower complaint to his or her employer may bring a retaliation claim under the whistleblower statute (Cal. Lab. Code § 1102.5(b)) even if the subject of the complaint was already known to the employer. The employee, who worked as a bartender, complained to her employer that she had not been paid wages owed to her for three shifts she had worked at Kolla's Inc., a nightclub. Upon receiving the complaint, the owner of the nightclub responded by threatening to report the employee to immigration authorities, terminating her employment, and telling her never to return to the nightclub. The employee then filed a complaint against the nightclub with the California Division of Labor Standards Enforcement (DLSE), and the DLSE concluded that the nightclub had unlawfully retaliated against the employee. When the nightclub refused to pay damages, the California Labor Commissioner sued for various violations, including unlawful retaliation under Section 1102.5(b).

The trial court and the court of appeal rejected the Labor Commissioner's claim for retaliation after finding that the bartender's complaint was not a protected "disclosure" under Section 1102.5(b). The lower courts reasoned that a "disclosure" required "the revelation of something new, or at least believed by the discloser to be new, to the person or agency to whom the disclosure is made." Because the nightclub presumably knew that it had failed to pay the employee the wages that were due, the employee's complaint did not qualify as a "disclosure" as required by Section 1102.5(b).

In this opinion, however, the California Supreme Court found that the term "disclosure" under Section 1102.5(b) "includes protection for disclosures made to 'another employee who has the authority to investigate… or correct the violation,' without regard to whether the recipient already knows of the violation." Because it was immaterial whether the nightclub had existing knowledge of its failure to pay the employee for wages earned, the nightclub's actions, including its threatening to report the employee to immigration authorities, terminating her employment, and instructing her never to return to work, constituted unlawful retaliation under Section 1102.5(b). *See also Kourounian v. California Dep't of Tax & Fee Admin*., 91 Cal. App. 5th 1100 (2023) (trial court should not have admitted evidence of employer's alleged retaliation that predated employee's EEO complaint or of employee's EEO complaints themselves, which were inadmissible hearsay).

C. Wage/Hour and PAGA

Attorneys Who "Severely Over-Litigated" Wage Claims Were Still Entitled to Reasonable Fees

Gramajo v. Joe's Pizza on Sunset, Inc., 100 Cal. App. 5th 1094 (2024)

Elinton Gramajo worked as a pizza delivery driver for less than a year and sued his former employer for various Labor Code violations, including minimum and overtime wage claims. After nearly four years of litigation and extensive discovery, a jury awarded Gramajo only $7,659.93 though his attorneys sought approximately $324,000 in prevailing party costs and attorney's fees. The trial court denied the requests for fees and costs in their entirety, finding that plaintiff's counsel severely over-litigated the case and the requested fees and costs were grossly disproportionate to the limited trial success. As an example, Gramajo's counsel propounded 15 sets of written discovery requests and noticed 14 depositions, yet only admitted 12 exhibits at trial. The trial court relied on Code of Civil Procedure section 1033(a), which gives trial courts discretion to deny prevailing plaintiffs their litigation costs when they file their case as an unlimited civil proceeding but only recover an amount available in a limited civil case. The Court of Appeal reversed after concluding that Code of Civil Procedure section 1033(a) and Labor Code section 1194 (which provides a mandatory award of reasonable attorney's fees to employees who prevail in their actions) are in "irreconcilable conflict," but that Labor Code section 1194 ultimately controls because it is the more recently enacted and specific statute of the two. The Court then remanded the matter for the trial court to determine a reasonable fee and cost award.

California Supreme Court Clarifies Scope of Compensable "Hours Worked"

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

This decision arose from a class action asserting wage claims on behalf of contractors hired to assist with "procurement, installation, construction, and testing services" at a solar power facility on privately-owned land. The California Supreme Court answered three questions certified by the Ninth Circuit as follows:

- An employee's time spent on an employer's premises awaiting and undergoing an employer-mandated exit procedure that includes a visual inspection of the employee's personal vehicle is compensable as "hours worked";

- The time an employee spends traveling between a security gate and employee parking lots is compensable as "employer-mandated travel" under Wage Order No. 16 (governing the construction industry), if the security gate was the first location where the employee's presence was required for an employment-related reason other than the practical necessity of accessing the worksite; and

- When an employee is covered by a collective bargaining agreement that provides the employee with an "unpaid meal period," that time is nonetheless compensable as "hours worked" if the employer prohibits the employee from leaving the employer's premises or a designated area during the meal period and if this prohibition prevents the employee from engaging in otherwise feasible personal activities.

Employer Waived Its Right To Arbitrate
By Litigating Civil Action

Semprini v. Wedbush Secs. Inc., 101 Cal. App. 5th 518 (2024)

Joseph Semprini originally filed a lawsuit against his employer in 2015, which included individual claims, class action claims and a cause of action under the California Labor Code Private Attorneys General Act of 2004 ("PAGA"). Soon after this, Semprini and the employer entered into a stipulation to arbitrate plaintiff's personal claims but have his class and PAGA claims proceed in court. The class was certified in 2017 and trial was scheduled to begin in October 2023. However, five months before trial, the employer attempted to compel the non-representative PAGA claims to arbitration, relying on the Supreme Court's decision in *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022) and the fact that class members who still worked for the employer signed new arbitration agreements in September and October 2022. The trial court denied the employer's motion, finding it had waived its right to compel arbitration by entering into the 2015 stipulation.

Plaintiff Allowed to Continue with Complaint
Despite Only Alleging "Representative" PAGA Claims

Balderas v. Fresh Start Harvesting, Inc., 101 Cal. App. 5th 533 (2024)

Lizbeth Balderas sued her former employer on behalf of 500 other current and former employees of an agricultural company, seeking civil penalties under the California Labor Code Private Attorneys General Act of 2004 ("PAGA"). In her complaint, Balderas stated she was "not suing in her individual capacity; she is proceeding herein solely under the PAGA, on behalf of the State of California for all aggrieved employees, including herself and other aggrieved employees." The trial court struck her complaint based on *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022); because she had not filed an individual action seeking PAGA relief for herself, the court found under *Viking River* she lacked standing to pursue representative PAGA claims on behalf of other employees. The Court of Appeal reversed this decision, following the

California Supreme Court's decision in *Adolph v. Uber Technologies, Inc.*, 14 Cal. 5th 1104 (2023). Under *Adolph*, the standing requirements to file a PAGA complaint should be interpreted broadly and Balderas satisfied them (despite only bringing claims in a representative capacity) because she alleged she was an "aggrieved" employee who was subject to one or more of the employer's Labor Code violations.

California Employers Score A
Rare Victory On Wage Statement Penalties

Naranjo v. Spectrum Sec. Servs., Inc., 15 Cal. 5th 1056 (2024)

Gustavo Naranjo, a security guard, filed a putative class action against his former employer, alleging violations of California Labor Code section 226 based upon the employer's failure to report missed-break meal premiums on employees' wage statements. Labor Code Section 226 imposes a penalty of up to $4,000 per employee when an employer commits a "knowing and intentional failure … to comply" with the wage statement law. The employer argued that even if it did have an obligation to report premium pay owed on employees' wage statements, this failure was not "knowing and intentional" under Section 226 because up until 2022, it remained an unsettled issue whether wage statements needed to include premium pay for missed meal breaks.

The inaccurate wage statements were issued between June 2004 and September 2007, though the question of whether premium pay had to be recorded on employee wage statements remained unsettled law until 2022 (the first time this employer was before the Court). Thus, the Court held that "[g]iven the uncertainty and confusion, it was not objectively unreasonable for [the employer] to believe [during this period] it had no obligation to report meal premiums as wages. Imposing liability under these circumstances would penalize [the employer] not for failing to apprise itself of its obligations, but for failing to predict how unsettled legal issues would be resolved many years down the line."

The Court held that if an employer "reasonably and in good faith believed" it provided the proper wage statements, it has not violated Section 226. Previously, some California courts had held that a violation is "knowing and intentional" if the employer is aware of the "factual predicate" underlying the violation — for instance, that it has not reported certain information on an employee's wage statement, even if "the employer believed in good faith that it had complied with the law."

Dismissal of Representative PAGA Claim Vacated
Following *Adolph v. Uber Techs.*

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

The Ninth Circuit vacated a district court's dismissal of a former employee's "non-individual" Private Attorneys General Act (PAGA) claims in the wake of the California Supreme Court's holding in *Adolph v. Uber Techs., Inc.*, 14 Cal. 5th 1104 (2023). Plaintiff in this case signed a contract with her employer (Lowe's) that contained an arbitration agreement for claims arising from her employment. After her termination, she filed a complaint in California state court (later

removed to federal court), asserting both individual and representative claims under PAGA. Lowe's successfully moved to arbitrate the individual PAGA claims following the U.S. Supreme Court's decision in *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022), which held that the Federal Arbitration Act preempts PAGA's mandatory joinder rule and allows for an employer to compel individual PAGA claims to arbitration. The district court then dismissed the representative claims, citing the majority opinion in *Viking River*: "PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate [arbitration] proceeding." However, a year after *Viking River* (and before the Ninth Circuit heard oral argument in this case), the California Supreme Court held in *Adolph* that "an order compelling arbitration of individual claims does *not* strip the plaintiff of standing to litigate non-individual claims in court."

Trial Court May Not Dismiss PAGA Claims On Manageability Grounds

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

The California Supreme Court affirmed an appellate court judgment that "trial courts lack inherent authority to strike PAGA claims on manageability grounds"—that is, trial courts may not "dismiss [them] with prejudice." In so holding, the Supreme Court overruled *Wesson v. Staples the Office Superstore, LLC*, 68 Cal. App. 5th 746 (2021).

The Court was careful to limit its decision to the question of whether trial courts can dismiss a PAGA claim on manageability grounds, but it assiduously avoided interfering with trial judges' discretion to control their dockets. Thus, it "le[ft] undisturbed various case management tools" short of dismissing claims outright. In doing so, the Court expressly endorsed lower court decisions holding that trial courts may "limit the evidence to be presented at trial or otherwise limit the scope of the PAGA claim." And it observed that because trial courts have the ability to limit evidence or claims, "it behooves the PAGA plaintiff to ensure that trial of the action is manageable[.]"

Because the California Supreme Court left intact a trial court's inherent authority to control its own docket in the face of unwieldy PAGA claims, the ultimate impact of *Estrada* may prove to be relatively minor. Many trial courts already proactively work with litigants to manage individualized issues in PAGA cases, including requiring plaintiffs to submit trial plans at an early but practicable time. Nothing in *Estrada* casts any doubt on the propriety of these practices. Thus, employers may take the ruling as tacit encouragement to continue to try to limit PAGA claims in a way that allows parties and courts to manage individualized issues, even if outright dismissal is now off the table.

Rest-Break Class Gets Second Chance for Class Certification

Miles v. Kirkland's Stores Inc., 89 F.4th 1217 (9th Cir. 2024)

Ariana Miles was employed by Kirkland's, a chain of home décor stores, from February 2011 to July 2018. She sued her former employer under two theories. First, she alleged that the company unlawfully required its employees to remain in the store during their rest breaks. She also alleged

that employees were forced to work off-the-clock, because company policy stated that employees who brought bags to work would be subject to visual inspections when they left, but these inspections would take place at the store entrance, after they clocked out. Miles filed a motion to certify classes based on both of these theories, but the district court denied the motion after concluding that individual issues would predominate over common issues for both proposed classes.

