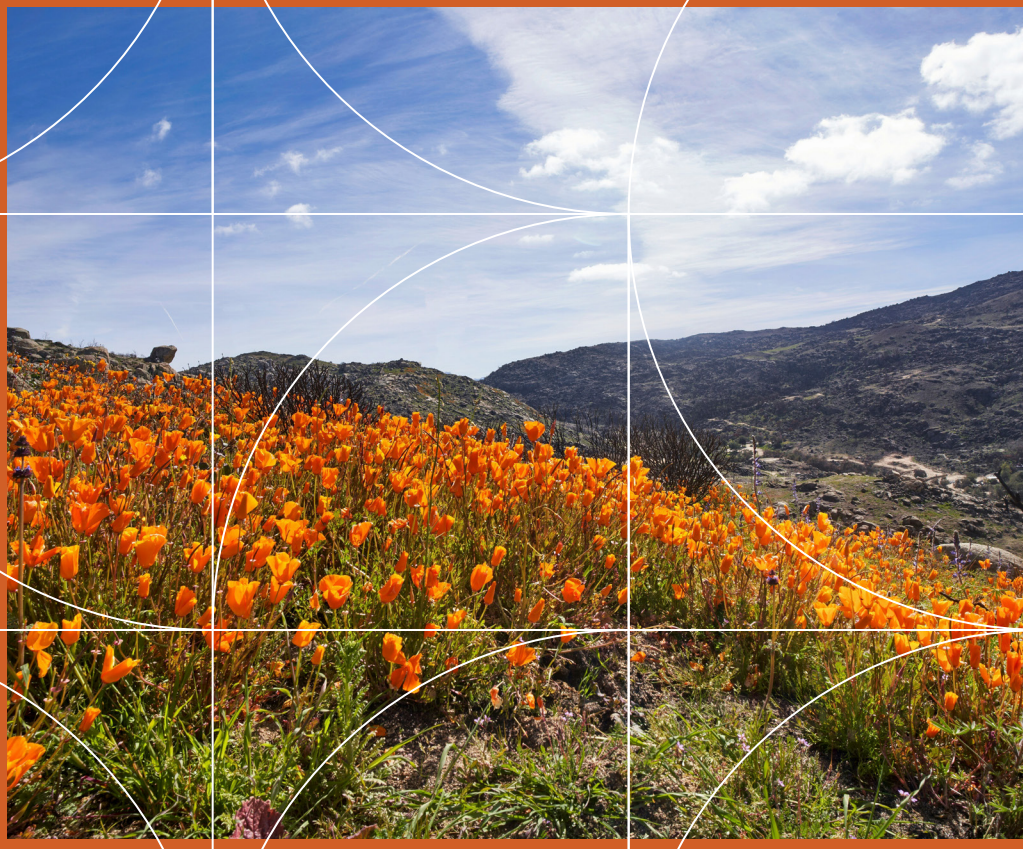
Seyfarth

Cal-Peculiarities

How California Employment Law is Different



2024 Edition

About Our Graphics

Yes, we know that California is a contiguous part of the North American continent. But seventeenth-century mapmakers saw it otherwise. When they outlined the western contours of our region, they extended the Gulf of California far north, to make California appear as a yam-shaped island in the Pacific Ocean.

If such maps are now historical curiosities, they still reflect a persistent view that California is a world apart. Carey McWilliams explored this theme in his 1946 classic, SOUTHERN CALIFORNIA: AN ISLAND ON THE LAND. He argued that Southern California is, metaphorically, an island in profound cultural ways. Much the same is true of California writ large when it comes to labor and employment law. So while early maps were cartographically incorrect, their symbolism remains powerful.

Any picture of California as an island apart remains vivid in 2023. Although the national government now is more in step with California's own attitude toward the business community, our federal legislators, regulators, and judges still have a long way to go before they can even begin to match California's extraordinary solicitude toward the interests of labor unions, law enforcement agencies, and the plaintiffs' bar. During the foreseeable future, California not only will continue its traditional role of providing progressive examples for similarly inclined states to follow, but will provide examples for the federal government to follow as well.

Perhaps nowhere has the peculiarity of California law been more prominent than it is in the area of labor and employment law. Federal labor law hit high tide in the 1930s, leaving us with the National Labor Relations Act and the Fair Labor Standards Act. The federal high tide returned in the 1960s—leaving us with the Equal Pay Act, Title VII, and the Age Discrimination in Employment Act—and returned yet again in the 1990s, leaving us with the Americans with Disabilities Act and the Family and Medical Leave Act. In the Golden State, meanwhile, the waves of labor and employment regulation have, especially during this century, risen ever higher, even while federal efforts occasionally ebbed. And California's ever-rising tide has left us with the extraordinary law described in this book.

This book highlights differences between federal and California law in key areas of interest to private employers that operate both in California and in the rest of America. In virtually every case, the California version favors workers, labor unions, government agencies, plaintiffs, and the lawyers who represent them—always at the expense of the business community.

Authors' Note

At annual intervals throughout this century, we've cataloged how California law deviates from prevailing American labor and employment law. The result—this steadily growing volume—summarizes the legislative, judicial, and regulatory developments that have made California a uniquely challenging environment for private employers. (We do *not* address special challenges facing public employers or government contractors.) We highlight these California peculiarities to help corporate counsel and human resources professionals avoid legal pitfalls, without treating what is provided here as the final word (a point emphasized in the disclaimer that follows).

This 2024 edition contains contributions from many Seyfarth lawyers—all members or friends of our California Workplace Solutions Group: Michael Afar, Mahsa Aliaskari, Heriberto Alvarez, Ashley Arnett, Brian Ashe, Nicole Baarts, Jeff Berman, Candace Bertoldi, Holger Besch, Bailey Bifoss, Dan Birnbaum, Jonathan Brophy, Bob Buch, Debbie Caplan, Nancy Chawla, Peter Choi, Andrew Cohen, Kelly Cohen, Mel Cole, Chris Crosman, Justin Curley, Catherine Dacre, Pamela Devata, Giselle Vinas Dhallin, Brad Doucette, Michelle DuCharme, Phillip Ebsworth, Shiva Emrani, Angelina Evans, Katie Farr, Cathy Feldman, Sage Fishelman, Lindsay Fitch, Barri Friedland, Kerry Friedrichs, Reiko Furuta, Nick Geannacopulos, Gina Gi, Brian Gillis, Ari Hersher, Laura Heyne, Eric Hill, Timothy Hix, Charlotte Hodde, Timothy Hoppe, Heather Horn, Dana Howells, Francesca Hunter, Justin Jackson, David Jacobson, Patrick Joyce, David Kim, Seong Kim, Kelly Koelker, Jessica Koenig, Yana Komsitsky, Michael Kopp, Kristina Launey, Paul Leaf, Elizabeth Levy, Leo Li, Sierra Chin Liu, Eric Lloyd, Brian Long, Aaron Lubeley, Laura Maechtlen, Elizabeth MacGregor, Scott Mallery, Mary Manesis, Jonathan Martin, Mandana Massoumi, Eric May, Amanda Mazin, Everett McLean, Kathleen McConnell, Ryan McCoy, Andrew McNaught, Jon Meer, Chelsea Mesa, Robert Milligan, Kamran Mirrafati, Jennifer Mora, Ilana Morady, John Ayers-Mann, Yoon-Woo Nam, Jeffrey Nordlander, Jennifer Nunez, Lori O'Hara, Bernard Olshansky, Scott Page, Andrew Paley, Romtin Parvaresh, Beth Pelliconi, Sofya Perelshtyn, Dana Peterson, Sean Piers, Jamie Pollaci, Jill Porcaro, Tom Posey, Clara Rademacher, Janine Raduechel, Miguel Ramirez, Juan Rehl-Garcia, Jamie Rich, Josh Rodine, Valerie Rodriguez, Christian Rowley, Timothy Rusche, Joshua Salinas, Galen Sallomi, Jeanine Scalero, Lauren Schwartz, Sam Schwartz-Fenwick, Kiran Seldon, Laura Shelby, Kimberly Shen, Michael Sigall, Shardé Skahan, Kathleen Cahill-Slaught, James Sobolov, Emily Stamler, Eric Steinert, Sean Strauss, Eric Suits, Diana Tabacopulos, Ryan Tikker, Tiffany Tran, Coby Turner, Annette Tyman, Parnian Vafaeenia, Pamela Vartabedian, Andrea Vizzo, Jonathan Tomaszewski, Ryan Tzeng, Pam Vartabedian, Myra Villamor, Nick Waddles, Ping Wang, Elisabeth Watson, Geoffrey Westbrook, Daniel Whang, Kiersten Wiens, Jeff Wortman, Steven Wong, Lilah Wylde, and Ann Marie Zaletel.

We especially note the formidable contributions of Dana Howells and Elizabeth Levy, which included imposing some order on the chaos that is California's bewildering welter of local sick pay laws.

To keep up with the latest peculiarities of California employment law, please subscribe to Seyfarth's award-winning *California Peculiarities Employment Law Blog*: www.calpeculiarities.com/subscribe.

Important Disclaimer

We've been representative, not exhaustive, in cataloging California peculiarities. This book is general commentary, not legal advice. We disclaim liability as to anything done or omitted in reliance on this publication. Readers should refrain from acting on any discussion without obtaining specific advice applying current law to particular circumstances. (From *A Declaration of Principles* adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.)

Legal Notice

Seyfarth

Table of Contents

Glossary

We sometimes use the following shorthand references without specially defining them.

Term	Definition	Section Number(s)
ADA	Americans with Disabilities Act	6.3
ADEA	Age Discrimination in Employment Act	6.4
ALRA	California Agricultural Labor Relations Act	18.1
ALRB	California Agricultural Labor Relations Board	18.1
AWS	Alternative Workweek Schedule	7.7
Berman hearing	Wage claim hearing before Labor Commissioner	1.5, 5.2
CalGINA	California Genetic Discrimination Act	4.2, 6.2
CA-SPSL	California Supplemental Paid Sick Leave	2.14.2
CCPA	California Consumer Privacy Act	4.17
CBA	Collective bargaining agreement	2.14, 5.2, 5.7, 7.7, 7.8, 7.19
CCRAA	California Consumer Credit Reporting Agencies Act	4.11
CFRA	California Family Rights Act	2.3
COBRA	Consolidated Omnibus Budget Reconciliation Act	8.3
DFEH	California Department of Fair Employment and Housing	1.1
DIR	California Department of Industrial Relations	1.3
DLSE	California Division of Labor Standards Enforcement	1.5
DOL	U.S. Department of Labor	2.12, 7.6
DOSH	California Division of Occupational Safety and Health	1.10
DWC	California Division of Workers' Compensation	1.8
EDD	California Employment Development Department	1.6
ERISA	Employee Retirement Income Security Act	2.11, 7.19, 8.4, 17.8
FAAAA	Federal Aviation Administration Authorization Act of 1994	7.9.9, 19.7
FAA	Federal Arbitration Act	5.2
FCRA	Fair Credit Reporting Act	4.11
FEHA	California Fair Employment and Housing Act	1.1
FEHC (old)	California Fair Employment and Housing Commission	1.1

Term	Definition	Section Number(s)
FEHC (new)	California Fair Employment and Housing Council	1.1
FFCRA	Families First Coronavirus Response Act	2.16
FLSA	Fair Labor Standards Act	5.14, 7.1
FMCSA	Federal Motor Carrier Safety Administration	7.8.7
FMLA	Family and Medical Leave Act	2.3
FTDI	California Family Temporary Disabilities Insurance	2.4
HIPP	Health Insurance Premium Program	8.3, 9.2.4, 13.2.3
ICRAA	California Investigative Consumer Reporting Agencies Act	4.11.2
IRCA	Immigration Reform and Control Act of 1986	5.17
IWC	California Industrial Welfare Commission	1.4, 7.1
Labor Commissioner	Head of DLSE, enforcer of the Labor Code	1.5
LWDA	California Labor and Workforce Development Agency	1.2, 5.15
MMPI	Minnesota Multiphasic Personality Inventory	4.12
Ninth Circuit	U.S. Court of Appeals for the Ninth Circuit, covering California	Various
NLRA	National Labor Relations Act	18.1
NPLA	New Parent Leave Act	2.3
ODA	Order, Decision, or Award of Labor Commission	1.5
PAGA	California Labor Code Private Attorneys General Act of 2004	5.15
PDLL	Pregnancy Disability Leave Law	2.1
PFL	Paid Family Leave	1.6
PSL	Paid Sick Leave	2.14
PTO	Paid Time Off	7.19
RMIs	Repetitive Motion Injuries	14.8
SDI	State Disability Insurance	1.6
Section 1981	42 U.S.C. § 1981	6
SSN	Social Security Number	4.8
UCL	Unfair Competition Law	5.13, 6.15
UIAB	Unemployment Appeals Board	1.7, 15.3

Term	Definition	Section Number(s)
USERRA	Uniformed Services Employment and Reemployment Rights Act	2.12, 13.4.3
WARN	Worker Adjustment and Retraining Notification	13.1
WCAB	California Workers' Compensation Appeals Board	1.9

Introduction

When employers across America face a labor or employment law issue on the Left Coast, a phrase they often hear is, “California is different.”

For better or worse, California ***is*** different. California is also important, as the nation’s most populous state, the world’s fifth-largest economy, and a notorious trend-setter in employment law. And California’s influence is not limited to just its sister states. As President Joseph R. Biden, Jr., prepared for his debut, the *Los Angeles Times* ran an article entitled, “Make America California Again? That’s Biden’s plan.” The article reported that “California is emerging as the de facto policy think tank of the Biden-Harris administration and of a Congress soon to be under Democratic control.”

Several sources have influenced California’s continuing expansion of employee rights (and employer obligations). The chief source has been the extensive legislation codified in the California Labor and Government Codes. In more recent years, counties and cities have gotten into the act in a big way, particularly with respect to issues of minimum wage, sick pay, hazard pay, and scheduling. Also significant have been expansive judicial decisions.

These decisions have come not only from California state courts but from federal judges applying California law. Most of these federal judges are within the Ninth Circuit of the U.S. Court of Appeals—the circuit that historically has been the most friendly to the interests of plaintiffs (and the circuit most often reversed by the U.S. Supreme Court).

A final important source would be the interpretations issued by California administrative agencies empowered to enforce various employment laws.

This volume assumes extensive knowledge of federal labor and employment law in the private sector. Our principal focus is on the peculiar aspects of California law that can bewilder even the most sophisticated private employers who are used to doing business elsewhere.

Highlighted immediately below are some important areas of California labor and employment law. We do not cover California law in fine detail, but rather simply aim to raise consciousness (a California term) about certain legal issues. (Elsewhere herein is a full-form disclaimer.)

The reader with particular subjects in mind can consult the Table of Contents and Glossary (at the front of this volume) and the comprehensive Index of Terms and the Index of Statutory Provisions (at the back).

So what’s so peculiar about California labor and employment law? Let us count the ways:

Leaves

California, going far beyond federal leave law,

- creates a right to unpaid leave for up to four months (or 17.33 weeks) for pregnancy-related disabilities, in addition to any available family leave and any related disability leave (see § 2.1),

- imposes family-leave obligations not only on larger employers (those with at least 50 employees), but also on smaller employers (those with at least five employees), defines “family” very broadly, and has no geographical limitations or any carve-outs for key employees (see § 2.3),
- enables employees to claim state-paid family leave benefits, for up to eight weeks (see § 2.4),
- allows employees who are victims of certain crimes and of domestic violence, sexual assault, or stalking to take time off to attend to issues in court (see §§ 2.6, 2.7),
- permits employees who accrue paid sick leave to use up to one-half their annual entitlement for “kin care” (to attend sick relatives) (see § 2.10),
- treats paid time off as the equivalent of sick leave (for purposes of “kin care”), if the paid time off can be used for any purpose (see § 2.10),
- creates a right to unpaid leave of up to ten days for employees married to military personnel who themselves are on leave from a military conflict (see § 2.12),
- entitles employees to accrue up to 40 hours or five days of annual paid sick leave, which can accumulate up to 80 hours or 10 days (see § 2.14), and
- creates a right to paid leave for organ or bone marrow donation (see § 2.15).

Employee Privacy—Protected Activities and Confidential Information

The California Constitution uniquely creates a right to privacy that governs private as well as public employers. The California Consumer Privacy Act of 2018 (CCPA) (as amended by the California Privacy Rights Act (CPRA)) imposes significant compliance obligations with respect to California resident employees and others, including a requirement to notice and disclose practices relating to personal information and a requirement to facilitate the exercise of certain rights of control employees have over the use of their personal information. California also has statutes that prohibit employer intrusions into, or interference with, various forms of employee personal conduct.

Specifically, California

- forbids employers from discriminating against employees or applicants for lawful off-premises, off-duty conduct (see § 3.1),
- entitles employees to designate attorneys to negotiate on their behalf with employers regarding conditions of employment (see § 3.4),
- forbids employers to inquire about certain marijuana-related convictions, or about participation in pre- or post-trial diversion programs, or about convictions that have been judicially dismissed or ordered sealed (see § 4.2),
- forbids unconsented tape-recording of confidential communications (see § 4.6),
- forbids audio and videotaping of restrooms, locker rooms, and changing rooms (see § 4.6),

- entitles employees to workplace privacy against intrusions by their employer (see § 4.6),
- forbids employers to request or require employees or job applicants to disclose personal social media usernames or passwords (see § 4.8),
- forbids use of credit background checks for most positions (see § 4.11), and
- requires employers to disclose to employees the categories of personal information the company has collected and the purposes for which the categories of personal information will be used (see § 4.17).

Agreements with Applicants, Employees, Former Employees

California forbids, requires, or regulates various agreements that employers enter into with job applicants, current employees, and former employees. California

- forbids employers from requiring any applicant or employee to take a polygraph as a condition of employment (see § 4.3),
- renders unenforceable any settlement agreement provision that prevents the disclosure of facts related to a sexual harassment or retaliation claim, with limited exceptions (see § 6.5.13),
- renders unenforceable any contractual provision that waives a right to testify about the criminal or sexually harassing conduct of the other contracting party (or that party's agent) (see § 6.5.13),
- forbids employers from imposing, as a condition of employment or the receipt of a raise or bonus, the release of any FEHA claim (except in a negotiated settlement of a filed claim) (see § 6.5.13),
- requires written agreements to memorialize an employee's entitlement to commissions (see § 7.15),
- forbids employers from imposing, as a condition of employment, any agreement the employer knows to be unlawful (see § 7.25),
- forbids releases of wage claims as to wages undisputedly due but not paid (see § 7.25),
- forbids various covenants not to compete (see § 12),
- forbids settlement agreements—with employees who have filed a legal claim—from including no-rehire clauses (see § 12),
- forbids any agreement to have a dispute settled in a non-California forum under non-California law (see § 20.2),
- forbids agreements that condition employment-related benefits on any waiver of FEHA or Labor Code rights (except post-dispute settlement agreements and negotiated severance agreements) (see § 20.2), and
- regulates the formation and terms of mandatory arbitration agreements in ways that are constitutionally suspect in light of the Federal Arbitration Act (see immediately below).

Arbitration Agreements

Heeding wishes of the plaintiffs' bar, California legislators and courts repeatedly have invented special reasons not to enforce employer-mandated arbitration agreements, despite the pro-arbitration policy of the Federal Arbitration Act that the U.S. Supreme Court has often applied to preempt state rules—both legislative and judicial—that frustrate arbitration by design or in effect.

California has succeeded in subjecting arbitration agreements to certain peculiar conditions that the U.S. Supreme Court has yet to correct. Under California's peculiar law, arbitration agreements

- must be "mutual," requiring the employer as well as the employee to use arbitration instead of litigation in initiating claims (including claims for injunctive relief to prevent unfair competition),
- must (as to statutory claims) provide full discovery and have the employer pay all costs unique to arbitration,
- must permit employees to bring representative PAGA actions in court,
- generally cannot shorten statutory limitations periods,
- cannot be imposed upon employees or job applicants (as to Labor Code or FEHA claims) as a condition or employment, and
- often are unenforceable if they have more than one "unconscionable" provision—notwithstanding the general rule that courts will sever unenforceable provisions and enforce the rest (see § 5.2).

Litigation Issues

California has tilted the litigation playing field to the advantage of plaintiffs suing employers, deviating from the law of many jurisdictions by

- requiring whistleblower defendants to justify allegedly retaliatory employment actions by producing clear and convincing evidence that the actions reflected legitimate reasons independent of the whistleblowing (see § 3.5),
- forbidding pre-dispute waivers of jury trial (see § 5.1),
- forbidding employers from imposing forum-selection or choice-of-law agreements that would avoid California courts or California law (see § 5.3),
- creating broad-ranging contract and tort theories by which employees can challenge terminations (see §§ 5.4, 5.5, 5.6),
- limiting the efficacy of summary judgment motions that would screen out unmeritorious litigation (see §§ 5.7, 6.5),
- expanding potential employer liability for defamation and negligent misrepresentation (see §§ 5.8, 5.9),
- expanding employer liability to third parties for employee torts (see § 5.10),

- creating one-sided rules favoring prevailing plaintiffs, but not prevailing defendants, who seek recovery of attorney fees and costs (see §§ 5.12, 6.13),
- encouraging wage and hour class actions (see § 5.14), and
- permitting plaintiffs' lawyers to obtain private contact information for the defendant's current and former employees, even when the current plaintiff is not even a member of the proposed class and the lawyers are trolling for new clients, and even if the employees have advised in writing that they don't want their contact information disclosed (see §§ 4.10, 5.14, 5.15).

Immigrant Workers

California has taken the lead in protecting undocumented persons against federal immigration-control efforts. Some thus have called California America's largest "sanctuary state."

In response to the Trump Administration, California enacted the California Values Act, aimed at limiting the extent to which state officials will enforce federal immigration law. California prevents police from asking people about their immigration status or from participating in most federal immigration enforcement actions, limits law enforcement communication with federal immigration authorities, prevents jails from detaining a criminal suspect for federal immigration authorities (unless the person has been convicted of certain crimes), and forbids landlords from reporting the immigration status of their renters. California's resistance to federal immigration law fully extends to the workplace.

California, to protect immigrant workers,

- makes a plaintiff's immigrant status irrelevant to employer liability,
- generally forbids inquiries into a person's immigration status during a legal proceeding,
- rejects arguments that its pro-immigrant protections are preempted by the federal Immigration Reform and Control Act,
- forbids employers from discriminating against employees for updating names and social security numbers,
- forbids employers from allowing immigration raids at their work sites without a court order,
- forbids employers from re-verifying employment eligibility of current employees,
- no longer allows employers to favor job candidates who are not "aliens," and
- has purged the Labor Code of the term "alien" (see § 5.17).

California has also extended the definition of national origin discrimination to include any adverse action that an employer takes against an individual for holding a special driver's license that California makes available to those who cannot prove that they are authorized under federal law to work in the United States (see §§ 6.2, 6.6).

Discrimination

California protects from employment discrimination not only the federally protected bases (race, color, religion, sex, national origin, age, and disability), but also a host of additional bases.

The extra bases include military and veteran status, sexual orientation, gender expression, gender identity, genetic characteristics, transgender status, political affiliation, marital status, breastfeeding, religious dress and grooming practices, and holding a special California driver's license (see § 6.2), and extends marital-status protections to registered domestic partners (see § 8.1).

Race Discrimination

California, going beyond federal law on race discrimination (as stated in Title VII and Section 1981), was the first state in the nation to ban discrimination because of natural hairstyles (see § 6.2).

Disability Discrimination

California, going beyond federal law on disability discrimination (as stated in the Americans with Disabilities Act),

- defines "disability" very broadly to include conditions, as well as impairments, that create any restriction on a major life activity,
- expressly requires employers to engage in an interactive process regarding accommodations requested by disabled employees, and
- effectively requires employers to deal with an employee on leave through the employee's attorney if the employee so desires (see § 6.3).

Age Discrimination

California, going beyond federal law on age discrimination (as stated in the ADEA),

- categorically forbids employers from relying on pay levels in deciding which employees to dismiss, if that criterion adversely affects employees over age 40, and
- endorses the adverse impact theory of liability in age discrimination, without recognizing a defense available in federal age discrimination cases: the employer's reliance on reasonable factors other than age (see § 6.4).

Harassment

California, going beyond federal law on workplace harassment (based on federal discrimination law),

- expressly forbids discriminatory "harassment,"
- applies harassment law to all private employers, no matter how small,

- protects from harassment not only employees and applicants, but also various classes of individuals—such as independent contractors, unpaid interns, and volunteers—who usually do not qualify for the protections afforded employees,
- makes employers vicariously liable for supervisor-perpetrated harassment, using a broad definition of "supervisor,"
- specifies that sexual harassment may be actionable even if not motivated by sexual desire,
- denies employers the *Ellerth/Faragher* defense, which absolves employers of liability if they took reasonable measures to prevent and correct harassment and if the plaintiff unreasonably failed to use those measures,
- makes both supervisors and co-workers personally liable for perpetrating discriminatory workplace harassment,
- requires all employers to distribute to all employees a detailed fact sheet on sexual harassment, and requires employer harassment policies to have specified content,
- requires larger employers to train supervisors (and all rank-and-file employees) to prevent sexual harassment,
- requires special sexual harassment training for janitorial employees,
- requires training for supervisors to address "abusive conduct" (bullying), without regard to discriminatory conduct, and
- forbids contractual provisions that would limit disclosure of sexual harassment allegations (see § 6.5).

National Origin Discrimination

California, going beyond federal law on national origin discrimination (as stated in Title VII),

- generally forbids English-only rules in the workplace (see § 6.6), and
- defines "national origin discrimination" to include discrimination against a person for holding a special driver's license that California makes available to undocumented residents (see §§ 6.2, 6.6).

Pay Equity

California, going beyond federal law on pay discrimination (as stated in Title VII and the Equal Pay Act),

- entitles employees to challenge pay disparities on the basis of race and ethnicity as well as sex,
- allows equal-pay claims even where the compared employees do not work in the same establishment,
- permits equal-pay claims where the compared jobs are merely "substantially similar,"

- limits the factors an employer may cite to justify a pay disparity and requires that the cited factors justify the entire pay differential,
- forbids employers from relying on the factor of prior salary as the sole basis to justify a pay disparity,
- forbids employers from inquiring into an external job applicant's compensation history,
- requires employers to provide applicants, upon their "reasonable request," with "the pay scale" for the sought-after position, and
- requires larger employers to file annual reports of pay data, counting employees—by race, ethnicity, and sex—in various job categories, together with their pay in pay bands as established by the Bureau of Labor Statistics (see § 6.7).

Sex Discrimination

California, going beyond federal law on sex discrimination (as stated in Title VII),

- entitles women as well as men to wear pants in the workplace (see § 6.8), and
- has expanded the prohibition against sex discrimination to include discrimination because of "breastfeeding or medical conditions related to breastfeeding" as well as discrimination because of "gender," defined to mean "actual sex" or perception thereof, including the employee's "gender, gender identity, and gender expression," and expressly protects transgender individuals (see § 6.9).

Religious Discrimination

California, going beyond federal law on religious discrimination (as stated in Title VII),

- explicitly protects religious dress and grooming practices,
- requires religious accommodation absent "undue hardship," which California defines much more narrowly than federal law does, and
- forbids employers from using segregation in the workplace as a means of a religious accommodation (see § 6.10).

Wage and Hour

California, going beyond federal wage and hour law (as stated in the Fair Labor Standards Act),

- requires employers to provide paid sick leave (see § 2.14),
- imposes an escalating minimum wage far above the federal level, and requires that employers pay separately for each hour of work, including the unproductive time of piece-rate and commissioned employees (see § 7.2),
- expands the concept of "hours worked" to include not only time required of an employee that benefits the employer but also any time "subject to the control" of the employer (see § 7.3.2),

- requires employers to pay time-and-one-half premium wages for work over eight hours a day, and for work on a seventh consecutive work day, as well as for work over 40 hours a week (see § 7.4),
- requires employers to pay double-time wages for work over 12 hours a day, and for work over eight hours on a seventh consecutive work day (see § 7.4),
- requires employers to provide employees with paid rest breaks and paid recovery periods and unpaid meal periods, and to pay an additional hour of pay for each day of violation (see §§ 7.8, 7.9),
- requires employers to provide suitable seats to employees where the nature of the work reasonably permits, and to provide workplace temperatures providing reasonable comfort consistent with industry-wide standards (see § 7.11),
- forbids employers from requiring employees to share the cost of business operations (see § 7.12),
- requires employers to reimburse employees for ordinary business expenses (see § 7.13),
- imposes onerous reporting requirements for payment of piece-rates (see § 7.14),
- requires written agreements for the payment of commissions (see § 7.15),
- requires pro rata payment of bonuses where employment ends for reasons beyond the employee's control (see § 7.16),
- deviates from federal law by imposing a pro-employee formula for computing overtime pay on "flat sum" bonuses for nonexempt employees (see § 7.16),
- restricts certain employers in their staffing and scheduling of employees (see §§ 7.22, 7.23),
- requires large warehouse distribution centers to disclose whatever work quotas they use and ensure that they do not impede employees' ability to take unrestricted rest, meal, and bathroom breaks (see § 7.22),
- requires employers to provide new hires with written notice of such things as pay rates, paydays, employer names, as well as any other information the Labor Commissioner deems "material and necessary" (see § 16.1),
- requires employers to provide, with each payment of wages, a highly detailed itemized statement, while imposing heavy penalties for even technical non-compliance (see § 16.3), and
- empowers "aggrieved employees" to sue on behalf of the State of California to collect massive civil penalties for Labor Code and Wage Order violations (see immediately below).

Private Lawsuits for Civil Penalties

California, uniquely among American governments, has a Private Attorneys General Act (PAGA), which empowers employees, acting as private attorneys general, to sue on behalf of all "aggrieved employees" in order to enforce wage and hour laws. PAGA—perhaps the California peculiarity par excellence—has been a bonanza

for plaintiffs' lawyers and a bane for employers. Here are some of the features that make PAGA particularly painful for the employer community:

- PAGA creates massive civil penalties—generally $100 per employee per pay period for first violations and twice that for further violations—for employer failures to comply with numerous, often obscure, provisions of the Labor Code and the IWC Wage Orders, though newly-enacted legislation aims to place caps on the amount of civil penalties,
- PAGA sometimes creates massive penalties for even hyper-technical violations, such as penalties for a wage statement's failure to state an employer's legal name and address and to state the first and the last inclusive dates of relevant pay periods,
- PAGA makes maximum penalties the default, thereby forcing liable employers to ask courts to reduce penalties that are "unjust, arbitrary and oppressive, or confiscatory,"
- PAGA awards civil penalties on top of the substantial statutory penalties already prescribed for the same offense (e.g., unpaid wages and unprovided meal and rest breaks),
- PAGA enables aggrieved employees to become private attorneys general by merely filing a notice with the LWDA and then waiting for 65 days of inaction by the Labor Commissioner, who almost never chooses to investigate the matter,
- PAGA permits profit-seeking private plaintiffs' counsel—entitled to attorney fees on behalf of prevailing plaintiffs—to seek PAGA civil penalties in the name of the California Labor Commissioner, even though the Commissioner might exercise prosecutorial discretion to decline to seek them,
- PAGA permits plaintiffs' counsel to forum-shop by obtaining venue in any county where the company does business, regardless of where its headquarters are and regardless of where the plaintiff lives,
- PAGA enables multiple law firms to simultaneously sue the same defendant, for the same alleged Labor Code violations, requiring the defendant to stave off various law firms on the same issues, with each firm vying to be the first to reduce its PAGA claims to judgment,
- PAGA enables plaintiffs' counsel to broadly discover private information such as employee contact information, and then use discovery to ferret out Labor Code violations the plaintiffs themselves never experienced or even knew about before suing,
- PAGA enables plaintiffs' counsel to pursue PAGA claims broader than the claims they specified in the LWDA notice, thereby enabling counsel to act as roving vigilantes seeking justice at the employer's expense,
- PAGA enables plaintiffs to seek civil penalties for themselves and other employees even when the plaintiffs have settled their own individual Labor Code claims,
- PAGA confronts defendants with one-way interventions, where an employer loss would strip the employer of defenses in later Labor Code claims, while an employer win would not bind any employee suing in later Labor Code claims,

- PAGA enables plaintiffs' counsel to pursue what essentially are class actions, but without having to satisfy the requirements of typicality, adequacy, predominance, and manageability, and without being subject, under the Class Action Fairness Act, to removal of their action to federal court,
- PAGA dashes the hopes of clever defendants who would blow up class actions by achieving individual settlements, in that aggrieved employees cannot release PAGA claims, which belong exclusively to the State of California as represented by the PAGA plaintiff private attorney general,
- PAGA directs 65% of civil penalty proceeds to the State of California (with 35% going to aggrieved employees), thereby creating an implicit bias for government employees such as Labor Commissioners (and judges) to find liability,
- PAGA may deprive employers of jury trials as to PAGA claims, and
- PAGA enables plaintiffs to evade arbitration agreements in that representative PAGA actions may be able to proceed even where the suing aggrieved employee has agreed, in an arbitration agreement, to waive representative claims. (See §§ 5.2, 5.15.)

Vacation

California, addressing a subject matter not regulated by federal law,

- treats paid vacation as wages earned and vested on a daily basis,
- requires that all unused vacation be paid upon termination of employment at the final rate of pay, regardless of when the vacation was earned or whether the employee was eligible to take vacation,
- treats as the equivalent of vacation any time off that employees can use for any purpose, including some floating holidays and some sabbaticals, and
- prohibits "use it or lose it" vacation provisions, although employers may place a "reasonable" cap on the further accrual of vacation pay for employees who fail to take enough paid vacation. (See § 7.19.)

Employee Access to Information

California, going beyond federal law on employee access to information,

- entitles employees and former employees access to, and copies of, personnel and payroll records upon request (see § 10),
- requires employees to post a wide variety of notices, listed in part at www.dir.ca.gov/dlse/WorkplacePostings.html, and
- requires a notice to new hires, on a single form, regarding the name of the employer, the rates of pay, the identity of the workers' compensation carrier, and other such basic information (see § 9).

Covenants Not to Compete

California broadly bans even narrowly drawn restraints on trade and thus complicates employers' efforts to enforce various covenants traditionally enforceable in other states, including many (if not all)

- reasonable covenants not to compete,
- customer non-solicitation clauses,
- employee non-solicitation clauses, and
- no-rehire clauses in settlement agreements (see § 12).

Workers' Compensation

California makes it unlawful, absent "business necessity," to dismiss an employee on workers' compensation leave, even pursuant to a policy setting a uniform maximum length for all leaves (see § 17).

Independent Contractors

California is generally hostile to companies that treat workers as independent contractors instead of employees. California requires defendants, rather than plaintiffs, to bear the burden of proof on whether a worker is an employee or an independent contractor (see §19.2).

Most significant of all, California presumes that a company hiring a worker is the worker's employer unless the hirer can prove all three parts of an "ABC test": (A) the worker is free from the hirer's control and direction in performing the work, both under the contract of hire and in fact, (B) the worker performs work outside the hirer's usual course of business, and (C) the worker has been customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed (see § 19.6).

California imposes fines of up to $25,000 for willfully misclassifying employees as independent contractors (see § 19.7).

Thankfully, for many employers, there may be some relief from the oppressive effects of PAGA. Effective June 19, 2024, the California Legislature enacted Assembly Bill 2288 and Senate Bill 92, which reform existing Labor Code section 2698 et seq. and imposes many long-awaited and much-needed reforms to PAGA.

The PAGA reform bills introduce the following significant changes: (1) there is now a cap on penalties for employers who take reasonable steps for compliance (15%) or who take steps for compliance after receipt of the PAGA notice (30%); (2) wage statement penalties are capped at $25 where there is no harm; (3) the California Supreme Court's Estrada decision is codified and explicitly provides that trial courts "may limit the evidence to be presented at trial or otherwise limit the scope of any claim filed pursuant to this part to ensure that the claim can be effectively tried"; (4) a plaintiff must now personally experience the Labor Code violations they are seeking to pursue on a representative basis; (5) a plaintiff must experience the Labor Code violation within the one-year statute of limitations; (6) no more derivative penalties; (7) caps on penalties for isolated errors; (8) a change in the distribution of PAGA penalties from 75% to the LWDA and 25% to affected employees, to 65% and 35%, respectively; (8) new and expanded cure provisions; (9) options to request a stay of litigation and an Early Neutral

Evaluation conference with the court; and (10) halving penalties for employers who pay on a weekly basis, so there is no unfairness as compared to bi-weekly pay employers.

Preface to the 2024 Edition

New Legislation

Following somewhat of a lull in the amount of employment-related legislation introduced in 2020 and 2021 — when the State Legislature was focused on pressing pandemic-related measures — the Legislature returned to more normal activity in 2022 and 2023. Bills affecting non-compete agreements, paid sick leave, workplace violence prevention plans, and new minimum wage standards for health care workers, topped the list of new employer obligations, most of which became effective on January 1, 2024.

New Laws

Non-Compete Agreements. Though largely declarative of existing law, the Governor signed legislation rendering unenforceable any contract void for the inclusion of a non-compete agreement, and codified *Edwards v. Arthur Andersen LLP*, which makes void any non-compete clause or agreement in an employment context, no matter how narrowly tailored. Employers must now notify both current and former employees if they signed an employment contract containing a now void non-compete clause. Failure to do so constitutes a violation of the Unfair Competition Law set forth in the Business & Professions Code.

Paid Sick Days Accrual and Use. The annual amount of paid sick leave employers must provide was increased from three days or 24 hours to five days or 40 hours for eligible employees, and the accrual cap increased from 48 hours to 80 hours. Anti-retaliation and procedural provisions already contained in California's sick pay law now apply to anyone covered by a valid CBA.

Leave for Reproductive Loss. Employers must provide eligible employees up to five days of (unpaid, unless the employer has an existing policy stating otherwise) reproductive loss leave upon suffering a failed adoption or surrogacy, miscarriage, stillbirth, or an unsuccessful assisted reproduction.

Retaliation Rebuttable Presumption. There is now a rebuttable presumption of retaliation under Labor Code sections 98.6 and 1197.5 if an employer subjects an employee to an adverse action within 90 days of an employee engaging in protected activity (i.e., 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). The associated civil penalty is increased from $10,000 generally to $10,000 per employee per violation.

Local Enforcement: Wage Theft. Public prosecutors, including the Attorney General, a district attorney, a city attorney, or a county counsel, may now independently prosecute specified violations of the Labor Code that occur within their geographic jurisdictions. Any individual agreement (i.e., not CBAs) that requires arbitration of a dispute or limits representative actions does not affect the prosecutor or Labor Commissioner's ability to enforce the Labor Code.

Defamation Privilege: Sexual Harassment. The defamation privilege was extended to include an individual's communications made, without malice, regarding factual information related to incidents of sexual assault, harassment, or discrimination experienced by that person, provided the individual had a reasonable basis to file a complaint (regardless of whether it was filed or not). A defendant who prevails in an action related to making such a privileged communication may recover its reasonable attorney fees and costs, treble damages, and punitive damages.

Workplace Violence Restraining Orders: Harassment. Starting January 1, 2025, employers may seek restraining orders on behalf of their employees who have been harassed, or suffered unlawful violence or a credible threat of violence in the workplace, or where there is "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose."

Workplace Restraining Orders and Violence Prevention Plan. Nearly all employers in the State of California must prepare a Workplace Violence Prevention Plan, train employees on how to identify and avoid workplace violence, and maintain a violent incident log. These requirements went into effect on July 1, 2024.

Cannabis Use. California employers are now prohibited from discriminating against a candidate or employee because of the person's use of cannabis off the job and away from the workplace. It is also unlawful to request information from an applicant relating to the applicant's prior use of cannabis, with certain exceptions.

Judicial Developments

Here are highlights from decisions rendered in 2023 and early 2024 by courts applying California law.

Most Judicial Developments Create More Challenges for Employers

During 2023 and 2024, California courts continued the general trend of expanding employer liability to employees.

- **Arbitration agreement enforceability is read together with other agreements.** Arbitration agreements may be unenforceable due to other agreements signed during the onboarding process. Other agreements signed on the same day and as part of the same process as the arbitration agreement may be read together in determining unconscionability of the arbitration agreement. (See § 5.2.4.)

- **Organizations have standing under the UCL.** Organizations (e.g., trade organizations) have standing to pursue UCL claims if they incur costs in responding to perceived unfair competition that threaten their bona fide, preexisting missions (Court of Appeal). (See § 5.13.2.)

- **Later-filed PAGA action may not be barred by claim preclusion.** Claim preclusion did not bar a second-filed PAGA action because the dearth of factual allegations in the PAGA notice in the prior PAGA action provided no factual basis to the LWDA, and thus failed to give LWDA an opportunity to investigate (Court of Appeal). (See § 5.15.3.)

- **Permissive intervention may be allowed in settling overlapping PAGA claims.** Trial courts should consider permissive intervention to permit an overlapping PAGA plaintiff an opportunity to participate in the settlement process (Court of Appeal). (See § 5.15.3.)

- **Arbitration of individual PAGA claims does not destroy standing to pursue representative PAGA claims.** An individual who has been compelled to arbitrate claims under PAGA has standing to maintain representative claims on behalf of other employees. Representative PAGA claims will be stayed pending arbitration of the individual's claims, and the arbitrator's ruling on the individual PAGA claim will impact the individual's standing to pursue the representative PAGA claims (California Supreme Court). (See § 5.15.3.)

- **PAGA claims cannot be dismissed on manageability grounds.** Trial courts do not have inherent authority to dismiss or strike PAGA claims based on manageability grounds. Trial courts may limit the types of evidence a representative plaintiff may present, or use other tools to assure that a PAGA claim can be effectively tried, but the trial court may not dismiss PAGA claims on the basis of manageability (California Supreme Court). (See § 5.15.3.)

- **"Undue hardship" requires showing "substantial increased costs" in religious accommodation cases.** To defend against a claim of denial of religious accommodation under Title VII, an employer must

show that the burden of granting an accommodation would result in "substantial increased costs" in relation to the conducts of its particular business (U.S. Supreme Court). (See § 6.1.)

- **Security check time is compensable work hours.** Time spent on employer premises waiting in a personal vehicle to scan an identification badge and have a security guard peer into a personal vehicle was held to be compensable as "hours worked" because employees were subject to employer control (California Supreme Court). (See § 7.3.2.)

- **Private employers must provide necessary tools and equipment (or reimburse for them) when the government issues a "stay home" order.** Employers may not avoid liability for providing tools and equipment (or reimbursing employees for those costs) even if the decision to work away from the office was at the direction of an outside entity, such as the government (California Court of Appeal). (See § 7.12.3.)

- **"Final rate" is defined as the employee's "final wage rate."** The term "final rate" used in California Labor Code section 227.3 refers to the terminated employee's final "wage" rate, which includes shift differentials (Ninth Circuit). (See § 7.19.1.)

- **Employee's unused vested vacation pay accrues upon termination of employment.** Employees who were subject to a "furlough" during the COVID-19 pandemic were discharged within the meaning of California Labor Code section 201, thereby triggering the requirement that they be immediately paid for accrued unused vacation time, because there was no specific return date within the normal pay period (Ninth Circuit). (See § 7.19.7.)

- **Non-employee household members may sue for Covid-19 exposure.** Although employers have no duty of care under California tort law to prevent the spread of Covid-19 to the household members of employees, household member's claims are not barred by the exclusive remedy doctrine (California Supreme Court). (See § 17.10.)

Some Judicial Developments Provide Glimmers of Hope

- **"Waiting time" penalties are warranted only for "willful" employer conduct.** California Labor Code sections 203 and 226 penalties are not warranted where the employer's violations are not "willful." A good faith dispute regarding whether premium pay constituted "wages" that must be reported on wage statements precludes a finding of intent as required for penalties (Court of Appeal). (See § 7.5.3.)

- **Plaintiffs must demonstrate that suitable seating for position exists to defeat summary judgment.** Summary judgment was affirmed in favor of the employer, based on a finding that the plaintiff's position working the drive-thru and cash register precluded the existence of a suitable seat (Court of Appeal). (See § 7.11.3.)

- **It is uncertain whether, and when, public employers must reimburse employees for business expenses.** A university was not required to reimburse a professor for remote teaching expenses, because applying Labor Code section 2802 would "infringe upon its sovereign governmental powers." However, the decision was limited to the facts of the case and does not create a bright-line rule (Court of Appeal). (See § 7.13.1.)

- **City ordinance requiring airlines who use SFO Airport to provide health benefits for employees does not evade preemption.** A City acted as a government regulator rather than a market participant in issuing its ordinance requiring health benefits coverage, and therefore the ordinance could be preempted by federal law. Consequently, the trade association's challenge to the ordinance was allowed proceed (Ninth Circuit). (See § 8.10.)

- **Rideshare companies may classify drivers as independent contractors.** Although initially deemed unconstitutional, Proposition 22 allows rideshare and delivery network companies to treat their drivers as independent contractors provided they comply with the legislation's protections, such as 120% of minimum wage for "engaged time" (while drivers are actively transporting riders or making deliveries), and some expense reimbursement (Court of Appeal). (See § 19.7.)

- **Registered securities broker-dealers and investment advisers may not rely on the ABC test to prove misclassification.** The statutory exemption for securities dealers and investment advisers under AB5 is constitutional. Therefore, these professionals must establish claims of misclassification through the more burdensome *Borello* test rather than under the ABC test (Court of Appeal). (See § 19.7.)

- **Statutory provisions prohibiting staff of long-term care facilities from referring to residents by other than resident's self-identified name or pronoun are subject to strict scrutiny.** Name and pronoun provisions legislation was not narrowly tailored to achieve government's compelling interest in eliminating discrimination on basis of sex, and therefore was subject to strict scrutiny (Court of Appeal). (See § 20.8.)

Issues Pending Review in 2024 Before the California Supreme Court

This volume reports on California Supreme Court decisions through about June 2024. We expect the Supreme Court to issue several further decisions affecting private employment during 2024:

- **Can a coworker's use of a single racial epithet create a hostile work environment?** *In Bailey v. San Francisco District Attorney's Office,* No. A153520 (nonpublished opinion) (2020), *review granted,* No. S265223 (Cal. Oct. 26, 2020), the Supreme Court agreed to decide: "Can a plaintiff's coworker's use of a single egregious racial epithet support a discrimination claim based on a hostile work environment?" (Case argued and submitted on May 22, 2024.) (See § 6.1.)

- **Are elected officials employees under Labor Code § 1102.5(b)?** In *Brown v. City of Inglewood,* 92 Cal. App. 5th 1256 (2023), *review granted,* No. S280773 (Cal. Sep. 27, 2023), the Supreme Court agreed to decide: "Are elected officials employees for purposes of whistleblower protection under Labor Code section 1102.5, subdivision (b)?" (Fully briefed Feb. 13, 2024.)

- **Should the calculation of enhanced workers' compensation benefits be based on temporary disability payments?** In *California Department of Corrections and Rehabilitation v. Workers' Comp. Appeals Bd.,* 94 Cal. App. 5th 464 (2023), *review granted,* No. S282013 (Cal. Dec. 13, 2023), the Supreme Court agreed to decide: "Should the calculation of enhanced workers' compensation benefits for an employer's serious and willful misconduct under Labor Code section 4553 be based on temporary disability payments available under the Labor Code?" (Fully briefed Mar.14, 2024.)

- **Can employers use neutral time-rounding for payroll purposes?** In *Camp v. Home Depot U.S.A., Inc.,* 84 Cal. App. 5th 638 (2022), *review granted,* No. S277518 (Cal. Feb. 1, 2023), the Supreme Court agreed to decide: "Under California law, are employers permitted to use neutral time-rounding practices to calculate employees' work time for payroll purposes?" (Fully briefed Sep. 25, 2023.) (See § 7.4.4.)

- **Was the employer's mandatory arbitration agreement unenforceable as unconscionable?** In *Fuentes v. Empire Nissan, Inc.,* 90 Cal. App. 5th 919 (2023), *review granted,* No. S280256 (Cal. Aug. 9, 2023), the Supreme Court agreed to decide: "Is the form arbitration agreement that the employer here required prospective employees to sign as a condition of employment unenforceable against an employee due to unconscionability?" (Fully briefed Mar. 26, 2024.)

- **When may an employer invoke a good faith defense to avoid liquidated damages for alleged minimum wage violations, and is there a private right of action to enforce administrative penalties under the Healthy Workplaces, Healthy Families Act?** In *Iloff v. LaPaille,* 80 Cal. App. 5th 427 (2022), *review granted,* No. S275848 (Cal. Oct. 26, 2022), the Supreme Court agreed to decide: "(1) Must an employer demonstrate that it affirmatively took steps to ascertain whether its pay practices comply with the Labor Code and Industrial Welfare Commission Wage Orders to establish a good faith defense to liquidated damages under Labor Code section 1194.2, subdivision (b)? (2) May a wage claimant prosecute a paid sick leave claim under section 248.5, subdivision (b) of the Healthy Workplaces, Healthy Families Act of 2014 (Lab. Code, § 245 et seq.) in a de novo wage claim trial conducted pursuant to Labor Code section 98.2?" (Fully briefed May 4, 2023.) (See § 7.20.)

- **Do California Code of Civil Procedure section 998's cost-shifting provisions apply if parties agree on a pre-trial settlement?** In *Madrigal v. Hyundai Motor America,* 90 Cal. App. 5th 385 (2023), *review granted,* No. S280598 (Cal. Aug. 30, 2023), the Supreme Court agreed to decide: "[Do] the Code of Civil Procedure section 998's cost-shifting provisions apply if the parties ultimately negotiate a pre-trial settlement?" (Answering brief filed Apr. 8, 2024.)

- **Is California's test for determining waiver of the right to arbitration valid?** In *Quach v. California Commerce Club, Inc.,* 78 Cal. App. 5th 470 (2022), *review granted,* No. S275121 (Cal. Aug 24, 2022), the Supreme Court agreed to decide: "Does California's test for determining whether a party has waived its right to compel arbitration by engaging in litigation remain valid after the United States Supreme Court decision in [*Morgan v. Sundance, Inc.,* ___U.S. ___, 142 S. Ct. 1708 (2022)]?" (Argued and submitted May 21, 2024.)

- **Is a provision providing for recovery of fees on a motion to compel arbitration substantively unconscionable?** In *Ramirez v. Charter Communications, Inc.,* 75 Cal. App. 5th 365 (2022), *review granted*, No. S273802 (Cal. June 1, 2022), the Supreme Court agreed to decide: "Did the Court of Appeal err in holding that a provision of an arbitration agreement allowing for recovery of interim attorney's fees after a successful motion to compel arbitration, was so substantively unconscionable that it rendered the arbitration agreement unenforceable?" (Agued and submitted May 8, 2024.)

- **Do PAGA plaintiffs have the right to intervene in related actions?** In *Turrieta v. Lyft, Inc.*, 69 Cal. App. 5th 955 (2021), *review granted*, No. S271721 (Cal. Nov. 10, 2021), the Supreme Court agreed to decide: "Does a plaintiff in a representative action filed under the Private Attorneys General Act (Lab. Code, § 2698, et seq.) have the right to intervene, or object to, or move to vacate, a judgment in a related action that purports to settle the claims that plaintiff has brought on behalf of the state?" (Supplemental Brief filed by Respondent on Apr. 26, 2024.) (See § 5.15.3.)

- **Do non-California forum selection clauses in arbitration agreements violate Labor Code section 925?** In *Zhang v. Superior Court,* 85 Cal. App. 5th 167 (2022), *review granted,* No. S277736 (Cal. Feb 15, 2023), the Supreme Court agreed to decide: "(1) If an employer files a motion to compel arbitration in a non-California forum pursuant to a contractual forum-selection clause, and an employee raises as a defense Labor Code section 925, which prohibits an employer from requiring a California employee to agree to a provision requiring the employee to adjudicate outside of California a claim arising in California, is the court in the non-California forum one of "competent jurisdiction" (Code Civ. Proc., § 1281.4) such that the motion to compel requires a mandatory stay of the California proceedings? (2) Does the presence of a delegation clause in an employment contract delegating issues of arbitrability to an arbitrator prohibit a California court from enforcing Labor Code section 925 in opposition to the employer's stay motion?" (Fully briefed July 19, 2023.)

1. California Employment Law Agencies

The Supreme Court's decision in *Loper* requires courts to use independent judgment in interpreting statutes administered by agencies. Recent agency actions will now face greater scrutiny based upon the *Loper* decision. These include rules issued by the Department of Labor pertaining to independent contractor classification under the Fair Labor Standards Act (FLSA) and increasing the minimum salary threshold for employees to qualify as exemption under the FLSA; a "walkaround" rule issued by the Occupational Safety and Health Administration allowing union representatives to accompany inspectors during inspections; regulations from the Equal Employment Opportunity Commission implementing the Pregnant Workers Fairness Act; and a rule by the Federal Trade Commission voiding non-compete agreements.

Most statutory provisions regulating California employers appear in the Labor Code or the Government Code. Statutory provisions are available on-line at https://leginfo.legislature.ca.gov/. The Department of Industrial Relations, which interprets Labor Code provisions, has information on-line at www.dir.ca.gov. The California Civil Rights Department (formerly the Department of Fair Employment and Housing), which interprets employment discrimination provisions in the Government Code, has information on-line at www.calcivilrights.ca.gov.

Below is a partial listing of California employment law agencies.[1]

Agricultural Labor Relations Board

California Apprenticeship Council

CAL/OSHA Appeals Board

CAL/OSHA Standards Board

Civil Rights Department (the new DFEH)

Civil Rights Council (formerly, the FEHC)

Commission on Health and Safety and Workers' Compensation

Department of Industrial Relations

Division of Apprenticeship Standards

Division of Labor Standards Enforcement

Division of Labor Statistics and Research

Division of Occupational Safety and Health

Division of Workers' Compensation

Employment Development Department

Industrial Medical Council

Industrial Welfare Commission

Labor and Workforce Development Agency

State Compensation Insurance Fund

State Mediation and Conciliation Service

Workers' Compensation Appeals Board

1.1 The Civil Rights Department (CRD), Enforcing the Fair Employment and Housing Act (FEHA)

The Civil Rights Department (CRD), founded in 1959 as the Department of Fair Employment and Housing, enforces the FEHA and other civil rights laws, including the Unruh Civil Rights Act and the Ralph Civil Rights Act. The CRD investigates and prosecutes allegations of discriminatory practices in employment, housing and public accommodations, and discriminatory practices involving "hate violence."[2]

Formerly, California had a Fair Employment and Housing Commission (FEHC), which promulgated regulations, conducted administrative hearings on civil rights DFEH complaints, levied fines, and awarded damages. The FEHC also ordered employers to implement written harassment policies and post notices of violations. In 2013, however, the Legislature abolished the FEHC and, with it, the administrative adjudication of FEHA claims.

In the FEHC's place is a Civil Rights Council, located within the CRD. The CRC consists of seven volunteer members appointed by the Governor, with the power to issue regulations, but without the power to adjudicate.

The CRD, meanwhile, can file lawsuits to seek all remedies, including attorney fees, after it first engages in mandatory dispute resolution through its internal Dispute Resolution Division, which offers its services free of charge. The Legislature has also established a Civil Rights Enforcement and Litigation Fund to hold attorney fees and costs awarded to the CRD in civil actions, which can be used to help defray its costs.

The CRD can file class actions challenging systemic discrimination. It obtained a favorable state trial court ruling concerning the workplace rights of transgender individuals.[3] But the CRD's attempt to enforce Title I of the federal ADA was struck down by a federal district court judge because the CRD had acted in excess of its authority.[4]

Regulations interpreting FEHA prohibit discrimination and harassment based on gender identity or gender expression[5] or national origin,[6] prohibit discrimination against persons who hold the special driver's license that can be issued to undocumented persons,[7] prescribe course content and require recordkeeping for harassment-prevention training,[8] prescribe content and require distribution of discrimination and harassment policies,[9] and assert authority for the CRD to pursue "non-monetary preventative remedies" against an employer, even in the absence of evidence of discrimination or harassment.[10]

1.2 The Labor and Workforce Development Agency (LWDA)

The Labor and Workforce Development Agency emerged from a 2002 consolidation of various state departments—the Department of Industrial Relations (DIR), the Employment Development Department (EDD), the Workforce Investment Board, the Employment Training Panel, the Public Employment Relations Board, Business Investment Services, the Unemployment Insurance Appeals Board, and the Agricultural Labor Relations Board (ALRB). The LWDA was organized to provide more efficiency in California's workforce training programs, and to coordinate enforcement and worker disability programs operated by DIR and EDD.[11]

The LWDA is perhaps best known among California employment lawyers as the agency to which plaintiffs seeking to file civil claims under the Private Attorneys General Act (PAGA), must first submit their PAGA claims before filing in court. (See § 5.15.)

1.3 Department of Industrial Relations (DIR)

The DIR exists to improve working conditions and advance employment opportunities in California. The DIR oversees the Division of Workers' Compensation, Cal/OSHA, the Industrial Welfare Commission (see § 1.4), the

Division of Labor Standards Enforcement (see § 1.5), and the Division of Apprenticeship Standards. The DIR has formed a Labor Enforcement Task Force to combat the underground economy in California, with the goal of reducing the prevalence of underpaid wages and taxes. The Task Force includes representatives of many government branches, such as the DIR, the EDD, the Contractor's State Licensing Board, the Bureau of Automotive Repair, the California Attorney General, and the Department of Insurance.

1.4 Industrial Welfare Commission (IWC)

The IWC, a five-member body appointed by the Governor, ascertained the hours and conditions of labor and employment in various occupations, trades, and industries, investigated the health, safety, and welfare of those employees, and promulgated Wage Orders that have the force of statutes (see § 7.1).[12] Established in 1913, the IWC spent its first 60 years focusing on the wages, hours, and working conditions of women and children. To this end, the IWC—beginning in 1916—promulgated a series of industry- and occupation-wide Wage Orders, prescribing various minimum requirements with respect to wages, hours, and working conditions to protect the health and welfare of women and child laborers. The IWC's jurisdiction broadened to employees generally in the 1970s, after courts held that female-protective legislation was unlawful.[13]

Before 2000, the IWC was the body that set overtime as well as other wage and hour requirements. It acted in a quasi-legislative capacity, promulgating Wage Orders that set rules for wages, hours, and working conditions that differed from one industry to another.

During a Republican administration, in 1997, the IWC eliminated daily overtime from the Wage Orders. In response, after Democrat Gray Davis became governor in 1998, the Legislature amended the Labor Code to reinstate daily overtime requirements and to enshrine various employee protections into the Labor Code so that they could never again be altered by the IWC. The Wage Orders remain in effect, but the IWC is precluded from promulgating Wage Order rules that conflict with the Labor Code.

Although the California Legislature defunded the IWC in 2004, the IWC Wage Orders remain in effect, and are enforced by the DLSE.[14] In 2023 the Governor set aside $3 million in the State's budget for the IWC to again reconvene and set forth recommendations for wages, hours, and working conditions in new wage orders by October 31, 2024, thus setting in motion a potential revival of the IWC after 20 years.[15]

1.5 The Labor Commissioner—the Division of Labor Standards Enforcement (DLSE)

1.5.1 Complaints for unpaid wages with the DLSE

The head of the DLSE is known as the "Labor Commissioner."[16] Employees claiming unpaid wages may file a claim with a local DLSE office, which will investigate and can hold a hearing. The DLSE has no jurisdiction over bona fide independent contractors and only limited jurisdiction over claims by federal, state, county, or municipal employees, and employees working under collective bargaining agreements.

The DLSE, through its Bureau of Field Enforcement, has focused its enforcement and collection efforts in particular industries, such as the car wash, restaurant, construction, garment, and agriculture industries.[17] The Labor Commissioner has heralded a public awareness campaign—"Wage Theft Is A Crime"—to educate workers about their wage and hour rights.[18] The Labor Commissioner can investigate an employer—with or without a filed complaint—when the Labor Commissioner, during a wage claim or investigation, suspects retaliation or discrimination.[19] The DLSE schedules settlement conferences and administrative hearings—called Berman hearings—before Deputy Labor Commissioners in various branch offices. Within ten days after service of the notice and the complaint, the defendant (the employer) may file an answer. Within 30 days of the complaint, the

DLSE is supposed to notify the parties whether a hearing will be held, whether the DLSE will prosecute the matter itself, or whether no further action will be taken.[20] A hearing, if held, is to occur within 90 days of that determination. [21] A continuance of a hearing is rarely granted. Claims that involve a large number of employees and records may attract the attention of the DLSE's Bureau of Field Enforcement, which may require the employer to undergo an audit. The DLSE can seek liquidated damages for an employer's failure to pay the minimum wage[22] and has three years to collect statutory penalties and fees.[23]

As of 2022, intentional wage theft—including gratuities "in an amount greater than nine hundred fifty dollars ($950) from any one employee, or two thousand three hundred fifty dollars ($2,350) in the aggregate"—is now considered grand theft punishable as a misdemeanor or felony with jail time.[24]

In 2023, the California legislature amended the Labor Code to permit public prosecutors to independently prosecute specified violations of the Labor Code that occur within their geographic jurisdictions.[25] In addition, the amendment provides that individual agreements that require arbitration of a dispute or limit representative actions do not affect the prosecutor or Labor Commissioner's ability to enforce the Labor Code.

Moreover, a Labor Commissioner order, decision, or award, once final and filed with the county recorder, creates a lien on the employer's real property as if it were a final judgment creating a judgment lien.[26]

The conference. The conference determines if the claim can be resolved without a hearing. The parties bring evidence to support their positions but do not testify under oath. If the case is not resolved at the conference, then the Deputy Labor Commissioner determines whether to dismiss the claim or set the matter for a hearing.

The Berman hearing. This hearing occurs in an informal setting, but it is a formal proceeding. The parties and witnesses testify under oath and the proceedings are tape-recorded. The hearing officer is not bound by formal rules of evidence and has wide discretion to accept evidence and decide whether to assess penalties. Within 15 days of the hearing, the Labor Commissioner is supposed to serve on the parties an Order, Decision, or Award (ODA), setting forth the hearing officer's decision and the amount awarded, if any.

Can employees waive a Berman hearing in an arbitration agreement? In 2011, the California Supreme Court held that waiver of the Berman hearing would contravene public policy, and that California law prohibiting waiver of a Berman hearing is not preempted by the Federal Arbitration Act.[27] The U.S. Supreme Court then reversed this decision and remanded to the California Supreme Court for further consideration in light of the U.S. Supreme Court's decision in *AT&T Mobility, LLC v. Concepcion*.[28] On remand, the California Supreme Court reversed itself and agreed that the FAA would preempt any categorical ban on a Berman-hearing waiver. The California Supreme Court nonetheless held that California's policy against unconscionability might still apply to void an arbitration provision that would deprive an employee of the right to a Berman hearing before arbitration is required.[29] In 2019, the Supreme Court revisited the issue and voided an arbitration agreement as unconscionable on the ground that it was presented in oppressive circumstances and that its resolution procedures were unduly cumbersome in comparison to the pro-employee features of the Berman hearing. (See § 5.2.)

Appeal to civil court. Within ten days after service of notice of an ODA, a party may seek judicial review by filing an appeal to the court.[30] The court will then schedule a trial *de novo*—the parties will try the case again from the start, with each party presenting evidence.

The Labor Code discourages employer appeals from DLSE awards by (1) requiring that the appealing employer post a bond, (2) making interest run on the amount of the award, (3) entitling the employee to costs and attorney fees on the appeal even if the award on appeal is less than the award from the Labor Commissioner (so long as the award is greater than zero), and (4) permitting the employee to raise new claims on appeal that the employee failed to raise before the DLSE.

Undertaking required of employer on appeal. Employers who appeal a DLSE award must post with the reviewing court an undertaking in the amount of the award.[31] Employers wishing to appeal must first post the undertaking.[32] An employer's failure to timely post the undertaking—or to request an indigency waiver—is jurisdictional, depriving the trial court of jurisdiction and leaving the employer without recourse.[33] If the employer loses at trial or withdraws its appeal, then the employer must pay the amount of the award within ten days of the court's judgment or withdrawal of the appeal; otherwise, the undertaking will be forfeited to the employee.[34]

Employers who have failed to post the required bond have thereby lost their appeals from adverse Labor Commissioner awards. One such employer, Fushan Li, owned four massage parlors. The Labor Commissioner ordered him to pay $198,576 in unpaid wages and liquidated damages. In seeking to appeal, he requested relief from the bond requirement of Labor Code section 1197.1(c)(3) because it did not take effect until January 1, 2017, after the citations to Li had already issued. The trial court denied this request and dismissed Li's appeal for his failure to post the required bond. The Court of Appeal affirmed, holding that even though Li contested the citations before the amended statute took effect, the Commissioner issued its findings and order in April 2017, after the statute took effect. Application of the bond requirement in these circumstances was not deemed an improper retroactive application of the statute.[35]

Faring no better was Cardinal Care Management, a senior care home company. Facing a Labor Commissioner award of over $2.5 million, Cardinal appealed and petitioned for relief from the requirement that it post a bond in the amount of the award. Cardinal's principal claimed he was "rebuilding his life after a bankruptcy and divorce" and declared he had no assets to support a bond. But the trial court found he had transferred large assets to certain financial entities managed by his wife in "an effort to avoid a judgment." The Court of Appeal affirmed, holding that Cardinal's ultimate failure to post a bond doomed its appeal, and that the bond requirement did not violate due process.[36]

Interest. All awards accrue interest (at the legal rate of 10%) from the date due to the date paid.[37]

Costs and attorney fees. The DLSE may represent a claimant who cannot afford counsel.[38] In an appeal from an ODA, the appealing party who is "unsuccessful" is liable for the other party's costs and reasonable attorney fees on appeal.[39] Although appealing employees who received less from the court than the DLSE awarded were previously considered "unsuccessful" in this sense,[40] the California Legislature has since deemed that an appealing employee "is successful if the court awards an amount greater than zero."[41]

New employee claims can arise at trial. In one case, an employee prevailed before the Labor Commissioner on claims for unpaid overtime. When the employer appealed from the ODA for a trial *de novo* in court, the court permitted the employee to add new claims.[42]

1.5.2 Complaints for retaliation

The DLSE also hears complaints that a person has suffered discrimination in violation of any law under the DLSE's jurisdiction.[43] There once was a six-month deadline to bring such a complaint, but as of 2021 the deadline is now one year.[44]

1.5.3 Records inspection

The Labor Code permits the DLSE to inspect the records of any "employer" to determine if the minimum wage has been paid, and to "enforce the payment of any sums found, upon examination, to be due and unpaid to the employees."[45]

1.5.4 The DLSE Manual

In 2002, the DLSE published a comprehensive *Enforcement Policies and Interpretations Manual*—available on-line and subject to periodic updates.[46] DLSE interpretations typically favor the view of the law that is most onerous for employers. The *Manual* itself deserves no judicial respect, as it amounts to an "underground regulation"—an administrative pronouncement that an agency issues without giving notice of a proposed regulation and an opportunity for the public to comment.[47] The *Manual* is very useful, however, to the extent that it summarizes opinion letters (discussed immediately below) that the DLSE has issued in specific situations.

1.5.5 DLSE opinion letters

The DLSE has issued opinion letters in response to particular situations presented by individual employees and employers. The amount of judicial deference owed to DLSE opinion letters is unclear. DLSE opinion letters are advice in specific cases only. Nonetheless, California courts state that the "DLSE's interpretation of an IWC [wage] order is entitled to great weight."[48] A court seems to adopt or reject the reasoning of a DLSE opinion letter depending on whether the court independently finds the DLSE's reasoning persuasive.[49]

1.5.6 Compliance Monitoring Unit

The DLSE's Compliance Monitoring Unit (CMU) focuses on enforcing prevailing wage requirements on public works. Awarding bodies must notify the CMU, through the Public Works Chapter, each time a public works contract is awarded.

1.5.7 Labor Commission enforcement authority

The Labor Commissioner can hold hearings to determine whether an employer is liable for civil penalties.[50] Under legislation called "A Fair Day's Pay Act," the Labor Commissioner can conduct hearings to determine whether a "person acting on behalf of an employer" should be held personally liable for an employer's violations, and can seek payment from successor employers. The Labor Commissioner can file liens on property in California for unpaid wages and the other compensation, penalties, and interest owed to an employee.[51] The Labor Commissioner can enforce local laws regarding overtime and minimum wage provisions and issue citations and penalties for violations, provided the local entity has not already cited the employer for the same violation. The Labor Commissioner can also issue citations and penalties to employers who violate the expense-reimbursement provisions of Labor Code section 2802.[52]

The Labor Commissioner or an employee may seek injunctive relief—such as reinstatement pending a claim—upon a mere finding of "reasonable cause" that a violation of the law has occurred.[53] The Labor Commissioner may also issue citations to persons it determines to be responsible for violations, directing specific relief.[54]

The Labor Commission has been given expanded authority as of 2020. New legislation has expanded the appeal and enforcement mechanisms available when the Labor Commissioner cites an employer for violating the Labor Code's anti-retaliation provisions.[55] And the Labor Commissioner can cite employers for failure to pay contract wages when the employer has paid an employee below minimum wage.[56]

1.6 Employment Development Department (EDD)

1.6.1 General administration

The EDD collects payroll taxes for the state and administers programs concerning Job Service, Unemployment Insurance, State Disability Insurance (SDI), Paid Family Leave (PFL) benefits, the Workforce Investment Act, and the Welfare-to-Work program.

SDI is a partial wage-replacement insurance plan for California workers, funded through mandatory employee payroll deductions. SDI provides short-term benefits to eligible workers who suffer a loss of wages when they cannot work due to a non-work-related illness or injury, or a medically disabling condition resulting from pregnancy or childbirth.

The EDD also administers the employee-funded PFL program, which provides partial wage-replacement for employees who are eligible for an otherwise unpaid leave to care for an ill or injured family member, bond with a new child, or participate in certain events because of a family member's military deployment.[57]

1.6.2 Payroll tax audits regarding independent contractor classifications

As California's largest tax collection agency, the EDD conducts payroll tax audits of California businesses, often after workers have filed claims for unemployment insurance benefits against businesses that have not paid payroll taxes with respect to those workers. The EDD frequently challenges the classification of workers as independent contractors instead of employees. During a payroll tax audit, the EDD obtains accounting records and makes on-site visits. The review period is generally up to three years. The audit aims to see if every worker paid for services was properly classified as an employee or independent contractor and if wages and taxes were properly reported. Audits, if they go badly for the employer, can result in an assessment of additional taxes and penalties due. The employer may petition for a reassessment or for a hearing before an administrative law judge.

The significance of correct classification looms especially large in light of the hefty potential civil penalties for employers and their outside, non-attorney advisors who engage in "willful misclassification" of workers as independent contractors.[58]

1.6.3 EDD regulations and checklists with respect to employment status

The EDD has comprehensive regulations applying the common law to questions of whether workers are employees or independent contractors. The regulations state that the most important factor is the right of the principal to control the manner and means of accomplishing the desired results, but they also list ten other factors to consider.[59] The regulations explain how to apply these rules in various industries, including real estate, home health care, computer services, newspaper distribution, process servers, banking, and cosmetology.[60] A comprehensive EDD checklist provides guidance in determining whether the service provider is an employee or an independent contractor. But in 2019 the Legislature re-wrote the rules of the game, creating a presumption of employment status for any worker providing service to a hiring entity unless the entity can satisfy the ABC test as to that provider.[61] (See § 19.7.)

1.7 Unemployment Insurance Appeals Board (UIAB)

The UIAB hears claims for unemployment and disability benefits. These cases are appeals from administrative determinations made by the EDD. The UIAB also hears petitions from taxpayers concerning assessments made by the EDD's Tax Branch. The initial hearings and decisions are heard in eleven Offices of Appeals throughout the state. These offices conduct the first level of appeal. An administrative law judge presides, and takes tape-recorded testimony under oath (see § 15.3). A losing party at the first level may appeal to the second level.[62]

1.8 Division of Workers' Compensation (DWC)

Workers' compensation cases brought by injured workers ("applicants") are heard by workers' compensation referees employed by the DWC. Any settlement of a workers' compensation case must be in the form of a compromise and release or stipulations with request for award. A compromise and release extinguishes liability for future medical care in return for a lump sum payment. A stipulation with request for award leaves open the

injured worker's entitlement to future medical treatment. Both types of settlement must be approved by a workers' compensation referee. The standard "C&R" form used to effect a compromise and release will not release an individual's civil claims against the employer[63] and a civil release alone cannot settle a workers' compensation claim. Applicants' attorney fees also must be approved by a workers' compensation judge, and are generally 9-15% of the settlement amount.[64] Only the WCAB can resolve workers' compensation issues. They cannot be resolved in a Settlement and Release on the civil side without WCAB approval.

1.9 Workers' Compensation Appeals Board (WCAB)

The WCAB is a seven-member judicial body appointed by the Governor and confirmed by the California Senate. It reviews petitions for reconsideration of decisions by workers' compensation administrative law judges of the DWC and regulates the adjudication process by adopting rules of practice and procedure. A WCAB decision is reviewable only by the appellate courts.

1.10 Division of Occupational Safety and Health (DOSH)

The DOSH, also known as Cal/OSHA, protects workers and the public from safety hazards by enforcing occupational health and safety laws and providing information and consultative assistance to employers, workers, and the public about workplace and public safety matters. The DOSH, through the Cal/OSHA Enforcement Unit, inspects California workplaces based on worker complaints, accident reports, and programmed inspections especially in high hazard industries. Penalties for Cal/OSHA violations are assessed per citation, and can run from several hundred dollars to tens of thousands of dollars.[65]

DOSH amended its regulations several years ago to (1) increase the "look back" period from three years to five years to determine if there is a "repeat" violation of a safety order, (2) allow a repeat citation for any prior employer violations in the state (as opposed to repeat citations to a fixed establishment or within the region for businesses that have no fixed establishments), and (3) allow a repeat citation for a substantially similar violation, hazard, or condition (as opposed to the "same violation" under former law).[66]

DOSH's broader authority to issue repeat citations could have significant ramifications for employers, in that repeat violations require no higher proof of intent by the employer, and penalties for repeat citations can reach $158,727 per violation.[67]

The Occupational Safety and Health Appeals Board, a three-member quasi-judicial body appointed by the Governor and confirmed by the California Senate, handles appeals from private and public sector employers regarding citations issued by DOSH for alleged violations of workplace safety and health laws and regulations.[68]

---

1 For more information, see www.ca.gov (last visited July 12, 2024).

2 Historically, disability discrimination complaints have been the most common, followed by retaliation, race, and gender discrimination, and sexual harassment. For more information, see www.calcivilrights.ca.gov (last visited July 11, 2024).

3 *Dep't of Fair Employment & Housing v. Am. Pac. Corp.,* No. 34-2013-00151153-CU-CR-GDS, Sacramento Cnty. Superior Ct. (Mar. 13, 2014).

4 *Cheng v. WinCo Foods LLC,* No. 14-CV-0483-JST, 2014 WL 2735796 (N.D. Cal. June 11, 2014).

5 2 Cal. Code Regs. §§ 11029-11030.

6 2 Cal. Code Regs. § 11028.

7 2 Cal. Code Regs. § 11028(g).

8 2 Cal. Code Regs. § 11024.

9 2 Cal. Code Regs. § 11023(b), (c).

10 2 Cal. Code Regs. § 11023(a).

[11] For more information, see www.labor.ca.gov (last visited Mar. 21, 2024).

[12] Lab. Code § 1173.

[13] See *California Labor Federation v. IWC*, 63 Cal. App. 4th 983 (1998).

[14] *Mendiola v. CPS Sec. Sols., Inc.*, 60 Cal. 4th 833, 838 n.6 (2015). See www.dir.ca.gov/iwc/wageorderindustries.htm (last visited Mar. 21, 2024).

[15] Budget Act of 2023, Assembly Bill 102, Section 215, passed July 10, 2023, https://legiscan.com/CA/text/AB102/id/2833538 (last visited Mar. 21, 2024).

[16] Lab. Code § 21.

[17] Some industries historically have heavily relied on immigrant labor. California has enacted measures in recent years to protect immigrant workers (see §§ 3.5.8, 5.17, 6.6).

[18] The campaign targets workers in low-wage industries (e.g., agriculture, garment, construction, and hospitality) and uses numerous languages to better reach immigrant workers. The websites, in English and Spanish, are www.wagetheftisacrime.com and www.robodesueldoesuncrimen.com (last visited Apr. 20, 2023).

[19] SB 306, codified in Labor Code §§ 98.74, 1102.61, 1102.62 and amending Labor Code § 98.7(b)(2).

[20] See Lab. Code §§ 98(a) and 98.3.

[21] Lab. Code § 98.

[22] Lab. Code § 98(a).