In this appeal, the Ninth Circuit affirmed the denial of certification for the "bag check" class, but reversed and remanded the denial of the certification of the rest break class. As to that claim, the company's policy explicitly required employees to remain on the premises during their rest breaks, unless they had their supervisors' permission to leave. While the company submitted declarations from employees to prove that the store did not in fact require its employees to get their managers' permission, the panel held that these declarations only discussed store conditions in 2021, which was after the relevant time period. On the other hand, the declarations submitted by the plaintiff, alongside the company policy, provided "overwhelming evidence" that the company consistently enforced its policy for all employees during the relevant period.

"Poison-Pill" Provision Voided Entire Arbitration Agreement

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

Former bank employees filed a lawsuit against their former employer for various wage-and-hour violations. The lawsuit included a Private Attorneys General Act ("PAGA") claim, under which plaintiffs sued on behalf of all other "aggrieved employees" of the company. In response, the bank filed an unsuccessful motion to compel plaintiffs' "individual" claims to arbitration. Pursuant to the arbitration agreement, the parties waived their respective rights to bring any claims against one other "in any purported class or representative proceeding. There shall be no right or authority for any dispute to be brought, heard, or arbitrated on a class, collective, or representative basis and the Arbitrator may not consolidate or join the claims of other persons or Parties who may be similarly situated."

The appellate court rejected the bank's argument that the waiver provision did not constitute a "wholesale waiver" of plaintiffs' PAGA claims, but instead was an enforceable waiver pertaining only to plaintiffs' "nonindividual" PAGA claims, though the waiver provision made no distinction between "individual" and "non-individual" PAGA claims. Furthermore, the waiver provision contained a "poison-pill provision" that stated that if the waiver provision were severed in any way, the entire arbitration agreement would be voided. Thus, the Court concluded that the "poison pill" clause invalidated the entire arbitration agreement. See also *Westmoreland v. Kindercare Education LLC*, 90 Cal. App. 5th 967 (2023) (also holding that a poison-pill provision invalidated an entire arbitration agreement).

Health Care "Opt-Out Credits" Do Not Count Towards Calculation Of FLSA Regular Rate of Pay

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

The Ninth Circuit affirmed the district court's grant of summary judgment in favor of the employer (Ventura County) in this putative class action arising under the federal Fair Labor Standards Act ("FLSA"), brought by county firefighters and police officers who opted out of their union- and employer-sponsored health plans. The employees who opted out of these health plans received monetary compensation in return, however part of the compensation was deducted as a fee that was then used to fund the plans from which they had opted out. The employees argued that this opt-out fee should count as part of their "regular rate" of pay for purposes of calculating overtime compensation under the FLSA.

The Court held that these opt-out fees should not be considered part of the employees' "regular rate" of pay. Instead, the fees should be exempted as "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing" health insurance, per the statutory exemption set forth in 29 U.S.C. § 207(e)(4). The opt-out fees deducted from the credit employees received was provided to their union, and employees had no ability to access this sum. The court also rejected an argument from the plaintiffs that the 29 U.S.C. § 207(e)(4) exception should only apply to contributions made to support plaintiffs' own health care (not that of other employees).

Employer May Not Challenge Voided Employment Agreements Via Interlocutory Appeal

Dominguez v. Better Mortgage Corp., 88 F.4th 782 (9th Cir. 2023)

Underwriter Lorenzo Dominguez filed this putative class and collective action against his former employer, alleging that the company failed to pay proper overtime to him and other similarly situated underwriters. After Dominguez filed the lawsuit, his former employer allegedly attempted to persuade other underwriters at the company not to participate in the lawsuit, offering each of them $5,000 in exchange for an agreement to release all of their non-FLSA claims. The employer also circulated a new draft employment agreement to the underwriters that did not specifically call attention to the existence of the arbitration provision contained therein. Dominguez challenged the enforceability of these new agreements, and in response the district court issued an order invalidating the agreements because they were signed "coercively." The district court also ordered the employer to refrain from communicating with any putative class members about the lawsuit, except by way of court-approved writings.

The employer appealed the order restricting its communications, and in this opinion, the Ninth Circuit confirmed its jurisdiction to hear the interlocutory appeal and affirmed the district court's communication restriction as a "tailored response." However, the Ninth Circuit concluded it did not have appellate jurisdiction to determine the enforceability of the nullified employment agreements. The Court concluded that the communication restriction and the order nullifying the employment agreements were not "inextricably intertwined" and that the lower court's

nullification of the employment agreements did not constitute injunctive relief. Thus, the appellate court could not decide that issue at this stage of the litigation.

Employer Improperly Delayed Pay
To Employees Terminated After Onset Of COVID-19

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

Karen Hartstein represents a certified class of former Hyatt employees who were laid off after the onset of the COVID-19 pandemic in March 2020. The class alleged that Hyatt violated California law by failing to pay them immediately for their accrued vacation time and by failing to compensate them for the value of the free hotel rooms employees received each year. Hyatt, however, argued that it was not required to pay its employees their accrued vacation pay until June 2020, when the employees' employment was terminated. The Ninth Circuit reversed the district court's earlier summary judgment ruling in favor of Hyatt on the issue of prompt payments. The panel held that the prompt payment provisions of the California Labor Code required Hyatt to pay plaintiffs their accrued vacation pay in March 2020, because a temporary layoff with no specific return date within the normal pay period is a "discharge" for purposes of the statute.

However, the panel affirmed the district court's ruling that the complimentary hotel rooms Hyatt provided to employees were excludable from the calculation of employees' regular rate of pay under the federal Fair Labor Standards Act ("FLSA"). The FLSA excludes "other similar payments" not made as compensation for an employee's hours of employment from the regular rate of pay calculation, and the free hotel rooms fell into this exception.

Employee's Meal and Rest Break
PAGA Claims Survive Summary Judgment

Arce v. Ensign Grp., Inc., 96 Cal. App. 5th 622 (2023)

Cecilia Arce worked as a certified nursing assistant at a skilled nursing facility. After her employer terminated her, she brought claims under the Private Attorneys General Act ("PAGA") that she worked through meal and rest periods and was not paid premiums she was owed for meal and rest breaks after her termination. The employer moved for summary judgment, arguing that Arce did not suffer any violation during the limitations period. The trial court granted summary judgment to the employer, but on the basis that Arce did not offer any "competent proof" that a Labor Code violation related to meal or rest break violations occurred during her employment. The Court of Appeal reversed the judgment. Arce provided evidence that her employer's understaffing and workload policies made it effectively impossible for her to take the required breaks. According to the Court, the employer did not furnish evidence that negated Arce's allegations that its actual practices conflicted with its written break policies, and thus did not meet the initial burden of production. It was not enough that the employer's policies and handbooks all required Arce to take meal and rest breaks if the employer pressured its employees not to take breaks. The summary judgment against Arce was reversed and remanded to the trial court.

COVID-19 Emergency Order Extending Statute Of Limitations For Civil Cases Upheld

LaCour v. Marshalls of Cal., LLC, 94 Cal. App. 5th 1172 (2023)

Plaintiff Robert LaCour, a former "loss prevention specialist" for Marshalls, appealed from a judgment in favor of his former employer and certain affiliated entities. Marshalls filed a demurrer arguing that because LaCour's employment with Marshalls ended in May 2019, he had only a year and 65 days to bring a PAGA claim, and having missed that deadline, his PAGA action was untimely. Marshalls also filed a motion to strike. The trial court overruled Marshalls' demurrer and granted its motion to strike in part. Marshalls later filed a motion for judgment on the pleadings, which was granted.

Marshalls argued that since LaCour's employment ended in May 2019, he had up to a year and 65 days to file his civil complaint (i.e., August 2020 at the latest), taking into account the 65-day tolling period. However, in response to the COVID-19 pandemic, the PAGA statute of limitations was tolled from April 6, 2020, through October 30, 2020, which had the effect of extending the deadline to file with the California Labor & Workforce Development Agency (LWDA) a notice of a PAGA claim until November 24, 2020. Marshalls argued that the emergency rule was "unconstitutional and prohibited by statute," but the appellate court rejected this argument, concluding that the state had the authority to toll the statutes of limitation for civil cases, including PAGA.

In addition, the trial court had granted the defendants' motion for judgment on the pleadings because it found that a previous PAGA judgment based upon a settlement agreement had a preclusive effect. However, the appellate court rejected this argument and reversed the previous judgment. The appellate court held that in the earlier case, the initial LWDA notice dealt narrowly with a complaint regarding paying employees for off-the-clock work at the end of their shifts. However, the settlement release encompassed a wide swath of Labor Code violations not mentioned in the initial notice, unfairly limiting LaCour from pursuing his claims, which were broader.

Non-Party Plaintiffs With Overlapping PAGA Claims May Be Able To "Permissibly Intervene" In Related Actions

Accurso v. In-N-Out Burgers, 313 Cal. Rpt. 3d 151 (2023), *rev. granted* [**not citable**]

Plaintiffs Tom Piplack and Brianna Marie Taylor filed PAGA actions in Orange and Los Angeles Counties, respectively, against respondent In-N-Out Burgers (In-N-Out). When they learned about settlement negotiations in a later, overlapping PAGA action brought by Ryan Accurso against In-N-Out in Sonoma County, Piplack and Taylor filed a proposed complaint to intervene in the Sonoma County action and moved to intervene under Cal. Code Civ. Proc. § 387 and for a stay. They requested a stay of proceedings in Accurso's case based on the doctrine of exclusive concurrent jurisdiction, arguing that Accurso should be stayed as a later-filed action.

The trial court concluded that Piplack and Taylor lacked standing to intervene, and on that basis denied the motions to intervene and to stay the case. "The Court finds that neither [Piplack nor

Taylor] has a personal interest in the PAGA claims being prosecuted by Accurso, but rather the interest lies with the State, as the real party in interest, and thus [Piplack and Taylor] do not have standing to intervene." "[L]ikewise," the court ruled, they "do not have standing to request a stay." In this opinion, the appellate court vacated the order and remanded for reconsideration. It agreed that Piplack and Taylor did not have the ability to "intervene as of right," but concluded it was possible that they could permissively intervene. The trial court rejected Piplack and Taylor's ability to intervene out-of-hand, but the appellate court held that the trial court must weigh arguments the plaintiffs make in favor of staying the case (fully or partially) against any arguments Accurso and In-N-Out wish to offer as to why the motion should not be heard or should be denied.

Disability Leave Is Not "Compensation" Under California Workers' Compensation Law

California Dep't of Corr. & Rehab. v. WCAB, 311 Cal. Rptr. 3d 861 (2023), *rev. granted* [**not citable**]

Under the Workers' Compensation Act, if a worker is injured because of the employer's serious and willful misconduct, the "compensation" the worker is entitled to receive increases by one half. The statute defining "compensation" limits the term to benefits or payments provided by Division 4 of the Labor Code. In this case, the Court held that "compensation" does not include industrial disability leave, which is provided by the Government Code, and therefore is not subject to being increased by one half in cases of serious and willful employer misconduct.

While at his job as a correctional officer at the Lancaster State Prison in August 2002, respondent Michael Ayala was severely injured in a preplanned attack by inmates. He filed a workers' compensation claim and alleged that the injury was caused by the serious and willful misconduct of his employer, petitioner California Department of Corrections and Rehabilitation (CDCR). Labor Code § 4553 provides that "[t]he amount of compensation otherwise recoverable shall be increased one-half . . . where the employee is injured by reason of serious and willful misconduct" by the employer. Ayala and CDCR agreed that the injury caused Ayala 85% permanent disability, but they could not agree whether CDCR engaged in serious and willful misconduct.

The Workers' Compensation judge agreed with CDCR and found that the base compensation was what Ayala would have been paid in temporary disability. But on reconsideration, the Board again rescinded and reversed the workers' compensation judge's decision, this time finding that the base compensation was what Ayala was paid on industrial disability leave and enhanced industrial disability leave. The appellate court held that industrial disability leave and enhanced industrial disability leave are not "compensation" as that term is used in section 4553 and thus are not subject to a 50 percent increase.

PAGA Plaintiffs May Maintain Representative Claims In Court After Individual Claims Are Compelled To Arbitration

Adolph v. Uber Techs., Inc., 14 Cal. 5th 1104 (2023)

After months of anticipation, the California Supreme Court answered "yes" to the critical question of whether "aggrieved" PAGA plaintiffs retain their standing to pursue representative claims in court after their individual claims have been compelled to arbitration.

Erik Adolph worked as a driver for Uber, delivering food to customers through Uber's online platform. As a condition of his employment, Adolph had to accept a technology services agreement that contained an arbitration provision. The arbitration agreement required Adolph to arbitrate, on an individual basis, work-related claims he might have against Uber. The arbitration agreement also included a provision that purported to waive Adolph's ability to bring PAGA claims on behalf of others, either in court or through arbitration.

Adolph sued Uber, claiming that the company misclassified him and other drivers as independent contractors, rather than employees. Uber moved to compel arbitration of Adolph's individual claims, which the trial court granted; the trial court subsequently dismissed Adolph's class action claims that were pending in court. However, with the court's permission, Adolph amended his complaint to eliminate his individual claims and include only a PAGA claim for civil penalties and filed a motion for preliminary injunction to prevent arbitration from proceeding. The trial court then granted the injunction. Uber appealed the injunction order and attempted to compel arbitration again, but an appellate court affirmed the trial court's decision. Uber appealed that decision as well.

The California Supreme Court concluded in this opinion that PAGA plaintiffs do not lose their standing to pursue a non-individual claim when their individual claims are compelled to arbitration. The Court reasoned that denying a PAGA plaintiff standing to pursue the non-individual PAGA claims was inconsistent with PAGA's purpose, because it would undermine the State's ability to deputize individuals to enforce the Labor Code, reduce state revenues, and increase state costs of enforcement. The Supreme Court further held that a trial court may stay the representative civil action pending arbitration, and following arbitration, the award may be confirmed in court, which would bind the parties in the pending court action. *See also Barrera v. Apple Am. Grp. LLC*, 95 Cal.App.5th 63 (2023).

Absent Exemption, Highly Compensated Daily-Rate Workers Are Entitled To Overtime

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

Oil rig worker Michael Hewitt earned over $200,000 per year but did not receive overtime compensation. Hewitt was paid on a "daily-rate" basis, i.e., Hewitt's biweekly paycheck was calculated based on a daily rate which was multiplied by the number of days he worked during the pay period. Helix asserted that Hewitt was "a bona fide executive" and thus exempt from overtime. To meet this exemption, Helix had to show that Hewitt received a predetermined and fixed salary that does not vary based on the amount of time worked; however, Hewitt's salary

varied depending on the number of days worked. Further, although there is an exception for daily-rate highly compensated employees, this exception was not satisfied because Helix did not "guarantee" a weekly payment that bears a reasonable relationship to what Hewitt usually earns. In dissent, Justice Kavanaugh, joined by Justice Alito, argued that Helix's daily guarantee of $963 per day to Hewitt satisfied the FLSA's requirement of guaranteeing at least $455 per week.

Distributors Not Liable For
Unpaid Wages Of Agricultural Workers

Morales-Garcia v. Better Produce, Inc., 70 F.4th 532 (9th Cir. 2023)

Agricultural laborers who picked strawberries for several growers sued the growers' distributors Better Market Produce and Red Blossom Sales, alleging that the distributors were liable for unpaid wages after the growers went bankrupt. Under Cal. Lab. Code § 2810.3, a company that outsources work to a labor provider may be held liable for a laborer's wages as a "client employer" if the laborer's work is within the outsourcer's "usual course of business." The statute defines usual course of business as "the regular and customary work of a business, performed within or upon the premises or worksite of the client employer." The district court rejected plaintiffs' claims, holding that the determination of whether the farms were part of the distributors' premises required considering the degree of control the distributors exercised over the laborers' location of work. The Ninth Circuit affirmed and distinguished typical control tests which focused on control over workers with the control test applied by the district court which considered the distributors' control of the land, *i.e.*, the premises. The Ninth Circuit agreed that the distributors did not exercise sufficient control over the land despite having an exclusive arrangement with the growers for the land and retaining entry rights for inspection. The Ninth Circuit also rejected plaintiffs' overarching claim that Section 2810.3 extends liability for wages of workers who produce a product necessary to the company's business.

Enforcement of PAGA Carve Out
Urges Caution In Shifting Arbitration Landscape

Duran v. EmployBridge Holding Co., 92 Cal. App. 5th 59 (2023)

In 2014, the California Supreme Court determined that Private Attorneys General Act ("PAGA") claims are immune from arbitration in *Iskanian v. CLS Transp. Los Angeles, LLC* – which, unsurprisingly, led to an avalanche of PAGA claims being filed as plaintiffs' lawyers scrambled to make their cases arbitration-proof (at least as to those pesky PAGA claims). In response to *Iskanian*, some employers immediately and dutifully revised their arbitration agreements to exclude PAGA claims. Then, in June 2022, the United States Supreme Court in *Viking River Cruises v. Moriana* held that the Federal Arbitration Act preempts *Iskanian*'s holding that PAGA actions could not be divided into individual and representative claims brought on behalf of other allegedly "aggrieved employees." Now, in this opinion, the Court of Appeal has decided that a law-abiding employer that relied to its detriment upon *Iskanian* and included a broad PAGA carve out in its arbitration agreement *could not* compel to arbitration an employee's individual PAGA claim – even though that claim would have otherwise been arbitrable but for the *Iskanian*-compliant carve out.

PAGA Debt Not Dischargeable in Bankruptcy

In re Patacsil, 2023 WL 3964908 (Bankr. E.D. Cal. June 9, 2023)

The Private Attorneys General Act (PAGA) permits aggrieved employees to file representative action to recover civil penalties for Labor Code violations. The law allocates 75% of any recovery to the Labor and Workforce Development Agency (LWDA) for "enforcement of labor laws" and "education of employers and employees about their rights and responsibilities" under the Labor Code. Further, according to a recent bankruptcy court opinion, the amounts payable to the LWDA qualify as penalties "payable to and for the benefit of a governmental unit" which makes them nondischargeable in bankruptcy. 11 U.S.C. § 523(a)(7). Thus, employers will remain liable for 75% of the award even after emerging from bankruptcy. Importantly, however, the bankruptcy court held that the other 25% of the penalty (payable to "aggrieved employees") and any statutory attorneys' fees do not satisfy any exception in the Bankruptcy Code and thus are dischargeable in bankruptcy.

No Final Paycheck Due After End Of Temporary Assignment

Young v. RemX Specialty Staffing, 91 Cal. App. 5th 427 (2023)

Vanessa Young worked as an employee of staffing company RemX Specialty Staffing and was temporarily assigned to work at Bank of the West. Young allegedly "verbally abused" a RemX representative on a call about delivery of her paycheck. Young claimed that the RemX representative "basically" fired her from RemX; however, the representative instructed her in a contemporaneous email not to return *to the bank*. Notwithstanding this directive, Young reported to work at the bank and was escorted from the premises by another RemX representative. Young again alleged that this representative "basically implied" she was fired from RemX, but a subsequent email showed RemX only instructed her not to return to work *at the bank*.

Young sued RemX, alleging several causes of action including a PAGA claim. Young's individual claims were compelled to arbitration and the Court of Appeal dismissed the appeal of her class claims. Thus, Young's only remaining claim was for PAGA penalties due to failure to timely pay final wages to a "discharged" employee under Cal. Lab. Code § 201.3. The trial court granted summary judgment to RemX, finding that Young had not been discharged from her employment with RemX when she was instructed not to return to work at the bank. The Court of Appeal affirmed. The Court of Appeal emphasized that a discharge requires the end of an employment relationship and that a discharge can only occur "when an employee is terminated from work with the temporary services employer, not when the employee is terminated from an assignment with a client." Thus, Young was not discharged when her temporary assignment with the bank ended because she was still employed by RemX. RemX therefore was entitled to summary judgment because Section 201.3 requires a discharge to occur in order to trigger an employer's obligation to pay final wages, and Young was not discharged.

Employee's PAGA Action Was Not Limited By Sick Pay Statute

Wood v. Kaiser Found. Hosps., 88 Cal. App. 5th 742 (2023)

Ana Wood brought a PAGA action against her employer Kaiser for alleged failure to correctly pay for three paid sick days as required under California's Healthy Workplaces, Healthy Families Act (the "Act"). The Act provided for compensatory relief and civil penalties, but restricted relief to equitable, injunctive, or restitutionary relief when brought by "any person or entity enforcing this article on behalf of the public." Kaiser argued that this phrase encompassed PAGA actions in which a plaintiff acts on behalf of the public and thus civil penalties (as plaintiffs seek under PAGA) are barred. On the other hand, the plaintiff argued that the Legislature intended to only restrict the Unfair Competition Law (UCL). The trial court sustained Kaiser's demurrer. The Court of Appeal reversed, holding that the phrase only referred to the UCL and not to PAGA. Disagreeing with several federal district courts and despite recognizing that aggrieved employees bring an action "on behalf of the state," the Court of Appeal held that the Legislature intended PAGA plaintiffs to bring claims on behalf of the plaintiff and fellow aggrieved employees. *See* Cal. Lab. Code § 2699(a). This in contrast to the UCL which is expressly brought on behalf of the public. Thus, the Act's reference to "on behalf of the public" referred only to the UCL and plaintiff was not precluded from bringing a PAGA action under the Act.

Issue Preclusion Barred PAGA Claims After Arbitration Loss

Rocha v. U-Haul Co. of Cal., 88 Cal. App. 5th 65 (2023)

Thomas and Jimmy Rocha alleged FEHA and Labor Code violations against their employer U-Haul. The brothers' individual PAGA claims were compelled to arbitration where they subsequently lost on all causes of action. The Rochas then moved to vacate the arbitrator's award, but the trial court confirmed the award and imposed sanctions. The Court of Appeal affirmed, holding that issue preclusion applied because the Rochas were not "aggrieved employees" as required for standing under PAGA. Therefore, the arbitrator's finding that the brothers did not suffer any Labor Code violations precluded them from acting as aggrieved employees. The opinion criticized *Gavriiloglou v. Prime Healthcare Mgmt., Inc.*, 83 Cal. App. 5th 595 (2022), which held that issue preclusion did not apply to the subsequent PAGA action because the plaintiff was not operating in the same capacity. The *Rocha* court noted that there is no "same capacity" requirement for issue preclusion.

Employer Need Not Count Overtime Twice In Bonus Calculation

Lemm v. Ecolab Inc., 87 Cal. App. 5th 159 (2023)

Stephen Lemm, a route sales manager, brought a PAGA action against his employer, Ecolab, Inc., alleging that Ecolab improperly calculated nondiscretionary bonuses. Pursuant to Ecolab's incentive plan, an employee could receive a higher monthly bonus based on performance as a percent of gross wages. For the purpose of calculating the bonus, gross wages included straight time, overtime, and double time wages. Ecolab relied on a federal regulation that specifically applies to percentage bonuses and permitted Ecolab's calculation method. Lemm argued that the DLSE manual requires that a nondiscretionary bonus be incorporated into the calculation of the

regular rate of pay, which would in turn affect overtime calculations. Further, Lemm argued, because California law favors an interpretation that is more protective of workers, Ecolab could not rely on a less protective federal regulation. The trial court granted summary judgment for Ecolab and the Court of Appeal affirmed, holding that because Ecolab's calculation was already based on overtime, requiring Ecolab to again calculate based on overtime would require them to pay "overtime on overtime."