[23] Lab. Code § 200.5(a). In 2013, the Court of Appeal held that, as long as a claimant is consistently pursuing remedies in any forum—administrative or judicial—the statute of limitations on a wage claim will be subject to equitable tolling, but this decision was depublished by the California Supreme Court. *Bain v. Tax Reducers, Inc.*, 219 Cal. App. 4th 110 (2013), *rev. denied and ordered not to be officially published*, No. S213850 (Cal. Dec 11, 2013).

[24] AB 1003, Penal Code § 487m.

[25] AB 594, amending Labor Code §§ 218 and 226.8.

[26] Lab. Code § 98.2.

[27] *Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal. 4th 659, 678, 695 (2011), *vacated,* 132 S. Ct. 496 (2011).

[28] 563 U.S. 333 (2011).

[29] *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1146 (2013).

[30] Lab. Code § 98.2(a).

[31] *Williams v. FreedomCard, Inc.*, 123 Cal. App. 4th 609, 615 (2004) (employer found liable for failure to pay wages waived right to appeal Labor Commissioner's award of unpaid wages by failing to post surety bond or file declaration of indigency).

[32] Lab. Code § 98.2(b). In years past, employers would sometimes timely appeal from DLSE orders within the 10-day statutory deadline, but not post the bond or cash deposit until later, because of financial or practical difficulties. But now the 10-day deadline applies to the undertaking requirement as well as the notice of appeal. *Palagin v. Paniagua Constr., Inc.*, 222 Cal. App. 4th 124, 140 (2013).

[33] Lab. Code § 98.2(b). *Burkes v. Robertson*, 26 Cal. App. 5th 334, 347 (2018); *Palagin v. Paniagua Constr., Inc.*, 222 Cal. App. 4th 124, 126 (2013).

[34] Lab. Code § 98.2(b).

[35] *Li v. Department of Indus. Relations*, 53 Cal. App. 5th 877 (2020).

[36] *Cardinal Care Mgmt., LLC v. Afable*, 47 Cal. App. 5th 1011 (2020).

[37] Lab. Code § 98.1(c).

[38] Lab. Code § 98.4.

[39] Lab. Code § 98.2(c).

[40] *Smith v. Rae-Venter Law Grp.*, 29 Cal. 4th 345, 370 (2002) (before amendment of Labor Code section 98.2(c), either party seeking *de novo* appeal of Labor Commissioner order, whether employer or employee, was liable for the other side's attorney fees and costs unless the trial court judgment was more favorable to the appealing party than was the award being appealed).

[41] Lab. Code § 98.2(c) (amended effective 2004). See *Progressive Concrete, Inc. v. Parker*, 136 Cal. App. 4th 540, 554 (2006) (attorney fees not available to employer even though employer, after adverse ODA, succeeded in reducing the award on appeal).

[42] *Murphy v. Kenneth Cole Prods., Inc.,* 40 Cal. 4th 1094, 1114-20 (2007) (employee who claimed only overtime and waiting-time penalties before the DLSE could add, during the trial *de novo* on the employer's appeal, additional claims for missing meal and rest breaks and inadequate wage statements).

[43] Lab. Code § 98.7. This provision has *not* been held to be an employee's exclusive remedy for discrimination of this sort. (See generally § 5.7.2.)

[44] AB 1947, 2020 bill amending Lab. Code § 98.7(a)(1) ("Any person who believes that they have been discharged or otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commissioner may file a complaint with the division within one year after the occurrence of the violation. The one-year period may be extended for good cause.").

[45] Lab. Code § 1195.5.

[46] See www.dir.ca.gov/dlse/Manual-Instructions.htm (last visited Mar. 21, 2024).

[47] *Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal. 4th 557, 576 (1996) (no deference owed to DLSE's Enforcement Manual, because it was not promulgated in conformity with Administrative Procedures Act); *see also McFarland v. Guardsmark*, *LLC,* 538 F. Supp. 2d 1209, 1216-17 (N.D. Cal. 2008) (holding that employee who agrees to on-duty meal break can wave second meal break when working more than 10 hours and not fewer than 12, and rejecting contrary interpretation set forth in DLSE Manual as "void regulation"), *aff'd*, 588 F.3d 1236 (9th Cir. 2009); *Areso v. CarMax, Inc.*, 195 Cal. App. 4th 996, 1007 (2011) ("we afford no deference to the statement in the DLSE manual," because it was not properly adopted); *California Sch. of Culinary Arts v. Lujan*, 112 Cal. App. 4th 16, 27-28 (2003) (rejecting as void a long-standing DLSE "underground regulation" limiting professional exemption for teachers to teachers in colleges that offer a baccalaureate degree).

[48] *Bell v. Farmers Ins. Exchange*, 87 Cal. App. 4th 805, 815 (2001) (quoting *Monzon v. Schaefer Ambulance Serv.*, 224 Cal. App. 3d 16, 30 (1990)).

[49] *E.g., Hudgins v. Neiman Marcus Grp., Inc.*, 34 Cal. App. 4th 1109, 1126 (1995) (rejecting DLSE opinion letter as contrary to settled law and as relying on a single out-of-state case that was itself "poorly reasoned").

[50] Lab. Code §§ 96, 98.

[51] Lab. Code §§ 96.8, 238, 238.2, 238.3, 238.4, 238.5, and 558.1.

[52] Lab. Code §§ 558, 1197, 1197.1, and 2802.

[53] SB 306, 2017 bill adding Lab. Code §§ 98.74, 1102.61, 1102.62.

[54] Lab. Code § 98.74(a).

[55] SB 229, 2019 bill amending Lab. Code § 98.74 (establishing procedures and deadlines to follow when adjudicating or contesting a citation).

[56] SB 688, 2019 bill amending Lab. Code § 1197.1.

[57] For more information, see http://www.edd.ca.gov (last visited July 12, 2024).

[58] Lab. Code §§ 226.8 and 2753. Penalties range from $5,000 to $25,000 per violation.

[59] 22 Cal. Code Regs. § 4304-1.

[60] 22 Cal. Code Regs. §§ 4304-2 to 4304-12.

[61] Lab. Code § 2750.5.

[62] For more information, see https://cuiab.ca.gov/ (last visited Mar. 12, 2024). UIAB decisions can have binding effect. In *Happy Nails & Spa of Fashion Valley v. Su*, 217 Cal. App. 4th 1459 (2013), *ordered not officially published* (Nov. 20, 2013), the Court of Appeal held that once the UIAB found that cosmetologists were independent contractors, the Labor Commissioner was collaterally estopped to pursue penalties on the basis that the workers were really employees.

[63] *Claxton v. Waters*, 34 Cal. 4th 367 (2004) (standard preprinted form used to settle workers' compensation claim releases only those claims within scope of the workers' compensation system, and not claims asserted in separate civil actions); *Camacho v. Target Corp.*, 24 Cal. App. 5th 291 92018) (reversing summary judgment for employer as to statutory discrimination claims and tort claims; mandatory preprinted C&R form, amended since *Claxton*, does not release claims outside workers' compensation system and expressly disclaims any intent to do so). A different result obtained in *Jefferson v. Dep't of Youth Auth.*, 28 Cal. 4th 299, 304 (2002), only because there the parties in an attachment to their settlement agreement clearly expressed their intent to settle matters outside the scope of workers' compensation.

[64] For more information, see www.dir.ca.gov/DWC (last visited Mar. 12, 2024).

[65] 8 Cal. Code Regs. § 336.

[66] 8 Cal. Code Regs. § 334.

[67] 8 Cal. Code Regs. § 336(g).

[68] For more information, see http://www.dir.ca.gov/DOSH (last visited Mar. 17, 2024).

2. Leave and Accommodation Statutes

2.1 Pregnancy Disability Leave

Under the Pregnancy Disability Leave Law (PDLL), California employers with five or more employees must grant up to "four months" (17.33 weeks (693 hours based on a 40-hour workweek)) of unpaid, job-protected leave per pregnancy[1] to employees disabled by pregnancy, childbirth, or related medical conditions,[2] regardless of whether the employer allows disability leaves generally.[3] Regulations state that reinstatement must be to the exact same position (as opposed to an equivalent or comparable position), and that the employee is entitled to a written guarantee of reinstatement upon request.[4] A pregnancy-disabled employee who exhausts her four months of PDLL leave also may be entitled to additional leave under FEHA, as a reasonable accommodation for a disability.[5]

Note that California thus requires a *pregnancy disability* leave, not a *maternity* leave. Employers who grant motherhood leaves (unrelated to disability) without also granting leaves for fathers or other parents arguably discriminate against employees because of their sex and/or gender.

The PDLL requires further accommodations, such as temporary transfers, for conditions related to pregnancy, childbirth, or related medical conditions.[6]

A California employer may temporarily transfer an employee over her objection only if she seeks a reduced schedule or intermittent leave and a transfer would better accommodate her needs than her regular job would.[7] California employers must maintain and pay for group health benefits during the employee's pregnancy disability leave as if she were actively working during the leave, up to a maximum of four months within a 12-month period (commencing on the date the pregnancy disability leave begins).[8] Employers must maintain health coverage for up to seven months if employees take their full PDLL leave and then their full CFRA leave for baby bonding.[9]

Employees may be required to provide medical certification confirming the need for leave and the approximate duration of the leave. Employees must provide at least 30 days' advance notice that they will need to take PDLL unless 30 days' notice cannot be given due to an unexpected or emergency condition. Employees may be required to use their accrued sick time during PDLL, but not accrued vacation or other accrued paid time off.

Employers must not interfere with or restrain the exercise or attempted exercise of PDLL rights.[10]

Further, as of June 27, 2023, when the federal Pregnant Workers Fairness Act (PWFA)[11] went into effect, covered employers[12] are restricted by federal law from forcing pregnant employees to take leave if another reasonable accommodation can be provided that would allow the employee to continue working. Although the PWFA does not prescribe specific reasonable accommodations, the final PWFA regulations (published on April 18, 2024, and effective as of June 18, 2024) and the Congressional House Committee on Education and Labor Report on the PWFA provide examples such as: the ability to sit and drink water, receive closer parking, have flexible hours, receive appropriately-sized uniforms and safety apparel, receive additional break time, or be excused from strenuous activities. Different from the ADA and the PDLL, the PWFA requires employers to consider temporarily excusing pregnant workers from performing essential functions of their jobs absent undue hardship. This means that temporary accommodations for pregnancy-related work restrictions may be reasonable under the PFWA, but not the ADA or PDLL, due to the worker being unable to perform one or more essential functions of the position.

2.2 Lactation Accommodation

In 2010, Congress amended the FLSA to require employers to provide nonexempt employees with a reasonable amount of unpaid break time in a private location (other than a bathroom) to express milk for their children of up to one year in age.[13] The 2022 PUMP for Nursing Mothers Act (PUMP Act) extended these same protections to exempt employees. California law has always been more lactation-friendly than federal law: California's lactation benefits have always been extended to all employees, not just nonexempt employees.[14] Since 2002, California has entitled employees to take unpaid breaks to express milk in a private location (other than a toilet stall), in close proximity to the work area, unless this break time would "seriously disrupt the operations of the employer."[15]

In 2019 California went further. Inspired by the San Francisco lactation law, the legislature passed a new version of mandatory lactation accommodation, requiring employers to provide a lactation room with specific characteristics: not a bathroom; shielded from view; free from intrusion while the employee is lactating; safe, clean, and free of toxic or hazardous materials; containing a surface to place a breast pump and personal items; containing a place to sit; and having access to electricity or alternative devices (e.g., extension cords, charging stations) needed to operate an electric or battery-powered breast pump. While a sink with running water and refrigerator (or other cooling device suitable for storing milk) do not necessarily have to be in the lactation room, they must be in "close proximity" to the employee's workspace.[16] If a multipurpose room is used for lactation and other uses, then lactation must take precedence over the other uses.

Note: there are some exceptions to California lactation accommodation laws for certain job sites and smaller employers.[17]

California law makes denial of lactation break time or space an unlawful denial of a rest break, and subjects the employer to a $100 penalty per violation. Further, the PUMP Act gives employees a private right of action under the FLSA that could make employers liable for liquidated, compensatory, and punitive damages. California also requires employers to develop and implement a written policy regarding any lactation accommodations. The policy must describe the employee's right to file a complaint with the Labor Commissioner for an alleged violation, must appear in the employer's handbook or other written policies, and must be distributed to new hires and to employees who ask about or request parental leave rights.[18] California prohibits retaliation against any employee attempting to exercise any right the law creates.[19] Employers with fewer than 50 employees may be exempt if they can show that compliance would cause undue hardship. However, such employers must make reasonable efforts to provide a lactation room that is not a toilet stall and that is in close proximity to the employee's work area.

The FEHA also includes breastfeeding and related medical conditions within its very expansive definition of "sex" (see § 6.2), and thus forbids California employers from discriminating against those who breastfeed. Note that while the California Labor Code specifies that breaks must be provided when the employee needs to express milk "for the employee's infant child," an employee expressing milk for another purpose (e.g., donation) should be accommodated under the FEHA.[20]

San Francisco ordinance. San Francisco employers must provide, for employees who want to express milk, a clean, private space that includes a place to sit, has access to electricity, and has a surface space for a breast pump. The space must be in close proximity to a sink with running water and a refrigerator. If such a space does not exist, then the employer must create it, unless doing so would impose an undue hardship. San Francisco employers must provide notice of their lactation accommodation policy to employees upon hiring and whenever employees ask about pregnancy or parental leave.[21]

2.3 Family Care and Medical Leave

Before 2021, the employers covered under the California Family Rights Act aligned with the federal Family and Medical Leave Act. That is no longer true. The CFRA now applies to employers with as few as five employees[22] (unlike the 50-employee threshold applying under the FMLA). The CFRA also no longer includes a geographical requirement for employee eligibility (while the FMLA continues to require that an employee work at or report to a location with at least 50 employees within 75 miles).[23] Accordingly, employees now can be eligible for CFRA leave if they work for a covered employer with five or more employees. The 2021 CFRA amendments also eliminated the previous carve-out that existed for certain highly paid or key employees.[24]

Both state and federal statutes continue to require that the employee have (1) more than 12 months of service with the employer, and (2) 1,250 hours of that service within the last 12 months to be eligible to take leave. As a result, all employees who take CFRA leave have the same reinstatement rights.[25]

The CFRA, like the FMLA, entitles eligible employees to take unpaid leave of up to 12 workweeks during a 12-month period because of (1) birth, adoption, or foster care placement of a child, (2) serious health condition of the employee or the employee's covered family member, or (3) a qualified exigency related to covered active duty or call to covered active duty of an employee's spouse, domestic partner (CFRA only), child, or parent in the U.S. Armed Forces. In 2021 the CFRA expanded "Covered Family Member" to encompass grandparents, grandchildren, and siblings with a serious health condition, and "child" became broadly defined to include all children regardless of age, as well as children of domestic partners. [26] In 2022, the definition of "parent" expanded to protect leave to care for a parent-in-law with a serious health condition.[27] As of January 1, 2023, eligible employees may take CFRA leave to care for a "designated person" with a serious health condition, meaning any blood relative or a person whose association with the employee is the equivalent of a family relationship.[28] Employees may designate such a person at the time leave is requested, but employers can limit employees to designating only one such person per 12-month period.[29]

The CFRA continues to provide more employee entitlements than the FMLA. The CFRA entitles employees to intermittent leave for bonding without the employer's permission; the basic minimum duration of that leave generally is two weeks, and both parents have the right to a full 12 weeks of bonding leave.[30] Further, employees who have taken pregnancy disability leaves of up to four months under the California PDLL (concurrently with FMLA leave) may take 12 more weeks of CFRA leave to bond with their child (or for any other CFRA-qualifying reason), during which the employer must continue health insurance coverage.

The CFRA also peculiarly restricts employer inquiries. California employers cannot require "medical facts" (e.g., symptoms or a diagnosis) and certain other information that the FMLA permits an employer to obtain as part of a medical certification, and California employers also cannot obtain a second or third medical opinion as to the serious health condition of a family member (as opposed to the employee's own medical condition, when second and third opinions are permitted).[31]

The CFRA forbids employers from interfering with an employee's exercising or attempting to exercise CFRA rights.[32] For example, an employee fired for excessive absenteeism invoked this provision to sue his former employer. The employer's policy called for terminating employment after eight unexcused absences, with prior unexcused absences being forgiven if followed by a 60-day period of no absence. The employer refused to count CFRA leave days as days of "no absence." The employee claimed that this refusal was unlawful retaliation against him for using his CFRA leave. The Court of Appeal, however, affirmed summary judgment for the employer, holding that refusing to count the employee's CFRA days towards 60-day "no absence" periods did not violate the CFRA. The employee was not penalized for taking CFRA leave. Rather, he was penalized for his unexcused absences. His taking CFRA leave did not increase the number of scheduled work days he had to

remain absence-free. Otherwise stated, the benefit of absenteeism forgiveness was a reward for working, and the CFRA does not require that an employee be allowed to accrue such benefits while on CFRA leave.[33]

The 2020 amendments to the CFRA replaced California's short-lived New Parent Leave Act—an interim measure that made baby bonding available to employees of employers with only 20 employees within 75 miles (rather than 50). Now all types of CFRA leave are available to eligible employees of employers with five or more employees in the United States.[34]

CRD small employer mediation program. Indicating a concern about fostering new litigation for smaller employers affected by the 2020 expansion of the CFRA, the Legislature directed the DFEH (now the CRD) to create a small employer family leave mediation pilot program. Among other things, the program authorizes a small employer or the employee, within 30 days of a right-to-sue notice, to request mediation through the CRD's dispute resolution division. The request would suspend the employee's civil action and toll the limitations period for related claims until the mediation is complete.[35]

2.3.1 Employee right to rely on spokesperson while on leave

Ordinarily, an employer can discipline an employee on leave who refuses to communicate. But the Court of Appeal reversed summary judgment for an employer that had dismissed an employee on leave for refusing to respond to repeated follow-up inquiries regarding his condition, and for insisting instead that any communication be through his wife or his workers' compensation attorney or his physician. To the employer, the employee's behavior was a clear case of insubordination, warranting dismissal, but the Court of Appeal found a triable issue of whether the employer had been reasonable in insisting on direct communication with its employee. The employee's psychiatrist had advised him to avoid stressful situations and he had felt "too stressed out" to speak with his employer directly. The Court of Appeal concluded that "nothing precluded [the employer], at a minimum, from contacting [the workers' compensation] attorney," and that the record thus supported an inference that the employer had unreasonably refused to communicate with the employee's representatives.[36]

2.3.2 Expansive definition of serious health condition

The California Supreme Court has found that an employee's ability to work in a limited capacity does not foreclose the employee from qualifying as having a "serious health condition." The court reversed summary judgment in favor of a hospital that dismissed a technician for being absent under suspicious circumstances and then defying an order to return to work after the employer learned she was working during her leave.[37] She had submitted a physician's note supporting a 30-day leave for "medical reasons," which the employer disputed by sending her to a second physician, who opined that she could return to work without restrictions. The employer relied on this second opinion in firing the plaintiff. The technician sued the hospital for firing her without following CFRA procedures, arguing that the hospital's failure to seek yet a ***third*** medical opinion stopped the hospital from challenging her serious health condition.

The California Supreme Court made two rulings. *First*, an employer can challenge an employee's assertion of a serious health condition without having to use the CFRA's dispute resolution method of obtaining a binding determination on the employee's condition from a third, jointly chosen, health care provider. This was a narrow employer victory through a 4-3 vote. *Second*, by the same narrow margin, the Supreme Court rejected the employer's argument that the employee's ability to perform a similar job during her absence conclusively disproved her claim that she had a "serious health condition" that made her "unable to perform the functions of a technician's position." Rather, this fact was merely "strong evidence" for the employer to take to the jury.

2.3.3 Employer response obligations clarified

CFRA regulations provide a deadline for the employer's response to a request for leave.[38] An employer need not affirm or deny a request within five business days, but rather must "respond to" a request within that time. It is sufficient, therefore, for an employer to address a request and seek additional information from the employee; the employer need not reach its final decision within the five-day period.[39]

2.3.4 Leave granted to care for same-sex spouse

An employee may take CFRA and FMLA leave to care for a same-sex spouse with a serious health condition. In 2015, the federal Department of Labor revised the definition of "spouse" for purposes of taking FMLA leave. Under the FMLA, spouse is defined as "a husband or wife" under state law for purposes of marriage in the state where the employee resides, and includes a spouse in "a same-sex or common law marriage."[40]

2.3.5 Absence of "honest belief" defense

In a decision now depublished, the Court of Appeal held that the "honest belief" defense available to an employer in many discrimination contexts does not apply to a CFRA claim. Rather, an employer denying leave in the belief that the employee is abusing leave must be factually correct in that belief: the employer could not "simply rely on an imprecisely worded and inconsistently applied company policy to terminate an employee on CFRA leave without adequately investigating and developing sufficient facts to establish the employee had actually engaged in misconduct warranting dismissal."[41]

On review, the California Supreme Court declined to rule on the viability of the "honest belief" defense, as it ruled for the defendant on another ground.[42]

2.3.6 San Francisco work arrangement leave

Since 2014, the San Francisco Family Friendly Workplace Ordinance has given employees of covered employers the right to request a flexible or predictable work arrangement for family care. Employees can qualify to care for a child, a covered family member with a serious health condition, or any person age 65 or older (where the original ordinance was limited to caring for a parent over 65).[43] To be eligible, an employee must have worked for the employer for at least six months, must regularly work at least eight hours per week, and must work within the San Francisco City limits. Amendments that went into effect in 2022 expanded what it means to work "within the city limits," so that the ordinance now covers remote employees who report into the employer's worksite in the City from a location outside the City.[44]

A request by an eligible employee, which must be in writing, triggers various procedural requirements under the 2022 amendments. The employer has the *option* to meet with the employee about the request within 14 days of the request (the employer is no longer *required* to hold a meeting within 21 days), and must respond in writing to the employee's request within 21 days of the request regardless of whether a meeting is held. The 21-day response must either grant the request, or deny the request and initiate an interactive process to find an alternative with other specific contents.[45] An employer may deny the employee's request based on an undue hardship (labeled "bona fide business reasons" prior to the 2022 amendments), such as costs directly caused by flexible or predictable working arrangements, including cost of productivity loss, retraining or hiring employees, or transferring employees from one facility to another; the detrimental effect on ability to meet customer or client demands; the inability to organize work among other employees; and the insufficiency of work to be performed during the time or at the location the employee proposes to work. If the request is denied and the ensuing interactive process is unsuccessful, then the employer must issue a new written notice at the end of the interactive process.

2.4 Paid Family Leave

Employees of private California employers who take time off work for certain military exigencies, to care for a seriously ill family member, or to bond with a new child can take up to eight weeks of Paid Family Leave (PFL) (also known as Family Temporary Disability Insurance or FTDI benefits) during a 12-month period.[46] The program is administered in conjunction with the state disability insurance program, with insurance payments funded by an employee payroll tax. In July 2020, the benefit period increased to eight weeks.[47]

The level of benefits provided to individuals in the PFL program for periods of family leave is either 60 or 70 percent, depending on the applicant's income, up to a monetary cap.[48] An employer may require an employee to take up to two weeks of earned but unused vacation leave prior to the employee's initial receipt of PFL benefits.[49]

Some other states' paid family leave laws create protected leave. In a California twist, the PFL law does *not* create leave rights. Thus, California employees eligible for PFL benefits are not entitled to job protection during the leave unless the leave is otherwise protected by law (e.g., FMLA or CFRA), and employers need not provide employee benefits during the PFL unless other statutes (e.g., FMLA or CFRA) provide for continuation of benefits.

Under a broad definition of "family member," family temporary disability wage replacement benefits are available for family leaves regarding not only a seriously ill child, spouse, parent, or domestic partner, but also a seriously ill grandparent, grandchild, sibling, and parent-in-law.[50] Pay is also available for leave to bond with a minor child within one year of the birth of the child or the placement of the child in connection with foster care or adoption.[51] As of 2021, PFL benefits are also available for leave to participate in a qualifying exigency related to the covered active duty status or call to covered active duty status of a spouse, domestic partner, child, or parent in the U.S. Armed Forces.[52]

2.4.1 San Francisco Paid Parental Leave Ordinance

San Francisco's Paid Parental Leave Ordinance (SFPPLO) requires employers who regularly employ at least 20 employees worldwide to provide full pay (up to a cap) for up to eight weeks.[53] Eligible employees may already receive wage replacement through the California PFL, but San Francisco employers must supplement the PFL pay, providing employees with their full pay, up to the benefits cap established by the California EDD (as described below).

Employees must have 180 days of employment with the employer to be eligible for leave. Part-time or temporary employees, to be eligible, must spend at least 40% of their total weekly hours (and eight hours per workweek) for the employer within San Francisco's geographic boundaries. Only those employees who apply for and receive PFL wage replacement for the purpose of bonding with a new child are eligible for SFPPLO pay.[54]

Employers may also mandate use of up to two weeks of accrued vacation before the supplemental pay is due, and these two weeks count toward the employer's requirements to provide supplemental pay for a total of eight weeks.[55] But if an employer combines vacation and sick into a single paid time off (PTO) bank, then the employer may apply only up to two weeks of accrued, unused PTO in excess of 72 hours. The 72 hours of PTO cannot be used to satisfy the employer's Supplemental Compensation obligation, because of the intersection of provisions of the SFPPLO and the San Francisco Paid Sick Leave Ordinance (PSLO).[56] Employers also may require employees to obtain PFL benefits to be eligible for the supplemental pay.[57]

Employees are entitled up to a maximum benefit set by formula.[58] Employers need not provide SFPPLO pay that exceeds a state cap on income (for the purposes of PFL). The maximum weekly PFL pay for claims beginning on or after January 1, 2023, is 60% or 70%, with a maximum payment of $1,619.[59] SFPPLO requires employers to supplement the remainder of an employee's compensation, up to a cap of $2,700 per week for 2023 and 2024.[60]

Changes in the percentage of income replacement by PFL and the state income cap will affect the supplemental amount that San Francisco employers must pay.

2.5 Accommodation of Addicts and Individuals Who Cannot Read

Employers of 25 or more employees must provide a "reasonable accommodation" (e.g., an unpaid leave) for employees who wish to participate in alcohol or drug rehabilitation programs or adult literacy programs,[61] and must take reasonable steps to safeguard the privacy of the employee who has enrolled in a rehabilitation program.[62] Unpaid leave is also an entitlement under CFRA for employees wishing to participate in an alcohol rehabilitation program, if the employee provides medical certification for an alcohol-related dependency.

2.6 Time Off for Court Appearances (Jury Duty, Witness Leave, etc.)

California employers must grant unpaid leave to, and must not discriminate against, employees who (1) are summoned for jury duty or for a court appearance as a witness, (2) appear in court to seek relief as a victim of domestic violence, stalking, or sexual assault, or (3) are victims of certain felonies or are closely related to such victims.[63] Generally a condition of leave is giving reasonable notice to the employer.

2.6.1 Jury duty

California law does not prohibit an employer from requiring that employees on jury duty report to work when not called to serve on a jury. Although employers who provide paid jury duty typically limit the pay to two weeks, both federal and California law generally require, as a condition of exempt status, that exempt employees receive a salary of a fixed amount per week regardless of the amount worked that week, so that a partial-week jury leave may amount, as a practical matter, to fully paid leave for exempt employees.

2.6.2 Victim-related court appearances

California employers must not discharge, discriminate, or retaliate against an employee who takes time off, after giving reasonable advance notice (where feasible), to appear at any proceeding involving the right of a victim of any of certain crimes.[64] The law specifies that the information needed to certify the absence can include a police report, court order, or medical documentation.[65] A "victim" protected under this law includes the employee or the employee's spouse, parent, child, sibling, or guardian.[66]

2.7 Crime Victim Accommodation

California has created rights for individuals who are victims of domestic violence, sexual assault, or stalking. These individuals may not only need to miss work for victim-related judicial proceedings (see § 2.6.2), but may also have special safety and medical needs that employers must consider (see §§ 2.7.1, 2.7.2).

As of 2021, additional victims—those who have experienced other crimes or abuses "that caused physical injury or that caused mental injury and a threat of physical injury," and those "whose immediate family member is deceased as the direct result of the crime"—are entitled to take time off from work to obtain relief to help ensure the health, safety, or welfare of the victim or the victim's child.[67] Under California law, an "immediate family member" is a child, a parent, a spouse, a sibling, or anyone else whose relationship is the equivalent of the family relationship listed above (i.e., step-parents, half-siblings, foster or adopted children, etc.).[68]

2.7.1 Safety accommodations

California employers must engage in a timely, good faith interactive process and provide reasonable accommodations—absent undue hardship—for employees victimized by domestic violence, sexual assault, or

stalking who have disclosed that status and who have requested an accommodation for their safety while at work. Reasonable accommodations may include, but are not limited to, such "safety measures" as a transfer, reassignment, modified schedule, changed work telephone number, changed work station, and installed lock. The employer, in considering a reasonable accommodation, may require certification of the employee's continued victim status.[69]

2.7.2 Leaves of absence

California employers with 25 or more employees must permit employees who are victims of domestic violence, sexual assault, or stalking to take time off work to obtain victim-related services, such as medical attention, psychological counseling, or help in safety planning.[70]

2.8 Time Off for Good Deeds and Training for Same

California employers must allow employees to take leaves of absence to serve as volunteer firefighters, reserve peace officers, and emergency rescue personnel.[71] Also qualifying for leave status is volunteer service with the Civil Air Patrol.[72] California law also requires employers with 50 or more employees to provide up to 14 days of temporary leave per calendar year to allow employees to engage in fire, law enforcement, and emergency rescue training activities.[73] Employees subjected to an adverse employment action for taking time off for these reasons can seek reinstatement and recovery of lost wages and work benefits. A willful violation of this law may constitute a misdemeanor.[74]

2.9 Voting Leave

California employers must post, at least ten days before each statewide election, a notice that employees who lack time to vote during nonworking hours may take paid leave of up to two hours to vote.[75] This time off to vote should be at the start or end of the regular work shift, whichever allows the most time for voting.[76]

2.10 Child-Related Activities Leave

Employers with 25 or more employees at the same location must grant unpaid leave of up to 40 hours each year to an employee who is a parent to participate in various activities of the parent's child in grades kindergarten through 12, or at a licensed child care provider.[77] Among the activities covered are finding and enrolling in school or licensed child care, participating in school-related activities and events, and addressing a school or child care provider emergency.[78] "Child care provider or school emergency" includes a request that the child be picked up from school or child care, an attendance policy that prohibits the child from attending the school or licensed child care provider, behavioral or discipline problems, closure or unexpected unavailability of the school or child care provider (excluding planned holidays), and a natural disaster.[79] An eight-hour per month limit applies to leave for non-emergency activities.[80] Employers must not discriminate against an employee for taking time off for these activities.[81] Employers also must not discriminate against an employee who, at a teacher's request, appears in school as the parent or guardian of a suspended pupil.[82] The law defines "parent" expansively to include a parent, guardian, stepparent, foster parent, or grandparent of—or a person who stands in loco parentis to—a child.[83]

2.11 Kin Care Leave

Under the Healthy Workplaces, Healthy Families Act, all California employers must provide paid sick leave to all employees for their own or a family member's illness or injury and other specified reasons.[84] (See § 2.14.)

Meanwhile, under the "kin care" statute,[85] employers also must permit employees to use in any calendar year the amount of sick leave that employees accrue during six months for the reasons specified in Labor Code section

246.5 (the California Healthy Workplaces, Healthy Families Act), i.e., (1) for the diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or the employee's "family member" (a spouse, registered domestic partner, grandparent, grandchild, sibling, parent, child, or designated person); and (2) for an employee who is a victim of domestic violence, sexual assault, or stalking, for reasons related to same.[86] Both "parent" and "child" are defined very broadly to cover all varieties—biological, adopted, foster, step, ward, or in loco parentis.[87] For purposes of the California Healthy Workplaces, Healthy Families Act, a "designated person" is defined as "a person identified by the employee at the time the employee requests paid sick days."[88] Accordingly, California employers are cautioned to broadly interpret who is considered a "family member" when addressing kin care requests.[89]

Kin Care calculation example. An employee who accrues six days of sick leave throughout a year may use up to three days of sick leave for kin care, while an employee who receives a grant of six sick days at the beginning of a year may use all six days of leave for kin care. In light of the paid sick leave law, which does not distinguish between time off for the employee's own medical condition and time off to attend to a family member (each being a legitimate reason to use statutory paid sick time), the "kin care" rule has limited relevance. The rule applies practically only to grants of sick leave in excess of the statutory minimum of 40 hours (or five days) annually. (See § 2.14.1.)

Employee's right to designate paid sick leave as kin care. As of 2021, the designation of sick leave taken as kin care is at the sole discretion of the employee.[90] For companies with absentee policies and paid sick grants that are more generous than the state mandate, the employee's choice to designate paid sick as kin care (or alternatively to not do so), could affect the rate at which employees exercise protected leave and thereby determine if an absence to care for a sick family member is protected leave instead of a violation of an absentee policy. Accordingly, employers should await the authorization of the employee before designating an employee's exercise of paid sick as kin care.

PTO trap for unwary employers. Employers who provide paid time off (PTO) may unwittingly subject themselves to additional kin care requirements, as PTO (personal time off that can be taken for any reason, including illness) can be considered a form of additional sick leave.[91]

The California Supreme Court has ruled that the kin care statute does not apply to sick leave policies that provide for an uncapped number of compensated sick days for an employee's own illness, but rather applies only to sick leave policies that provide for measurable amounts of accrued sick leave.[92]

California employers must grant kin care leave to—and must not discriminate against—an employee who attempts to use kin care leave, and must not count that leave as an absence that may lead to discipline of the employee.[93] Aggrieved employees are entitled to reinstatement and actual damages, or one day's pay, whichever is greater. Employees who prevail in a court action are entitled to attorney fees.[94]

California employers must not deny an employee the right to use sick leave for kin care purposes and must not take discriminatory action against an employee for using—or attempting to exercise the right to use—sick leave for those purposes.[95]

The Court of Appeal has rejected an argument that ERISA preempts the application of kin care requirements for an employer that uses trusts to provide paid sick leave.[96]

2.12 Military Leave

The California Military and Veterans Code contains sections comparable to the language in the federal USERRA, and also provides additional employee rights, especially for public sector employees, and protects service

members for state call-ups. California employers must not discharge a returning employee who was on active military duty with the National Guard, except for cause, within one year after being restored to the position. Violation of the California statute is a misdemeanor.[97]

The U.S. DOL, in interpreting the federal USERRA, defines "employer" broadly to include any person who pays salary or wages for the work performed, or who has control over employment opportunities—including someone to whom the performance of employment-related responsibilities has been delegated (other than functions that are purely ministerial in nature). The DOL thus opines that individuals can be subject to personal liability for USERRA violations.[98] Here, remarkably, the California version of the law is less plaintiff-friendly, for the Court of Appeal has ruled that individuals cannot be personally liable for violating California's military leave statute.[99]

San Francisco pay differential for military leave. San Francisco is the first jurisdiction in the nation to require private employers to provide "differential pay" to employees who are called to active military duty.[100] San Francisco's Military Leave Pay Protection Act (MLPPA) became effective February 19, 2023, and requires employers with 100 or more employees nationwide to provide 30 days per calendar year of differential pay to bridge the gap between employees' military pay and what they would have otherwise earned from their civilian employer.[101] The MLPPA covers employees who work within the geographic boundaries of the City and County of San Francisco, including part-time and temporary employees with limited exception for employees of private businesses located in "federal enclaves" such as the Presidio, Fort Mason, and the Golden Gate National Recreation Area.[102] Employees covered by a collective bargaining agreement also may be exempt provided that the CBA includes an express, clear, and unambiguous waiver of the MLPPA.[103] The supplemental compensation provided for under the MLPPA must be calculated as the difference between the employee's gross military pay and the amount of gross pay the employee would have received from the employer had the employee worked his or her regular work schedule, including overtime if the employee was regularly scheduled for overtime hours.[104] The differential must be used in daily increments of one or more days at a time, and is available to employees engaged in any active military service, including training, drills, and natural disaster relief.[105] Recognizing that some private employers already provide additional income protection for employees called to active service (including training and drills), the MLPPA permits employers to offset any obligation under the MLPPA by any other military leave benefits paid pursuant to any other law or employer policy.[106] Failure to comply with this category of leave may result in fines and penalties of (i) the greater of three times the amount of differential pay withheld or $250, and (ii) up to $50 per day to employees for each day the compensation was withheld.[107] These penalties are in addition to other available remedies, including temporary revocation of employers' certificates, permits, or licenses, and a private right of action.[108]

2.13 Military Spousal and Partner Leave

California employers with 25 or more employees must grant up to ten days of unpaid leave to employees married to (or registered domestic partners of) certain members of the active military service who themselves are on leave from a combat zone or during a military conflict.[109] Employees who work an average of at least 20 hours per week are eligible for military spousal leave if they are spouses or registered domestic partners[110] of a "qualified member" of the military. A "qualified member" is a member of the U.S. Armed Forces deployed to a combat zone, or a member of the National Guard or Reserves who has been deployed anywhere during a military conflict.

Employees requesting leave must notify the employer of their intention to take time off within two business days of receiving official notice that the employee's spouse or registered domestic partner will be on leave from military deployment. There is no provision allowing an employer to deny or delay the leave. Because the law establishes no cap on the aggregate amount of time off, it appears that the employee can take the full ten days off on each qualifying occasion. The statute states that spousal leave shall not prevent an employee from taking a leave that

the employee "is otherwise entitled to take,"[111] suggesting that an employer cannot require an employee on military spousal leave to concurrently use other leave that the employee is entitled to take.

Employers must not retaliate or otherwise discriminate against employees requesting military spousal leave.

2.14 Paid Sick Leave

In most states, and in the absence of a federal mandate, employers are not required to pay workers while they are on sick leave. California is one of about 17 states that, as of 2023, have enacted some form of paid sick leave law. California followed the lead of the City of San Francisco, which, in 2007, became the first American city to mandate paid sick leave for private employees. Since then, California and many of its cities and counties have followed suit, with each local jurisdiction piling on to make its own peculiar piece in a patchwork of paid sick laws. Generally speaking, California employers must comply with whichever material provision – state or local – that is the most generous to employees. During 2020, local laws spread like a coronavirus among cities and counties seeing a need for special employer mandates to provide supplemental sick pay for Covid-related reasons.[112] All of those special measures have since expired, but they left their mark. For example, San Francisco opted to pass a permanent Public Health Emergency Leave law in the event of a future pandemic or other public health emergency.[113]

2.14.1 California Paid Sick Leave Law

In 2014, California became the second state (after Connecticut) to impose a state-wide PSL law. The Healthy Workplaces, Healthy Families Act (the California Paid Sick Leave Law) created a poster requirement, an amended Wage Theft Prevention Act Notice requirement, and a PSL entitlement provision (including specific PSL accrual provisions). In September 2023, the California legislature passed SB 616, which expanded the State's existing paid sick leave mandate effective January 1, 2024.[114] The most significant change in the amended law is an increase to the annual PSL entitlement from 24 hours (or three days) to 40 hours (or five days) of paid sick leave per year. [115] This update resulted in changes to the accrual cap, annual usage cap, and frontloading requirements.

The California PSL law covers virtually all employees (including part-time, temporary, and seasonal employees) who work in California for the same employer for 30 or more days within a year.[116]

Rate of accrual. Covered employees must accrue no less than one hour of PSL for every 30 hours worked.[117] An employer may use a different accrual method so long as the accrual is on a regular basis that gives employees no less than 24 hours of PSL or paid time off by the 120th calendar day of employment (and each 12-month period thereafter), and no less than 40 hours of accrued PSL or paid time off by the 200th calendar day of employment (and each 12 month period thereafter).[118]

The accrual rate for exempt employees is based on a presumed 40-hour workweek, except that an exempt employee whose normal workweek is less than 40 hours accrues PSL based on that employee's normal workweek.[119] Employees must be permitted to carry over all accrued, unused PSL to the following year, but employers may cap the accrual of PSL at 80 hours or ten days (whichever is greater).[120]

As an alternative to the accrual method, employers may "lump grant" the greater of 40 hours or five days of PSL upon hire and at the beginning of each year thereafter.[121]

The law does not require an employer to provide additional paid sick days if (1) the employer has an existing paid leave or PTO policy, (2) the employer makes the paid leave available under the same conditions as stated in the law, and (3) the existing policy either (a) satisfies the accrual, carry-over, and use requirements of the law or (b)

provided PSL or paid time off to a class of employees before 2015, pursuant to a PSL policy or a PTO policy that used an accrual method different than providing one hour per 30 hours worked, so long as the accrual was on a regular basis so that an employee has no less than one day or eight hours of PSL or paid time off within three months of employment of each calendar year, or each 12-month period, and the employee was eligible to earn at least five days or 40 hours of PSL or paid time off within six months of employment.[122]

Employers can limit use of PSL to 40 hours or five days (whichever is greater) during each year of employment.[123] Employers may set a reasonable minimum increment, not to exceed two hours, for an employee's use of PSL.[124]

Permitted uses of PSL. Employees become eligible to use PSL on their 90th day of employment, after which they are eligible to use PSL as it accrues.[125]

Employees may use PSL not only for their own illness, diagnosis, treatment, or preventive care, but also to care for an ill child (regardless of age or dependency status), parent (which is broadly defined and includes, among others, parents-in-law), spouse or registered domestic partner, grandparent, grandchild, sibling, and as of January 1, 2023, a "designated person".[126] (A "designated person" is someone is someone with whom the employee has the equivalent of a family relationship who is identified at the time the employee requests the PSL; employers may limit an employee to one "designated person" per 12-month period.) Additionally, employees who are victims of domestic violence, sexual assault, or stalking, or other abuses or crimes as defined by California Labor Code section 230.1, may use PSL to seek aid, treatment, or related assistance.[127]

Calculating pay rates for sick time. While an employer may calculate sick pay for exempt employees "in the same manner as the employer calculates wages for other forms of paid leave time,"[128] employers must choose between two different methods of calculating PSL for nonexempt employees. The first method entails "dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment."[129] The alternative method is to calculate sick pay using "the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek."[130] In other words, the pay rate may be calculated by using the "regular rate" of pay as though calculating overtime, inclusive of incentives, shift differentials, etc.[131] On October 11, 2016, a DLSE opinion letter declared that all commissioned employees, whether or not exempt from overtime requirements, must be paid using the 90-day method: dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked during the full pay periods within the prior 90 days of employment.[132]

Payout of unused PSL. Employers need not pay out available, unused PSL upon employment separation. An employer must, however, restore to a rehired employee any unused PSL if the employee is rehired within one year of the separation.[133] However, if an employer uses PTO to comply with the PSL law, then any accrued, unused PTO must be paid out upon termination of employment and need not be restored upon re-hire.[134]

Posting. The PSL law includes a posting requirement (see § 9.1).[135] Also, employers must include information about PSL rights in the Wage Theft Prevention Act Notice that employers must provide to nonexempt employees upon hire (see §§ 9.2.2, 16.1.2).[136] In addition, the amount of PSL an employee has available must appear on either the employee's itemized wage statement (see § 16.3) or in a separate document provided to the employee on the designated pay date.[137]

Record-keeping. The PSL law requires employers to keep records, for three years, documenting the hours worked and the PSL accrued, and to make those records available for inspection by the Labor Commissioner or the employee (see § 11).[138]

CBA exemption. The PSL law previously offered a complete exemption for employees covered by a collective bargaining agreement (CBA) outside the construction industry, provided the CBA met certain specific requirements. As of January 1, 2024, however, no CBA is completely exempt from the requirements of the PSL law. As before, the definition of "employee" under the PSL law excludes any employee who is "covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for sick days or a paid leave or paid time off policy that permits the use of sick days for those employees, final and binding arbitration of disputes concerning the application of its paid sick days provisions, premium wage rates for all overtime hours worked, and regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate."[139] However, as of January 1, 2024, such "CBA-exempted" employees (1) must be allowed to take sick leave for all of the reasons specified in the PSL law, (2) cannot be required to find a replacement worker as a condition of taking paid sick leave, and (3) are protected by the law's anti-retaliation provisions.[140] This change will impact CBA attendance provisions that apply instances of absence for use of available paid sick time.

Co-existence with ordinances. As of January 1, 2024, the California PSL law preempts specific provisions of local PSL ordinances, including requirements regarding the lending of paid sick leave, paystub statements, methods of calculating sick pay, employee requirements to provide notice of foreseeable paid sick leave use, timing of payment of paid sick leave, and whether payment of sick leave is required upon termination.[141] If a local ordinance contradicts the state law on these topics, the California PSL law requirement applies rather than the local law. However, the local PSL ordinances already in place in several California municipalities generally do not contradict the California PSL law on these specific points. Accordingly, the way remains mostly clear for California cities and counties to continue to enforce their own PSL ordinances that create employee entitlements and employer burdens beyond what California state law provides.

Enforcement. Until a Covid-related 2020 amendment took effect as "urgency legislation," enforcement of California's PSL leave law was through administrative proceedings in which the Labor Commissioner could award relief after a hearing "containing adequate safeguards to ensure the parties due process, including reinstatement, back pay, payment of sick days unlawfully withheld, and additional sums in the form of an administrative penalty to employees whose rights were violated."[142] The 2020 amendments removed the "due process language" and simply provided that the Labor Commissioner "may order any appropriate relief, including reinstatement, backpay, the payment of sick days unlawfully withheld, and the payment of an additional sum in the form of an administrative penalty to an employee or other person whose rights under this article were violated."[143] The administrative penalties vary depending on the violation. If paid sick days have been unlawfully withheld, then the administrative penalty is the greater of the value of those sick days multiplied by three or $250, not to exceed an aggregate penalty of $4,000. For other types of violations the penalty is $50 per day while the violations continue, not to exceed an aggregate penalty of $4,000.[144]

2.14.2 Covid-19 Paid Sick Leave

Legislators at national, state, and local levels all decisively addressed the effect of Covid-19 on workers, acting with general agreement that employers rather than governments should provide the desired relief. On May 5, 2023, the World Health Organization declared an end to the Public Health Emergency for Covid-19.[145] On May 11, 2023, the U.S. Department of Health and Human Services followed suit.[146] As of the time of publishing, there are no longer any Covid-19 specific mandates in effect in California.

County and city ordinances. See Section 2.14.3, immediately following.

2.14.3 Local Paid Sick Leave Ordinances

Numerous municipalities were not content to follow a uniform state-wide standard for paid sick leave. They have opted instead to create their own special laws. These municipalities include San Francisco, Berkeley, Emeryville, Long Beach, Los Angeles, Oakland, San Diego, San Francisco, and Santa Monica. In 2021, West Hollywood enacted a mandatory paid time off (PTO) law, joining the ranks of several jurisdictions nationwide with such a mandate.

San Francisco Paid Sick Leave. The San Francisco Paid Sick Leave Ordinance (PSLO), enacted in 2007, is the grandparent of paid sick leave mandates.[147] Under the PSLO, workers accrue an hour of PSL for each 30 hours worked. Accrued PSL carries over year to year, although employers may apply a cap. Small employers (those with fewer than 10 workers) may cap accrued PSL at 40 hours, and larger employers may impose a cap of 72 hours. Employees may take leave not only for their own illness, but also to care for a child, parent, spouse, domestic partner, or other designated person. Employers need not pay out unused PSL upon termination of employment, unless the PSL has been combined with vacation as a form of personal time off. With California's new "designated person" coverage, the list of covered family members now matches state law. While state law allows "front loading" of PSL once a year, the PSLO addresses the concept of front-loading PSL somewhat differently. Employers may grant an advance of PSL, which halts accruals until the employee has worked enough hours to earn the amount of the grant, then accruals resume or another advance is needed. San Francisco employees can earn more PSL than under state law and face no limit on the amount of annual use. The San Francisco Office of Labor Standards Enforcement (OLSE) enforces the PSLO.[148]

OLSE rules state that if an employee is jointly employed, and if at least one employer is covered by the PSLO, then *each employer* must comply with the PSLO.[149] The OLSE notes, by way of example, that joint employment can occur when an employer uses a temporary staffing agency, leasing agency, or professional employer organization. The ordinance also applies to an employee who may live in San Francisco and work from home, or who makes stops in San Francisco to work (for example, to make pickups or deliveries), if the employee works in San Francisco at least 56 hours within a calendar year.[150]

The OLSE rules also provide guidance on calculating the rate of pay for sick leave and generally track statewide standards.[151] Like state law, the OLSE rules require different rate-of-pay calculations for exempt and nonexempt employees. Although the PSLO does not define "regular rate of pay" or "exempt employee," the OLSE defers to the DLSE on calculating the regular rate of pay, and to California law regarding whether an employee is exempt or nonexempt from overtime requirements. If an individual is exempt, and no other form of paid leave is provided, then the employee must be paid the designated salary without deducting for sick time taken. But the time taken can be applied against the employee's sick leave balance. Rates of sick pay that have been deemed reasonable in a CBA remain so, even if the CBA does not explicitly waive or refer to the rates of pay section of the PSLO.[152]

The PSLO entitles employees to use accrued PSL as of the 90th day of employment. For rehired employees—if separated from the employer and rehired within one year—all previously accrued, unused PSL must be reinstated. For employees separated from an employer before the 90th day of employment and rehired within one year, the original period of employment counts toward the 90-day usage waiting period.[153] For example, if an employee separates from an employer after working for 45 days, and then one month later is rehired, the employee must work another 45 days before the employer must permit the employee to use accrued PSL.

San Francisco Public Health Emergency Leave. Going beyond the pre-existing generous PSLO, in 2020 San Francisco enacted the Public Health Emergency Leave Ordinance (PHELO).[154] After repeatedly renewing the PHELO, San Francisco allowed it to expire in 2021, and then passed a permanent Public Health Emergency Leave (PHEL) ordinance that, as of October 1, 2022, requires employers with 100 or more employees worldwide, with limited exceptions, to provide up to 80 hours of paid PHEL to San Francisco employees.[155] PHEL may be

used during a local or statewide health emergency related to a contagious, infectious, or communicable disease as declared by the City of San Francisco or California's health officer, and certain vulnerable employees who primarily work outside are entitled to PHEL leave when the Bay Area Air Quality Management District issues a "Spare the Air" alert.[156] All employees who work for a covered employer in San Francisco are entitled to PHEL, regardless of duration of employment or job title, including part-time, temporary, seasonal, and salaried employees. The only exception for otherwise covered employers is for employees subject to a collective bargaining agreement that expressly waives PHEL in clear and unambiguous terms.

As of March 24, 2024, San Francisco has no active public health emergencies.[157] However, employees must receive their PHEL allotment at the beginning of each calendar year, or the start of their employment, regardless of whether there is an ongoing public health emergency. Employers must provide notice of the amount of PHEL available to each employee on a wage statement or another writing. If the employer offers unlimited paid leave or paid time off, the employer must note "unlimited" on employees' wage statements.[158]

Berkeley. Berkeley's PSL ordinance became effective in 2017.[159] This ordinance, like San Francisco's, requires an accrual rate of one hour per 30 hours worked. Employers are covered regardless of location if they have employees who work two or more hours a week within Berkeley city limits. Small businesses (fewer than 25 employees) may cap accrual of paid sick leave at 48 hours as well as limit use of paid sick leave to 48 hours within a calendar year. Employers with 25 or more employees may cap accrual of paid sick leave at 72 hours but may not limit use of paid sick leave. As with the San Francisco ordinance, PSL begins to accrue at the time of hire, and can be used beginning on the 90th day of employment. Employers can front-load paid sick leave at the beginning of each year as long as employees can accrue additional leave after working enough hours to have accrued the amount that is front-loaded. Berkeley employees can add a designated person to the category of covered family members. After an initial use of one hour, sick time can be used in 15-minute increments. Sick leave need not be cashed out upon termination of employment, but sick leave must be restored if the employee is rehired within 12 months. Employers must, each pay period, report on a wage statement or other written notice how much paid sick leave time employees have accrued.

Emeryville. Emeryville's PSL ordinance[160] is part of a minimum wage law, similar to the Oakland and City of Los Angeles ordinances discussed below. The Emeryville PSL ordinance covers employers regardless of location if their employees work at least two hours a week within Emeryville city limits. The basic entitlement is a maximum of 48 PSL hours for employees of small businesses (55 or fewer employees within Emeryville city limits) and 72 hours for employees of large businesses (56 or more employees within Emeryville city limits). Employers may establish a more generous cap or use no cap. In any given year, employees may use PSL up to the applicable maximum. Front-loading the entire annual amount is allowed and in that event no carryover is required. If PSL is accrued rather than front-loaded, then the standard accrual applies: one hour of PSL for every 30 hours of work. Emeryville defines "family member" to include a designated individual if the employee has no spouse or registered domestic partner (but to the extent state law is more generous, state law applies). In addition to all the same uses as allowed by state law, Emeryville employees may use their PSL to provide care for a guide dog, signal dog, or service dog (their own or a family member's or a designated individual's).

Long Beach. The City of Long Beach has mandated paid sick leave for hotel workers.[161]

Los Angeles (City). The City of Los Angeles PSL law became effective in 2016.[162] Its ordinance defines "employee" to include any individual who performs two or more hours of work per week within the City's geographic boundaries, regardless of whether the individual resides in the City or is legally authorized to work. The minimum wage ordinance that mandates paid sick leave excludes employees employed by the government or exempt from state minimum wage laws. "Employer" is defined to include "a corporate officer or executive, who directly or indirectly or through an agent or any other person, including through the services of a temporary

service or staffing agency or similar entity, employs or exercises control over the wages, hours or working conditions of any Employee."

Thus, corporate officers and executives may be personally liable under the Los Angeles ordinance. Employees may use up to 48 hours of PSL in "each year of employment, calendar year or 12-month period." Unused accrued PSL must carry over to the following year of employment, but may be capped at 72 hours. Employers may set a higher cap or no cap. Employers can choose to either (1) "frontload" PSL by providing the entire 48 hours to an employee at the beginning of each year, or (2) have PSL accrue at the rate of one hour for every 30 hours worked. The Los Angeles ordinance differs from state law, which provides that if an employer front-loads PSL, then the unused PSL does not carry over, and the unused balance is simply replaced by the new grant. By contrast, Los Angeles requires that employers carry over from year to year up to at least 72 hours. So while a Los Angeles employee can use only 48 hours of sick pay in a year, the employee can carry over 72 hours of PSL (or more, if the employer allows it).

The Los Angeles ordinance covers family members as defined in the state PSL.[163] Los Angeles is one of the cities that expanded existing covered reasons for taking general PSL to include specific Covid-related reasons.[164]

Los Angeles (City) - Living Wage Ordinance. With some exceptions, Los Angeles's Living Wage Ordinance (LWO) applies to city contractors, and includes specific provisions for employees servicing airports.[165] See § 7.2.3 for a discussion of the wage requirements.

The LWO also requires city contractors to provide their employees with at least 96 hours of compensated time off and 80 hours of uncompensated hours off.[166] These allotments are similar to West Hollywood's PSL mandate discussed below. Employees are eligible to use their accrued paid compensated time off after the first 90 days of employment, or consistent with the employer's policies, whichever is sooner.[167] Compensated time off can be used for sick leave, vacation, or personal necessity. This time must be paid at an employee's regular rate at the time the compensated time off is used.[168] As in West Hollywood, under the LWO, unused accrued compensated time off will carry over until the time off reaches a maximum of 192 hours, unless the employer's established policy is more generous.[169] Once an employee reaches the maximum accrued compensated time off, an employer must provide a cash payout once every 30 days for accrued compensated time off over the maximum.[170] Employers can provide the option of cashing out any portion of accrued compensated time off, but cannot require employees to cash out any accrued compensated time off.[171]

Additionally, the LWO requires employers to permit full-time employees to take at least 80 additional hours per year of uncompensated time off and non-full-time employees to take a proportionate incremental number of hours of uncompensated time off each year.[172] Uncompensated time off can be used for sick leave for the employee or for a family member's illness when the employee has exhausted compensated time off. This time off is available for use after the first 90 days of employment or consistent with the employer's policies, whichever is sooner.[173] Again mirroring West Hollywood's PSL ordinance, unused, accrued uncompensated time off will carry over until the time off reaches a maximum of 80 hours, unless the employer's established policy is more generous.[174] There are other similarities between the two ordinances, including their respective silence regarding payout of unused accrued time off at termination.

Oakland. Oakland's PSL ordinance, passed in 2014, covers any employee who in any workweek performs at least two hours of work in the city. The definition of "employer" includes indirect employers, such as businesses who hire through staffing agencies. The substantive provisions are similar to San Francisco's ordinance as it existed at the time. The Oakland ordinance[175] provides that employees earn one hour of PSL for every 30 hours worked. Employers may cap the annual amount accrued at 72 hours, though small businesses (fewer than 10 employees) may impose a cap at 40 hours. Sick leave can be used for care of the employee, a wide array of

covered family members, and designated persons. As in San Francisco, PSL in Oakland begins to accrue upon hire and can be used beginning on the 90th day of employment. Front-loading 72 hours (40 hours for small businesses) is not permissible under the Oakland ordinance.[176] Oakland's PSL pay rate is now preempted by the state PSL law sick pay requirements.[177] In response to the pandemic, Oakland issued guidance that its PSL ordinance applies to Covid-related family care as well as the employee's own needs.[178]

San Diego (City). The City of San Diego's PSL became effective in 2016.[179] Unlike other ordinances, San Diego's specifically excludes not only employees who are exempt from state minimum wage laws, but also employees paid a subminimum wage under a specific license, employees of publicly subsidized summer or short-term youth employment programs, and student employees, camp counselors, and program counselors of organized camps. The San Diego ordinance mostly follows state law as to covered family members, though San Diego makes a point of covering half, adopted, and step-siblings. The ordinance also follows state law on reasons for using PSL, except that San Diego adds two additional triggering events: (1) when the workplace is closed due to a public health emergency, and (2) when the employee is providing care or assistance to a child whose school or child care provider is closed by local order due to a public health emergency.

The San Diego ordinance differs from state law on the rate of pay for PSL, but that provision is now preempted by the amended California PSL law.[180] San Diego's PSL ordinance aligns with Califoria's amended state PSL law and expressly allows employers (1) to cap an employee's total accrual of PSL and carryover at 80 hours, (2) to front-load no fewer than 40 hours of PSL at the beginning of each "benefit year" (a regular and consecutive 12-month period, as determined by the employer), and (3) to limit an employee's use of PSL to 40 hours per "benefit year."

Santa Monica. Santa Monica's PSL provisions took effect in 2017.[181] The Santa Monica ordinance excludes government employees and employees who are exempt from the state minimum wage laws. Santa Monica employees working at least two hours per week in the City and working for small businesses (having 25 or fewer employees) earned at least 32 hours of PSL in 2017 and 40 hours in 2018 and going forward. Employees in larger businesses (with at least 26 employees) earned at least 40 hours of PSL in 2017 and 72 hours starting in 2018. The accrual rate is one hour for every 30 hours worked, and employees carry over earned PSL each year up to the caps set by the employer (which can either mirror the caps above or be more generous).

Employers can front-load PSL rather than have employees accrue PSL per hour, so long as the employer provides leave consistent with the required amounts. Other PSL designs are possible so long as they meet or exceed ordinance requirements. In terms of covered family members, reasons for use of PSL, and pay rate, Santa Monica includes the covered family members covered by state law.

West Hollywood. West Hollywood's PSL mandate took effect on January 1, 2022, for "hotel employers" and on July 1, 2022, for other West Hollywood employers.[182] The ordinance includes a minimum wage component and requires coordination between PTO and vacation.[183]

Employers must provide at least 96 compensated hours off per year for sick leave, vacation, or personal necessity to full-time employees (those working at least 40 hours per week or whom the employer deems full-time, whichever is more generous).[184] Employers must make this time available at the employee's request. Under the ordinance, after the first six months of employment (or pursuant to a more generous employer policy), full-time employees shall accrue at least 96/52 hours of compensated time off each week in a calendar year that the employee has been employed by the Employer.[185] Compensated time off does not accrue for work in excess of 40 hours per week, subject to legally protected exceptions.[186] Full-time employees who work less than 40 hours a week receive the compensated time off in proportional increments.[187]

Unused accrued compensated time off will carry over until the time off reaches a maximum of 192 hours, unless the employer's established policy is more generous.[188] Once an employee reaches the maximum accrued compensated time off, an employer must provide a cash payment once every 30 days for accrued compensation time off over the maximum.[189] Employers cannot require employees to cash out any accrued compensated time off under the maximum.[190] Employers can forego this payment by not having a cap at all, but that would result in an unlimited amount of accrued time off.

Employers must also permit full-time employees to take at least 80 additional hours per year of uncompensated time off to be used for sick leave where the employee has exhausted their compensated time off for that year.[191] Employees must be eligible to use accrued uncompensated time off after the first six months of employment or consistent with company policies, whichever is sooner.[192] Unused, accrued uncompensated time off will carry over until the time off reaches a maximum of 80 hours, unless the employer's established policy is more generous.[193]

Notably, the ordinance is silent with regard to the issue of payout upon separation. Thus, employers should follow California's requirements with regard to separation pay as it pertains to vacation pay.[194]

2.15 Paid Leave for Organ or Bone Marrow Donation

California employers must grant eligible employees leaves of absence to donate an organ or to donate bone marrow. An employee employed for at least 90 days may take up to five business days of *paid* leave during any one-year period to donate bone marrow, and up to 30 business days of *paid* leave during any one-year period to donate an organ. Employers must grant an additional *unpaid* leave of absence, up to 30 business days during a one-year period, for the purpose of organ donation.[195] The one-year period is measured forward from the date an employee's leave begins. Employers may require employees to use up to five days of earned but unused sick leave, vacation, or paid time off during the initial bone-marrow donation leave, and up to two weeks of earned but unused sick leave, vacation, or other paid time off during the initial organ-donation leave. These leaves are not a break in service for purposes of any right to salary adjustments, seniority, or accrual of sick leave, vacation, or annual leave, and employers must maintain and pay for group health coverage during the leaves. These leaves do not run concurrently with FMLA and CFRA leaves. Employees returning from leave generally must be reinstated to their same position or an equivalent position.[196]

2.16 Bereavement Leave

Effective January 1, 2023, California added an unpaid bereavement leave entitlement for all California employees who have completed 30 days of employment with an employer.[197] Eligible employees make take up to five days of unpaid leave for the death of their spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law.[198] Leave need not be taken all at once, but must be completed within three months of the death of the family member.[199]

If an employer has an existing bereavement leave policy, then leave under the employer policy and the new law run concurrently. If the employer policy does not provide a full five days of leave or does not cover certain family members now covered by law, then employees are entitled to additional unpaid time off in accordance with the new law.[200] Employees may use available paid time off such as sick time, vacation, or PTO rather than taking the time off as unpaid.[201]

Employers may request that employees provide documentation to support their bereavement leave within 30 days of the first day of leave. Documentation may include a death certificate, published obituary, or written verification of death, burial, or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution, or governmental agency.[202]

Effective January 1, 2024, California has added leave for reproductive-related losses as a subset of its bereavement leave law.[203] A "reproductive loss event" is defined as "the day or for a multiple-day event, the final day of a failed adoption, failed surrogacy, miscarriage, stillbirth or an unsuccessful assisted reproduction."[204] Covered employers must provide up to five days of leave for a reproductive loss event, up to a maximum of 20 days within a 12-month period.[205] Leave need not be taken all at once, but must be completed within three months of the event triggering the leave.[206] Employees may use available paid time off such as sick time, vacation, or PTO rather than taking the time off as unpaid.[207] The law does not specify that employers may require documentation in connection with reproductive-related loss leave.

---

1 DFEH regulations define the four months as the equivalent of what the employee works in four months (17.33 weeks or 693 hours based upon a 40-hour workweek). If an employee's hours vary from month to month, then the average number of hours per week is used, calculated by looking back for 17.33 weeks. 2 Cal. Code Regs. §§ 11042(a)(1), 11035(*l*).

2 DFEH regulations define pregnancy-related conditions to include morning sickness, preeclampsia, pre- and post-natal care, and post-partum depression. 2 Cal. Code Regs. § 11035(f).

3 Gov't Code § 12945(a)(1).

4 2 Cal. Code Regs. § 11043(a).

5 *Sanchez v. Swissport, Inc.*, 213 Cal. App. 4th 1331 (2013) (employee placed on bed rest during most of her pregnancy, and then terminated after 19 weeks of pregnancy leave—three months before her due date—may have been entitled to additional, disability leave, under FEHA, if the employer could not show that the extended leave would have imposed an undue hardship on the company); 2 Cal. Code Regs. § 11047.

6 Gov't Code § 12945(a)(2)(C).

7 2 Cal. Code Regs. § 11041(c). The position to which an employee is transferred must have the equivalent pay and benefits as the employee's regular job.

8 Gov't Code § 12945(a)(2)(A). Employers may recover from employees the premium paid to maintain their coverage during a leave to the extent that (1) employees fail to return to work after the pregnancy disability leave, and (2) the failure to return from leave is for a reason other than either (a) taking leave under the California Family Rights Act or (b) the continuation, recurrence, or onset of a condition that entitles the employee to a pregnancy disability leave or other circumstances beyond the employee's control.

9 An even longer leave could be required if pregnancy-related conditions require further leave under the reasonable-accommodation provisions of FEHA. See *Sanchez v. Swissport, Inc.*, 213 Cal. App. 4th 1331 (2013); 2 Cal. Code Regs. § 11047.

10 Gov't Code § 12945(a)(4).

11 Pregnant Workers Fairness Act, H.R. 2617-1626, 117th Cong. §§ 101-109 (signed into law December 29, 2022), https://www.congress.gov/117/bills/hr2617/BILLS-117hr2617enr.pdf#page=1626 (last visited March 9, 2023).

12 "Covered employers" include private and public sector employers with at least 15 employees.

13 29 U.S.C. § 207(r)(1) (employee who needs to express milk "for her nursing child for 1 year after the child's birth" is entitled to (a) reasonable break time and (b) a private place, other than a bathroom, that is free from intrusion).

14 *See, e.g., Gonzales v. Marriott Int'l, Inc*., 142 F. Supp. 3d 961 (C.D. Cal. 2015) (denying motion to dismiss gestational surrogate's claims for failure to accommodate and discrimination where she expressed milk for the child she delivered for several months and then continued to express milk for her own health benefits and for donation purposes).

15 Lab. Code §§ 1030-1032.

16 SB 142, 2019 bill amending Lab. Code §§ 1030, 1031, 1033 and adding Lab. Code § 1034.

17 Labor Code § 1031 (f-i).

18 SB 142, 2019 bill amending Lab. Code §§ 1030, 1031, 1033 and adding Lab. Code § 1034.

19 Lab. Code § 1033(b), (c) (noting that Labor Commissioner can seek civil penalties for violations).

20 *See, e.g., Gonzales v. Marriott Int'l, Inc*., 142 F. Supp. 3d 961 (C.D. Cal. 2015) (denying motion to dismiss gestational surrogate's claims for failure to accommodate and discrimination where she expressed milk for the child she delivered for several months and then continued to express milk for her own health benefits and for donation purposes).

21 San Francisco Lactation in the Workplace Ordinance, San Francisco Police Code Article 331, https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_police/0-0-0-49176 (last visited March 5, 2022).

22 A covered employer must be engaged in any business or enterprise in California and directly employ five or more employees within any state of the United States, District of Columbia, or any U.S. territory. There is no requirement that the five employees work at the same location or work full time. 2 Cal. Code Regs. § 11087(d).

23 12945.2(a). SB 1383, 2020 bill amending Gov't Code § 12945.2 to remove geographical eligibility requirement.

24 SB 1383, 2020 bill amending Gov't Code § 12945.6 and amending, repealing, and adding Gov't Code § 12945.2.

25 Gov't Code § 12945.2. Special eligibility rules apply to employees working for an air carrier as a flight deck or cabin crew member, who are eligible if they have 12 months of service and meet certain other requirements. Gov't Code § 12945.2(r).

[26] Gov't Code § 12945.2. SB 1383, 2020 bill amending Gov't Code § 12945.2(b)(4)(B) to add new covered family members (grandparents, grandchildren, and siblings) and revising definition of child to remove age limitations.

[27] AB 1033, amending Gov't Code § 12945.2(b)(11) to add "parent-in-law" to the definition of "parent."

[28] Gov't Code § 12945.2. AB 1041, 2022 bill amending Gov't Code § 12945.2(b)(2) to add "designated person" as a new covered family member.

[29] *Id.*

[30] 2 Cal. Code Regs. § 11090(d) provides that "[o]n two occasions, an employee has a right to take intermittent CFRA bonding leave of less than two weeks' duration." The Civil Rights Department interprets the definition of "eligible employee" in 2 Cal. Code Regs § 11087(g) to cover both parents even when they are employed by the same employer. https://calcivilrights.ca.gov/employment/pdl-bonding-guide/#:~:text=%2C%20%C2%A7%2011035).-,Yes.,work%20for%20the%20same%20employer (last visited Mar. 18, 2024).

[31] *See generally* 2 Cal. Code Regs. § 11091(b)(2).

[32] Gov't Code § 12945.2(q) ("It shall be an unlawful employment practice for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this section."). This legislation aims to incorporate parallel restrictions in the federal FMLA.

[33] *Lares v. Los Angeles County Metro. Transp. Auth.*, 56 Cal. App. 5th 318 (2020).

[34] SB 1383, amending Parental Leave Act, Gov't Code § 12945.6 to sunset on December 31, 2020.

[35] AB 1867, adding and repealing Gov't Code § 12945.21. Formerly set to expire on January 1, 2025, the small employer family leave mediation program was made permanent by legislation passed in 2024 (AB 2011) and signed into law by Governor Newsom.

[36] *Faust v. California Portland Cement Co.*, 150 Cal. App. 4th 864, 882-83 (2007).

[37] *Lonicki v. Sutter Health Cent.*, 43 Cal. 4th 201 (2008).

[38] The deadline for the employer's response is five business days. *See* 2 Cal. Code Regs. § 11091(a)(6).

[39] *Olofsson v. Mission Linen Supply*, 211 Cal. App. 4th 1236 (2012) (affirming summary judgment for employer but noting that employer might have avoided litigation with a more meticulous leave-request process; the employer took weeks to calculate how many hours the employee had worked during the preceding 12 months, before finally concluding he was ineligible for leave). The employee had requested unpaid FMLA/CFRA leave to care for his mother. The employer denied the request because he had not worked enough hours within the past 12 months. Between the employee's request for leave and the employer's denial, the employee spoke several times with supervisors and HR representatives about his request, with the employer providing a leave request form and asking the employee to submit a doctor's letter corroborating the need for leave.

[40] 29 C.F.R. § 825.102.

[41] *Richey v. AutoNation, Inc.*, 210 Cal. App. 4th 1516, 1537, 1540-41 (2012), *review granted*, No. S207536 (Cal. Feb. 13, 2013). The Court of Appeal reversed a judgment confirming an arbitration award for the employer, which had fired an employee while he was on CFRA leave, in the belief that he was misusing his leave by working part-time at the restaurant he owned. The Court of Appeal concluded that the arbitrator had committed clear legal error by accepting an "honest belief" defense, because that defense wrongly relieved the employer of its burden to prove the employee actually abused his medical leave by working at another job while on leave.

[42] *Richey v. AutoNation, Inc.*, 60 Cal. 4th 909 (2015).

[43] Frequently Asked Questions, available at https://sfdhr.org/sites/default/files/documents/Forms-Documents/Family-Friendly-Workplace-Ordinance-Frequently-Asked-Questions.pdf (last visited Mar. 18, 2024). The City of San Francisco has clarified that the ordinance covers employers with at least 20 employees anywhere. Thus, if the employer has 20 or more employees anywhere in the world, then the ordinance would apply as to any employee working in San Francisco. See Rules Implementing the Family Friendly Workplace Ordinance, July 7, 2022, https://www.sf.gov/sites/default/files/2024-02/FFWO%20Rules-Final.pdf (last visited Mar. 18, 2024).

[44] The amendments became effective July 12, 2022. https://sfgov.org/olse/sites/default/files/Amended_Family_Friendly_Workplace_Ordinance_2022.pdf (last visited Mar. 18, 2024).

[45] Specifically, the notice must include the basis for the denial (i.e., how the flexible work arrangement created an undue hardship); the right to request reconsideration of the denial; the right to file a complaint with the San Francisco Office of Labor Standards Enforcement; and a copy of the Flexible Work Ordinance Notice.

[46] Unemp. Ins. Code § 3301.

[47] SB 83, 2019 bill sunsetting older versions of Unemp. Ins. Code § 3301 and adding new versions of § 3301 (effective July 1, 2020 and January 1, 2021). San Francisco's Paid Parental Leave benefit increased to eight weeks as of July 2020.

[48] Unemp. Ins. Code § 2655.

[49] Unemp. Ins. Code § 33013.1.

[50] Unemp. Ins. Code § 3302.

[51] Unemp. Ins. Code § 3301.

[52] AB 2399, 2020 bill amending Unemp. Ins. Code §§ 3302, 3307.

[53] San Francisco Paid Parental Leave Ordinance ("SFPPLO"), https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_laboremployment/0-0-0-596 (last visited Mar. 18, 2024); see Rules Implementing the Paid Parental Leave ordinance. http://sfgov.org/olse/sites/default/files/Document/31%20FINAL%20PPLO%20Rules%2012%2023%2016v2.pdf (last visited Mar. 5, 2023); Cal. Unemployment Ins. Code § 3301.

[54] San Francisco Police Code section 14.3, available at https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_laboremployment/0-0-0-628#JD_14.3 (last visited Mar. 18, 2024).

[55] *Id.* at section 14.4(b)(5).

[56] SFPPLO FAQs (Dec. 2019), available at https://sfgov.org/olse/sites/default/files/FAQ%20Dec%202019.pdf (last visited May 18, 2024).

[57] San Francisco Police Code section 14.4(c), available at https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_laboremployment/0-0-0-628#JD_14.3 (last visited Mar. 18, 2024).

[58] San Francisco Police Code section 14.4(b)(2), available at https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_laboremployment/0-0-0-628#JD_14.3 (last visited Mar. 18, 2024).

[59] https://edd.ca.gov/siteassets/files/pdf_pub_ctr/de2588.pdf (last visited Mar. 18, 2024).

[60] SF.gov, https://sfgov.org/olse/paid-parental-leave-ordinance (last visited Mar. 19, 2024).

[61] Lab. Code §§ 1025, 1041. Under section 1025, employers need not provide rehabilitation where (i) rehabilitation would cause undue hardship for the employer, or (ii) the employer is denying employment because (a) the employee cannot perform duties because of the current use of alcohol or drugs, or (b) the employee cannot perform duties without endangering the health or safety of the employee or others. Under section 1041, employers need not provide an accommodation to an employee who reveals a problem of illiteracy if doing so would impose an undue hardship on the employer.

[62] Lab. Code § 1026.

[63] Lab. Code §§ 230, 230.2.

[64] Lab. Code § 230.5(a)(1), (b)(1). The specified offenses, listed in section 230.5(a)(2), include vehicular manslaughter while intoxicated, felony child abuse likely to produce great bodily harm or death, assault resulting in the death of a child under eight years of age, felony domestic violence, felony physical abuse of an elder or dependent adult, felony stalking, solicitation for murder, "serious felony," hit-and-run causing death or injury, felony driving under the influence causing injury, and sexual assault.

[65] Lab. Code § 230.5(b)(2).

[66] Lab. Code § 230.5(f).

[67] AB 2992, 2020 bill amending Lab. Code §§ 230 and 230.1.

[68] Lab. Code § 230(j)(3).

[69] Lab. Code § 230(f)(7)(b), (C).

[70] Lab. Code § 230.1.

[71] Lab. Code § 230.3.

[72] Lab. Code §§ 1501-1507 (unpaid leave of not less than ten days per calendar year).

[73] Lab. Code § 230.4 (temporary leaves of absence not to exceed an aggregate of 14 days per calendar year).

[74] Lab. Code §§ 230.3, 230.4.

[75] Elec. Code § 14000 et seq.

[76] Elec. Code § 14000(b).

[77] Lab. Code § 230.8.

[78] Lab. Code § 230.8(a)(1)(A), (B).

[79] Lab. Code § 230.8(e)(2).

[80] Lab. Code § 230.8(a)(1)(A).

[81] Lab. Code § 230.8(d).

[82] Lab. Code § 230.7.

[83] Lab. Code § 230.8(e)(1).

[84] Lab. Code § 245 et seq.

[85] Lab. Code § 233.

[86] Lab. Code §§ 233(a), 246.5(a).

[87] *See* Lab. Code §§ 245.5(c)(1), (2).

[88] Lab. Code § 245.5(c)(8).

[89] Assembly Bill 1041.

[90] Lab. Code § 233 (effective Jan. 1, 2021) ("Any employer who provides sick leave for employees shall permit an employee to use in any calendar year the employee's accrued and available sick leave entitlement, in an amount not less than the sick leave that would be accrued during six months at the employee's then current rate of entitlement, for the reasons specified in subdivision (a) of Section 246.5. The designation of sick leave taken for these reasons shall be made at the sole discretion of the employee.").

[91] DLSE Opinion Letter 2003.05.21, at 6 (PTO that employer implicitly permits to be used for sick leave constitutes sick leave for purposes of kin care).

[92] *McCarther v. Pac. Telesis Grp., Inc.*, 48 Cal. 4th 104 (2010).

[93] Lab. Code § 234. Similarly, the San Francisco Family Friendly Workplace Ordinance, effective in 2014, prohibits retaliation for requesting time off to care for a family member, even if the employee has no sick time available. (See § 2.14.)

[94] Lab. Code § 233.

[95] Lab. Code § 233(a), 234. By one reading of the poorly drafted statutory language, the anti-retaliation provisions of the "kin care" statute, section 233, protect from retaliation the employee's use of sick time *for the employee's own needs*. That is because section 233 forbids retaliation against an employee for using or attempting to use sick leave "to attend to an illness or the preventive care of a family member*, or for any other reasons specified in subdivision (a) of Section 246.5*." (Emphasis added.) Section 246.5(a)(1), meanwhile, addresses the diagnosis, care, preventive care, or treatment of an existing health condition for "*an employee or* an employee's family member." (Emphasis added.)

[96] *Airline Pilots Ass'n Int'l v. United Airlines, Inc.*, 223 Cal. App. 4th 706 (2014) (because trusts in question were not "bona fide separate trusts," ERISA preemption did not apply).

[97] Mil. & Vet. Code §§ 394.5 *et seq.*

[98] 20 C.F.R. § 1002.5(d)(1)(i) and DOL comments in preamble to same. *See also* 38 U.S.C. § 4303(4)(A)(i).

[99] *Haligowski v. Superior Ct. (Pantuso)*, 200 Cal. App. 4th 983 (2011).

[100] https://sf.gov/information/understanding-military-leave-pay-protection-act (last visited Mar. 17, 2024).

[101] San Francisco Labor and Employment Code §§ 15.1 through 15.8, available at https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_laboremployment/0-0-0-711 (last visited Mar. 17, 2024).

[102] *Id*.; San Francisco Private Sector Military Leave Pay Protection Act Implementation Guidance Pub. Feb. 16, 2023, available at https://www.sf.gov/sites/default/files/2023-02/MLPPA%20FAQ_Final_2.16.23_0.pdf (last visited Mar. 17, 2024).

[103] San Francisco Labor and Employment Code § 15.6.

[104] San Francisco Labor and Employment Code § 15.4.

[105] San Francisco Labor and Employment Code §§ 15.2, 15.4.

[106] San Francisco Labor and Employment Code § 15.4.

[107] San Francisco Labor and Employment Code § 15.5(b)(2).

[108] San Francisco Labor and Employment Code § 15.5(b)(3).

[109] Mil. & Vet. Code § 395.10(d), (e).

[110] Fam. Code § 297.5.

[111] Mil. & Vet. Code § 395.10(d), (e).

[112] The Covid-19 pandemic drove an exponential increase in complex paid sick and personal leave mandates enacted during 2020. Nationally, 66 paid sick or personal leave mandates arose in 46 jurisdictions. California contributed most of them: about 25 paid sick leave mandates, with the total number depending on whether one counts industry-specific laws (e.g., those applying to hotel or food services employees) and contract-specific laws (e.g, those applying to airport concessionaires and city contractors).

[113] https://sfgov.org/olse/public-health-emergency-leave-ordinance (last visited Mar. 20, 2024).

[114] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB616 (last visited Mar. 20, 2024).

[115] *Id.*

[116] Lab. Code § 246(a). Employees partially exempt from the California Paid Sick Leave Law include employees whose employment is governed by a valid CBA that provides for payment of wages, hours of work, working conditions, overtime premiums, regular hourly rate of pay not less than 30 percent greater than the state minimum wage, paid sick leave or similar leave, and final and binding arbitration of disputes regarding the paid sick days provision. *See* Lab. Code § 245.5(a). However, these workers are still entitled to some paid sick leave under their CBA, and as of January 1, 2024, these employees are protected by the law's anti-retaliation provisions, must be allowed to take sick leave for all the purposes specified in the paid sick leave law, and cannot be required to find a replacement as a condition of taking paid sick leave law. *Id.* To the contrary, construction employees covered by CBAs with specified provisions, certain air carrier and flight personnel, and certain public-sector working retirees are completely exempt from the California Paid Sick Leave Law. *Id*.

[117] Lab. Code § 246(b)(1).

[118] Lab. Code § 246(b)(3).

[119] Lab. Code § 246(b)(2).

[120] Lab. Code § 246(d), (j).

[121] Lab. Code § 246(d).

[122] Lab. Code § 246(f)(2).

[123] Lab. Code § 246(d).

[124] Lab. Code § 246(k).

[125] Lab. Code § 246(c).

[126] Lab. Code §§ 245.5(c), 246.5(a)(1).

[127] Lab. Code § 246.5(a)(2).

[128] Lab. Code § 246(*l*)(3).

[129] Lab. Code § 246(*l*)(2).

[130] Lab. Code § 246(*l*)(1).

[131] Lab. Code § 246(*l*)(1) & (2).

[132] http://dir.ca.gov/dlse/opinions/2016-10-11.pdf (last visited Mar. 20, 2024). The DLSE letter opines that Labor Code § 246(*l*) (3) did not apply to commissioned employees under the commissioned employee exemption or outside sales exemption, but only to the "white collar" exemptions: administrative, professional and executive. For commissioned employees, employers must choose between Labor Code §§ 246(*l*)(1) and (2).

[133] Lab. Code § 246(g)(1), (2).

[134] Lab. Code § 246(g)(2).

[135] Lab. Code § 247(a).

[136] Lab. Code § 2810.5(a)(1)(H).

[137] Lab. Code § 246(i).

[138] Lab. Code § 247.5.

[139] Lab. Code § 245.5(a)(1).

[140] Lab. Code § 246.5d).

[141] Lab. Code § 246(r).

[142] Lab. Code § 248.5(b)(1) (as enacted in 2014)provided: "If the Labor Commissioner, after a hearing that contains adequate safeguards to ensure the parties due process, determines that a violation of this article has occurred, he or she may order any appropriate relief, including reinstatement, backpay, the payment of sick days unlawfully withheld, and the payment of an additional sum in the form of an administrative penalty to an employee or other person whose rights under this article were violated."

Amendments enacted as urgency legislation in September 2020 dropped the reference to a hearing with adequate due process safeguards and emphasized the Labor Commissioner's power to issue citations. *See* Lab. Code § 248.5(a) (as amended by AB 1867, effective Sept. 9, 2020) ("The Labor Commissioner shall enforce this article, including investigating an alleged violation, and ordering appropriate temporary relief to mitigate the violation or to maintain the status quo pending the completion of a full investigation or hearing through the procedures set forth in Sections 98, 98.3, 98.7, 98.74, or 1197.1, including by issuance of a citation against an employer who violates this article, and by filing a civil action. If a citation is issued, the procedures for issuing, contesting, and enforcing judgments for citations and civil penalties issued by the Labor Commissioner shall be the same as those set out in Section 98.74 or 1197.1, as appropriate."). Although the amendment was part of urgency legislation creating supplemental paid sick leave for Covid-related reasons, the amendment deleting the due process reference from section 248.5(b)(1) now applies to California's general paid sick leave law.

[143] Lab. Code § 248.5(b)(1).

[144] Lab. Code §§ 248.5(b)(1)(3) (administrative penalties for unpaid sick leave versus other violations); 248.5(c) ($50 per day penalty where no prompt compliance by employer, not to exceed $4000 aggregate).

[145] https://www.who.int/news/item/05-05-2023-statement-on-the-fifteenth-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-coronavirus-disease-(covid-19)-pandemic (last visited Mar. 20, 2024).

[146] https://www.hhs.gov/coronavirus/covid-19-public-health-emergency/index.html (last visited Mar. 20, 2024).

[147] San Francisco Administrative Code, Ch. 12W, https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_admin/0-0-0-8843 (last visited Mar. 20, 2024).

[148] Rules Implementing Paid Sick Leave Ordinance (June 7, 2018), City and County of San Francisco Office of Labor Standards Enforcement, https://sfgov.org/olse/sites/default/files/Document/PSLO%20Final%20Rules%2005%2007%202018%20to%20post.pdf (last visited Mar. 20, 2024).

[149] *Id.* Rule 10.

[150] *Id.* Rule 6.

[151] *Id.* Rule 5.

[152] *Id.* Rule 5.4. The pay rate would still need to be at least as high as the rates in Lab. Code §246(*l*)(1)-(3), unless the collective bargaining agreement exemption applies under Lab. Code § 245.5(2).

[153] *Id.* Rule 4.

[154] https://sfgov.legistar.com/View.ashx?M=F&ID=8897590&GUID=ACE5835E-CDB4-425C-AC2D-5B1C0EECEBB2 (reenacting through expiration date of Feb. 11, 2021) (last visited Mar. 20, 2024).

[155] https://sfgov.org/olse/public-health-emergency-leave-ordinance (last visited Mar. 20, 2024).

[156] Proposition G, effective October 1, 2022. http://files.amlegal.com/pdffiles/sanfran/2022-06-07-PropG.pdf (last visited Mar. 20, 2024).

[157] https://sf.gov/news/san-francisco-end-covid-19-public-health-emergency-declaration-and-health-orders (last visited Mar. 20, 2024).

[158] Proposition G, effective October 1, 2022. http://files.amlegal.com/pdffiles/sanfran/2022-06-07-PropG.pdf (last visited Mar. 20, 2024).

[159] Berkeley Municipal Code §§ 13.100.010 through 13.100.120, https://berkeley.municipal.codes/BMC/13.100 (last visited Mar. 20, 2024). *See also* Frequently Asked Questions (FAQs), available at https://solomonpage.com/wp-content/uploads/Berkeley-Paid-Sick-Leave-Ordinance.pdf (last visited Mar. 6, 2023).

[160] Emeryville Municipal Code Chap. 37, § 5-37.03, available at http://www.codepublishing.com/CA/Emeryville/#!/emeryville05/Emeryville0537.html#5-37 (last visited Mar. 6, 2023). *See also* Frequently Asked Questions (FAQs), available at https://www.ci.emeryville.ca.us/DocumentCenter/View/9092 (last visited Mar. 6, 2023).

[161] Long Beach Municipal Code 5.48.020, available at https://library.municode.com/ca/long_beach/codes/municipal_code. (last visited Mar. 20, 2024).

[162] The City of Los Angeles' paid sick leave provisions are found in Los Angeles Municipal Code, ch. XVIII, art. 7, § 187.04, available at https://codelibrary.amlegal.com/codes/los_angeles/latest/lamc/0-0-0-209549 (last visited Mar. 24, 2024), and its enforcement provisions are found at ch. XVIII, art. 8, §§ 188.05-188.11, available at https://codelibrary.amlegal.com/codes/los_angeles/latest/lamc/0-0-0-288106 (last visited Mar. 20, 2024).

[163] *Id.* ch. XVIII, art. 7, § 187.04(G).

[164] https://wagesla.lacity.org/sites/g/files/wph1941/files/2021-09/COVID19-SPSL-RR-20210628.pdf (last visited Mar. 20, 2024) (providing that covered reasons included time off work (1) because public health officials or healthcare providers required or recommended that the employee isolate or quarantine to prevent the spread of disease, (2) because the employee was 65 or older or had a serious chronic medical condition, (3) because the employee's business or a work location temporarily ceased operations in response to a public health recommendation or mandate, (4) to provide care for a family member, by blood or affinity, who was not sick but who public health officials or healthcare providers required or recommended isolate or quarantine, and (5) to provide care for a family member whose school, child care provider, senior care provider, or work temporarily ceased operations in response to a public health recommendation or mandate that was made to prevent the spread of disease).

[165] https://bca.lacity.org/living-wages-ordinance-lwo (last visited Mar. 24, 2024).

[166] *Id.* § 10.37.2(b) & (c).

[167] *Id.* § 10.37.2(b)(3).

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.* § 10.37.2(b)(4).

[173] *Id.*

[174] *Id.*

[175] Oakland Municipal Code, tit. 5, ch. 5.92, § 5.92.030, available at https://www.municode.com/library/ca/oakland/codes/code_of_ordinances?nodeId=TIT5BUTAPERE_CH5.92CIMIWASILEOTEMST_5.92.030PASILE (last visited Mar. 24, 2024).

[176] Office of the Oakland City Attorney, Frequently Asked Questions, Measure FF (Feb. 5, 2015), available at http://www.oaklandcityattorney.org/PDFS/Guides%20and%20FAQs/Revised%20Measure%20FF%20FAQ%20Feb%202015.pdf, FAQ No. 17 (last visited Mar. 24, 2024) ("Employers may risk a violation of Oakland's Paid Sick Leave law if they simply frontload … paid sick leave at the beginning of the year.").

[177] Lab. Code § 246(r).

[178] Office of the Oakland City Administrator, "COVID-19 (Coronavirus Disease and Oakland's Sick Leave Law," available at https://cao-94612.s3.amazonaws.com/documents/3-12-20_Guidance-to-employees-and-employers-_-COVID-19-KB-with-logo.pdf (last visited Mar. 24, 2024).

[179] San Diego Municipal Code, ch. 3, art. 9, div. 1, §§ 39.0101-39.0106, available at http://docs.sandiego.gov/municode/MuniCodeChapter03/Ch03Art09Division01.pdf (last visited Mar. 24, 2024).

[180] Lab. Code § 246(r).

[181] Santa Monica Municipal Code, art. 4, §§ 4.62.010, 4.62.025, available at http://qcode.us/codes/santamonica/view.php?topic=4-4_62&showAll=1&frames=on (last visited Mar. 24, 2024).

[182] West Hollywood, California Municipal Code tit. 5, art. 5 ch. 5.130, available at https://library.qcode.us/lib/west_hollywood_ca/pub/municipal_code/item/title_5-article_5-chapter_5_130-5_130_030 (last visited Mar. 24, 2024).

[183] *Id.*

[184] *Id*. at ch. 5.130.030(A).

[185] *Id*. at ch. 5.130.030(A)(1).

[186] *Id.*

[187] *Id.*

[188] *Id*. at ch. 5.130.030(A)(3)(c).

[189] *Id*. at ch. 5.130.030(A)(3)(d).

[190] *Id*.

[191] *Id*. at ch. 5.130.030(B).

[192] *Id*. at ch. 5.130.030(B)(3)(a).

[193] *Id*. at ch. 5.130.030(B)(3)(c).

[194] Lab. Code § 227.3.

[195] AB 1223, 2019 bill amending Lab. Code § 1510.

[196] Lab. Code §§ 1508-1513.

[197] AB 1949, adding Gov't Code § 12945.7. The bereavement leave law does not apply to employees whose employment is governed by a valid collective bargaining agreement that expressly provides for bereavement leave equivalent to what is required under the law, and meets other requirements. *See* Gov't Code § 12945.7(k).

[198] Gov't Code § 12945.7(a)(3).

[199] *Id.* § 12945.7(a)(3).

[200] *Id.* § 12945.7(e).

[201] *Id*. § 12945.7(e).

[202] *Id.* § 12945.7(f).

[203] *Id.* § 12945.6 (a).

[204] *Id.* § 12945.6 (a)(1)(A)(7).

[205] *Id.* § 12945.6 (b)(1).

[206] *Id.* § 12945.6 (b)(1)(3)(B).

[207] *Id.* § 12945.6 (b)(1)(4)(B).

3. Employee Privacy—Protected Activities

California prides itself on the state's constitution being "a document of independent force and effect particularly in the area of individual liberties."[1] While the U.S. Constitution generally applies only to governmental action, the California Constitution reaches aspects of private employment.

The California Constitution expressly protects the individual's right to privacy.[2] One aspect of "privacy" is personal autonomy—the individual's interest in making lifestyle choices free of unwarranted interference, as discussed in this section. Another aspect is the individual's interest in being free from unwarranted intrusion (see § 4). The California Constitution and various statutes further both interests.

3.1 Off-Duty, Off-Premises Lawful Conduct—Including Marijuana Use

Broadly worded Labor Code provisions forbid employers from discriminating against employees or applicants for lawful off-premises conduct during nonworking hours.[3] The Labor Code gives employers only two statutory safe harbors: (1) employers may require an employee to sign a contract to avoid any conduct that "is actually in direct conflict with the essential enterprise-related interests of the employer and where breach of that contract would actually constitute a material and substantial disruption of the employer's operation,"[4] and (2) employers may require a firefighter to sign a contract limiting the firefighter's "consumption of tobacco products on and off the job."[5]

Although these provisions were enacted in 1999 and 2001, it remains unclear exactly what they add to a plaintiff's rights. Even before their enactment, a court citing the California constitutional right to privacy upheld a judgment of tortious discharge against IBM in favor of a marketing manager fired for her romantic involvement with a manager who worked for a rival firm.[6] The cases interpreting these provisions have suggested that they are not as broad as a literal reading of them might suggest and that they merely codify existing constitutional rights, rather than adding a new basis for a claim of wrongful termination in violation of public policy.

In certain circumstances, however, courts have recognized limits on the Labor Code's privacy protections. One decision upheld the dismissal of a supervisor who was fired for dating his subordinate in violation of his company's anti-fraternization policy.[7] A second decision upheld the dismissal of a hospice employee who was suspected of engaging in an unlawful investment scheme.[8]

California has legalized marijuana for both medical and recreational use,[9] but using marijuana remained prohibited by federal law, and California still permitted employers to prohibit its use by employees and job applicants.[10] California, while generally eager to lead the way in creating employee protections, historically lagged behind other states in giving job protections to applicants and employees who are authorized to use medical marijuana.[11]

However, California law changed in a dramatic way as of January 1, 2024. On September 22, 2022, Governor Gavin Newsom signed AB 2188, which amended FEHA to prohibit an employer from discriminating against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person, based on: (1) the person's use of cannabis off the job and away from the workplace (with an exception for preemployment drug screening for psychoactive cannabis metabolites only)[12]; or (2) a drug test that has found the person to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids. There are several exceptions to the new employment discrimination prohibitions: (1) employees in the building and construction

trades; (2) applicants or employees hired for positions that require a federal government background investigation or security clearance in accordance with Department of Defense regulations, or equivalent regulations applicable to other agencies; and (3) applicants and employees required to be tested under state or federal laws and regulations or as a condition of an employer receiving federal funding or federal licensing benefits or entering into a federal contract. As a practical matter, California employers are likely going to (1) move away from urine drug testing to comply with the testing methodology aspect of the law, (2) rely on saliva (and perhaps hair) specimens, which target THC – the parent drug and primary component of cannabis that is psychoactive – to lawfully deny employment to applicants who test positive for cannabis, and (3) regardless of testing methodology, face significant risk in taking adverse action against current employees who test positive for cannabis.

3.2 Disclosure of Wages

California employers must not prohibit employees from disclosing the amount of their wages. More specifically, employers must not (1) require an employee to refrain, as a condition of employment, from disclosing the amount of the employee's wages, (2) require an employee to waive the right to disclose the amount of the employee's wages, or (3) discharge, formally discipline, or discriminate against an employee for disclosing the amount of the employee's wages.[13] California courts interpret "wages" in this context broadly to include bonuses.[14]

Similar provisions appear in California's pay-equity law. Under these provisions, employers must not forbid employees from (1) disclosing their own wages, (2) discussing the wages of others, (3) inquiring about other employees' wages, or (4) aiding or encouraging other employees to exercise those rights.[15]

The Legislature added an afterthought for those employees who do not want to discuss their own or others' wages: "Nothing in this section creates an obligation to disclose wages."[16]

3.3 Disclosure of Working Conditions

California employers must not forbid employees from disclosing information about working conditions. More specifically, as to working conditions, an employer must not (a) require an employee to refrain from disclosing information, (b) require an employee to waive the right to disclose information, or (c) discharge, formally discipline, or otherwise discriminate against an employee for disclosing information.[17] The Ninth Circuit has indicated that this law may invalidate a clause in an arbitration agreement forbidding the sharing of information about the specifics of an arbitration case.[18] This law may be preempted by federal labor law to the extent that it concerns concerted complaints about working conditions and not health or safety complaints.[19]

This California law runs roughly parallel to NLRA law that empowers employees to engage in concerted activity for their mutual protection.[20] The NLRB once ruled that employers run afoul of the law when they require employees to observe confidentiality during workplace investigations,[21] but in 2019 the NLRB reversed course, to close a previous gap between California law and federal law.[22] We expect another reversal in NLRB-made law as the composition of the NLRB changes during the current federal administration.

In addition, when an employer uses a nondisparagement provision, or a clause that otherwise restricts an employee's ability to disclose information related to conditions in the workplace, the agreement must include a phrase along the lines of, "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct you have reason to believe is unlawful."[23] An agreement that fails to adhere to this requirement is contrary to public policy, and is unenforceable.[24]

3.4 Right to Designate Counsel

Under Labor Code section 923, California employers must not discriminate against an employee for designating a representative to bargain over conditions of the employee's employment.[25] Courts have construed section 923 to empower an employee to designate an attorney to bargain with the employer with respect to conditions of employment, and to prohibit an employer from firing an employee who has made that designation.[26] The Court of Appeal has held that an employer's refusal to deal with its employee's workers' compensation attorney raised a triable issue as to whether the employer had failed to comply with its duty, under FEHA, to engage in an interactive process to see if it was possible to accommodate the employee's disability.[27]

Nonetheless, a California employer may still insist on dealing directly with an employee, without the presence of counsel, when investigating employee misconduct or assessing employee job performance.[28]

3.5 Employee Whistleblowing

California employers must not retaliate against employees who have—or are perceived to have—engaged in whistleblowing activities protected under Labor Code sections concerning working conditions or pay.[29]

3.5.1 Labor Code § 1102.5—general whistleblower statute

For many years, Labor Code section 1102.5 was a straightforward whistleblower protection statute. It provided that California employers must not discipline an employee for disclosing information to a governmental or law enforcement agency with a good-faith belief that the information evidenced noncompliance with state or federal law.[30] But judicial interpretation and statutory amendments have expanded the scope of this prohibition in various directions. Protected activity now includes reports (1) about violations of *local* as well as state and federal law, (2) that involve only co-worker or third-party wrongdoing,[31] (3) that are made regardless of whether disclosing the information is simply part of the employee's job,[32] and (4) that went to the employer rather than to the government.[33] Further, the Court of Appeal has held that a sheriff's deputy was protected by section 1102.5 even though he was not the first employee who had reported the alleged unlawful conduct and thus was not really the one who "disclosed" it.[34]

Section 1102.5 also prevents employers from taking retaliatory action based upon a belief that "the employee disclosed or may disclose" protected information.[35] The Court of Appeal has clarified that section 1102.5 forbids employers from terminating "perceived whistleblowers," even if in fact the employee never reported a violation.[36] And plaintiffs need not exhaust administrative remedies before suing under this statute.[37] Section 1102.5 also prohibits retaliation against employees for being a family member of an employee who has, or who is perceived to have, engaged in protected activities under these provisions.[38] Upon proof that the employee's protected activity was "a contributing factor in the alleged prohibited action," the employer must prove by "clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in [protected] activities."[39]

The Ninth Circuit held that a state administrative agency's ruling against an employee did not preclude the employee's section 1102.5 retaliation claim in court. A county civil service commission had upheld the plaintiff's firing, but the Ninth Circuit concluded that although administrative decisions typically have preclusive effect if they have a sufficiently "judicial character" and the elements of claim or issue preclusion are satisfied, the California Legislature intended to create "distinct fora and procedures" for retaliation claims, separate and apart from administrative procedures. The administrative decision thus did not preclude the section 1102.5 claim, even though the administrative procedure's "sufficiently judicial character" and the plaintiff's "adequate opportunity to litigate" meant that the administrative decision did preclude the employee's Section 1983 claim for denial of federal constitutional rights.[40]

Violation of Labor Code section 1102.5 makes the employer liable not only for damages, but for a civil penalty of $10,000.[41] In 2020, the Legislature made section 1102.5 more potent yet by empowering successful plaintiffs to recover their attorney fees.[42] The Legislature was not convinced by the criticism that authorizing attorney fees for retaliation claims would incentivize employees to choose litigation over resolution.

In January 2022, in *Lawson v. PPG Architectural Finishes, Inc*., the California Supreme Court clarified that section 1102.5 claims are evaluated under the framework delineated in Labor Code section 1102.6, rather than under the U.S. Supreme Court's 1973 burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green*.[43] *Lawson* makes it more difficult for employers to defend section 1102.5 claims. *Lawson* holds that the plaintiff makes out a prima facie case of liability simply by producing evidence that retaliation was a contributing factor in the employee's termination, demotion, or other adverse action, pursuant to Labor Code section 1102.6.[44] Once the plaintiff meets this burden, the burden shifts to the defendant to establish, by clear and convincing evidence, that it would have taken the same action "for legitimate, independent reasons."[45] Under the previously applicable *McDonnell Douglas* test, the ultimate burden would have been on the plaintiff "to demonstrate that the employer's proffered legitimate reason is a pretext for discrimination or retaliation."[46] Without this final burden-shifting back to the plaintiff, the new *Lawson* standard puts additional pressure on the employer to establish, by clear and convincing evidence, that the plaintiff was adversely affected for legitimate, independent reasons that were unrelated to the plaintiff's whistleblowing.

3.5.2 Labor Code § 98.6—reports to Labor Commissioner

California employers must not discriminate against an employee or applicant for filing a bona fide complaint relating to rights under the jurisdiction of the Labor Commissioner, for making a written or oral complaint of unpaid wages, or for initiating or testifying in a PAGA proceeding. Section 98.6's protections extend to "the exercise by the employee or applicant … on behalf of himself, herself, or others of any rights afforded him or her."[47] A section 98.6 plaintiff is entitled to reinstatement, recovery of lost wages and benefits, and a $10,000 civil penalty.[48]

3.5.3 Labor Code § 1197.5(k)—reports under the Fair Pay Act

California employers must not discharge or in any manner discriminate against employees who invoke or assist in the enforcement of Labor Code section 1197.5—a section that also protects employee rights to disclose their own wages, discuss the wages of others, inquire about another employee's wages, and aid or encourage other employees to exercise rights under section 1197.5.

3.5.4 Labor Code §§ 6310-6311—safety and health reports

No person may discriminate against any California employee for making any oral or written comment to government agencies with jurisdiction over employee safety or health, for instituting or testifying in any employee health or safety proceeding, or for exercising other rights relating to employee safety or health. Protected activity also includes reporting a work-related fatality, injury, or illness, requesting access to occupational injury or illness reports and records, and exercising any rights protected by the federal OSHA. California employers must not dismiss an employee for refusing to perform work in violation of occupational health or safety standards, where the violation would create a "real and apparent hazard" to an employee.

3.5.5 Government Code § 12940(h)—FEHA complaints

No person may discriminate against any person for opposing a practice forbidden by FEHA or for filing a complaint, testifying, or assisting in any FEHA proceeding.

3.5.6 Business and Profession Code § 2056—health care advocacy by physician

No person shall terminate, retaliate against, or otherwise penalize a physician for advocating medically appropriate health care for the physician's patients.[49]

3.5.7 Health and Safety Code § 1278.5—health care advocacy

California health facilities cannot retaliate against employees or medical staff for complaining to the facility, to an accrediting agency, or to a governmental entity, or for participating in any investigation of the facility's quality of medical care.[50] A "rebuttable presumption" of unlawful retaliation by the facility arises if its "responsible staff" knows of an individual's protected activity and if the facility takes adverse action against the individual within 120 days of the filing of a grievance or a complaint.[51]

3.5.8 Labor Code § 1019—retaliation by reporting immigration issues because of exercise of rights

California employers must not report or threaten to report to a government agency the suspected citizenship or immigration status of an individual who is an employee, former employee, prospective employee (or that of the individual's family members) in retaliation for the individual's exercise of rights under California laws.[52] The definition of "unfair immigration-related practices" includes filing or threatening to file false reports to a state or federal agency, contacting or threatening to contact immigration authorities, and certain unauthorized uses of immigration documents.[53] Persons subjected to unfair immigration-related practices have a private right of action, and a court may order government agencies to suspend business licenses.[54]

3.6 Refusal to Undergo Medical Treatment or Exam

The California constitutional right of autonomy can protect an employee's right to determine the course of medical treatment or lack thereof. An employee thus could sue an employer for relying on confidential medical information to require that the employee enroll in a 30-day inpatient alcohol treatment program as a condition of employment.[55]

3.6.1 Protection for refusing to provide certain medical information

Under a Civil Code provision, California employers must not discriminate against employees for refusing to sign a release of medical information to the employer, although employers may take "such action as is necessary in the absence of medical information due to an employee's refusal to sign an authorization[.]"[56] The Court of Appeal has rejected a claim based on this provision, holding that an employer could fire an employee for refusing to undergo a job-related fitness-for-duty exam where the examiner would have reported to the employer no medical information other than whether the employee was fit for duty.[57]

3.6.2 Fitness-for-duty exam upon return from medical leave

Under the FMLA, when an employee's physician certifies that the employee can return to work from leave, the employer must return the employee to work.[58] The Court of Appeal has held that an employer may require a fitness-for-duty medical examination upon the employee's return from leave, so long as the examination is job-related and there is a business necessity under the specific circumstances.[59]

3.7 Changing Personal Information

California employers must not discharge, discriminate, retaliate, or take adverse action against an employee because the employee "updates or attempts to update his or her personal information based on a lawful change of name, social security number, or federal employment authorization document."[60]

[1] *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 490 (2000) (citing *People v. Hannon*, 19 Cal. 3d 588, 607, n.8 (1977)).

[2] Cal. Const., art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.").

[3] Lab. Code §§ 96(k), 98.6(a).

Section 96 provides: "The Labor Commissioner and the deputies and representatives authorized by the commissioner in writing shall, upon the filing of a claim therefor by an employee, or an employee representative authorized in writing by an employee, with the Labor Commissioner, take assignments of: ... (k) Claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises."

Section 98.6 provides: "(a) A person shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96 … . (b)(1) Any employee who is discharged, threatened with discharge, demoted, suspended, retaliated against, subjected to an adverse action, or in any other manner discriminated against in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96 ... shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by those acts of the employer."

[4] Lab. Code § 98.6(c)(2)(A).

[5] Lab. Code § 98.6(c)(2)(B).

[6] *Rulon-Miller v. IBM*, 162 Cal. App. 3d 241, 248 (1984) (observing "close question of whether those rules or regulations permit IBM to inquire into the purely personal life of the employee. … [T]he right of privacy, a constitutional right in California … , could be implicated by the IBM inquiry."). In upholding a jury verdict for the employee, the *Rulon-Miller* court relied on the implied covenant of good faith and fair dealing, with the constitutional discussion as background, rather than relying directly on the constitutional right to privacy itself.

[7] *Barbee v. Household Auto. Finance Co.*, 113 Cal. App. 4th 525, 535 (2003) (supervisor could be terminated for violating company policy against dating subordinates; Labor Code section 96(k) does not describe any public policy but rather "simply outlines the types of claims over which the Labor Commissioner shall exercise jurisdiction").

[8] *Grinzi v. San Diego Hospice Corp.*, 120 Cal. App. 4th 72, 77, 84-86 (2004) (case manager fired on suspicion of participating in Ponzi scheme has no public policy claim for wrongful termination based on First Amendment of the United States Constitution or on Labor Code sections 96(k) or 98.6).

[9] Health & Safety Code § 11362.1 ("it shall be lawful under state and local law" for persons at least age 21 to use cannabis up to certain quantities depending on the form of cannabis).

[10] Health & Safety Code § 11362.45(f) (section 11362.1 does not affect "[t]he rights … of public and private employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of cannabis in the workplace, or affect the ability of employers to have policies prohibiting the use of cannabis by employees and prospective employees, or prevent employers from complying with state or federal law"). *See also* § 14.7, "Drug Free Workplace," herein (California employers can deny employment to users of medical marijuana, notwithstanding the 1996 Compassionate Use Act).

[11] Assembly Bill 1256, introduced on February 19, 2021, was aimed at prohibiting an employer, subject to exemptions, from discriminating against a person in the hiring, termination, or any term or condition of employment because a drug test revealed the presence of THC. The bill was not passed in the State Assembly.

[12] The new statute reads as follows (codified at Gov't Code § 12594 (a)): "(a) It is unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person, if the discrimination is based upon any of the following:

(1) The person's use of cannabis off the job and away from the workplace. *This paragraph does not prohibit an employer from discriminating in hiring, or any term or condition of employment, or otherwise penalize a person based on scientifically valid preemployment drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites.*

(2) An employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids."

(Emphasis added.)

[13] Lab. Code § 232.

[14] *E.g., Grant-Burton v. Covenant Care, Inc.*, 99 Cal. App. 4th 1361, 1376-77 (2002) (upholding wrongful termination claim of employee fired after telling co-workers she had not received bonus because her supervisor did not believe in them; Labor Code section 232, protecting disclosure of "wages," covers bonuses).

[15] Lab. Code § 1197.5(k)(1).

[16] *Id.*

[17] Lab. Code § 232.5.

[18] *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1079 & n.5 (9th Cir. 2007).

[19] *Luke v. Collotype Labels USA, Inc.*, 159 Cal. App. 4th 1463 (2008) (federal labor law preempts claim for wrongful termination in violation of public policy stated in Labor Code sections 232.5 and 923).

[20] 29 U.S.C. § 157 ("Employees shall have the right to self-organization, 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. § 158(a)(1) (establishing that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title").

[21] *Banner Health Sys. dba Banner Estrella Med. Ctr*., 362 NLRB No. 137 (2012). This Obama Board ruling created a rare, albeit temporary, example of federal law being more hostile to employers than California law. Expect a similar ruling now that we have a Biden Board.

[22] *Compare Apogee Retail LLC*, 368 NLRB No. 144 (Dec. 16, 2019*)* (employer rule requiring investigative confidentiality during investigation did not violate Section 7 of the NLRA) *with Silva v. Lucky Stores, Inc.*, 65 Cal. App. 4th 256, 265 (1998) (employer's investigation policy was appropriate in part because the policy ensured confidentiality).

[23] Gov't Code § 12964.5(a)(1)(B)(ii).

[24] Gov't Code § 12964.5(a)(2).

[25] Lab. Code § 923.

[26] *Montavio v. Zamora*, 7 Cal. App. 3d 69, 75 (1970) ("We believe it to be within the intent and scope of the statute, by implication, though not expressly declared, that the individual employee has the right to designate an attorney or other individual to represent him in negotiating terms and conditions of his employment, and that his discharge for so doing constitutes a violation of Labor Code, section 923."); *Gelini v. Tishgart*, 77 Cal. App. 4th 219 (1999) (employer violated section 923 by firing employee because her lawyer wrote employer to request better hours and parental leave). *See also Santillan v. USA Waste of Cal., Inc.,* 853 F.3d 1035, 1047 (9th Cir. 2017) (employee designating attorney to represent him in negotiating employment terms is a protected activity that supports a claim for wrongful termination in violation of public policy).

[27] *Claudio v. Regents of the Univ. of Cal.*, 134 Cal. App. 4th 224, 247-48 (2005).

[28] *TRW, Inc. v. Superior Ct.*, 25 Cal. App. 4th 1834, 1849-52 (1994) (defense contractor could fire employee for refusing, in absence of counsel, to cooperate in investigation of possible security breaches; no Fifth Amendment right against self-incrimination applied as there was no government action and no "custodial interrogation by law enforcement"), *cert. denied,* 513 U.S. 1151 (1995); *Robinson v. Hewlett Packard*, 183 Cal. App. 3d 1108, 1130-32 (1986) (employer could fire employee for refusing to meet alone, without his lawyer, to attend performance evaluation).

[29] Lab. Code §§ 98.6, 1102.5, and 6310.

[30] Lab. Code § 1102.5; *Holmes v. Gen. Dynamics Corp.*, 17 Cal. App. 4th 1418, 1432-35 (1993) (affirming jury verdict for plaintiff fired for reporting company violations of federal False Statements Act); *Collier v. Superior Ct. (MCA, Inc.)*, 228 Cal. App. 3d 1117, 1124-27 (1991) (involving claim that plaintiff allegedly fired for telling upper management that other employees *might* be engaged in embezzlement and violations of federal antitrust laws; "Retaliation by an employer when an employee seeks to further this well-established public policy by responsibly reporting *suspicions* of illegal conduct to the employer seriously impairs the public interest, even though the employee is not coerced to participate or restrained from exercising a fundamental right.").

[31] *McVeigh v. Recology San Francisco*, 213 Cal. App. 4th 443, 471 (2013) (section 1102.5 "protects employee reports of unlawful activity by third parties such as contractors and employees, as well unlawful activity by an employer.").

[32] *Id. at* 469 ("An employee's report of illegal activity can … constitute protected conduct under [section 1102.5(b)] even if she 'was simply doing her job' in making the report.").

[33] Lab. Code § 1102.5(a), (b) (law protects not only reports to "a government or law enforcement agency," but also reports "to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance").

[34] *Hager v. Cnty. of Los Angeles,* 228 Cal. App. 4th 1538, 1541, 1548 (2014) (rejecting defendant's argument that the plaintiff did not "disclose information" where suspicions of unlawful conduct had already been reported by others), *disapproved on other grounds by Lawson v. PPG Architectural Finishes, Inc.*, 12 Cal. 5th 703, 711 (2022).

[35] Lab. Code § 1102.5(b).

[36] *Diego v. Pilgrim United Church of Christ*, 231 Cal. App. 4th 913 (2014) (teacher allegedly fired because the preschool director mistakenly believed she had complained to the Community Care Licensing Division of the California Department of Social Services, resulting in an unannounced inspection of the preschool).

[37] *See* Lab. Code § 244(a) (plaintiffs need not exhaust administrative remedies or procedures to sue under a Labor Code section, unless the section expressly requires exhaustion—and section 1102.5 does not).

[38] Lab. Code §§ 98.6(e), 1102.5(h), and 6310(c).

[39] Lab. Code § 1102.6.

[40] *Bahra v. Cnty. of San Bernardino*, 945 F.3d 1231, 1236 (9th Cir. 2019) (California law meant the civil service commission's decision did not preclude the section 1102.5 claim, while under federal law the plaintiff's "full opportunity to litigate the propriety of his termination before the administrative agency" meant that the commission's decision did preclude the Section 1983 claim).

[41] Lab. Code § 1102.5(f).

[42] AB 1947, 2020 bill amending Lab. Code § 1102.5. Section 1102.5(j) now reads: "The court is authorized to award reasonable attorney's fees to a plaintiff who brings a successful action for a violation of these provisions."

[43] *Lawson v. PPG Architectural Finishes, Inc.*, 12 Cal. 5th 703, 707 (2022) ("Unsurprisingly, we conclude courts should apply the framework prescribed by statute in Labor Code section 1102.6. Under the statute, employees need not satisfy the *McDonnell Douglas* test to make a case of unlawful retaliation."); *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[44] *Lawson*, 12 Cal. 5th at 712 ("First, it must be 'demonstrated by a preponderance of the evidence' that the employee's protected whistleblowing was a 'contributing factor' to an adverse employment action.") (citing Lab. Code § 1102.6).

[45] *Id*. ("Then, once the employee has made that necessary threshold showing, the employer bears 'the burden of proof to demonstrate by clear and convincing evidence' that the alleged adverse employment action would have occurred for 'legitimate, independent reasons' even if the employee had not engaged in protected whistleblowing activities.") (citing Lab. Code § 1102.6).

[46] *Id*. at 708 ("Under that approach, the employee must establish a prima facie case of unlawful discrimination or retaliation. Next, the employer bears the burden of articulating a legitimate reason for taking the challenged adverse employment action. Finally, the burden shifts back to the employee to demonstrate that the employer's proffered legitimate reason is a pretext for discrimination or retaliation.") (citing *McDonnell Douglas*, 411 U.S. at 802, 804).

[47] Lab. Code § 98.6(a).

[48] Lab. Code § 98.6(b)(3).

[49] Bus. & Prof. Code § 2056(c). This statute probably does not create a direct right of action but could support an action for breach of contract and, like any explicit statement of public policy, would support an employee's tort action for dismissal or demotion in violation of public policy. *See generally Tameny v. Atl. Richfield Co.*, 27 Cal. 3d 167 (1980) (employee could bring tort for wrongful termination where dismissed for refusing to engage in illegal price-fixing).

[50] Health & Safety Code § 1278.5(b)(3) (providing for civil penalties of up to $25,000 and remedies for employees or medical staff suffering retaliation).

[51] Health & Safety Code § 1278.5(d)(1).

[52] Lab. Code §§ 244, 1019. Section 244(b) defines "family member" to include a spouse, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, or grandchild related by blood, adoption, marriage or domestic partnership.

[53] Lab. Code § 1019(b).

[54] Lab. Code § 1019(d).

[55] *Pettus v. Cole*, 49 Cal. App. 4th 402, 452-61 (1996).

[56] Civ. Code § 56.20(b). *See generally Loder v. City of Glendale,* 14 Cal. 4th 846, 861 (1997).

[57] *Kao v. Univ. of San Francisco,* 229 Cal. App. 4th 437, 453 (2014) (upholding jury verdict against USF professor fired for refusing to undergo fitness-for-duty examination, after faculty members and school administrators reported his frightening behavior); *cf. Ellis v. San Francisco State Univ.*, 2016 WL 4241907, at *4 (N.D. Cal. Aug. 11, 2016) (denying summary judgment for employer in light of material issues whether the employer had "requisite evidence that a business necessity warrant[ed] a properly tailored fitness for duty evaluation").

[58] 29 U.S.C. § 2614 ("any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave—(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment."); *id*. § 2614(a)(4) ("employers may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.").

[59] *White v. Cnty. of Los Angeles,* 225 Cal. App. 4th 690 (2014) (while employer cannot seek a second opinion regarding fitness for work prior to restoring the employee to employment from an FMLA leave, employer may, if not satisfied with the employee's health care provider's certification, seek its own evaluation of the employee's fitness for duty, at the employer's own expense; employee here was fired for refusing to submit to fitness-for-duty exam).

[60] Lab. Code § 1024.6.

4. Employee Privacy—Protection From Intrusions

California is at the forefront of the national conversation on privacy and data protection. The California Supreme Court has called the California Constitution "a document of independent force and effect particularly in the area of individual liberties."[1] The California Constitution expressly protects the individual's right to privacy. Unlike the federal constitution, which generally restrains only governmental action, the California Constitution can restrain private employers. Its privacy provision protects both aspects of privacy: the interest in being free from unwarranted interference with personal autonomy (as discussed in § 3 above) and the interest in being free from unwarranted intrusions, as discussed in this section. The California Constitution and various statutes further both interests.

On January 1, 2023, the California Privacy Rights Act (CPRA) amending the California Consumer Privacy Act (CCPA) came into effect, removing an important exemption for employee personal information under the CCPA. This important legislation is discussed in detail in § 4.17 below.

4.1 Drug Testing

4.1.1 Privacy issues

Drug testing (through urinalysis and other specimen testing) implicates the California right to privacy. While drug testing of employees for reasonable suspicion is permissible in California, random testing is not, absent (1) a federal legal mandate to do so or (2) a strong case that the particular class of employees being tested would pose some imminent safety or health threat, with irremediable consequences, if allowed to work under the influence of drugs.[2] Testing job applicants appears to accord with the guidance provided by California courts.[3] The Ninth Circuit has upheld an employer's "one strike" rule, authorized by a collective bargaining agreement, providing that an applicant who tests positive on a pre-employment drug screen is permanently disqualified.[4]

Under a San Francisco ordinance, a private employer can have an employee's blood or urine specimen tested only if the employer has reasonable grounds to believe the employee's faculties are impaired on the job and the employee works in a position in which impairment presents a clear and present danger to the physical safety of the employee, another employee, or the public. Employers must not engage in random or company-wide testing of blood or urine specimens.[5]

As of January 1, 2024, FEHA regulates the testing methodologies that employers may use to test applicants and employees for cannabis use and creates liability for employers who do not use a lawful methodology or otherwise violate the law by discriminating against an applicant or employee who uses cannabis off the job and away from the workplace. (See § 3.1.)

4.1.2 Disability discrimination issues

Disability discrimination laws protect privacy to the extent that they prohibit certain examinations or questions. For peculiar California law on this point, see § 6.3.4.

4.2 Questions about Certain Arrests and Convictions

4.2.1 State law

California, unlike federal law, regulates various forms of employer inquiries about the arrests and convictions of applicants and employees.[6]

Questions about arrests. California employers generally must not ask applicants, employees, or *any other source* about the arrest of an applicant or employee that did not lead to a conviction.[7]

Questions about certain convictions or diversion programs. California employers must not ask about an applicant's or employee's referral to, and participation in, any pretrial or post-trial diversion program,[8] and must not ask employees about judicially dismissed, sealed, or expunged criminal convictions.[9] California employers cannot ask applicants about certain marijuana-related convictions more than two years old.[10]

Plaintiffs' lawyers exploited this provision to seek $26 million for 135,000 unsuccessful applicants who had unlawfully been asked if they had marijuana convictions. The trial court granted summary judgment to the plaintiffs, even though none of them actually had marijuana convictions to reveal. The Court of Appeal provided some adult supervision here, reversing the judgment while observing, "Plaintiffs' strained efforts to use the marijuana reform legislation to recover millions of dollars from Starbucks gives a bizarre new dimension to the everyday expressions 'Coffee Joint' and 'Coffee Pot.'"[11]

A 2020 Court of Appeal decision reinstated a lawsuit alleging that an employee was fired because she had not disclosed on her job application a conviction for grand theft that had been judicially dismissed once she completed her probation. Although the employer did not know that the conviction had been judicially dismissed when it fired the employee, the employer did not rehire the employee once it learned of the judicial dismissal.[12]

Asking applicants about convictions. California's "ban the box" statute forbids private and public employers from asking about convictions on initial job applications.[13] This rule applies even if applicants volunteer such information.[14] Furthermore, California employers cannot state in job advertisements, postings, applications, or other materials that individuals with a criminal history will not be considered for hire.[15]

About 30 states have similar legislation, in addition to 15 California cities and counties—including Los Angeles and San Francisco—that have enacted local legislation applying to private and public employers.

California employers subject to the law generally may procure a background report or ask applicants about criminal convictions only after extending them a conditional offer of employment.[16] And California employers can rely on conviction history to deny employment only after making "an individualized assessment" of whether the conviction "has a direct and adverse relationship" with the job's "specific duties … that justif[ies] denying the applicant the position." That assessment must consider the nature and gravity of the offense, the time that has passed since completion of any sentence, and the nature of the job.[17]

An employer intending to deny employment after an individualized assessment must notify the applicant of its "preliminary decision" and provide a copy of the conviction history report, with notice of the applicant's right to respond before the decision becomes final. The applicant has at least five business days to submit relevant evidence challenging the accuracy of the conviction history and/or evidence of rehabilitation or mitigating circumstances or both.[18] Relevant evidence was broadened by 2023 regulatory amendments to include an applicant's past employment, details and context of any offenses, self-improvement efforts, impact of personal challenges like trauma or disability on the offense, age at offense time, re-offense risk, bonding status, job-seeking initiative, and compliance with legal probation or parole.[19] And an employer finalizing its preliminary

decision must notify the applicant of rights to pursue the matter further.[20] Employers can inquire about an applicant's "particular conviction" under limited circumstances, mostly involving cases where a law requires consideration of criminal history.[21]

In 2023, the amended regulations also expanded the definitions of "employer" and "applicant." The amended definition of "employer" now includes direct and joint employers, entities assessing conviction history for employers, staffing agencies, and entities making selections from a pool or availability list such as a hiring hall.[22] The amended definition of "applicant" now includes employees who commenced employment after receiving a conditional offer, current employees seeking different positions, and employees affected by changes in ownership, management, policy, or practice.[23]

4.2.2 San Francisco ordinance limiting inquiries into criminal history

Under the "Fair Chance Ordinance" (designed to give rehabilitating ex-offenders a "fair chance" at employment), San Francisco employers of five or more employees must not ask job applicants about certain arrests or criminal convictions at all, and must not ask about other conviction history until after making a conditional offer of employment.[24] San Francisco employers also must not inquire about or consider infractions, convictions that are more than seven years old (measured from date of sentencing), or any conviction for an offense that arises out of conduct that has since been decriminalized (measured from date of sentencing).

Further, any criminal conviction, in order to disqualify a job candidate, must bear a "direct relationship" to the position the candidate is seeking. That is, the conviction must have a "direct and negative bearing on that person's ability to perform duties or responsibilities necessarily related to the employment position." The ordinance also imposes special notice, posting, and recordkeeping requirements on covered employers.[25]

In 2018, San Francisco amended its Fair Chance Ordinance to align it, in some respects, with California's ban-the-box law. For violations occurring after October 1, 2018, employers are subject to increased penalties for non-compliance: $500 for the first violation; $1,000 for the second violation; and $2,000 for further violations (under the initial Ordinance, the maximum penalty was $50). The amended Ordinance grants aggrieved individuals a right to file a civil action, if they first file a complaint with the OLSE and exhaust their administrative remedies.

San Francisco bars covered employers from considering convictions that are more than seven years old (measured from the date of sentencing) and infractions. The Board further amended the Ordinance to add a new category of "off limits" information: convictions that arose out of conduct that has since been decriminalized.

4.2.3 Los Angeles County ordinance limiting inquiries into criminal history

Effective September 3, 2024, Los Angeles County adopted its Fair Chance Ordinance for Employers.[26] Employers with five or more employees located in the unincorporated areas of Los Angeles County may not procure a background screen for employment purposes or *ask* about criminal history until making a conditional offer of employment. "Employer" includes labor organizations, nonprofit organizations, temporary and referral agencies, and entities assessing criminal histories for employers.[27] The Los Angeles County Ordinance contains several unique requirements that go well beyond other federal state and local laws governing criminal history checks.

The Los Angeles County law requires job solicitations, bulletins, postings, announcements, and advertisements to specify any laws that impose restrictions or prohibit the hiring of individuals with certain criminal histories.[28] It includes a long list of types of criminal histories which cannot be disqualifying. Where a criminal history might result in a rescinded job offer, employers must include in any job solicitations, bulletins, postings, announcements, or advertisements a list of all material job duties of the specific job for which the employer reasonably believes that criminal history "may have a direct, adverse and negative relationship."[29]

If an employer intends to conduct a background check after a conditional offer of employment, the employer must provide written notice that includes (1) statement that the conditional offer of employment is contingent upon review of the individual's criminal history; (2) a statement that the employer has good cause to conduct a review of the individual's criminal history for the job position with supporting justification provided in writing; and (3) a complete list of all types of information, background, or history that will be reviewed by the employer (including verifying employment history, motor vehicle driving records, reference checks, credit history, licensing or credential verification, drug testing, or medical examination).[30]

When an applicant has a criminal history, the employer must first conduct an initial individualized assessment, and document that assessment. If the employer intends to rescind the conditional offer, the employer must provide the applicant or employee with a preliminary notice of adverse action. The notice must be sent by regular mail and email (if available) and, in addition to the information required under the state "ban the box" law, the notice must include a copy of the initial individualized assessment.[31] The notice must have the timeline described below for applicants to respond in **bold font** and **ALL CAPS**.[32]

No final action may be taken for five business days. If the applicant or employee notifies the employer in writing within five business days that they dispute the accuracy of the criminal history information and are taking steps to obtain supporting evidence or that they need additional time to obtain evidence of rehabilitation or mitigating circumstances, the employer must provide an additional 10 business days.[33] If an applicant or employee timely submits information, the employer must defer a decision for ten business days and conduct a second individualized assessment considering the factors listed in the ordinance. If the second decision is the same, the employer must follow a final notification process, including a copy of the second individualized assessment, the criminal history report, and other required content.[34] The second notification must include notice of the right to file a complaint with the Los Angeles County Department of Consumer & Business Affairs for violation of the ordinance or to pursue a complaint with the California Civil Rights Department for violation of the state law.[35] If the employer provides the second and final notice more than 30 calendar days after a timely response to the preliminary notice, there is a presumed violation of the ordinance. The employer must rebut this presumption by providing a written explanation of acceptable reasons for the delay.[36]

The Los Angeles County Ordinance has a minimum four-year recordkeeping requirement.[37] Violations of the ordinance are serious. The County's Department of Consumer and Business Affairs may investigate and award penalties progressively from $5,000-$20,000 per violation (plus late-payment penalties and interest) as well as loss of County-issued licenses and contracts.[38] Subject to certain exhaustion requirements, the ordinance provides for a private right of action for violations.[39]

4.2.4 Los Angeles City ordinance limiting inquiries into criminal history

Under the Fair Chance Initiative for Hiring Ordinance, employers with ten or more employees in the City of Los Angeles may not procure a background screen for employment purposes or ask about criminal history until making a conditional offer of employment, contingent only on the results of the background screen.[40]

The LA Bureau of Contract Administration has an Individualized Assessment and Reassessment Form that employers should complete in making a preliminary decision to reject an applicant based on criminal history. The form addresses both individualized assessment and reassessment. Most of the form reflects an initial individualized assessment, to deliver with the pre-adverse action notice and any federal or state disclosures, such as the summary of rights, and a copy of the consumer report. If applicants provide additional information about their criminal record after receiving the pre-adverse package, the employer must complete the reassessment portion of the form and provide it with the final adverse action notice.[41]

4.3 Polygraph Tests

California employers must not require, as a condition of employment, an applicant or employee to take a polygraph, lie-detector test, or "similar" test. Employers may *request* a person to take such a test, but only after first advising the person, *in writing* at the time of the test, that the employer cannot *require* the test.[42]

4.4 HIV Testing

HIV test results cannot be used to determine insurability or suitability for employment.[43]

4.5 Genetic Testing

California employers must not, directly or indirectly, subject applicants or employees to tests for the presence of a genetic characteristic.[44]

4.6 Tape Recording and Videotaping

4.6.1 Confidential communications

It is a crime for a California employer *or employee* to surreptitiously tape-record confidential communications.[45] Violators are liable for civil penalties in amounts of up to $5,000 per violation, or three times any actual damages, whichever is greater.[46] The recording may not be used as evidence, except to prove a violation of the statute or if the evidence is relevant in a criminal proceeding, under the "Right to Truth-in-Evidence" provision of the California Constitution.[47]

4.6.2 Restrooms, locker rooms, changing rooms

California employers must not use or cause to be made any video or audio-taping of employees in a restroom, locker room, or any room that the employer has designated for changing clothes, unless authorized by court order.[48]

4.6.3 Secret videotaping in open areas

The California Supreme Court has held that employees have the right to privacy, even in an open workplace, against intrusions by members of the general public.[49] The California Supreme Court in one case held that employees have reasonable expectations of privacy against their employer, with respect to their activities in a closed shared office.[50] The employees sued their employer upon discovering that it had installed a covert video camera in order to catch night-time intruders in the office shared by the plaintiffs, who worked only during the day. The Court of Appeal held that the plaintiffs could sue for invasion of privacy even if the camera never actually observed them, on the theory that mere intrusion into their workplace solitude was actionable.[51] The Supreme Court reversed this odd result because, although the employer did intrude upon the plaintiffs' privacy, the surveillance—being narrowly tailored in place, time, and scope, and reflecting legitimate business concerns—was not highly offensive and never caught the plaintiffs on videotape.[52]

4.7 Medical Records

4.7.1 Civil Code § 56

California employers must establish procedures to keep employee medical records confidential (e.g., implementing a security system that restricts access to medical information).[53] California employers must not—unless complying with court orders, administering employee benefits, litigating medical issues the employee has put in controversy, or determining eligibility for medical leaves—use or disclose medical records unless the

employee has signed a special release.[54] California employers must not discriminate against an employee who refuses to sign that release, but may take necessary action in the absence of medical information if the employee refuses to sign the release.[55] (See § 3.6.1.) The release must meet several requirements, e.g., the language must be separate from other language, and must be in no smaller than 14-point font.

Moreover, the release must authorize only the release of medical information, be limited in purpose, and state an expiration date or event. The expiration date or event must limit the duration of the release to one year or less, unless the person signing the release requests a specific date beyond a year. Additionally, the release must specify who may disclose the information, and must contain an advisory that the employee is entitled to a copy of the release.[56]

4.7.2 Labor Code § 3762—workers' compensation insurers

In workers' compensation proceedings, the employer's insurance carrier or a third-party administrator often receives medical information about an employee (in, for example, a deposition transcript or medical report). The Labor Code forbids disclosure of this information to the employer, except as to (1) the diagnosis of the condition for which workers' compensation is claimed or treatment is provided, and (2) information needed to modify the employee's work duties.[57]

4.8 Social Security Numbers and Other Personal Information

4.8.1 Limits on use of SSNs

No person may print an individual's social security number (SSN) on materials mailed to the individual, publicly post SSNs, print them on password cards, or require their use to access a website.[58] Nor may a person require an individual to transmit an SSN over the Internet unless the connection is secure or the SSN is encrypted.[59]

4.8.2 Duty to protect personal information

California businesses owning personal information—such as SSNs, driver's license numbers, credit card numbers, or medical information—must "maintain reasonable security procedures and practices appropriate to the nature of the information, to protect the personal information from unauthorized access, destruction, use, modification, or disclosure."[60] A business that "discloses personal information about a California resident pursuant to a contract with a nonaffiliated third party"—e.g., an employer that releases personal information when contracting with third parties for payroll, benefits administration, or background check purposes—must "require by contract that the third party implement and maintain reasonable security procedures and practices appropriate to the nature of the information, to protect the personal information from unauthorized access, destruction, use, modification, or disclosure."[61]

4.8.3 Social media password and access protections

California employers must not request or require employees or job applicants to divulge personal social media account information. The term "social media" broadly encompasses all digital or electronic content, including videos, photographs, blogs, podcasts, instant-text messages, email, on-line services or accounts, and internet website profiles.[62] Specifically, employers must not ask or demand that employees or applicants (1) disclose user name or password to access a personal social media account, (2) access personal social media in the employer's presence, or (3) divulge any personal social media.[63] Employers must not take any adverse action against an employee for refusing or failing to comply with such a request or demand.[64] However, employers still may ask employees to divulge personal social media reasonably believed to be relevant to investigating suspicions of employee misconduct or violations of law, so long as the employer uses the social media solely for that or a

related investigation or proceeding.[65] And employers can still request username and password information for the purpose of accessing an employer-issued electronic device.[66]

4.8.4 Other personal information

The Court of Appeal has upheld an employee's right to sue her employer on the basis that her supervisor had informed the workforce that the employee suffered from bipolar disorder. Although the defendant won summary judgment against this claim for invasion of privacy—on the ground that the alleged disclosure was oral only and not reduced to a writing—the Court of Appeal reversed, holding that "disclosure in a writing is not required to maintain a cause of action for public disclosure of private facts."[67]

4.9 Security of Personal Information

4.9.1 Potential liability for failing to secure personal information

Businesses that collect the personal information of California consumers have an affirmative obligation to protect that information from unauthorized or illegal access, destruction, use, modification, or disclosure.[68] Failure to implement reasonable security procedures and practices to protect such personal information can subject an employer to class action liability up to $750 per impacted employee per incident.[69] Additionally, such failure can trigger administrative fines ranging from $2,500 for each violation to $7,500 for each intentional violation.[70] Of note, the scope of this obligation is broader than the breach notice obligation (see § 4.9.2, immediately below). The affirmative obligation around reasonable security is for broadly defined "personal information."[71] Breach notice obligations only apply to "computerized data" that includes "personal information."[72]Thus the "reasonable security" obligation applies to both off-line data as well as on-line data. Similarly, the monetary liability for failure to secure "personal information" will apply to both off- and on-line data.

4.9.2 Duty to provide notice of security breaches

California businesses owning or licensing any computerized data including unencrypted (and, in some instances, encrypted) personal information must, upon breach of the security of that information, notify the affected persons "in the most expedient time possible and without unreasonable delay."[73] The items considered protected information include, but are not limited to, medical information, health insurance information, and genetic data (defined as "any data, regardless of its format, that results from the analysis of a biological sample of an individual, or from another source enabling equivalent information to be obtained, and concerns genetic material").[74] California mandates a special format for the notice to individuals affected by a breach.[75] The notice must be in plain language and must be titled "Notice of Data Breach."[76] The notice must use at least 10-point font and include the following "clearly and conspicuously displayed" headlines: "What Happened," "What Information Was Involved," "What We Are Doing," "What You Can Do," and "For More Information."[77] The relevant statute also includes a template notice of breach that will "be deemed to be in compliance with" these format requirements.[78]

4.10 Personnel Records

In a lawsuit, the personnel files of California employees are often unavailable to the party seeking them until (1) there is a notice given to the employees and (2) the employees have the opportunity to object in court to the disclosure of their files.[79] Employee privacy rights have yielded, however, when respecting privacy rights would hinder the pursuit of a class action against an employer.[80] Courts have permitted class-action counsel alleging wage and hour violations to obtain the name, address, and telephone number of every current and former employee belonging to the allegedly aggrieved class, so long as the employee did not, after receiving notice, object in writing to contact by plaintiffs' counsel.[81] In *Belaire-West Landscape, Inc. v. Superior Court*, the Court of Appeal rejected the employer's suggestion to shield private employee information unless the employee affirmatively agreed to be contacted. *Belaire-West* reasoned that "no serious invasion of privacy" was involved, as

what was involved was only "contact information, not medical or financial details."[82] *Belaire-West* allowed an opt-out procedure and did not require an opt-in procedure, because "there was no evidence of any actual or threatened misuse of the information"[83] and because the "prompt payment of wages due an employee is a fundamental policy of this state."[84]

California courts have exalted the class-action procedure over employee privacy rights even when employees are on record as wanting to be left alone. In one case, where the defendant's employees had signed forms stating that they did not want to be contacted by plaintiffs' lawyers, the defendant argued that these forms revealed a heightened expectation of privacy that justified only opt-in discovery of the employees' private contact information. The Court of Appeal rejected this argument, ordering disclosure of employee addresses and telephone numbers unless the employees affirmatively opted out of the disclosure process.[85] And in some circumstances courts have even ordered disclosure of employee home addresses without permitting the affected individuals to object to their privacy being invaded.[86]

4.11 Background Checks

The federal Fair Credit Reporting Act (FCRA)[87] requires employers to give certain notices and access rights to applicants and employees on whom an employer is requesting a background report, and to give these individuals a chance to correct inaccuracies in the report. Compliance with the FCRA is complicated. Here we highlight some ways in which California's analogous statutes differ.

4.11.1 Credit reports

The California Consumer Credit Reporting Agencies Act (CCRAA)[88] governs certain credit-history information that a consumer credit reporting agency reports for use in evaluating an individual's fitness for employment or other permissible purposes. While resembling federal law on this subject, California law also requires employers to provide, on the form authorizing the credit report, a check-box that the individual can use to request a copy of the report, and California employers must, when notifying the consumer of any adverse action, identify the consumer credit reporting agency providing the report.[89] If the individual has indicated a desire for a copy of the report, then the report user must request that a copy be provided to the individual when the user requests its copy from the credit reporting agency. The report to the individual subject must be provided contemporaneously and at no charge.[90] California generally prohibits using credit reports for employment decisions.[91] "Credit report" does not include verification of past employment or income that does not otherwise include credit information (such as credit scores, records or history).[92] Credit reports are permissible as to the following eight job categories, if the applicant or employee receives written notice of which of these categories applies:

> (1) managerial positions (as defined in the "executive" exemption in the Wage Orders),
>
> (2) positions in the California Department of Justice,
>
> (3) sworn peace officer or other law enforcement positions,
>
> (4) positions for which the information is required to be obtained or disclosed by law,
>
> (5) positions involving regular access to bank or credit card information, social security numbers, dates of birth (for a purpose other than routine solicitation or processing of credit card applications in a retail establishment),

(6) positions where the person can enter into financial transactions on behalf of the company (includes being a named a signatory on the employer's bank or credit card account, authorization to transfer money, or enter contracts),

(7) positions involving access to proprietary or confidential information, and

(8) positions with regular workday access to cash totaling $10,000 or more belonging to the employer, a customer, or a client.[93]

4.11.2 Investigative consumer reports

The California Investigative Consumer Reporting Agencies Act (ICRAA)[94] governs the use of reports received from investigative consumer reporting agencies on an employee's or applicant's "character, general reputation, personal characteristics, and mode of living."[95] Unlike the federal FCRA, which limits the definition of an "investigative consumer report" to information gathered from personal interviews with the subject's neighbors and associates, the California ICRAA definition extends to collection of information from *any* source.

The ICRAA is an especially annoying statute, authorizing not only an action for actual and punitive damages plus attorney fees, but also the greater of actual damages or civil penalties of $10,000 per violation.[96] There is little case law interpreting whether these penalties apply to each report or each "violation" under the statute.

Constitutional questions. Some defendants have challenged the constitutionality of ICRAA as applied to criminal records requested for either tenancy or employment purposes. The California Supreme Court in 2018 rejected that challenge, holding that ICRAA is not unconstitutionally vague as applied to employment background checks. The Supreme Court thus eliminated one threshold defense in ICRAA cases and reinforced the importance of being familiar with the requirements of *both* ICRAA and CCRAA.[97]

Background checks. California applicants and employees, unlike individuals in most of America, have a right to see the investigative consumer report even if no adverse action has occurred. The employer must provide on the authorization form a box that an individual can check to request a copy of any report that is sought for reasons other than suspicion that the subject of the investigation has engaged in wrongdoing or misconduct.[98]

ICRAA also imposes detailed requirements. Thus, a California employer asking an employee or applicant to sign a form authorizing the employer to obtain an investigative consumer report from a reporting agency must disclose, in a writing consisting solely of the disclosure, information such as the following:[99]

- the permissible purpose for obtaining the report,
- that an investigative consumer report may be obtained (as the FCRA requires),
- that the report is being obtained for employment purposes (as the FCRA requires),
- that the report may include information on the individual's character, general reputation, personal characteristics, and mode of living (as the FCRA requires),
- the nature and scope of the investigation requested (which the FCRA requires only if the individual asks),
- the name, address, telephone number, and website of the investigative consumer reporting agency that will conduct the investigation (the website information is beyond what the FCRA requires),[100]

- that the investigative consumer reporting agency will, on reasonable notice, permit the individual to inspect the agency's files for information on the individual (beyond what the FCRA requires),
- that the individual may obtain a copy of the file, by paying the actual cost of duplication (beyond what the FCRA requires), and
- that the individual may obtain a summary of the file information by telephone, with proper identification (beyond what the FCRA requires).[101]

In a 2019 case, the Ninth Circuit, interpreting both FCRA and ICRAA, held that an employer's disclosure form for job applicants did not comply with the stand-alone-document requirement because it contained extraneous state disclosure requirements and was not clear and conspicuous.[102]

Moreover, there are California-specific limits on what may be reported by a background screening company. For example, under the FCRA, there is no longer any time limit affecting the search for records of criminal convictions for applicants making $75,000 or more.[103] In California, it's different. A California report generally must not contain reports of convictions that precede the report by more than seven years, regardless of an applicant's contemplated salary.[104]

On-line child care job posting. California has enacted extra requirements for on-line child care job posting services (including unlicensed childcare providers) and the background check service providers that service those companies.[105] Unlike the rules outlined above, which focused on the subject of the background screening, this new requirement focuses on informing parents of the availability of background screens. Childcare services providers' websites must now include a notice informing parents how to access free background screen information and a description of the types of background screens available from their website.[106]

Background check services providers have more extensive notice requirements, including a detailed description of what is included in the background check and a chart listing the databases searched, the sources of the data, date ranges, information on the frequency with which the information is updated, a description explaining how the databases are checked, and a list of counties for which no data were available.[107]

Investigations into suspicions of wrongdoing. The ICRAA notice, authorization, and disclosure requirements do not apply if an investigative consumer reporting agency is used to investigate suspicions of wrongdoing or misconduct[108] (although certain adverse action requirements in the FCRA and ICRAA do apply).

Employer-generated reports. While the FCRA applies only if the employer uses a consumer reporting agency, ICRAA applies to an employer's own investigative efforts to the extent that they involve obtaining certain public records without the use of a consumer reporting agency. Public records include records of arrest, indictment, conviction, civil judicial action, tax liens, and outstanding judgments.[109] If a California employer takes adverse action as a result of receiving such a public record, then the employee has an unwaivable right to receive a copy of the record.[110]

The first ICRAA appellate case, decided in 2005, involved an employer who had fired the plaintiff when he confessed that he had a felony conviction. The employer induced that confession by interrogating the plaintiff after obtaining an internet copy of a judicial decision mentioning his felony.[111] Eight business days after the interrogation, the employer gave the plaintiff the internet copy. The plaintiff then sued for untimely disclosure, seeking the minimum $10,000 penalty for an ICRAA violation.

The Court of Appeal made two holdings of interest: (1) the employer could not avoid ICRAA disclosure requirements by arguing that its dismissal of the plaintiff resulted from his admission to a felony conviction instead

of the employer's receipt of the internet report; the Court of Appeal aggressively read the ICRAA to say that the employer must disclose a copy of the public record if an adverse action was taken under circumstances in which the record was obtained, and (2) no specific deadline applies to the required disclosure; rather, the employer must furnish a copy "of any public record uncovered in a background check within a reasonable time after an investigation concludes."[112] Here, the Court of Appeal held, as a matter of law, that eight business days following the plaintiff's interrogation was a reasonable time in which to furnish a copy of the relevant documents, especially since the employer's due diligence in asking the plaintiff about his criminal record served to verify that the background "information was accurate and not the result of identity theft or otherwise erroneous."[113]

The employer must also provide a copy of all public records obtained even if no adverse action occurs, upon "completion" of the investigation, unless the individual has checked a box, on a written form, to waive the right to receive a copy of the public records.[114]

Criminal history information. Litigants have disputed whether criminal history information is "character" information governed by ICRAA or "creditworthiness" information governed by CCRAA. In 2012, a California federal district court held that ICRAA is unconstitutionally vague as applied to background reports containing criminal history information. The federal court, reviewing the two statutes and their legislative history, concluded that an item of information can be subject to either ICRAA or CCRAA, but not both. The criminal history information at issue in the case pertained to both the plaintiff's character and creditworthiness.

The federal court held that because there was no rational basis to decide that the information should be governed by one statute versus the other, ICRAA was unconstitutionally vague in that situation and so the federal court dismissed the ICRAA claim.[115] But the California Supreme Court has since held that ICRAA is not unconstitutionally vague and that employers can comply with both statutes simultaneously.[116]

4.12 Psychological Tests

California prohibits pre-employment or employment-related psychological tests except in extremely limited circumstances.[117] California applicants have successfully challenged, as an unlawful invasion of privacy, psychological tests (such as the MMPI—the Minnesota Multiphasic Personality Inventory) that require them to answer questions about their religious beliefs and sexual orientation, even though the test answers were used by only the professional administrators of the test and not by the employer itself.[118]

Pre-employment psychological examinations are forbidden just as pre-employment medical examinations are (see § 6.3.2).

4.13 Fingerprinting

Absent an exception, California employers must not fingerprint employees to provide information to a third person who could use the information against the employee.[119]

4.14 Photographing

California employers must not photograph employees to provide information to a third person who could use the information against the employee.[120] If an employee photograph is required, then the employer must pay the cost.[121]

4.15 Subcutaneous Identification Devices

Subverting the aspirations of intrusive employers (as well as certain concerned parents of wayward teenagers), the California Freedom from Subcutaneous Identification Device Act (our unofficial title only) forbids any person from requiring any individual to undergo the subcutaneous implanting of an identification device.[122]

An identification device is anything that can transmit personal information, such as a person's name, address, telephone number, email address, date of birth, driver's license number, religion, ethnicity or nationality, photographic, social security number, bank or credit card account number, etc.[123]

4.16 Email Usage

California employers can minimize employee expectations of privacy by issuing clear written policies. Some employees might expect to have privacy in their electronic communications, even when enabled by the employer's technology,[124] but the Court of Appeal has held that an employee's communications to her attorney on her work computer, via work email, were not confidential and thus were not protected by the attorney-client privilege, even though the employee had used her company-issued private password and had deleted the email messages.[125] The employee had no reasonable expectation of privacy, because her employer had a written policy, which she had signed, stating that company technology resources should be used only for company business, that employees must not use company resources to send or receive personal emails, and that the company would monitor its computers for compliance with the policy.

4.17 California Consumer Privacy Act of 2018 (as amended by the California Privacy Rights Act of 2020)

The CCPA is highly detailed legislation intended to further California's constitutional right to privacy by giving "consumers"[126] concrete ways to control how their personal information is used by covered businesses.[127] The CCPA regulations provide guidance on implementation.[128] Employers' obligations under this legislation must be considered holistically with other obligations (e.g., the duty to protect personal information outlined in § 4.8.2).

Effective on January 1, 2023, the California Privacy Rights Act (CPRA) amended the CCPA to eliminate the CCPA's exemption for employee personal information. Under the CPRA amendments, businesses both within and outside California that are covered[129] by the legislation are now required to treat job applicants, employees, directors, officers, independent contractors, and other members of the workforce as "consumers" as defined in the CCPA.[130] This legislation requires employers to (1) provide comprehensive information to employees and others about personal information handling practices; (2) facilitate the exercise of rights by such individuals to request certain specifics about the employer's practices; (3) delete personal information; and (4) limit the use of certain types of information and for certain purposes (all of which will implicate the employer's legitimate uses of such information for purposes outlined elsewhere in this book).

Under the amended law, California consumers, including applicants, employees, and independent contractors, have the right to (1) be provided notice prior to their data being collected; (2) ask a business to disclose what personal information it has collected; (3) know what personal information is being sold or disclosed and to whom[131]; (4) request and receive a copy of all of the above information in a readily useable format; (5) correct inaccurate personal information[132]; (6) request that the company delete their personal information (the right to be forgotten)[133]; (7) opt out of the sale of their personal information; (8) restrict the use of their "sensitive personal information" (if the purpose of the collection is to infer characteristics from the data);[134] and (9) be free from retaliation for exercising any CCPA rights. These rights are addressed in more detail below.

Notice Requirements

Under the CCPA, covered businesses are required to notify “consumers,” in advance of collection, of the categories of personal information the business will collect, for what purposes, whether the personal information has or will be shared (and the categories of third parties with whom it is shared), and what rights the consumers have with regard to such information, along with certain other specific requirements.[135]

Consumer Rights

Consumers have the right to request disclosure of what personal information about them has been collected and how it is used or shared ("the right to know"), the right to correct inaccuracies, the right to request deletion (subject to certain exceptions), the right to opt out of sale or sharing of personal information, and the right to limit the use and disclosure of “sensitive personal information.”[136]

Sensitive Personal Information

"Sensitive personal information” includes a consumer’s government identification (e.g., SSN), account log-in, financial accounts and card numbers including access credentials, geolocation, racial or ethnic origin, religious or philosophical beliefs, union membership, the contents of communications, genetic data, information concerning a consumer's health, sex life, or sexual orientation, or biometric information processed for the purpose of uniquely identifying a consumer.[137]

Non-discrimination

Consumers also have the right to not be discriminated against for exercising their CCPA rights.[138]

Third-party sharing and vendor management

In addition to issuing the required policies and notices and responding to the above-outlined requests, employers should ensure they have in place appropriate contractual terms with vendors and others with whom they share the personal information of consumers (including employees/job applicants), conduct appropriate due diligence, and implement appropriate data governance measures where required.[139]

Duty to Implement Reasonable Security Measures

The CCPA includes a requirement for employers to implement reasonable security measures to protect personal information. (See § 4.9.1.)

Remedies

Violations of the CCPA can trigger administrative fines ranging from $2,500 for each violation to $7,500 for each intentional violation or violations involving personal information of consumers under 16 years of age.[140] The CCPA does not provide a private right of action for any claims other than those relating to security breaches (see § 4.9.1).[141] Nor does the CCPA provide a basis for a private right of action under any other law (e.g., section 17200 of the California Business & Professions Code).[142]

Enforcement

The amended law went into effect on January 1, 2023 and has a one-year lookback period for any data collected by businesses from January 1, 2022. Enforcement began on July 1, 2023.[143]

[1] *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 489-90 (2000).