D. Discrimination/Harassment

Employee Need Not Show "Significant Harm" Resulted From Discriminatory Transfer

Muldrow v. City of St. Louis, 601 U.S. ___, 144 S. Ct. 967 (2024)

Sergeant Jatonya Clayborn Muldrow worked as a plainclothes officer in the Intelligence Division of the St. Louis Police Department until she was reassigned to a uniformed job elsewhere in the Department and replaced with a male officer. Although Muldrow's rank and pay remained the same, her responsibilities, perks and schedule changed. Muldrow no longer worked with the high-ranking officials in the Department's Intelligence Division — instead, she was supervising the day-to-day activities of neighborhood patrol officers. Also, she lost access to an unmarked take-home vehicle and had a less-regular schedule involving weekend shifts. Muldrow brought suit under Title VII, challenging the transfer as a discriminatory action based on her sex. The lower court affirmed summary judgment in favor of the City because the allegedly discriminatory transfer "did not result in a diminution to her title, salary, or benefits" and had caused "only minor changes in working conditions." However, in this opinion, the United States Supreme Court vacated the judgment and held that Muldrow could proceed with her claim to the extent she could show that the transfer brought about "some" harm with respect to an identifiable term or condition of employment, even though the harm was not "significant."

NASA Scientist's Hostile Work Environment Claim Should Not Have Been Dismissed

Mattioda v. Nelson, 98 F.4th 1164 (9th Cir. 2024)

Dr. Andrew Mattioda, a NASA scientist, sued the agency for discrimination and hostile work environment that allegedly began after he informed his supervisors of a disability to his hips and spine and requested upgraded airline tickets for work-related travel. The district court dismissed on summary judgment both the discrimination and hostile work environment claims, but the Ninth Circuit reversed the judgment as to the latter. Dr. Mattioda alleged that after he reported his disabilities to NASA, he received derogatory comments from his supervisors, diminished work opportunities, unwarranted negative job reviews and resistance to his requests for accommodation. After one of his supervisors learned of the cost of the requested travel upgrades, the supervisor openly discussed Dr. Mattioda's disabilities in front of others, compared the alleged disabilities to the supervisor's own hip issues and asked Dr. Mattioda why he could not just "tough it out or suck it up and travel coach." The Ninth Circuit held that Dr. Mattioda had alleged a plausible causal nexus between the claimed harassment and his disabilities. Further, the Court determined that the alleged harassment was sufficiently severe or pervasive to

survive summary judgment. Finally, the Court affirmed dismissal of Dr. Mattioda's disability discrimination claim on the ground that NASA's proffered legitimate nondiscriminatory reason for selecting another employee for a promotion instead of Dr. Mattioda was not pretext for discrimination because the other candidate had more relevant experience.

Court Properly Dismissed Lawsuit Of Employee Who Failed To Exhaust Administrative Remedies

Kuigoua v. Department of Veteran Affairs, 101 Cal. App. 5th 499 (2024)

Arno Kuigoua, who worked as a registered nurse for the Department of Veteran Affairs, alleged in the complaint he filed with the EEOC and the California Department of Fair Employment and Housing (the "DFEH") that he was discriminated against on the basis of his sex (male). He also alleged retaliation for reporting the discrimination. The DFEH found no evidence that Kuigoua had suffered any discrimination on the basis of his gender or of any illegal retaliation and gave him a right-to-sue notice. In his subsequently filed civil suit, Kuigoua alleged he was the victim of harassment and discrimination based upon his gender, sex and/or sexual orientation as well as his race, color and/or national origin. The Department successfully moved for summary judgment on the ground that Kuigoua had failed to properly exhaust administrative remedies in that he asserted claims in his civil suit that were not identified in the DFEH complaint. The Court of Appeal affirmed dismissal because by "changing the facts [Kuigoua] denied the agency the opportunity to investigate the supposed wrongs [he] made the focus of his judicial suit."

"Dispute" Does Not Exist Under Ending Forced Arbitration Act Until Employee Asserts A Claim Or Demand

Kader v. Southern Cal. Med. Ctr., Inc., 99 Cal. App. 5th 214 (2024)

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (9 U.S.C. §§ 401, *et seq.*) became effective on March 3, 2022. A "statutory note" to the Act states that the "Act shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act." Omar Kader worked as the CFO and then the COO of the employer, where he signed an arbitration agreement on June 25, 2019 by which he agreed to arbitrate "employment disputes." Kader alleges he was subjected to multiple acts of sexual assault and harassment both before and after he signed the arbitration agreement though he did not file a complaint with the California Department of Fair Employment and Housing (DFEH) until May 2022. Defendants moved to compel arbitration on the ground that the alleged conduct began before Kader signed the arbitration agreement and, therefore, the "dispute" between the parties arose before the effective date of the Act. However, the trial court denied the motion to compel arbitration, and the Court of Appeal affirmed on the ground that "there was no evidence that Kader asserted any right, claim, or demand prior to filing charges with the DFEH in May 2022."

Prevailing Employer May Only Recover Costs If FEHA Action Was "Objectively Frivolous"

Neeble-Diamond v. Hotel Cal. By the Sea, LLC, 99 Cal. App. 5th 551 (2024)

Amanda Neeble-Diamond sued her employer for violation of the Fair Employment and Housing Act (FEHA), but after a jury concluded she was an independent contractor rather than an employee, the trial court entered judgment in favor of the employer (Hotel California). Hotel California then filed a motion for attorney's fees and a cost memorandum. Neeble-Diamond successfully opposed the motion for attorney's fees on the ground that Hotel California had failed to establish that her FEHA claims were "objectively frivolous," relying upon *Williams v. China Valley Indep't Fire Dist.*, 61 Cal. 4th 97 (2015) and Cal. Gov't Code § 12965(c)(5), but she failed to file a timely motion to tax costs. The trial court refused to excuse the failure to file a timely motion to tax costs and awarded Hotel California more than $180,000 in costs. The Court of Appeal reversed, holding that Hotel California had failed to file a motion for an award of costs but had simply filed a cost memorandum requesting the court clerk to enter costs – but "the clerk has no authority to exercise discretion in awarding costs, let alone to make the frivolousness finding required by Cal. Gov't Code § 12965."

New Trial Of Sexual Harassment Claim Ordered Following Admission Of Evidence Of Other Employees' Complaints Against Plaintiff

Argueta v. Worldwide Flight Servs., Inc., 97 Cal. App. 5th 822 (2023)

Eunices Argueta worked as an agent in the import department of the employer, a freight operations company, reporting to Dzung Nguyen whom she claimed had sexually harassed her. A jury returned a defense verdict, and Argueta filed a motion for new trial and for judgment notwithstanding the verdict, both of which the trial court denied. Over the spirited dissent of Justice Grimes, the Court of Appeal reversed, holding that Argueta was entitled to a new trial based on the lower court's admitting evidence of multiple complaints that other employees had made against Argueta. The complaints accused Argueta of "bullying, harassment, retaliation, yelling, making threats and other bad behavior, including discriminating against a pregnant subordinate employee." The trial court denied Argueta's motion in limine regarding the employee complaints against her on the ground that they were relevant to "the plaintiff's motive for making the complaints of sexual harassment." Argueta contended and the Court of Appeal agreed that the evidence in question was improper and irrelevant character evidence and that, in any event, motive is not an element of a sexual harassment claim and that the employer would be strictly liable for the harassment regardless of what motive Argueta may have had to complain.

A Single Incident Of Harassing Conduct May Create A Hostile Work Environment

Beltran v. Hard Rock Hotel Licensing, Inc., 97 Cal. App. 5th 865 (2023)

Stephanie Beltran, a server at the Hard Rock Hotel in Palm Springs, alleged she had been sexually harassed by Juan Rivera, the former General Manager of the hotel. Beltran reported to Human Resources that Rivera had "grabbed or slapped her ass." Beltran also testified in her

deposition about "multiple incidents of conduct over a period of months, including leering gestures, hand massages, and inappropriate questions, which culminated with the slapping or groping incident." Although the trial court granted summary adjudication in favor of the employer, the Court of Appeal reversed, holding that this evidence was more than sufficient to raise a triable issue of fact as to whether "a reasonable person who was subjected to the harassing conduct would find that the conduct so altered working conditions as to make it more difficult to do the job." In so holding, the Court relied principally upon Cal. Gov't Code § 12923 and the case law that post-dates the January 1, 2019 effective date of the statute.

The Court also published that portion of its opinion concerning the "appropriate scope" of a separate statement of undisputed material facts filed in support of a motion for summary judgment, concluding that the separate statement filed in this case, which included over 600 paragraphs and ran over 100 pages, was neither "convenient nor expeditious" in that it included not only "material" facts but also "merely background information that has [no] relevance to any cause of action or defense." The Court similarly criticized the plaintiff's opposition separate statement, holding that "it is completely unhelpful to evade the stated fact in an attempt to create a dispute where none exists."

Once Again, Employer Loses Right To Arbitrate
By Failing To Timely Pay Arbitration Fees

Doe v. Superior Court, 95 Cal. App. 5th 346 (2023)

An anonymous employee sued her former employer and former manager, alleging multiple instances of sexual harassment and assault. The former employer successfully compelled the case to arbitration. The deadline for the employer to pay the arbitration fees pursuant to Cal. Code Civ. Proc. § 1281.98(a)(1) was October 3, 2022, but the arbitrator did not receive the payment until October 5, 2022, two days after the 30-day statutory grace period had expired. Accordingly, the employee moved to vacate the order compelling arbitration because of the late payment, but the trial court denied this motion.

In this opinion, the Court of Appeal strictly enforced the statutory deadline and held that the employee could proceed with her sexual harassment and assault claims in state court and avoid arbitration. The relevant provision in the California Arbitration Act states that arbitrator fees must be "paid within 30 days after the due date." Here, the court held that "paid" means when a payment is actually received, rather than when a payment is sent. The employer submitted a check for fees that it owed one business day before the fees were due, but the check was not received until two days after payment was due. Because the fees were received late, the Court of Appeal granted the employee's petition for writ of mandate and ordered the trial court to grant the employee's motion to vacate the order granting the employer's motion to compel arbitration. Said the Court: "We do not find that the proverbial check in the mail constitutes payment."

Disability Discrimination Claim
Was Properly Dismissed On Summary Judgment

Martin v. Board of Trustees of the Cal. State Univ., 97 Cal. App. 5th 149 (2023)

Following the termination of his employment as director of university communications at CSUN's Marketing and Communications Department, Jorge Martin sued the university for race, gender and sexual orientation harassment and discrimination because he is a "middle-aged, light-skinned Mexican-American, heterosexual and cisgender male." The trial court granted the university's motion for summary judgment after concluding that Martin could not demonstrate he was performing competently or that discriminatory animus could be inferred; further, the university submitted unrebutted evidence that Martin was terminated for a legitimate, nondiscriminatory reason. The Court of Appeal affirmed summary judgment based on the results of various investigations that were undertaken by the university prior to the termination of Martin's employment. The trial and appellate courts rejected Martin's argument that the university's reasons for terminating him were pretextual, rejecting Martin's assertion that the university's commitment to diversity was evidence of pretext against him or that the "cat's paw" theory applied (i.e., that a "significant participant" in the termination decision had exhibited discriminatory animus toward Martin).