[2] *Compare Smith v. Fresno Irrigation Dist.*, 72 Cal. App. 4th 147, 165-66 (1999) (reversing judgment for plaintiff in lawsuit alleging wrongful termination when he was dismissed after testing positive for amphetamines, methamphetamines, and marijuana; random drug test was justified by hazards inherent in his employment) *with Luck v. S. Pac. Transp. Co.*, 218 Cal. App. 3d 1 (1990) (mandatory drug testing of computer programmer was breach of implied covenant of good faith and fair dealing as it was an unwarranted intrusion under California Constitution's privacy provisions; plaintiff was not a safety employee and no other compelling interests justified the testing). *Luck*'s "compelling interest" test for non-safety-related private sector drug testing was disapproved in *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 56-57 (1994).

[3] *Loder v. City of Glendale*, 14 Cal. 4th 846 (1997) (upholding applicant testing as part of generally applicable pre-employment exam, where employer's "substantial interest" overcame "relatively minor" intrusion on expectation of privacy, but disallowing testing of current employees seeking promotion), *cert. denied,* 522 U.S. 807 (1997); *see generally Hill v. Nat'l Collegiate Athletic Ass'n,* 7 Cal. 4th 1 (1994) (privacy rights depend in part on reasonable expectation of privacy, and invasion of privacy can be justified by "countervailing interests" or by consent). *See also Pilkington Barnes Hind v. Superior Ct.*, 66 Cal. App. 4th 28 (1998) (upholding suspicionless applicant testing).

[4] *Lopez v. Pac. Mar. Ass'n*, 657 F.3d 762 (9th Cir. 2011) (amended opinion issued on denial of rehearing and petition for rehearing en banc) (policy challenged not on privacy grounds, but rather on the theory that "one strike" rule discriminated against former addicts on the basis of disability).

[5] San Francisco, CA Municipal Code, Labor and Employment Code § 51.5 ((Employer Prohibited From Testing Employees).

[6] The EEOC tried to nudge federal law in California's direction law in 2012, in the EEOC's Enforcement Guidance on Consideration of Arrest and Conviction Records Under Title VII of the Civil Rights Act of 1964. See http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm (last visited Mar. 4, 2024). The EEOC argued that pre-employment inquiries about arrests not resulting in convictions have had a disparate impact on applicants in protected classifications such as national origin and race, and that use of arrest records "is not job related and consistent with business necessity." This approach would still leave employers free, of course, to consider the underlying facts that led to the arrest.

[7] Lab. Code § 432.7. Exceptions exist for certain types of arrests for peace officers and health care employees. *See also* Gov't Code § 12952(a)(3) (employers, in checking conviction history on an applicant, generally must not consider or relay information about arrests not followed by conviction, about referrals to pretrial or post-trial diversion program, or about convictions that have been sealed, dismissed, expunged, or statutorily eradicated by law).

[8] Lab. Code § 432.7(a)(1).

[9] *Id*. By special exception, community youth athletic programs may request criminal history information from the Department of Justice for both volunteer coaches and hired coach candidates. Pen. Code § 11105.3.

[10] Lab. Code § 432.8.

[11] *Starbucks Corp. v. Superior Ct.*, 168 Cal. App. 4th 1436 (2008) (*Starbucks I*). And the mischief continued. The trial court permitted class counsel to conduct further discovery to find a "suitable" class representative, and ordered Starbucks to review job applications to find former job applicants with prior marijuana convictions to reveal to class counsel, unless the applicants affirmatively opted out to a neutral administrator. In *Starbucks Corp. v. Superior Ct.*, 194 Cal. App. 4th 820 (2011) (*Starbucks II*), the Court of Appeal granted a writ of mandate against this discovery, noting that by providing for the disclosure of job applicants with minor marijuana convictions, the lower court ironically was violating the very privacy rights contained in "marijuana reform legislation" that the class action purported to enforce.

[12] *Garcia-Brower v. Premier Automotive Imports of CA, LLC*, 55 Cal. App. 5th 961 (2020).

[13] AB 1008, codified in Gov't Code § 12952, repealing Labor Code § 432.9. Exceptions exist for cases where the law requires a criminal history background check for the position in question. Note that California in some cases *requires* a criminal background check. Effective 2017, transportation network companies (e.g., Uber, Lyft) must obtain a criminal background report on each participating driver. A transportation network company must not contract with or employ any driver who (i) is registered on the U.S. Department of Justice National Sex Offender Public Website, (ii) has been convicted of any of certain terrorism-related or violent felonies, or (iii) has been convicted, within the last seven years, of any misdemeanor assault or battery, any domestic violence offense, driving under the influence of alcohol or drugs, or any of a specified list of felonies. Public Util. Code § 5445.2.

[14] 2 Cal. Regs. Code § 11017.1 and blackline of amendments at https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2023/07/Final-Text-of-Modifications-to-Employment-Regulations-Regarding-Criminal-History.pdf (last visited Apr. 13, 2024).

[15] *Id*.

[16] Gov't Code § 12952(a). Exceptions apply for special jobs. *Id.* § 12952(d).

[17] Gov't Code § 12952(c)(1)(A).

[18] Gov't Code § 12952(c)(3).

[19] Cal. Code Regs. tit. 2, § 11017.1(c)(2)(D)(i)-(ii).

[20] Gov't Code § 12952(c)(5) (employer must inform applicant of any existing procedure employer has for applicant to challenge the decision or request reconsideration, and of the applicant's right to file a complaint with the DFEH).

[21] Lab. Code § 432.7(m).

[22] 2 Cal. Code Regs. § 11017.1(j)(2).

[23] 2 Cal. Code Regs. § 11017.1(j) (1).

[24] The ordinance would permit a conviction check after a live interview, but under state law the employer must first make a conditional offer of employment. The ordinance applies to positions at which an employee will work at least eight hours a week in San Francisco. There is also an annual reporting requirement.

[25] 49 S.F. Police Code §§ 4901-4920.

[26] Ordinance No. 2024-0012, Los Angeles County Code of Ordinances, tit. 8, div. 6, ch. 8.300.

[27] *Id.* at ch. 8.300.040(P).

[28] *Id.* at ch. 8.300.050(B)(3).

[29] *Id*. at ch. 8.300.050(B)(4).

[30] *Id*. at ch. 8.300.050(D)(3).

[31] *Id*. at ch. 8.300.050 (G).

[32] *Id*. at ch. 8.300.050(I)(1)(b).

[33] *Id*. at ch. 8.300.050(I)(2)-(3).

[34] *Id*. at ch. 8.300.050(J).

[35] *Id.* at ch. 8.300.050(K).

[36] *Id*. at ch. 8.300.050(K)(6).

[37] *Id*. at ch. 8.300.080.

[38] *Id*. at ch. 8.300.100.

[39] *Id*. at ch. 8.300.110.

[40] Los Angeles, Mun. Code, Art. 9, Ch. 18, § 189 et seq. Under the Los Angeles Fair Chance Initiative for Hiring, the definition of "employee" extends to those individuals who are working an average of two hours per week within the geographic limits of Los Angeles, even if those two hours are telecommuting from an LA address. Id. § 189.01(l).

[41] See https://bca.lacity.org/fair-chance (visited August 13, 2024). The assessment/reassessment form is found at https://bca.lacity.gov/Uploads/fciho/Ban%20the%20Box%20Individual%20Assessment%20and%20Reassessment%202.1.22%20fillable.pdf (visited August 13, 2024).

[42] Lab. Code § 432.2.

[43] Health & Safety Code § 120980(f) ("Except as [used for insurance risk purposes], the results of an HIV test, as defined in subdivision (c) of section 120775, that identifies or provides identifying characteristics of the person to whom the test results apply, shall not be used in any instance for the determination of insurability or suitability for employment.").

[44] Gov't Code § 12940(o).

[45] Penal Code § 632.

[46] Penal Code § 637.2.

[47] Penal Code § 632(d). *People v. Guzman*, 8 Cal. 5th 673, 677 (2019) ("Within the context of defendant's criminal trial, the recording in this case was relevant evidence. By the express terms of the Right to Truth-in-Evidence provision, therefore, the recording could 'not be excluded.'") (quoting Cal. Const. Art. I, § 28(f)(2)).

[48] Lab. Code § 435.

[49] *Sanders v. Am. Broad. Co.*, 20 Cal. 4th 907, 923 (1999) (employees talking around a cubicle could sue ABC news crew for surreptitiously videotaping).

[50] *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272 (2009).

[51] *Id*. at 277.

[52] *Id*. at 300-301.

[53] Civ. Code § 56.20(a).

[54] Civ. Code § 56.20(c).

[55] Civ. Code § 56.20(b).

[56] AB 1697, 2023 bill amending Civ. Code §§ 56.11, 56.21.

[57] Lab. Code § 3762(c).

[58] Civ. Code § 1798.85(a)(1)-(2), (4)-(5).

[59] Civ. Code § 1798.85(a)(3).

[60] Civ. Code § 1798.81.5(b).

[61] Civ. Code § 1798.81.5(c).

[62] Lab. Code § 980(a).

[63] Lab. Code § 980(b)(1)-(3).

[64] Lab. Code § 980(e).

[65] Lab. Code § 980(c).

[66] Lab. Code § 980(d).

[67] *Ignat v. Yum! Brands, Inc.*, 214 Cal. App. 4th 808, 819 (2013) ("limiting liability for public disclosure of private facts to those recorded in a writing is contrary to the tort's purpose, which has been since its inception to allow a person to control the kind of information about himself made available to the public—in essence, to define his public persona").

[68] Civ. Code §§ 1798.100(e); 1798.81.5(d)(1)(A).

[69] Civ. Code § 1798.150(a)(1)(A).

[70] Civ. Code § 1798.155(a).

[71] Civ. Code § 1798.80(e) (defining "personal information" as including "any information that identifies, relates to, describes, or is capable of being associated with, a particular individual, including, but not limited to, his or her name, signature, social security number, physical characteristics or description, address, telephone number, passport number, driver's license or state identification card number, insurance policy number, education, employment, employment history, bank account number, credit card number, debit card number, or any other financial information, medical information, or health insurance information").

[72] *See* Civ. Code § 1798.82(h) (defining "personal information" for purposes of required data breach notices).

[73] Civ. Code § 1798.82(a).

[74] Civ. Code §§ 1798.82(h)(1)(D), (E), (H); 1798.82(i)(5).

[75] Civ. Code § 1798.82(d).

[76] Civ. Code § 1798.82(d)(1).

[77] *Id.*

[78] Civ. Code § 1798.82(d)(1)(D).

[79] *See* Civ. Proc. Code §§ 1985.6, FI: 0(d) (requiring advance notice to individual when individual's employment records are being subpoenaed).

[80] A rare exception occurred when the Court of Appeal struck down a discovery order that an employer identify all applicants who had reported marijuana convictions on their job applications. *Starbucks Corp. v. Superior Ct.*, 194 Cal. App. 4th 820 (2011). In another victory for privacy, the Court of Appeal in a wrongful-termination case protected from disclosure, via interrogatory answers, personal information that the plaintiff had sought regarding the age, contact information, date of termination, and reason for termination of the defendant employer's former employees, among other types of information. *Life Techs. Corp. v. Superior Ct.,* 197 Cal. App. 4th 640, 655-56 (2011) (trial court abused discretion in ordering answers to interrogatories without evaluating whether a compelling need for information outweighed third-party privacy and whether less intrusive means would yield the information sought, without giving sufficient notice affording former employees a simple, reasonable means of objecting to disclosure of personal information, and without providing for protection of any information ultimately disclosed). But the California Supreme Court disapproved of *Life Techs.* in *Williams v. Superior Ct.,* 3 Cal. 5th 531, 557 (2017), stating that "[o]nly obvious invasions of interests fundamental to personal autonomy must be supported by a compelling interest," leaving plaintiffs and defendants to fight over the compelled disclosure of all but the most private aspects of personal employee information.

[81] *Belaire-West Landscape, Inc. v. Superior Ct.*, 149 Cal. App. 4th 554 (2007).

[82] *Id.* at 561-62.

[83] *Id.* at 562.

[84] *Id.* (quoting *Phillips v. Gemini Moving Specialists*, 63 Cal. App. 4th 563, 571 (1998)).

[85] *Crab Addison, Inc. v. Superior Ct.*, 169 Cal. App. 4th 958 (2008) (employees' execution of release forms objecting to employer's disclosure of contact information to third parties did not preclude discovery of contact information in class action against employer for violation of wage and labor laws).

[86] *Stone v. Advance Am.*, No. 08cv1549 WQH (WMc), 2010 WL 5892501 (S.D. Cal. Sept. 21, 2010) (distinguishing *Belaire-West Landscape* and ordering that contact information be produced for former employees employed during the class period, without prior notice to them, where plaintiff claimed former employees during class period were percipient witnesses).

[87] 15 U.S.C. § 1681 et seq.

[88] Civ. Code § 1785.1 et seq.

[89] Civ. Code § 1785.20.5(a).

[90] *Id*.

[91] Lab. Code § 1024.5.

[92] Lab. Code § 1024.5(c)(1).

[93] Lab. Code § 1024.5(a)(1)-(8). There is an exemption for financial institutions subject to the Gramm-Leach-Bliley Financial Services Modernization Act of 1999. Under Civil Code section 1785.20.5(a), the disclosure to the consumer when a credit report is ordered for employment purposes must identify the applicable exception under Labor Code section 1024.5.

[94] Civ. Code § 1786 *et seq*.

[95] Civ. Code § 1786.2(c).

[96] Civ. Code § 1786.50(a)(1).

[97] *See Connor v. First Student, Inc.*, 5 Cal. 5th 1026, 1038 (2018) (holding that both the ICRAA and CCRAA may apply to the same report and that an employer may be responsible to comply simultaneously with both statutes).

[98] Civ. Code § 1786.16(b)(1), (c).

[99] Civ. Code § 1786.16(a)(2).

[100] California employers procuring a report must also disclose the website of the investigative consumer reporting agency. Civ. Code § 1786.16(a)(2)(B)(vi). If the investigative consumer agency does not have a website, then the consumer must receive a telephone number to learn about the investigative consumer agency's privacy practices, including whether the consumer's personal information will be sent outside the United States or its territories. Civ. Code § 1786.16(a)(2)(B)(vi).

[101] Civ. Code § 1786.22(b).

[102] *Gilberg v. Cal. Check Cashing Stores*, LLC, 913 F.3d 1169, 1176 (9th Cir. 2019).

[103] 15 U.S.C. § 1681c(b)(3).

[104] Civ. Code § 1786.18(a)(7) (investigative consumer reporting agency may not report records of convictions that from date of disposition, release, or parole antedate report by more than seven years). Section 1786.18(b)(2) exempts reports for employers explicitly required by government regulatory agencies to check for certain records.

[105] Bus. & Prof. Code §§ 18890 et seq.

[106] *Id.* § 18890.2(a), (b).

[107] *Id.* § 18890.2(c).

[108] Civ. Code § 1786.16(c).

[109] Civ. Code § 1786.53(a)(3).

[110] Civ. Code § 1786.53(b)(4).

[111] *Moran v. Murtaugh, Miller, Meyer & Nelson*, 126 Cal. App. 4th 323 (2005) (holding—in opinion that superseded the lower court decision and that did not reach the ICRRA issues—that trial court could look beyond the pleadings and weigh evidence when deciding how likely a "vexatious litigant" was to prevail), *aff'd on other grounds,* 40 Cal. 4th 780 (2007).

[112] *Id.,* 126 Cal. App. 4th at 336.

[113] *Id.*

[114] Civ. Code § 1786.53(b)(1)-(3). Copies of the records must be provided within seven days. *Id.*

[115] *Moran v. The Screening Pros, LLC*, 2012 U.S. Dist. LEXIS 158598 (C.D. Cal. Sept. 28, 2012), *rev'd*, 923 F.3d 1209 (9th Cir. 2019). The plaintiff sued Screening Pros for issuing a background check report on him that contained his criminal history, in violation of the ICRAA. Screening Pros moved to dismiss, successfully arguing that ICRAA is unconstitutionally vague as to criminal history information, leaving persons of reasonable intelligence unable to tell whether that information is "character" information that ICRAA governs or "creditworthiness" information that the CCRAA governs. This distinction matters because ICRAA imposes stricter duties and more severe penalties—such as the option to seek $10,000 in statutory damages in lieu of damages. Following the California Supreme Court's decision in *Connor v. First Student*, the Ninth Circuit reversed the district court and remanded for further proceedings.

[116] *Connor v. First Student, Inc.*, 5 Cal. 5th 1026, 1035-36 (2018).

[117] Gov't Code § 12940(e).

[118] *Soroka v. Dayton Hudson Corp.*, 235 Cal. App. 3d 654 (1991) (decision not officially published), *rev. dismissed,* 862 P.2d 148 (1993).

[119] Lab. Code § 1051.

[120] *Id. See also Young v. Kenco Logistic Servs., LLC,* No. A153023, 2019 WL 5654520, at *8 (Cal. Ct. App. Oct. 31, 2019) (unpublished) (finding no section 1051 violation where the plaintiff failed to allege transmission of video recordings by the employer to a third party).

[121] *See* Lab. Code § 401.

[122] Civ. Code § 52.7.

[123] Civ. Code § 52.7(h)(1), (3).

[124] See *City of Ontario v. Quon*, 560 U.S. 746, 760 (2010) (assuming, *in arguendo*, that a police officer "had a reasonable expectation of privacy in the text messages sent on the pager provided to him by the City").

[125] *Holmes v. Petrovich Dev. Co.*, 191 Cal. App. 4th 1047, 1068 (2011); *see also Militello v. VFARM 1509*, 89 Cal. App. 5th 602, 613–14 (2023) ("presumptively confidential communications sent from and received on a company-owned computer will not be protected from disclosure as privileged if the computer-user had been 'warned that it was to be used only for company business, that e-mails were not private, and that the company would randomly and periodically monitor its technology resources to ensure compliance with the policy.'").

[126] Civ. Code § 1798.140(i).

[127] A covered business is any for-profit business that collects California consumers' personal information and meets any one of the following criteria: (1) had an annual gross revenue of above $25 million in the prior calendar year, (2) annually collects, stores, analyzes, discloses, or otherwise uses the personal information of 100,000 or more California consumers or households, or (3) derives at least 50% of its annual revenue from selling or sharing the personal information of California consumers. Civ. Code § 1798.140(d).

[128] Civ. Code § 1798.185.

[129] Civ. Code § 1798.140(d).

[130] Civ. Code § 1798.140(i).

[131] Civ. Code § 1798.110.

[132] Civ. Code § 1798.106.

[133] Civ. Code § 1798.105.

[134] Civ. Code § 1798.121.

[135] Civ. Code §§ 1798.110, .130.

[136] Civ. Code §§ 1798.106, .110, .115, .120, .121, .130.

[137] Civ. Code §§ 1798.121, .140(ae).

[138] Civ. Code § 1798.125.

[139] Civ. Code §§ 1798.140(j), (ag).

[140] Civ. Code § 1798.155(a).

[141] Civ. Code § 1798.150(c).

[142] *Id*.

[143] Civ. Code § 1798.185(d).

5. Litigation Issues

California stacks the litigation deck in favor of employees suing employers. Purporting to justify this one-sided treatment is the notion that employers have ample resources while suing employees do not, and that California should encourage employees to invoke the numerous statutory provisions designed to protect them from oppressive employers. Accordingly, California has

- made jury trials available to suing employees, while permitting courts to deny jury trials in certain wage and hour cases to defending employers (see § 5.1),
- often refused to enforce employer-mandated arbitration agreements (see § 5.2),
- refused to enforce employer-mandated venue-selection and choice-of-law agreements (see § 5.3),
- created a common law tort of wrongful termination in violation of public policy (see § 5.4),
- expanded theories of contract liability for wrongful termination (see §§ 5.5, 5.6),
- tilted the procedural playing field against employers seeking summary judgment (see § 5.7),
- broadened employer liability for defamation (see § 5.8),
- broadened employer liability for misrepresentation (see § 5.9),
- broadened employer liability to third parties for employee torts (see § 5.10),
- permitted full tort remedies for violations of employment discrimination statutes (see § 5.11),
- created one-sided rules for awarding attorney fees and costs to prevailing parties (see § 5.12),
- applied unfair competition laws to create a longer limitations period for employment claims (see § 5.13), and
- encouraged class actions against employers to pursue wage and hour claims (see § 5.14).

5.1 Special Rules for California Jury Trial

5.1.1 Employers can't avoid jury with mandatory predispute jury waivers

In many states, employers have avoided jury trials while maintaining the procedural advantages of litigating in court by agreeing with employees and applicants to have employment disputes heard by a judge sitting without a jury. This predispute selection of a bench trial avoids the risk of unpredictable, excessive jury verdicts while also retaining the right to seek judicial appellate review. In California it's different. The California Supreme Court has held that these agreements are invalid, on the ground that waiving a jury trial requires a specific statutory authorization, such as the California Arbitration Act.[1] (A concurring justice, calling California "out of step with the authority in other state and federal jurisdictions—most of which have permitted predispute jury waivers"[2]—urged

the California Legislature to authorize predispute waivers of jury trial, to permit trials by the court.[3] No such statutory development has been forthcoming or appears likely in the near future.)

5.1.2 Employers sometimes can be deprived of a jury trial

While juries often sympathize with individuals who sue corporations, those plaintiffs are less sympathetic in certain cases, such as when they have signed contracts saying they were independent contractors and now claim employee benefits on a claim that they were really employees, or when they have earned large dollars as a salaried employee and now seek overtime pay on a claim that their employer misclassified them as exempt. Although California employers should be entitled to a jury trial in these cases, plaintiffs have circumvented that right by asserting their claims under the Unfair Competition Law, which enables them to recover unpaid monies as a matter of equitable relief decided by the court sitting without a jury.[4] And even when plaintiffs also sue under the Labor Code (on which a jury trial is available), some courts have tried the UCL claim first, without a jury, to reach a result that makes a jury trial unnecessary.[5]

5.2 California's Hostility to Arbitration of Employment Disputes

The Federal Arbitration Act. The FAA promotes the enforceability of written arbitration agreements, including those made in the employment context. The FAA declares that courts can invalidate contractual agreements to arbitrate only on the same grounds that would invalidate contractual promises generally, such as unconscionability or duress. This declaration reflects a "liberal federal policy favoring arbitration,"[6] which preempts special state rules that disfavor arbitration agreements. Accordingly, courts throughout America generally enforce agreements by which parties agree to arbitrate rather than litigate in court.

The California Arbitration Act. The CAA itself authorizes enforcement of arbitration agreements,[7] and California courts give lip service to the existence of a "'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.'"[8] But the reality of the employment context has been different, as California has both legislatively and judicially repeatedly evinced hostility toward employer-mandated arbitration agreements.

Limited preemptive effect of the FAA. The FAA has inherent limits. *First*, the FAA, for historical reasons, excludes a certain class of transportation workers. Section 1 of the FAA exempts employment contracts for "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[9] The U.S. Supreme Court has explained that this exemption is for "transportation workers."[10] The California Court of Appeal has construed the Section 1 exemption broadly, against companies trying to enforce arbitration agreements, thus holding that the exemption encompasses truck and delivery drivers even though they never personally crossed state lines, on the rationale that they still work in the stream of goods moving through interstate commerce.[11] In *Southwest Airlines Co. v. Saxon,* the U.S. Supreme Court explained that arbitration-exempted transportation workers under Section 1 of the FAA are those workers who "play a direct and necessary role in the free flow of goods across borders" and "must be actively engaged in transportation of those goods across borders via the channels of foreign or interstate commerce."[12] Applying this standard, he Supreme Court concluded that workers "who load cargo on and off airplanes" are transportation workers under the FAA.[13]

Second, the FAA applies to "contract[s] evidencing a transaction involving commerce."[14] The Supreme Court has interpreted the FAA as expressing "an expansive congressional intent" "to exercise Congress' commerce power to the full."[15] Interstate business activities by an employer fall under the FAA's reach.

The NLRA does not defeat arbitration agreements. Both the California and U.S. Supreme Courts have rejected plaintiffs' arguments that arbitration agreements with class action waivers run afoul of the National Labor

Relations Act and its protection of concerted activity by employees for their mutual aid and protection. (See § 5.2.4.)

Statutory hostility to arbitration. California has enacted several anti-arbitration statutes.

Labor Code section 229. This provision purports to void any private agreement to arbitrate wage disputes.[16] Although the U.S. Supreme Court in 1987 struck down section 229 as preempted by the FAA,[17] the section remains on the books, serving as a snare for unwary employers that move to compel arbitration without establishing that the parties' transactions are in interstate commerce and thus covered by the FAA.[18] Section 229 also remains in effect, of course, as to cases exempt from the FAA, such as cases involving certain transportation workers.[19]

A 2019 Court of Appeal decision recognized the limited effect of this voided section of California employment law. A clever plaintiff's lawyer argued in an unpaid wages lawsuit that when contracting parties used a standard clause to choose California law to govern their arbitration agreement, those parties meant to adopt section 229, which invalidates agreements to arbitrate wage disputes. This argument convinced a trial judge, who denied the employer's motion to compel arbitration, reasoning that the parties, in choosing California law, had thereby agreed to have section 229 apply. But the Court of Appeal reversed this mechanical result and held that because the parties obviously intended to arbitrate all disputes arising from the employment relationship, they could not have meant to negate that intent as to wage claims.[20]

The Ralph and Bane Acts. California legislators reflected further anti-arbitration animus in the Ralph Act[21] and the Bane Act,[22] which, by a 2014 amendment, require that any waiver of procedural rights with respect to a violation must be "knowing and voluntary … and expressly not made as a condition of … providing … services."[23] The Court of Appeal recognized that this provision runs afoul of the FAA mandate against state rules that single out arbitration provisions for suspect status, and thus reversed a trial court order refusing to direct Ralph and Bane Act claims to arbitration in accordance with a mandatory employment contract.[24]

Labor Code section 432.6 and Government Code section 12953. Assembly Bill 51 (AB 51), which was passed in 2019, added Labor Code section 432.6 and Government Code section 12953. These provisions purported to make unlawful any mandatory employment arbitration agreements entered into after January 1, 2020. The statute as written attempted to avoid rendering mandatory arbitration agreements *per se* unlawful and unenforceable in contravention of the FAA and Supreme Court precedent, and instead attempted to impose potential civil and criminal sanctions based on the formation of such agreements. The Ninth Circuit saw beyond the statute's attempted distinction and held that AB 51 is preempted by the FAA.[25] However, AB 51 remains in effect as to any arbitration agreements not covered by the FAA. This legislative attempt to avoid mandatory arbitration of employment claims is discussed further in § 5.2.4 below.

The legislative hostility intensifies. California's State Legislature also has enacted laws voiding arbitration agreements where sponsors of arbitration agreements fail to timely pay arbitration fees. (*See* § 5.2.4.)

Judicial hostility toward arbitration. Judges have joined legislators in evincing hostility to arbitration. California employers implementing mandatory arbitration agreements, while hoping to avoid runaway juries and eliminate expensive and time-consuming class actions, can run a harrowing judicial gauntlet. A judge intent on defeating arbitration has many weapons to deploy, ranging from (a) refusing to find consent to the agreement, to (b) finding agreement provisions unconscionable and non-severable, to (c) finding the employer has waived the agreement, to (d) refusing to confirm an arbitration award in the employer's favor. Courts have also parsed arbitration agreement language to find it authorizing *class arbitration*, which almost no employer would ever want.

5.2.1 The U.S. Supreme Court's repeated rejections of California hostility to arbitration

The U.S. Supreme Court repeatedly has invoked the FAA to strike down California-created obstacles to arbitration.

- In 1984, *Southland Corp. v. Keating* overturned the California Supreme Court and held that franchisees suing under California's Franchise Investment Law must abide by their contractual agreement to arbitrate.[26]

- In 1987, *Perry v. Thomas* held that the FAA preempts California Labor Code section 229, which authorizes non-union employees to sue for unpaid wages "without regard to the existence of any private agreement to arbitrate."[27]

- In 2008, *Preston v. Ferrer* reversed a California Court of Appeal decision that empowered the Labor Commissioner, instead of an arbitrator, to decide the validity of an arbitration agreement signed by entertainment workers suing under the California Talent Agencies Act.[28]

- In 2011, *AT&T Mobility v. Concepcion*[29] held that the FAA preempts California's *Discover Bank* rule, which invalidated class action waivers in arbitration agreements.[30]

- Later in 2011, *Sonic-Calabasas A, Inc. v. Moreno* vacated a California Supreme Court decision that had found an arbitration agreement contrary to public policy and unconscionable because it required employees to waive their right to a Berman hearing.[31] The U.S. Supreme Court directed the California Supreme Court to reconsider its decision in light of *AT&T Mobility v. Concepcion.*[32]

- In 2015, *DirecTV, Inc. v. Imburgia* reversed a California Court of Appeal decision that had affirmed a refusal to enforce an arbitration agreement containing a class action waiver. The Court of Appeal, in interpreting the arbitration agreement, had failed to follow general contract principles and instead had followed a rule of contractual interpretation uniquely hostile to arbitration. This approach failed to give "due regard … to the federal policy favoring arbitration."[33]

- In 2019, *Lamps Plus v. Varela* applied the FAA to correct a Ninth Circuit decision involving California law.[34] Lamps Plus employees had filed a class action against their employer for compromising their private data. When Lamps Plus moved to enforce the employees' agreement to arbitrate "all disputes … arising out of … the employment relationship," the district court ordered arbitration but said the arbitration could include class claims.[35] The Ninth Circuit approved class arbitration because "ambiguous" agreement language could be read to authorize class arbitration. The U.S. Supreme Court reversed the Ninth Circuit because ambiguity, like silence, is an insufficient basis to conclude that parties agreed to a class arbitration that would sacrifice the principal advantages of individual arbitration contemplated by the FAA.[36]

- In 2022, *Viking River Cruises, Inc. v. Moriana* held that PAGA claims can be split into individual and non-individual components, with the individual component subject to arbitration under the FAA. Prior to *Viking River Cruises*, California courts consistently held that pre-dispute arbitration agreements do not apply to PAGA claims and rejected so-called "claim splitting."

5.2.2 Unconscionability doctrine used to invalidate arbitration agreements

In the United States generally, employers make arbitration agreements a condition of employment. Such agreements have certain common features: they waive court and jury trial while reserving the employer's right to seek judicial relief for trade secret violations; they limit discovery; they share the costs of arbitration between the

parties; and they sometimes limit the remedies available and the time in which to file a claim. California, however, casts a peculiarly disapproving gaze on all these provisions. The leading case is the California Supreme Court's 2000 decision in *Armendariz v. Foundation Health Psychcare Services.*[37] Under *Armendariz* and its progeny, California courts refuse to enforce arbitration agreements if they are "unconscionable," and define unconscionability very broadly.[38]

Armendariz arose in the context of an employer-employee agreement, and businesses since have argued that the harsh anti-arbitration rules set forth in *Armendariz* should not apply in other contexts, such as where the individual contesting arbitration is, for example, a partner suing a partnership or an independent contractor suing the contractor's principal. But California courts have applied *Armendariz* broadly, extending it to any situation characterized by "a power imbalance analogous to that of an employer-employee relationship."[39]

Armendariz explains that a contract is unenforceable if it is unconscionable *both* procedurally and substantively. Procedural unconscionability addresses the circumstances of negotiating and forming contracts, focusing on oppression or surprise due to unequal bargaining power. Substantive unconscionability involves terms that the court deems overly harsh or one-sided. Both forms of unconscionability must exist for a contract to be unenforceable, with the two forms evaluated on a "sliding scale," so that the more substantively unconscionable the contract is, the less evidence of procedural unconscionability is needed to rule the contract unenforceable, and vice versa. This vague standard often empowers courts to strike down arbitration agreements they don't like.

Judicial hostility toward arbitration was on full display in a trial court decision that the Court of Appeal corrected in 2020. A fitness company's vice president sued the company after signing an arbitration agreement. The agreement recited that it had been negotiated, that the employee should seek legal advice about it, that the agreement covered all disputes between the parties, and that arbitrations are subject to rules the employee could find on the corporate intranet. The trial court denied the employer's motion to compel arbitration because the agreement was a "contract of adhesion" and because it limited the number of depositions to five, absent a ruling by the arbitrator. In reversing, the Court of Appeal explained:[40]

> As a matter of general contract law, California courts require both procedural and substantive unconscionability to invalidate a contract.… We apply a sliding scale, meaning if one of these elements is present to only a lesser degree, then more evidence of the other element is required to establish overall unconscionability.… In other words, if there is little of one, there must be a lot of the other. We reverse because there was little or none of either element.

More specifically, the trial court was out of line, even by California standards, for these reasons. *First, there was little procedural unconscionability.* The agreement was not one of "adhesion," even if the contractual text came from a corporate word processor. The key issues are surprise and oppression, not adhesion. Here, there was no surprise as the arbitration agreement was prominently displayed, and there was little oppression in that there was an opportunity to negotiate, even if arbitration was a condition of employment. *Second, there was little or no substantive unconscionability.* The plaintiff did not show that a five-deposition limit would create a significant barrier to pursuing his claims, and the arbitrator presumably would act reasonably to authorize more discovery upon a showing of substantial need.[41]

5.2.3 California's broad view of procedural unconscionability

Analyses of procedural unconscionability focus on "oppression" and "surprise" arising from unequal bargaining power. A California court can sense "oppression" in light of (1) how much time an employee has to sign a contract, (2) any pressure exerted to have the employee sign, (3) the contract's length and complexity, (4) the employee's level of education and experience, and (5) whether the employee's review was aided by legal counsel.[42] And courts can find "surprise" in the context of contracts containing long sentences or paragraphs containing legalistic language written in extremely small font.[43]

Limited value of opt-out procedures. Some employers have sought to eliminate problems with substantively unconscionable arbitration agreements by eliminating procedural unconscionability. They have sought to do this by proposing written arbitration agreements that employees can reject simply by opting out of the agreement within a reasonable time, such as 30 days, so that the resulting agreement, even if deemed substantively unconscionable, could nevertheless be enforceable because it is not procedurally unconscionable.

But then came the California Supreme Court's 2007 decision in *Gentry v. Superior Court* (*Circuit City Stores, Inc.*).[44] *Gentry* decided that even an easily understood one-page opt-out form may be insufficient to avoid a finding of procedural unconscionability. Thus, *Gentry*, disagreeing with the Court of Appeal and with two Ninth Circuit cases,[45] refused to accept that Circuit City's arbitration program—which permitted employees to opt out of the program within 30 days of written notice and even advised that employees could consult an attorney about the opt-out decision—was free of procedural unconscionability.

Gentry reasoned that the opt-out form gave employees a "highly distorted picture of the arbitration Circuit City was offering[,]" such that only "a legally sophisticated party" would have understood the relative advantages of judicial litigation. *Gentry* also speculated that employees "likely" "felt at least some pressure not to opt out of the arbitration agreement."[46] A dissenting opinion argued that there were no grounds to find that Circuit City had unfairly coerced or induced employees not to opt out of the arbitration program.[47]

Second-guessing presentations of arbitration agreements. Contracting parties often incorporate other documents by reference, a practice that is enforceable so long as the documents are readily available. This permissible contractual practice of incorporation by reference should be appropriate in arbitration agreements as well as other agreements, as the FAA would forbid any special rule that disfavors arbitration agreements. And so it is that throughout most of America an arbitration agreement will mention rules of arbitration that a party can easily find on the internet. Although the Court of Appeal once held that an arbitration clause in a mandatory employment agreement was procedurally unconscionable because the employer had failed to provide the employee with a complete copy of the arbitration rules,[48] the California Supreme Court then clarified the point that a mere failure to attach arbitration rules does not itself make an arbitration agreement unconscionable; rather, a failure to attach the rules will call for closer scrutiny of the "artfully hidden" rules to see if they are substantively unconscionable.[49]

Another decision found procedural unconscionability where the employer failed to give the employee enough time to review the agreement or have it reviewed by legal counsel, and failed to give the employee a copy of the signed agreement.[50]

The risk of procedural unconscionability looms large when the employee lacks English skills and receives only an English version of the arbitration agreement. In a 2016 non-employment case with implications for employment arbitration agreements, the Court of Appeal found procedural unconscionability where an arbitration agreement was presented in English to renters of mobile home spaces who did not understand English.[51] And a 2019 employment case found procedural unconscionability where the employee was not fluent enough in English to fully understand documents written in English and had to sign them "on the spot" to get a job.[52]

A Ninth Circuit opinion, applying California law, found procedural unconscionability where the employer, having presented the arbitration agreement on a "take it or leave it" basis, also failed to provide the actual terms of the arbitration policy to the employee until three weeks after she had agreed to be bound by it as a condition of employment.[53]

In 2019 the California Supreme Court, in *OTO L.L.C. v. Kho*,[54] held that an arbitration agreement was unenforceable as to a wage claim because the employer put the agreement in 8.5 point font and pressured the employee to sign it, and because the agreement's litigation-like arbitral procedures were unduly complex

compared with the Labor Commissioner's employee-friendly Berman hearing process. Three years into his employment, the plaintiff was approached at his desk and asked to sign the arbitration agreement, which featured procedures mirroring those found in litigation. *Kho* found a high degree of procedural unconscionability because the plaintiff had to sign the agreement without having a real chance to review it, because the agreement was lengthy and legalistic, and because no one was available to explain it to him.

5.2.4 California's broad view of substantive unconscionability

Berman hearings. Kho struck down an arbitration agreement waiving a Berman hearing, in part because the high court felt that Berman hearings are more favorable to the employee than judicial proceedings. Although the parties' arbitration agreement might suffice for wrongful termination claims, *Kho* found the agreement substantively unconscionable for wage claims because its litigation-like procedures were unduly complex and lengthy, in unfavorable contrast to a Berman hearing. *Kho* also found the agreement substantively unconscionable because the complex and time-consuming civil litigation-type process the agreement entailed was a barrier to plaintiff's right to the expedient, largely cost-free Berman hearing process. The waiver of Berman procedures does not, in itself, render an arbitration agreement unconscionable, but where, as here, that waiver was imposed in an unconscionable fashion, *Kho* concluded that the agreement was unenforceable.[55]

Requiring an odd form of "mutuality." Armendariz held that any arbitration agreement imposed on an employee is substantively unconscionable if it lacks a "modicum of bilaterality." One example of unconscionability, California style, is an arbitration agreement carving out certain claims that only an employer would be likely to bring, absent reasonable justification for such a carve-out. The agreement in *Armendariz* was unconscionable because, while it generally subjected all claims to arbitration, it carved out claims for injunctive relief, which typically would be brought only by the employer (to restrain unfair competition).[56]

Through this expansive anti-arbitration reasoning, some California courts thus have held that an arbitration agreement is substantively unconscionable if it permits the parties to pursue court claims that would likely be more valuable to employers than to employees.[57] (Of course, there is nothing inherently "unfair" about reserving certain claims for litigation if, as the public policy favoring arbitration implies, arbitration is an acceptable substitute for litigation. So, by saying that it is unfairly one-sided for agreements to leave certain claims unaffected by the agreement to arbitrate, California courts reveal their bias against arbitration.)

Inventing special requirements for statutory claims. Armendariz created certain minimum requirements that mandatory arbitration agreements must meet to be substantively conscionable as to statutory claims: (1) providing for neutral arbitrators, (2) providing for discovery sufficient for the employee to secure information needed to present the claim, (3) requiring a written decision to permit limited judicial review, (4) providing for all relief that would be available in court, and (5) requiring the employer to pay all of the costs unique to arbitration, such as the arbitrator's fees. A court may save an arbitration agreement by interpreting it as *implicitly* requiring these conditions, unless the agreement itself states expressly to the contrary.

Courts following *Armendariz* have struck down arbitration agreements as substantively unconscionable when they provide employers with greater rights than they would have in court. One provision disfavored on this ground was a clause providing for prevailing-party attorney fees on a FEHA claim, without limiting the defendant's right to fees to those cases where the employee's claims were "frivolous, unreasonable, without foundation, or brought in bad faith."[58] Other provisions found to be substantively unconscionable have included neutrally worded arbitrator selection provisions that, as a practical matter, would result in an arbitrator of the employer's choosing, and fee provisions that apportion arbitrator's fees equally among parties at the outset of the arbitration.[59]

Although *Armendariz* arose in the context of statutory employment discrimination claims, courts have applied its special requirements to other statutory claims as well.[60] These rulings—which ultimately rely on a judicial

prejudice that litigation is inherently superior to arbitration—thus convey an anti-arbitration bias that conflicts with the FAA, which requires courts to place arbitration contracts on an equal footing with contracts generally.

Inventing the "free peek" doctrine to undermine arbitration agreements. Parties contemplating a potential dispute might reasonably agree to seek mediation before escalating their differences. But that's not so easy in California. Several appellate decisions have faulted arbitration agreements for requiring mediation as a pre-condition to arbitration, particularly when this contractual provision obliges only the employee, not the employer. The leading (2004) decision held that an arbitration agreement was substantively unconscionable for requiring only the employee—not the employer—to engage in a pre-arbitration "employer-controlled dispute resolution" process. The Court of Appeal reasoned that this pre-arbitration provision was substantively unconscionable because while it superficially seemed "a laudable mechanism for resolving employment disputes informally, it connotes a less benign goal. Given the unilateral nature of the arbitration agreement, requiring plaintiff to submit to an employer-controlled dispute resolution mechanism (i.e., one without a neutral mediator) suggests that defendant would receive a 'free peek' at plaintiff's case, thereby obtaining an advantage if and when plaintiff were to later demand arbitration."[61]

Hostility toward default discovery limitations. The Court of Appeal has held that provisions in an arbitration agreement that limit discovery are unconscionable where "the default discovery allowed … is low, the burden placed on [the claimant] to justify additional discovery is somewhat greater than a simple showing of need or good cause, and [the claimant] has established as a factual matter that she will likely need to conduct at least three to five times the number of depositions allowed[.]"[62] At least one decision has even gone so far as to find that an arbitration agreement that does not have any limitations on discovery but instead provides that the arbitrator "shall have the authority to allow for appropriate discovery and exchange of information" is problematic because such a provision gives "unfettered discretion" to the arbitrator to decide how much discovery to allow, which the Court of Appeal found to be inconsistent with allowing more than minimal discovery.[63]

A 2020 Court of Appeal decision affirmed a trial court refusal to enforce an arbitration agreement in a case where the agreement's limit of two depositions would make it impossible for a 15-year employee to vindicate FEHA claims for age and sexual harassment, even though the agreement empowered the arbitrator to authorize more discovery upon a showing of sufficient cause.[64]

Hostility toward shortened statutes of limitations. Employers often seek to have employees agree to shorten the time in which the employee can sue. California courts, being hostile to those efforts, have struck down one-year limitations periods that appear in arbitration agreements, reasoning that such a short limitations period would unfairly preclude an employee from relying on legal theories that could extend the deadline for suing.[65]

While one court upheld a six-month limit on employee claims measured from the termination of employment,[66] another court found such a provision unenforceable, where it limited an otherwise-applicable four-year statute of limitations to six months.[67] A 2008 Court of Appeal decision upheld, with respect to a FEHA claim, a one-year limitations period imposed by an arbitration agreement, where the period did not unreasonably restrict the plaintiff's ability to vindicate his FEHA rights, but then the California Supreme Court took that decision off the books by granting review of the case.[68] The Supreme Court's own decision, in 2010, declined to address the viability of the one-year limitations period.[69]

The Court of Appeal has held that even a one-year limitations period imposed by an arbitration agreement would be unreasonably short for a FEHA claim.[70] And it was not enough that the agreement authorized the arbitrator, for good cause, to extend the limitations period: the employer "cannot rely on that provision to excuse an otherwise substantively unconscionable limitations provision … A provision delegating authority to the arbitrator to resolve questions of unconscionability is itself unconscionable."[71]

Meanwhile, employees reneging on promises to arbitrate need not fear that their arbitration claim-filing deadline looms while they pursue a court action to evade arbitration. In California, if an arbitration agreement requires that arbitration be initiated by a deadline, commencing a court action by that deadline tolls the arbitration claim-filing deadline until 30 days after a final judicial determination that the party must arbitrate instead of litigate, or 30 days after the judicial action ends, whichever date occurs first.[72]

Limited severability in arbitration agreements. Courts generally will save and enforce contracts by using a "blue pencil" to sever unenforceable provisions, leaving the rest of the contract intact. In California, it's different. *Armendariz* authorizes courts to strike down arbitration agreements, the general availability of severance notwithstanding, if the existence of "multiple unlawful provisions" indicate "a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage," thereby justifying a conclusion that "the arbitration agreement is permeated by an unlawful purpose."[73] *Armendariz* upheld the trial court's refusal to sever offending provisions because (1) there were multiple unlawful provisions (both a limitation on damages and an "unconscionably unilateral arbitration clause") and (2) they permeated the entire agreement. Furthermore, the employer's post-dispute offer to waive the offending provisions did not save the day: "'No existing rule of contract law permits a party to resuscitate a legally defective contract merely by offering to change it.'"[74]

The Court of Appeal has refused to enforce an arbitration agreement where it found that an invalid PAGA waiver was not severable, even though the agreement said it was severable. A car wash employee sued his employer for wage and hour violations, alleging both individual claims and a representative PAGA action. The employment handbook—provided to all employees in both English and Spanish—required arbitration of employment disputes and denied rights to bring a PAGA action. The English version said the PAGA-denial provision was severable, so that if that provision was invalid then the rest of the agreement would be enforceable, but the Spanish version said the PAGA-denial provision was *not* severable. The employee had agreed to arbitration by signing *both* the English and the Spanish handbook acknowledgements. In ruling against the employer, the Court of Appeal reasoned that although the English version stated that in the event of any conflict the English version would control, the difference between the two versions created an ambiguity to be construed against the employer, the drafting party, particularly since the arbitration agreement was a contract of adhesion.[75]

California courts have continued to follow *Armendariz*'s lead in declining to sever offensive provisions in arbitration agreements in a way that would leave the remaining provisions intact. One case involved a class action by truck drivers who, to keep their jobs, had to sign annual agreements with little notice and with no chance to bargain. The agreements classified them as independent contractors, contained a submerged arbitration clause, incorporated by reference AAA commercial rules including a cost-splitting provision, imposed a 120-day limitations period, and allowed only the company to seek provisional relief. Under these circumstances, the Court of Appeal upheld the trial court's refusal to sever the offending provisions, because of the defendant's "systematic effort to impose arbitration" as "an inferior forum" that worked to the individual's disadvantage.[76]

One 2020 Court of Appeal decision considered an arbitration agreement with three "unconscionable" provisions: (1) a mutual waiver of punitive damages, (2) waiver of the employer's duty to post a bond and show irreparable injury in order to obtain a judicial injunction to protect propriety information (which was unconscionable even though the employer generally had "reasonable justification" or "legitimate commercial need" for a non-mutual right to seek injunctive relief), and (3) a waiver of jury trial in any court proceeding that the agreement did not direct to arbitration. The Court of Appeal ruled that the trial court had erred in refusing to enforce the arbitration agreement merely because of its multiple unconscionable provisions,[77] but upheld the refusal nonetheless on the independent ground that the "arbitration agreement is permeated with too high a degree of unconscionability for severance to rehabilitate."[78]

A 2023 Court of Appeal decision took this a step further and affirmed a trial court's invalidation of an arbitration agreement because a confidentiality agreement—and not the arbitration agreement itself—contained similar unenforceable provisions. The confidentiality agreement had a waiver of the employee's duty to post a bond or to show irreparable injury to obtain injunctive relief for disclosure of proprietary information. Even though the offending provisions were not in the arbitration agreement itself, the trial court reasoned (and the Court of Appeal agreed) that because the confidentiality agreement was signed on the same day as the arbitration agreement, both agreements could be read together and invalid provisions in one agreement could be imputed to the other.[79]

In yet another 2020 case, the Court of Appeal observed at the outset that the arbitration agreement had an invalid waiver of PAGA claims, but the employer had not sought to enforce the invalid PAGA waiver; rather, the employer had sought to selectively enforce the rest of the arbitration agreement, against the plaintiff's Labor Code claims. The Court of Appeal held that the employer could not pursue this path, because the PAGA waiver occurred in a provision that was expressly deemed not severable, and so when it fell the entire agreement failed.[80]

In a final 2020 case, the Court of Appeal held that two substantively unconscionable provisions could be severed to save the agreement, and directed the trial court to sever them on remand,[81] but then the Supreme Court depublished the decision and granted review, to decide whether the two invalid provisions could doom the arbitration agreement on a theory that they had been included within the agreement as a matter of "bad faith."[82] The Supreme Court declined to proceed, however, when the parties settled their case.[83]

5.2.5 Judicial reluctance to find employee consent and class action waiver and willingness to find employer waiver

Just as judges can invoke unconscionability to avoid enforcing arbitration agreements, they can creatively find that the employee never consented to the agreement in the first place. In one case, decided in 2020, the trial court did just that, denying a motion to compel enforcement of a stand-alone arbitration agreement simply because the employee had failed to initial an individual paragraph calling for waiver of jury trial. The Court of Appeal corrected this mistake by holding that the employee's failure to initial a paragraph was immaterial in light of his signing the agreement immediately below language—prominently displayed in ALL CAPITAL LETTERS—stating that he agreed to "all of the terms of this agreement" and had "no right to pursue claims against the company in court and before a jury but only through the arbitration process."[84] The Court of Appeal rebuked the trial court for crediting the employee's "undisclosed assertions he did not want to arbitrate or waive his jury trial right"; even if the trial court found the employee credible, the court should not have considered his "unexpressed intentions as evidence of the lack of mutual assent. The law is well settled that unexpressed subjective intentions are irrelevant to [this] issue …"[85]

Inadvertently overbroad contractual disclaimer. California courts have ensnared employers in traps of their own making when the employer handbook containing an arbitration policy comes with a disclaimer (as some handbooks do) that the handbook is "not a contract." In one case, the Court of Appeal, while giving lip service to the "strong policy favoring contractual arbitration," emphasized that this "policy does not extend to parties who have not agreed to arbitrate."[86] The Court of Appeal thus upheld the denial of arbitration because the handbook containing an arbitration policy came with a welcome letter stating that the handbook was "not intended to … create any legally enforceable obligations[.]"[87]

Inadvertent effect of requiring employees to sign arbitration agreements. The Court of Appeal refused to compel arbitration against an employee who was subject to a handbook containing an arbitration agreement, because the handbook said that employees must sign an arbitration agreement, yet the employer could not produce any signed agreement. The Court of Appeal reasoned that the handbook had evinced an intent that employee consent to arbitration would be obtained only through a signed separate agreement, which here was absent.[88]

Inadequate electronic signature. The Court of Appeal has upheld a refusal to compel arbitration on the ground that the employer failed to prove that the employee's electronic signature on the arbitration agreement was authentic. The Court of Appeal relied on the technicality that the employer, in the declaration supporting its petition to compel arbitration, had failed to state sufficient facts regarding the employer's electronic system to show reasons for believing that the electronic signature was in fact the act of the employee.[89] There have been increasing challenges to electronic signatures in arbitration agreements.

Inadequate CBA provision. In the context of a collective bargaining agreement, the Court of Appeal has held that a CBA did not require arbitration of Labor Code claims for unprovided meal and rest breaks and for unpaid wages where the employer could not show that the CBA had a "clear and unmistakable waiver of a judicial forum," which, the Court of Appeal said, must "specify the statutes for which claims of violation will be subject to arbitration." The employer's petition to compel arbitration was thus properly denied because the CBA in question lacked that specific language.[90]

Contract read to provide worst possible result for the employer. In a 2020 judicial switcheroo, the trial court granted the employer's petition to compel a class action plaintiff to arbitrate his individual claims only, but the Court of Appeal rendered a surprising result by ordering that the plaintiff could pursue his *class claims in arbitration*—the worst outcome imaginable for the employer. The Court of Appeal accepted the plaintiff's argument although he had waived the right to present his class claims *in court*, he did *not* waive the right to submit the class claims *in arbitration*. The Court of Appeal held that, whether or not that was the employer's subjective intent, the arbitration agreement unambiguously provided for arbitration of class claims.[91]

Effect of employee repudiation. In a 2019 split decision, the Court of Appeal departed from the deep-seated reluctance to find employee consent to an arbitration agreement. In that case an at-will employee refused to sign an arbitration agreement but was nonetheless bound by it after the employer expressly told her that arbitration was a condition of employment that she would accept by continuing her employment. A dissenting opinion argued that the Court of Appeal should have affirmed the trial court's finding that no actual consent occurred in light of the employee's express repudiation of the agreement.[92]

In a 2020 decision, the Court of Appeal applied to an arbitration agreement the general rule that a minor can disaffirm a contract into which she has entered, "within a reasonable time" after she reaches the age of majority. The plaintiff, bringing a FEHA claim for sexual harassment, had signed an arbitration agreement at age 16 and had continued to work for the employer for four months after reaching her 18th birthday. She then resigned and waited another four months to sue. The trial court, affirmed by the Court of Appeal, held that this eight-month delay after reaching age 18 was "reasonable." The Court of Appeal, rejecting the employer's argument that the plaintiff had ratified the arbitration agreement by continuing to work for the employer for four months after reaching the age of majority, noted evidence indicating that the plaintiff remained unaware of the significance of the arbitration agreement when and after she signed it. And the trial court acted within its discretion in finding that the plaintiff's decision to disaffirm the agreement within eight months of reaching her age of majority was acting within a "reasonable time."[93]

Limiting scope of consent. In 2020, the Court of Appeal considered an arbitration agreement between the plaintiff and his former employer, a car dealership. At issue was whether this agreement applied to the plaintiff's lawsuit against his next employer, which was a closely affiliated car dealership. The Court of Appeal upheld the trial court's refusal to apply the agreement, because the agreement was limited to its actual signatories even though the car dealerships were affiliated. The arbitration agreement failed to expressly state the agreement was for the benefit of any third-party beneficiaries.[94] This result obtained even the plaintiff's complaint alleged that all the car dealerships were "joint employers."[95] The trial court also permissibly refused to stay litigation of a PAGA claim:

"Because a PAGA claim is representative and does not belong to an employee individually, an employer should not be able dictate how and where the representative action proceeds."[96]

Agreement to arbitrate claims already accrued. Reflecting the pervasive judicial hostility to arbitration agreements, a California trial court refused to enforce an agreement the parties signed after the relevant claim already had accrued, but the Court of Appeal found that the agreement's language was "clear, explicit, and unequivocal with regard to the claims subject to it and contains no qualifying language limiting its applicability to claims that had yet to accrue."[97]

Employer inaction deemed waiver to right to arbitrate.[98] A sales representative filed a Labor Commissioner complaint for unpaid commissions. The employer sought to have the complaint dismissed because the parties had an arbitration agreement, but the Labor Commissioner nonetheless scheduled a hearing. The employer repeatedly moved to dismiss the complaint because of the arbitration agreement, to no avail. When the Labor Commissioner awarded the sales rep $27,412.60 in commissions and interest, the employer took an appeal for a *de novo* trial and eventually, after the sales rep had retained counsel and engaged in discovery, petitioned to compel arbitration. The trial court denied the petition, finding that the employer's delay had waived any right to arbitrate. The Court of Appeal affirmed, reasoning that the employer had waived its right to arbitrate by taking steps inconsistent with an intent to invoke arbitration. During the administrative hearing the employer fully participated by presenting documentary evidence, witness testimony, and argument. Only 20 months later did the employer finally petition to compel arbitration, after the benefits of speedy arbitral resolution had been lost.

5.2.6 California public policy precluding enforcement of arbitration agreements

Sometimes explicitly, sometimes implicitly, California has disfavored arbitration on the basis that California public policy prefers litigation to arbitration. This policy preference runs counter to the FAA's decree that courts must not discriminate against arbitration agreements. But California has persisted, notwithstanding numerous slap-downs by the U.S. Supreme Court (*see* § 5.2.1).

Banning formation of mandatory arbitration agreements. As noted above, a 2019 California statute purported to decree that California businesses—as to agreements entered into, modified, or extended as of 2020—could not require any job applicant or employee to waive any right, forum, or procedure for a violation of FEHA or the Labor Code, including any requirement that an individual opt out or take affirmative action to preserve such rights.[99] The statute purported to forbid retaliation against anyone for refusing to consent to an agreement to arbitrate and to impose civil and criminal penalties, injunctive relief, and attorney fees. The legislative strategy was to deter employers from forming arbitration agreements by creating the specter of lawsuits under the Labor Code and FEHA and even the possibility of criminal prosecution.

This statute prompted immediate constitutional challenge. Employer groups sued the State of California to stall enforcement of the statute on the ground that it is preempted by the FAA. In February 2020 a federal district court granted a preliminary injunction prohibiting California state officials from enforcing certain provisions of the new law—specifically, sections 432.6(a), (b), and (c) of the Labor Code and section 12953 of the Government Code—to the extent that they involve an arbitration agreement covered by the FAA.[100] This decision was affirmed by the Ninth Circuit.[101]

Because of unclear drafting, however, the new law may also call into question the use of traditional settlement and severance agreements.

Voiding arbitration agreements where the agreement drafter fails to pay fees. Employers that mandate employment arbitration agreements must, under California law, pay the parties' arbitration fees. Drafters of arbitration agreements must pay those fees timely or be deemed to waive their right to arbitrate.[102] An employer's

failure to pay entitles the suing employee to withdraw from arbitration and proceed in court and seek sanctions. Motivating this law was a feeling that companies seek to ensnare employees in mandatory arbitration agreements while strategically delaying arbitrations by failing to pay fees and costs. The law now enables class action attorneys to employ their own strategy: when foiled by an arbitration agreement's class action waiver, they can flood the employer with employee arbitration demands to impose ruinous arbitration fees upon the hapless employer.

California's ultimately unsuccessful efforts to invalidate class waivers in arbitration agreements. The California Supreme Court long clung to the notion that public policy prevents the enforcement of arbitration agreements that waive rights to participate in class actions. This notion that class actions were immune from arbitration agreements was known as the *Gentry* rule, named after a 2007 California Supreme Court decision that said:

> "We conclude that at least in some cases, the prohibition of class-wide relief would undermine the vindication of the employees' unwaivable statutory rights and would pose a serious obstacle to the enforcement of the state's overtime laws. Accordingly, such class arbitration waivers should not be enforced if a trial court determines, based on the factors discussed below, that class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration."[103]

In 2014, the California Supreme Court finally acknowledged that, under U.S. Supreme Court precedent,[104] class waivers in arbitration agreements are enforceable, notwithstanding state public policy, because of the preemptive strength of the FAA.[105]

In 2018, the U.S. Supreme Court reaffirmed that class waivers are enforceable under the FAA and rejected an argument that they unlawfully interfere with employee rights to engage in concerted activity for mutual aid or protection under the National Labor Relations Act.[106]

And in 2019 the U.S. Supreme Court held that ambiguity, like silence, is an insufficient basis to conclude that parties have agreed to a class arbitration that would sacrifice the principal advantages of individual arbitration contemplated by the FAA.[107]

California's preference for arbitrators to decide whether class arbitration is authorized. A threshold issue for arbitration agreements is who decides whether class arbitration is permitted—the court or the arbitrator? Federal courts generally presume that this gateway question is for the court to decide, while California presumes the question is for the arbitrator (though in either case the contracting parties can expressly dictate who will decide). A factor favoring the federal allocation of decisional authority to the court is that an arbitrator who would be empowered to decide the question of class arbitration would face a conflict of interest, in that the arbitrator would have strong financial incentives to multiply arbitral fees by approving class arbitration.

The California Supreme Court deviated from the federal norm in *Sandquist v. Lebo Automotive*, a 2016 decision considering an arbitration agreement that did not expressly address whether class arbitration was authorized.[108] The agreement simply stated that it covered any "claim, dispute, or controversy."[109] The Supreme Court held that the question of "who decides" whether class arbitration is available—the court or the arbitrator—should be answered by interpreting the agreement under state contract law,[110] and that where the agreement does not expressly permit or prohibit class arbitration and states the arbitrator will resolve "all disputes," then the question of class arbitrability is for the arbitrator.[111]

California's invalidation of representative PAGA waivers in arbitration agreements. While California has yielded to federal authority with respect to enforcing class waivers in arbitration, the same has not been true as to waivers of the right to bring PAGA representative actions. For some time, California appellate courts disagreed

whether to enforce arbitration agreements by which the parties waive the right to participate in representative actions, such as PAGA actions.[112] The California Supreme Court finally addressed that issue in 2014, in *Iskanian v. CLS Transportation Los Angeles, LLC*. *Iskanian* acknowledged that the FAA preempts California's policy against class action waivers in arbitration agreements,[113] but also held, against the weight of federal authority, that representative actions are *not* subject to mandatory arbitration.[114]

The Court of Appeal then expanded on *Iskanian* to conclude that predispute waivers of the judicial forum in a PAGA claim are unenforceable, and that the predispute/postdispute boundary is not crossed until the pertinent employee is authorized to commence a PAGA action as an agent of the state: "Only after employees have satisfied the statutory requirements for commencing a PAGA action are they in a position 'to determine what trade-offs between arbitral efficiency and formal procedural protections best safeguard their statutory rights.'"[115]

Employers sought to revisit PAGA's immunity from arbitration agreements after a 2018 U.S. Supreme Court ruling that arbitration agreements requiring individual arbitration are enforceable under the FAA, regardless of employee rights to concerted activity under the NLRA.[116] But in 2019 the Court of Appeal reaffirmed that PAGA representative action waivers remain unenforceable under California law and that PAGA representative actions may not be compelled to arbitration without the state's consent.[117]

A 2020 case upheld an employee's right to seek injunctive relief against arbitration of a PAGA claim. The employee had brought a PAGA suit for violation of wage and hour laws. When the employer moved to stay proceedings pending arbitration under the parties' employment contract, the employee sought a preliminary injunction against the arbitration. The trial court issued the injunction and denied the employer's stay request. The Court of Appeal affirmed, holding that the trial court properly considered (1) the party's likelihood of prevailing on the merits and (2) the relative interim harm the parties would suffer from the issuance or nonissuance of an injunction. Both factors seemed to favor the injunction: because the PAGA claim was representative, not individual, the plaintiff could not be compelled to submit any portion of it to arbitration, including whether he was an "aggrieved employee," and so arbitration of a nonarbitrable claim would be futile. And the employee's harm from suffering arbitration would outweigh the employer's harm from an injunction against arbitration.[118]

Another 2020 case similarly held that predispute waivers of PAGA claims are unenforceable. The Court of Appeal held that the plaintiffs' arbitration agreements were unenforceable as to their PAGA claims, which they brought on behalf of the LWDA—the real party in interest despite it not being named as such. Here, although the plaintiffs were acting as agents of the LWDA when they sued, they were not acting as LWDA agents when they signed their arbitration agreements. Consequently, the agreements were not entered into on behalf of the LWDA and thus could not be enforced against the LWDA. Because there was no arbitration agreement between the employer and the LWDA, the trial court properly denied the employer's motion to compel arbitration.[119]

Two 2020 Court of Appeal decisions rejected employer arguments that the California Supreme Court's 2014 *Iskanian* decision—holding that employee cannot be compelled to arbitrate PAGA claims on the basis of pre-dispute arbitration agreements—did not survive the U.S. Supreme Court's 2018 decision in *Epic Systems Corp. v. Lewis* upholding an arbitration agreement with a class action waiver. In the first case, the Court of Appeal noted that *Epic* does not address the PAGA plaintiff's unique status as "the proxy or agent" of the state in enforcing state labor laws on behalf of state law enforcement agencies. *Epic* thus does not undermine *Iskanian*'s characterization of PAGA claims as law enforcement actions in which plaintiffs step into the shoes of the state. Moreover, while *Epic* reconfirmed the FAA's breadth, the FAA allows courts to refuse to enforce arbitration agreements on grounds applicable to any contract, and refusing to enforce a PAGA waiver in an arbitration agreement would be for a reason that would apply to any contract: the LWDA is not a party to the agreement, and thus cannot be bound by the employee's pre-dispute agreement to arbitrate.[120]

In a similar 2020 decision, the Court of Appeal likewise rejected a post-*Epic* challenge to *Iskanian*. The Court of Appeal reasoned that *Epic*—which addressed whether the NLRA renders unenforceable arbitration agreements containing class action waivers that interfere with workers' right to engage in "concerted activities"—did not address the same issue raised in *Iskanian*, which addressed a private attorneys general law.[121]

And in yet another 2020 repudiation of employer efforts to direct PAGA claims to arbitration, the Court of Appeal held that a PAGA action is not subject to arbitration even for the limited purpose of determining whether the plaintiff has standing to sue. The employer, noting that the plaintiff alleged he was misclassified as an independent contractor, moved to compel arbitration under an arbitration agreement, arguing that since only "aggrieved employees" can bring PAGA claims, an arbitrator must decide whether the plaintiff was an employee, instead of an independent contractor, before a PAGA action could proceed. The trial court rejected this argument, as did the Court of Appeal, which held that requiring the plaintiff to arbitrate whether he is an "aggrieved employee" would require splitting his single action into two components: (1) an arbitrable "individual" claim and (2) a nonarbitrable representative claim. Such case-splitting would run contrary to the law holding that a PAGA action is not an individual action at all, but is instead an indivisible claim belonging solely to the state. The employer thus could not require the plaintiff to submit any part of his PAGA action to arbitration.[122]

The landscape changed significantly with the United States Supreme Court's 2022 decision in *Viking River Cruises, Inc. v. Moriana*. The Supreme Court held that when the Federal Arbitration Act applies to an arbitration agreement and that agreement provides for the arbitration of disputes on an individual basis, a PAGA claim can be split into an individual component that is subject to arbitration and a non-individual representative component that will proceed in court.[123]

California's invalidation of agreements to arbitrate claims for public injunctive relief. Another example of hostility to arbitration is California's "*Broughton-Cruz* Rule," which makes arbitration provisions unenforceable as against public policy if they require arbitration of injunctive claims brought for the public's benefit.[124] Thus, a plaintiff, alleging that Citibank's "Credit Protector" insurance plan violated the UCL and other statutes, invoked the *Broughton-Cruz* Rule in an effort to disregard an arbitration agreement and seek judicial injunctive relief against deceptive practices.

The Court of Appeal rebuffed this effort, holding that the plaintiff must arbitrate because the *Broughton-Cruz* Rule conflicts with the FAA.[125] The Court of Appeal declined to extend *Iskanian*'s reasoning to create a PAGA-like exception for the *Broughton-Cruz* Rule. The Court of Appeal reasoned that in a PAGA action, unlike a UCL action, the state retains "primacy over private enforcement efforts," with the PAGA plaintiff being required to give advance notice to the state and to await state action before suing.[126] In a UCL action, by contrast, the state is not the "real party in interest," and so the PAGA exception set forth in *Iskanian* was not a precedent for saving the *Broughton-Cruz* Rule from FAA preemption. The Court of Appeal explained: the FAA "preempts all state-law rules that prohibit arbitration of a particular type of claim because an outright ban, no matter how laudable the purpose, interferes with the FAA's objective of enforcing arbitration agreements according to their terms."[127]

But the California Supreme Court took review of the case and, in 2017, reversed the Court of Appeal[128]. The high court ruled that an arbitration agreement's waiver of injunctive relief is contrary to California public policy where that relief would be to prohibit unlawful acts that threaten future injury to the general public. Moreover, the high court concluded, a state rule forbidding such a waiver is not preempted by the FAA, because the *Broughton-Cruz* Rule applies to *all* contracts and is not limited to arbitration agreements.[129]

The *Broughton-Cruz* Rule encouraged employment plaintiffs to evade arbitration agreements by using the UCL to seek "public injunctions" against Labor Code violations. But a 2019 Court of Appeal decision, *Clifford v. Quest Software, Inc.*, rebuffed this tactic:

> "We need not decide whether the FAA applies or whether it preempts *Broughton-Cruz* because, even if *Broughton-Cruz* is still viable, it would not bar the arbitration of any portion of Clifford's UCL claim … Clifford's requests for injunctive relief under the UCL are … limited to him as an individual. … The only express beneficiary of Clifford's requested injunctive relief is Clifford, and the only potential beneficiaries would be Quest's current employees, not the public at large."[130]

The injunction sought was thus private and not public and so the parties' arbitration agreement still applied to that claim for relief.[131]

California's refusal to apply CBA arbitration clauses to statutory claims. The California Supreme Court has rejected an employer's argument that security guards must arbitrate, under their collective bargaining agreement, a claim for penalties owed because of untimely final pay. The high court reasoned that because this claim invoked a right arising under state law, not the CBA, the security guards could proceed in court even though the CBA was relevant to their claim and would be "consulted" in determining it.[132] The employer argued that the claim was preempted by Section 301 of the Labor Management Relations Act because the claim required "interpretation and application" of the CBA. The high court concluded that not every claim requiring resort to CBA language is necessarily preempted, particularly when the meaning of the CBA is not in dispute. "It is up to state courts, not an arbitrator, to interpret state labor law standards applicable to all workers."[133]

5.2.7 Peculiar standards for judicial review of arbitration awards

Hostility to federal "manifest disregard of law" standard. Although the FAA authorizes judicial review of arbitral awards in only very limited situations—generally involving a misbehaving arbitrator[134]—federal courts have vacated awards where the arbitrator has exhibited a "manifest disregard" for controlling law. They have done so even after the U.S. Supreme Court, in 2008, held that parties cannot contract to supplement the grounds for vacating or modifying the award provided by the FAA.[135] California courts, however, have refused to recognize this "manifest disregard" standard of review. For example, a California employer was denied meaningful judicial review of a wrongful termination arbitral award that granted $225,000 in emotional distress damages without evidence of severe mental injury and that imposed $1,000,000 in punitive damages without citing evidence to support the award. The Court of Appeal refused to review these legal outrages, because California law, unlike federal law, does not permit vacating an arbitration award merely because the arbitrator manifestly disregarded the law.[136] (The result in California might differ, of course, if the arbitration agreement itself provides for broadened judicial review. *See* below.)

By contrast, if an arbitrator legally errs in favor of an employer, that could be grounds for vacating the award. The California Supreme Court ruled in 2010 that an arbitrator makes "a clear error of law," giving grounds to vacate the award, if the arbitrator made a procedural error that deprived an employee of a hearing on the merits of a statutory employment claim.[137]

Overturning awards not sufficiently protective of employee interests. Although arbitration awards can be upheld even when they get the law wrong, a 2020 Court of Appeal decision refused to confirm an arbitration award that prevented a former employee from competing with his former employer, a statistical arbitrage firm. The Court of Appeal held that the arbitrator exceeded his power in issuing an award enforcing contractual provisions that restricted the employee's right to work, given the public policy against any contract that restrains anyone "from engaging in a lawful profession, trade, or business of any kind." Despite the facial invalidity of the provisions, the arbitration award let them stand as a perpetual restriction on the employee's right to compete. Because the award was inconsistent with the protection of employee rights to compete with a former employer, the trial court erred in entering judgment on the award.[138]

Negotiated review of arbitral awards. Employers have sought to hedge against run-away arbitral awards by bargaining for judicial review of arbitration awards for "clear error of law" and for "lack of substantial evidence" to

sustain the award. That review would exceed the review provided by arbitration statutes, however, which very narrowly limit judicial scrutiny of an arbitration award to such matters as whether the arbitrator had a personal bias or clearly exceeded the arbitrator's authority,[139] and the Court of Appeal has held that extra-statutory judicial review of an arbitration award is forbidden.[140]

Surprisingly welcome news came in 2008, in a non-employment case, in which the California Supreme Court held that under California law, parties can contract for judicial review of legal error in arbitration awards.[141] The high court reached this holding even though the U.S. Supreme Court had held that the FAA does not permit the parties to expand the scope of judicial review beyond those grounds specified by the FAA.[142] The high court announced a special "California rule" and held that the parties may agree to have expanded judicial review of an arbitration award. Support for this rule appears in a California statutory provision for vacating an arbitration award when "[t]he arbitrators exceeded their powers."[143] The high court thus enforced (as a matter of California, not federal, law) a provision in an arbitration agreement that "[t]he arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error."[144]

The demise of second-arbitrator provisions. The Court of Appeal once upheld, as not unconscionable, an arbitration agreement authorizing a second arbitrator to review an arbitration award in the same manner as an appellate court would review a trial court judgment.[145] But the tide has turned against this attempt to guard against run-away arbitration awards. Plaintiffs have successfully argued that a second-arbitrator provision, while facially neutral, adds costs and time to arbitration to the advantage of the employer as the better-resourced party. In one 2003 case, the Court of Appeal struck down a second-arbitrator provision that applied only to awards exceeding $50,000, on the ground that it gave an unfair advantage to the employer.[146] And the Court of Appeal has found a second-arbitrator provision unconscionable even though it neutrally permitted either party to seek review without regard to any monetary threshold.[147]

5.3 Hostility to Employer-Mandated Forum Selection and Choice of Law

Courts throughout America generally enforce forum-selection and choice-of-law provisions. But in California it's different. California has shown special hostility to these provisions in the employment context. A 2016 California statute forbids employers from requiring employees who reside and work in California to agree, as a condition of employment, to litigate or arbitrate employment disputes either outside of California or under another state's laws. The only exception is where the employee was individually represented by a lawyer in negotiating an employment contract.[148]

The statute applies to any contract "entered into, modified, or extended on or after January 1, 2017." An employer that modified pay provisions of a 2014 employment agreement in 2018 thus found itself unable to enforce the agreement's selection of an Ohio forum, even though the forum-selection clause itself had not been modified.[149]

Even before this statute hobbled employer efforts to select venue and the applicable law, California courts were reluctant to enforce forum-selection and choice-of-law provisions. One Court of Appeal decision reasoned that an arbitration agreement, by choosing Texas law to govern the parties' disputes, was unconscionable.[150] The Court of Appeal faulted Texas law for not recognizing an unconscionability defense, for not recognizing a private right of action to enforce wage and hour protections, for imposing a one-year limitations period, and for permitting the defendant to recover attorney fees and costs it could not recover under California law.[151]

The Court of Appeal addressed which state—California or Texas—had the greater interest in enforcing its law in this circumstance: "We acknowledge the value and efficiency to [a Texas-based company] of having a predictable, uniform wage-and-hour regime wherever it does business nationally, and we do not minimize the

priority Texas may place on providing a hospitable legal climate for Texas-based employers that is conducive to such uniformity. But when weighed against the countervailing interest of California in ensuring that its statutory protections for California-based workers are not selectively disabled by out-of-state companies wishing to do business in this state, we think California has the materially greater interest. … [T]he parties' choice of Texas law will not be enforced 'for the obvious reason' that it would be contrary to 'fundamental policy' in California to do so."[152]

In another decision pitting California law against Texas law, the Court of Appeal ruled against another Texas-based company.[153] In this case, Alliantgroup, LP had an employee agreement containing a forum-selection clause requiring any lawsuit against the company to be heard in Texas.[154] The employee nonetheless sued in California when asserting claims for unpaid overtime pay, meal and rest premium pay, and penalties for inadequate wage statements.[155] Although the trial court found the forum-selection clause enforceable and stayed the lawsuit, the Court of Appeal reversed, holding that the clause had the potential to operate as a waiver of the employee's unwaivable statutory rights under the Labor Code.[156] The Court of Appeal ruled: "Although a party opposing enforcement of a forum-selection clause ordinarily bears the burden to show enforcement would be unreasonable or unfair, the burden is reversed when the underlying claims are based on statutory rights the Legislature has declared to be unwaivable."[157]

In that instance, the party seeking to enforce the forum-selection clause has the burden to show enforcement would not diminish unwaivable California statutory rights; otherwise a forum-selection clause could be used to force a plaintiff to litigate in another forum that may not apply California law."[158]

The Court of Appeal reversed the trial court's stay order because the employer had "failed to show a Texas court would apply California law, and therefore the Texas-based company failed to meet its burden to show enforcing the forum selection clause would not diminish the unwaivable statutory rights on which [the plaintiff] bases her claims."[159]

5.4 Public Policy Claims for Wrongful Employment Actions

California permits employees to seek economic, non-economic, and punitive damages from employers who have fired or demoted them in violation of public policy.

5.4.1 Broad definition of public policy

Admitting that "public policy" is "inherently not subject to precise definition,"[160] the California Supreme Court has sought to put some defining boundaries around it. *First*, the public policy must be clearly established and substantial, and stem from a constitution, a statute, or an administrative regulation. *Second*, the policy must be established for the benefit of the public as a whole, and not just for the individual.[161] *Third,* the policy must sufficiently describe prohibited conduct to give employers adequate notice.[162] Nonetheless, as seen below, these limits encompass a broad variety of lawsuits.

5.4.2 Examples of *absence* of public policy

Can employers insist on arbitration agreements to the point of firing employees who refuse to sign? A California appellate court rejected the wrongful termination claim of an employee fired for refusing to sign an arbitration agreement. The Court of Appeal rejected the plaintiff's argument that the employer violated public policy by requiring employees to waive the right to jury trial, because the parties could, consistent with public policy, agree to waive a jury trial as part of an arbitration agreement.[163] This argument gained renewed vitality in light of Labor Code section 432.6, which was to go into effect in 2020 and would have forbidden employers from requiring employees to waive any right, forum, or procedure with respect to a Labor Code or FEHA claim. A federal district

court partly enjoined enforcement of the law, and after further proceedings, the Ninth Circuit on February 15, 2023 held that the FAA fully preempted section 432.6 because it obstructed the FAA's policy of encouraging arbitration.[164] As such, California employers may continue to require employees to arbitrate disputes pursuant to agreements covered by the FAA. However, given the ever-changing developments in the laws on arbitration, this is unlikely to be the last word on the issue.

Employers not liable for tort actions for unlawful denial of hire? The Court of Appeal held that, absent an employment relationship, a business does not owe an individual a duty of care with respect to his hiring, and so an individual denied employment because of his race has only statutory remedies and no tort claim for an unlawful failure to hire.[165]

No general public policy favoring lawsuits. The Court of Appeal rejected the wrongful termination claim of an employee who sued a *client* of the employer, as no public policy (even in California) generally favors the prosecution of a lawsuit.[166]

No public policy against advising high schoolers to gain weight. The Court of Appeal reversed a jury verdict in a wrongful termination claim by a high school teacher fired for reporting a football coach's advice to students to use creatine. Displaying a rare exercise of Californian judicial restraint, the Court of Appeal noted that while there may be "sound policy reasons" to bar coaches from recommending weight-gaining substances to students, "any such prohibition must be enacted explicitly by the Legislature, not implicitly by the courts."[167]

Workers' compensation remedies for retaliation are exclusive. The Court of Appeal has held that a worker fired for filing a workers' compensation claim could not sue for the tort of wrongful termination on that basis, because the Labor Code provision forbidding retaliation for such a filing also limits the remedy for that retaliation. The Court of Appeal reasoned that allowing a plaintiff to sue in tort for a violation of that provision would permit remedies and procedures broader than those provided by the statute itself, and thus concluded that the Labor Code provision cannot serve as the basis for a tort claim of wrongful termination in violation of public policy.[168]

5.4.3 Retaliatory discharge claims

Retaliatory discharge claims generally arise in one of four situations: the employee was fired or demoted for (1) performing a statutory obligation (e.g., jury duty), (2) refusing to break the law (e.g., committing perjury), (3) exercising (or refusing to waive) a statutory or constitutional right or privilege, or (4) reporting in good faith an alleged violation of a statute of public importance.[169] Here are examples of permitted wrongful termination claims.

Performing a statutory obligation. California employees can sue for breach of public policy when they are fired or demoted for taking time off to serve as an election officer.[170]

Refusing to break the law. California employees can sue for breach of public policy when fired or demoted for

- refusing to engage in illegal price-fixing,[171]
- refusing to implement a fraudulent pricing scheme,[172] or
- defying an employer's instruction to commit perjury.[173]

Exercising a constitutional or statutory right. California employees can sue for breach of public policy when fired or demoted for

- accepting employment in breach of an invalid noncompete covenant with a prior employer,[174]

- claiming in good faith (even if mistakenly) entitlement to overtime premium pay,[175]
- refusing to submit to a random drug test, in violation of constitutional privacy provisions that apply to private as well as public employers,[176]
- refusing to enroll in an inpatient alcohol rehabilitation program,[177]
- resisting sexual harassment that violates constitutional provisions forbidding sex discrimination by private as well as public employers,[178]
- hiring a lawyer to negotiate conditions of employment,[179]
- appearing on a radio show to support a political candidate in a local election and to criticize a Member of Congress for supporting the candidate's opponent,[180]
- taking leave under the California Family Rights Act,[181] or
- discussing with co-workers the fairness of the employer's bonus system.[182]

Reporting a suspected violation of law. California employees can sue for breach of public policy when fired or demoted for

- reporting an alleged violation of a health and safety statute,[183]
- reporting a death threat by a co-worker,[184]
- raising reasonable suspicions of company practices violating federal safety regulations,[185]
- investigating and reporting suspected unlawful acts,[186]
- reporting violations of federal immigration law,[187]
- protesting the employer's refusal to provide reimbursement for mileage,[188]
- protesting an unlawful deduction from a paycheck,[189] or
- notifying the Board of Equalization and the employer's general counsel of a belief that the employer was not complying with California sales and use tax law, even though the employee was unable to use employer tax returns to prove a tax violation.[190]

California law protects employees even from preemptive retaliation, where an employer takes adverse action against them *in anticipation of* their reporting unlawful workplace conduct.[191] The Court of Appeal extended this principle in favor of an employee who sued for breach of public policy on a theory that the employer constructively discharged her because she was a potential witness in a claim for sexual harassment: "Employer retaliation against employees who are believed to be prospective complainants or witnesses for complainants undermines this legislative purpose just as effectively as retaliation after the filing of a complaint. To limit FEHA in such a way would be to condone 'an absurd result' … that is contrary to legislative intent."[192]

Related discussions appear in sections on employee whistleblowing (§ 3.5) and FEHA retaliation (§ 6.11).

5.4.4 Other wrongful discharge claims

California courts have also permitted tort claims to challenge employment actions that conflict with public policy, without regard to whether the employee has engaged in protected activity, such as where the employee allegedly was fired

- for reasons forbidden by an employment discrimination statute, even if the plaintiff has failed to exhaust the administrative remedies that the statute provides and even if the limitations period for filing suit under that statute has expired,[193] or
- to avoid paying commissions, in violation of the Labor Code.[194]

In yet another extension of employer liability, the Court of Appeal held that a low-wage employee who quit his job could sue for constructive discharge for failing to reimburse his auto expenses. The Court of Appeal reasoned that because the employer's failure to reimburse expenses effectively reduced the employee's pay below the minimum wage, the employer arguably created an intolerable work condition for the employee that justified his decision to quit.[195]

"Pay the union boss or be fired" extortion. The Court of Appeal allowed a wrongful termination claim to proceed against a union that allegedly fired the plaintiff for failing to meet demands to financially support the union leaders' election campaigns. The Court of Appeal reasoned that a union demand to pay or be fired could qualify as attempted extortion, in that Penal Code section 518(a) defines extortion as obtaining property through "wrongful use of force or fear," and in that Penal Code section 519 explains that "fear" for purposes of extortion "may be induced by a threat to inflict unlawful injury to the person or property of the individual." The Court of Appeal concluded that "property" in this context may include the victim's employment, so the plaintiff could plausibly claim he had been terminated in violation of public policy.[196]

5.4.5 Wrongful employer actions short of termination

California has extended the public policy tort to "wrongful demotion," permitting an employee to sue for a disciplinary demotion imposed for reasons contrary to public policy.[197]

The Court of Appeal, in a semi-heroic refusal to yield to the temptation of judicial activism, has declined to create a tort for a wrongful failure to renew an employment contract, reasoning that there is no "termination" of an employment that ends by the terms of the employment contract.[198] This employer victory was limited, however, because the Court of Appeal also noted that the employee could pursue a statutory retaliation claim based on the same allegations (a firing in retaliation for raising workplace safety concerns), because the non-renewal, while not a "termination," could be an "adverse employment action."[199] Moreover, although the facts of this case did not raise the issue, a plaintiff in some other case might pursue a "wrongful termination" claim if the employment contract had an automatic renewal clause or if the employer permitted the employee to work past the contractually set termination date.

5.4.6 Protection of registered sex offenders—Megan's Law

California's Megan's Law[200] calls for the Department of Justice to publicize, via a website,[201] the whereabouts of sex offenders. Megan's Law is named after a seven-year-old girl who was raped and killed by a known child molester who had moved close to Megan's family without the family's knowledge. That tragedy inspired the family to lobby for laws enabling people to know where sex offenders live, so that people may better protect their children. Many states now have a Megan's Law.

The California version forbids firing an employee because the employee's name appears on the Megan's Law website, as the law authorizes use of information disclosed pursuant to the law "only to protect a person at risk" and prohibits use of the information for purposes relating to employment.[202] Someone aggrieved by a "misuse" of Megan's Law information may sue for actual damages, punitive damages, and a civil penalty of up to $25,000.[203] Employers may still use independent means, such as background checks, to learn whether an applicant or employee is a convicted sex offender.[204] Indeed, some employers, such as school districts, must not hire convicted sex offenders, and must perform due diligence to fulfill that duty.[205]

5.5 Claims for Breach of Contract of Continued Employment

5.5.1 Implied contracts to dismiss only for good cause

California nominally recognizes the doctrine of employment at will, which gives both employee and employer the contractual right to end the employment relationship without cause or prior notice.[206] California also recognizes, however, that circumstances may create an implied contract that requires the employer to make important employment decisions only for "good cause."

The ease of plaintiff's proof. California judges routinely invite juries to find an "implied-in-fact contract" of continued employment, by which an employee can be discharged only for "good cause." The jury may infer such a contract from common incidents of employment, such as longevity, personnel policies or practices, assurances of continued employment, good performance reviews, merit raises, and industry practices.[207]

The problem with traditional disclaimers. Because California juries can so easily infer an implied contract of continued employment, the presumption of employment at will is, as a practical matter, reversed: juries often will require "good cause" for discharge *unless* the parties have *expressly* provided, in writing, for employment at will. Moreover, unilateral statements by the employer to this effect are not necessarily conclusive.[208]

Accordingly, the only reasonably effective way for employers to ensure at-will status is to have the employee sign contract-like statements to that effect. An at-will provision in an express written agreement signed by the employee cannot be overcome by a contrary implied agreement.[209] To preclude jury findings of implied promises of continued employment, express employment-at-will statements should also appear everywhere the employer states a policy regarding factors the employer will consider in terminating or changing the terms of employment, and in confidentiality agreements and other agreements that the employee signs.[210]

California employers sometimes make the mistake of relying on certain disclaimer language that generally works outside California. Employers traditionally sought to shield themselves from implied-contract claims by placing disclaimers in handbooks and job applications to the effect that "this policy is not a contract." That language can have unintended consequences for the California employer who wishes to use a handbook or job application as a shield against claims for breach of implied contract. In one case, at-will language appearing in a job application failed to preclude a contract claim, because the application also contained broad "no contract" language; the Court of Appeal reasoned that the application could not "establish a binding employment condition [i.e., at-will employment] while at the same time expressly providing that neither the application nor subsequent communications can create a binding employment condition or contract."[211]

A better approach, under California law, would be to state that the employment-at-will language *is* contractual and that other language appearing in the document in question—whether it be a handbook, job application, or employment policy—is *not* a promise of continued employment.

Actions short of termination. The implied-contract action, like the tort claim for breach of public policy, extends to "wrongful demotion." The California Supreme Court has recognized an enforceable promise not to be demoted without good cause.[212]

Procedural violations. The theory of implied contract may also challenge an employer's failure to follow promised pre-termination procedures. The California Supreme Court has held that an employee might be able to recover on the basis that he would not have been dismissed in a reduction in force had the employer followed its own RIF procedures.[213]

5.5.2 Standard for "good cause"

Balancing test. The standard of "good cause" for dismissal or demotion formally permits the employer to rely on any legitimate, nontrivial reason for dismissal. Here again, though, the latitude that the law appears to give to employers may be more nominal than real. A standard California jury instruction permits juries to apply the "good cause" standard in a discretionary fashion, balancing the employee's interest in continued employment against the employer's interest in operating the business efficiently and profitably.[214] (Which way do you suppose the balance tips when the scale is administered by a jury of the plaintiff's peers?)

"Good cause" in cases of misconduct. In cases of suspected misconduct, an employer may have good cause for dismissal even if the employer's belief in the existence of misconduct turns out to be factually mistaken. But a California employer that relies on a factually mistaken ground for dismissal must show that it conducted an "appropriate investigation," which typically must include private interviews of witnesses, adequate documentation, and an opportunity for the accused to address the allegations.[215] The investigation need not be perfect, but should be "appropriate" in light of all of the existing circumstances.[216] Assuming the requisite level of propriety and fairness, courts will be hesitant to interfere with an employer's legitimate exercise of managerial discretion in determining that an employee's conduct constituted good cause for termination.[217]

5.6 Claims for Breach of Implied Covenant of Good Faith and Fair Dealing

Under California law, each employment contract necessarily implies a covenant of good faith and fair dealing. An employer breaches the covenant by any action, taken in bad faith, that deprives an employee of the benefit of the express terms of the contract. An employer might breach the implied covenant even where there is no breach of an express contract, such as where an employer dismisses a salesperson to avoid paying a commission on a sale that the salesperson has already completed,[218] or misleads an employee into taking a job in reliance on a reasonable assumption that he would have a chance to perform his job to the good faith satisfaction of the employer, and revokes the offer before the new hire begins work.[219]

The implied covenant of good faith and fair dealing does not impose substantive terms beyond those to which the parties actually agreed, and thus cannot transform an at-will employment contract into a contract terminable only for good cause. To the extent that a plaintiff claims a breach of the implied covenant simply on the basis that she was fired without good cause, the claim lacks merit.[220]

5.7 Limited Effectiveness of Common Defenses and Procedural Devices

5.7.1 Workers' compensation preemption

In many states, the workers' compensation act generally provides the exclusive remedy for a work-related injury, and thus preempts claims based on that injury. One California exception to that general rule is that an employee can pursue a FEHA claim for discrimination, harassment, or retaliation without regard to workers' compensation exclusivity.[221] California has gone a step further, to permit employees to pursue tort claims for intentional and even

negligent infliction of emotional distress, notwithstanding the workers' compensation act, where the tort claim stems from conduct (such as FEHA violations) alleged to violate public policy.[222]

California courts have reasoned that the employer's tortious conduct was not one of the "normal risks of employment" covered by the workers' compensation act.[223] In recent years, however, a moderating trend of authority has limited these kinds of tort actions, recognizing that employer misconduct in connection with normal employment decisions is within the compensation bargain, even if the misconduct was arguably outrageous and intended to cause emotional harm.[224]

It still remains the case, though, that some California courts permit intentional tort claims to proceed against employers even though they arise out of employment.[225] A 2017 Court of Appeal decision permitted an employee to pursue a claim for intentional infliction of emotional distress for conduct that was also retaliatory under FEHA.[226] This decision reverted to a prior, discredited view that conduct violating FEHA necessarily "falls outside the compensation bargain" and thus can be subject to an IIED claim.[227] This decision may be a classic case of bad facts making bad law. The defendant supervisor, knowing that the plaintiff was supporting another employee complaining of discriminatory conduct, ostracized the plaintiff in the workplace, encouraged her to lie to investigators, pursued her at home and in the office to see if she did so, and verbally and physically attacked her after she disobeyed.[228]

Power press exception. A statutory exception to workers' compensation exclusivity is the "power press exception," which benefits employees injured by their employer's knowing removal of—or failure to install—a point-of-operation guard on a power press when required by the manufacturer.[229] In a 2020 case, the Court of Appeal applied this exception to reinstate the lawsuit of a machine operator who had injured her hand while she was operating a power press without a protective guard.[230] Her lawsuit invoked the "power press exception" to workers' compensation exclusivity.[231] The trial court granted summary judgment to the employer, which had neither removed nor failed to install a required protective guard on its power press, which the employer had bought, used, from another manufacturer.[232] But the Court of Appeal reversed because of triable issues as to (1) whether the instruction manual for the power press put the employer on notice that protective guards were required and (2) whether the employer knowingly disregarded that directive.[233]

Emotional distress from negligent immigration processing did not arise out of and in the course of employment. In 2020 the Court of Appeal upheld a jury award for a couple—a British citizen business analyst and his wife—who suffered over $2 million in emotional distress damages because his employer negligently failed to obtain papers authorizing him to continue his work in the United States.[234] The employer had agreed to sponsor him for a green card, but application delays caused him and his family to move back to England, where his employment was terminated when his visa expired.[235] He successfully alleged that he would have kept his job but for the employer's breach of its assumed duty of due care.[236] On appeal, the employer argued that workers' compensation provided the exclusive remedy for emotional injury and distress, but the Court of Appeal disagreed.[237] The emotional injuries did not arise out of the business analyst's job-related duties or responsibilities, and the sponsorship of the green card was neither a condition of employment nor a form of pay.[238] Nor was the negligent handling of the process an inherent risk of employment.[239]

5.7.2 Exclusive statutory remedies—not

In many states, if a statute forbids conduct and provides a remedy for a violation, then the statutory remedy is exclusive for that conduct. In California it's different. For example, an employee alleging age discrimination may sue for wrongful termination under the public policy against age discrimination established by FEHA, without complying with FEHA's administrative requirements (that is, the employee may bring a tort claim based on the public policy expressed in an antidiscrimination statute, independent of a claim brought under the antidiscrimination statute itself).[240]

5.7.3 Summary judgment—not so fast

In America generally, and particularly in the federal system, courts use summary judgment to weed out weak lawsuits. A defendant can file such a motion and expect it to be submitted for decision relatively quickly, often within five weeks. Not so in California state courts.

Special pro-plaintiff notice requirement. A California party moving for summary judgment in an employment case (almost always the defendant) must give 75 days of notice.[241] This period gives plaintiffs plenty of time to take multiple depositions and to conduct additional written discovery, specifically designed to defeat the summary judgment motion, by establishing issues of contested material fact that must be decided by a jury. The party opposing a motion for summary judgment (almost always the plaintiff in an employment case) also can often delay the hearing still further to conduct even more discovery.

General judicial hostility toward summary judgment. Judicial hostility towards summary judgment in California employment cases arose vividly in *Nazir v. United Airlines*, a Court of Appeal decision that reversed a summary judgment while devoting many pages to criticizing the defense counsel (and leaving unscathed the corresponding conduct of the plaintiff's counsel).[242] *Nazir* injudiciously shared various judicial prejudices against summary judgment in employment cases:

- Summary judgment "is being abused, especially by deep pocket defendants to overwhelm less well-funded litigants."[243]
- "[C]ourts are sometimes making determinations properly reserved for the factfinder, sometimes drawing inferences in the employer's favor, sometimes requiring the employees to essentially prove their case at the summary judgment stage."[244]
- "[M]any employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper. Such cases, we caution, are rarely appropriate for disposition on summary judgment, however liberalized it be. … Its flame lit by [U.S. Supreme Court decisions encouraging the use of summary judgment motions to weed out nonmeritorious cases], ... summary judgment has spread ... through the underbrush of undesirable cases, taking down some healthy trees as it goes.' ...This we cannot allow."[245]

The Court of Appeal took another swipe at summary adjudication for employers in a lawsuit that a female construction worker brought to challenge inaccessible and unsanitary portable toilets.[246] The trial court granted summary adjudication against the employee's claim for punitive damages because, as a matter of law, no managing agent of the employer had engaged in or ratified any oppressive, malicious, or fraudulent conduct.[247] The Court of Appeal reversed, concluding that the declaration of the alleged managing agent, filed in support of the motion for summary adjudication, did not state "sufficient *evidence.*"[248] Even though the declarant clearly enumerated his limited job duties, the Court of Appeal held that a jury "could reasonably infer that the declarant was a managing agent because he "exercised substantial authority and discretion regarding a broad range of issues involving the Project, including compliance with [the employer's] policies and the hiring, supervision, and laying off of Project employees."[249]

To make matters still worse for litigation-weary employers, a 2018 FEHA amendment codified California's hostility to summary adjudication in harassment cases by stating: "Harassment cases are rarely appropriate for disposition on summary judgment. In that regard, the Legislature affirms the decision in *Nazir v. United Airlines, Inc.* (2009) 178 Cal. App. 4th 243 and its observation that hostile working environment cases involve issues 'not determinable on paper.'"[250]

5.7.4 Plaintiff's income tax returns privileged from discovery

In America generally, plaintiffs seeking lost income in lawsuits against employers must produce income tax returns. In California it's different. California courts have held that individuals have a privilege to withhold income tax returns from discovery.[251]

5.7.5 Limits to statutes of limitations

California courts liberally apply "equitable estoppel," "continuing violation," and other doctrines designed to lengthen the deadlines for filing a lawsuit.

Deferring accrual of discrimination claims. Under federal law, an employee challenging a wrongful dismissal generally must sue within a period of time that begins with the *notice* of the employee's termination of employment.[252] The notice may precede the actual termination of employment by weeks or months.[253] In California it's different. For a California plaintiff, the time to sue for wrongful termination does not start to run until employment actually terminates.[254] The same lenient standard favors a plaintiff suing on a breach of contract: the Court of Appeal has held that an employee's claim against an employer for breaching its promise to permit "senior" employees to continue employment under relaxed sales quotas did not accrue when the employer announced it would no longer honor the promise, but rather accrued only later, when the employer first counseled an employee for failing to meet sales quotas contrary to the relaxed quotas.[255]

California's standard for determining when a claim accrues is somewhat less lenient in a failure-to-promote case. In 2021 the California Supreme Court considered a claim that the plaintiff was denied a promotion because she had rebuffed a supervisor's sexual advance.[256] The Supreme Court decided that the claim would have accrued when the employee knew or reasonably should have known of the allegedly unlawful refusal to promote, and remanded for findings on that issue.[257] Further, because the statute of limitations is an affirmative defense, the Supreme Court held that the defendant employer has the burden to prove the plaintiff's actual or constructive knowledge of a refusal to promote.[258] This ruling places a premium on the employer's use of clear, written notice of its employment decisions.[259]

"Continuing violation." California discrimination plaintiffs can sue on acts preceding the limitations period if they are "sufficiently connected to unlawful conduct within the limitations period."[260] California courts thus permit suit on unlawful actions occurring beyond the limitations period if a course of conduct, continuing into the limitations period, has not reached a state of "permanence" and consists of acts "sufficiently similar in kind," occurring with "sufficient frequency," even if the employee already knew of facts sufficient to sustain a claim at a time preceding the limitations period.[261]

The Court of Appeal has applied the "continuing violation" doctrine to reverse a summary judgment against a gay CHP officer allegedly subjected to homophobic comments and to related conduct putting his safety at risk.[262] The Court of Appeal concluded that the plaintiff had presented evidence of similar misconduct both before and during the limitations period, with reasonable frequency, and that the misconduct had not previously gained permanence because the employer had not definitely rejected the officer's concerns about the harassment he was experiencing.[263]

In another "continuing violation" case, the Court of Appeal sustained a female spa employee's hostile environment claim alleging unwelcome sexual overtures and assault by a company salesman.[264] Her complaints to the company were unavailing and when a new owner took over the company the situation deteriorated further.[265] Although much of the conduct preceded the limitations period, the Court of Appeal permitted the plaintiff to sue for it, because the new owner claimed to have a "zero tolerance" policy for sexual discrimination and the plaintiff

could reasonably expect him to prevent further harassment, despite her unheard prior complaints, and as to those complaints the prior owner had not formally rejected her claims of harassment.[266]

Equitable tolling. California plaintiffs can extend suit-filing deadlines upon showing (1) timely notice to the defendant, (2) lack of prejudice to the defendant, and (3) reasonable conduct in good faith by the plaintiff.[267] In a 2020 case, the Court of Appeal, reversing a summary judgment against a plaintiff for bringing an untimely FEHA claim, held that there was enough evidence for a jury to find that the FEHA limitations period had been equitably tolled by the filing of a workers' compensation claim.[268] Because that claim involved work-related stress arising from homophobic harassment that supported the later FEHA claim, the Court of Appeal concluded that an investigation concerning the source of the work-related stress should have preserved evidence concerning his discrimination claims.[269] And even though the plaintiff waited 11 months after the workers' compensation claim resolved to file his FEHA claim, he allegedly "was so distressed that he became suicidal and was unable to work, and he was denied adequate counselling while struggling to recover."[270]

Disapproving contractual limitations. The Court of Appeal has rejected a defendant's reliance on a contractually shortened limitations period in a sexual harassment lawsuit.[271] The Court of Appeal concluded that a six-month limitations period was "unreasonable and against public policy."[272]

Tolling individual claims during class actions. California law, like federal law, tolls the limitations period for individual claims during the pendency of class actions asserting those claims. The Court of Appeal so held in a case where a trial court granted summary judgment against a retail manager, concluding that his various wage and hour claims were all time-barred.[273] The Court of Appeal held that the plaintiff could claim the benefit of class-action tolling, by which the limitations period for an individual claim is tolled from the time an asserted class action starts until the time when class certification is denied.[274] The Court of Appeal held that the plaintiff could reasonably have relied on the pending class actions as a basis for postponing the filing of his own claims, and the defendant suffered no prejudice because the class actions provided adequate notice of the plaintiff's potential claims.[275]

5.7.6 Statute of Frauds not a defense

Plaintiffs suing for breach of a contract of continued employment, requiring good cause for dismissal, often rely on alleged oral promises made many years ago, by managers no longer with the employer. The Statute of Frauds, found in virtually every state, generally provides that a contract must be in writing to be enforceable, if by its terms the contract is not to be performed within one year from its inception.[276]

One might think that an oral contract of continued employment, contemplating performance for a period of more than one year, is subject to the Statute of Frauds. Not so in California. The California Supreme Court has held that the Statute of Frauds defense is unavailable in an employment case because an oral employment contract *could possibly* be completed within one year, in that, within one year, the employee could quit or die or be fired for good cause.[277] The Supreme Court's reasoning thus relied on the possibility of a first-year *failure* of performance of an oral employment contract, even though the Statute of Frauds itself addresses only *actual* performance of the contract.[278]

5.7.7 Federal labor preemption generally not a defense

Limited effect of LMRA preemption. Employers sometimes argue that a state law claim is preempted by Section 301 of the Labor Management Relations Act and thus must proceed, if at all, only as a claim under the collective bargaining agreement governing the terms and conditions of the plaintiff's employment. But in California this defense fails when the claim arises, as it typically does, under independent state law that does not require

interpretation of the CBA.[279] The Ninth Circuit has held that even where applying the CBA terms might affect the outcome, no preemption applies if one need only "look at" the terms of the CBA.[280]

Limited effect of RLA preemption. See § 7.7.8.

Limited effect of NLRA preemption. Under NLRA preemption, as the U.S. Supreme Court explained in *San Diego Unions v. Garmon*, the NLRB has exclusive jurisdiction over disputes involving unfair labor practices, requiring state jurisdiction to yield when "state action would regulate conduct governed by the NLRA."[281] Because the NLRB decides whether the NLRA governs conduct, NLRA preemption may extend beyond conduct that the NLRA directly governs to activities that "arguably" constitute unfair labor practices. In a 2020 case, the Court of Appeal rejected an employer's NLRA preemption defense to employee claims that the employer's confidentiality policies unlawfully prevented employees from sharing information about wages, working conditions, and corporate wrongdoing, and from engaging in competition.[282] The trial court invoked NLRA preemption to dismiss the lawsuit, but the Court of Appeal reversed, holding that the plaintiffs' claims fell within the "local interest" exception to NLRA preemption.[283] That exception applies if (1) there is "a significant state interest" in protecting the citizen from the challenged conduct, and (2) the exercise of state jurisdiction entails little risk of interference with the NLRB's regulatory jurisdiction.[284] Both conditions appeared here, the Court of Appeal thought, where the plaintiffs cite state statutes on traditional matters of local concern, which reasonably seem peripheral to the NLRA.[285] States may set minimum employment standards without running afoul of the NLRA, and state violations alleged by the plaintiffs could be proven without considering whether the employer committed unfair labor practices.[286]

5.7.8 Limits on defensive cross-complaints

One weapon in an employment defendant's arsenal is a cross-complaint filed against the plaintiff for the plaintiff's own actionable conduct. California limits the effectiveness of such a cross-complaint, however, by authorizing a specialized motion—an "anti-SLAPP" motion—which permits a plaintiff to argue that a cross-complaint should be stricken on the ground that it is simply a litigation tactic.[287]

When a female employee sued both her employer and her co-worker for sexual harassment, the co-worker defendant cross-complained against her for defamation and intentional infliction of emotional distress (IIED), based on her allegations to the police, a nurse, and an HR manager.[288] When the plaintiff then filed an anti-SLAPP motion, the trial court dismissed the cross-complaint and required the co-worker to pay the plaintiff's attorney fees.[289] The Court of Appeal affirmed, because the anti-SLAPP statute protected the plaintiff's allegations in that they were made in connection with matters under review by an official proceeding or body, and because the co-worker could not demonstrate a likelihood that he would prevail on the merits of his defamation and IIED claims.[290]

5.7.9 Restricting peremptory juror challenges

Trial lawyers often use their judgment to exercise a peremptory challenge to excuse a prospective juror who seems unfair or incompetent, even though the lawyer cannot prove that the prospective juror is actually unqualified to serve on the jury. The lawyer need not state the basis for the challenge, unless the other side objects. The peremptory challenge then stands so long as the lawyer was not discriminating on the basis of the prospective juror's membership in some protected group.

California will be making peremptory jury challenges much more difficult, if not impossible, by creating very heavy presumptions of unlawfulness with respect to some common reasons for exercising a peremptory strike. Legislation passed in 2020 will, effective in 2026, hinder civil trial lawyers who rely on various potential indicia of a prospective juror's bias, including the prospective juror's (1) expressing a distrust of or having a negative experience with law enforcement or the criminal legal system, (2) expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner, (3) having

a close relationship with people who have been stopped, arrested, or convicted of a crime, (4) neighborhood of residence, (5) having a child outside of marriage, (6) receiving state benefits, (7) not being a native English speaker, (8) ability to speak another language, (9) dress, attire, or personal appearance, (10) employment in a field disproportionately occupied by members of a race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or that a serves a population disproportionately composed of members of such a group, (11) unemployment or underemployment, or unemployment or underemployment of the prospective juror's family member, (12) apparent friendliness with another prospective juror of the same race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation.[291] The law will presume that these reasons for excluding jurors are improper proxies for unlawful discrimination unless the party exercising the peremptory challenge can show by "clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups."[292]

To make peremptory jury strikes even harder, the new law proclaims that certain reasons for peremptory challenges "have historically been associated with improper discrimination," such as the prospective juror (a) being inattentive, or staring or failing to make eye contact, (b) exhibiting either a lack of rapport or problematic attitude, body language, or demeanor, and (c) providing unintelligent or confused answers.[293] The new law will deem these reasons "presumptively invalid unless the trial court is able to confirm that the asserted behavior occurred, based on the court's own observations or the observations of counsel for the objecting party.[294] Even with that confirmation, the counsel offering the reason shall explain why the asserted demeanor, behavior, or manner in which the prospective juror answered questions matters to the case to be tried."[295]

5.8 Defamation Claims

In 2020, the Court of Appeal reinstated a $6 million defamation award as not duplicative of a wrongful termination award, in that the damages awarded for the wrongful termination claim were for only past and future lost earnings due to the employee's discharge and the damages for wrongful termination did not include a component for reputation damages.[296]

5.8.1 Self-compelled publication

Ordinarily, a defamation claim requires proof that the defendant published the defamatory statement to third parties. In California, it's different. California joins a few other jurisdictions in recognizing the doctrine of "self-compelled publication," applying when it is foreseeable that the defendant's act would result in a plaintiff's publication to a third person. For self-compelled publication to apply, the defamed party must operate under a strong compulsion to republish the defamatory statement, and the circumstances creating the compulsion must be known to the originator of the statement when the statement is made to the defamed individual. Suppose that an employer fires an employee for suspected theft, while privately reminding the employee that theft is a dismissible offense under company policy. Suppose further that the employee is not really a thief, but really just meant to borrow the company's money. Suppose now that the fired employee, seeking a new job, feels compelled to tell prospective employers that theft was the reason that the prior employer gave for the dismissal. Peculiarly in California, these facts may create liability for defamation, even though the former employer never told anyone (other than the fired employee) about the theft, if the plaintiff was "compelled" under the circumstances to publish the defamatory statement. The doctrine of "self-compelled publication" has obvious implications for exit interviews.

Employers have tried to avoid liability under this theory by following a strict policy against giving out any information about former employees except for the dates of employment. Such a policy would tend to undermine any contention that an employee reasonably felt compelled to disclose the prior employer's reasons for terminating employment.[297]

The Court of Appeal has upheld a $1.7 million jury verdict in a case of self-compelled publication. Michael Tilkey, a licensed life insurance broker employed by an insurance company, argued with his girlfriend while visiting her apartment. When he stepped out onto her patio, she locked the door behind him. When he banged on the door to seek re-admittance, she called the police. He was arrested for disorderly conduct. Tilkey's employer fired him and filed a Form U5 with the Financial Industry Regulatory Authority, stating he was dismissed for "threatening behavior and/or acts of physical harm violence to another person." Tilkey then prevailed in a lawsuit for self-compelled defamation. The Court of Appeal affirmed the jury award, noting that because nothing about Tilkey's arrest indicated he ever harmed or threatened to harm anyone, the U5 statement was untrue and supported a finding of defamation. And the evidence also supported the jury's finding of self-compelled publication. The Form U5 was available to every prospective employer of similarly licensed employees, and so when Tilkey was asked by such an employer about prior terminations he reasonably had to disclose the U5 statement.[298]

5.8.2 References by former employers

California expressly recognizes a privilege for a former employer to say whether it would rehire a current or former employee.[299] The statutory language is so vague, however, that it is conceivable that an employer still could be liable for defamation if the employer was motivated by ill will to state that a former employee would not be eligible for rehire.

Some employers disclose information on former employees based on written authorizations signed by those former employees. But California law does not recognize a waiver of liability as to future intentional acts, so that an employer allegedly providing false information could still be sued for intentional defamation, notwithstanding the former employee's written authorization for the employer's disclosure.[300]

5.8.3 Privileges inspired by #MeToo movement

Legislation effective in 2019 specifies that three types of communications regarding sexual harassment are deemed privileged—immune from a defamation claim unless they were made maliciously (with complete disregard for the truth, or false accusations made out of spite, ill will, or hatred). The three forms of non-malicious communications enjoying this protection are (1) reports of sexual harassment made by an employee to the employer based on credible evidence, (2) communications regarding sexual harassment allegations between the employer and "interested persons" (such as witnesses or victims), and (3) statements made to prospective employers as to whether a decision to rehire would be based on a determination that the former employee engaged in sexual harassment.[301]

Legislation effective in 2024 extends the statutory definition of a privileged communication in defamation actions to include communications concerning an individual's experience of sexual assault, sexual harassment, workplace harassment or discrimination, and cyber sexual bullying.[302] The same law also provides that a prevailing defendant in any defamation action brought against that defendant for making a communication that is privileged is entitled to their reasonable attorney fees and costs for successfully defending themselves in the litigation, plus treble damages for any harm caused to them by the defamation action against them, in addition to punitive damages permitted by law.[303]

5.9 Misrepresentation Claims

5.9.1 Employer liability for fraudulent inducement

Labor Code section 970 authorizes double damages for an employee who has been induced to change from one place to another by false promises regarding employment.

Many states refuse to use the doctrine of promissory estoppel to aid an employee who leaves a job to accept an at-will job that never materializes. In California it's different. Even if the plaintiff has left an at-will employment, the California employer inducing the plaintiff to leave another's employ can be liable under theories of promissory estoppel[304] or promissory fraud[305] for the income the plaintiff lost by leaving the prior employer in reliance on the new employer's pre-hire promises. A California court held that a plaintiff who was hired by an at-will employer with false promises of compensation, and who was fired six months later for complaining about the broken promises, could recover the compensation that he would have earned with his former employer, which would have re-hired him but for its strict no-rehire policy.[306]

In 2022, the Court of Appeal held that an at-will employee could not rely on any promises about how long he would be employed because the employee's at-will employment status rendered such reliance unreasonable as a matter of law. The employee could base his lawsuit on alleged misrepresentations during the interview about the nature of the employment being offered, however, including whether the employer knowingly misrepresented that the employee would be hired to fill the role of lead project manager for the company. As a result, the Court of Appeal reversed the lower court's grant of summary judgment.[307]

5.9.2 Employer liability for too-generous references: negligent referral

A California employer that gives a reference praising a former employee, while failing to report facts showing the employee's dangerous tendencies, may be liable for intentional or negligent misrepresentation. A school district that praised a former employee for his ability to work with children, while failing to report his misconduct with children, was subject to a misrepresentation suit by a child whom the employee molested in his new employment. In this situation, the school district presented "misleading half-truths" and was obligated to complete the picture by disclosing material facts regarding charges and complaints regarding the former employee's sexual improprieties.[308]

5.9.3 Employer liability for blackballing

Labor Code sections 1050-1054 make an employer liable for treble damages and a misdemeanor criminal penalties for misrepresentations to prevent a former employee from obtaining new employment. However, an employee may not be able to recover both statutory treble damages and punitive damages, as this would constitute an impermissible double recovery.[309]

5.10 Employer Liability for Employee Torts

5.10.1 Negligent retention of wrongdoing employees

An employer is liable for injuries to third parties caused by an employee whom the employer retained while knowing of the employee's known propensities to cause such harm.[310]

5.10.2 Intentional torts by employees

The traditional rule is that an employee's actions are within the scope of employment—and thus binding on the employer—only if they are motivated, in whole or part, by a desire to serve the employer's interest. Deviating from this rule, California courts have expanded employer liability by reasoning that an employee's willful, malicious, and even criminal torts can fall within the scope of employment. In California, the employer is vicariously liable for an employee's conduct—even if that conduct is not authorized or ratified—if the employment predictably creates the risk that employees will commit torts of the type for which liability is sought.

The Court of Appeal applied this expansive notion of tort liability in holding that an auto-supply store could be liable to a customer who had been assaulted by the store's employee. The employee had hit the customer in the head with a metal pipe when the customer criticized the employee for giving an inadequate response to a

question about the price of motor oil. The Court of Appeal concluded that this physical eruption, stemming from a customer interaction, could be a predictable risk of retail employment.[311]

5.10.3 Unintentional torts of employees

Under the traditional "going and coming" rule, employers are not liable for torts that their employees commit on their way to and from work, because commuting employees are not acting within the scope of their employment.[312]

But California courts have created a "required vehicle" exception to the going-and-coming rule, reasoning that an employer derives an incidental benefit from its employee's use of a vehicle where that use is an express or implied condition of employment.

The Court of Appeal has reversed summary judgment for the employer of an employee who hit someone with her car on her way home from work, even though the accident occurred while the employee was deviating from her normal route home to obtain some frozen yogurt and attend a yoga class. The Court of Appeal broadly reasoned: "Because the employer required the employee to use her personal vehicle to travel to and from the office and make other work-related trips during the day, the employee was acting within the scope of her employment when she was commuting to and from work."[313] And "the planned stops [for yoga and yogurt] were not so unusual or startling that it would be unfair to include the resulting loss among the other costs of the employer's business."[314]

But the "required vehicle" exception applies only when the employee is under a duty to bring the vehicle to work—either as a matter of daily duty or as a matter of duty on the day of the accident.[315] The Court of Appeal reversed judgment against an employer where the employee was under no such duty: on the day of the accident he was not required to drive, not assigned any job duties outside the workplace, and not using his vehicle for work purposes.[316]

5.11 Employment Discrimination Litigation

California forbids all the kinds of employment discrimination forbidden by federal statutes, plus quite a few more (see § 6.2).

Even California, however, recognizes that a worker suing for employment discrimination must first be an employee. A participant in the Adult Offender Work Program (AOWP) thus lost his claim for disability discrimination. Although injured while performing work in the AOWP, he could not sue his employer under the FEHA for his injuries, for failure to accommodate his preexisting physical disability, and for failure to engage in the interactive process. The trial court, affirmed by the Court of Appeal, granted summary judgment against the participant, finding that he was not an employee for purposes of the FEHA. The Court of Appeal affirmed, reasoning that an individual must receive remuneration to be an employee. The Court of Appeal reasoned that remuneration must take the form of a substantial financial benefit and here the participant did not receive any money, health insurance, dental insurance, life insurance, or retirement benefits for participating in the AOWP. Merely being granted the privilege of staying out of jail did not constitute a financial benefit for the participant. Further, although he received workers' compensation benefits for his injury, these benefits were not paid for his inability to work; they were paid to compensate for his injury. The trial court properly found that the lack of remuneration precluded a finding of employment for FEHA purposes.[317]

5.11.1 Far greater scope of liability for employment discrimination

In many ways California's discrimination provisions have a greater breadth, provide more remedies, and are easier for plaintiffs to pursue than are the corresponding provisions under federal law (see § 6.1). Under federal law—Title VII, ADA, and the ADEA—monetary remedies for employment discrimination are subject to certain limits, such as caps on compensatory and punitive damages for Title VII lawsuits and the absence of emotional

distress recovery for ADEA lawsuits. Further, some states, such as Washington, do not recognize claims for punitive damages.

In California, it's different. A California plaintiff who prevails in any kind of employment tort suit—common law or statutory—is entitled to recover the full panoply of tort damages, including uncapped economic damages and non-economic damages, and punitive damages, as well as costs, and in a discrimination suit can recover not only reasonable attorney fees but also expert witness fees.[318]

And under California law, unlike federal law, attorney-fee awards can often dwarf damage awards (see § 5.12).

5.11.2 Additional claims for physical violence

California employees discriminated against with acts of violence and intimidation have a private right of action in addition to the rights they already have under ordinary discrimination statutes.[319]

5.11.3 Joint employer liability

California takes an extraordinarily expansive view on what constitutes joint employment.

A Court of Appeal decision held, as a matter of law, that a worksite employer was a joint employer of a staffing agency employee because the worksite employer exercised significant control over the employee's work. The plaintiff was placed with the worksite employer defendant by a temporary staffing company. Although the staffing company paid all wages and benefits and recorded all work time, the worksite employer controlled the temporary employees much as it did its own employees. When the plaintiff sued the worksite employer for harassment and retaliation, the jury decided that the worksite employer was not the plaintiff's employer and returned a defense verdict. The Court of Appeal reversed, reasoning that an employment relationship for purposes of FEHA exists, as a matter of law, if the defendant controls the individual's work performance. The plaintiff had worked as a supervisor for the worksite employer, had reported to the worksite employer's management, had been subject to the worksite employer's employee handbook and disciplinary policies, and had undergone the worksite employer's mandatory in-house training. The Court of Appeal remanded the case for a retrial, with the jury to be instructed that the worksite employer was the plaintiff's employer with respect to FEHA claims.[320]

Better news for employers came in a 2019 decision affirming a summary judgment against a health clinic nurse who sued not only the clinic that employed her but also a firm that provided the clinic with services including patient scheduling, patient registration, coding and transcription, billing, and collections. The Court of Appeal held that the service firm was not the plaintiff's joint employer because the firm did not pay her salary, benefits, or Social Security taxes, and did not own the equipment she used when working. The service firm lacked authority to hire, transfer, demote, discipline, or discharge the plaintiff and did not set her schedule or determine her pay. Although the service firm controlled patient scheduling, any effect on the plaintiff's pay was minimal and indirect. The fact that the health clinic could not function without the service firm did not make the firm the plaintiff's employer.[321]

But then, in 2021, California employers suffered a hit in the joint employment arena, with respect to a company's relationship with its contractor's employee. A Court of Appeal decision broadened the test for joint employment by lowering the bar for determining what constitutes control by a business over the wages and working conditions of its vendor's employees. Shell Oil Company had agreements with independent gas station operators by which the operators paid Shell a monthly rent while employing their own employees. When an operator's employee sued Shell on wage and hour claims, the Court of Appeal ultimately held that Shell was a joint employer because Shell maintained control over the operator's "finances, day-to-day operations, facilities, and practices" such that it could have stopped employees from "working in their stations through a variety of means." The Court of Appeal specifically noted that Shell employees told the plaintiff they had the power to have him fired, that Shell had

contractually mandated control over the operator's bank accounts, and that Shell could remove individual stations from the operator at any time.[322]

5.12 Anti-Employer Rules Regarding Attorney Fees and Costs

5.12.1 Wage claims

For claims seeking to recover unpaid minimum wages or overtime premium pay, California favors plaintiffs with a one-way fee-shifting provision that entitles only the prevailing *employee* to recover attorney fees.[323] For claims seeking other forms of unpaid wages, a prevailing employee remains entitled to attorney fees, while the prevailing employer is so entitled only upon a finding that the employee sued in bad faith.[324]

Section 218.5 of the Labor Code originally provided, in an even-handed way, for prevailing-party attorney fees as to wage claims that did not involve minimum wages or overtime premium wages. Employers invoked this statute when they defeated claims seeking pay for denied meal periods or rest breaks. Employers could say that those claims were claims for "wages" because a 2007 California Supreme Court decision had held that meal and rest pay was a "wage," not a "penalty."[325]

In 2012, however, in *Kirby v. Immoos Fire Protection*, the California Supreme Court deprived employers of this leverage. *Kirby* determined that claims for meal and rest pay are not claims for "wages" after all, but rather are claims for violation of the employer's obligation to provide meal and rest breaks.[326] *Kirby* implied that if the claims had involved wages instead of penalties, then an award of attorney fees to the prevailing employer would have been appropriate. The attention thus focused on section 218.5 prompted the Legislature in 2013 to amend the statute to tilt the playing field still further in favor of plaintiffs.[327] Now, while section 218.5 continues to entitle employees to attorney fees when they win claims for unpaid wages, the statute entitles prevailing employers to attorney fees only if the court finds that the employee brought the lawsuit in bad faith.[328] Meanwhile, as to actions for unpaid minimum or overtime premium wages, it remains the case that only the successful employee—and never the successful employer—is eligible to recover attorney fees.[329]

The Court of Appeal has denied an employer prevailing-party attorney fees where the claim was for split-shift premium pay (considered to be a claim for minimum wages), but has allowed fee applications where the claim was for reporting-time pay (considered to be a claim for unpaid wages at the employee's regular rate).[330]

5.12.2 Court-enhanced attorney fees by use of multipliers

Under federal statutes authorizing an award of attorney fees to the prevailing party, the award is simply the product of (a) the hours reasonably expended on the winning effort and (b) the reasonable rate for those hours. There is usually no after-the-fact multiplier or enhancement to augment the plaintiff attorney's reward for pursuing a risky case,[331] although there are rare circumstances where an enhancement may be appropriate.[332] The Court of Appeal once agreed, opining that an attorney-fee enhancement would "at best serve no purpose and at worst encourage pursuit of unmeritorious claims."[333]

But the California Supreme Court disagreed, holding that trial courts can grant an enhanced attorney-fee award to compensate plaintiff's attorneys for the risk that they assume in taking a case on a contingent fee basis.[334] Following that lead, the Court of Appeal has held that a trial court could grant an enhanced fee award to class-action plaintiffs' counsel who took a PAGA case that raised significant complex legal issues of first impression.[335]

5.12.3 Attorney fees awarded even if plaintiff doesn't win

Sometimes plaintiffs seek prevailing-party attorney fees even though all they arguably accomplished was simply a voluntary change in the defendant's course of conduct. The U.S. Supreme Court has rejected attempts to rely on

this "catalyst" theory of fee recovery.[336] In California it's different. The California Supreme Court has endorsed the recovery of attorney fees for a plaintiff if the defendant changes its behavior substantially because of, and in the manner sought by, the plaintiff's lawsuit.[337]

The California Supreme Court thus permitted qualifying plaintiffs—who never won their lawsuit—to recover not only (1) attorney fees for litigating the underlying lawsuit but also (2) a multiplier on those fees, (3) attorney fees for litigating their entitlement to attorney fees, and (4) a multiplier on the fees for litigating entitlement to fees.[338] This development led the dissenting justice to note forlornly: "The majority today goes further than this court has ever gone before—indeed, so far as I can tell, further than any other court has ever gone—in permitting plaintiffs to win large attorney fee awards. … Lest California truly become a mecca for plaintiffs and plaintiffs' attorneys throughout the country, we need to be at least somewhat in step with the rest of the country."[339]

In the wage and hour context, California has departed from the conventional view that courts should reduce attorney-fee awards to account for the plaintiff's lack of success. The Court of Appeal has held that an employer, on appeal from a Labor Commission award, owed over $85,000 in plaintiff's attorney fees and costs even though the plaintiff had minimally prevailed on but one of three claims, winning just $4,250: "[The employer] chose to appeal and seek a trial de novo after suffering only a relatively modest loss before the commissioner, having defeated two other claims for which [the plaintiff] sought considerably higher damages. If [the plaintiff] consequently was required to incur substantial attorney fees to retry the entire case, including issues on which she did not prevail before the commissioner, defendant has only itself to blame."[340]

5.12.4 Attorney fees awards can dwarf actual recoveries

In federal cases, the amount of attorney fees awarded to a plaintiff generally must be in reasonable proportion to the plaintiff's success.[341] In California it's different. The Court of Appeal refused to reduce a $1.1 million attorney-fee award where the plaintiff failed to succeed on certain claims and won only a $30,500 jury award.[342] The California Supreme Court corrected a similar situation in 2010. A plaintiff winning an $11,500 FEHA verdict had sought $871,000 in attorney fees. The trial court denied the fee request because the recovery was so modest that the case could have been brought in a court of limited jurisdiction (with recoveries limited to $25,000). When the Court of Appeal reversed, holding that it was an abuse of discretion to deny attorney fees in a FEHA case solely because the amount of the damages award was modest,[343] the California Supreme Court reversed the Court of Appeal and upheld the trial court, concluding that the trial court could deny attorney fees on the basis of the plaintiff's minimal success and the grossly inflated fee request.[344]

Yet courts continue to countenance grossly disproportionate fee awards. The Ninth Circuit has applied California law to uphold an award of $700,000 in plaintiff's attorney fees where the jury had rejected most of her claims and had awarded her just $30,000 in damages.[345]

5.12.5 Windfall fees for plaintiffs' attorneys in class action settlements

Federal courts, to protect the interests of unnamed class members, often restrict plaintiff's attorney fees to a maximum of 25% of the common-fund settlement, absent "special circumstances."[346] In California it's different. The California Supreme Court—approving attorney fees amounting to a full one-third of the common fund—has held that an attorney fee is not unreasonable merely because it is a fixed percentage of the common fund.[347]

In the wage and hour case in question, the plaintiffs' attorneys estimated that their lodestar (hours worked times hourly billing rate) were about $3 million, but successfully claimed fees in excess of $6 million (one-third of a $19 million gross settlement).[348]

5.13 Unfair Competition Claims

5.13.1 The Unfair Competition Law (UCL)

California's vaguely worded UCL permits lawsuits for any "unlawful, unfair or fraudulent business practice."[349] Wage and hour plaintiffs often add a UCL claim to obtain a four-year statute of limitations instead of the three-year statute that applies to Labor Code claims generally. The UCL authorizes only limited remedies: it does not permit damage awards or a remedy of nonrestitutionary disgorgement (e.g., return of profits that an employer has realized through Labor Code violations).[350] Nor does the UCL authorize recovery of penalties due for untimely payment of termination wages.[351] The UCL does authorize injunctive relief and any order "necessary to restore to any person in interest any money or property which may have been acquired by means of such unfair competition."[352] The California Supreme Court thus held that an action seeking restitution for unpaid overtime wages could proceed as a representative action under the UCL, and that UCL's four-year limitations period applied even though the underlying wage claim was governed by a three-year statute.[353]

Plaintiffs have used the UCL to circumvent a defendant employer's right to jury trial. The Court of Appeal has upheld a trial court's decision to have a wage and hour claim tried to the court, without a jury, over the defendant's objection, on the basis that the UCL claim encompassed the traditional wage and hour claims and that the UCL claim is one for equitable relief, for which no jury trial is available. The Supreme Court decided to review this decision (on other grounds), making it unfit to cite as precedential authority.[354] Historically, a UCL action also permitted the plaintiff to seek restitution on a class-wide basis without satisfying the usual requirements of class certification.[355] This rule was amended by Proposition 64, however, discussed below.

5.13.2 Proposition 64 and recent expansion of organizational standing

Proposition 64, enacted by a vote of the People of California in November 2004, reformed the UCL by requiring that a private UCL plaintiff must have suffered an "injury in fact" and have lost "money or property" as a result of the challenged business practice, and by requiring that UCL plaintiffs suing on behalf of others must satisfy the requirements for a class action.[356]

Despite Proposition 64 and long-standing precedent denying associational standing,[357] the California Supreme Court in *California Medical Association v. Aetna Health of California Inc.* ruled that organizations such as trade organizations have standing to pursue UCL claims if they incur costs while responding to perceived fraudulent, unlawful, or unfair trade practices that threatens their bona fide, pre-existing mission.[358] While such an expansion is likely to have costly implications for employers facing a new brand of UCL plaintiffs, the Supreme Court limiting the opinion to organizational standing and expressly stating it did not expand associational or individual standing.[359] In addition, the opinion made clear that an organization may not establish standing by diverting costs, and establishing standing, by preparing for UCL litigation.[360]

5.14 The Wage and Hour Class Action Explosion

5.14.1 California peculiarities favoring wage and hour class actions

The number of class action lawsuits alleging California Labor Code violations has risen continuously over the last twenty years, with thousands pending every year. PAGA actions have also become prolific, and PAGA claims are regularly included in class action lawsuits, or filed alone.

The following factors make class actions particularly attractive to California wage and hour plaintiffs:

- California wage and hour law differs from federal law in important ways, such that an employee who is exempt from federal overtime pay requirements often is not exempt under California law.

- California procedural rules facilitate class actions for violations of wage and hour obligations. Federal wage and hour claims, under the FLSA, require an "opt-in" procedure, meaning that collective actions proceed to the extent that employees want to join the suit.[361] California procedural law, however, does not permit opt-in class actions,[362] meaning that employees will belong to the class unless they affirmatively opt out.

- A California plaintiff denied class certification in state court is entitled to an immediate appeal under the "death knell" doctrine, while a plaintiff denied class certification in federal court has no right to appeal until a final judgment, unless the plaintiff can obtain permission to file a discretionary interlocutory appeal.[363]

- California recognizes that plaintiffs' lawyers have a constitutional right to communicate with potential class members, and requires employers to allow those lawyers to obtain the names and addresses of potential class members, notwithstanding their privacy interests.[364]

- Virtually every Labor Code claim entitles the prevailing plaintiff to attorney fees.[365]

- California has permitted wage and hour claims to proceed under its UCL, which has an extraordinarily long (four-year) statute of limitations.[366]

- California courts show extraordinary deference to plaintiffs' pleaded allegations. Federal courts require all plaintiffs, including wage and hour plaintiffs, to specify facts to support a plausible claim for relief.[367] In California courts, it's different. The Court of Appeal has stated that, "in the vast majority of wage and hour disputes, class suitability should not be determined on demurrer."[368]

- California courts, in considering class certification, are not required to use the "rigorous analysis" that the U.S. Supreme Court has required of federal courts.[369]

Thus, to defeat class certification, California employers often must bear the enormous expense of filing or defeating a motion based on extensive evidence regarding the suitability of the claim for class treatment. Wage and hour plaintiffs thus gain enormous leverage by seeking class treatment, which exponentially magnifies the employer's potential exposure to monetary liability. A plaintiff seeking class certification need only identify a sufficiently numerous class that has a well-defined community of interest, a concept that embodies three factors: (1) predominant common questions of law or fact, (2) class representatives with claims typical of the class, and (3) class representatives who can adequately represent the class.[370]

Employers defending class actions often gather declarations from employees to show such things as variations in work experiences – illustrating how class certification would be inappropriate because individual issues would predominate over common issues. One employer, in opposing a motion for class certification, submitted 53 declarations from current and former employees who were putative class members.[371] Many declarants had been summoned, during working hours, to sign their declarations.[372] When the plaintiff moved to strike all the declarations, alleging they had been obtained improperly, the trial court denied the motion and then denied class certification.[373] Yet the Court of Appeal reversed, holding that the record failed to reflect that the trial court understood its duty to ensure that employee declarations did not result from the employer's coercion or abuse. If the trial court found that the declarations had been obtained through coercion or abuse, it had broad discretion either to strike the declarations or to discount their evidentiary weight.[374] Because the record demonstrated the trial court's unawareness or misunderstanding of its duty to closely scrutinize the declarations with employer coercion or abuse in mind, its order denying the motions to strike the declarations had to be reversed, as did its ensuing order denying class certification.[375] A dissenting justice opined that the majority erred in reaching the evidentiary issue and in treating the trial court's purported evidentiary error as reversible without determining whether that evidentiary ruling had affected the certification decision.[376]

5.14.2 Judicial endorsement of California wage and hour class actions

The California Supreme Court, in its 2004 *Sav-On Drug Stores* case, issued a decision favoring class certification of a wage and hour case involving whether the employer had properly classified certain managers as exempt.[377] *Sav-On* emphasizes that if one reasonably *might* conclude from the record that common issues predominate over individualized ones, then a trial court's certification order should not be disturbed on appeal.[378] *Sav-On* states that decisions regarding predominance are for the trial court to determine, and the trial court's decisions should not be lightly overturned.[379]

While *Sav-On* does not mandate certification in exempt/nonexempt classification cases, the opinion has a pro-certification tone, stating that class actions are "encouraged" in the wage and hour context.[380] Furthermore, the Supreme Court suggested that if an employer categorically reclassified all the subject employees as nonexempt without changing their duties, that could fairly be taken as an admission that the position had been misclassified all along.[381] The Supreme Court also suggested that class treatment could be supported by the employer's failure to audit the performance of its exempt employees to see if particular employees truly were functioning in an exempt capacity.[382]

Sav-On identified several issues plaintiffs could establish through common proof:

- Whether the employer deliberately misclassified nonexempt employees as exempt.
- Whether the employer implicitly conceded the employees in question were nonexempt when it reclassified them all from exempt to nonexempt.
- Whether any given task within the limited universe of tasks that managers performed qualifies as exempt or nonexempt.
- Whether a manager following the employer's reasonable expectation for performing the job would spend most working time on exempt duties.[383]

Sav-On concluded that a trial court could rationally conclude that those common issues predominated over individualized issues concerning how managers actually spent their time.[384] Dismissing concerns that these cases could prove unmanageable, *Sav-On* noted that the trial court had broad discretion as to how to handle individualized issues once the class issues were resolved.[385] *Sav-On* gave minimal guidance as to how to carry out those proceedings, but it encouraged trial courts to be "procedurally innovative" in fashioning procedures to resolve remaining individualized issues efficiently.[386]

The California Supreme Court affirmed these general class certification principles in *Brinker Restaurant Corp. v. Superior Court*, a 2012 case, by holding that a trial court considering certification need not decide issues that affect an element of the certification standard, if they are unnecessary to the ultimate certification decision.[387]

After *Brinker*, California courts have extended this pro-certification rationale even further, ruling that certification should turn on whether a plaintiff's *theory* is susceptible to common proof, and minimizing the individualized inquiries necessary to determine which putative class members, if any, actually experienced a violation of the Labor Code.[388] Indeed, the California Supreme Court has gone so far as to say that employer records showing potential meal period violations create a rebuttable presumption in favor of certification – casting aside employer arguments that a short meal period on paper could easily be due to employee choice, creating a need for individual inquiry.[389]

Meanwhile, California appellate decisions going the other way (in the employer's favor) either were not published or suffered the indignity of being depublished by the California Supreme Court.[390]

5.14.3 Some limits to use of the class device

In 2014, the California Supreme Court, in *Duran v. U.S. Bank*,[391] corrected some but not all the ways that plaintiffs in wage and hour cases had abused the class device to disadvantage employers. *Duran* vacated a $15 million judgment that the trial court had entered on the basis of flawed statistical sampling in a case alleging that a bank had misclassified certain employees as outside salespersons. *Duran* limited the circumstances in which statistical sampling can establish class-wide liability. In particular, *Duran* ruled that courts cannot use sampling to deprive a defendant of its due process right to present affirmative defenses as to all class members.[392] Perhaps most important, *Duran* reaffirmed that the plaintiff bears the burden to establish that class certification is appropriate, and ruled that trial courts, before deciding whether to certify a class, must determine that a class trial would be manageable.[393]

The Court of Appeal returned to this case in 2018, affirming an order denying class certification because the plaintiffs failed to show that the case was manageable as a class action.[394] Agreeing with the trial court, the Court of Appeal noted that the defendant's affirmative defenses "would appear to require a host of 'mini-trials.'"[395] There were also "multiple flaws" in the plaintiffs' trial plan, including an inability to "use representative sampling to establish an aggregate restitution award."[396] The Court of Appeal thus concluded that the trial court had not abused its discretion in denying class certification.[397]

Although *Duran* did not reject the use of statistical sampling to establish class-wide liability, the decision makes it significantly more difficult for plaintiffs to use that approach. *Duran* also reaffirmed the requirement that class litigation be manageable, a requirement that California lower courts, until then, had often ignored. The decisions of the trial court and the Court of Appeal after remand demonstrate that manageability concerns and the lack of a viable trial plan can be an obstacle to class certification.

In one refreshing application of *Duran,* the Court of Appeal upheld denial of class certification where the plaintiffs—property inspectors claiming to be insurance employees misclassified as independent contractors—proposed a trial plan that would have denied the defendant its right to due process.[398] The plaintiffs proposed that their expert would testify by relying on hearsay evidence contained in his survey of class members.[399] The Court of Appeal rejected this affront to due process: "[a]lthough an expert 'may rely on inadmissible hearsay in forming his … opinion … and may state on direct examination the matters on which he … relied, the expert may not testify as to the details of those matters if they are otherwise inadmissible.'"[400] The Court of Appeal explained: "Defendants have the right to defend against plaintiffs' claims by impeaching the evidence supporting them. … Plaintiffs' proposed procedure forestalls defendants' exercise of this important right."[401]

5.14.4 Broad pre-certification class discovery

Under federal law, the Ninth Circuit has held that a federal district court erred in ordering a defendant to produce a list of putative class members to help the plaintiff find someone to bring a class action under California law.[402] The Ninth Circuit reasoned that it was an abuse of the federal discovery rules "to find a client to be the named plaintiff before a class action is certified."[403] In California, it's different. The Court of Appeal, to help class-action plaintiffs' lawyers, has held that a plaintiff need not even belong to the asserted class to have standing to obtain pre-certification discovery.[404] At issue was an order permitting pre-certification discovery to identify class members who might become substitute plaintiffs in place of the original plaintiff.[405] The Court of Appeal upheld a trial court ruling that the rights of absent class members outweighed the potential for abuse of the class procedure.[406]

5.15 PAGA Civil Penalty Claims for Labor Code Violations

California's Labor Code Private Attorneys General Act of 2004 (PAGA) is a bane to employers and a boon to the plaintiffs' bar. PAGA is perhaps the California peculiarity par excellence. It has no precise precedent or analog in the American legal system, although recently other states have contemplated their own similar statutes. PAGA's stated purpose is to enlist employee plaintiffs to stand in for the California Labor Commissioner to enforce the Labor Code, on the rationale that the Labor Commissioner lacks the resources to enforce the law and that, without PAGA, the level of law enforcement and the level of civil penalties would fail to deter employers from breaking labor laws. (For those who remember their maritime history, PAGA may bring to mind the letter of marque—a governmental license issued to enterprising ship captains that authorized them to fit out an armed vessel to capture enemy merchant shipping, through acts that otherwise would constitute piracy. Today's PAGA pirates are enterprising plaintiffs' lawyers who use PAGA as a vehicle to extract large settlements that often depend on hypertechnical, trivial violations of the Labor Code. Indeed, one prominent PAGA plaintiffs' lawyer has a personalized license plate—"MR PAGA"—on his Rolls Royce.)

PAGA aims to fix these perceived problems by authorizing employees to sue in the Labor Commissioner's stead to seek civil penalties that go to the state and to "aggrieved employees," with 75% of penalties going to the state and 25% of penalties going to the aggrieved employees.[407]

As interpreted by California courts, PAGA permits any current or former employee of a California company to sue the company on behalf of all "aggrieved employees." Even though PAGA has a one-year limitations period, a PAGA action can seek massive civil penalties for virtually all violations of the Labor Code—no matter how trivial the violation and regardless of any actual injury—so long as the plaintiff can claim a single violation. A current or former employee becomes a PAGA plaintiff simply by sending a letter to the LWDA and the employer to notify them of the alleged Labor Code violations and then waiting for 65 days to see if the LWDA itself will take action (which it almost never does).[408] Once the LWDA fails to act, the employee is free to sue, ostensibly on behalf of the LWDA and the other "aggrieved employees."[409]

Plaintiffs' lawyers like to bring PAGA actions because

- PAGA creates private rights of action to sue for Labor Code violations that previously only the Labor Commissioner could address,
- PAGA creates massive, unlimited civil penalties and multiplies potential liability still further because it empowers employees to sue on behalf of others as well as themselves, and because in doing so they need not meet the requirements of a class action,
- PAGA enables a plaintiff affected by one violation to seek penalties for all violations affecting other employees, and not just those violations that personally affected the plaintiff,
- PAGA can enable plaintiffs to sue for civil penalties for themselves and other aggrieved employees even if the plaintiffs have agreed to dismiss their own individual Labor Code claims,
- PAGA enables massive discovery of private information such as the contact information of a company's employees, and
- arbitration agreements waiving representative PAGA claims are unenforceable.

PAGA suits have powerfully proliferated since PAGA's early days, especially when plaintiffs' counsel discovered that PAGA actions were immune to arbitration agreements[410] and that PAGA-only actions cannot be removed to

federal court. While the annual number of PAGA notices sent to the LWDA remained under 700 during the first four years of PAGA's existence, annual LWDA notices numbered in a much higher range—from 1,338 to 2,001—during 2008-2013, then jumped to a range of 3,703 to 6,307 during 2014-2018, and ranged from 2,690 to 6,431 during 2019 to 2021.[411] PAGA notices sent to the LWDA decreased to 5,817 in 2022, but rebounded to 7,909 PAGA in 2023.[412]

A 2021 development further incentivizing PAGA actions was a Court of Appeal decision holding that venue is proper for a PAGA action in any California county where Labor Code violations allegedly occurred, even if the defendant's principal place of business is not in that county and even though the plaintiff never worked there. Noting that a PAGA plaintiff is suing as the State of California's designated proxy, the Court of Appeal stated: "We see no reason why the Legislature would restrict the proper venue to the location of an individual employee when she is suing on behalf of all aggrieved employees, not herself, and she has no individual claim."[413]

5.15.1 The PAGA legislation

When federal and state governments create civil penalties for certain statutory violations, the mission of enforcing these penalties is typically entrusted to public officials who exercise prosecutorial discretion. In California it's different. PAGA[414] created two significant problems for California employers. *First,* as of 2004, new civil penalties apply to violations of all Labor Code provisions "except those for which a civil penalty is specifically provided." (See § 7.25.2.)[415] *Second,* "aggrieved employees"[416] may sue, in lieu of the Labor Commissioner, to recover the civil penalty, with the plaintiff and other aggrieved employees to collect 25% of the penalties (the remainder going to the state).[417] The prevailing plaintiff also can recover costs and attorney fees.[418] Recovery of civil penalties is not available, however, if the LWDA or its agencies or employees already have cited the employer for a violation of the same section(s) of the Labor Code based on the same facts and theories.[419]

The California Supreme Court enhanced PAGA's power still further in 2009, when it held that PAGA authorizes individuals to sue under PAGA without having to satisfy the requirements of a class action, on the rationale that "an action to recover civil penalties 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.'"[420]

Calculation of PAGA penalties. PAGA vaguely calls for penalties of $100 for each aggrieved employee per pay period for "the initial violation" and $200 for "each aggrieved employee per pay period for each subsequent violation."[421] How does one determine when a "subsequent violation" has occurred? The Court of Appeal has stated that penalties reach $200 per pay period once the employer "has learned its conduct violates the Labor Code."[422] Does this language indicate that until the Labor Commissioner or a court finds a Labor Code violation, the employer can be assessed only the $100 per pay period for an "initial" violation? Or does it indicate that the employer has been notified of a violation—and thus now faces penalties of $200 per pay period—whenever an employee submits a PAGA notice to the LWDA and the employer? The California Supreme Court has yet to clarify the point.[423]

Anti-retaliation provision. California employers must not retaliate against any employee for bringing a PAGA claim.[424]

5.15.2 PAGA amendments

Reform legislation mitigated certain aspects of PAGA. The principal reform measures were as follows.

DLSE exhaustion requirement. Employees challenging certain Labor Code violations must, before suing, give written notice to the LWDA of the specific violation, to enable the LWDA to investigate and cite the employer for the violation, in which case a private lawsuit cannot proceed.[425] The LWDA has 60 days to notify the employee that it intends to investigate the alleged violation, in which case a private lawsuit cannot proceed.[426] If the LWDA

gives notice that it does not intend to investigate or the LWDA does not act with 65 days, then the employee may file a PAGA action.[427] For a few specified violations, the employer has an opportunity to cure the violation within a limited time after the employee's notice.[428]

A PAGA claim is deficient if the notice to the LWDA and the employer failed to provide sufficient "facts and theories" for the alleged Labor Code violation.[429] The Court of Appeal thus held that a PAGA plaintiff who complains of untimely payment of termination wages on behalf of all aggrieved employees cannot proceed if the LWDA notice refers only to the plaintiff's own situation.[430] A 2020 Court of Appeal decision, however, reasoned that the "facts and theories" alleged in an LWDA letter "need not 'satisfy a particular threshold of weightiness,'" and held that a PAGA plaintiff had adequately exhausted administrative remedies by alleging in his LWDA letter that the employer had knowingly permitted employees to work off the clock, had unlawfully rounded work time, had automatically deducted 30 minutes of pay for meal periods not taken, and had manipulated time to avoid overtime wages.[431]

Courts have further diminished the significance of PAGA exhaustion requirements by holding that plaintiffs may pursue certain penalties without first contacting the DLSE. These are "statutory penalties" — those that employees could collect directly, pre-PAGA (e.g., waiting-time penalties). These courts would apply the exhaustion requirement only as to "civil penalties," defined as those penalties that only the Labor Commissioner can collect absent a PAGA action. Courts thus have held that while employees must exhaust LWDA remedies as to any claim for "civil penalties," employees need not contact the LWDA before suing for "statutory penalties."[432]

Of some concern with respect to the exhaustion requirement was a 2008 Court of Appeal decision holding that PAGA claims added in an amended complaint relate back to the original complaint, if the claims rest on the same misconduct and the same injury.[433] But this decision failed to address the exhaustion requirement, and courts since have recognized that the failure to properly notify the LWDA and the employer is fatal to a PAGA claim.[434]

Judicial discretion to reduce penalties. Courts may exercise discretion to reduce the amount of PAGA penalties if the amount otherwise would be "unjust, arbitrary and oppressive, or confiscatory."[435] In exercising that discretion, courts have considered such factors as the corresponding amount of statutory penalties, the employer's attempts to comply with the law, the uncertainty of the law, and the employer's ability to pay.[436]

Court approval of settlements. The court must "review and approve any settlement" of a PAGA action, regardless of whether the settlement includes an award of penalties.[437] Further, a copy of a proposed settlement must be provided to the LWDA when it is submitted to the court.[438] Courts have approved PAGA settlements involving payments to the LWDA of less than 0.1% of a common settlement fund.[439] But one federal district court rejected a $100 million class action settlement because it allocated only 1%—$1,000,000—to PAGA penalties.[440]

Exemption for notice, posting, and filing violations. Employees cannot maintain PAGA lawsuits for petty violations such as failures to post notices or file notices, although this exemption does not cover "mandatory payroll or workplace injury reporting."[441]

Repeal of job-application provision. Employers no longer must (as was once required by former Labor Code section 431) file a copy of their job application forms with the DLSE. The Legislature thus removed the basis for what would be a particularly annoying "gotcha" PAGA lawsuit.

Exemption for unionized construction employers. Legislation effective in 2019 created a PAGA exemption for construction employers whose employees are covered by a collective bargaining agreement.[442]

Exemption for some unionized janitorial employers. Legislation effective in 2022 created a PAGA exemption for some janitorial employers whose employees are covered by a collective bargaining agreement.[443]

"The California Fair Pay and Employer Accountability Act" initiative. The California Fair Pay and Employer Accountability Act qualified for the 2024 ballot and, if passed, would do the following: (1) replace PAGA and instead give only the Labor Commissioner the right to issue penalties, including increasing penalties for willful violations, (2) provide 100% of the penalties to employees, and (3) create a Consultation and Publication Unit that employers can utilize for guidance on applying the Labor Code.

5.15.3 Further PAGA peculiarities

Employees settling individual Labor Code claims can still pursue PAGA claims for themselves and other aggrieved employees for the same violations. One Court of Appeal decision upheld the dismissal of a PAGA claim when a Labor Code plaintiff, whose individual claims had been directed to arbitration, settled his individual claims and then sought to resume his PAGA claim that had been stayed in court pending the arbitration.[444] The Court of Appeal held that the plaintiff, upon settling his individual claims, was no longer an "aggrieved employee" and thus lacked standing to pursue a PAGA claim.[445] The California Supreme Court upset this sensible result by granting review of the case[446] and then unanimously ruling for the plaintiff. The Supreme Court, focusing on the literal language of PAGA, reasoned that an "aggrieved employee" eligible to pursue a PAGA claim is anyone who has suffered a relevant Labor Code violation, and that a PAGA plaintiff remains "aggrieved" even if he has received individual relief for the violation.[447]

PAGA settlements resolve PAGA claims of other aggrieved employees, but only if the PAGA notice supports a conclusion that claims of other aggrieved employees are covered. The Court of Appeal so held in a case where a truck driver who was bringing a PAGA action against his employer for denying rest and meal breaks learned that another employee bringing a PAGA action and a class action on those claims was settling those claims. Although the truck driver opted out of the proposed class settlement, he could not opt out of the PAGA action and so the PAGA settlement and resulting judgment in the other employee's case finally resolved all PAGA claims, including the truck driver's. Although the truck driver sought to continue his own PAGA action beyond the period covered by the PAGA settlement, he lacked standing to do so because, by the time that period ended, he had not been employed by the employer for well more than a year.[448]

In 2022 the Ninth Circuit similarly held that an aggrieved employee, who was not a party to the PAGA lawsuit, could not appeal a PAGA settlement. The Ninth Circuit noted: "There is no individual component to a PAGA action because *every* PAGA action is a representative action on behalf of the state [and] [p]laintiffs may bring a PAGA claim *only* as the state's designated proxy[.]"[449] The Ninth Circuit further rejected the argument that an aggrieved employee could appeal a PAGA settlement on the grounds that he was entitled to some portion of the PAGA award: an aggrieved employee "does not receive a portion of the PAGA settlement because of any injury, but instead because the California legislature made a policy choice that the bounty that normally serves as the incentive for the plaintiff to bring the suit should instead be shared with all aggrieved employees."[450]

In 2023, the Court of Appeal in *LaCour v. Marshalls of California, LLC* reversed dismissal of a PAGA action.[451] The trial court had dismissed PAGA claims in an action alleging unreimbursed business expenses on grounds they had been released in settlement of a prior PAGA action. Though the PAGA notice in the prior action listed a variety of alleged violations, including Labor Code section 2802, the state court complaint factually alleged only off-the-clock claims. Nevertheless, the trial court found that the first-filed plaintiff had authority to settle the second-filed plaintiff's expense reimbursement claims. The Court of Appeal reversed, noting that the dearth of factual allegations in the PAGA notice in the prior PAGA action could not support the conclusion that the prior settlement agreement released expense reimbursement claims alleged in the second action. The court further noted that *res judicata* did not bar the second action because the two actions did not assert the same primary rights and there was no privity between the two named plaintiffs despite a judicially accepted and broadly worded release in the first matter.

Employers face threat of permissive intervention in settling overlapping PAGA claims. In 2023, the Court of Appeal in *Accurso v. In-N-Out Burgers* overturned a trial court's denial of an initial PAGA plaintiff's intervention as a matter of right in a later-filed overlapping PAGA case.[452] The first plaintiff sought to join imminent settlement and to stay a later-filed case under the doctrine of exclusive concurrent jurisdiction. The Court of Appeal reversed, finding the lower court had not considered whether permissive intervention was appropriate, reasoning there was no reason not to give an overlapping PAGA plaintiff a "seat at the table," and "permissive intervention even before the settlement approval process begins may be a way to ensure" overlapping plaintiffs "are meaningfully involved in the settlement approval process."[453] This decision could make it more difficult to obtain approval of PAGA settlements and extinguish other overlapping PAGA claims.

The manner in which PAGA actions are settled confirms their peculiar nature. This chart compares a PAGA settlement with a class action settlement involving the same underlying alleged Labor Code violations (in which a class is conditionally certified for purposes of settlement).