Arbitrator Correctly Enforced Release Agreement
Executed By Employee

Castelo v. Xceed Fin. Credit Union, 91 Cal. App. 5th 777 (2023)

Elizabeth Castelo sued her former employer Xceed Financial Credit Union for wrongful termination and age discrimination in violation of FEHA. After the parties stipulated to binding arbitration, the arbitrator granted summary judgment to Xceed based on a release that Castelo signed after she was notified of the termination decision but before her last day on the job. Castelo argued that the release violated Cal. Civ. Code § 1668, which prohibits pre-dispute releases of liability. Although Xceed provided Castelo with a two-part release (a release of claims through the date of execution and a "Reaffirmation" that Castelo was supposed to sign on her last day of her employment six weeks later), Castelo signed both releases at the same time (i.e., six weeks before her employment ended) and then later contended that her wrongful termination claim was not barred by either release, because that claim "accrued" on the date of her separation, which occurred after the releases were executed. The arbitrator (the late Hon. Enrique Romero (ret.)) enforced the releases and determined that they were not barred by the statute because they did not have as their purpose the immunization of Xceed from liability for a future violation of law. The trial court granted Xceed's petition to confirm the arbitration award and denied Castelo's petition to vacate. The Court of Appeal affirmed the trial court's judgment.

Business Entity Agents Of Employer Share Potential FEHA Liability

Raines v. U.S. Healthworks Med. Grp., 15 Cal. 5th 268 (2023)

The Ninth Circuit certified to the California Supreme Court the question of whether FEHA's definition of "employer" extends to corporate agents of the employer such as a company that conducts preemployment medical screenings. In this putative class action, plaintiffs allege that their employment offers were conditioned upon their completion of pre-employment medical tests conducted by U.S. Healthworks Medical Group (USHW). They further allege that during the screenings, USHW asked intrusive and illegal questions unrelated to the applicants' ability to work, including whether the applicants had cancer, mental illnesses, HIV, or problems with menstrual periods. The applicants asserted FEHA claims against the prospective employers that used USHW to conduct the medical screenings and USHW itself as an "agent" of the employers. In this opinion, the Court examined FEHA's definition of "employer" and concluded the definition encompasses third-party corporate agents such as USHW.

Employer Must Prove "Substantial Increased Costs" Would Result From Religious Accommodation

Groff v. DeJoy, 600 U.S. 447 (2023)

Gerald Groff, an Evangelical Christian, took a mail delivery job with the USPS at a time when postal service employees were was not required to work on Sundays. However, when the USPS began facilitating Sunday deliveries for Amazon, he was called upon to work Sundays, which ultimately resulted in his resignation from his employment after he was subjected to progressive discipline for refusing to work Sundays. Groff sued the USPS for violation of Title VII, alleging the postal service could have accommodated his Sunday Sabbath practice "without undue hardship on the conduct of [its] business." The district court and the Court of Appeals for the Third Circuit ruled in favor of the USPS, holding that requiring an employer "to bear more than a de minimis cost to provide a religious accommodation is an undue hardship." The lower courts held that exempting Groff from Sunday work had "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale." In this unanimous decision, the Supreme Court clarified earlier precedent (*Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977)) and vacated the lower court's opinion, holding that an employer can show "undue hardship" when the burden of granting a religious accommodation would result in substantial increased costs in relation to the conduct of its particular business.

Fire Chief Was Terminated For Misconduct Not Because Of His Religion

Hittle v. City of Stockton, 101 F.4th 1000 (9th Cir. 2024)

Ronald Hittle served as the City's Fire Chief before he was fired (following an investigation by an outside investigator) because he lacked effectiveness and judgment in his ongoing leadership of the Fire Department; used City time and a City vehicle to attend a religious event and

approved on-duty attendance of other Fire Department managers; failed to properly report his time off; engaged in potential favoritism of certain employees; endorsed a private consultant's business in violation of City policy; and had potentially conflicting loyalties in his management role and responsibilities. Hittle sued the City under Title VII and the California Fair Employment and Housing Act ("FEHA"), alleging his termination was "based upon his religion." Hittle pointed to what he characterized as "direct evidence of discriminatory animus" based on a comment made by the Deputy City Manager Laurie Montes that Hittle was part of a "Christian coalition" and part of a "church clique" in the Fire Department. However, the evidence showed that Montes was repeating what was written in anonymous letters sent to the City and that the comment did not originate with Montes herself. The Court noted that such remarks were in any event "more akin to 'stray remarks' that have been held insufficient to establish discrimination." Further, based on the investigation, the Court held that defendants' legitimate non-discriminatory reasons for firing Hittle were not mere pretext for religious discrimination. *See also Crowe v. Wormuth*, 74 F.4th 1011 (9th Cir. 2023) (police officer's Title VII sexual orientation discrimination claim was properly dismissed on summary judgment despite homophobic language used by another officer who had participated in investigation into plaintiff's misconduct).

Age/National Origin Case Was Properly Dismissed Despite "Direct Evidence" Of Discriminatory Animus

Opara v. Yellen, 57 F.4th 709 (9th Cir. 2023)

Joan Opara was terminated from her employment as an IRS revenue officer after the IRS determined she had committed several "UNAX offenses" (i.e., incidents of unauthorized access of taxpayer data). Following her termination, Opara sued the Treasury Secretary, alleging she was terminated in violation of the Age Discrimination in Employment Act and Title VII for, respectively, age and national origin discrimination. The district court granted summary judgment to the Treasury Secretary, and the Ninth Circuit affirmed, concluding that Opara's direct evidence of age-related discriminatory animus (several age-related comments from a decision maker), while sufficient to support a prima facie case of age discrimination, was insufficient to raise a genuine issue as to pretext concerning the reasons offered by the Secretary for the termination. The reason the direct evidence was insufficient to defeat the summary judgment motion was because it consisted entirely of Opara's own uncorroborated and self-serving testimony and allegations (*citing Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054 (9th Cir. 2002)). The Ninth Circuit also affirmed dismissal of Opara's age/national origin discrimination claims based on her failure to show pretext for the UNAX offenses.

Court Recognizes "Music As Harassment" While Rejecting "Equal Opportunity Harasser" Defense

Sharp v. S&S Activewear, LLC, 69 F.4th 974 (9th Cir. 2023)

Fed up with hearing "very offensive" songs like Eminem's "Stan" and Too $hort's "B*job Betty" on the job, Stephanie Sharp and several other employees (including one male) filed a hostile work environment claim against their employer under Title VII. Plaintiffs claimed they could not escape the music because it was "[b]lasted from commercial-strength speakers" that

were mounted on forklifts and driven around the warehouse where they worked. Plaintiffs claimed the music encouraged male employees to make sexually graphic gestures and remarks and to openly share pornographic videos in the workplace.

The district court dismissed the claim, relying upon what is sometimes referred to as the "equal opportunity harasser" defense, which some employers have argued should shield them from liability where there is evidence that employees outside the protected group have been subjected to the same or similarly objectionable behavior. In short, the trial court found that the claim failed as a matter of law because the music was offensive to both men and women. However, the Ninth Circuit reversed, squarely rejecting the "equal opportunity harasser" defense and holding that harassment need not be directly targeted at a particular plaintiff to support a harassment claim. The court found that the repeated and prolonged exposure to music "saturated with sexually derogatory content" could constitute "music as harassment."

Employee Who Refused To Get Flu Vaccine Was Properly Terminated

Hodges v. Cedars-Sinai Med. Ctr., 91 Cal. App. 5th 894 (2023)

Deanna Hodges, who worked for Cedars-Sinai as an administrative employee with no patient responsibilities, refused to get vaccinated for the flu, contrary to Cedars' policy which required all of its employees to get vaccinated in an effort to limit employee transmission of the flu. The only exceptions were for a "valid medical or religious exemption." Hodges refused to get vaccinated and convinced her physician (who had no expertise in advising whether a person should or should not receive a flu vaccine for "medical reasons") to help her apply for an exemption from the vaccination policy. Cedars' Exemption Review Panel denied Hodges' request for an exemption because it did not meet the CDC's criteria for a medical exemption. Following the termination of her employment, Hodges sued Cedars for disability discrimination, among other things. The trial court granted Cedars' summary judgment motion, and the Court of Appeal affirmed, holding that Hodges failed to establish a disability or the perception by Cedars of a disability. Moreover, Cedars presented a legitimate, nondiscriminatory reason for the termination that was not pretextual: Cedars' mandatory vaccination policy was a product of its concern about patient safety and the guidance from the CDC and was not related to any disability Hodges purported to have.

Art Teacher's Age Discrimination Case May Not Be Barred By "Ministerial Exception"

Atkins v. St. Cecilia Catholic Sch., 90 Cal. App. 5th 1328 (2023)

Frances Atkins was a long-term employee of St. Cecilia Catholic School, and in her final year with the school, she worked part-time as an art teacher and office administrator. Following the termination of her employment, Atkins sued the school for age discrimination in violation of the California Fair Employment and Housing Act. The trial court granted summary judgment to the school based on the ministerial exception, which precludes certain employment claims to be brought against a religious institution by its "ministers." The Court of Appeal reversed, holding

that although the school did not waive the ministerial exception defense by failing to assert it as an affirmative defense, there were triable issues of fact as to whether the ministerial exception applied to Atkins' position because she did not teach religion to the students nor did she lead the students in any religious activities or services or ever attend such services herself. Despite the fact that Atkins prayed with the students in her art class and promoted the Archdiocese of Los Angeles' six tasks of catechesis by encouraging "Christ-like" behavior, there were triable issues of fact as to whether educating students in the Catholic faith lay at the core of her job responsibilities, which included the dual roles of teaching and acting as a school administrator.

No Claim By Employee Who Was Friends With Alleged Harasser

Atalla v. Rite Aid Corp., 89 Cal. App. 5th 294 (2023)

Hanin Atalla and Erik Lund had a social relationship and became "close friends" before Atalla began working at Rite Aid where Lund worked as a district manager/district leader. Atalla and her husband socialized with Lund and his wife, and Atalla and Lund exchanged hundreds of texts; joked with one another in those texts; texted about personal matters; and sent multimedia messages to one another. They also frequently met for lunch and went out for coffee together. Late one Friday night after meeting with his "wine group," Lund sent Atalla a "Live Photo" of himself masturbating, followed shortly thereafter by a photo of his penis. Lund texted that he was "so drunk right now" and that he had "meant to send to wifey." Lund texted an apology to Atalla the next day to which she did not respond. Within a few days, Atalla's counsel sent a letter to Rite Aid asserting a claim of sexual harassment; following an investigation, Lund's employment was terminated. Although Rite Aid assured Atalla that she was welcome to return to work (and notified her of Lund's termination), she refused to come back. The trial court granted summary judgment to Rite Aid, and the Court of Appeal affirmed, holding that the evidence did not support an inference that "the text exchange culminating in the inappropriate photos was work-related in that Lund was acting in his capacity as a supervisor, and the conduct was in turn properly imputable to Rite Aid." The Court also held there was no constructive termination of Atalla's employment because "Rite Aid immediately took action, terminated Lund, and invited plaintiff back to work" (quoting the trial court's order).