PAGA Settlements	Class Settlements
One-step approval process	Preliminary and final approval steps required
Individuals cannot opt out	All class members have a chance to opt out
Only the LWDA can object	Any class member can object
PAGA judgments preclude duplicative PAGA claims	Class members can bring PAGA claims
No effect on individual Labor Code claims	Class members are bound by the settlement
75% of net fund goes to LWDA, 25% to individuals	All of net fund goes to class members
100% of settled civil penalties	Settlement proceeds can be both wages and penalties

Prior immunity to arbitration agreements. The California Supreme Court enhanced PAGA's power in 2014, in *Iskanian v. CLS Transportation Los Angeles*,[454] which found a PAGA exception from the general rule that class-action waivers in arbitration agreements are enforceable. *Iskanian* reasoned that a PAGA claim differs from a class action in that PAGA plaintiffs act as private attorneys general, on behalf of the State of California—an entity that never agreed to arbitrate with the employee.[455] While federal district courts both before and after *Iskanian* reached the opposite conclusion,[456] the Ninth Circuit in 2015 sided with *Iskanian.*[457] And later U.S. Supreme Court authority, though reaffirming the broad scope of the FAA in striking down state laws hostile to arbitration, left intact the PAGA claim's special immunity from enforceable arbitration agreements. (See § 5.2.4.)

However, on June 15, 2022, the U.S. Supreme Court partially preempted the *Iskanian* decision in *Viking River Cruises, Inc. v. Moriana* by ruling that employers can enforce arbitration agreements under the FAA insofar as the agreements mandate arbitration of an employee's individual PAGA claims.[458] Specifically, the Court held that PAGA claims can be divided into individual and non-individual, "representative" PAGA claims and that individual PAGA claims can be compelled to arbitration under the FAA. In such instances, where plaintiff's individual PAGA claims are enforced in arbitration, it follows that the plaintiff no longer has statutory standing to maintain representative PAGA claims in court because "[u]nder PAGA's standing requirement, a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action."[459] The U.S. Supreme Court clarified that a "wholesale waiver" of PAGA claims in an arbitration agreement is still invalid under *Iskanian* and is not preempted by the FAA.[460]

In a series of post-*Viking River* decisions, California Courts of Appeal dealt significant blows to employers' attempts to avoid representative PAGA actions by holding that an employer can compel arbitration of the plaintiff's individual PAGA claims, but cannot compel arbitration of the plaintiff's representative PAGA claims.[461] In other words, notwithstanding compelled arbitration of the plaintiff's individual PAGA claim, the plaintiff retains standing to pursue representative claims on behalf of other employees in state court or another forum. In a 2023 ruling, the California Supreme Court cemented PAGA plaintiffs' standing to pursue representative claims on behalf of other employees in state court or another forum.[462] But in a somewhat surprising twist, the California Supreme Court's decision supports the stay of representative PAGA claims pending arbitration, rather than employers having to defend two concurrent actions, and further noted the binding effect the arbitrator's ruling on the individual PAGA claim has on the plaintiff's standing to pursue representative PAGA claims.[463] Practically speaking, this means that if an employer prevails on individual PAGA claims in arbitration, a representative action by the unsuccessful plaintiff is extinguished – and vice versa. That is, if the individual plaintiff prevails in arbitration, she has standing to pursue a representative action in court.

Broad discovery rights. The California Supreme Court, in *Williams v. Superior Court*,[464] made PAGA more annoying yet. A PAGA plaintiff suing a retailer sought personal contact information for thousands of California employees, not just those at the store where he worked. The Court of Appeal upheld the trial court's discretion to find that the plaintiff had failed to specify good cause to justify the broad discovery sought, but the Supreme Court in *Williams* reversed. *Williams* held that in both class and representative actions "the contact information of those a plaintiff purports to represent is routinely discoverable as an essential prerequisite to effectively seeking group relief."[465] *Williams* acknowledged that "the Legislature was aware that establishing a broad right to discovery might permit parties lacking any valid cause of action to engage in fishing expeditions to a defendant's inevitable annoyance," but granted the right to broad discovery anyway.[466] *Williams* reasoned that the plaintiff "was presumptively entitled" to the information and that the employer had failed to justify withholding the information on any of three grounds: overbreadth, undue burden, and privacy.[467]

In rejecting the employer's argument about overbreadth, *Williams* held that employee contact information was reasonably calculated to lead to the discovery of admissible evidence.[468] The rules for PAGA discovery are the same as those applied in class actions, where plaintiffs can learn names and contact information of other potentially aggrieved employees to gather information to support their claims.[469] *Williams* rejected the employer's view that PAGA actions are different because PAGA plaintiffs must show that individuals are "aggrieved employees."[470] Instead, for discovery purposes, the plaintiffs need only allege that the employees at issue are aggrieved.[471]

In rejecting the employer's argument about undue burden, *Williams* noted that contact information often appears in a central database, so it would be the exception rather than the rule that an employer could show that producing statewide contact information would be too burdensome.[472]

In rejecting the employer's argument about privacy, *Williams* affirmed that the rules in place as to wage and hour class actions apply to PAGA actions as well. Notwithstanding the privacy right in one's personal contact information, trial courts cannot preclude discovery of employee contact information or require that employees affirmatively consent to disclosure before allowing it.[473] Rather, a court can call for a privacy notice that gives employees the chance to affirmatively opt out, with the default result being disclosure of contact information.[474] In this connection, *Williams* reversed published decisions that had required a party seeking discovery implicating privacy to show a "compelling need" for production. *Williams* said the degree of the privacy invasion is not always so great as to require a "compelling need" for production.[475]

While ordering the production of employee contact information in response to interrogatories, *Williams* acknowledged that when a party seeks information through other discovery devices, such as demands for

inspection and copying, good cause must be shown before production may be compelled.[476] *Williams* also recognized that a PAGA plaintiff must demonstrate "trial manageability," such that a PAGA claim should be dismissed if there are too many individualized issues to allow the action to be manageably tried.

Until January 2024, and despite *Williams*, there was an appellate split as to whether PAGA claims are subject to a motion to strike on manageability grounds.[477] However, in its decision in *Estrada v. Royalty Carpet Mills, Inc.,* the California Supreme Court made it clear that PAGA claims – and the broad discovery encompassed by them – cannot be stricken on grounds of manageability alone.[478]

Suing for Wage Order violations. Courts have permitted aggrieved employees to pursue PAGA claims not only for violations of provisions appearing expressly within the Labor Code, but also for violations of provisions appearing only in the Wage Orders. These courts have concluded that Labor Code section 1198 incorporates the Wage Order provisions by reference.[479] Accordingly, PAGA claims may assert violations of applicable Wage Orders, including violations of "suitable seating" requirements (see § 7.11). The Wage Orders include regulations on various other working conditions as well, including suitable workplace temperature.

Recovering wages as civil penalties. Although the California Supreme Court characterized a PAGA "action to recover civil penalties [as] fundamentally a law enforcement action designed to protect the public and not to benefit private parties,"[480] some California decisions permitted PAGA plaintiffs to seek "underpaid wages," under Labor Code section 558, as part of the civil penalty.[481]

These decisions benefitted plaintiffs' lawyers by saying that they did not have to choose between (1) pursuing lucrative claims for unpaid wages while running the risk that defendants would (a) remove the action to federal court and (b) enforce arbitration agreements with class-action waivers and (2) pursuing only civil penalties, in a PAGA action that would resist both removal and attempts to enforce arbitration agreements.[482] The California decisions permitted plaintiffs' lawyers to combine the best of both options by bringing a PAGA action to seek unpaid wages under section 558, which authorizes the Labor Commissioner (and inferentially a PAGA plaintiff) to recover civil penalties and unpaid wages.

The California Supreme Court brought this plaintiffs' gravy train to a halt in 2019, holding that employees can use PAGA only to recover civil penalties, not to recover unpaid wages.[483] The case arose when a bank employee, who had signed an arbitration agreement with a class-action waiver, avoided the waiver by suing only under PAGA, alleging failures to provide overtime and minimum wages, meal and rest periods, timely wages, adequate wage statements, and expense reimbursements. She argued that section 558 entitled her to seek not only civil penalties for each underpaid employee for each pay period, but also the amount of underpaid wages. This ploy worked with the Court of Appeal, which held that a PAGA plaintiff invoking section 558 could both avoid arbitration and recover unpaid wages, as a form of civil penalties recoverable through PAGA.[484]

The California Supreme Court agreed to review the case to decide whether the FAA preempts a state rule that would keep an arbitration agreement from applying to a PAGA claim for unpaid wages, but then decided to address a "more fundamental question": whether a PAGA plaintiff can obtain unpaid wages under section 558.[485] The California Supreme Court concluded that the unpaid wages recoverable under section 558 are *not* civil penalties and thus are *not* recoverable in a PAGA action: only the Labor Commissioner can recover unpaid wages under section 558. Thus, a plaintiff who sues only under PAGA can recover only civil penalties, and not unpaid wages.[486]

Seeking wage statement penalties when there was no injury. The Court of Appeal has permitted plaintiffs to seek PAGA penalties for inadequate wage statements even where the wage statement statute itself (Labor Code

section 226) would not authorize a penalty in light of the absence of any actual or even deemed injury.[487] (See § 16.3.1.)

Suing penalties for Labor Code violations the plaintiffs themselves never experienced. A Court of Appeal decision permitted a security guard affected by only one Labor Code violation to assert PAGA claims on behalf of aggrieved employees for other Labor Code violations, even though the violations did not personally affect the plaintiff. The Court of Appeal acknowledged that this result conflicts with traditional rules of standing, but reasoned that those rules do not apply to a PAGA case, where the plaintiff is acting on behalf of the California Labor Commissioner.[488]

Private suits for statutory penalties for untimely payment of wages and equal pay. A 2019 amendment makes claims for untimely payment of wages even more lucrative. The old law provided no private right to sue for untimely wage payments during employment: only the Labor Commissioner or a PAGA plaintiff could sue, for civil penalties, and those penalties went exclusively or mostly to the State of California.

Accordingly, employees experiencing untimely payment of wages now can choose to seek either (1) civil penalties under PAGA (which would be split between the LWDA and aggrieved employees) or (2) statutory penalties (going entirely to the employees).[489] This private right to sue for statutory penalties also applies to violations of the California Equal Pay Act. If an affected employee sues, then the Labor Commission could not bring an independent action.

PAGA pirates must share their booty. The Court of Appeal has held that a prevailing PAGA plaintiff must share with the other aggrieved employees the 25% portion of civil penalties that PAGA designates for aggrieved employees. The Court of Appeal thus upheld a trial court that denied the plaintiff a default PAGA judgment because he proposed to have all 25% of the civil penalties go to him instead of it being shared with his 22 fellow aggrieved employees. The case was dismissed when the plaintiff persisted in refusing to share.[490]

No right to a PAGA jury trial. Parties have hotly contested whether there is a right to jury trial in PAGA actions. Although PAGA itself does not call for a jury trial, the California Constitution arguably does. Often, but not always, it has been the plaintiff who desires a jury trial. The first appellate decision on this issue occurred in 2022. In that case the plaintiff lost a trial and then took an appeal from the trial judge's denial of the plaintiffs' request for a jury trial. The Court of Appeal, in affirming the judgment against the plaintiff, held: "On balance, we cannot conclude that such an action [under PAGA] has a pre-1850 common law analog that would call for the right to a jury trial under the California Constitution."[491]

5.16 "The Life Unlitigated is Not Worth Living"

This Californicated paraphrase of Socratic wisdom is not exactly public policy in California, but sometimes it sure seems that way.

5.16.1 Limited Good Samaritan protection

Like many states, California has a Good Samaritan statute, designed to encourage people to assist victims of dire emergencies. The statute exists because the common law, while imposing no duty on a person to come to a victim's aid, does require due care of a person who chooses to administer aid. To encourage helping behavior by people who would be inclined to act as Good Samaritans but for this fear of common-law liability, the California Legislature enacted a statute that gave immunity from liability to "any person … who renders emergency care at the scene of an emergency."[492] But then the California Supreme Court, acting in its historical tradition of expanding liability at every opportunity, held in a 2008 decision that Good Samaritan protection was limited to those who provided "emergency *medical* care."[493] In reading "medical" into the statute, the Supreme Court reversed a

summary judgment in favor of a defendant who had removed her friend from a wrecked automobile immediately following an accident, inadvertently aggravating the friend's spinal injuries in the process.[494]

The dissenting opinion in this 4-3 decision pointed out that the majority's rewriting of the Good Samaritan statute—immunizing only *medical* assistance—would legally jeopardize all rescue and transportation efforts, so that a person would be at legal risk while pulling a victim from a burning building and would be legally protected only while administering CPR to the victim on the sidewalk.[495] The dissent doubted that the Legislature intended "results so illogical, and so at odds with the clear statutory language."[496] The dissent was right: the Legislature responded by amending the statute to include both "medical" and "non-medical" emergency care.[497]

5.16.2 Encouragement of multiple claims

California judges practically encourage plaintiffs' attorneys to assert all claims possible. The California Supreme Court has stated, "A responsible attorney handling an employment discrimination case must plead a variety of statutory, tort and contract causes of action in order to fully protect the interests of his or her client."[498] Plaintiff's attorneys can thus feel obliged to bring many claims, lest their clients second-guess their judgment by citing the high court's wisdom.

And in one case, in which the plaintiffs' attorneys had won a class action judgment against an employer in the amount of $90 million, the Court of Appeal permitted disgruntled class members to sue these highly successful plaintiffs' attorneys for malpractice, on the ground that they had failed to bring yet an additional claim for still more money.[499]

5.16.3 No guarantee that plaintiffs need ever pay costs

In America generally, frivolous litigation faces some deterrent because a plaintiff who loses a lawsuit must pay not only the plaintiff's own litigation costs but also the defendant's litigation costs (as well as the defendant's attorney fees, in rare circumstances). In California it's different. California creates no guarantees that the plaintiff who files a bad lawsuit will ever have to pay anything. As to the prevailing defendant's costs, California courts have held that in certain circumstances the plaintiff is liable for costs only if the plaintiff has the ability to pay.[500] And in 2018 the Court of Appeal extended this pro-plaintiff doctrine still further, holding that a defendant can recover expert witness fees under the FEHA only upon showing that the FEHA claim was objectively baseless.[501] In so ruling the Court of Appeal held that the FEHA's pro-plaintiff protections trumped the general rule that would enable a trial court to award defendants expert witness fees when they had offered to settle for an amount less than the verdict.[502]

And California permits a plaintiff to sue while secure in the knowledge that even the losing plaintiff's own costs will be paid by someone else. Various states historically have recognized causes of action (e.g., champerty, maintenance) that can put a party at risk for financing litigation. State bar rules in other states have limited the ability of lawyers to engage in that financing.

In California it's different. California does not discourage financing litigation and its state bar rules do not restrict a lawyer from agreeing to advance expenses of a client and even waiving the right to repayment if the client fails to obtain any recovery. A Formal Opinion by the Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association, citing the California Rules of Professional Conduct, ruled that it is permissible for a law firm to cover a client's litigation costs and to forgive repayment if the client loses.[503]

And a member of a California-certified plaintiff class need not worry about potential liability for costs in deciding whether to opt out of the class: absent class members cannot be held liable for the defendant's costs if the defendant wins the lawsuit.[504]

5.16.4 Deficient jury instructions often wrongly favor plaintiffs

The California Judicial Council has commissioned standard jury instructions, such as the California Civil Jury Instructions (CACI), that have misstated the law to the plaintiff's advantage.

Courts have corrected some of these mistakes, by

- rejecting a standard jury instruction that permitted retaliation plaintiffs to prevail simply because their protesting activity was a motivating reason for their discipline, even in the absence of retaliatory intent,[505]
- rejecting a standard jury instruction that permitted discrimination plaintiffs to prevail where, notwithstanding the presence of some discriminatory motive, the plaintiff would have experienced the same adverse employment action even in the absence of discrimination,[506] and
- holding that a trial court erred in refusing to give a "business judgment" jury instruction that the defendant had submitted. The defendant had proposed a nonstandard instruction, which read: "You may not find that Lucasfilm discriminated or retaliated … based upon a belief that Lucasfilm made a wrong or unfair decision. Likewise, you cannot find liability for discrimination or retaliation if you find that Lucasfilm made an error in business judgment. Instead, Lucasfilm can only be liable … if the decisions made were motivated by discrimination or retaliation related to [the plaintiff] being pregnant."[507]

5.16.5 Precluding discriminatory criteria in calculating lost earnings

A peculiar 2019 law, though not specifically an employment law, reflects California's progressive attitude toward tort damages. The law provides that, in personal injury and wrongful death cases, the plaintiff's damages for lost or impaired earning capacity cannot be reduced from any calculation based on a person's race, ethnicity, or gender.[508] The new law aims, obviously, to narrow the consequences of observed differences in the pay of groups defined by gender or ethnicity.[509]

5.17 Special Protections for Unauthorized Workers

5.17.1 Plaintiff protections

In the United States generally, the unauthorized work status of a plaintiff can limit their litigation remedies. The U.S. Supreme Court has held that undocumented workers cannot recover back pay for a wrongful termination, because awarding back pay would conflict with federal immigration policy.[510] In California the law is different. California legislation—codified in the Labor Code, the Civil Code, and the Government Code—makes the immigration status of a plaintiff irrelevant to any liability and to the remedies available under California law, except to the extent that federal law prohibits a reinstatement remedy.[511] Moreover, in a proceeding to enforce California law, it is unlawful even to inquire into a person's immigration status, absent clear and convincing evidence that the inquiry is necessary to comply with federal law.[512]

Employers have argued that the federal Immigration Reform and Control Act (IRCA) preempts this California legislation, but California courts have held otherwise. For example, a trial court held that IRCA preempted the claims of undocumented workers suing for unpaid wages under California's prevailing-wage law because the plaintiffs, under federal law, could not work lawfully in the United States. But the Court of Appeal reversed, concluding "there is no actual conflict between the IRCA and the prevailing-wage law as the state law is not an obstacle to the accomplishment and execution of the full purposes and objectives of the IRCA."[513] In fact, allowing the workers to seek a remedy "removes a major incentive to hiring undocumented workers."[514]

In that same case, when the employer argued that allowing wage suits by unauthorized workers would encourage illegal immigration, the Court of Appeal disagreed, saying "that many illegal aliens come to this country to gain the protection of our labor laws. Rather it is the hope of getting a job—at any wage—that prompts most illegal aliens to cross our borders."[515]

Another California Court of Appeal has held that an undocumented worker who was injured on the job is entitled to workers' compensation, negating the employer's argument that federal immigration law preempts state labor law protections for undocumented workers.[516]

The Ninth Circuit upheld a $1.1 million dollar jury verdict for an Italian store manager whose Beverly Hills employer dismissed him when his visa expired.[517] The employee claimed his termination was not for good cause, as required by his employment contract. The employer disagreed, arguing that under IRCA, an employer cannot "continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment."[518] The Ninth Circuit, while agreeing that compliance with IRCA would constitute good cause, nonetheless upheld employer liability because the employer, instead of immediately dismissing the plaintiff, could have granted his request to go on temporary, unpaid leave for a "reasonable period" in order to restore his work authorization.[519]

Further obstacles to employer reliance on immigration laws as a defense arose during 2014, when the California Supreme Court decided *Salas v. Sierra Chemical Co.*[520] The plaintiff had sued the defendant for failing to accommodate his disability and for refusing to rehire him in retaliation for filing a workers' compensation claim. The defendant, during the lawsuit, learned that the plaintiff had obtained his job by using a false social security number and that he actually could not work in the United States.[521] The Court of Appeal held that an undocumented worker who fraudulently claims legal work status cannot recover back pay for a wrongful termination or for a wrongful failure to hire because the employer could assert the defenses of after-acquired evidence and unclean hands.[522] But the Supreme Court in *Salas* disagreed, finding that in practice this approach "would eviscerate the public policies embodied in the FEHA by allowing an employer to engage in invidious employment discrimination with total impunity."[523] Instead, the Supreme Court concluded that the employee was still entitled to protection against disability discrimination under the FEHA.[524]

Salas acknowledged that it is a federal crime to use false identification documents to conceal one's true citizenship or resident alien status, but relied on a California statute providing that applicants and employees are entitled to all "protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, … *regardless of immigration status*."[525] *Salas* therefore held that a worker who cannot legally work in the United States can still sue under the FEHA, with the equitable defenses of after-acquired evidence and unclean hands being effective only for the purpose of limiting the remedies and the amount of recoverable damages.[526]

5.17.2 General protection for unauthorized workers

The California Legislature has increased protections for employees that may face suspicion as to their immigration status. For example, legislation makes it unlawful to discriminate or retaliate against anyone who *lawfully* updates documents relating to work authorization, such as name changes or social security numbers.[527]

Additionally, a California employer cannot report or threaten to report to the government the suspected citizenship or immigration status of an employee, former employee, or prospective employee because that person has exercised a right under the Labor Code or other laws.[528] Except as federal law requires, California employers also must not re-verify the employment eligibility of any employee.[529]

As of 2016, even on public works projects, employers cannot give preference to citizens over non-citizen workers. In other words, once an individual has confirmed they are legally authorized to work, an employer cannot give preference based on the source of that authorization (i.e., citizenship, green card, etc.).

In 2023, the Governor also unveiled a pilot program to provide free immigration legal assistance to undocumented farmworkers who are involved in California labor investigations, further emphasizing the general protection unauthorized workers receive under California laws.[530]

5.17.3 California employers must follow state procedural requirements if confronted by federal law enforcement

California—led by the Legislature, the Governor, and the Attorney General—resisted federal immigration law enforcement by the Trump Administration. California asserted, through litigation and various statutes, its traditional police powers to protect all state residents, including undocumented immigrants, from perceived over-reaching by the U.S. Departments of Homeland Security and Justice. Further, California sought to enlist employers in the cause. Under the Immigrant Worker Protection Act, effective in 2018,[531] California employers face a series of obligations designed to protect workers from enforcement of federal immigration laws. Employers who fail to abide by the new requirements incur liability for civil penalties in amounts up to $10,000, recoverable by the Labor Commissioner or, in some instances, the Attorney General.

These California challenges to federal supremacy sparked a response. In 2018, the U.S. Justice Department sued California in federal court to seek a preliminary injunction against the enforcement of California statutes addressing immigration issues.[532] A federal district court largely denied preliminary relief to the U.S. government but did grant a preliminary injunction against three provisions of California law.: Under that injunction, California cannot enforce enactments that prevent employers from (1) giving immigration enforcement officials employment or payroll records without a judicial warrant (except for Form I-9 audits), (2) re-verifying employee I-9 Forms (unless required by federal law), and (3) giving immigration enforcement officials warrantless access to the non-public areas of the employer's business.[533]

Meanwhile, California added a new immigrant protection: no party can disclose an individual's immigration status in open court, unless the party first persuades a judge in a private hearing that the evidence is relevant and admissible.[534]

5.18 Employer's Attorney-Client Privilege

In America generally, an employer can secure a confidential written opinion from an outside law firm and have the firm interview the employer's employees to learn facts needed to prepare the opinion, all without the fear that later, in litigation, the employer's legal adversaries can discover what facts the law firm relied upon in rendering its legal advice. That principle applies in California, too, but only because the California Supreme Court granted extraordinary relief to correct the errors of two levels of lower courts. In one wage and hour class action challenging the classification of managers as exempt from overtime pay, the Court of Appeal ruled that it would not disturb a trial-court order that the defendant must turn over to a discovery referee an opinion letter that the defendant had secured from a law firm, for the purpose of having the referee redact out and reveal to the plaintiffs the "facts" that the law firm had relied upon in rendering its legal advice.[535]

The California Supreme Court eventually issued a ringing endorsement of the attorney-client privilege, recognizing that confidential attorney-client communications are protected from discovery in their entirety, regardless of whether the facts contained therein are otherwise discoverable, and that courts cannot compel parties to submit documents to in camera review to determine whether the communication is privileged.[536]

5.19 Limits to Protection for Attorney Work Product

Employers defending lawsuits often have defense counsel interview witnesses to investigate the plaintiff's claims. The plaintiff's counsel then asks the defendant employer, during pre-trial discovery, to serve up on silver platter the fruits of the defense counsel's investigation. In a 2012 case, *Coito v. Superior Court (State of California)*, the California Supreme Court addressed the degree of protection that courts should give to work product that an attorney creates while obtaining evidence from witnesses.[537] In *Coito*, the defendant employer argued that both the identities of attorney-selected interviewees and the recorded witness statements were necessarily attorney work product (and thus could be withheld from the plaintiff).[538]

Coito made two relevant rulings. The first was that the identities of attorney-selected witnesses must be disclosed unless disclosure of them would "reveal the attorney's tactics, impressions or evaluation of the case, or would result in opposing counsel taking undue advantage of the attorney's industry or efforts."[539] The second ruling, more favorable to defendants, recognized that a witness statement obtained through an attorney-directed interview deserves "at least qualified work product protection."[540] *Coito* held that the party seeking the witness statements must show that withholding them would be unjust.[541] *Coito* also stated that the statements potentially could be subject to an absolute work product protection, if the statements reflected "an attorney's impressions, conclusions, opinions, or legal research or theories."[542]

Whether an investigation by outside counsel is privileged can depend on whether counsel is performing a legal function or a purely business one.[543] A factual investigation conducted by outside counsel that does not provide legal advice to the employer could nevertheless be subject to both the attorney-client privilege and attorney work product doctrine if outside counsel was not merely gathering information, but using expertise to "identify pertinent facts, synthesize the evidence, and come to a conclusion of what actually happened."[544]

5.20 Employer's Obligation to Withhold Taxes Due on Damages Judgment

In America generally, an employer who pays money to settle a claim or satisfy a judgment can, and must, withhold income taxes and payroll taxes to the extent that the money represents lost income (back pay and front pay), because to that extent the payment, for purposes of the Internal Revenue Code, is wages. So it was that when United Airlines suffered a judgment in a California wrongful termination case, United withheld taxes from its payment of the judgment.

Yet the California Court Appeal, in a 1992 opinion called *Lisec v. United Airlines*, held that United must pay the plaintiff the full amount of the judgment (and thus take its chances with the IRS) because the Court of Appeal, in an under-analyzed opinion that the IRS itself surely disagreed with, concluded that "the damages award was not 'wages' from which United was obliged to withhold taxes."[545]

This California peculiarity finally came to an end in 2015, when a Court of Appeal decision challenged the *Lisec* holding. In considering a judgment against an employer for lost past and future wages, the Court of Appeal concluded that the employer "chose correctly" when it followed the "prevailing federal view" by withholding payroll taxes.[546] The Court of Appeal observed that *Lisec*, and the cases that have followed it, "represent a dwindling minority view."[547]

5.21 Can Employees Seeking Unpaid Wages Bring Tort Claims?

Conversion. The tort of conversion consists of a wrongful act to take the property of another. A tort claim can entitle the plaintiff to punitive damages in cases of malicious, fraudulent, or oppressive conduct. Courts traditionally have not recognized a tort action for unpaid wages. Numerous Labor Code provisions already permit

employees to sue for prompt payment of wages, as well for civil penalties and attorney fees and costs. Although the California Supreme Court indicated an action for conversion might be available in a tip-pooling case (see § 7.20),[548] that was a special situation (the employer allegedly had misappropriated gratuities left for employees), and was not a simple case of unpaid wages.

A 2019 Supreme Court decision held that conversion of earned but unpaid wages is not a valid tort claim. The plaintiff worked for the individual defendant on several start-up companies, in return for a promise to pay wages later. The promised pay never materialized. The plaintiff successfully sued the companies for unpaid wages but also wanted to recover personally from the individual defendant, on a theory of conversion. In rejecting this theory, the high court noted that employees already have "extensive remedies" for unpaid wages, including contract and statutory remedies.

The high court concluded that "a conversion claim is an awfully blunt tool" for deterring intentional failures to pay wages, as conversion "does not require bad faith, knowledge, or even negligence; it requires only that the defendant have intentionally done the act depriving the plaintiff of … rightful possession." Conversion liability for unpaid wages would thus "not only reach those who act in bad faith, but also those who make good faith mistakes—for example, an employer who fails to pay the correct amount in wages because of a glitch in the payroll system or a clerical error. We see no sufficient justification for layering tort liability on top of the extensive existing remedies demanding that this sort of error promptly be fixed."[549]

This large helping of common sense did not entirely win the day. A dissent by Justice Cuellar, joined by Justice Liu, formalistically argued that conversion should be available to recover unpaid wages because unpaid wages are the employee's property once they are earned and payable.[550]

"Theft of labor." The Court of Appeal has rejected a novel claim that an employer's failure to pay commissions amounts to stealing property, in violation of the Penal Code.[551]

---

1 *Grafton Partners v. Superior Ct. (PricewaterhouseCoopers)*, 36 Cal. 4th 944 (2005). *But see Woodside Homes of California, Inc. v. Superior Ct. (Wheeler)*, 142 Cal. App. 4th 99 (2006) (enforcing contract clause that any controversy arising under contract shall be submitted to general judicial reference).

2 *Grafton Partners*, 36 Cal. 4th at 968 (Chin, J., concurring).

3 *Id*. at 970.

4 *See, e.g., Hodge v. Superior Ct. (Aon Insurance Servs.)*, 145 Cal. App. 4th 278, 284-85 (2006) (because claim for violation of the UCL is equitable in nature, no right to a jury trial exists).

5 *See, e.g., Pellegrino v. Robert Half Int'l, Inc.*, 181 Cal. App. 4th 713, 737-38 (2010) (equitable issues could be tried first to the judge alone and a bench trial of the equitable issues could dispense with the legal issues and end the case).

6 *ATT Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

7 Civ. Proc. Code §§ 1280 *et seq.*

8 *OTO, L.L.C. v. Kho*, 8 Cal. 5th 111, 125 (2019) (citations omitted).

9 9 U.S.C. § 1.

10 *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

11 *Muller v. Roy Miller Freight Lines, LLC*, 34 Cal. App. 5th 1056, 1069 (2019) (truck driver who drove intrastate portion of interstate trips for transportation company was engaged in interstate commerce and thus FAA-exempt, because company's goods originated primarily outside of California); *Nieto v. Fresno Beverage Co.*, 33 Cal. App. 5th 274, 284 (2019) (intrastate delivery driver was FAA-exempt because he "was engaged in interstate commerce through his participation in the continuation of the movement of interstate goods to their destinations").

12 *Southwest Airlines Co. v. Saxon,* 142 S. Ct. 1783, 1790 (2022).

13 *Id.*

14 9 U.S.C. § 2.

15 *Allied-Bruce Terminix Companies, Inc. v. Dobson,* 513 U.S. 265, 266 (1995).

[16] Lab. Code § 229 ("Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate.").

[17] *Perry v. Thomas*, 482 U.S. 483, 489-90 (1987).

[18] *Lane v. Francis Capital Mgmt. LLC,* 224 Cal. App. 4th 676 (2014) (plaintiff could proceed to trial on wage claim because employer, in moving to compel arbitration, did not show that the relevant transaction was in interstate commerce).

[19] *E.g., New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 541 (2019) (interstate trucking company sued by truck driver for misclassifying him as an independent contractor could not invoke the FAA to enforce the parties' arbitration agreement, because the FAA Section 1 exclusion for "contracts of employment of … [transportation] workers engaged in … interstate commerce" is broad enough to embrace independent contractors). *See also Muller v. Roy Miller Freight Lines LLC*, 34 Cal. App. 5th 1056 (2019) (applying section 229 of the Labor Code to defeat employer's effort to enforce arbitration agreement as to claims for unpaid wages, because the FAA Section 1 exclusion applies to truck drivers who transport goods that mostly originate outside California, even if plaintiffs transported the goods solely within California); *Nieto v. Fresno Beverage Co.*, 33 Cal. App. 5th 274 (2019) (same as to delivery driver transporting beer and other beverages manufactured outside of California and then stored in defendant's California warehouse before transport; although plaintiff did not drive across state lines, he transported goods in stream of interstate commerce after short pause in California and thus was a transportation worker engaged in interstate commerce).

[20] *Bravo v. RADC Enters., Inc.*, 33 Cal. App. 5th 920, 923 (2019) ("The choice-of-law provision becomes consistent with the parties' intent to arbitrate all disputes when we read 'the laws of the State of California' to *include* substantive principles California courts would apply, but to *exclude* special rules limiting the authority of arbitrators.") (emphasis in original).

[21] Civ. Code § 51.7 ("Ralph Civil Rights Act") (entitling persons "to be free from any violence, or intimidation by threat of violence, committed against their persons or property" because of race, religion, national origin, sex, sexual orientation, or position in a labor dispute).

[22] Civ. Code § 52.1 ("Tom Bane Civil Rights Act") (providing right of action "if a person interferes … or attempts to interfere, by threat, intimidation, or coercion, with the exercise or enjoyment of … rights secured by the Constitution or laws of the United States").

[23] Civ. Code §§ 51.7(c)(3), 52.1.

[24] *Saheli v. White Mem'l Med. Ctr.*, 21 Cal. App. 5th 308, 323 (2018) (FAA preempts any state rule discriminating on its face against arbitration).

[25] *Chamber of Commerce of the United States of America v. Bonta*, 62 F.4th 473 (9th Cir. 2023).

[26] *Southland Corp. v. Keating*, 465 U.S. 1,10 (1984).

[27] *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987) (FAA preempts California Labor Code section 229, banning arbitration of wage claims, so plaintiff must abide by agreement to arbitrate pursuant to a Form U-4 agreement). Section 229 remains in the Labor Code.

[28] *Preston v. Ferrer*, 552 U.S. 346, 353-54 (2008).

[29] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1747 (2011).

[30] *See Discover Bank v. Sup. Court,* 36 Cal. 4th 148 (2005) (in contract of adhesion, arbitration provisions that waive class actions are void as against public policy).

[31] *Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal. 4th 659 (2011) ("*Sonic I*").

[32] *Sonic-Calabasas A, Inc. v. Moreno,* 132 S. Ct. 496 (2011) (remanding to Supreme Court of California for further consideration in light of *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011)). On remand, the California Supreme Court acknowledged that the FAA, as interpreted by *Concepcion*, preempts any categorical bar on Berman hearing waivers. Nonetheless, the California Supreme Court insisted that unconscionability could still be found, on a case-by-case basis, and that a Berman hearing waiver may be considered a relevant factor supporting an ultimate finding of unconscionability. *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109 (2013) ("*Sonic II*") (unconscionability remains a valid defense against enforcement of arbitration agreements).

[33] *Direct TV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015).

[34] *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412-13 (2019).

[35] *Id*. at 1412-13.

[36] *Id*. at 1416. *Lamps Plus* followed the U.S. Supreme Court case in *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp*., 559 U.S. 662, 684 (2010), which held that parties who have not contracted for class arbitration may not be forced to arbitrate class claims, and that class arbitration was inappropriate to order where the arbitration agreement was silent on class arbitration.

[37] *Armendariz v. Foundation Health Psychcare Servs., Inc*., 24 Cal. 4th 83 (2000).

[38] *E.g., Ontiveros v. DHL Express (USA), Inc.*, 164 Cal. App. 4th 494 (2008) (upholding denial of motion to compel arbitration of suit for employment discrimination; arbitration agreement was unconscionable, and therefore unenforceable, because employee had to sign it to be hired, and because agreement gave arbitrator sole authority to determine arbitrability, required employee to pay costs unique to arbitration, deprived employees of right to recover statutory costs and reasonable attorney fees if employee prevailed, and limited employee to one deposition; trial court could declare entire agreement unconscionable rather than severing unconscionable provisions where unconscionable provisions governing arbitrability, discovery, and costs permeated entire agreement). *Ontiveros* has since been abrogated as to its conclusion that an arbitration agreement is unconscionable simply by virtue of delegating the issue of arbitrability to the arbitrator. *See Tiri v. Lucky Chances, Inc*., 226 Cal. App. 4th 231, 248-50 (2014) (recognizing *Ontiveros*'s abrogation in light of *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), which held that such delegation clauses are valid absent a challenge specific to the delegation clause).

[39] *Ramos v. Sup. Court*, 28 Cal. App. 5th 1042, 1057-58 (2018) (holding it was unnecessary to first find whether law firm "income partner" was an employee of the firm, since the firm had a superior bargaining position akin to that of an employer-employee relationship). *See also Ali v. Daylight Transp., LLC*, 59 Cal. App. 5th 462 (2020) (applying *Armendariz* to arbitration agreement between transportation company and truck drivers classified as independent contractors); *Subcontracting Concepts (CT), LLC v. De Melo*, 34 Cal. App. 5th 201, 209-10

(2019) (applying *Armendariz* to arbitration agreement because of "power imbalance" between the parties, without deciding whether individual classified as an independent contractor was really an employee); *Wherry v. Award, Inc.*, 192 Cal. App. 4th 1242, 1249) (applying *Armendariz* to arbitration agreement even though plaintiffs were independent contractors, given that the arbitration provision was mandatory).

[40] *Torrecillas v. Fitness Int'l, LLC*, 52 Cal. App. 5th 485, 492 (2020).

[41] *Id.* at 492-501.

[42] *OTO, L.L.C. v. Kho*, 8 Cal. 5th 111, 126-27 (2019).

[43] *Id*. at 128.

[44] 42 Cal. 4th 443 (2007).

[45] *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108 (9th Cir. 2002); *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1198-1200 (9th Cir. 2002).

[46] 42 Cal. 4th at 471-72.

[47] *Id.* at 480-81 (Baxter, J., dissenting).

[48] *Trivedi v. Curexo Tech. Corp.*, 189 Cal. App. 4th 387 (2010). *See also Mayers v. Volt Mgmt. Corp.,* 203 Cal. App. 4th 1194, 1208 (2012) ("By failing to even identify the set of arbitration rules that would apply to the parties' final and binding arbitration of employment disputes, the arbitration provisions subjected plaintiff to unreasonable surprise and oppression.").

[49] *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237, 1246 (2016) (unanimously upholding an arbitration agreement against claims of unconscionability). The agreement, which appeared in a job application, was enforceable even though (i) it was made a condition of employment, (ii) the employer did not provide the employee with a copy of the arbitration rules, (iii) the agreement gave both sides the right to seek provisional judicial relief, (iv) the agreement said the claims subject to arbitration were all employment-related claims, including but "not limited to" a series of claims that only an employee would bring, and (v) the agreement provided for "all necessary steps" to protect "trade secrets and proprietary and confidential information."

[50] *Wherry v. Award, Inc.*, 192 Cal. App. 4th 1242 (2011).

[51] *Penilla v. Westmont Corp.*, 3 Cal. App. 5th 205 (2016); *see Carmona v. Lincoln Millennium Car Wash, Inc.,* 226 Cal. App. 4th 74, 80-81 (2014) (finding procedural unconscionability where employees spoke little or no English and had just minutes to read and sign English language arbitration documents).

[52] *Subcontracting Concepts (CT), LLC v. De Melo*, 34 Cal. App. 5th 201, 80-81 (2019).

[53] *Chavarria v. Ralphs Grocery Co*., 733 F.3d 916 (9th Cir. 2013) (employer arbitration policy deemed so one-sided it "shocked the conscience" and was unenforceable under California law).

[54] *OTO, L.L.C. v. Kho*, 8 Cal. 5th 111 (2019).

[55] *Id.* As Justice Chin noted in dissent, this opinion creates tension with the FAA, which prohibits courts from refusing to enforce arbitration on the basis that another forum was preferable or that arbitration would not be effective in vindicating a statutory right.

[56] *Armendariz*, 24 Cal. 4th at 117. ("Given the disadvantages that may exist for plaintiffs arbitrating disputes, it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on 'business realities.'"). The language about "disadvantages that may exist for plaintiffs arbitrating disputes" betrays a judicial prejudice against arbitration, which is antithetical to the FAA.

[57] Thus, *Trivedi v. Curexo Tech. Corp.*, 189 Cal. App. 4th 387, 396-97 (2010), disapproved of a provision permitting the parties to seek judicial injunctive relief while arbitration proceeded, because *Trivedi* viewed the employer as more likely to seek injunctive relief than the employee. What makes this conclusion particularly peculiar, even for California, is that the California Arbitration Act itself authorizes precisely this sort of interim judicial injunctive relief. Civ. Proc. Code § 1281.8(b) (party to arbitration agreement may seek provisional judicial relief, if arbitral award "may be rendered ineffectual without provisional relief[,]" without thereby waiving the right to arbitrate). Finally, in 2016, the California Supreme Court repudiated this holding of *Trivedi*: "[A]n arbitration agreement is not substantively unconscionable simply because it confirms the parties' ability to invoke undisputed statutory rights." *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237 (2016).

[58] *Trivedi*, 189 Cal. App. 4th at 394-95 (arbitration agreement cannot serve to waive statutory rights, and so arbitration clause calling for prevailing-party attorney fees was "substantively unconscionable" because it put the suing employee "at greater risk than if he brought his FEHA claims in court"); *see also Wherry v. Award, Inc.*, 192 Cal. App. 4th at 1248-49 (arbitration agreement authorizing arbitrator to award costs, including arbitration fees, to the prevailing party was substantively unconscionable, because the agreement would cause a losing FEHA plaintiff to pay costs greater than the costs of litigating in court).

[59] *See Chavarria v. Ralphs Grocery Co*., 733 F.3d 916, 923-26 (9th Cir. 2013).

[60] *Little v. Auto Steigler, Inc.*, 29 Cal. 4th 1064 (2003) (special *Armendariz* rules apply to claim for dismissal in violation of public policy); *see Mercuro v. Sup. Court (Countrywide Securities Corp.)*, 96 Cal. App. 4th 167, 180 (2002) (special rules cover claim under statute enacted for "public reason," such as Labor Code sections 230.8 [protecting employee-parent for taking time off to visit school] and 970 [prohibiting false job promises to induce people to move]).

[61] *Nyulassy v. Lockheed Martin Corp.,* 120 Cal. App. 4th 1267, 1282-83 (2004). Importantly, the challenged arbitration agreement also required only the employee to arbitrate, and shortened the employee' statutes of limitations, so the independent significance of the "free peek" provision was unclear. *See also Carmona v. Lincoln Millennium Car Wash, Inc.,* 226 Cal. App. 4th 74, 89 (2014) (relying on *Nyulassy* to find a similar "unilateral `free peek' provision" substantively unconscionable, because the provision unfairly favored the employer by subjecting employees to mandatory prearbitration disclosures while the employer had "no corresponding obligation … to discuss its disputes with employees before taking action in court or through arbitration"); *Carlson v. Home Team Pest Defense, Inc.*, 239 Cal. App. 4th 619, 635 (2015) (arbitration agreement unconscionable in requiring employees, but not the employer, "to submit to an

unspecified form of alternative dispute resolution before demanding arbitration"); *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 999 (9th Cir. 2010) (arbitration provision that required employees—but not the employer—to submit disputes to non-binding, "employer-controlled" pre-arbitration dispute resolution process was substantively unconscionable because the provision gave the employer an "unfair advantage" by providing a "free peek" at the employee's case).

[62] *Baxter v. Genworth N. Am. Corp.*, 16 Cal. App. 5th 713, 730 (2017). In upholding a refusal to compel arbitration, the Court of Appeal also cited provisions in the arbitration agreement that (1) prohibited contacting other employees about a claim, (2) shortened limitations periods, and (3) effectively limited an employee's right to seek administrative remedies before an arbitration is conducted.

[63] *Beco v. Fast Auto Loans, Inc.*, 86 Cal. App. 5th 292 (2022). The Court of Appeal recognized that while the plaintiff did not make any showing that he could not "vindicate his rights without a guarantee that he can conduct any discovery," such a showing was unnecessary because the discovery provision ran afoul of *Armendariz* on its face.

[64] *Davis v. Kozak*, 53 Cal. App. 5th 897 (2020). The agreement was also deemed substantively unconscionable for exempting from arbitration any disputes involving "obligations under the Employee Confidentiality Agreement[.]" This provision enabled judicial claims that the employer was most likely to bring, while obliging the employee to arbitrate claims against the employer for wrongfully using the employee's inventions or intellectual property.

[65] *E.g., Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175 (9th Cir. 2003) (one-year limitations period set forth in arbitration agreement is unconscionable, as it would bar suits on continuing violations); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir. 2002) (same); *Stirlen v. Supercuts, Inc.,* 51 Cal. App. 4th 1519, 1542 (1997) (criticizing one-year limitations period in arbitration agreement that would not permit tolling).

[66] *Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1043-47 (9th Cir. 2001) (upholding provision in job application creating post-termination limitations period of six months, but striking down 10-day deadline to give written notice of intent to sue).

[67] *Pellegrino v. Robert Half Int'l, Inc.*, 182 Cal. App. 4th 87, 107-110 (2010). The California Supreme Court granted review of this case, albeit on other grounds, so it has been officially depublished. *See Martinez v. Master Protection Corp.*, 118 Cal. App. 4th 107 (2004) (holding it was unconscionable for employer-imposed arbitration agreement to shorten limitations period to six months from date of violation, as that are insufficient to protect employees' right to vindicate statutory protections).

[68] *Pearson Dental Supplies, Inc. v. Sup. Court*, 166 Cal. App. 4th 71 (2008), *review granted*, No. S167169 (Cal. Aug. 21, 2008) (raising these issues: (1) What standard of judicial review applies to an arbitrator's decision on a FEHA claim? (2) Can a mandatory arbitration agreement restrict an employee from seeking administrative remedies for violations of the Act?).

[69] *Pearson Dental Supplies, Inc. v. Sup. Court,* 48 Cal. 4th 665 (2010). *Pearson* declined to address whether a one-year limitations period in the arbitration agreement was unlawful and independently rendered the agreement invalid, because the issue was not presented in the petition for review. *Id.* at 682 n.5.

[70] *Baxter v. Genworth N. Am. Corp.*, 16 Cal. App. 5th 713, 731-32 (2017) (reasoning that "[r]educing the time to pursue a claim by as much as two-thirds does not provide sufficient time to vindicate an employee's statutory rights under the FEHA").

[71] *Id.* at 732.

[72] Civ. Proc. Code § 1281.12.

[73] *Armendariz*, 24 Cal. 4th at 124.

[74] *Armendariz*, 24 Cal. 4th at 93 (citations omitted). *See Wherry v. Award, Inc.*, 192 Cal. App. 4th 1242, 1250 (2011).

[75] *Juarez v. Wash Depot Holdings, Inc.*, 24 Cal. App. 5th 1197, 2013 (2018). The Court of Appeal breezed past the point that the English version was to control by adopting a cynical, speculative rationale: "At best, the difference in the severability clauses in the English-language and Spanish-language versions of the handbook is negligent; at worse, it is deceptive. Under the circumstances, we construe the ambiguous language against the interest of the party that drafted it. … This rule applies with particular force in the case of a contract of adhesion. … Wash Depot may have left the meaning of severability deliberately obscure, intending to decide at a later date what meaning to assert." *Id.* at 2013 (citations omitted) (internal quotation marks omitted).

[76] *Ali v. Daylight Transp., LLC*, 59 Cal. App. 5th 462 (2020).

[77] *Lange v. Monster Energy Co.*, 46 Cal. App. 5th 436, 454 (2020) ("No authority supports the trial court's conclusion that any more than a single unconscionable provision in an arbitration agreement *precludes severance*.") (emphasis in original). *See Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1273 (9th Cir. 2017) (presence of more than one substantively unconscionable term "is only one of the relevant factors" in the severability inquiry, where "the dispositive question is whether 'the central purpose of the contract' is so tainted with illegality that there is no lawful object of the contract to enforce").

[78] *Lange v. Monster Energy Co.*, 46 Cal. App. 5th 436, 455 (2020).

[79] *Alberto v. Cambrian Homecare*, 91 Cal. App. 5th 482 (2023).

[80] *Kec v. Superior Ct. (R.J. Reynolds Tobacco Co.)*, 51 Cal. App. 5th 972 (2020).

[81] *Conyer v. Hula Media Servs., LLC*, 268 Cal. Rptr. 3d 346 (2020). The two offending provisions required the parties to pay pro rata shares of arbitral fees and costs, and required the arbitrator to award attorney fees to the prevailing party—provisions invalid under, respectively, *Armendariz v. Foundation Health Psychcare Servs., Inc*., 24 Cal. 4th 83-84, 112 (2000) (employees can't be compelled to pay more fees than what they would have to pay in court) and *Serafin v. Balco Props. Ltd.,* 235 Cal. App. 4th 165, 183 (2015) (requiring each party to bear own attorney fees was unenforceable because it would deprive a FEHA plaintiff an unwaivable statutory remedy available if she prevailed: "[s]uch a modification of California law is inappropriate under *Armendariz*"). The Court of Appeal in *Conyer* explained why these provisions were severable: "Plaintiff has not shown that unconscionability so permeates the arbitration clause that the arbitrator's fees and costs and the attorney fees provisions cannot be severed, leaving a fully mutual and enforceable arbitration agreement. This is not a case where we must reform the contract by augmenting it or otherwise rewriting the parties' agreement, which of course we cannot do." 53 Cal. App. 5th at 354.

[82] *Conyer v. Hula Media Servs.*, 268 Cal. Rptr. 3d 346 (2020), *review granted*, No. S264821 (Cal. Dec. 16, 2020).

[83] *Conyer v. Hula Media Servs.,* 482 P.3d 988 (Mar. 25, 2021) (dismissing matter as moot).

[84] *Martinez v. BaronHR, Inc.*, 51 Cal. App. 5th 962, 967-68 (2020).

[85] *Id.* at 969-70.

[86] *Esparza v. Sand & Sea, Inc.*, 2 Cal. App. 5th 781, 787 (2016) (citations omitted).

[87] *Id.* at 789.

[88] *Mitri v. Arnel Mgmt. Co*., 157 Cal. App. 4th 1164, 1170-71 (2007). *See Gorlach v. Sports Club Co.,* 209 Cal. App. 4th 1497, 1509 (2012) (declining to enforce handbook arbitration clause because handbook told employees they must sign an arbitration agreement, "implying that it was not effective until (and unless) they did so. Because Gorlach never signed the arbitration agreement, we cannot imply the existence of such an agreement between the parties.").

[89] *Ruiz v. Moss Bros. Auto Grp., Inc.*, 232 Cal. App. 4th 836, 842 (2014) (affirming order denying petition to compel arbitration where employer did not present enough evidence to show that employee's electronic signature on the arbitration agreement was in fact the "act of" the employee).

[90] *Vasserman v. Henry Mayo Newhall Mem'l Hosp.*, 8 Cal. App. 5th 236 (2017).

[91] *Garner v. Inter-State Oil Co.*, 52 Cal. App. 5th 619, 624 (2020).

[92] *Diaz v. Sohnen Enters.*, 34 Cal. App. 5th 126 (2019) (when an at-will employee continues employment after notification that an agreement to arbitrate is a condition of continued employment, the employee impliedly consents to the arbitration agreement).

[93] *Coughenour v. Del Taco, LLC*, 57 Cal. App. 5th 740 (2020).

[94] *Jarboe v. Hanlees Auto Grp.*, 53 Cal. App. 5th 539, 550-51 (2020).

[95] *Id.* at 554 ("These boilerplate allegations are not sufficient to support defendants' equitable estoppel claim. … The defendants have not admitted that they are 'joint employer[s]' nor have they provided any evidence that shows a joint employment relationship with Jarboe.").

[96] *Id*. at 557.

[97] *Franco v. Greystone Ridge Condominium*, 39 Cal. App. 5th 221, 223-24 (2019).

[98] *Fleming Distribution Co. v. Younan*, 49 Cal. App. 5th 73 (2020).

[99] AB 51, 2019 bill adding Lab. Code § 432.6 and Gov't Code § 12953.

[100] *Chamber of Com. of the United States v. Becerra*, 438 F. Supp. 3d 1078 (E.D. Cal. Feb. 7, 2020).

[101] *Chamber of Com. of the United States v. Bonta*, 62 F.4th 473 (9th Cir. 2023).

[102] SB 707, 2019 bill amending Civ. Proc. Code §§ 1280, 1281.96, and adding Civ. Code §§ 1281.97, 1281.98, 1281.99. Newly amended section 1281.96 of the Code of Civil Procedure will require arbitration providers to report publicly a large array of information on each arbitration within the last five years, including the identity of the nonconsumer party, the nature of the dispute, who won the arbitration, how often the nonconsumer party has been a party to arbitration, the name of the consumer party's attorney, and the name of the arbitrator. The arbitration provider must also report, in the aggregate, the ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation of all its arbitrators, as self-reported by the arbitrators.

[103] *Gentry v. Sup. Court (Circuit City Stores, Inc.)*, 42 Cal. 4th 443, 450 (2007).

[104] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

[105] *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 364 (2014) ("*Concepcion* holds that even *if* a class waiver is exculpatory in a particular case, it is nonetheless preempted by the FAA. Under the logic of *Concepcion*, the FAA preempts *Gentry*'s rule against employment class waivers.") (emphasis in original).

[106] *Epic Sys. Corp. v. Lewis,* 138 S. Ct. 1612 (2018).

[107] *Lamps Plus v. Varela*, 139 S. Ct. 1407, 1412-13 (2019).

[108] 1 Cal. 5th 233 (2016).

[109] *Id.*

[110] *Id.* at 244.

[111] *Id.* at 245-48.

[112] *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489, 502-03 (2011) (PAGA is a mechanism by which the state itself can enforce state labor laws, and a PAGA plaintiff is a state proxy or agent and so the state should be unaffected by a private agreement to arbitrate). *Brown* relied on *Broughton v. Cigna Healthplans,* 21 Cal. 4th 1066 (1999) (claims for injunctive relief under the California Consumers Legal Remedies Act are not arbitrable), *Cruz v. PacifCare Health Sys., Inc.*, 30 Cal. 4th 303 (2003) (claims for injunctive relief under the UCL are not arbitrable), and *Franco v. Athens Disposal Co.*, 171 Cal. App. 4th 1277, 1303 (2009) (PAGA waiver in arbitration agreement invalid because it impedes comprehensive enforcement of the Labor Code). Disagreeing with that view was the Court of Appeal decision that the California Supreme Court reviewed in 2014: *Iskanian v. CLS Transp.*, 206 Cal. App. 4th 949 (2012) (disagreeing with *Brown*: "[W]e disagree with the majority's holding in *Brown*. We recognize that the PAGA serves to benefit the public and that private attorney general laws may be severely undercut by application of the FAA. But we believe that the United States Supreme Court has spoken on the issue, and we are required to follow its binding authority."), *judgment rev'd,* 59 Cal. 4th 348 (June 23, 2014), *review granted,* No. S204032 (Cal. Sept. 19, 2012).

[113] *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 366 (2014) ("*Concepcion* held that the FAA does prevent states from mandating or promoting procedures incompatible with arbitration. The *Gentry* rule runs afoul of this latter principle. We thus conclude in light of *Concepcion* that the FAA preempts the *Gentry* rule.").

[114] *Id.* at 384 ("We conclude that the rule against PAGA waivers does not frustrate the FAA's objectives because, as explained below, the FAA aims to ensure an efficient forum for the resolution of private disputes, whereas a PAGA action is a dispute between an employer and the state Labor and Workforce Development Agency."). The Supreme Court held that "where … an employment agreement compels the waiver of representative claims," the agreement "frustrates the PAGA's objectives" and "is contrary to public policy and unenforceable as a matter of state law." *Id.* As the Ninth Circuit has stated, California's ban on arbitral waivers of representative actions reflects public policy, rather than substantive unconscionability, *Poublon v. C.H. Robinson Co.,* 846 F.3d 1251, 1264 (9th Cir. 2017).

[115] *Julian v. Glenair, Inc.*, 17 Cal. App. 5th 853, 860 (2017) (internal quotation marks and citation omitted) ("an agreement to arbitrate a PAGA claim, entered into before an employee is statutorily authorized to bring such a claim on behalf of the state, is an unenforceable predispute waiver. As any agreement by [the plaintiff employees] was entered into before they were authorized to bring a PAGA claim, the trial court properly denied the petition to compel.").

[116] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

[117] *Correia v. NB Baker Elec., Inc.*, 32 Cal. App. 5th 602 (2019) ("Although the *Epic* court reaffirmed the broad preemptive scope of the [FAA], *Epic* did not address the specific issues before the *Iskanian* court involving a claim for civil penalties brought *on behalf of the government* and the enforceability of an agreement barring a PAGA representative action in any forum. We thus conclude the trial court properly ruled the waiver of representative claims in any forum is unenforceable.") (emphasis in original) abrogated on other grounds by *Barrera v. Apple Am. Grp. LLC*, 95 Cal. App. 5th 63 (2023).

[118] *Brooks v. AmeriHome Mortg. Co.*, 47 Cal. App. 5th 624, 629 (2020) (plaintiff "cannot be compelled to separately arbitrate whether he was an aggrieved employee"). *See also Contreras v. Sup. Court (Zum Servs., Inc.)*, 61 Cal. App. 5th 461, 477 (Mar. 1, 2021) ("a PAGA plaintiff may not be compelled to arbitrate whether he or she is an aggrieved employee").

[119] *Bautista v. Fantasy Activewear, Inc.*, 52 Cal. App. 5th 650 (2020).

[120] *Collie v. The Icee Co.*, 52 Cal. App. 5th 477 (2020).

[121] *Olson v. Lyft, Inc.*, 56 Cal. App. 5th 862 (2020).

[122] *Provost v. YourMechanic, Inc.*, 55 Cal. App. 5th 982 (2020).

[123] *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022). The Supreme Court affirmed that *Iskanian*'s prohibition on PAGA waivers is not inconsistent with the Federal Arbitration Act.

[124] *Broughton v. Cigna Healthplans of Cal.,* 21 Cal. 4th 1066 (1999); *Cruz v. PacifiCare Health Sys., Inc.,* 30 Cal. 4th 303 (2003).

[125] *McGill v. Citibank*, 232 Cal. App. 4th 753 (2014), *judgment rev'd*, 2 Cal. 5th 945 (April 6, 2017).

[126] *Id.* at 770 (quoting *Iskanian v. CLS Transp. L.A., LLC,* 59 Cal. 4th 348, 379 (2014)).

[127] *Id.* at 761.

[128] *McGill v. Citibank*, *review granted*, 345 P.3d 61 (Cal. April 1, 2015) (granting review to decide: "Does the Federal Arbitration Act (9 U.S.C. § 1 et seq.), as interpreted in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), preempt the California rule (*Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066 (1999); *Cruz v. PacifiCare Health Sys., Inc.*, 30 Cal. 4th 303 (2003)) that statutory claims for public injunctive relief are not subject to compulsory private arbitration?").

[129] *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 952, 962 (2017).

[130] *Clifford v. Quest Software Inc.*, 38 Cal. App. 5th 745, 753 (2019) (distinguishing the private injunctive relief sought here from the public injunctive relief sought in *Broughton* and *Cruz* against misleading advertising practices).

[131] *Id.*

[132] *Melendez v. San Francisco Baseball Assocs. LLC*, 7 Cal. 5th 1, 10 (2019) ("Plaintiffs' claim arises solely from independent state law—Labor Code section 201—and is not based on the collective bargaining agreement.").

[133] *Id.* at 13.

[134] Section 10(a) of the FAA empowers courts to vacate an arbitral award only where (1) the award was procured through corruption, fraud, or undue means, (2) the arbitrator was corrupt or evidently partial, (3) the arbitrator committed prejudicial misconduct such as refusing to hear material evidence, or (4) the arbitrator exceeded powers or so imperfectly executed them that a definite award on the subject matter submitted was not made. 9 U.S.C. § 10(a).

[135] The Supreme Court decision is *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008). A case holding that the "manifest disregard" doctrine remains viable after *Hall Street* is *Kashner Davidson Securities Corp. v. Mscisz*, 531 F.3d 68 (1st Cir. 2008) (vacating arbitration award based on manifest disregard of the law).

[136] *Siegel v. Prudential Ins. Co.*, 67 Cal. App. 4th 1270 (1998).

[137] *Pearson Dental Supplies, Inc. v. Sup. Court*, 48 Cal. 4th 665, 669-70 (2010) (trial court properly vacated arbitrator's award that "clearly erred in ruling that the employee's claim was time-barred," because award would have deprived the employee of "a hearing on the merits of an unwaivable statutory employment claim").

[138] *Brown v. TGS Mgmt. Co.*, 57 Cal. App. 5th 303 (2020).

[139] *See* Civ. Proc. Code §§ 1286.2 (ground for vacating arbitration award), 1286.6 (grounds for correcting arbitration award).

[140] *Crowell v. Downey Cmty. Hosp. Found.*, 95 Cal. App. 4th 730 (2002) (parties cannot agree to expand jurisdiction of court to provide judicial review of arbitration awards beyond that provided by statute).

[141] *Cable Connections v. DirecTV*, 44 Cal. 4th 1334, 89 Cal. Rptr. 3d 229 (2008). The Supreme Court's reasoning suggests that the parties could also contract to vacate an award that lacks substantial evidence to support it.

[142] *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 1404-05 (2008).

[143] Civ. Proc. Code §§ 1286.2(a)(4), 1286.6(b).

[144] *Cable Connections v. DirecTV*, 44 Cal. 4th at 1340, 89 Cal. Rptr. 3d at 234.

[145] *Cummings v. Future Nissan*, 128 Cal. App. 4th 321 (2005).

[146] *Little v. Auto Steigler, Inc.*, 29 Cal. 4th 1064, 1072 (2003).

[147] *Alvarez v. Altamed Health Servs. Corp.*, 60 Cal. App. 5th 572 (2021) (also citing lack of clarity as to the procedure to follow in the second arbitration, which itself increases costs of litigating issues).

[148] Lab. Code § 925. Section 925, effective 2017, not only invalidates mandatory forum-selection and choice-of-law provisions but creates, in subdivision (c), a right of action for employees subjected to such provisions:

(a) An employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following: (1) Require the employee to adjudicate outside of California a claim arising in California. (2) Deprive the employee of the substantive protection of California law with respect to a controversy arising in California.

(b) Any provision of a contract that violates subdivision (a) is voidable by the employee, and if a provision is rendered void at the request of the employee, the matter shall be adjudicated in California and California law shall govern the dispute.

(c) In addition to injunctive relief and any other remedies available, a court may award an employee who is enforcing his or her rights under this section reasonable attorney fees.

(d) For purposes of this section, adjudication includes litigation and arbitration.

(e) This section shall not apply to a contract with an employee who is in fact individually represented by legal counsel in negotiating the terms of an agreement to designate either the venue or forum in which a controversy arising from the employment contract may be adjudicated or the choice of law to be applied.

[149] *Midwest Motor Supply Co. v. Superior Ct. (Finch)*, 56 Cal. App. 5th 702 (2020).

[150] *Pinela v. Neiman Marcus Grp., Inc.*, 238 Cal. App. 4th 227, 246-47 (2015).

[151] *Id.* at 247-56.

[152] *Id.* at 257.

[153] *Verdugo v. Alliantgroup, LP*, 237 Cal. App. 4th 141 (2015).

[154] *Id*. at 146.

[155] *Id.*

[156] *Id.* at 144-45.

[157] *Id*. at 144.

[158] *Id.* at 144-45.

[159] *Id.* at 160.

[160] *Gantt v. Sentry Ins.*, 1 Cal. 4th 1083, 1094 (1992). The high court has acknowledged that the Legislature, not the judiciary, makes public policy in the employment arena: 'public policy' as a concept is notoriously resistant to precise definition, and … courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch, 'lest they mistake their own predilections for public policy which deserves recognition at law.' … [C]ourts 'should proceed cautiously' if called upon to declare public policy absent some prior legislative expression on the subject." *Id.* at 1095 (internal quotations and citations omitted).

[161] *See, e.g., Stevenson v. Superior Ct. (Huntington Mem'l Hosp.)*, 16 Cal. 4th 880, 889-90 (1997) (public policy must have support in constitutional or statutory provision, inure to public benefit rather than merely individual interest, be articulated at the time of employee's dismissal, and be fundamental and substantial); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 670 n.12 (1988) (no public policy implicated where plaintiff told management that co-worker was suspected of embezzlement at his prior place of employment, as the parties, consistent with public policy, could have expressly agreed that plaintiff was not to reveal co-worker's background).

[162] *Green v. Ralee Eng'g Co.*, 19 Cal. 4th 66, 79 (1988); *Turner v. Anheuser-Busch, Inc*., 7 Cal. 4th 1238, 1256 n.9 (1994).

[163] *Lagatree v. Luce, Forward, Hamilton & Scripps*, 74 Cal. App. 4th 1105, 1116 (1999) ("The rights underlying Lagatree's claim are easily identified: an individual's constitutional rights to a jury trial and a judicial forum for the resolution of disputes. The question thus becomes whether those rights can be waived by agreement. As a general rule, they are subject to waiver")..

[164] *Chamber of Com. of the United States v. Bonta*, 62 F.4th 473 (9th Cir. 2023).

[165] *Williams v. Sacramento River Cats Baseball Club, LLC*, 40 Cal. App. 5th 280, 283 (2019) ("*Tameny* . . . requires 'the prior existence of an employment relationship' between the parties upon which to predicate a tort duty of care … Because defendant did not owe [a job applicant] any duty, plaintiff cannot bring a failure to hire claim against defendant in a common law tort action and must instead proceed under the [FEHA].").

[166] *See, e.g., Jersey v. John Muir Med. Ctr.*, 97 Cal. App. 4th 814, 825-27 (2002) (employee sued abusive client; case did not implicate any anti-retaliation provision such as exists in employment discrimination statutes); *Becket v. Welton Becket & Assocs.,* 39 Cal. App. 3d 815, 822 (1974) (no clearly identified constitutional or statutory provision supports public policy favoring free access to courts without fear of retaliation).

[167] *Carter v. Escondido Union High Sch. Dist.*, 148 Cal. App. 4th 922, 926 (2007).

[168] *Dutra v. Mercy Med. Ctr. Mt. Shasta*, 209 Cal. App. 4th 750, 756 (2012).

[169] *See generally Green v. Ralee Eng'g Co.*, 19 Cal. 4th 66, 76 (1998).

[170] *Kouff v. Bethlehem-Alameda Shipyard*, 90 Cal. App. 2d 322, 324-25 (1949).

[171] *Tameny v. Atl. Richfield Co.*, 27 Cal. 3d 167, 176, 178 (1980).

[172] *Haney v. Aramark Uniform Servs., Inc.*, 121 Cal. App. 4th 623, 643 (2004) (public policy of discouraging fraud constitutes fundamental California public policy sufficient to support wrongful discharge claim).

[173] *Petermann v. Teamsters*, 174 Cal. App. 2d 184, 188-89 (1959).

[174] *Silguero v. Creteguard, Inc.,* 187 Cal. App. 4th 60, 63 (2010) (reinstating wrongful termination claim of sales employee who was fired when her employer was notified by her former employer that she had signed an agreement prohibiting her "from all sales activities for 18 months following" her employment, as this was an noncompete clause invalid under section 16600's legislative declaration of California's "settled legislative policy in favor of open competition and employee mobility"). (For discussion of the wrongful termination implications of this section, see § 12.2.)

[175] *Barbosa v. IMPCO Techs., Inc.,* 179 Cal. App. 4th 1116, 1123 (2009) (reversing trial court's nonsuit where employee had dismissed plaintiff for falsifying time records, after plaintiff offered to repay two hours of claimed overtime pay with excuse that he had been "confused" in claiming the pay in the first place).

[176] *Semore v. Pool*, 217 Cal. App. 3d 1087, 1092 (1990) (employee fired for refusing to submit to random drug test may sue for breach of public policy as stated in California constitutional right to privacy).

[177] *Pettus v. Cole*, 49 Cal. App. 4th 402, 414 (1996) (employee fired for refusing to enroll in inpatient program for alcohol treatment may sue for breach of public policy as stated in California Constitution and Civil Code section 56).

[178] *Rojo v. Kliger*, 52 Cal. 3d 65, 89-91 (1990) (employee discriminated against because of protected status may sue for breach of public policy as stated in California Constitution Article I, Section 8: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin").

[179] *Gelini v. Tishgart*, 77 Cal. App. 4th 219 (1999) (where plaintiff's lawyer wrote employer to request better hours and parental leave, jury could find that the employer, in then firing the plaintiff, violated Labor Code section 923, which entitles employees to select their own bargaining representatives).

[180] *Ali v. L.A. Focus Publ'n*, 112 Cal. App. 4th 1477, 1488 (2003) (employee's activities privileged under Labor Code section 1101, which forbids employers to prevent employees from engaging in politics and to discriminate because of political affiliation).

[181] *Nelson v. United Techs.*, 74 Cal. App. 4th 597, 609-11 (1999) (dismissing employee for taking CFRA leave supports tort claim for wrongful discharge).

[182] *Grant-Burton v. Covenant Care, Inc.*, 99 Cal. App. 4th 1361, 1371, 1379-80 (2002) (employee privileged under Labor Code section 232 to disclose wages, a concept that includes bonuses).

[183] *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290, 299-300 (1982) (claim based on Labor Code section 6310, forbidding any person to discriminate against any employee for complaining to governmental agency or employer about employee safety or health); *see also* Lab. Code § 1102.5.

[184] *Franklin v. The Monadnock Co.*, 151 Cal. App. 4th 252, 255, 259 (2007) (employers must provide "safe and secure workplace and encourage employees to report credible threats of violence in the workplace").

[185] *Green v. Ralee Eng'g*, 19 Cal. 4th 66, 71 (1998) (upholding public-policy claim where quality control inspector was fired after complaining about employer's shipment of defective aircraft parts, even though public policy appears in regulation, not statute).

[186] *McVeigh v. Recology San Francisco*, 213 Cal. App. 4th 443, 448, 471 (2013) (Labor Code "protects employee reports of unlawful activity by third parties such as contractors and employees, as well [as] unlawful activity by an employer").

[187] *Jie v. Liang Tai Knitwear Co.*, 89 Cal. App. 4th 654, 662 (2001) (public policy forbids firing employees for complaining to the authorities that the employer was employing undocumented workers in violation of the federal Immigration Reform and Control Act of 1986).

[188] *Vasquez v. Franklin Mgmt. Real Estate Fund, Inc.*, 222 Cal. App. 4th 819, 831 (2013) (plaintiff could pursue theory that employer violated the Labor Code by assigning him tasks requiring extensive use of his vehicle while refusing to reimburse him for mileage, leading to his constructive discharge in violation of the public policy promoting payment of the minimum wage).

[189] *Phillips v. Gemini Moving Specialists*, 63 Cal. App. 4th 563, 574 (1998) (public policy forbids firing employee for complaining about deduction of wages from paycheck for a towing charge).

[190] *Siri v. Sutter Home Winery, Inc.*, 31 Cal. App. 5th 598, 605-06 (2019) (reversing summary judgment for employer; while unobtainable tax returns might strengthen plaintiff's case, her right to recover turns only on whether she was fired for communicating a reasonable belief that defendant was violating tax law, and that could be shown without invading the implied taxpayer privilege). *See also Wadler v. Bio-Rad Labs., Inc.*, 916 F.3d 1176, 1189-90 (9th Cir. 2019) (upholding $8 million out of $11 million whistleblower verdict for former general counsel; plaintiff need not prove actual violation of law, but rather only that employer fired employee for reporting a reasonably based suspicion of unlawful activity).

[191] *Steele v. Youthful Offender Parole Bd.*, 162 Cal. App. 4th 1241, 1255 (2008) (upholding judgment for employee constructively discharged because she was a potential witness in a claim for sexual harassment); *Lujan v. Minagar*, 124 Cal. App. 4th 1040, 1045-46 (2004) (firing employee who did not personally report suspected workplace safety violations but who was fired in fear she might do so violated Labor Code section 6310, which prohibits dismissal in retaliation for reporting OSHA violations).

[192] *Steele v. Youthful Offender Parole Bd.,* 162 Cal. App. 4th 1241, 1255 (2008).

[193] *Stevenson v. Superior Ct. (Huntington Mem'l Hosp.)*, 16 Cal. 4th 880, 905 (1997) (employee can assert common law tort for wrongful termination based on public policy forbidding age discrimination, without administrative exhaustion); *Nelson v. United Techs.*, 74 Cal. App. 4th 597, 612 (1999) (discharge for taking CFRA leave supports tort claim for wrongful dismissal); *Prue v. Brady Co./San Diego, Inc.*, 242

Cal. App. 4th 1367, 1383 (2015) (employee may assert a public-policy tort claim for disability discrimination without satisfying FEHA's then one-year statute of limitations).

[194] *Gould v. Maryland Sound Indus., Inc.*, 31 Cal. App. 4th 1137, 1148 (1995) (Labor Code section 216 expresses fundamental public policy for prompt payment of wages and forbids firing employee to avoid paying commissions earned).

[195] *Vasquez v. Franklin Mgmt. Real Estate Fund, Inc.*, 222 Cal. App. 4th 819, 828-29 (2013).

[196] *Galeotti v. Int'l Union of Operating Eng'rs Local No. 3*, 48 Cal. App. 5th 850, 863 (2020).

[197] *Garcia v. Rockwell Int'l Corp.*, 187 Cal. App. 3d 1556, 1562 (1986) (wrongful demotion or suspension without pay is actionable as breach of public policy). *Gantt v. Sentry Ins.*, 1 Cal. 4th 1083, 1093-95 (1992), criticized *Garcia* to the extent that *Garcia* indicated that a tort action does not need to be rooted in either a statute or a constitutional provision.

[198] *Baker v. Roman Catholic Archdiocese of San Diego*, 2015 WL 1344958, at *5 (S.D. Cal. Mar. 23, 2015) (rejecting claim of wrongful termination in violation of FEHA's public policy against disability discrimination, because California law does not recognize "a claim for tortious nonrenewal of an employment contract"); *Touchstone Television Prod. v. Superior Ct. (Sheridan)*, 208 Cal. App. 4th 676, 680-81 (2012) (rejecting tort claim by "Desperate Housewives" actress that the television producer refused to renew her contract in retaliation for her raising safety concerns); *see also Daly v. Exxon Corp.*, 55 Cal. App. 4th 39, 45 (1997) (rejecting claim of wrongful termination for failure to renew contract that expired by its terms; use of "wrongful termination" is a "misnomer" where the "employment contract is for a fixed term and expires"); *Motevalli v. Los Angeles Unified Sch. Dist.*, 122 Cal. App. 4th 97, 113 (2004) ("The District did not terminate Motevalli—she was a probationary teacher, working under an emergency credential, whose contract was not renewed. ... Motevalli was incapable of amending her complaint to allege a new cause of action for tortious nonrenewal of her employment contract in violation of public policy because no such cause of action is recognized.").

[199] *Touchstone*, 208 Cal. App. 4th at 682; *Daly*, 55 Cal. App. 4th at 46.

[200] Pen. Code § 290.46.

[201] *See* www.meganslaw.ca.gov (last visited Mar. 4, 2023).

[202] Pen. Code § 290.46(*j*)(1), (2)(E).

[203] Pen. Code § 290.46(*j*)(4)(A), (B).

[204] *See, e.g.*, *Donaleski v. Wal-Mart Stores, Inc.*, 2009 WL 1296257, at *3-4 (E.D. Cal. May 8, 2009) (Penal Code does not prohibit employer from discharging the plaintiff for a felony conviction even if employer first learned of possible conviction through a co-worker's statement that the plaintiff's name appeared on the Megan's Law Website, where the co-worker had not looked at the website at the employer's direction and where the employer did not consult the Website or discharge the plaintiff for being listed on the Website, but rather discharged the plaintiff after an independent investigation confirmed the felony conviction).

[205] *See* Edu. Code § 45122.1(a) (school districts must not employ someone "convicted of a violent or serious felony").

[206] Lab. Code § 2922: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month."

[207] *See generally Guz v. Bechtel Nat'l Inc.*, 24 Cal. 4th 317, 336-37 (2000).

[208] *Id.* at 340 ("[D]isclaimer language in an employee manual or policy manual does not necessarily mean an employee is employed at will"); *Stillwell v. Salvation Army*, 167 Cal. App. 4th 360, 382-83 (2008) (employer not entitled to reversal of judgment for breach of implied-in-fact contract of continued employment even though several employee handbooks during plaintiff's tenure recited that employment was at will).

[209] *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 340 n.10 (2000) (collecting cases holding that an express at-will agreement signed by the employee cannot be overcome by proof of a contrary implied understanding).

[210] *Id.* at 340 & n. 11 (handbook disclaimer language is not controlling, but may be considered as evidence of at-will employment: "the more clear, prominent, complete, consistent, and all-encompassing the disclaimer language," the greater the likelihood that the parties intended the employment to be at will).

[211] *Nelson v. United Techs.*, 74 Cal. App. 4th 597, 615 (1999) (affirming finding of implied contract notwithstanding at-will language in job application that by its terms was not "intended in any way to create an employment contract"). See generally *Sparks v. Vista Del Mar Child & Family Servs.*, 207 Cal. App. 4th 1511, 1522 (2012) (declining to enforce arbitration clause contained within a handbook that stated, "This Handbook is not intended to create a contract of employment …").