Pregnancy Discrimination Lawsuit Was Properly Dismissed

Lopez v. La Casa de Las Madres, 89 Cal. App. 5th 365 (2023)

Gabriela Lopez worked as shelter manager for a non-profit organization that provides services to women and children who are victims of domestic violence. In September 2016, Lopez gave birth to a child; by December 17, 2016, Lopez had received the full four months of pregnancy-disability leave required by statute, including the concurrently running 12 weeks of baby-bonding leave. Lopez then submitted a work-status report from Kaiser which stated that Lopez should not return to work before January 14, 2017. Lopez later submitted another form signed by a "social worker at Kaiser specializing in mental health" stating that Lopez was suffering from a disability that necessitated two modifications to her work duties for an "unknown" period: (1) time off to allow Lopez to continue mental health treatment (group and individual therapy);

and (2) flexible/shortened workdays if Lopez "finds the nature of the work or stress of the work overwhelming and triggering of severe anxiety/depressive symptoms." La Casa notified Lopez that it was unable to accommodate the limitations proposed by her social worker and instead offered to briefly extend her leave and upon her return to work to temporarily assign her to a data entry specialist position. After Lopez failed to timely submit further information about her alleged disability, La Casa sent her a letter stating that La Casa considered Lopez to have "elected to discontinue her employment."

Following a bench trial, the trial court found that Lopez failed to carry her burden of proving that she had a condition related to pregnancy; could perform the essential functions of the job; and was denied a reasonable accommodation. The trial court also determined that Lopez had failed to prove La Casa had discriminated against her based on a disability because she did not prove that she was otherwise qualified to perform the shelter manager job, given her need to avoid stressful duties. The Court of Appeal affirmed judgment in favor of La Casa.

Employer That Failed To Layoff Employee Before She Became Disabled May Have Discriminated

Lin v. Kaiser Found. Hosps., 88 Cal. App. 5th 712 (2023)

Suchin Lin received favorable performance evaluations as an IT Engineer at Kaiser before the decision was made to eliminate her position. Before Lin was informed of the elimination of her position, she fell in the workplace and suffered an injury to her shoulder, which resulted in her doctor placing her on modified duty. Thereafter, Lin's supervisor judged her performance more harshly in comparison to that of her teammates at Kaiser. After her employment was terminated, Lin filed this lawsuit against Kaiser, alleging disability discrimination and related claims. The trial court granted summary judgment in favor of Kaiser, but the Court of Appeal reversed, holding that although Kaiser had tentatively placed Lin on the termination list before becoming aware of her disability, it did not terminate her employment until after it was aware of her disability. The Court concluded that a reasonable jury could find that the negative evaluations Lin had received and her ultimate termination were substantially motivated by her disability.

E. Trade Secrets/Restrictive Covenants/Tortious Interference/UCL

Former Employer Was Entitled To Injunction And Attorney's Fees For Employee's Misappropriation Of Trade Secrets

Applied Med. Distribution Corp. v. Jarrells, 100 Cal. App. 5th 556 (2024)

Stephen Jarrells worked for Applied as a vice president in charge of group purchasing organizations and had previously held other positions during his tenure with the company. When he was hired, Jarrells signed Applied's proprietary information agreement in which he agreed to hold in "strictest confidence" Applied's trade secrets and confidential/proprietary information. Shortly before his resignation eight years later, Jarrells created a folder titled "Good Stuff" on the laptop computer supplied to him by Applied, which contained trade secrets and confidential information that belonged to Applied. Jarrells then transferred the contents of the "Good Stuff" folder onto a thumb drive and uploaded that data to a computer issued to him by his new

employer, Bruin Biometrics, LLC, one of Applied's competitors. Then, Jarrells wiped his Applied computer and network drives and returned his Applied computer to Applied.

In the lawsuit that followed, Applied sued Jarrells for misappropriation of trade secrets and breach of the proprietary information agreement. At trial, the jury found Jarrells liable for breach of contract and misappropriation of trade secrets but awarded no damages to Applied on any of its claims. The court issued a permanent injunction against Jarrells and Bruin and awarded Applied $554,000 in attorney's fees and costs (though Applied had requested over $3.9 million). Both parties appealed. In this opinion, the Court of Appeal held the following: (1) Even though the jury awarded it no damages, Applied prevailed on its misappropriation of trade secrets and breach of contract claims and thus was entitled to a permanent injunction against Jarrells as well as prevailing-party attorney's fees; (2) the trial court erred in its assessment and apportionment of fees and costs recoverable by Applied; (3) the trial court erred in excluding from Applied's damages calculation the fees incurred by Applied's forensic computer expert; and (4) the trial court erred by granting nonsuit on the issue of whether Jarrells's conduct in misappropriating trade Applied's trade secrets was willful and malicious.

Company That Hired Competitor's Employee Was Not Entitled To Arbitrate Claims

Mattson Tech., Inc. v. Applied Materials, Inc., 96 Cal. App. 5th 1149 (2023)

Canfeng Lai worked for many years at Applied Materials before submitting his resignation to begin a new job at Mattson Technology (one of Applied's competitors). First, however, Lai allegedly emailed himself a number of files containing Applied's trade secrets. In response, Applied sued both Lai and Mattson for violating the Uniform Trade Secrets Act (the "UTSA"). Both Lai and Mattson moved to compel arbitration (based on an arbitration agreement between Applied and Lai). The trial court granted Lai's motion but denied Mattson's because it was not a party to the arbitration agreement and because the equitable estoppel exception was inapplicable. The trial court also denied Mattson's motion to stay the litigation pending the outcome of Lai's arbitration and issued a preliminary injunction to protect Applied's confidential information. The Court of Appeal affirmed the trial court's rulings except as to its order denying Mattson's motion to stay the litigation pending the outcome of the arbitration, which should have been granted pursuant to Cal. Code Civ. Proc. § 1281.4.

F. Independent Contractor

Exemption of Financial Professionals From ABC Test And Retroactive Application Are Constitutional

Quinn v. LPL Fin. LLC, 91 Cal. App. 5th 370 (2023)

Alleging misclassification, John Quinn brought a PAGA action on behalf of a class consisting of securities broker-dealers and investment advisers against his employer LPL Financial. Quinn brought the PAGA action prior to the enactment of AB 2257, which exempted the occupations identified in Quinn's PAGA action from the "ABC test" as set out in *Dynamex Operations W. v. Superior Ct.*, 4 Cal. 5th 903 (2018). Instead, exempt occupations are analyzed according to the

standard in *S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels.*, 48 Cal. 3d 341 (1989). The parties stipulated that Cal. Lab. Code § 2750.3(i)(2) would apply the exemption retroactively; however, Quinn challenged the constitutionality of the exemption and its retroactivity.

The trial court rejected Quinn's challenge and the Court of Appeal affirmed. First, the court concluded the law survived equal protection scrutiny because the legislature had a rational basis to exempt financial professionals given their higher skill and bargaining power and, therefore, less vulnerability to exploitation by misclassification. This holding joins the equal protection analysis of other courts which have upheld the exemption as applied to real estate agents and freelance writers and photographers. Next, the Court rejected the due process claim, holding that Quinn was not deprived of any right because there is no vested right in application of a particular legal test or presumption. In so holding, the court declined to follow *Hall v. Cultural Care USA*, 2022 WL 2905353 (N.D. Cal. July 22, 2022), which held that application of a different standard would deprive a putative employee of the vested right to wages and therefore could support a due process challenge. The court rejected *Hall's* reasoning because whether Quinn had a vested right depended on whether he *was* an employee, and that question was not decided.

G. Arbitration

New Period of Employment Requires New Arbitration Agreement

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

Jasmine Vazquez began working at a pharmaceutical company through a staffing agency and was later hired by the company as an at-will employee. At the time of initial hire, Vazquez agreed that claims she had against the company would be submitted to and determined exclusively by binding arbitration and that she would bring any claim individually, waiving her right to pursue a class or collective action. Two years into her first period of employment she terminated her employment but then returned to the company a few months later and negotiated a new employment agreement. The parties did not discuss whether she would need to sign an arbitration agreement again or whether her claims related to her employment would be subject to arbitration. Her second period of employment with the company ended less than a year later.

After her second period of employment, Vazquez filed a class action in which she alleged the company failed to provide proper wage statements during her second period of employment. The employer moved to compel the complaint to arbitration. The trial court denied the motion to compel arbitration, holding that the parties did not agree to arbitrate claims arising from Vazquez's second stint of employment, nor did the employer "show the existence of an implied agreement to submit claims arising from that second stint to arbitration; the agreement covering [plaintiff's] first stint of employment terminated in May 2021, and there was no evidence that the parties intended it to apply thereafter." The Court of Appeal affirmed the trial court's decision as

the employer "failed to carry its 'almost impossible' burden of showing that the trial court erred as a matter of law when it denied the motion to compel arbitration."

Really, Really Pay Those Arbitration Fees Within 30 Days – Really!

Hohenshelt v. Superior Court, 2024 WL 2966505 (2024), *rev. granted* [**not citable**]

For the *seventh* time since it became effective in 2020, the California Court of Appeal has published an opinion holding that Cal. Code Civ. Proc. §§ 1281.97 and 1281.98 truly mean what they say: "[I]f the [arbitration] fees or costs… are not paid [by the employer] within 30 days after the due date, the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel the employee … to proceed with that arbitration." *See, e.g., Suarez v. Superior Court*, 99 Cal. App. 5th 32 (2024) (intervening national holiday does not extend time for employer to pay fees). Consistent with the holdings of the prior cases, the Court held that the ADR provider has no discretion to extend the period for the employer to pay, and if the payment is received by the ADR provider even one day late, the employer is in "material breach" of the arbitration agreement and irretrievably waives its right to compel arbitration. Like courts before it, this Court held that the Federal Arbitration Act (FAA) does not preempt this strict state statute "because [it] prescribes further—rather than frustrates—the objectives of the FAA… [In fact, the California statute] is a friend of arbitration and not its foe" (citations omitted).

Associate Justice John Shepard Wiley Jr. filed a particularly pithy dissent worthy of the late Justice Scalia in which he first noted that:

> California state law disagrees, strongly and persistently, with federal law about whether arbitration is desirable… This California statute "singles out arbitration agreements for disfavored treatment." No other contracts are voided on a hair-trigger basis due to tardy performance. Only arbitration contracts face this firing squad.

Justice Wiley then predicted: "By again putting arbitration on the chopping block, this statute invites a *seventh* reprimand from the Supreme Court of the United States." He proceeded to recount the six prior instances over the past 37 years in which the Supreme Court of the United States has "rebuked California state law that continues to find new ways to disfavor arbitration." Finally, Justice Wiley cited approvingly a recent U.S. District Court opinion that "debunks" the argument that the statute is really "pro-arbitration": *Belyea v. GreenSky, Inc.*, 637 F. Supp. 3d 745 (N.D. Cal. 2022) (holding that the FAA preempts Cal. Code Civ. Proc. § 1281.97).

No Arbitration Waiver Where Employer Answered Complaint And Engaged In Limited Discovery

Armstrong v. Michaels Stores, Inc., 59 F.4th 1011 (9th Cir. 2023)

Teresa Armstrong executed an arbitration agreement with her employer Michaels Stores. After filing her claims in state court, Michaels answered, asserting its right to arbitration as an affirmative defense and removing the action to federal district court. The parties then submitted a joint case management statement that referenced as an issue in dispute whether Armstrong had

agreed to arbitrate. Michaels also served interrogatories and a request for document production. Following the Supreme Court's ruling in *Epic Sys. Corp. v. Lewis*, 584 U.S. 497 (2018), Armstrong's claims were compelled to arbitration where she lost. Armstrong appealed the arbitrator's award on the basis that Michaels waived its right to arbitration by waiting too long to move to compel arbitration. The district court confirmed the award and the Ninth Circuit affirmed. The Ninth Circuit explained that Michaels did not engage in "intentional acts inconsistent" with the right to arbitration. Thus, although Michaels did not immediately move to compel arbitration, Michaels repeatedly reserved the right to compel arbitration, did not ask the district court to weigh in on the merits, and did not engage in any meaningful discovery unrelated to the arbitration issue.

Ninth Circuit Strikes Down "*Request Arbitration, Go To Jail*" Law

Chamber of Commerce v. Bonta, 62 F.4th 473 (9th Cir. 2023)

A Ninth Circuit panel struck down California's AB 51 (aka the *Request Arbitration, Go to Jail Law*). The law imposed civil and criminal penalties on employers that required employees to sign arbitration agreements. The same panel previously held that the Federal Arbitration Act (FAA) preempted much of the law but declined to strike down AB 51's penalties for employers who had failed to get an employee to sign. In dissent, Judge Ikuta eviscerated the majority's "torturous ruling" which, she said, was analogous to a statute making it unlawful for a drug dealer to attempt to sell drugs, but lawful if the drug dealer had succeeded in the transaction. However, after *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022), the panel voted to rehear the case and Judge Fletcher switched sides. Now writing for the majority, Judge Ikuta noted that AB 51 singled out arbitration agreements in violation of the FAA and that non-negotiable agreements (like arbitration agreements) are routine and lawful.

H. Miscellaneous

Employer Is Not Liable For Malicious Prosecution Against Former Employee

Lugo v. Pixior, LLC, 101 Cal. App. 5th 511 (2024)

Saide Lugo sued her former employer Pixior and some of its employees for malicious prosecution after Pixior reported Lugo to the police for deleting "valuable computer files" after she "quit in a huff." Lugo was arrested and criminally prosecuted but the prosecutor dismissed the matter after it was discovered that one of Pixior's employee's had lied under oath at a preliminary hearing. In response to Lugo's malicious prosecution action, Pixior filed an anti-SLAPP motion to strike on the ground that by helping to bring a criminal prosecution the company had engaged in protected activity under the applicable statute. The trial court denied the motion to dismiss but the Court of Appeal reversed, holding that Lugo had failed to demonstrate a probability of success on the merits based on the fact that the police conducted an investigation that was independent of Pixior, which "shielded the Pixior parties from liability" for malicious prosecution.

Plaintiff's Attorneys Denied Additional Interest on Attorneys' Fees

Vines v. O'Reilly Auto Enterprises, LLC, 101 Cal. App. 5th 693 (2024)

Renee Vines filed an action against his former employer alleging discrimination and harassment under the Fair Employment and Housing Act ("FEHA") based on his race and age; that he was retaliated against when he was wrongfully terminated after he complained about the discrimination and harassment; and that his employer failed to prevent this discrimination, harassment and retaliation. At trial, Vines only won on his claims for retaliation and failure to prevent retaliation. While the jury awarded plaintiff $70,200 in damages, in September 2019 his attorneys sought $809,681 in attorney's fees. However, the trial court only awarded $129,540 in fees, which Vines successfully appealed. On remand, the trial court awarded Vines $518,162 in fees.

Vines then sought interest on the attorney's fees dating from the 2019 award and applied for and obtained a renewal of the judgment in the amount of $138,454 (i.e., the additional interest). The employer filed a motion to vacate the renewal of judgment, which the trial court denied. The employer successfully appealed from the order denying its motion to vacate the renewal of judgment, challenging only the amount of interest on the award of attorney's fees. Because the Court of Appeal reversed rather than modified the trial court's original award of attorney's fees, the interest on the attorney's fees awarded should have run from the date of reversal, not the original date of the award. "Whether an appellate court's disposition is a modification or a reversal depends on the substance and effect of the order … [b]ecause the effect of our opinion was to remand the matter for further hearing and factfinding necessary to determine an appropriate fee award, [our original opinion] was a reversal, not a modification."

Employers Owe No Duty Of Care To Prevent The Spread Of COVID To Employees' Household Members

Kuciemba v. Victory Woodworks, Inc., 14 Cal. 5th 993 (2023); 74 F.4th 1039 (9th Cir. 2023)

The California Supreme Court unanimously ruled that employers are not liable to nonemployees who contract COVID-19 from employee household members who bring the virus home from their workplace, because "[a]n employer does not owe a duty of care under California law to prevent the spread of COVID-19 to employees' household members." The Ninth Circuit certified two questions to the California Supreme Court: (1) If an employee contracts COVID-19 at the workplace and brings the virus home to a spouse, does the California Workers' Compensation Act (Lab. Code, § 3200 *et seq.*) (the "WCA") bar the spouse's negligence claim against the employer; and (2) Does an employer owe a duty of care under California law to prevent the spread of COVID-19 to employees' household members? The court answered the first question in the plaintiff's favor, concluding "take home" COVID-19 claims do not fall under the Workers' Compensation regime and therefore are not barred by the exclusivity provisions of the WCA. However, as a practical matter, the court's ruling on the second question—that employers owe no such duty of care—bars negligence claims for COVID-19 infection by members of an employee's household. Among other considerations, public policy concerns seemed to drive the Court's analysis:

> Imposing on employers a tort duty to each employee's household members to prevent the spread of this highly transmissible virus would throw open the courthouse doors to a deluge of lawsuits that would be both hard to prove and difficult to cull early in the proceedings. Although it is foreseeable that employees infected at work will carry the virus home and infect their loved ones, the dramatic expansion of liability plaintiffs' suit envisions has the potential to destroy businesses and curtail, if not outright end, the provision of essential public services. These are the type of "policy considerations [that] dictate a cause of action should not be sanctioned no matter how foreseeable the risk."

Terminating Sanctions Entered Against Employee Who Deleted Relevant Text Messages

Jones v. Riot Hospitality Group LLC, 85 F.4th 730 (9th Cir. 2024)

Alyssa Jones, a former waitress at a Scottsdale, Arizona bar, sued the owner of the bar and his company (Riot) for violations of Title VII and common law tort claims. After two of Jones' coworkers testified in their depositions that they had exchanged text messages with Jones about the case, the district court ordered Jones to produce the text messages. When Jones failed to produce the text messages, the district court ordered the parties to jointly retain a third-party forensic search specialist to review Jones' and the other witnesses' phones. The forensic search specialist (K.J. Kuchta) extracted messages from Jones' phone and forwarded them to Jones' lawyer, who had been ordered to forward the extracted messages to Riot's lawyer. Despite multiple district court orders and deadline extensions, Jones' lawyer failed to forward the text messages to Riot's lawyer. The district court then ordered Kuchta to send all non-privileged messages directly to Riot and assessed $69,576 in fees and costs against Jones and her lawyer. After receiving the text messages from Kuchta, Riot successfully moved for terminating sanctions pursuant to Fed. R. Civ. P. 37(e)(2) based on an expert report from Kuchta who concluded that "an orchestrated effort to delete and/or hide evidence subject to the Court's order had occurred." The Ninth Circuit affirmed the judgment.

Lawyer-Investigators Recover Attorneys' Fees Following Successful Anti-SLAPP Motion

Ross v. Seyfarth Shaw LLP, 96 Cal. App. 5th 722 (2023)

Plaintiff Natalie Operstein was a professor of linguistics at California State University, Fullerton, and plaintiff Craig Ross is her husband. In 2014, the university hired a law firm to investigate multiple accusations Operstein raised to her superiors about three of Operstein's colleagues. Defendant Colleen Regan, then a partner at the law firm, led the investigation. The investigation concluded that none of Operstein's allegations was well-founded.

In 2015, the university recommended termination of Operstein's employment purportedly due to her lack of progress towards tenure. Operstein filed a discrimination charge with the EEOC against the university and filed a separate lawsuit in federal court. All of her claims were dismissed on summary judgment. In April 2020, Operstein and Ross filed yet another lawsuit, this time against the law firm and Regan, alleging they conducted a biased investigation and that their findings were defamatory against Operstein. In response, the firm and Regan filed an anti-

SLAPP motion to strike the complaint. The trial court issued a tentative ruling which would have struck multiple causes of action from the complaint, and the plaintiffs immediately voluntarily requested dismissal of their lawsuit. Subsequently, the lawyer investigators filed a motion to recover their attorney's fees, which the court granted in part. Both parties appealed the order.

The appellate court rejected the plaintiffs' attempt to challenge the earlier judgment, and instead held that the investigators were prevailing parties (even though the plaintiffs voluntarily withdrew their complaint), and thus entitled under the anti-SLAPP statute to all (not just a portion) of the attorney's fees they requested.

Employee's Attorney's "Pervasive Incivility" Justified $460,000 Reduction In Fees

Snoeck v. ExakTime Innovations, Inc., 96 Cal. App. 5th 908 (2023)

Steve Snoeck prevailed at trial on one of his six claims against his former employer, ExakTime Innovations, and was awarded $1.14 million in attorney's fees – an amount that the trial court reduced by a "0.4 negative multiplier" to account for Snoeck's attorney's "lack of civility throughout the entire course of this litigation." The jury awarded Snoeck $130,088 in damages on his claim that ExakTime had breached the Fair Employment and Housing Act by failing to engage in the interactive process with him. The Court of Appeal affirmed the judgment, including the reduction in the attorney's fee award, noting that Snoeck's attorney had acted uncivilly when he accused ExackTime's attorneys of telling the court "lies," committing "fraud" and a "brazen con," making "misrepresentations" to the trial court and engaging in "sleazy" and "cringeworthy" conduct and "duping" the court of appeal.

Principal Of Former Employer Liable Based On Alter Ego Theory

Hacker v. Fabe, 92 Cal. App. 5th 1267 (2023)

In 2005, attorney Jacqueline Fabe filed claim for unpaid wages against her employer with the Labor Commissioner. Her employer then filed a malpractice suit against Fabe, and Fabe in response filed a retaliation suit with the Labor Commissioner. Fabe and the Labor Commissioner later won on all claims. In March 2010, Fabe filed a motion to add Ron Hacker, the principal of Fabe's former employer, to the judgment as a judgment debtor. This motion was denied without prejudice. Fabe and the Commissioner tried to enforce the judgment against Fabe's employer for years without success.

After years of back-and-forth, in 2020, the trial court granted a motion by the Labor Commissioner to amend the judgment to add Hacker as an alter ego judgment debtor. Hacker appealed this order. He contended there was "virtually no evidence" he commingled his assets or operations with those of the judgment debtor; that the original judgment was not renewed during the 10-year limitation period; the doctrine of laches bars the alter ego motion; and the denial of an earlier alter ego motion barred the current motion under *res judicata* principles.

The Court of Appeal rejected Hacker's arguments and affirmed the trial court's order and judgment. The court cited Hacker's complete control over Fabe's former employer, his control

of the litigation, his sharing of attorneys with Fabe's former employer, his transfer of the company to another person immediately after the judgment, and his destruction of relevant records of assets as evidence that Hacker acted in bad faith and was hiding behind the corporate shell of Fabe's former employer. Hacker's other arguments for why he should not be added as a judgment debtor were also rejected.

School District Employer Did Not Violate The Law By Requiring COVID Vaccination/Weekly Testing

Rossi v. Sequoia Union Elementary Sch., 94 Cal. App. 5th 974 (2023)

Pursuant to the State Public Health Officer Order of August 11, 2021, K-12 schools were required to verify the COVID-19 vaccination status of all school workers and to require proof of vaccination or weekly diagnostic screen testing. Plaintiff Gloria Elizabeth Rossi, an employee of the school district, refused to disclose her vaccination status or undergo weekly testing, and would not consent to the school district's obtaining or disclosing her confidential medical information. Rossi was offered the option to work remotely, but she refused to do so, claiming she could not fulfill her job duties remotely. Ultimately, Rossi's employment was terminated for her refusal to comply with the district's test-or-vaccinate requirement. Rossi sued the district under the Confidentiality of Medical Information Act ("CMIA") for alleged discrimination based on her refusal to authorize a release of her confidential medical information, and for unauthorized use of her medical information. The trial court sustained the district's demurrer without leave to amend, and the Court of Appeal affirmed dismissal on the ground that the necessity exception found within Cal. Civ. Code § 56.20(b) (i.e., complying with a lawful order of the State Public Health Officer) shielded defendants from liability as a matter of law.