[212] *Scott v. Pac. Gas & Elec. Co.*, 11 Cal. 4th 454, 473-74 (1995).

[213] *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 345-46 (2000) (triable issue exists that dismissed employees could rely on RIF guidelines as part of implied contract, even though guidelines not distributed to employees generally).

[214] CACI 2404—Breach of Employment Contract—Unspecified Term—"Good Cause" Defined.

[215] *Cotran v. Rollins Hudig Hall*, 17 Cal. 4th 93, 107-09 (1998).

[216] *Silva v. Lucky Stores, Inc.*, 65 Cal. App. 4th 256, 275 (1998) (affirming summary judgment for employer on claim for breach of an implied contract to terminate only for good cause: "While the investigation was not perfect, it was appropriate given that it was conducted 'under the exigencies of the workaday world and without benefit of the slow-moving machinery of a contested trial").

[217] *Serri v. Santa Clara Univ.,* 226 Cal. App. 4th 830, 873-74 (2014) (affirming summary judgment for employer on breach of implied contract claim, and rejecting plaintiff's claim that a jury should decide whether her misconduct was serious enough to warrant immediate termination under the *Cotran* good cause standard).

[218] *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 353 n.18 (2000) ("[T]he covenant prevents a party from acting in bad faith to frustrate the contract's actual benefits. Thus, for example, the covenant might be violated if termination of an at-will employee was a mere pretext to cheat the worker out of another contract benefit to which the employee was clearly entitled, such as compensation already earned") (internal quotation marks omitted).

[219] *See*, *e.g., Comeaux v. Brown & Williamson Tobacco Co.,* 915 F.2d 1264, 1272-73 & n.9 (9th Cir. 1990) (breach of implied covenant may occur where employer made an offer of employment of at-will employment, without stating that the offer was contingent on a credit check, and then, relying on the outcome of that check, revoked the offer before the new hire started work)*; Sheppard v. Morgan Keegan & Co.*, 218 Cal. App. 3d 61, 67 (1990) (reversing summary judgment against contractual wrongful termination claim of individual who, in reliance on job offer, moved from California to Tennessee to take the job, only to be denied employment after he made pre-employment visit to office dressed in jeans and T-shirt; claim sustainable notwithstanding at-will employment status, as doctrine of promissory estoppel gave plaintiff right to assume he would have chance to perform job to the good-faith satisfaction of his employer).

[220] *Guz v. Bechtel Nat'l Corp., Inc.*, 24 Cal. 4th 317, 352-53 (2000) (summary judgment affirmed as to implied covenant claim: "To the extent Guz's implied covenant cause of action seeks to impose limits on Bechtel's termination rights beyond those to which the parties actually agreed, the claim is invalid. To the extent the implied covenant claim seeks simply to invoke terms to which the parties did agree, it is superfluous").

[221] *See, e.g., M.F. v. Pac. Pearl Hotel Mgmt., LLC*, 16 Cal. App. 5th 693, 700 (2017) (workers' compensation act did not preempt FEHA claim by hotel housekeeper that hotel was liable for negligently failing to prevent her rape by a drunken trespasser whose dangerous presence should have been known to hotel management; "workers' compensation exclusivity doctrine is inapplicable to claims under the FEHA").

[222] *See, e.g.*, *Cabesuela v. Browning-Ferris Indus.*, 68 Cal. App. 4th 101, 112-13 (1998) (emotional distress claim based on violation of fundamental public policy not preempted by WCA); *Leibert v. Transworld Sys.*, 32 Cal. App. 4th 1693 (1995) (emotional distress claim based on same conduct as public policy claim lies outside exclusive remedy provision); *Accardi v. Superior Ct. (City of Simi Valley)*, 17 Cal. App. 4th 341, 353 (1993) (WCA does not bar claim for infliction of emotional distress based on conduct that violates public policy).

[223] *Id.*

[224] *See, e.g.*, *Miklosy v. Regents of Univ. of Cal.*, 44 Cal. 4th 876, 902-03 (2008) (WCA preempts emotional distress claims arising from "risks inherent" in the normal employment relationship; "whistle blower retaliation" is risk inherent in normal employment relationship); *Ferretti v. Pfizer, Inc*., 2012 WL 3638541, at *11 (N.D. Cal. Aug. 22, 2012) (wrongful termination plaintiff cannot use *Cabesuela* to support claim for intentional infliction of emotional distress claim, in view of *Miklosy*); *Yau v. Margarita Ford, Inc.*, 229 Cal. App. 4th 144, 161-62 (2014) (upholding dismissal of IIED claim brought against individual defendant who allegedly gave illegal directions regarding fraudulent warranty claims; after *Miklosy*, violation of public policy does not support exception to WCA exclusivity); *Vasquez v. Franklin Mgmt. Real Estate Fund, Inc.*, 222 Cal. App. 4th 819, 832-33 (2013) (*Cabesuela* and *Leibert* have been limited); *Singh v. Southland Stone, U.S.A., Inc.*, 186 Cal. App. 4th 338, 366–67 (2010) (WCA exclusivity barred claim for intentional infliction of emotional distress claim where employer "berated and humiliated [plaintiff], criticized his job performance, and insulted him with profanities on a regular basis"; "employer's intentional misconduct in connection with actions that are a normal part of the employment relationship … resulting in emotional injury is considered to be encompassed within the compensation bargain, even if the misconduct could be characterized as 'manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance.'").

[225] *See Light v. Dep't of Parks & Recreation*, 14 Cal. App. 5th 75, 101 (2017) ("[W]e are unwilling to abandon the long-standing view that unlawful discrimination and retaliation in violation of FEHA falls outside the compensation bargain and therefore claims of intentional infliction of emotional distress based on such discrimination and retaliation are not subject to workers' compensation exclusivity.").

[226] *Id.* at 81.

[227] *Id.* at 101.

[228] *Id.* at 82-85.

[229] Lab. Code section 4558(b) provides: "An employee, or his or her dependents in the event of the employee's death, may bring an action at law for damages against the employer where the employee's injury or death is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press, and this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death."

[230] *Santos v. Crenshaw Mfg., Inc.*, 55 Cal. App. 5th 39 (2020).

[231] *Id.* at 42.

[232] *Id.* at 46.

[233] *Id.* at 54-56.

[234] *Reynaud v. Technicolor Creative Servs. USA, Inc.*, 46 Cal. App. 5th 1007 (2020).

[235] *Id.* at 1011-14.

[236] *Id.* at 1014.

[237] *Id.* at 1021-23.

[238] *Id.*

[239] *Id.* at 1023.

[240] *See e.g., Stevenson v. Superior Ct. (Huntington Mem'l Hosp.)*, 16 Cal. 4th 880, 885 (1997) (FEHA does not preempt any common law tort claims, so that employee may bring claim for wrongful termination in violation of the public policy against age discrimination even though FEHA already provides a statutory remedy for age discrimination); *see also Nelson v. United Techs.*, 74 Cal. App. 4th 597, 611-12 (1999) (fired employee may sue for wrongful termination in violation of public policy expressed in California Family Rights Act, even though CFRA itself provides remedies for violations); *Prue v. Brady Co./San Diego, Inc.*, 242 Cal. App. 4th 1367, 1383 (2015) (employee may assert public-policy tort claim for wrongful termination in violation of public policy aginst disability discrimination, without meeting FEHA's one-year statute of limitations).

[241] Civ. Proc. Code § 437c(a)(2).

[242] *Nazir v. United Airlines, Inc.,* 178 Cal. App. 4th 243 (2009).

[243] *Id.* at 248.

[244] *Id.*

[245] *Id.* at 286 (citing law review article authored by Chief Judge Wald of the D.C. Circuit).

[246] *Davis v. Kiewit Pac. Co*., 220 Cal. App. 4th 358, 361 (2013).

[247] *Id.*

[248] *Id*. at 369 (emphasis in original).

[249] *Id*. at 370.

[250] Gov't Code § 12923(e).

[251] *See, e.g., Coate v. Superior Ct.*, 81 Cal. App. 3d 113, 115 (1978) (absent a finding of waiver of the privilege, a court may not compel disclosure of joint federal or joint state income tax returns, or information contained therein; privilege of tax returns "facilitate[s] tax enforcement by encouraging a taxpayer to make full and truthful declarations in his return, without fear that his statements will be revealed or used against him for other purposes").

[252] *See, e.g., Delaware State Coll. v. Ricks*, 449 U.S. 250, 257-58 (1980) (statute of limitations for Title VII action began to run when adverse employment decision was communicated to employee, not when it took effect). *But see* Lilly Ledbetter Fair Pay Act of 2009 (180-day statute of limitations for filing equal-pay suit reset with each new discriminatory paycheck).

[253] *Id.*

[254] *Romano v. Rockwell Int'l*, 14 Cal. 4th 479, 503 (1996). Similarly, under Ninth Circuit authority that would likely apply to a California claim, a plaintiff suing for constructive discharge can start the time in which to sue with the date of resignation, not the day of the last event prompting the resignation. *Fielder v. UAL Corp.*, 218 F.3d 973, 988 (9th Cir. 2000) (date of resignation, not date of last intolerable act, triggers limitations period for constructive discharge claim), judgment vacated by *UAL Corp. v. Fielder*, 536 U.S. 919 (2002).

[255] *McCaskey v. CSAA*, 189 Cal. App. 4th 947, 957-62 (2010) (2020), *judgment reversed and remanded by Pollock v. Tri-Modal Dist. Servs.*, 11 Cal. 5th 918 (2021).

[256] *Pollock v. Tri-Modal Dist. Servs.*, 11 Cal. 5th 918 (2021).

[257] *Id*. at 941.

[258] *Id.* at 945-47.

[259] *Id.*

[260] *Richards v. CHWM Hill, Inc.*, 26 Cal. 4th 798, 802 (2001).

[261] *Id.* For more on California's continuing violation doctrine, see § 6.11.3.

[262] *Brome v. Cal. Highway Patrol*, 44 Cal. App. 5th 786, 798-801 (2020).

[263] *Id.*

[264] *Blue Fountain Pools & Spas Inc. v. Superior Ct. (Arias)*, 53 Cal. App. 5th 239 (2020).

[265] *Id*. at 245-46.

[266] *Id.* at 252.

[267] *McDonald v. Antelope Valley Cmty. Coll. Dist*., 45 Cal. 4th 88, 102 (2008).

[268] *Brome v. Cal. Highway Patrol*, 44 Cal. App. 5th 786, 795-98 (2020).

[269] *Id.*

[270] *Id.* at 798.

[271] *See, e.g., Ellis v. U.S. Sec. Assocs.*, 224 Cal. App. 4th 1213 (2014) (reversing judgment for the defendant, where plaintiff, a security guard, had signed an employment application purporting to limit the statute of limitations to six months for any employment-related claim).

[272] *Id.* at 1217.

[273] *Hildebrandt v. Staples the Office Superstore, LLC*, 58 Cal. App. 5th 128, 136-39 (2020) (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), and *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103 (1988)).

[274] *Hildebrandt,* 58 Cal. App. 5th at 139-45.

[275] *Id.*

[276] *See*, *e.g.*, Civ. Code § 1624(a).

[277] *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 673 (1988) (citing *White Lighting Co. v. Wolfson*, 68 Cal. 2d 336, 343-44 (1968)).

[278] See Civ. Code § 1624(a)(1): "The following contracts are invalid unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent: (1) An agreement that by its terms is not to be performed within a year from the making thereof."

[279] *See*, *e.g.*, *Sciborski v. Pac. Bell Directory*, 205 Cal. App. 4th 1152 (2012) (to invoke LMRA preemption, defendant must show claim "cannot be resolved on the merits without choosing among competing interpretations of a collective bargaining agreement and its application to the claim"; CBA interpretation not needed to resolve claim that employer unlawfully used self-help to deduct funds from wages already paid, upon the employer's unilateral declaration that a commission was unearned)

[280] *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1054 1071 (9th Cir. 2007) (rejecting LMRA preemption argument because, although claims depended on language of CBA, the claims did not substantially depend on a CBA interpretation and could "be resolved by—at most—merely 'looking to' the CBAs").

[281] 359 U.S. 236, 244-45 (1959).

[282] *San Diego Unions v. Garmon,* 359 U.S. 236, 244-45 (1959).

[283] *Doe v. Google, Inc.*, 54 Cal. App. 5th 948 (2020).

[284] *Id*. at 960-61.

[285] *Id.* at 963.

[286] *Id.* at 968-69.

[287] Civ. Proc. Code § 425.16(b)(1)(3), (c)(2). SLAPP stands for Strategic Lawsuit Against Public Participation. For cases granting plaintiffs' anti-SLAPP motions, see *Aber v. Comstock,* 212 Cal. App. 4th 931 (2013) (upholding anti-SLAPP order against alleged sexual harasser who sued plaintiff for defamation and IIED); *cf. Cho v. Chang,* 219 Cal. App. 4th 521 (2013) (striking in part alleged harasser's cross-complaint for defamation and IIED).

[288] *Aber v. Comstock*, 212 Cal. App. 4th 931 (2013).

[289] *Id.* at 939.

[290] *Id.* at 941-953.

[291] AB 3070, adding Civ. Proc. Code § 231.7.

[292] *Id.*

[293] *Id.*

[294] *Id.*

[295] Civ. Proc. Code § 231.7(g).

[296] *King v. U.S. Bank Nat'l Ass'n*, 52 Cal. App. 5th 675, 720, 730-31 (2020) (the court "cannot find … that the jury awarded the same damages for the defamation and wrongful termination claims" as there was substantial evidence that plaintiff's reputation had been affected by defamatory statements following his termination).

[297] *See Davis v. Consol. Freightways*, 29 Cal. App. 4th 354, 373 (1994) (there was no basis to find self-compelled publication where no strong compulsion to disclose theft accusation existed, because the former employer had a strict policy against giving prospective employers any information about former employees beyond the dates of their employment).

[298] *Tilkey v. Allstate Ins. Co*., 7 Cal. App. 5th 521, 549-550 (2020) ("The jury concluded that Tilkey was under strong pressure to communicate Allstate's defamatory statement to another person. There is ample evidence to support this conclusion" as the reason for termination reported on the Form U5 was negative, and employers have access to U5 forms, which meant that Tilkey would have to explain the situation to any prospective employer).

[299] Civ. Code § 47(c).

[300] *McQuirk v. Donnelley*, 189 F.3d 793, 796 (9th Cir. 1999) (release signed by applicant authorizing former employer to provide information could not, under California law, release future intentional acts of defamation); *but see Bardin v. Lockheed Aeronautical Sys. Co.*, 70 Cal. App. 4th 494, 507 (1999) (release barred defamation claims against former employer).

[301] Civ. Code § 47(c).

[302] Civ. Code § 47.1.

[303] *Id.*

[304] *Toscano v. Greene Music,* 124 Cal. App. 4th 685 (2004) (plaintiff, suing for promissory estoppel stemming from defendant's unfulfilled alleged promise of employment, causing plaintiff to resign from at-will job at former employer, can recover what wages he would have earned from former employer through retirement, to extent damages not speculative).

[305] *Helmer v. Bingham Toyota Isuzu*, 129 Cal. App. 4th 1121 (2005) (plaintiff can recover damages for lost income suffered from leaving secure job due to false promises about monthly compensation he would earn at defendant). See also § 5.6 (claims for breach of implied covenant of good faith and fair dealing).

[306] *Helmer v. Bingham Toyota Isuzu*, 129 Cal. App. 4th 1121 (2005).

[307] *White v. Smule, Inc.,* 75 Cal. App. 5th 346, 357-59 (2022) ("[A]n 'at-will' employer does not have carte blanche to lie to an employee about any matter whatsoever to trick him or her into accepting employment" and at-will employment does not 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) (internal citations omitted).

[308] *Randi W. v. Muroc Joint Unified Sch. Dist.*, 14 Cal. 4th 1066, 1081-82 (1997) ("we view this case as a 'misleading half-truths' situation in which defendants, having undertaken to provide some information regarding Gadams's teaching credentials and character, were obliged to disclose all other facts which 'materially qualify' the limited facts disclosed" and "having volunteered this information, defendants were obliged to complete the picture by disclosing material facts regarding charges and complaints of Gadams's sexual improprieties.")

[309] *Marshall v. Brown*, 141 Cal. App. 3d 408, 418-19 (1983) (where plaintiff recovered both a treble damage award under Labor Code section 1054 and punitive damages, the plaintiff was required to elect between the two penalties, as the primary purpose behind both is to punish the defendant and "we do not sanction a double recovery for the plaintiff").

[310] *Cf. Doe v. Cap. Cities*, 50 Cal. App. 4th 1038, 1046 (1996) (no liability for negligent retention of alleged sexual harasser where employer had no prior knowledge of relevant propensities).

[311] *Flores v. AutoZone West*, 161 Cal. App. 4th 373, 380-81 (2008) (the question of "whether the employee's physical eruption, stemming from his interaction with a customer, is a predictable risk of retail employment" presented a question of fact and precluded summary judgment).

[312] *See, e.g., Morales-Simental v. Genentech, Inc.*, 16 Cal. App. 5th 445, 456 (2017) (affirming summary judgment for company sued for death caused by employee while driving to work, because employee was simply going to work and was not performing "special errand" for his employer and an "employee's decision to take work home or to drive to work at an unusual time does not bring the trip within the scope of employment").

[313] *Moradi v. Marsh USA, Inc.*, 219 Cal. App. 4th 886, 890 (2013). *See also Purton v. Marriott Int'l, Inc.*, 218 Cal. App. 4th 499, 509-10 (2013) (reversing summary judgment for Marriott on wrongful-death claim by estate of doctor who was killed by a Marriott bartender who had tended bar at a non-mandatory holiday party and was driving intoxicated; even though the accident occurred after the bartender had returned home, before returning to the road to give a lift to another intoxicated co-worker, Marriot could still be responsible: "a trier of fact could conclude that the party and the drinking of alcoholic beverages benefitted Marriott by improving employee morale and furthering employer-employee relations … and … that [the bartender] was acting within the scope of his employment while ingesting alcoholic beverages at the party").

[314] *Moradi,* 219 Cal. App. 4th at 891. Another 2013 appellate decision went the other way, affirming summary judgment for an employer whose employee, driving a company vehicle, hit another vehicle. In that case the Court of Appeal held that the employee's trip was "entirely personal" in that it involved a 140-mile detour from his normal commute, and in that it was not taken for the benefit of the company. The risk of this accident was thus not even broadly incident to the company's enterprise. *Halliburton Energy Servs., Inc. v. Dep't of Transp.,* 220 Cal. App. 4th 87 (2013); *but see Moreno v. Visser Ranch, Inc.*, 30 Cal. App. 5th 568, 583-84 (2018) (distinguishing *Halliburton* because the driver was on personal business when the accident occurred, but noting that this did not establish as a matter of law that he was engaged in *"purely"* personal business).

[315] *Newland v. Cnty. of Los Angeles*, 24 Cal. App. 5th 676, 689-91 (2018).

[316] *Id.* at 692-93.

[317] *Talley v. County of Fresno,* 51 Cal. App. 5th 1060 (2020)..

[318] *See Commodore Homes, Inc. v. Superior Ct.*, 32 Cal. 3d 211, 220-21 (1982) (tort-like remedies are available under FEHA); Cal. Gov't Code § 12965(b)(6) (attorney fees and expert witness costs awardable to prevailing party).

[319] *Stamps v. Superior Ct.,* 136 Cal. App. 4th 1441 (2006) (Ralph Civil Rights Act of 1976 and Tom Bane Civil Rights Act, codified in Civil Code sections 51.7 and 52.1, provide separate claims for employee suffering employer's discriminatory violence and intimidation; while the Unruh Act does not apply to employment discrimination, neither section here is part of the Unruh Act, and both statutes authorize a private right of action in employment cases—section 51.7 making wrongdoer liable for "actual damages suffered by any person denied that right" and section 52.1 providing that person whose rights have been interfered with "may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages").

[320] *Jimenez v. U.S. Cont'l Mktg., Inc.,* 41 Cal. App. 5th 189 (2019).

[321] *St. Myers v. Dignity Health,* 44 Cal. App. 5th 301 (2019).

[322] *Medina v. Equilon Enters., LLC,* 68 Cal. App. 5th 868 (2021).

[323] Lab. Code § 1194 (employee suing for statutory minimum wage entitled to attorney fees); *Earley v. Superior Ct. (Washington Mut. Bank)*, 79 Cal. App. 4th 1420, 1429-30 (2000) (written notice to class members deciding whether to opt out is not to advise that they could be liable for defendant's attorney fees if the defendant prevails; the policy stated in section 1194 overrides the general language of section 218.5; court harmonizes the two sections to hold that a prevailing defendant can obtain attorney fees in wage claims generally but not in claims for minimum wage or overtime premium pay). Section 218.5 does not apply "to any cause of action for which attorney fees are recoverable under Section 1194." Lab. Code § 218.5(b).

[324] Lab. Code § 218.5(a) ("[I]f the prevailing party in the court action is not an employee, attorney fees and costs shall be awarded pursuant to this section only if the court finds that the employee brought the court action in bad faith."). Although "bad faith" is not defined, it is likely that an employer must show that the employee's claim was brought with knowledge that it was baseless.

[325] *Murphy v. Kenneth Cole Prods.*, *Inc.*, 40 Cal. 4th 1094, 1099 (2007). The result of this pro-employee holding was that the statute of limitations for claims seeking meal and rest pay was three years instead of just one.

[326] *Kirby v. Immoos Fire Prot.*, 53 Cal. 4th 1244, 1255, 1257 (2012) ("[The] question here is whether a Section 226.7 claim, which concerns an employer's alleged failure to provide statutorily mandated meal and rest periods, constitutes an 'action brought for the nonpayment of wages' within the meaning of Section 218.5. We conclude it does not."; "[A] section 226.7 claim is not an action brought for nonpayment of wages; it is an action brought for nonprovision of meal or rest breaks."). The Supreme Court in *Kirby* distinguished its prior decision holding that the pay owed for meal-break violations is a "wage." *Id.* at 1257 (discussing *Murphy v. Kenneth Cole Prods.*, 40 Cal. 4th 1094 (2007) ("To say that a section 226.7 remedy is a wage, however, is not to say that the legal violation triggering the remedy is nonpayment of wages. As explained above, the legal violation is nonprovision of meal or rest breaks, and the object that follows the phrase 'action brought for' in section 218.5 is the alleged legal violation, not the desired remedy.").

[327] SB 462, 2013 bill amending Lab. Code § 218.5.

[328] Lab. Code § 218.5(a) (described above). The Court of Appeal has held that this statute is procedural and applies to pending litigation, thus depriving employers of attorney fees for cases they won that were filed before section 218.5 was amended. *USS-Posco Indus. v. Case,* 244 Cal. App. 4th 197, 215-22 (2016).

[329] Lab. Code § 1194(a).

[330] *Aleman v. AirTouch Cellular,* 209 Cal. App. 4th 556, 579-84 (2012) (a split-shift claim seeks the minimum wage and is thus subject to section 1194 provision permitting only employee to recover attorney fees; a reporting-time claim seeks unpaid wages at the regular rate and thus is subject to section 218.5).

[331] *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992) (rejecting use of enhancements in calculating attorney fees under fee-shifting provisions of two federal statutes).

[332] *Perdue v. Kenny A. ex. rel. Winn*, 559 U.S. 542, 553-54 (2010) ("[W]e reject any contention that a fee determined by the lodestar method may not be enhanced in any situation. The lodestar method was never intended to be conclusive in all circumstances. Instead, there is a 'strong presumption' that the lodestar figure is reasonable, but that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee.").

[333] *Ketchum v. Moses,* 24 Cal. 4th 1122, 1130 (2001) (quoting lower court opinion).

[334] *Id*. at 1137-39 (trial court can include fee enhancement to basic lodestar figure for contingent risk, exceptional skill, or other factors).

[335] *Amaral v. Cintas Corp.*, 163 Cal. App. 4th 1157, 1216-18 (2008); *see also Pellegrino v. Robert Half Int'l, Inc.*, 182 Cal. App. 4th 278, 290 (2010) (affirming 1.75 multiplier to lodestar figure in multi-plaintiff Labor Code action).

[336] *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Hum. Res.*, 532 U.S. 598 (2001) (rejecting "catalyst theory" in a FOIA case because the theory would allow an award of attorney fees where there is no judicially sanctioned change in the legal relationship of the parties, would discourage defendants to voluntarily change conduct that may not be illegal, and would foment a second major litigation requiring analysis of the defendant's subjective motivations in changing its conduct). FOIA was amended, in 2007, to define "substantially prevailed" to include "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." 5 U.S.C. § 552(a)(4)(E)(ii). Congress intended this amendment to prevent federal agencies from denying meritorious FOIA requests, only to voluntarily comply with a request on the eve of trial to avoid liability for litigation costs. *Warren v. Colvin*, 744 F.3d 841 (2d Cir. 2014).

[337] *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553 (2004). The catalyst theory is available, however, only if the lawsuit had "some merit" and the plaintiff "engaged in a reasonable attempt to settle its dispute with the defendant prior to litigation." *Id.* at 561.

[338] *Id.* at 579-82.

[339] *Id.* at 585 (Chin, J., dissenting).

[340] *Nishiki v. Danko Meredith, APC,* 25 Cal. App. 5th 883, 896 (2018). *See also Stratton v. Beck*, 9 Cal. App. 5th 483, 497 (2017) (affirming $31,625 fee award while rejecting contention that it was "grossly disproportionate" to the $303 wage award).

[341] *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983) ("extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney fees under 42 U. S. C. § 1988. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee.").

[342] *Harman v. City & Cnty. of San Francisco,* 158 Cal. App. 4th 407 (2007).

[343] *Chavez v. City of Los Angeles*, 160 Cal. App. 4th 410, 416-22 (2008) (in ruling on motion for attorney fees by plaintiff who prevailed in FEHA case, trial court erred in denying fees solely because plaintiff's recovery was below the $25,000 threshold for general civil jurisdiction), *review granted*, No. S162313 (Cal. May 14, 2008).

[344] *Chavez v. City of Los Angeles*, 47 Cal. 4th 970, 989-92 (2010).

[345] *Muniz v. United States Parcel Serv.*, 738 F.3d 214, 218 (9th Cir. 2013) ("although there was a clear disparity between the damages recovered and the fees awarded, California law did not require the district court to reduce the disparity").

[346] *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (approving 28 percent fee as justified by a benchmark of 25 percent adjusted according to specified case circumstances); *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 942 (9th Cir. 2011) (Ninth Circuit district courts "typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure").

[347] *Laffitte v. Robert Half Int'l, Inc.*, 1 Cal. 5th 480, 486 (2016).

[348] *Id.* at 487.

[349] Bus. & Prof. Code § 17200 *et seq.*

[350] *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1150-51 (2003) (UCL not an all-purpose substitute for tort or contract claim; disgorgement of profits allegedly obtained by unfair business practice not an authorized UCL remedy where profits are neither money taken from plaintiff nor funds in which plaintiff has ownership interest); *Feitelberg v. Credit Suisse First Boston, LLC*, 134 Cal. App. 4th 997, 1018 (2005) (extending *Korea Supply* to class-action context: affirming dismissal of claim for nonrestitutionary disgorgement in class action brought under UCL, as UCL authorizes only restitutionary disgorgement; "class action status does not alter the parties' underlying substantive rights"). *See also Pineda v. Bank of Am., NA,* 50 Cal. 4th 1389, 1401-02 (2010) (Labor Code § 203 penalties are not recoverable as restitution under the UCL, because employees have no ownership interest in those penalties).

[351] *Pineda v. Bank of Am.*, 50 Cal. 4th 1389, 1401 (2010). For a discussion of waiting-time penalties due under Labor Code section 203, *see* §§ 7.5, 13.3.

[352] Bus. & Prof. Code § 17203.

[353] *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163, 179 (2000).

[354] *Pellegrino v. Robert Half Int'l, Inc.*, 181 Cal. App. 4th 713 (2010), *review granted*, No. S180849 (Cal. April 28, 2010) (the review was granted on issues relating to the administrative exemption, and then the case was remanded without a decision by the California Supreme Court). The *Pellegrino* decision is also notable for holding that the employer could not enforce a provision in its employment contract that shortened the deadline to sue. The Court of Appeal reasoned that shortening the limitations period was inconsistent with the fact that wage and hour laws protect unwaivable statutory rights supported by strong public policy.

[355] *See Kraus v. Trinity Mgmt. Servs., Inc.*, 23 Cal. 4th 116 (2000). *But see Arias v. Superior Ct. (Angelo Dairy)*, 46 Cal. 4th 969, 979-80 (2009) (recognizing the effect of Proposition 64, *see* § 5.13.2).

[356] Bus. & Prof. Code §§ 17203, 17204.

[357] *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Ct. (First Transit, Inc.)*, 46 Cal. 4th 993 (2009).

[358] *California Med. Ass'n v. Aetna Health of Cal., Inc.*, 14 Cal. 5th 1075 (2023).

[359] *Id.* at 1091-93.

[360] *Id.* at 1082.

[361] *E.g.*, *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1101 (9th Cir. 2018) ("A collective action is instituted when workers join a collective action complaint by filing opt-in forms with the district court."); *Rangel v. PLS Check Cashers of Cal., Inc.*, 899 F.3d 1106, 1109 (9th Cir. 2018) ("FLSA collective actions, unlike Rule 23(b)(3) class actions and their state law analogues, are strictly *opt-in* actions.") (citing 29 U.S.C. § 216(b)) (emphasis in original); *Misra v. Decision One Mortg. Co., LLC*, 673 F. Supp. 2d 987, 992 (C.D. Cal. 2008) ("Potential collective action plaintiffs must 'opt-in' to the action by filing a written consent with the court…. If similarly situated employees do not 'opt-in' to the collective action, these employees are not bound by any judgment reached in the action.") (citing *Leuthold v. Destination Am., Inc.,* 224 F.R.D. 462, 466 (N.D. Cal. 2004)).

[362] *E.g., Haro v. City of Rosemead*, 174 Cal. App. 4th 1067, 1077 (2009) ("As a matter of California law, appellants cannot maintain their FLSA action as a section 382 class action where other employees must opt in to join the putative class."); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 59 (2008) ("[R]equiring class members to take affirmative steps to opt in has been held to be contrary to state … class action law and policy.") (citing *Hypertouch, Inc. v. Superior Ct. (Perry Johnson, Inc.)*, 128 Cal. App. 4th 1527, 1550 (2005)).

[363] *Compare In re Bayol Cases I and II*, 51 Cal. 4th 751, 757-58 (2011) (if state order terminates class claims, with individual claims persisting, then the order is immediately appealable) *with Microsoft Corp. v. Baker,* 582 U.S. 23, 25 (2017) (federal order denying class certification is an interlocutory order, not reviewable as of right until a final judgment) *and* Fed. Rule Civ. P. 23(f) (federal order denying class certification can under limited circumstances be subject to a discretionary appeal).

[364] *See Parris v. Superior Ct. (Lowe's HI W, Inc.)*, 109 Cal. App. 4th 285 (2003) (pre-certification communication by plaintiff's counsel to individuals in potential class is constitutionally protected; trial court erred in denying motion for approval of content of such proposed communication, as motion was unnecessary; court also erred in denying motion to compel discovery of names and addresses of potential class members, where court did not expressly balance potential abuse of class action procedure against rights of parties).

[365] *E.g.*, Lab. Code §§ 218.5 (wage claims), 2699 (penalty claims).

[366] *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 179 (2000) (Any action on any UCL cause of action is subject to the four-year period of limitations created by section 17208 of the California Business & Professions Code).

[367] *Landers v. Quality Commc'ns, Inc.*, 771 F.3d 638, 644 (9th Cir. 2014) (upholding dismissal of FLSA claim of cable services installer that his employer failed to pay him and similarly situated individuals minimum and overtime wages, where he failed to allege facts showing there was a specific week in which he was denied minimum or overtime wages; the pleading standards the U.S. Supreme Court set forth in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (requiring complaint to plead facts to state an antitrust claim for relief that is plausible on its face), also apply to FLSA claims, meaning "that conclusory allegations that merely recite the statutory language are [not] adequate").

[368] *Gutierrez v. Cal. Com. Club,* 187 Cal. App. 4th 969, 972 (2010). *See also Prince v. CLS Transp., Inc.*, 118 Cal. App. 4th 1320 (2004) (trial court erred in determining class action suitability of wage-dispute case at pleading stage; Labor Commissioner hearings are not a superior method of resolution for a class of 500 drivers).

[369] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51, 131 S. Ct. 2541, 2551 (2011) ("sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question … and certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied"; "[A]ctual, not presumed, conformance with Rule 23(a) remains ... indispensable. Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped.") (internal citations omitted).

[370] *Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 470 (1981).

[371] *See Barriga v. 99 Cents Only Stores LLC*, 51 Cal. App. 5th 299, 310 (2020) (99 Cents "argued the proposed classes should not be certified because individual issues predominate.").

[372] *Id*. at 307.

[373] *Id*.

[374] *Id*. at 336 ("[T]he court had the duty to scrutinize *all* the declarations and the authority to strike any of them if it found evidence of coercion or abuse.") (emphasis in original).

[375] *Id*. at 333-34.

[376] *Id.* at 340 ("*[N]o court has ever overturned a certification order based on an evidentiary ruling without determining whether the ruling affected the order*. This is a first.") (emphasis in original).

[377] *Sav-On Drug Stores, Inc. v. Superior Ct.*, 34 Cal. 4th 319 (2004).

[378] *Id.* at 331; *accord Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1026 (2012).

[379] *Sav-On Drug Stores, Inc.*, 34 Cal. 4th at 326-27; *accord Brinker Rest. Corp.*, 53 Cal. 4th at 1022 (presuming "in favor of the certification order … the existence of every fact the trial court could reasonably deduce from the record").

[380] *Sav-On Drug Stores, Inc.*, 34 Cal. 4th at 340.

[381] *Id.* at 327, 329 n.4.

[382] *Id.* at 327, 332.

[383] *Id.* at 327-28.

[384] *Id*. at 343.

[385] *Id*. at 326 (trial courts "are afforded great discretion in granting or denying certification").

[386] *Id.* at 339.

[387] *Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1025 (2012) ("trial court does not abuse its discretion if it certifies (or denies certification of) a class without deciding one or more issues affecting the nature of a given element if resolution of such issues would not affect the ultimate certification decision").

[388] *Faulkinbury v. Boyd & Assocs.,* 216 Cal. App. 4th 220, 232-35 (2013), held that unlawful break policies provided sufficient basis to find predominating common issues for purposes of class certification, even if the policy was not uniformly applied. The Court of Appeal suggested that whether an employee was actually denied breaks was a damages question that did not preclude class certification. *Id.* at 235. *Faulkinbury* would be distinguishable where employers have legally compliant policies and practices.

Benton v. Telecom Network Specialists, Inc., 220 Cal App. 4th 701, 726 (2013), held that an alleged joint employer's lack of a lawful written policy on meal and rest breaks was a sufficient basis for certifying a class of technicians, even though many knew they could take breaks, and did so. The Court of Appeal held that the class could be certified on a theory that the defendant unlawfully failed to adopt a policy authorizing and permitting breaks. The theory was that the defendant, as an alleged co-employer, had to ensure that the technicians knew of their break rights. This suggestion that certification can rest on a theory that the defendant failed to adopt a formal break policy, even where the employees knew their rights and exercised them, is another example of a court liberally interpreting *Brinker* to the plaintiff's advantage.

The Supreme Court, in *Ayala v. Antelope Valley Newspapers,* 59 Cal. 4th 522 (2014), held that a uniform written contract under which a newspaper company engaged newspaper carriers as independent contractors could support a class action alleging that the company retained the right to control the manner of means of delivery, making the carriers employees who could assert various rights under the Labor Code. The Supreme Court held that whether the defendant actually exercised varying degrees of control over the carriers was immaterial, because the proper inquiry is whether the defendant had the contractual *right* to control the worker.

[389] *Donohue v. ANM Servs., LLC*, 11 Cal. 5th 58, 75-76 (2021).

[390] *E.g.*, *Altiery v. Granite Rock Co.*, No. H045263, 2021 WL 3825309 (Cal. App. 6th Aug. 27, 2021) (unpublished and not citable in California courts); *Salazar v. See's Candy Shops, Inc.*, 64 Cal. App. 5th (2021), *review denied and ordered not to be officially published* (Cal. Aug. 11, 2021); *Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th 885 (2019), *review denied and ordered not to be officially published* (Cal. Dec. 23, 2019); *Tien v. Tenet Healthcare*, 209 Cal. App. 4th 1077 (2012), *review denied and ordered not to be officially published* (Cal. Jan. 16, 2013); *Flores v. Lamps Plus*, 209 Cal. App. 4th 35 (2012), *review denied and ordered not to be officially published* (Cal. Dec. 12, 2013); *Hernandez v. Chipotle Mexican Grill*, 208 Cal. App. 4th 1487 (2012), *review denied and ordered not to be officially published* (Cal. Dec. 12, 2013).

[391] *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 34-36 (2014).

[392] *Id*. at 27 ("Class certification is appropriate only if these individual questions can be managed with an appropriate trial plan.").

[393] *Id*. at 29 ("Trial courts also have the obligation to decertify a class action if individual issues prove unmanageable.") (citations omitted).

[394] *Duran v. U.S. Bank Nat'l Ass'n*, 19 Cal. App. 5th 630 (2018).

[395] *Id.* at 641.

[396] *Id.* at 647.

[397] *Id.* at 650-51.

[398] *McCleery v. Allstate Ins. Co.*, 37 Cal. App. 5th 434, 448 (2019) (affirming trial court's conclusion that "plaintiffs' proposed class action would not be superior to individual actions because their survey failed to address 'all of the information needed for an accurate determination of liability,' and the trial plan 'deprive[d] defendants of the right of cross-examination and the ability to present their affirmative defenses").

[399] *Id*. at 453 ("plaintiffs expressly admit they intend to answer the ultimate question in this case based solely on expert testimony—testimony founded on multiple hearsay that defendants could never challenge.").

[400] *Id*. (quoting *Korsak v. Atlas Hotels, Inc.*, 2 Cal. App. 4th 1516, 1525 (1992)).

[401] *McCleery*, 37 Cal. App. 5th at 453 (citing *Goldberg v. Kelly*, 397, U.S. 254, 269-70 (1970)).

[402] *In re Williams-Sonoma, Inc.*, 947 F.3d 535, 540 (9th Cir. 2020) ("[respondent] contends that the information sought in discovery was relevant to class certification issues. … That does not undercut, or water down, the primary point that using discovery to find a client to be the named plaintiff before a class action is certified is not within the scope of Rule 26(b)(1).") (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 353 (1978)).

[403] *In re Williams-Sonoma, Inc.*, 947 F.3d at 540. The case involved a suit for misleading statements as to the thread count on bedding, but its general principles apply to an employment case. *Williams-Sonoma* has uncertain breadth, however, and may be limited to a case where the plaintiff's discovery request is solely to find a new class representative. *See Arredondo v. Sw. & Pac. Specialty Fin., Inc.*, 2019 WL 6128657, at *3 (E.D. Cal. Nov. 19, 2019) ("[D]istrict courts in th[e] [Ninth] Circuit have often found that as a general rule, before class certification has taken place, all parties are entitled to equal access to persons who potentially have an interest in or relevant knowledge of the subject of the action, but who are not yet parties. For that reason, discovery of the putative class members' contact information is routinely allowed.") (internal citations and quotations omitted); *Martin v. Sysco Corp.*, 2017 WL 4517819, at *3 (E.D. Cal. Oct. 10, 2017) ("Disclosure of contact information for putative class members is a common practice in the class action context.") (citing *Artis v. Deere & Co.*, 276 F.R.D. 348, 352 (N.D. Cal. 2011)).

[404] *CashCall, Inc. v. Superior Ct. (Cole)*, 159 Cal. App. 4th 273, 290-91 (2008) ("We conclude the *Parris* balancing test should be applied by trial courts in exercising their discretion whether to grant or deny an original plaintiff's precertification motion for discovery of the identities of class members regardless of whether that original plaintiff had standing at the beginning of the action.") (citing *Parris v. Superior Ct.*, 109 Cal. App. 4th 285, 300-01 (2003)).

[405] The named plaintiffs, debtors of the defendant, were suing for surreptitious telephone monitoring but discovered that they themselves were never monitored; only others were. *CashCall, Inc.*, 159 Cal. App. 4th at 279.

[406] *Id.* at 292-93. For discussion of how California favors the interests of class actions, as represented by plaintiffs' lawyers, over the privacy interests of employees, see § 4.10.

[407] Lab. Code § 2699(i).

[408] Lab. Code § 2699.3(a)(2)(A); *Hargrove v. Legacy Healthcare, Inc.*, 80 Cal. App. 5th 782, 792 (2022), *review denied* (Oct. 12, 2022) ("[A] PAGA action is subject to a one-year statute of limitations.") (quoting *Hutcheson v. Superior Ct.*, 74 Cal. App. 5th 932, 939 (2022)).

[409] Lab. Code § 2699.3(a)(2)(A).

[410] This has since changed with the U.S. Supreme Court's June 15, 2022, ruling in *Viking River Cruises v. Moriana*, 142 S. Ct. 1906, 1924 (2022), wherein the Court held that employers are entitled to enforce arbitration agreements insofar as they mandate arbitration of a plaintiff's individual PAGA claim. The California Supreme Court upheld the enforcement of arbitrating individual PAGA claims in *Adolph v. Uber Techs., Inc.*, 14 Cal. 5th 1104 (2023).

[411] State of California Department of Industrial Resources, Private Attorneys General Action (PAGA) Case Search, https://cadir.my.salesforce-sites.com/PagaSearch (last visited March 22, 2024).

[412] *Id.*

[413] *Crestwood Behavioral Health, Inc. v. Superior Ct.*, 60 Cal. App. 5th 1069, 1076 (2021).

[414] Lab. Code §§ 2698-2699.8.

[415] PAGA establishes civil penalties for all Labor Code provisions "except those for which a civil penalty is specifically provided." Lab. Code § 2699(f).

[416] An "aggrieved employee" is one whom the alleged violator employed and against whom an alleged violation was committed. Lab. Code § 2699(c).

[417] As originally enacted, PAGA split the money collected three ways: 50% to the California General Fund, 25% to the LWDA, and 25% to the aggrieved workers. As amended, PAGA now sends the State's 75% portion to the LWDA for labor law enforcement and education. Lab. Code § 2699(i). Section 2699 does not affect exclusive remedies for workers' compensation injuries. Lab. Code § 2699(k).

[418] Lab. Code § 2699(g)(1).

[419] Lab. Code § 2699(h).

[420] *Arias v. Superior Ct.*, 46 Cal. 4th 969, 986 (2009) (quoting *People v. Pac. Land Rsch. Co.,* 20 Cal. 3d 10, 17 (1977)).

[421] Lab. Code § 2699(f)(2).

[422] *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1209 (2008). Citing *Amaral*, a federal district court stated: "California law is clear that a subsequent violation level applies only to violations after the employer is on notice that its continued conduct is unlawful. Until notified that it is violating a Labor Code provision (whether or not the commissioner or court chooses to impose penalties), the employer cannot be presumed to be aware that its continuing underpayment of employees is a violation subject to penalties." *Steenhuyse v. UBS Fin. Servs., Inc.*, 317 F. Supp. 3d 1062, 1067-68 (N.D. Cal. 2018) (citations and internal quotation marks omitted).

[423] However, the Ninth Circuit held that until an employer is "notified by the Labor Commissioner or any court that it was subject to the California Labor Code[,]" then employers cannot be "subject to heightened penalties for any labor code violation that occurred prior to that point." *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021).

[424] Lab. Code § 98.6(a).

[425] Lab. Code §§ 2699(h), 2699.3(a)(1)(A); *Brown v. Ralphs Grocery Co.*, 28 Cal. App. 5th 824, 835 (2018) (pre-filing notice and exhaustion requirement is critical to PAGA actions, because "[p]roper notice under section 2699.3 is a 'condition' of a PAGA lawsuit") (quoting *Williams v. Superior Ct.*, 3 Cal. 5th 531, 545 (2017)).

[426] Lab. Code § 2699.3(a)(2)(A).

[427] *Id*.

[428] Lab. Code §§ 2699(d), 2699.3(c)(2)(A).

[429] Lab. Code § 2699.3(a)(1)(A); *Esparza v. Safeway, Inc.*, 36 Cal. App. 5th 42, 59 (2019) ("Before bringing a PAGA action, an aggrieved employee must give the LWDA written notice of the facts and theories supporting the Labor Code Violations."); *Williams v. Superior Ct.*, 3 Cal. 5th 531, 545-46 (2017) ("The evident purpose of the notice requirement is to afford the relevant state agency, the Labor and Workforce Development Agency, the opportunity to decide whether to allocate scarce resources to an investigation, a decision better made with knowledge of the allegations an aggrieved employee is making and any basis for those allegations."); *Culley v. Lincare Inc.*, 236 F. Supp. 3d 1184, 1193 (E.D. Cal. 2017) ("[N]otice to the LWDA 'requires an exceedingly detailed level of specificity.'") (citation omitted). *See, e.g.*, *Brown v. Ralphs Grocery Co.*, 28 Cal. App. 5th 824, 837 (2018) (holding the "[n]otice was a string of legal conclusions that parroted the allegedly violated Labor Code provisions" and "did not state facts and theories supporting the alleged violations not implied by reference to the Labor Code"); *Wyland v. Berry Petroleum Co., LLC*, 2019 WL 5079562, at *3 (E.D. Cal. Oct. 10, 2019) (dismissing plaintiff's rest break under PAGA because plaintiff "merely mimicked the statutes allegedly violated and f[e]ll short of PAGA's requirement that the aggrieved employee provide the LWDA with specific facts and theories supporting the plaintiff's allegations"); *Sinohui v. CEC Ent., Inc.*, 2016 WL 3406383, at *4 (C.D. Cal. June 14, 2016) (dismissing plaintiff's PAGA claim with prejudice because the "letter provides nothing more than a 'string of legal conclusions with no factual allegations or theories of liability to support them.'"); *Raphael v. Tesoro Ref. & Mktg. Co. LLC*, 2015 WL 5680310, at *4 (C.D. Cal. Sept. 25, 2015) ("The exceedingly detailed level of specificity for Section 2699.3(a)(1) is not satisfied here" because plaintiff "mimicked the statute violated, and therefore, the claims will be dismissed"); *Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1057 (9th Cir. 2015) (notice letter lacking "factual allegations or theories of liability" is insufficient to support PAGA claims); *Archila v. KFC U.S. Props., Inc*., 420 Fed. Appx. 667, 669 (9th Cir. 2011) (letter that "merely lists" Labor Code provisions lacks sufficient "facts and theories"); *Ovieda v. Sodexo Operations, LLC*, No. CV 12-1750-GHK SSX,

2013 WL 3887873, at *3 (C.D. Cal. July 3, 2013) ("To constitute adequate notice under § 2699.3(a), the notice must allege at least some 'facts and theories' specific to the plaintiff's principal claims; merely listing the statutes allegedly violated or reciting the statutory requirements is insufficient."); *Williams*, 3 Cal. 5th at 545-46 ("The evident purpose of the notice requirement is to afford the relevant state agency, the Labor and Workforce Development Agency, the opportunity to decide whether to allocate scarce resources to an investigation, a decision better made with knowledge of the allegations an aggrieved employee is making and any basis for those allegations.").

[430] *Khan v. Dunn-Edwards Corp.*, 19 Cal. App. 5th 804, 809 (2018) (affirming summary judgment against PAGA plaintiff because his LWDA letter giving notice of his claim referred only to himself and he had dismissed his individual claim; he could not sue on behalf of other aggrieved employees, because they were not mentioned in the LWDA notice).

[431] *Rojas-Cifuentes v. Superior Ct.*, 58 Cal. App. 5th 1051, 1059-61 (2020).

[432] *Caliber Bodyworks, Inc. v. Superior Ct.*, 134 Cal. App. 4th 365 (2005). *disapproved on other grounds in ZB, N.A. v. Superior Ct.*, 8 Cal. 5th 175, 195-96 (2019). *See also Dunlap v. Superior Ct. (Bank of Am.)*, 142 Cal. App. 4th 330, 340 (2006) (statutory penalties recoverable by employee before adoption of Private Attorneys General Act are not subject to its requirement to exhaust administrative remedies).

[433] *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1200 (2008).

[434] *Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56, 80 (2021) ("As a condition of suit under PAGA, the aggrieved employee must provide notice to the employer and the [LWDA] of the specific provisions [of the Labor Code] alleged to have been violated, including the facts and theories to support the alleged violation.") (internal quotations and citations omitted); *Brown v. Ralphs Grocery Co.*, 28 Cal. App. 5th 824, 835 (2018) ("Proper notice under section 2699.3 is a 'condition' of a PAGA lawsuit.") (quoting *Williams v. Superior Ct.*, 3 Cal. 5th 531, 545 (2017)).

[435] Lab. Code § 2699(e)(2).

[436] *DiPirro v. Bondo Corp.*, 153 Cal. App. 4th 150, 182 (2007), *as modified* (Aug. 8, 2007) ("[T]he statute has delegated the assessment of civil penalties in accordance with a highly discretionary calculation that takes into account multiple factors."). *See, e.g.*, *Kaanaana v. Barrett Bus. Servs., Inc.*, 29 Cal. App. 5th 778, 788 (2018), *review granted and aff'd on other grounds*, 11 Cal. 5th 158 (2021) (noting that the trial court "exercised its discretion to reduce the [PAGA] penalties to 13 percent of the full amount [requested, because] [o]n average, plaintiffs were deprived of 13 percent of the 30-minute meal period"); *Magadia v. Wal-Mart Assocs., Inc.*, 384 F. Supp. 3d 1058, 1100-01, 1104 (N.D. Cal. 2019) (reducing PAGA penalty of $131 million to $48 million for wage-statement violations involving details on bonus payments, because statutory and PAGA penalties for the same violation should not be disproportionate and because the underlying violation involved reporting an employee benefit—a bonus payment; and reducing PAGA penalty of $29 million to $5.8 million because of uncertainty in the law allowing employer to dispute liability in good faith), *rev'd in part, vacated in part*, 999 F.3d 668 (9th Cir. 2021) (reversing judgment and award of damages on wage statements claims against defendant); *Bernstein v. Virgin Am., Inc.*, 365 F. Supp. 3d 980, 992 (N.D. Cal. 2019) (reducing PAGA penalties by 25 percent from $33.3 million to $24.98 million, in light of $45 million in damages, defendant's ability to pay, and uncertainty of liability given lack of precedent and nonfrivolous preemption arguments); *Aguirre v. Genesis Logistics*, 2013 WL 10936035, at *2-3 (C.D. Cal. Dec. 30, 2013) (reducing PAGA penalties from $1.8 million to $500,000 for a wage-statement violation where the potential statutory penalties, under section 226(e), were only $500,000); *Fleming v. Covidien, Inc.*, 2011 WL 7563047, at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties for wage statement violations from $2,800,000 to $500,000, because "the aggrieved employees suffered no injury" as a result of the violations, the defendants "were not aware" their wage statements violated the law, and the defendants "took prompt steps to correct all violations once notified"); *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 517, 529 (2018) (affirming reduction of potential penalty of $50 per employee per pay period to just $5 because the violation—providing meal periods just slightly after the five-hour mark—was "greatly minimal" and the employer had attempted "full compliance" with "good faith attempts"; imposing maximum penalty would be unjust, arbitrary, and oppressive); *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal. App. 4th 1112, 1135-36 (2012) (affirming reduction of PAGA penalties by 30 percent, as awarding full penalties would have been "unjust" because "the evidence showed … defendants took their obligations … seriously and attempted to comply with the law," and that the defendants' financial condition "rendered them unable to pay penalties from ongoing revenues"), *disapproved of on separate grounds by ZB, N.A. v. Superior Ct.*, 8 Cal. 5th 175, 448 P.3d 239 (2019).

Cf. Amaral v. Cintas Corp. No. 2, 163 Cal. App. 4th 1157, 1214 (2008) (affirming trial court's refusal to reduce PAGA penalties where employer "was on notice that [a wage ordinance] applied to its operations but made no attempt to comply" and the employer's conduct "could be characterized as gross negligence or reckless disregard").

[437] Lab. Code § 2699(*l*)(2).

[438] *Id*.

[439] *Singh v. Roadrunner Intermodal Servs., LLC*, 2019 WL 316814, at *6 (E.D. Cal. Jan. 24, 2019) (holding that "the settlement amount related to plaintiffs' PAGA claims is fair, reasonable, and adequate," even though the settlement amount ($100,000) is less than 1% of the maximum value of PAGA penalties ($14,244,000)); *Haralson v. U.S. Aviation Servs. Corp.*, 2020 WL 12309507, at *6 (N.D. Cal. Sept. 3, 2020) (approving motion for preliminary approval even though "[t]he proposed [s]ettlement's PAGA recovery of $75,000 [wa]s just 1 percent of th[e] recalculated amount."); *Jennings v. Open Door Mktg., LLC*, 2018 WL 4773057, at *9 (N.D. Cal. Oct. 3, 2018) (approving 0.6 percent PAGA allocation where "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has not objected to the settlement"); *Chu v. Wells Fargo Invs., LLC*, 2011 WL 672645, at *1, 3 (N.D. Cal. Feb. 16, 2011) (approving PAGA settlement payment of $7,500 to LWDA, 0.1% of $6.9 million settlement); *Gong-Chun v. Aetna, Inc.*, 2012 WL 2872788, at *4 (E.D. Cal. July 12, 2012) (approving PAGA settlement payment of $15,000 to LWDA, 2.1% of settlement). And in *Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 589 (2010), where there was a basis to dispute that any penalty was owed, the Court of Appeal affirmed a class-wide settlement that apportioned zero dollars to PAGA claims.

[440] *O'Connor v. Uber Techs., Inc.,* 201 F. Supp. 3d 1110, 1135 (N.D. Cal. 2016) (rejecting proposed class settlement that, in allocating $1 million to PAGA penalties, would give a 99.9% discount off PAGA recovery while giving only a 90% discount off non-PAGA recovery).

[441] Lab. Code § 2699(g)(2) ("No action shall be brought under this part for any violation of a posting, notice, agency reporting, or filing requirement of this code, except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting.").

[442] AB 1654, 2018 bill adding Lab. Code § 2699.6.

[443] SB 646, 2021 bill adding Lab. Code § 2699.8.

[444] *Kim v. Reins Int'l California, Inc.*, 18 Cal. App. 5th 1052 (2017) (PAGA suit cannot continue if underlying claim settled: by accepting a settlement and dismissing his individual claims with prejudice, the plaintiff "essentially acknowledged that he no longer maintained any viable Labor Code-based claims against" the employer and therefore lacked standing to maintain a PAGA action as an "aggrieved employee"), *review granted*, No. S 246999 (Cal. Mar. 28, 2018).

[445] *Id*.

[446] *Kim v. Reins Int'l Cal., Inc., review granted*, No. S246911 (Cal. Mar. 28, 2018),

[447] *Kim v. Reins Int'l Cal., Inc.*, 9 Cal. 5th 73, 84-85 (2020).

[448] *Robinson v. Southern Counties Oil Co.*, 53 Cal. App. 5th 476 (2020).

[449] *Saucillo v. Peck*, 25 F.4th 1118, 1126–27 (9th Cir. 2022) (internal citations and quotations omitted) (emphasis in original).

[450] *Id*. at 1128.

[451] *LaCour v. Marshalls of Cal., LLC*, 94 Cal. App. 5th 1172, 1195 (2023) (no preclusive effect where a PAGA plaintiff agreed to entry of judgment to resolve various violations for which she provided no factual basis to the LWDA and thus failed to give LWDA an opportunity to investigate; "we hold that the prior judgment does not extinguish unlisted PAGA claims in litigation brought by other authorized PAGA plaintiffs because such claims do not arise from violations of the same primary rights").

[452] *Accurso v. In-N-Out Burgers*, 94 Cal. App. 5th 1128 (2023).

[453] *Id.* at 1153-54.

[454] *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 388-89 (2014).

[455] "*Iskanian* also established a new rule invalidating predispute waivers of an employee's right to bring a representative action under [PAGA] to recover civil penalties for an employer's Labor Code violations. The *Iskanian* court concluded the FAA did not preempt this new rule because a PAGA representative claim belongs to the state, and an aggrieved employee simply brings the claim as an agent or proxy of the state. Accordingly, a PAGA representative claim is not subject to a private arbitration agreement between an employer and an employee or the FAA." *McGill v. Citibank, N.A.*, 181 Cal. Rptr. 3d 494, 497 (2014), *review granted and opinion superseded sub nom. McGill v. Citibank*, 345 P.3d 61 (Cal. 2015), *and rev'd*, 2 Cal. 5th 945 (2017); *accord Betancourt v. Prudential Overall Supply*, 9 Cal. App. 5th 439, 445 (2017) ("The trial court correctly denied [defendant]'s motion to compel arbitration because a defendant cannot rely on a predispute waiver by a private employee to compel arbitration in a PAGA case, which is brought on behalf of the state."). The U.S. Supreme Court denied review of this decision. No. 17-254 (U.S. Dec. 11, 2017).

[456] *E.g., Lucero v. Sears Holdings Mgmt. Corp.*, 2014 WL 6984220, at *6 (S.D. Cal. Dec. 2, 2014) ("FAA preempts California's rule against arbitration agreements that waive an employee's right to bring representative PAGA claims"); *Mill v. Kmart Corp.*, 2014 WL 6706017 (N.D. Cal. Nov. 26, 2014) ("federal courts have addressed whether the FAA preempts California's rule prohibiting the waiver of representative PAGA claims, and all have concluded that it does") (citing *Langston v. 20/20 Cos., Inc.*, 2014 WL 5335734, at *7 (C.D. Cal. Oct. 17, 2014); citing also *Chico v. Hilton Worldwide, Inc.*, 2014 WL 5088240, at *12 (C.D. Cal. Oct. 7, 2014); citing also *Ortiz v. Hobby Lobby Stores, Inc.*, 52 F. Supp. 3d 1070, 1084 (E.D. Cal. 2014) ("Despite the holding of the California Supreme Court, federal law is clear that a state is without the right to interpret the appropriate application of the FAA. District courts within the Ninth Circuit have generally held that PAGA claims are subject to Arbitration Agreements and any waiver clauses within those agreements."). *Accord Parvataneni v. E*Trade Fin. Corp.*, 967 F. Supp. 2d 1298, 1305 (N.D. Cal. 2013), *order vacated on reconsideration*, 2014 WL 12611301 (N.D. Cal. Nov. 7, 2014) ("[A]n arbitration agreement that denies a plaintiff the right to pursue a representative PAGA claim is still a valid agreement."); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 846 (N.D. Cal. 2012) ("[T]he Court must enforce the parties' Arbitration Agreement even if this might prevent Plaintiffs from acting as private attorneys general."); *Quevedo v. Macy's, Inc.,* 798 F. Supp. 2d 1122, 1142 (C.D. Cal. 2011) (U.S. Supreme Court's *Concepcion* decision compels enforcement of arbitration agreement even where agreement would bar representative PAGA claim); *Grabowski v. Robinson*, 817 F. Supp. 2d 1159, 1180 (S.D. Cal. 2011) ("PAGA claim is arbitrable, and that the arbitration agreement's provision barring him from bringing that claim on behalf of other employees is enforceable").

[457] *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 431 (9th Cir. 2015) (finding pre-dispute agreements to waive PAGA claims are unenforceable). For further discussion, see § 5.2.4.

[458] *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1913, *reh'g denied*, 143 S. Ct. 60 (2022) (reversing the lower court's refusal to mandate arbitration of plaintiff's individual PAGA claim based on the rule that PAGA actions cannot be divided into individual and "representative" claim).

[459] *Viking River*, 142 S. Ct. at 1925.

[460] *Id*. at 1917 (the Supreme Court also noted that "insofar as [the agreement] was construed as a wholesale waiver of PAGA standing[,]" its severability clause "allowed enforcement of any 'portion' of the waiver that remained valid, so the agreement still would have permitted arbitration of [plaintiff]'s individual PAGA claim even if wholesale enforcement was impossible.").

[461] *Nickson v. Shemran, Inc.,* 90 Cal. App. 5th 121, 306 Cal. Rptr. 3d 835 (Apr. 7, 2023); *Seifu v. Lyft, Inc.,* 89 Cal. App. 5th 1129, 306 Cal. Rptr. 3d 641 (Mar. 30, 2023), *review granted* (Cal. June 14, 2023); *Gregg v. Uber Tech, Inc.*, 89 Cal. App. 5th 786, 306 Cal. Rptr. 3d 332 (Mar. 24, 2023), *review granted* (Cal. June 14, 2023); *Piplack v. In-N-Out Burgers*, 88 Cal. App. 5th 1281, 305 Cal. Rptr. 3d 405 (Mar. 7, 2023), *review granted* (Cal. June 14, 2023); *Galarsa v. Dolgen California, LLC*, 88 Cal. App. 5th 639, 305 Cal. Rptr. 3d 15 (Feb. 2, 2023), *as modified on denial of reh'g* (Feb. 24, 2023) (certified for publication), *review granted,* 528 P.3d 18, 307 Cal. Rptr. 3d 588 (Cal. May 3, 2023). As noted, the California Supreme Court has agreed to review the rulings in these decisions.

[462] *Adolph v. Uber Techs., Inc.*, 14 Cal. 5th 1104 (2023).

[463] *Id.* at 1123-24.

[464] *Williams v. Superior Ct. (Marshalls of CA, LLC)*, 3 Cal. 5th 531 (2017).

[465] *Id.* at 538.

[466] *Id.* at 551 (internal citations and quotations omitted).

[467] *Id*. at 542.

[468] *Id*. at 544.

[469] *Id*. at 548 ("overlapping policy considerations support extending PAGA discovery as broadly as class action discovery has been extended").

[470] *Id.* at 546-47.

[471] *Id*. at 546.

[472] *Id*. at 550 n.6.

[473] *Id*. at 554–55.

[474] *Id*.

[475] *Id*. at 555–56.

[476] *Id.* at 550-51.

[477] *Wesson v. Staples the Office Superstore, LLC*, 68 Cal. App. 5th 746, 857 (2021) (holding that, in PAGA cases, "courts have inherent authority to … strike the [PAGA] claim," and "this authority is not inconsistent with PAGA's procedures and objectives"); *cf*. *Estrada v. Royalty Carpet Mills, Inc.*, 76 Cal. App. 5th 685, 697 (2022)*, review granted*, 511 P.3d 191 (2022) (concluding that "a court cannot strike a PAGA claim based on manageability").

[478] *Estrada v. Royalty Carpet Mills, Inc.*, 15 Cal. 5th 582, 619 (2024) (trial courts lack inherent authority to dismiss or strike a PAGA claim on manageability grounds, but may "limit[ ] the types of evidence a plaintiff may present or us[e] other tools to assure that a PAGA claim can be effectively tried").

[479] *Bright v. 99 Cents Only Stores, Inc.,* 189 Cal. App. 4th 1472, 1481 (2010); *Home Depot USA v. Superior Ct.,* 191 Cal. App. 4th 210, 218 (2010).

[480] *Arias v. Superior Ct.*, 46 Cal. 4th 969, 986 (2009).

[481] *Ramirez v. Ghilotti Bros. Inc.*, 941 F. Supp. 2d 1197, 1210 (N.D. Cal. 2013) (permitting recovery of Labor Code section 558 penalties under PAGA); *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal. App. 4th 1112, 1132-33 (2012) (considering whether plaintiffs could recover meal and rest premium pay as "underpaid wages" under Labor Code section 558). Although the Supreme Court's later decision in *Kirby v. Immoos*, 53 Cal. 4th 1255 (2012), created uncertainty as to whether meal and rest pay constitutes "underpaid wages," *Thurman* opened the door for aggrieved employees to seek other wages as civil penalties under section 558.

[482] *See Viking River*, 142 S. Ct. 1906.

[483] *ZB, N.A. v. Superior Ct.*, 8 Cal. 5th 175, 182 (2019) ("What we conclude is that the civil penalties a plaintiff may seek under section 558 through the PAGA do not include the 'amount sufficient to recover underpaid wages.' Although section 558 authorizes the Labor Commissioner to recover such an amount, this amount—understood in context—is not a civil penalty that a private citizen has authority to collect through the PAGA.").

[484] *Lawson v. ZB, N.A.*, 18 Cal. App. 5th 705, 722 (2017), *as modified* (Dec. 21, 2017), *aff'd but criticized sub nom. ZB,* 8 Cal. 5th 175 (2019).

[485] *ZB,* 8 Cal. 5th at 181.

[486] *Id.* at 181-82.

[487] *Raines v. Coastal Pac. Food Distribs., Inc.*, 23 Cal. App. 5th 667, 680 (2018).

[488] *Huff v. Securitas Sec. Servs. USA, Inc.,* 23 Cal. App. 5th 745, 751 (2018) ("PAGA allows an 'aggrieved employee'—a person affected by at least one Labor Code violation committed by an employer—to pursue penalties for all the Labor Code violations committed by that employer.").

[489] AB 673, 2019 bill amending Lab. Code § 210(c) ("An employee is only entitled to either recover the statutory penalty provided for in this section or to enforce a civil penalty as set forth in subdivision (a) of Section 2699, but not both, for the same violation").

[490] *Moorer v. Noble L.A. Events, Inc.,* 32 Cal. App. 5th 736, 743–44 (2019) (affirming dismissal of case, as allocation of 25 percent of the penalties to all aggrieved employees is consistent with the statutory scheme under which the judgment binds all aggrieved employees, including nonparties).

[491] *LaFace v. Ralphs Grocery Co.*, 75 Cal. App. 5th 388 (2022).

[492] Health & Safety Code § 1799.102 (2008).

[493] *Van Horn v. Watson*, 45 Cal. 4th 322, 325 (2008), *abrogated in part by statute*, Health & Safety Code § 1799.102(a).

[494] *Id.*

[495] *Id.* at 335.

[496] *Id.*

[497] Health & Safety Code section 1799.102(a), as amended, now reads: "No person who in good faith, and not for compensation, renders emergency medical *or nonmedical care* at the scene of an emergency shall be liable for any civil damages resulting from any act or omission." (Emphasis added.)

[498] *Rojo v. Kliger*, 52 Cal. 3d 65, 74 (1990).

[499] *Janik v. Rudy, Exelrod & Zieff*, 119 Cal. App. 4th 930, 934 (2004) ("While we may share the attorneys' dismay that their efforts have been rewarded with this lawsuit rather than with the kudos they no doubt expected, and perhaps deserve, we are nonetheless constrained to hold that plaintiff's claim cannot be rejected out of hand. While it may well be that the attorneys did not breach their duty of care in failing to

proceed under an alternative theory that would have produced a greater recovery, we cannot say, as did the trial court, that there simply was no duty for the attorneys to breach.").

[500] *See, e.g., Williams v. Chino Valley Indep. Fire Dist.,* 61 Cal. 4th 97, 115 (2015) *(*prevailing FEHA defendant should not be awarded costs unless "action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so"); *Seever v. Copley Press, Inc.*, 141 Cal. App. 4th 1550, 1560 (2006) (defendant's statutory offer of compromise for sum certain, plus costs and attorney fees "incurred to the date of this offer in the amount determined by the Court according to proof," was sufficiently definite to constitute valid offer, but trial court abused discretion by awarding defendant more than $60,000 in costs without considering plaintiff's ability to pay). See also § 6.13.

[501] *Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 19 Cal. App. 5th 525, 552 (2018) ("We resolve the conflict in favor of the FEHA provision, which the Legislature enacted as part of a comprehensive statutory scheme designed to encourage victims of discrimination in employment or housing to seek relief.").

[502] *Id.* at 552-56.

[503] *Formal Opinion No. 517: Indemnification of Client's Litig. Costs* (April 2006) (re Rule 4-210(A)(3)). *See also Ripley v. Pappadopoulos*, 23 Cal. App. 4th 1616, 1626 n.17 (1994) ("It was formerly considered unethical for an attorney to agree to advance the costs of litigation if reimbursement was made contingent upon the outcome. … Rule 4-210 of the California Rules of Professional Conduct now permits an attorney to advance the costs of prosecuting or defending a claim and also permits repayment to be made contingent on the outcome of the matter."). *See generally Ramona Unified Sch. Dist. v. Tsiknas*, 135 Cal. App. 4th 510 (2006) (mere filing of meritless lawsuit could not give rise to cause of action for abuse of process).

[504] *Earley v. Superior Ct. (Washington Mut. Bank)*, 79 Cal. App. 4th 1420, 1435 (2000) (written notice to class members is not to tell the workers deciding whether to opt out that they might be liable for defendant's attorney fees or costs: "Defense fees and costs could easily dwarf the potential overtime compensation recovery each worker might obtain. With potential risks far outweighing potential benefits, workers may well forego asserting their statutory wage and hour rights.").

[505] *Joaquin v. City of Los Angeles*, 202 Cal. App. 4th 1207, 1231 (2012) (CACI fails to include "retaliatory intent" as essential element for claim of unlawful retaliation; rather, CACI instruction here made jury verdict "inevitable" because instruction simply required plaintiff to show (1) he reported sexual harassment, (2) the City terminated his employment, (3) the report was a "motivating reason" to terminate him, (4) he was harmed, and (5) the City's conduct was a substantial factor in causing his harm; CACI did not apply here, where the termination of employment was not for reporting as such, but for reporting *falsely*; "We urge the Judicial Council to redraft the retaliation instruction and the corresponding special verdict form so as to clearly state that retaliatory intent is a necessary element of a retaliation claim under FEHA.").

[506] *Harris v. City of Santa Monica*, 56 Cal. 4th 203, 213 (2013) (rejecting CACI No. 2500, which made employers liable if a protected status was merely "a motivating factor/reason" for the employer's adverse action, where a "motivating factor" is "something that moves the will and induces action even though other matters may have contributed to the taking of the action").

[507] *Veronese v. Lucasfilm Ltd.*, 212 Cal. App. 4th 1, 20 (2012) (reversing jury verdict for plaintiff in pregnancy discrimination case). The Judicial Council then issued a new jury instruction, CACI 2513, which is a disappointingly semi-adequate response to *Veronese*. CACI 2513 reads in pertinent part: "[A]n employer may [discharge] an employee for no reason, or for a good, bad, mistaken, unwise, or even unfair reason, as long as its action is not for a [discriminatory] reason."

[508] SB 41, 2019 bill amending Civ. Code § 3361 ("Estimations, measures, or calculations of past, present, or future damages for lost earnings or impaired earning capacity resulting from personal injury or wrongful death shall not be reduced based on race, ethnicity, or gender.").

[509] *Id.*

[510] *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

[511] Lab. Code § 1171.5(a). *See also* Civ. Code § 3339; Gov't Code § 7285.

[512] Lab. Code § 1171.5(b).

[513] *Reyes v. Van Elk, Ltd.*, 148 Cal. App. 4th 604, 617 (2007).

[514] *Id.* at 618.

[515] *Id.*

[516] *Farmers Bros. Coffee v. WCAB*, 133 Cal. App. 4th 533 (2005).

[517] *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005 (9th Cir. 2007).

[518] 8 U.S.C. § 1324a(a)(2).

[519] *Incalza,* 479 F.3d at 1010-11.

[520] *Salas v. Sierra Chem. Co.*, 59 Cal. 4th 407, 414 (2014).

[521] *Id*. at 416-17.

[522] *Salas v. Sierra Chem. Co.*, 198 Cal. App. 4th 29, 44-45 (2011).

[523] *Salas,* 59 Cal. 4th at 430.

[524] *Id*.

[525] *Id.* at 419 (citing Gov't Code § 7285(a)).

[526] *Id*. at 431-32.

[527] Lab. Code §1024.6.

[528] Lab. Code § 244(b) (employer engages in "adverse employment action" for purposes of establishing a violation of rights if employer, in retaliation for the exercise of California statutory rights, reports to a government agency the "suspected citizenship or immigration status" of either the employee, former employee, or prospective employee, or a member of that individual's family).

[529] Lab. Code § 1019.2 (violations trigger penalties of up to $10,000, recoverable by the Labor Commissioner).

[530] California Providing Free Legal Services for Undocumented Farmworkers, Office of Governor Gavin Newsom, published July 19, 2023; https://www.gov.ca.gov/2023/07/19/california-providing-free-legal-services-for-undocumented-farmworkers/ (last visited Mar. 21, 2024).

[531] AB 450, codified in Gov't Code §§ 7285.1, 7285.2, 7285.3, and Labor Code §§ 90.2, 1019.2.

[532] The statutes regulate information-sharing and conditions in state detention facilities housing noncitizens (AB 103 and SB 54) and limit the cooperation that California employers may provide to federal immigration enforcement agents (AB 450).

[533] *United States v. California*, 314 F. Supp. 3d 1077, 1112 (E.D. Cal. 2018). The U.S. government appealed, and the district court was reversed in one respect that did not involve employment issues. *United States v. California*, 921 F.3d 865 (9th Cir. 2019).

[534] SB 785, 2018 bill adding Evid. Code §§ 351.3, 351.4. The law had a January 1, 2022 sunset date. SB 785—enacted with immediate effect on May 17, 2018—responded to ICE arrests of immigrants in California courthouses, despite the March 2017 admonition of California Chief Justice, Tani Cantil-Sakauye that "[o]ur courthouses serve as a vital forum for ensuring access to justice and protecting public safety. Courthouses should not be used as bait in the necessary enforcement of our country's immigration laws." On August 23, 2022, California Governor Newsom signed into law SB 836 which removed the January 1, 2022 sunset date, making the protections of Evid. Code §§ 351.3 and 351.4 permanent.

[535] *Costco Wholesale Corp. v. Superior Ct.*, 47 Cal. 4th 725 (2009).

[536] *Id.* at 736-40.

[537] *Coito v. Superior Ct.,* 54 Cal. 4th 480 (2012).

[538] *Id.* at 485-86.

[539] *Id.* at 502 (calling for trial court to conduct *in camera* inspection to see if absolute or qualified work product protection should apply).

[540] *Id.* at 486 ("[W]e hold that the recorded witness statements are entitled as a matter of law to at least qualified work product protection. The witness statements may be entitled to absolute protection if defendant can show that disclosure would reveal its 'attorney's impressions, conclusions, opinions, or legal research or theories.'").

[541] *Id.* at 499 ("A party seeking disclosure has the burden of establishing that denial of disclosure will unfairly prejudice the party in preparing its claim or defense or will result in an injustice."); *see, e.g.*, *Palo Verde Unified Sch. Dist. v. Superior Ct.,* No. E079300, 2023 WL 116729, at *7 (Cal. Ct. App. Jan. 6, 2023) (unpublished) (finding no unfair prejudice because plaintiffs "have not suggested, let alone explained, how they have been prevented from ascertaining the identity of any percipient witnesses or [were] prevented from conducting their own interviews or depositions of such witnesses").

[542] *Id.* at 499-500 (remanding matter for finding whether absolute protection applies to all or part of the recorded witness interviews).

[543] *Wellpoint Health Networks, Inc. v. Superior Ct.*, 59 Cal. App. 4th 110, 123 (1997).

[544] *City of Petaluma v. Superior Ct.*, 248 Cal. App. 4th 1023, 1035 (2016).

[545] *Lisec v. United Air Lines, Inc.*, 10 Cal. App. 4th 1500, 1507 (1992).

[546] *Cifuentes v. Costco Wholesale Corp*., 238 Cal. App. 4th 65, 77 (2015).

[547] *Id.* at 76.

[548] *Lu v. Hawaiian Gardens Casino, Inc.*, 50 Cal. 4th 592, 603-04 (2010) ("To the extent that an employee may be entitled to certain misappropriated gratuities, we see no apparent reason why other remedies, such as a common law action for conversion, may not be available under appropriate circumstances.").

[549] *Voris v. Lampert*, 7 Cal. 5th 1141, 1156-58 (2019) (claims for unpaid wages resemble other actions for particular amounts of money owed in exchange for contractual performance—a type of claim that has long been understood to sound in contract, rather than as the tort of conversion).

[550] *Id*. at 1163-70.

[551] *Lacagnina v. Comprehend Sys., Inc.*, 25 Cal. App. 5th 955, 972 (2018) (sustaining grant of nonsuit against "wage theft" claim under Penal Code section 496(c): "If every plaintiff in an employment or contract dispute could also seek treble damages and attorneys' fees on the ground that the defendant received 'stolen property,' such claims would become the rule rather than the exception, parties would more frequently assert claims for 'theft' in run-of-the-mill commercial disputes, and cases would be harder to settle. We cannot believe the Legislature contemplated, much less intended, those consequences when it enacted section 496, subdivision (c).").