Statements Made To Nanny At The Time Of Her Termination Are Not "Protected" Speech

Nirschl v. Schiller, 91 Cal. App. 5th 386 (2023)

Jewel Nirschl worked for Zachary and Jacquelynn Schiller as a nanny for approximately three years. When the Schillers terminated Nirschl's employment, they hoped she would sign a release of potential claims against them in exchange for a severance payment. The Schillers asked a friend (Alice Fox) who ran a nanny placement service and who had helped hire Nirschl to propose the release to Nirschl, who refused to sign the severance agreement. Instead, Nirschl sued the Schillers for various wage-and-hour violations, including the Private Attorneys General Act, as well as for defamation associated with the Schillers' allegedly false accusations to Fox about Nirschl's "repeated misconduct" involving a "verbal assault" on the minor child (i.e., calling him a "fucking little shit"); violent shaking of the child after he soiled his diaper; and failing to disclose that Nirschl was in a car crash while the minor was in the car.

The Schillers moved to strike Nirschl's complaint under the anti-SLAPP law, asserting that the allegedly defamatory statements "arose in the context of an attempt to settle contemplated

litigation." Nirschl argued in response that the statements were made before actual litigation was "proposed" or "imminent" and thus they were not subject to the anti-SLAPP statute or protected by the litigation privilege. The trial court denied the Schillers' motion to strike and awarded Nirschl some of her attorney's fees. The Court of Appeal affirmed the trial court, holding that Schiller published the allegedly defamatory statements before the existence of any threat of litigation from Nirschl. Moreover, Nirschl's wage-and-hour claims did not arise from any protected activity. *See also Castelo v. Xceed Fin. Credit Union*, 91 Cal. App. 5th 777 (2023) (release did not violate Cal. Civ. Code § 1668 (prohibiting pre-dispute releases) because employee already was aware of alleged claims at the time she executed release).

No Implied Waiver Of Disqualification Of Judge For Bias Or Appearance Of Impartiality After One Year

North Am. Title Co. v. Superior Court, 308 Cal. Rptr. 3d 769 (2023), *rev. granted* **[not citable]**

During oral argument on a motion, the trial judge accused the employer-defendants of participating in a "name change shell game," a "corporate game of three-card monte" and "trickery" and "scheming" to evade payment of a $43.5 million judgment to plaintiffs in this wage-and-hour class action. One employer (Lennar Title) filed a statement of disqualification of the judge for cause approximately a year after the comments were made. The judge struck the statement of disqualification on multiple grounds, including that the statements in question were made "years before seeking disqualification." The Court of Appeal granted Lennar's petition for a writ of mandate, holding that a statement of disqualification for bias, prejudice, or appearance of impartiality cannot be impliedly waived as untimely under Cal. Code Civ. Proc. § 170.3(b)(2).

Short-Term Military Leave May Have To Be Comparable To Non-Military Leave Benefits

Clarkson v. Alaska Airlines, Inc., 59 F.4th 424 (9th Cir. 2023)

Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), employers are required to provide employees who take military leave with the same non-seniority rights and benefits as colleagues who take comparable non-military leaves. Casey Clarkson, a pilot for Alaska Airlines and a military reservist, alleged that the airline's failure to provide paid leave for short-term military leaves while providing pay for jury duty, bereavement, and sick leave violated the USERRA. The district court granted summary judgment to the Airline, but the Ninth Circuit reversed. The Ninth Circuit considered three comparability factors: (1) the duration of leave, (2) purpose of leave, and (3) employee choice of when to take the leave (i.e., control). The Ninth Circuit concluded that the district court erred by comparing all military leave instead of just short-term military leave. For example, the district court compared the longest military leave (185 days) rather than the average length of short-term military leave (3.1 days). The district court also erred by finding that the purpose of short-term military leave was not to perform a civic duty and public service and that a reasonable jury could conclude that

pilots do not have significantly more control over their short-term leave relative to other types of leave.

Users May Have Privacy Interest In Emails Sent Over Company Network Absent Express Policy

Militello v. VFARM 1509, 89 Cal. App. 5th 602 (2023)

Shauneen Militello brought a 22-count complaint against fellow co-owners of a cannabis manufacturing and distribution company, including Ann Lawrence. Lawrence moved to disqualify Militello's counsel, arguing that Militello had improperly provided to her counsel private emails between Lawrence and her husband that were sent on the company's email network, which Militello's attorney attempted to use in the litigation in violation of the spousal communications privilege. The trial court agreed with Lawrence and disqualified Militello's attorney, and the Court of Appeal affirmed, holding that private emails sent on a company computer network could not be used against the user where the user had a reasonable expectation of privacy with respect to personal emails sent over the company network. The appellate court noted that, because Lawrence was not "on notice" that her emails were not confidential, Militello failed to prove that Lawrence did not have a reasonable expectation of privacy. In so finding, both the trial court and Court of Appeal emphasized that Militello provided no evidence that the company had a policy of monitoring individual email accounts or any policy prohibiting the use of the company's email account for personal communications, which might have otherwise defeated Lawrence's reasonable expectation of privacy.

Family Court May Order Employer To Provide Determination Of Arrearages Owed In Spousal Support Case

Brubaker v. Strum, 87 Cal. App. 5th 497 (2023)

The family court ordered the employed former husband in this case to pay his former wife monthly child and spousal support payments; the husband's employer was ordered to withhold the total amount of support payments from the husband's paychecks and to forward those amounts to the California Child Support Services Department. Later, the wife filed a request with the family court for an order to determine child and spousal support arrearages. The family court denied the wife's request on the ground that the wife should seek relief directly from the husband's employer with respect to all periods during which there was a valid income withholding order in place. The Court of Appeal reversed, holding that pursuant to Family Code § 5241, the wife was permitted to obtain an order from the family court compelling the husband to provide a determination of arrearages. The appellate court also reversed the $9,329.50 in sanctions the family court ordered the wife's attorney to pay to the husband.

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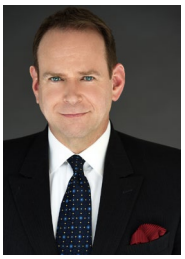

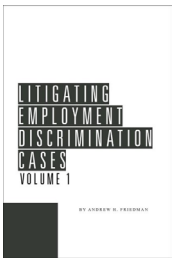

Andrew H. Friedman literally wrote "the book" on employment discrimination law – *Litigating Employment Discrimination Cases* (James Publ. 2005 - 2024)

Andrew H. Friedman, a name partner with the law firm of Helmer · Friedman LLP, primarily represents employees in all aspects of employment law.

Mr. Friedman has handled a wide range of employment-related litigation in state and federal courts including winning a $4.1 Million jury verdict in a fraud and breach of employment contract lawsuit in the Los Angeles Superior Court and jury verdict in the Orange County Superior Court in a sexual harassment case. He has resolved multiple seven-figure wage and hour class actions.

Mr. Friedman served as Counsel of Record in *Lightfoot v. Cendant Mortgage Corp. et. al.* (Case No. 10-56068) where he successfully convinced the U. S. Supreme Court to grant the petition for certiorari that he filed on behalf of his clients. In January 2017, the Supreme Court, in a unanimous decision authored by Justice Sotomayor, reversed the Ninth Circuit and ruled in favor of Mr. Friedman's clients.

From 2020-2024, out of more than 88,000 attorneys in the Los Angeles area, Super Lawyers named Andrew H. Friedman to its list of the Top 100 Super Lawyers in Southern California and from 2019-2023, LAWDRAGON selected Mr. Friedman as one of the Nation's leading plaintiff employment attorneys.

Chambers USA, the Nation's leading legal data and analytics provider, has awarded Mr. Friedman with its highest possible rating ("Band 1") for Labor & Employment.

Mr. Friedman is the author of a two-volume, approximately 1500-page, employment discrimination law treatise entitled *Litigating Employment Discrimination Cases* (James Pub. 2005-2024). Contributing Authors to the treatise include attorneys from: Proskauer Rose LLP, Sheppard Mullin LLP, Lewis Brisbois Bisgaard & Smith LLP, and Brown, Goldstein & Levy as well as mediators Lisa Klerman, Jan

Frankel Schau, and Mark Fingerman.

Lately, Mr. Friedman has received significant positive (and negative) buzz for his cutting-edge law review article - *Attorney Workplace Investigations: Neither Impartial Nor Independent*, Cal. Lab. & Emp. L. R. Vol. 37, No. 2 (2023).

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Tony represents employers and management in all aspects of labor relations and employment law, including litigation and preventive counseling, wage and hour matters, including class actions, wrongful termination, employee discipline, Title VII and the California Fair Employment and Housing Act, executive employment contract disputes, sexual harassment training and investigations, workplace violence, drug testing and privacy issues, Sarbanes-Oxley claims and employee raiding and trade secret protection. A substantial portion of Tony's practice involves the defense of employers in large class actions, employment discrimination, harassment and wrongful termination litigation in state and federal court as well as arbitration proceedings, including FINRA matters.

Tony is recognized as a leading lawyer by such highly respected publications and organizations as the *Los Angeles Daily Journal*, *The Hollywood Reporter*, and *Chambers USA*, which gives him the highest possible rating ("Band 1") for Labor & Employment. According to *Chambers USA,* clients say Tony is "brilliant at what he does… He is even keeled, has a high emotional IQ, is a great legal writer and orator, and never gives up." Other clients report: "Tony has an outstanding reputation" and he is "smart, cost effective and appropriately aggressive." Tony is hailed as "outstanding," particularly for his "ability to merge top-shelf lawyerly advice with pragmatic business acumen." He is highly respected in the industry, with other commentators lauding him as a "phenomenal strategist" and "one of the top employment litigators in the country."

"Tony is the author of the treatise titled *Employment Discrimination Depositions* (Juris Pub'g 2020; www.jurispub.com), co-author of *Proskauer on Privacy* (PLI 2020), and, since 1990, has been a regular columnist for the official publication of the Labor and Employment Law Section of the State Bar of California and the *Los Angeles Daily Journal.*

Tony has been a featured guest on Fox 11 News and CBS News in Los Angeles. He has been interviewed and quoted by leading national media outlets such as *The National Law Journal*, *Bloomberg News*, *The New York Times*, and *Newsweek* and *Time* magazines. Tony is a frequent speaker on employment law topics for large and small groups of employers and their counsel, including the Society for Human Resource Management ("SHRM"), PIHRA, the National CLE Conference, National Business Institute, the Employment Round Table of Southern California (Board Member), the Council on Education in Management, the Institute for Corporate Counsel, the State Bar of California, the California Continuing Education of the Bar Program and the Los Angeles and Beverly Hills Bar Associations. He has testified as an expert witness regarding wage and hour issues as well as the California Fair Employment and Housing Act and has served as a faculty member of the National Employment Law Institute. He has served as an arbitrator in an employment discrimination matter.

Tony is an appointed Hearing Examiner for the Los Angeles Police Commission Board of Rights and has served as an Adjunct Professor of Law and a guest lecturer at USC Law School and a guest lecturer at UCLA Law School.