6. Employment Discrimination Legislation and Litigation

6.1 Comparing California Antidiscrimination Law with Federal Statutes

Some differences between California law and federal law on various aspects of employment discrimination law appear below. With the possible exception of religious accommodations, discussed in § 6.10, California law is more onerous.

Issue	California statutes	Federal statutes
How many employees must an employer have to be covered?	Five or more employees, as to discrimination generally, and just one or more, as to harassment.[1]	15 or more employees, as to race, color, religion, disability, gender, national origin, and 20 or more employees, as to age.[2]
Are independent contractors protected?	Yes, as to harassment. (See § 6.5.)	No.
Are unpaid interns and volunteers protected?	Yes, as to discrimination against unpaid interns,[3] and yes as to harassment of unpaid interns and volunteers. (See § 6.5.)	No.
Are there caps on punitive and compensatory damages?	No. (See § 5.11.)	Title VII has caps of $50,000-$300,000, depending on employer size; ADEA does not authorize recovery for emotional distress, and authorizes penalties only in the form of liquidated damages.[4]
Are plaintiffs' counsel awarded multipliers on attorney fee awards?	Yes. (See § 5.12.)	No.
Is there individual liability for harassment by a supervisor or co-worker?	Yes. (See § 6.5.)	No.
Is it specifically unlawful to "aid, abet, incite, compel, or coerce" discrimination?	Yes. (See § 6.5.)	No.
Is the employer automatically liable for a hostile environment created by a supervisor?	Yes. (See § 6.5.)	Only if employer fails to show the affirmative defense described below.[5]

Issue	California statutes	Federal statutes
Can employers avoid liability for harassment by supervisors by showing they took reasonable steps to prevent and correct harassment and that the plaintiff unreasonably failed to follow those steps?	No. An employer merely can limit damages, if it proves (1) it took reasonable steps to prevent and correct harassment, (2) the plaintiff unreasonably failed to follow the steps provided, and (3) reasonable adherence to the steps would have prevented at least some of the harm suffered. (See § 6.5.)	Yes. An employer can avoid liability by showing (1) it took reasonable steps to prevent and correct harassment and (2) the plaintiff unreasonably failed to use the steps provided.[6]
What is the deadline for filing an administrative complaint?	Three years.[7]	300 days or 30 days after notice that the state agency has terminated its proceedings under state law, whichever is earlier.[8]
What is the deadline for suing after getting a right-to-sue letter?	One year.[9]	90 days.[10]
What is a protected disability?	An impairment *or* condition that simply limits a major life activity, including one that prevents performance of any job, *without* considering whether corrective devices or measures would mitigate the impact of the impairment. (See § 6.3.1.)	An impairment that *substantially* limits a major life activity, such as walking, talking, seeing, hearing, or learning. In the case of visual impairment, one considers if ordinary corrective lenses would correct the substantial limitation.[11]
Are only qualified individuals entitled to reasonable accommodations?	No.[12]	Yes.[13]
What statuses are protected?	Many statuses beyond those protected by federal law. (See § 6.2.)	Principally race, color, religion, gender, national origin, age, disability, oppositional activity, and military service.
Must plaintiffs overtly oppose an employer's action to engage in activity protected from retaliation?	No, plaintiffs need not opine as to unlawfulness, so long as their conduct implies that they think the employer's conduct is discriminatory. (See § 6.5.)	Yes, though Title VII does protect employees who speak out about discrimination during an employer's investigation into another employee's complaint of discrimination.[14]
Is the deadline for filing an administrative claim of discrimination tolled during the employee's pursuit of an internal grievance?	Yes.[15]	No.[16]
Can employers respond to requests for religious accommodation by segregating employees to reconcile their religious dress or grooming practices with employer personal-appearance policies?	No. (See § 6.10.)	Yes.[17]

Issue	California statutes	Federal statutes
Can employers avoid religious accommodation simply by showing that it would impose a cost that is more than *de minimis*?	No, an employer must show "undue hardship" defined by FEHA as "significant difficulty or expense." (See § 6.10.)	No, an employer must show "undue hardship" defined by the Supreme Court in *Groff* as "substantial increased costs."[18]
To show discrimination "because of" a protected status, must plaintiffs prove their protected status was a "but for" cause of the adverse action, or can they prevail merely by showing that their status was a "substantial motivating factor"?	Proof of a "substantial motivating factor" is enough, although employers can avoid damages and reinstatement by pleading and proving a "same decision" defense.[19]	Proof of merely a motivating factor, where the employer would have taken the same action in the absence of that factor, does not warrant a finding of employer liability.[20]

6.2 Additional Protected Bases

California law, like federal law, forbids employers from discriminating against employees and applicants on the usual bases (race, color, religion, sex, national origin, age, disability, and opposition or participation activity). But California law affects smaller employers (those with five or more employees), while Title VII (15 employees) and the ADEA (20 employees) apply only to larger employers.

Moreover, California goes far beyond federal law, expressly protecting a dizzying array of broadly defined additional statuses:

- any *perception* that an individual has a protected characteristic, and any perception that an individual is *associated* with a person who has, or is perceived to have, a protected characteristic,[21]
- political affiliation,[22]
- marital or domestic partner status,[23]
- sexual orientation,[24]
- sex stereotype,[25]
- gender, gender identity, gender expression, and transgender status,[26]
- pregnancy, childbirth, and medical conditions related to pregnancy or childbirth,[27]
- breastfeeding or medical conditions related to breastfeeding,[28]
- all aspects of religious belief, observance, and practice, including religious dress and grooming practices,[29]
- medical condition (any impairment related to cancer, or a record or history of cancer, and genetic characteristics),[30]
- genetic information,[31]
- veteran or military status,[32]

- testing positive for HIV,[33]
- holding a special California driver's license for those unable to prove lawful residence in the United States,[34]
- victims of certain crimes taking time off from work to testify,[35] and
- various kinds of whistleblowing or claim-filing such as
  - disclosing information in the reasonable belief that the information disclosed evidences a violation of law,[36]
  - reporting safety violations,[37]
  - claiming unpaid wages or other violations under the jurisdiction of the California Labor Commissioner,[38] and
  - filing workers' compensation claims or suffering workplace injuries.[39]
- employees who are a family member of an employee who has engaged in protected activity,[40]
- employees taking time off to care for children or other family members (expanding the types of situations in which employees may take time off work and expanding protection to employees tending to the illness of relatives),[41]
- employee requesting an accommodation of a disability or religious belief, whether or not the request was granted,[42] and
- individuals employed under a special license in a nonprofit sheltered workshop or rehabilitation facility.[43]

California's CROWN Act—designed to Create a Respectful and Open Workplace for Natural Hair—protects from employment discrimination certain traits historically associated with race, such as hair texture and "protective hairstyle" (e.g., braids, locks, and twists). The CROWN act protects employees against "Eurocentric norms" by addressing "workplace dress code and grooming policies that prohibit natural hair, including afros, braids, twists, and locks," because these policies "have a disparate impact on Black individuals as these policies are more likely to deter Black applicants and burden or punish Black employees than any other group." The CROWN act's rationale is that "hair discrimination targeting hairstyles associated with race is racial discrimination."[44]

6.3 Special Rules for Disability Discrimination

6.3.1 California's broader definition of "disability"

The California definition of disability is in some respects broader than the federal definition, even after the federal ADA Amendments Act of 2008 dramatically expanded the federal definition of disability. California authorizes many different types of health care providers to certify a disability, including as physicians, surgeons, marriage and family therapists, and acupuncturists, as well as "podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse midwives, clinical social workers, [and] physician assistants."[45]

Federal definition of disability. Under the federal ADA, "disability" means an impairment that "substantially limits" a major life activity.[46] The 2008 ADA amendments repudiated Supreme Court rulings that had narrowed interpreted the scope of what was considered a protected disability.[47]

Even under the new expanded federal definition, however, not all impairments are necessarily disabilities. For example, specifically excluded from the federal definition of disability are visual impairments that can be corrected by eyeglasses or contact lenses.[48]

California definition of disability. Going beyond federal law, California law defines physical or mental disability very broadly, to include any condition that merely "limits" a major life activity, in the minimal sense that the condition makes achievement of the major life activity "difficult."[49]

The California definition of disability:

- makes certain conditions disabilities by definition—conditions such as autism spectrum disorders, bipolar disorder, blindness, cerebral palsy, clinical depression, deafness, diabetes, epilepsy, heart disease, HIV/AIDS, hepatitis, multiple sclerosis, obsessive compulsive disorder, organic brain syndrome, post-traumatic stress disorder, schizophrenia, and seizure disorder,[50]
- covers not only impairments, but conditions,[51]
- considers the limitation on a major life activity without regard to any mitigating measures such as medications, prosthetics, assistive technology, or reasonable accommodations,[52]
- considers "major life activity" to include sleeping, thinking, and interacting with others,[53] and
- considers "major life activity" to include *any* job, with the result that an individual with a condition preventing the performance of a particular job has a disability even if that individual can perform many thousands of other jobs.[54]

The Court of Appeal has held that severe obesity can be a disability under California law if it has a physiological cause,[55] and a defendant challenging the disability status of a plaintiff's obesity condition must present scientific or expert evidence that the obesity lacked a physiological cause.[56]

California also protects an employee's association with persons who have disabilities.[57] For example, the Court of Appeal held that a plaintiff could sue for association-based disability and wrongful termination when he was fired after informing his employer that he would be donating a kidney to his sister, who had a disability (kidney failure).[58]

6.3.2 Disability-related inquiries

California law, like federal law, prohibits pre-employment disability-related inquiries and medical testing. Accordingly, California employers cannot ask applicants about any physical disability, mental disability, or medical condition, or about the severity of a physical disability, mental disability, or medical condition.[59] Nor can California employers seek information to confirm the nature of a medical condition.[60]

Notwithstanding these prohibitions, California employers may ask about the ability of applicants to perform job-related functions, may respond to applicant requests for reasonable accommodation,[61] and may require a post-offer medical or psychological examination.[62]

Ban on "psychological" examination. While federal law forbids only all *medical* examinations that precede a job offer,[63] California explicitly forbids pre-employment medical examinations *and psychological* examinations, subject to the exemptions below.[64]

Ban on broad-ranging employment entrance examination. California law, like federal law, generally permits employers to require an "employment entrance examination" of all job applicants seeking to enter the same job classification, so long as the exam occurs after the employment offer and before employment starts.[65]

But while federal law permits *any* medical inquiry in connection with the employment entrance examination, California requires that *all* aspects of the examination itself be "job-related and consistent with business necessity."[66] Both federal and California law, meanwhile, permit examinations that are "job related" and "consistent with business necessity."[67]

Limits on inquiries conducted pre-offer and post-hire. Federal law permits employers to inquire as to a job applicant's disability before making an offer if the inquiry is "job-related" and "consistent with business necessity."[68] California permits employers to "inquire into the ability of an applicant to perform job-related functions," but does not allow them to conduct examinations.[69] Where an employee has started work, both federal and California law permit disability inquiries and examinations that are "job-related and consistent with business necessity."[70]

Note, though, that the FEHC has opined that an employer may not require employees requesting accommodations to produce complete medical records to substantiate limitations stemming from a disability, as those records are likely to contain information that is unrelated to the disability and need for accommodation, and therefore is not job-related nor required by business necessity.[71]

6.3.3 Does the employer or the employee have the burden of proof as to qualifications?

Under federal law, a plaintiff suing for disability discrimination must prove that he or she is a qualified individual. The language of the California statute arguably suggests something different: it broadly prohibits discrimination because of a physical or mental disability[72] and then exempts those situations where "the employee, because of a physical or mental disability, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations."[73] One Court of Appeal decision read this statutory language to mean that the plaintiff's lack of qualifications is an affirmative defense, to be proved by the defendant employer. Accordingly, the plaintiff's ability to perform essential duties would be a matter for the defendant to disprove as part of an affirmative defense rather than a matter for the plaintiff to prove in the plaintiff's case in chief.[74]

In 2007, the California Supreme Court reversed this decision.[75] Citing statutory language, legislative intent, and well-settled law, the high court concluded that the FEHA, like the ADA, requires the plaintiff to prove an ability to perform the essential functions of the job, with or without reasonable accommodation. While the Supreme Court thus kept California within the national fold, it did so only barely, by a 4-3 vote. The three dissenting justices would have deferred to the administrative agency charged with interpreting the FEHA, which for many years had treated the inability to perform as an affirmative defense, rather than as part of the plaintiff's case in chief.[76]

6.3.4 Drug testing

California's Compassionate Use Act of 1996 legalized, for purposes of California law, the medical use of marijuana pursuant to a physician's prescription.[77] The Act does not address whether California employers must accommodate an applicant or employee whose physician has prescribed marijuana to treat a potentially disabling condition such as cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, or migraine.[78] The California Legislature provided a partial answer to this question in 2003, by providing that the Compassionate Use Act does not "require any accommodation of any medical use of marijuana *on the property or premises* of any place of employment or *during the hours* of employment."[79]

This language arguably implies that an employer must accommodate an individual's use of medical marijuana *beyond* working hours and *off* the employer's premises. Yet, in good news to employers, the California Supreme Court in 2008 held, 5-2, that denial of employment because of an individual's off-duty, off-premises use of marijuana did not violate the FEHA or any public policy established by California's constitutional right to privacy.[80] The plaintiff, an engineer, flunked a drug test because he tested positive for marijuana. He provided a physician's note recommending that he use marijuana to help alleviate his chronic back pain. When he nonetheless was fired for flunking the drug test, he sued the employer for discriminating against him because of his disability and for failing to reasonably accommodate his disability by permitting him to use marijuana in accordance with the Compassionate Use Act. The Supreme Court rejected these claims, holding that the Act merely decriminalizes medicinal marijuana use under California state law and simply does not speak to employment law.

The two dissenting justices accused the majority of "conspicuously lacking … compassion" and putting Californians with marijuana-alleviated symptoms to a "cruel choice" between a medically prescribed treatment and a job.[81] The dissenters argued that the FEHA itself required accommodation where, as here, the employer's objection was to off-duty conduct that did not affect the employee's performance of essential job functions. The dissenters conceded, however, that the Compassionate Use Act could not establish a truly fundamental public policy, given the contrary federal law. Indeed, as a later Court of Appeal decision has stated, "Despite this broadly worded statement of intent, the CUA's approach to the issue of medical marijuana was a relatively modest one: It provided immunity from prosecution for certain conduct that would otherwise be criminal."[82]

DFEH disability regulations make clear that California employers need not accommodate the use of medical marijuana in the workplace and can enforce their drug use policies when employees test positive for marijuana.[83] Any disciplinary focus must be on the violation of policy, however, and not on any underlying disability that the marijuana use may implicate.

Finally, the Ninth Circuit recently confirmed that California employers are free to conduct suspicionless drug testing of new hires even if the test is conducted shortly after the employees begin working. However, an employer may face liability for failure to engage in an interactive process and failure to accommodate under FEHA if the employer is on notice that the applicant is disabled with doctor-approved medical use of legal substances, but rescinded the offer or terminated the employment because of the applicant's failure to pass the pre-employment drug test.[84] Effective in 2024, off-duty use, including recreational use, of cannabis is protected under the FEHA and drug testing for cannabis has been restricted as described in section 3.1.

6.3.5 The interactive process and reasonable accommodation

The interactive process. In America generally, employers *should* follow an interactive process to ensure that they meet their duty to provide reasonable accommodation to an employee with a known disability who needs an accommodation to perform essential functions of a job. Failure to engage in that process is a problem *if* there was an available reasonable accommodation that the employer would have considered had the process been followed.

In California it's different. California employers often *must* follow the interactive process even if it turns out that no reasonable accommodation existed, and must initiate the interactive process when the employer learns about the employee's disability and the potential need for accommodation—whether from a direct source, from observation, or from a third party.[85] Indeed, California makes it unlawful *in itself* for an employer to fail to engage in a "timely, good faith, interactive process … to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known … disability."[86]

Thus, the Court of Appeal upheld a jury verdict against an employer for failing to engage in the interactive process, even though the jury also found that there had been no failure to provide a reasonable accommodation.

Acknowledging that the federal ADA would provide no remedy for failing to consider accommodations when in fact no reasonable accommodation was available, the Court of Appeal emphasized that California is different: "FEHA allows an independent cause of action for employees whose employers fail to engage in the interactive process."[87]

Reasonable accommodations. The California duty to accommodate can require employers, when aware that a disabled employee can no longer perform the regular job, to explore several options. *First*, employers must canvass vacant positions to see if there is one to offer to the employee.[88]

Second, employers must determine whether a leave of absence would be a reasonable accommodation. There is no specific time limit for how long a leave must be. Regulations state that employees must show that the leave likely would have been effective in allowing the employee to return to work at the end of the leave, with or without further accommodations.[89]

The FEHA's reasonable-accommodation requirements may require an employer to provide leave for a pregnancy-disabled employee for a period beyond the four-month maximum leave required under the PDLL.[90] Going beyond federal law, the FEHA expressly prohibits retaliation against a person for requesting an accommodation, regardless of whether the request is granted.[91]

A Court of Appeal decision went out of its way to suggest that the FEHA might create a duty "to provide reasonable accommodations to an applicant or employee who is associated with a disabled person."[92] The decision drew a strong dissent, pointing out that the majority opinion was substantially departing from federal law on the issue of reasonable accommodations in the context of associational disability. Federal courts hold that the ADA does not obligate employers to accommodate employees associated with a disabled person.[93]

California's disability discrimination regulations specify certain possible reasonable accommodations, such as telecommuting, reserving parking spaces, and acquiring or modifying furniture.[94] Employers may also need to allow "assistive animals" in the workplace as a reasonable accommodation for disabled individuals with visual or hearing impairments.[95] An assistive animal may also constitute a reasonable accommodation to provide emotional, cognitive, or other similar support to a person with a disability.[96] California regulations do acknowledge, however, that the duty to accommodate does *not* require an employer to make a light-duty position permanent or to lower the employer's quality standards.[97]

Under federal law, compensatory and punitive damages are not awarded for failures to provide reasonable accommodations when employers demonstrate they acted in good faith, in consultation with the disabled individual seeking an accommodation, to identify and offer a reasonable accommodation that would provide an equally effective opportunity and not cause an undue hardship for the business.[98] The FEHA seems to have no such savings provision for employers that have acted in good faith. Highlighting the significance of this difference, the Court of Appeal has held that a reasonable-accommodation plaintiff, seeking damages for lost wages and emotional distress, need not prove an employer was motivated by ill will or animosity.[99] The plaintiff was a deputy sheriff who, after taking a leave for his injured knee, was denied full reinstatement for many months because the employer mistakenly thought he could not safely perform his essential job functions. In his lawsuit for damages resulting from the delay in reinstatement, the trial court instructed the jury that he needed to prove that the employer had discriminated against him, and the jury ruled against him for failing to make that proof.

The Court of Appeal reversed, holding that the plaintiff deserved a retrial because the jury instruction was erroneous. The Court of Appeal explained that the traditional notions of proving discrimination do not apply in reasonable accommodation cases, where there necessarily is direct evidence of the employer's motivation. The Court of Appeal concluded that an employer denying an accommodation necessarily treats an employee

differently “because of” a disability whenever the disability is a substantial motivating factor in the employer’s decision to subject the employee to an adverse employment action. The Court of Appeal held that the employer was liable, as a matter of law, for a failure to provide a reasonable accommodation, and remanded for a new trial as to damages.

6.4 Special Rules for Age Discrimination

Even in California not every case makes it to trial. A 2020 Court of Appeal decision upheld summary judgment against the age discrimination claim of a medical assistant at a healthcare organization who was fired at age 66. Her supervisor and the organization’s executive director had expressed surprise at how old the plaintiff was. But their comments did not express age animus and neither commenter was in the chain of command regarding the decision to terminate her employment. In particular, expressing surprise at the plaintiffs’ age was insufficient to raise more than a weak suspicion of discriminatory animus where it was undisputed that the plaintiff had the physical appearance of a much younger person.[100]

6.4.1 Salary might not be an age-neutral criterion

In America generally, an employer reducing its workforce to cut costs may select employees for dismissal on the basis of their higher salaries, even though a higher salary correlates with experience, which in turn correlates with age. In California it’s different. The FEHA declares that “the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group.”[101]

6.4.2 Adverse impact theory, with no RFOA defense

Until 2005 there was debate over whether federal ADEA claimants could recover on a theory that an employer policy had an adverse impact on individuals over age 40. The U.S. Supreme Court then validated that theory of liability in age cases (just as it had in Title VII race cases). California, meanwhile, previously had declared that “the disparate impact theory of proof may be used in claims of age discrimination.”[102]

The main defense to a claim of adverse impact is that the policy in question is a business necessity, which is very difficult for an employer to prove. Federal law eases that burden on employers somewhat by recognizing that employers can defend an ADEA adverse-impact claim by showing that the challenged policy was based on reasonable factors other than age (RFOA).[103]

In California it’s different. While the ADEA provides for an RFOA defense, the FEHA does not.

6.4.3 Publishing ages of entertainment industry employees

Coming to the aid of aging actors—at the behest of the SAG-AFTRA actors’ guild—California legislation has aimed to “ensure that information obtained on an internet web site regarding an individual’s age will not be used in furtherance of employment or age discrimination.”[104] The statute requires commercial on-line entertainment employment service providers to honor subscribers’ requests not to publish age information. The statute suffered an early setback when, in a constitutional challenge, a federal district court held that the statute infringed upon the website operator’s First Amendment right of free speech.[105]

6.5 Special Rules for Discriminatory Workplace Harassment

Federal law on an employer’s duty to prevent and correct harassment consists principally of Title VII’s simple ban on sex discrimination, as interpreted by the Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex,[106] by various EEOC policy guidances, and by judicial decisions.[107] The #MeToo

movement has begun to affect federal employment law. First, it influenced the 2017 Tax Cuts and Jobs Act, which added Internal Revenue Code section 162(q), regarding payments related to sexual harassment and sexual abuse: "No deduction shall be allowed under this chapter for (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney fees related to such a settlement or payment."[108] And, on March 3, 2022, the Ending Forced Arbitration of Sexual Assault and Sexual Act of 2021 was signed into law. This amendment to the Federal Arbitration Act prohibits mandatory arbitration of sexual assault and harassment claims.[109] Notably, the Act only applies to any dispute or claim that arises or accrues on or after March 3, 2022.

While federal statutory language addressing harassment is relatively sparse, California statutory language on the subject is abundant. Generally, interpretations of the FEHA follow interpretations of Title VII, because the two statutes share the same basic purpose.[110] But California's statutory and regulatory language specifies many employer obligations that transcend federal law.

6.5.1 Special aspects of California harassment law

California law on workplace harassment exceeds the scope of federal law in many important respects. California harassment law, unlike federal law,

- governs employers of one or more (not 15 or more) employees,[111]
- protects from harassment additional statuses (e.g., marital status and sexual orientation),[112]
- protects from harassment not only employees and applicants but also many kinds of non-employees—such as independent contractors, unpaid interns, and volunteers,[113]
- imposes personal liability on individual perpetrators, including both supervisors and co-workers,[114]
- makes employers automatically liable for harassment by a supervisor, with no recourse to an affirmative defense, except for a defense that affects the amount of damages only,[115]
- defines "supervisor" more broadly than the definition followed under Title VII,[116]
- forbids "any person" to "aid, abet, incite, compel, or coerce" harassment,[117]
- makes employers liable for perpetrating or permitting sexual favoritism that is "sufficiently widespread" to convey the "message" that management views women as "sexual playthings" or that the way to get ahead is to sleep with the boss, regardless of whether the sexual conduct was unwelcome and regardless of whether the plaintiff herself ever received a sexual advance,[118]
- requires all employers "to take all reasonable steps to prevent harassment,"[119]
- requires all employers to distribute to all employees a detailed fact sheet on sexual harassment,[120]
- requires all employers to write and distribute anti-harassment policies with prescribed content,[121] and
- requires larger employers to train supervisors (and rank-and-file employees) on the prevention of sexual harassment.[122]

The FEHA does not define harassment, but administrative regulations cite examples of harassment, such as "verbal," "physical," and "visual" harassment, as well as "unwanted sexual advances."[123]

6.5.2 Difficulties in distinguishing harassment from management activity

Because individuals in California can be personally liable for harassment, and because employers can be liable for supervisory harassment even if the employer was unaware of the harassment and could not have prevented it, California plaintiffs try to characterize management actions as "harassment" whenever they can. For example, in *Roby v. McKesson Corp.*[124] a FEHA plaintiff suffering from panic attacks and suing for disability harassment claimed that her supervisor had unlawfully "harassed" her by (1) giving her bad job assignments, (2) ignoring her at staff meetings, (3) unfairly reprimanding her, (4) leaving her off a personal gift list, (5) making her document all telephone calls, and (6) counseling her about her body odor. The jury awarded $1 million in damages for "harassment." The Court of Appeal reversed this part of the judgment, explaining that "most of the alleged harassment here was conduct that fell within the scope of [the supervisor's] business and management duties. … While these acts might, if motivated by bias, be the basis for a finding of employer *discrimination*, they cannot be deemed 'harassment' within the meaning of FEHA."[125]

The California Supreme Court, however, reinstated the harassment verdict, on a rationale that official employment actions can support a claim of unlawful harassment.[126] In doing so, the Supreme Court undermined the effect of its earlier decision, in *Reno v. Baird*,[127] that individuals are not personally liable for making official employment decisions on behalf of the employer.

6.5.3 Duty to prevent and correct harassment, including mandatory training

Statutory language establishing a general duty to prevent. California employers must "take all reasonable steps necessary to prevent … harassment from occurring,"[128] and must take "immediate and appropriate corrective action" when harassment occurs.[129]

Judicial language on the employer duty to investigate. The Court of Appeal has stated, "FEHA goes even further than the federal statute by *requiring* that supervisors 'take immediate and appropriate corrective action' when harassment is brought to their attention."[130] The Court of Appeal quoted this legislative note to Government Code section 12940 (not part of the Code but part of its legislative history.)

> It is the existing policy of the State of California, as declared by the Legislature, that procedures be established by which allegations of prohibited harassment and discrimination may be filed, timely and efficiently investigated, and fairly adjudicated, and that agencies and employers be required to establish affirmative programs which include prompt and remedial internal procedures and monitoring so that worksites will be maintained free from prohibited harassment and discrimination by their agents, administrators, and supervisors as well as by their nonsupervisors and clientele.[131]

The Court of Appeal thus held that a supervisor could reasonably believe that he was engaging in a statutorily required (and thus protected) activity when he protested harassing conduct, even though the conduct was not severe or pervasive enough to be actionable.[132]

DFEH fact sheet. California employers must give each employee an official DFEH fact sheet or equivalent information to inform the employee regarding:

- the illegality of sexual harassment,
- the definition of unlawful sexual harassment,
- examples of sexual harassment,
- the employer's internal complaint process,

- the legal remedies available through government agencies,
- directions on how to contact the agencies, and
- the protection against retaliation for opposing harassment or filing a complaint or participating in an investigation or proceeding.[133]

Training. California has expanded the scope of required sexual harassment training: employers of five or more employees must provide training on preventing sexual harassment to all workers by January 1, 2021.[134] Thereafter, employers must provide sexual harassment training and education to each supervisory employee (and to all rank-and-file employees) once every two years, and must train new supervisors within six months of their assuming their positions.[135]

The training for supervisors—two hours of "classroom or other effective interactive training" conducted by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation—must include information and practical guidance regarding federal and California law on

- the prohibition against sexual harassment,
- the prevention of sexual harassment,
- the correction of sexual harassment in the workplace,
- the remedies available to victims of sexual harassment, and
- practical examples "aimed at instructing supervisors" in the prevention of harassment, discrimination, and retaliation, including harassment based on gender identity, gender expression, and sexual orientation.[136]

Training for non-supervisory employees—including temporary and seasonal employees—must last at least one hour and contain components on preventing abusive conduct and harassment based on gender identity, gender expression, and sexual orientation.[137] As of January 2021, seasonal and temporary employees (or any employee hired to work for less than six months) must be trained within 30 calendar days of hire or within the first 100 hours worked, whichever occurs first.[138] Temporary workers employed by a temporary agency must be trained by the temporary agency.[139]

Although no penalty attaches to employer failures to conduct mandatory training, that failure can be cited to argue that the employer has breached its statutory duty to take all reasonable steps to prevent workplace harassment. If the DFEH substantiates a complaint against an employer for non-compliance, then the DFEH will work with the employer to secure compliance.[140] Moreover, in investigating FEHA administrative complaints of discrimination, the DFEH routinely requires proof that a respondent employer has completed the mandated training.

The FEHC has issued Sexual Harassment Prevention Training Regulations[141] that interpret the California training statute as follows.

- Not only full-time employees but part-time and temporary employees and independent contractors count toward the 5 employee threshold.[142]
- Employers are covered if they do any business in California, even though most or nearly all employees work outside California.[143]
- As to supervisory training, employers need train only those supervisors located in California.[144]

- The required interactive training may be in the form of classroom training, webinar training, or other e-learning, so long as the program will take the participant no less than two hours to complete.[145] Electronic training meets the requirement of interactivity only if questions from participants are answered within two business days.[146]

- As to supervisory training, the instruction must include questions and skill-building activities to assess learning, and "numerous hypothetical scenarios about harassment, each with one or more discussion questions so that supervisors remain engaged in the training."[147]

As of 2020, California hotel and motel employers (excluding bed and breakfast inns) must provide at least 20 minutes of interactive human trafficking awareness training to employees likely to interact with human trafficking victims.[148]

California has also authorized—but does not require—the provision of "bystander intervention training."[149]

Mandated reporters. California employees must provide training for "mandated reporters." The California Child Abuse and Neglect Reporting Act requires that certain "mandated reporters" formally report suspected child abuse or neglect (including sexual abuse) to law enforcement authorities. As of 2021 there are two new categories of mandated reporters: (1) a "human resource employee" (someone who is designated to accept discrimination complaints) and (2) an adult whose duties require direct contact with and supervision of minors in the workplace. Employers must train the mandated reporters on identifying and reporting child abuse and neglect. The training requirement may be met by completing on-line four-hour training for mandated reporters offered by the Office of Child Abuse Prevention in the State Department of Social Services.[150]

Mandated reporters, before starting employment, must sign a form promising to comply with the Act and its reporting obligations.[151]

Anti-bullying training. The required training must address "abusive conduct," defined broadly to include malicious conduct that a reasonable person would find "hostile, offense, and unrelated to an employer's legitimate business interests." Examples include "repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, conduct that a reasonable person would find "threatening, intimating, or humiliating," and the "gratuitous sabotage or undermining of a person's work performance."[152]

Property service worker training. Under the Property Service Workers Protection Act, California companies that contract to provide janitorial services and thereby retain janitors as either employees or independent contractors must establish biennial sexual violence and harassment prevention training for those workers.[153] In 2019, the Legislature added the Janitor Survivor Empowerment Act, requiring the Director of the Department of Industrial Relations to organize a training advisory committee to identify qualified organizations and trainers for janitorial employers to use in providing biennial, in-person sexual violence and harassment prevention training for janitorial workers.[154]

Talent agency training. Talent agencies must provide education on sexual harassment prevention, retaliation, and reporting resources to adult artists, to parents or legal guardians of minors aged 14-17, and to age-eligible minors, within 90 days of retention.[155]

Adult-supervised training of minors in entertainment industry. California minors in the entertainment industry and their parents or guardian are to receive appropriate training regarding sexual harassment in order to protect the safety of minors. More specifically, the parent or guardian of a minor (age 14-17) issued with an entertainment work permit must (1) ensure, by accompanying the minor, that the minor completes training in sexual harassment

prevention, retaliation, and reporting resources using the DFEH-provided on-line training course, and (2) certify to the Labor Commissioner that the training has been completed.[156]

Construction and temporary worker training. Sexual harassment training requirements extend to seasonal, temporary, or other employees hired to work for less than six months, and special training provisions apply for construction industry employers that employ workers under a multiemployer CBA.[157]

"Implicit bias" training for certain medical professionals. By January 1, 2022, continuing education for physicians, surgeons, nurses, and physician assistants must include courses on implicit bias.[158]

Actions for failure to prevent discrimination or harassment. A California employee has no remedy if an employer fails to take all reasonable steps to prevent discrimination and harassment from occurring, unless actionable harassment or discrimination actually occurred.[159] But the employer risks prosecution by the DFEH for a violation of 12940(k), even in the absence of any actionable harassment or retaliation.[160]

Allegations of "inadequate" investigations. Plaintiffs suing California employers have, with judicial blessing, pointed to alleged inadequacies in employer investigations as proof that a resulting employment decision was discriminatory.[161] The Court of Appeal has indicated that a plaintiff's expert can testify on whether an employer in a given case has materially deviated from its own personnel standards and practices with respect to an investigation.[162]

6.5.4 Personal liability for perpetrators

Supervisors harassing. In America generally, workplace harassment leads to statutory liability for the employer, not to personal liability for the individual perpetrator, although the perpetrator may be subject to liability under common law torts such as battery, false imprisonment, and infliction of emotional distress. In California it's different. The FEHA imposes personal liability on individual supervisors who perpetrate harassment.[163]

Co-workers harassing. The FEHA, going beyond federal law, makes harassing supervisors personally liable. And California goes still further. The FEHA makes even non-supervisory co-workers personally liable for acts of harassment.[164]

6.5.5 Employer liability for supervisor's harassment

Vicarious employer liability. Where a hostile environment is created by a "supervisor" (someone with substantial independent authority over a subordinate's employment status), California imposes automatic liability on the employer (i.e., liability without regard to notice or fault).[165] Federal law gives employers an affirmative defense (the *"Ellerth/Faragher"* defense) in this kind of case, permitting the employer to avoid liability if (1) it took reasonable steps to prevent and correct harassment and (2) the plaintiff unreasonably failed to use those steps.[166] In California it's different. The California Supreme Court has refused to recognize the *Ellerth/Faragher* defense in a harassment case brought under FEHA.[167]

In place of the federal *Ellerth/Faragher* defense, California recognizes a limited avoidable-consequences defense, which permits employers to reduce damages (but not avoid liability) if the employer proves that (1) it took reasonable steps to prevent and correct harassment, (2) the plaintiff unreasonably failed to use measures the employer provided, and (3) the plaintiff's reasonable use of those measures would have prevented some or all of the harm.[168]

Broad definition of "supervisor." The U.S. Supreme Court has interpreted the analogous federal law (Title VII) to call for a narrow definition of "supervisor," encompassing only those management-level employees who "are empowered" to take "tangible employment actions" against lower-level employees.[169] The California statutory

language, by contrast, defines “supervisor” broadly, to include any employee with the authority to discipline or direct other employees.[170]

6.5.6 Protection of independent contractors

In America generally, employment discrimination laws protect employees and applicants (and, in the case of retaliation, former employees). Non-employees thus generally lack the protection of employment discrimination statutes. In California, it’s different. In California, an independent contractor, as much as an employee, is protected from discriminatory workplace harassment.[171]

6.5.7 Sexual assault statute

California has created a separate statutory claim for sexual battery.[172] Any person who commits sexual battery upon another can be find liable for “damages, including, but not limited to, general damages, special damages, and punitive damages.”[173] There are also separate statutory claims for discriminatory acts of violence and intimidation.[174]

6.5.8 Stalking

In addition to criminal stalking laws, California has created a separate civil statutory claim for stalking.[175]

6.5.9 Sexual harassment in business, service, and professional relationships (non-employment context)

California has created a special prohibition on sexual harassment in non-employment relationships.[176] Specifically, Civil Code section 51.9 (the Unruh Act) imposes liability for sexual harassment in a non-employment context involving business, service, and professional relationships (e.g., physician, attorney, real estate agent, loan officer, financial planner, landlord, teacher). Originally, section 51.9 imposed liability when the plaintiff and the defendant had a business, service, or professional relationship and (1) the defendant made sexual advances, solicitations, sexual requests, demands for sexual compliance, or engaged in other verbal, visual, or physical conduct that was unwelcome and pervasive or severe and based on gender, (2) the plaintiff could not easily terminate the relationship, and (3) the plaintiff suffered resulting economic loss or disadvantage or personal injury.

Legislation effective in 2019 has removed the requirement that the plaintiff could not “easily terminate the relationship” and has broadened the list of professional relationships to include “elected official”, “lobbyist,” “director,” and “producer.” The new law also makes the DFEH responsible for enforcing sexual harassment claims under section 51.9 and makes it unlawful to deny—or to aid, incite, or conspire in the denial of—a person’s rights related to sexual harassment claims.[177] Of note, courts have observed that the “history of the amendments to Civil Code section 51.9 leaves no doubt of the Legislature’s intent to conform the requirements governing liability for sexual harassment in professional relationships outside of the workplace to those of … California’s FEHA … liability for sexual harassment in the workplace ….”[178]

6.5.10 Special privacy protections for plaintiffs

California courts have prevented defendants in harassment litigation from inquiring into a plaintiff’s victimization by prior sexual assaults,[179] marital difficulties,[180] and sexual conduct with persons other than those for whose behavior the plaintiff seeks to hold the defendant liable.[181]

6.5.11 Sexual favoritism

Unlike federal law, California law dictates that sexual "favoritism” can be a basis for claims of sexual harassment.

For purposes of federal law, the U.S. Supreme Court has explained that the "critical issue" in a sexual harassment case is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed," and that harassment laws are not intended to create a "civility code."[182] Federal law thus contemplates actionable sexual harassment as involving unwelcome conduct directed at the victim on the basis of the victim's gender. Under this law, mere objections to unwelcome conduct involving others would not occasion a sexual harassment suit.

But in California it's different.

In *Miller v. Department of Corrections*,[183] the California Supreme Court recognized a claim for sexual harassment even though the plaintiffs themselves had never experienced disparate treatment on the basis of their gender. *Miller* thus permitted two women to sue under the FEHA on the basis that their boss had created a sexually hostile work environment for them by giving unwarranted favoritism to his female lovers. Neither plaintiff claimed that she had been treated worse than men in the workplace or that she had been treated badly because she was a woman. Neither woman received an unwelcome sexual advance and no man had directed any hostile conduct at her. Rather, the women were "sexually harassed" only in the sense that each was offended by seeing other women obtain preferential treatment through sexual cooperation with the boss. Nonetheless, *Miller* held that employer liability could exist on the theory that sexual favoritism within a workplace can be "sufficiently widespread" to convey the "message" that management views women as "sexual playthings" or that the way to get ahead is to sleep with the boss.[184]

Miller erroneously stated that it was following federal legal authority in the form of a 1990 EEOC policy guidance. Actually, a guidance is not federal authority but rather is simply the EEOC's litigation position, adopted without the benefit of the notice-and-comment process required by administrative rule-making. *Miller* nonetheless quoted, with evident approval, the EEOC's argument for greater employer liability: "If favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment … regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors. In these circumstances, a message is implicitly conveyed that the managers view women as 'sexual playthings,' thereby creating an atmosphere that is demeaning to women."[185]

Miller thus reasoned "that even in the absence of coercive behavior, certain conduct creates a work atmosphere so demeaning to women that it constitutes an actionable hostile work environment."[186]

6.5.12 Sexual desire not necessary to prove sexual harassment

The California Legislature has amended FEHA to clarify that sexual harassment is prohibited without regard to the harasser's sexual desire.[187] The amendment overturned an appellate court decision that "created confusion" by holding that a plaintiff in a same-sex harassment case must prove that the harasser harbored a sexual desire for him.[188] Thus, severe or pervasive sexually offensive conduct can create a hostile work environment, so long as the conduct is based on the victim's gender, regardless of whether the harasser had any sexual interest in the victim.[189]

6.5.13 #MeToo prohibitions on confidentiality clauses

A Code of Civil Procedure section effective in 2019 makes unenforceable any settlement agreement provision that prevents the disclosure of "factual information related to a claim" filed in court or in an administrative action and regarding sexual harassment or retaliation for reporting harassment or discrimination.[190] In 2022, the "Silence No More Act" expanded the scope of the Code of Civil Procedure section to make unenforceable any settlement agreement that prevents the disclosure of workplace harassment or discrimination, or failure to report workplace

harassment or discrimination, for agreements entered into on or after January 1, 2022.[191] The newly amended section still permits settlement agreements to prohibit confidentiality as to the amount paid in settlement[192] and as to the identity of the claimant—if the claimant so requests and if no party is a government agency or official.[193]

A Civil Code provision makes unenforceable any contractual provision that waives a party's right to testify in a legal proceeding (if required or requested by court order, subpoena or administrative or legislative request) regarding criminal conduct or sexual harassment on the part of the other contracting party, or the other party's agents or employees.[194]

A Government Code provision prohibits employers from requiring an employee to release any FEHA claim or right, or to sign a non-disparagement agreement that denies the employee the right to disclose information about sexual harassment, in exchange for a raise or bonus or as a condition of employment or continued employment.[195] In 2022, the "Silence No More Act" expanded the scope of the Government Code section to make unenforceable, as a condition of employment (or in a separation agreement), non-disparagement agreements that deny the employee's right to disclose information about any "unlawful acts in the workplace" unless the provision also includes specific carve-out language stating, in substantial effect: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."[196] This provision does not apply to any negotiated agreement to settle a FEHA claim filed in a legal proceeding or through the employer's internal complaint process.[197] The provision also expressly does not prohibit inclusion of a general release or waiver of all claims in a separation agreement (provided that the employee is notified of the right to consult with an attorney while being given at least five business days to do so).[198] Nor does the provision prohibit confidentiality as to the amount paid in settlement.[199]

6.5.14 Expanding liability exposure for harassment

The Legislature, in 2018, created a remarkable series of nudges to judges to favor harassment plaintiffs, adding a new FEHA section[200] to declare that

- the harassment laws aim to provide all Californians with equal opportunity to succeed in the workplace, and liability for harassment occurs when "the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to dispute the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being";

- plaintiffs need not show that "tangible productivity has declined as a result of the harassment," so long as a reasonable person subjected to the discriminatory conduct would find that the harassment so altered working conditions as to "make it more difficult to do the job," and the Legislature approves the concurring opinion of Justice Ginsburg in *Harris v. Forklift Systems,* 510 U.S. 17 (1993);

- a single incident of harassing conduct is sufficient to create a triable issue of hostile work environment if the conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment and the Ninth Circuit's opinion in *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000) must not be used to determine what conduct is sufficiently severe or pervasive under FEHA;[201]

- hostile work environments depend on the totality of circumstances and so—consistent with *Reid v. Google, Inc*., 50 Cal. 4th 512 (2010) (rejecting "stray remarks" doctrine)—discriminatory remarks may be relevant "even if not made directly in the context of an employment decision or uttered by a nondecisonmaker";

- liability for harassment should not vary by the type of workplace, notwithstanding any "language, reasoning, or holding to the contrary" in *Kelley v. Conco Cos.*, 196 Cal. App. 4th 191 (2011), and courts should consider the nature of the workplace only when "engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties"; and

- harassment cases "are rarely appropriate for disposition on summary judgment" and the Legislature approves the decision in *Nazir v. United Airlines, Inc.*, 178 Cal. App. 4th 243 (2009) (an anti-summary judgment screed) and its observation that hostile working environment cases involve issues "not determinable on paper."

6.6 Special Rules Relating to National Origin

FEHC regulations have clarified prohibitions against discrimination and harassment based on national origin.[202] The regulations define national origin broadly, to include not just the national origin of an individual but also the national origin of the individual's spouse or of those with whom the individual associates, as well as a person's perceived national origin. The expansive definition also includes an individual's or ancestor's (actual or perceived) physical, cultural, or linguistic characteristics associated with a national origin group, marriage to or association with a person of a national origin group, tribal affiliation, membership in or association with an organization identified with or seeking to promote the interest of a national origin group, attendance or participation in schools, churches, temples, mosques, or other religious institutions generally used by persons of a national origin group, and name associated with a national origin group.[203]

Lest anyone doubt the expansive scope of this definition, the regulations emphasize that "national origin groups include, but are not limited to, ethnic groups, geographic places of origin, and countries that are not presently in existence."[204]

The regulations prohibit employers from having policies that limit or prohibit the use of any language in the workplace—including an English-only rule—unless certain criteria are met.[205] The regulations also prohibit discrimination based on English proficiency and accents,[206] prohibit employers from inquiring into the immigration status of employees or applicants unless the inquiry is necessary to comply with federal law,[207] prohibit height and weight requirements,[208] and prohibit segregation or recruitment applicants based on national origin.[209]

6.6.1 English-only work rules

In America generally, employers may require that employees speak only English in the workplace, unless that requirement discriminates on the basis of national origin by having an unjustified adverse impact. In California it's different. The FEHA, without requiring any proof of an adverse impact, makes it an unlawful employment practice for an employer to adopt or enforce a policy that prohibits the use of any language in the workplace unless the employer notifies employees of the policy and justifies it by showing a "business necessity." "Business necessity" exists only if the policy serves an "overriding legitimate business purpose" and is needed for the safe and efficient operation of the business, and there is no available alternative.[210]

FEHC regulations on national origin discrimination declare it an unlawful employment practice for an employer to adopt a policy that creates an "English only" rule, unless (1) the rule is job-related and consistent with "business necessity," (2) the rule is narrowly tailored, and (3) employees get effective notice of when and where the rule applies and what consequences result from a violation.

The regulations also provide that an English-only policy is not valid simply because it promotes business convenience or reflects customer preference. Further, the regulations presume that English-only rules violate the FEHA unless the employer can prove "business necessity."[211]

FEHC regulations permit language restriction policies—including English-only policies—only under the very narrow circumstances already set forth in the FEHA: the language restriction must be justified by "business necessity," the language restriction must be narrowly tailored, and the employer must have told employees about how and when the language restriction applies and what happens to employees who violate it.

The regulations define "business necessity" narrowly as a situation where the restriction is necessary to the safe and efficient operation of the business, the restriction effectively fulfills the business purpose it is supposed to serve, and there is no alternative practice to the restriction that would accomplish the business purpose equally well with a lesser discriminatory impact. The regulations state that a language restriction is not justified simply because the restriction promotes business convenience or reflects customer or co-worker preference. In any event, English-only restrictions cannot apply to non-work time (such as breaks, lunch, unpaid employer-sponsored events).

Discrimination against an employee's accent may also be national origin discrimination, unless the accent interferes materially with the ability to perform the job in question. Requiring English proficiency may also be discriminatory, absent "business necessity." The regulations allow employers to ask applicants or employees about their ability to speak, read, write, or understand any language (including non-English languages), but inquiries must be justified by a business necessity.[212]

The regulations also clarify that the FEHA forbids height and weight requirements that create a disparate impact on the basis of national origin, unless, of course, the requirements are job-related and advance a business necessity.[213] Even then, the challenged requirement could be unlawful if the requirement's purpose could be more effectively achieved with less discriminatory measures. It is also unlawful for employers to seek, request, or refer applicants or employees based on national origin to assigned positions, facilities, or geographical areas of employment, unless the employers have a "permissible defense" such as job relatedness or a bona fide occupational qualification.[214]

The regulations apply to undocumented applicants and employees just as they would with any other applicant. Any inquiry into an applicant or employee's immigration status is unlawful unless there is clear and convincing evidence that the inquiry was needed to comply with federal immigration law.[215] The use of derogatory language or slurs based on national origin, and threatening to contact the immigration authorities about an individual's immigration status, also remain unlawful.[216]

6.6.2 Protections for specially licensed individuals

The prohibition against discrimination because of "national origin" also prohibits discrimination against an individual for possessing a special California driver's license for those individuals who can prove identity and residency and other qualifications for a driver's license but who "is unable to submit satisfactory proof that the applicant's presence in the United States is authorized under federal law."[217] This provision allows those who are not legally in the country to obtain a driver's license if they can provide valid proof of identity and California residency.

And, in the same vein, employers must not require applicants or employees to present a driver's license, unless the law requires the license or permits the employer's requirement. Further, failing to apply the requirement uniformly or for a legitimate business purpose may amount to discrimination because of national origin.

But any action an employer takes to comply with any federal requirement or prohibition would not be a violation.[218] And the U.S. Constitution preempts state laws that directly conflict with federal law,[219] so that it could be difficult to predict whether a court would find a violation where an employer has discriminated against a special licensed immigrant who is not authorized to work in the United States.

6.6.3 Other protections for inadequately documented workers

California, seeking to protect immigrants, has been a national leader in resisting federal immigration agencies, and in actively discouraging employers from cooperating with those agencies. California in this context has not limited itself to traditional concepts of national origin discrimination. California has enacted many other immigrant-protection laws, discussed elsewhere. (See § 5.17.)

6.7 Equal Pay

For many years, the Labor Code forbade California employers to pay an unequal wage for equal work on the basis of sex and made violating employers liable for double damages to employees who suffered that form of pay discrimination[220] and also made them subject to criminal liability.[221] In 2015 the Legislature went further, making employer obligations substantially more onerous and giving California one of the nation's more aggressive equal pay laws. In successive years, California has turned the Equal Pay screws ever tighter.

Differences from federal law. Federal law addresses gender-based pay discrimination. Title VII forbids pay discrimination because of any protected status, and the federal Equal Pay Act gives women a right to equal pay for equal work. California's peculiar version of the Equal Pay Act has expanded employer obligations well beyond federal law as to any pay differentials observed among employees of different genders, races, and ethnicities:

- Employees can be compared even if they do not work at the same establishment. This means that the pay of an employee may be compared to the pay of other employees who work hundreds of miles apart.
- Employees can be compared even if they do not hold the "same" or "substantially equal" jobs. Plaintiffs need only show that the employees are engaged in "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions."[222]
- Employers, in defending pay differentials, can cite only certain factors and must apply them reasonably, and the factors, when viewed together, must explain the entire pay differential.[223]

California thus has dramatically lowered the bar for equal pay suits, permitting plaintiffs to compare themselves with persons working at any location for the same employer, and in any similar—not necessarily the same—job. While Title VII does not require a showing of "equal work" within the same establishment (as the federal Equal Pay Act does), Title VII does require a showing of discriminatory intent or a specific practice or policy with a discriminatory impact—a showing that California does not require.

California requires equal pay defendants to affirmatively demonstrate that any pay differences are based on one or more of a limited number of factors.[224] The permitted reasons for differences in pay are:

- a seniority system,
- a merit system,
- a system that measures earnings by quantity or quality of production, and
- a bona fide factor other than sex such as education, experience, and training. Employers may rely on such a factor only if the employer proves the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a "business necessity" (i.e., the factor relied upon effectively fulfills the business purpose it is supposed to serve). Moreover, this defense will not apply if the plaintiff shows that an alternative business practice would serve the same business purpose without producing the pay differential.[225]

California, unlike federal law, has removed statutory exemptions that applied where work was performed "at different geographic locations" and "on different shifts or at different times of day." Nonetheless, employers may still justify pay differences based on geographic location, shift, or hours differentials, as a bona fide factor other than sex.[226]

Expansion beyond gender. In 2016, the Legislature doubled down on the Equal Pay Act, extending California's pay equity provisions beyond gender differentials to differentials among employees of different races or ethnicities.[227]

Ban on use of prior salary as sole basis to defend pay disparity. A 2015 amendment provided that employers must not use prior salary as the "sole" basis to justify a pay disparity.[228] In 2018 the Legislature tightened this restriction, providing that prior salary cannot be used to justify any disparity in compensation.[229] While employers still may cite rightfully obtained prior salary information, employers cannot rely on differences in prior pay to justify ongoing pay differences between substantially equal employees.[230]

Anti-secrecy provision. The Equal Pay Act, duplicating law found elsewhere, forbids employers from prohibiting employees from disclosing or discussing their own wages or the wages of others, or from aiding or encouraging other employees to exercise their rights under the law.[231] These anti-pay secrecy requirements echo similar prohibitions emanating from the National Labor Relations Act, the California Labor Code, and an Executive Order that applies to federal contractors.

Methods of enforcement. The DLSE can enforce the Equal Pay Act, and employees can sue directly in court—within two years from the date of the violation (or three if the violation was "willful")—to recover the balance of wages, interest, liquidated damages, costs, and reasonable attorney fees.[232] Employees also may file complaints with the DLSE alleging employer violations of the prohibitions on discrimination, retaliation, and restricting employee wage-information discussions.[233] The Equal Pay Act law provides an additional private right of action—with a one-year statute of limitations—for employees claiming they have been discharged, discriminated, or retaliated against for engaging in any conduct protected by the statute.[234] These employees may seek reinstatement and reimbursement for lost wages and benefits, interest, and "appropriate equitable relief."[235]

Recordkeeping requirements. The Equal Pay Act has extended—from two years to three—an employer's obligation to maintain records of wages and pay rates, job classifications, and other terms of employment.[236]

Ban on inquiries about applicant's prior salary. In 2017 California joined several other U.S. jurisdictions, including San Francisco,[237] in forbidding employer inquiries into applicants' salary history information.[238] Labor Code section 432.3 forbids employers to seek information about an applicant's "compensation and benefits."[239]

Under section 432.3, employers must not ask about salary history information and must not rely on it in deciding whether to offer a job or how much to pay. Nonetheless, the law also states that employers may consider this information in setting salary if an applicant volunteers that information.[240] That said, because California precludes employers from relying on prior salary to justify any gender, ethnicity, or race-based disparity in pay, employers should proceed with caution in utilizing prior salary.[241]

Required pay scale disclosure. Legislation enacted in 2017 made California the nation's first jurisdiction to require that employers provide applicants with pay scales: "An employer, upon reasonable request, shall provide the pay scale for a position to an applicant applying for employment."[242] This seemingly simple provision generated important compliance issues, as the key terms—"applicant," "pay scale," and "reasonable request"—were undefined.

In 2018 the Legislature enacted clarifying amendments. *First*, the law applied only to external applicants for a position. The pay scale did not need to be provided to internal applicants seeking a promotion or lateral move. *Second*, "pay scale" meant the salary or hourly wage range and did not include bonuses or equity ranges. *Third*, a "reasonable request" is made after the applicant has completed an initial interview; the pay scale need not be provided until the applicant has completed the initial interview and requested the pay scale.[243]

Further clarifications. Legislation effective in 2019 provided as follows. *First,* prior salary cannot be used to justify a wage differential, whether on its own or in combination with a lawful factor. *Second,* prior salary is a permissible factor to consider in pay decisions for current employees, such as in awarding a bonus, so long as any wage differential from the decision is justified by a specified permissible factor, such as a merit system. *Third,* the ban on asking about prior salary does not forbid employers to ask applicants about "salary expectations" for the position sought.[244]

Annual pay reports. In 2020, the Legislature created an onerous filing requirement for California employers that requires them to report potentially incomplete and misleading pay data that companies' adversaries could use to falsely claim discriminatory wage disparities. The legislation follows the lead of an Obama Administration initiative to require certain gender, race, and ethnicity data on the federal annual Employer Information Report (EEO-1)—an initiative that the Trump Administration halted in 2017. California private employers with 100 or more employees that must file the federal report must also submit annual pay data reports to California's Civil Rights Department (CRD) stating the number of employees by race, ethnicity, and sex in the following categories: all levels of officials and managers, professionals, technicians, sales workers, administrative support workers, craft workers, operatives, laborers and helpers, and service workers.[245] The pay data report must include employees who work in, live in, or report to a location in California. The reported earnings should be determined utilizing W-2 Box 5 wages, and hours worked must include paid time off, such as vacation, paid sick time, and paid holidays.

On September 27, 2022, Governor Newsom signed into law another groundbreaking pay transparency law, SB 1162.[246] SB 1162 expanded pay scale disclosure requirements and amended the pay data reporting requirements passed in 2020. Effective January 1, 2023, employers are required to provide pay ranges on job postings and to requesting employees. The signing of SB 1162 makes California the largest state that requires the affirmative disclosure of pay scale information. SB 1162 takes California's pay data reports a step further by requiring that employers report mean and median pay data and pay data of employees supplied by labor contractors.

SB 1162 made the following changes to requirements regarding employer pay data reports under Government Code section 12999:

- Within each job category, employers must report the median and mean hourly rate by each combination of race, ethnicity, and sex.[247]
- Reports are now due annually on the second Wednesday of May. The first report was due on May 10, 2023, based upon calendar year 2022 pay data.[248]Employers with multiple establishments are no longer required to submit a consolidated report. Instead, these employers must continue to submit a report for each establishment.[249]
- Employers with 100 or more employees hired through labor contractors have a new obligation to produce data on pay, hours worked, race/ethnicity, and gender information in a separate report.[250]

On January 19, 2023, the CRD released Frequently Asked Questions that introduced new definitions, clarified prior reporting requirements, and answered questions concerning the contractor pay data reporting.[251] On February 1, 2024, the CRD released Frequently Asked Questions that introduced a new definition of "remote

worker" and added a requirement that employers identify payroll employees and labor contractor employees working remotely.[252]

Additional Pay Scale Disclosure Requirements. SB 1162 in part made significant changes to California's pay scale disclosure law under Labor Code section 432.3. As of January 1, 2023, employers were required to comply with the below requirements:

- Employers with more than 15 employees must include a pay scale in all job postings (and provide that information to third parties who post them);[253]
- All employers, regardless of size, must provide a pay scale for a current employee's position at the employee's request.[254]

Labor Code section 432.3 defines pay scale as the salary or hourly wage range that the employer reasonably expects to pay for the position.[255] Pay scales must be included in job postings for both remote and in person roles. The California Labor Commissioner's office confirmed in its Frequently Asked Questions that bonuses, tips, and other benefits are not required to be included in the pay scale.[256] While employers may voluntarily provide information on "compensation or tangible benefits provided in addition to a salary or hourly wage," the Labor Commissioner reminds employers that "other forms of compensation may be considered for equal pay purposes."[257] While many jurisdictions allow employers to provide a link to a salary range in electronic postings, California requires the employer to include pay scales directly in the job posting.[258]

6.8 Pant Suits

In America generally, grooming and dress codes that differentiate between men and women are not unlawful as sex discrimination, as these employer requirements do not affect employment opportunities. In California it's different. FEHA makes it an unlawful employment practice for an employer to refuse to permit an employee to wear pants on account of the employee's gender. Thus, California employers can ban pants for all employees, but must not ban pants for men only or for women only. Exceptions exist for requiring employees "in a particular occupation to wear a uniform" and for requiring an employee to wear a costume while portraying a specific character or playing a dramatic role.[259]

6.9 Special Rules for Gender, Gender Identity, and Gender Expression

California's prohibition against sex discrimination includes discrimination on the basis of "gender," a term that means not only biological sex but also "gender identity and gender expression."[260] "Gender expression" means "gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."[261]

The statutory language aims to protect persons whose vocal pitch, facial hair, personality, hairstyle, mannerisms, clothing, or demeanor is associated with a particular gender. For example, the statute would forbid employment discrimination on the basis that a male employee appeared effeminate or on the basis that a female employee appeared masculine. Notwithstanding this prohibition, employers may continue to impose "reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, provided that an employer shall allow an employee to appear or dress consistently with the employee's gender identity or gender expression."[262]

Regulations provide additional protections for gender identity and transgender employees in the workplace. The regulations add a definition of "transitioning,"[263] and prohibited discrimination against individuals who are transitioning, have transitioned, or are perceived to be transitioning.[264] The regulations also require employers to

provide equal access to facilities such as bathrooms, regardless of the employee's gender identity, and to provide gender-neutral signage for single-occupancy facilities.[265] The regulations further prohibit employers from inquiring about sex, gender identity, or gender expression as a condition of employment,[266] and forbid imposing dress standards that conflict with an employee's gender identity or gender expression, unless the employer can establish a business necessity.[267] The regulations also require employers to abide by the employee's preferred name, pronouns (including gender-neutral pronouns), and gender identity, unless the employer otherwise must, by law, utilize the employee's legal name and the sex assigned at birth.[268]

6.10 Special Rules for Religious Accommodation

While FEHA's definition of "religion" may in some way be narrower than its federal counterpart,[269] the scope of the California duty to accommodate religious practices is broader in some aspects than the corresponding federal duty.

6.10.1 Express coverage of specified religious practices

Federal law protects religious workplace expression only in general terms. California differs, by expressly defining "religion" to encompass "all aspects of religious belief, observance, and practice, including religious dress and grooming practices." "Religious belief or observance" includes "observance of a Sabbath or other religious holy day or days, reasonable time necessary for travel prior and subsequent to a religious observance, and religious dress practice and religious grooming practice."[270] "Religious dress practice" includes "the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance" of an individual's religious creed. "Religious grooming practice" includes "all forms of head, facial, and body hair that are part of the observance" of the individual's religious creed.[271]

6.10.2 Disallowance of segregation as a religious accommodation

Judicial interpretations of federal law have permitted employers to accommodate religious objections to the employee's personal appearance standards by having the religiously objecting employee—while retaining pay and benefits—work in a secluded area of the workplace. California categorically rejects that approach: "An accommodation of an individual's religious dress practice or religious grooming practice is not reasonable if the accommodation requires segregation of the individual from other employees or the public."[272]

6.10.3 Express obligation that employer explore and document reasonable accommodations

While federal law generally requires employers to reasonably accommodate an employee's religious beliefs and observances, the FEHA contains express language that makes that duty more onerous. A California covered employer cannot enforce any requirement that conflicts with a "person's religious belief or observance" unless the employer "demonstrates that it has explored any available reasonable alternative means of accommodating that conflict between the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with the person's religious belief or observance or permitting those duties to be performed at another time by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship as defined in subdivision (u) of section 12926, on the conduct of the business of the employer or other entity covered by this part."[273]

6.10.4 Higher standard for employers to show undue hardship

Federal law (Title VII) permits employers to refuse to provide a religious accommodation for an employee if the accommodation would cause an "undue hardship." On June 29, 2023, the U.S. Supreme Court clarified that "undue hardship" under Title VII means that an employer must show that the "burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."[274]

The Court in *Groff v. DeJoy* made it clear that it was not adopting the legal standard for undue hardship applied in Americans with Disabilities Act (ADA) cases, but something in between that standard and the prior "de minimis" standard, which the Court stated had been incorrectly adopted by the lower courts in religious accommodation cases.[275]

In 2013, the FEHA was amended to clarify that, in religious accommodation cases, California law applies the same standard for undue hardship that it applies in disability cases.[276] The FEHA standard for "undue hardship" is expressly defined as "significant difficulty or expense" in terms of such factors as the size of the establishment, the size of budgets, the overall size of the employer, the nature and cost of the accommodation, and the availability of reasonable alternatives.[277]

The standards for proving "undue hardship" under California law and federal law are now more closely aligned ("substantial increased costs" vs. "significant difficulty or expense") than they were when some courts applied a *de minimis* standard to Title VII religious accommodation claims. It remains to be seen, however, how courts will parse the California and federal standards when both FEHA and Title VII claims are presented in future cases.

In addition, unlike Title VII, the FEHA has an express statutory exception or limitation to the religious accommodation requirement: "An accommodation is not required under this subdivision if it would result in a violation of this part or any other law prohibiting discrimination or protecting civil rights, including subdivision (b) of section 51 of the Civil Code [all business establishments] and section 11135 of this code [state government employment]."[278] In this regard, the Court in *Groff* stated that the effect on other employees is one factor to consider when evaluating the overall effect of the accommodation on the operations of the particular business.[279]

6.11 Special Rules for Retaliation

Under both federal and California law, employers cannot retaliate against employees for engaging in protected activity, even where the conduct the employees oppose turns out not to be unlawful.[280] But California diverges from federal law in several key respects, to broaden liability for retaliation.

6.11.1 Broad definition of protected activity

Under federal law, retaliation plaintiffs must show they engaged in protected activity, which means that they participated in a discrimination charge or lawsuit or at least overtly opposed what they reasonably thought was unlawful discrimination.[281] In California it's different. Here the employee's opposition need not be overt. Plaintiffs who disagree with employer directives they believe to be discriminatory need not express that belief; all they must prove is that the employer knew the plaintiff thought the directive was discriminatory. Thus, the California Supreme Court permitted a female manager to proceed on a retaliation claim in which her "opposition" activity was simply resisting a male manager's order to fire a female cosmetics sales clerk for not being pretty enough.[282] By the Supreme Court's view, the plaintiff had engaged in protected activity even though she did not report or protest the offensive order to fire the sales clerk, but rather simply said she needed more "justification." It was enough that she reasonably believed that the order to fire the clerk was discriminatory and that the employer, "in light of all the circumstances," was aware of that belief.

California has also expanded the scope of protected employee activity to include an employee's request for a reasonable accommodation with respect to either religious accommodation or disability accommodation.[283]

California courts do seem to recognize that a plaintiff's oppositional activity, to be protected, must have been in good faith; the law does not protect knowingly false charges.[284] Nor does the FEHA protect either lying or withholding information during an employer's internal investigation of a discrimination claim.[285]

6.11.2 Broad definition of adverse employment action

The California Supreme Court acknowledges that an adverse employment action "must materially affect the terms, conditions, or privileges of employment to be actionable" under the FEHA,[286] but broadly defines adverse employment action for purposes or retaliation to include "the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career."

The Supreme Court has thus permitted a retaliation plaintiff to establish an adverse employment action by citing a wide variety of intermediate personnel management decisions, such as (1) unwarranted negative performance evaluations, (2) a refusal to allow the plaintiff to respond to allegedly unwarranted criticism, (3) unwarranted criticism voiced by a manager in the presence of the plaintiff's associates, (4) a "humiliating" public reprobation by a manager, and (5) a manager's solicitation of negative feedback from the plaintiff's staff.[287] By this approach, the "totality of the circumstances" could show an adverse employment action against the plaintiff even if she never suffered a formal job detriment.

6.11.3 Broad application of the continuing violation doctrine

Under federal law, the continuing violation doctrine, properly understood, applies only to harassment cases and does not apply to discrete personnel management decisions.[288] In California it's different. The California Supreme Court, criticizing federal law, has rejected an employer's contention that certain retaliatory acts preceding the limitations period were time-barred. The Supreme Court concluded that limiting employees to evidence of discrete acts within the limitations period would undermine the goals of encouraging informal resolution of disputes and avoiding prematurely filed lawsuits.

Under the Supreme Court's broad view of the continuing violation doctrine, an employer can be liable for acts that preceded the limitations period if they are sufficiently linked to unlawful acts that occurred within that period. And under this approach, the statute of limitations begins to run only when the continuing course of conduct comes to an end (such as by the employer's cessation or by the employee's resignation), or when the employee is on notice that further efforts to end the unlawful conduct would be in vain.[289]

6.11.4 Personal liability for retaliation

For many years, California courts deviated from analogous federal law to impose personal liability on individual supervisors who retaliated against employees for opposing unlawful harassment or discrimination.[290] A California supervisor considering an employment decision on behalf of the employer that could be characterized as retaliatory thus had to consider the prospect of personal liability. It was highly doubtful that even the California Legislature ever intended to create such a conflict of interest for the individual supervisor.

Magnifying the aberrant nature of this doctrine of personal liability for retaliatory employment decisions was the judicial recognition that supervisors are *not* personally liable for employment decisions that turn out to be discriminatory or against public policy.[291] A hypothetical absurd result of the California doctrine was that a single wrongful dismissal could result in no personal liability for the individual decision-maker with respect to claims for sex and race discrimination and a claim for wrongful discharge, but personal liability for the individual decision-maker with respect to a claim for retaliation.

California courts nonetheless insisted on this absurd result by relying on a literal reading of a statutory provision.[292] Finally, in 2008, the California Supreme Court ended the nonsense (albeit only by a close vote of 4-3) by ruling that nonemployer individuals cannot be held personally liable for retaliation, just as they cannot be held personally liable for discriminatory actions.[293]

6.11.5 Broader class of plaintiffs

Ordinarily only employees and job applicants can bring retaliation claims, against their employer or prospective employer. Thus it was that a trial court granted summary judgment against a physician partner who claimed that her medical group removed her as a regional director because she had opposed sexual harassment of female employees. The Court of Appeal, however, reversed, concluding that it would further the purpose of FEHA—to eliminate employment discrimination—to allow a retaliation claim by the doctor, a non-employee, against the physician group, an employer, where the alleged retaliation was in response to her reporting employment discrimination.[294]

6.11.6 Lower causation standard

Under Title VII, a retaliation plaintiff must prove that the "protected activity was a but-for cause of the alleged adverse action by the employer." In other words, the plaintiff must prove that the adverse action would not have occurred but for the employer's retaliatory motive.[295] In California it's different. FEHA plaintiffs need only show that an unlawful retaliatory intent was a "substantial motivating factor" in the employer's adverse action.[296]

6.12 Special Rules for No-nepotism Policies

Employers in America generally may forbid the hiring of anyone who is a relative of any existing employee. This policy does not discriminate against anyone on a protected basis. In California, it's different. California prohibits discrimination based on marital status and interprets that prohibition in a peculiar way.

The DFEH maintains that an employer cannot base an employment decision on whether an individual's spouse is employed by the employer unless (1) there are "business reasons of supervision, safety, security or morale" such that an employer may "refuse to place one spouse under the direct supervision of the other spouse," or (2) "the work involves potential conflicts of interest or other hazards greater for married couples than for other persons," such that "business reasons of supervision, security or morale" warrant a refusal to have both spouses in "the same department, division or facility."[297]

6.13 Difficulty in Obtaining Defendant's Attorney Fees and Even Costs

6.13.1 Fees

Under the federal law that most states follow, a discrimination plaintiff who loses a claim is liable for the defendant's attorney fees if the action was frivolous, unreasonable, or without foundation, even if not maintained in subjective bad faith.[298] Applying this standard, California courts have denied attorney fees to prevailing defendants in FEHA cases, even when the plaintiff has rejected the defendant's more favorable offer of judgment.[299] Legislation effective in 2019 clarifies the legislative intent to deny both attorney fees and costs to offer-making FEHA defendants—even if they make an offer of judgment and win, and even if the plaintiff wins but fails to beat the offer—unless the lawsuit was frivolous, unreasonable, or groundless.[300]

And even those prevailing California defendants who can show that a plaintiff's FEHA claim was frivolous may face still further obstacles to the recovery of attorney fees. *First*, the Court of Appeal has held that awarding attorney fees to a prevailing defendant was an abuse of discretion absent proof regarding the plaintiff's ability to pay for them: "The trial court should also make findings as to the plaintiff's ability to pay attorney fees, and how large the award should be in light of the plaintiff's financial situation."[301]

Second, in a FEHA decision that affirmed summary judgment for the two defendants—the plaintiff's employer and her supervisor—the Court of Appeal affirmed the trial court's decision to award only $1.00 in attorney fees to the prevailing individual defendant, even though the suit against her was "frivolous and vexatious."[302] The Court of

Appeal upheld the decision to give only a nominal fee award because any fee award would benefit the corporate employer, which had paid for the individual's defense, and because the suit against the employer itself, while lacking merit, was not frivolous.

In a more welcome development, a Court of Appeal decision upheld an order requiring the plaintiff to pay a prevailing FEHA defendant $100,000 in attorney fees, where (1) the trial court made express oral findings when it ruled on defendant's motion, (2) the trial court properly considered plaintiff's financial condition, and (3) the trial court did not abuse its discretion in finding that the action was "unreasonable, frivolous, meritless, or vexatious."[303]

6.13.2 Costs

Under federal and California law, the prevailing party in a lawsuit generally is entitled to recover its costs of suit (filing fees, court reporter fees, etc.). But California has instituted a double standard to favor FEHA plaintiffs. The Supreme Court held that prevailing defendants in FEHA cases are not automatically entitled to their costs.[304] Rather, prevailing FEHA defendants seeking costs must show that the action was objectively without foundation when brought, or that the plaintiff continued to litigate after the lack of foundation had become clear.[305] That result follows even when a FEHA defendant made a pre-trial offer—rejected by the plaintiff—and then prevailed at trial: the defendant cannot recover its post-offer costs unless the FEHA plaintiff brought or maintained a frivolous action.[306]

The same kind of double standard has extended to awards of expert witness fees in FEHA cases, even where the defendant has made an offer of judgment that was more generous than what the plaintiff achieved in a verdict, and thus ordinarily would be entitled to recover its expert witness fees (see § 5.16.)

More generally, in 2021, the California Supreme Court held that "[a]n appellate court may not award costs or fees on appeal to a prevailing FEHA defendant without first determining that the plaintiff's action was frivolous, unreasonable, or groundless when brought, or that the plaintiff continued to litigate after it clearly became so."[307]

6.14 No Meaningful Duty to Exhaust Administrative Remedies

A Title VII plaintiff must, before suing, exhaust administrative remedies by filing a personally verified charge with the EEOC, which can investigate, conciliate, and possibly avoid litigation.

California, meanwhile, has systematically removed exhaustion requirements to the point that they have become a mere ministerial formality. *First*, employment discrimination complainants can bypass any administrative process simply by filing a form with the DFEH to "elect court action" and obtain an immediate right to sue. *Second*, California complainants need not even sign the administrative paperwork; the complainant's attorney may sign instead.[308] *Third*, the complainant's attorney need not even bother with a physical signature; the signature can be electronic.[309] Moreover, although the attorney is supposed to give notice of the administrative complaint to the employer, the attorney's failure to do so will not bar a lawsuit.[310] So it is that California employers often learn of an employee's claim of discrimination only once a lawsuit is served.

California also favors complainants when it comes to late administrative filings. Federal law excuses a late administrative filing only under special circumstances, such as where the employer has misled an employee or has concealed facts that the employee needed in order to assert the employee's rights; there is no tolling of the filing deadline simply because the employee has pursued an internal grievance.[311] In California it's different. The California Supreme Court has held that the deadline for filing an administrative complaint of discrimination under FEHA is tolled while the claimant voluntarily pursues an internal administrative remedy with the employer.[312]

To tilt the playing field even further to the complainant's advantage, DFEH regulations provide that "where there is doubt about whether the statute of limitations has run," the complaint will be accepted and timeliness "investigated and analyzed" during the investigation.[313] As a result, it is in the discretion of the DFEH investigator to determine timeliness.

A 2020 Court of Appeal decision did put a few teeth in the exhaustion requirement, however, when it held that a plaintiff challenging his employment termination as age discrimination could not rely on a newly amended DFEH administrative complaint to add class and disparate impact allegations. The Court of Appeal upheld the trial court's denial of request for leave to amend the judicial complaint. The plaintiff, in amending his DFEH complaint more than three years after the DFEH had permanently closed his case, could not rely on the relation-back doctrine, in that the original DFEH complaint could not "bear the weight" of the newly asserted class and impact theories. The original DFEH complaint failed to allege that the employer had discriminated against anyone other than the plaintiff because of age, and did not even suggest that the employer had a policy that fell more harshly on older employees.[314]

6.15 Use of the Unfair Competition Law to Sue for Discrimination

In America generally, laws designed to prevent unfair competition and antitrust violations do not enable employees to sue employers for employment discrimination. In California it's different. The Court of Appeal has held that the Unfair Competition Law (which has a four-year statute of limitations) enables employees to sue employers for age discrimination, the reasoning being that an employer who engages in that discriminatory practice has obtained an unfair competitive advantage over other employers.[315]

Employees who sue under this statute, though, typically are limited in remedy to injunctive relief.[316]

6.16 Disregard of Federal Evidentiary Doctrines

6.16.1 Rejection of the "stray remarks" rule

In America generally, courts rule as a matter of law (either on summary judgment or in a motion for judgment as a matter of law) against discrimination plaintiffs who rely on "stray remarks"—remarks made remote in time or otherwise disconnected from the challenged employment decision, remarks not made by anyone who made or influenced the decision, or remarks not directed to the plaintiff.[317] In California it's different. The Court of Appeal, in reversing a summary judgment for the employer in an age discrimination case, broadly repudiated the "so-called 'stray remarks' rule." The Court of Appeal reasoned that the "stray remarks" rule would impermissibly permit trial judges to weigh evidence in ruling on motions for summary judgment.[318]

The Court of Appeal concluded that the plaintiff should have been able to thwart summary judgment with his assertions that co-workers (who had no apparent connection with the challenged employment decision) had called him "slow," "fuzzy," "sluggish," and "lethargic." In 2010, the California Supreme Court affirmed this reasoning, concluding that the alleged comments should be considered with all the evidence in the record.[319]

6.16.2 Rejection of the "same actor rule"

In America generally, courts have followed the "same actor rule": Where the same actor both hired and fired the same discrimination plaintiff within a short period of time, an inference arises that there was no discriminatory motive in the firing.[320] So the reasoning goes: "[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological cost of associating with them), only to fire them once they are on the job."[321] . California courts also once followed this rule, in line with the general principle that FEHA interpretations should follow Title VII interpretations where the two statutes share the same basic purpose.[322]

Yet a Court of Appeal decision, upholding a jury verdict of race and gender discrimination, disputed the "same actor rule," stating: "Evidence that the same actor conferred an employment benefit on an employee before discharging that employee is simply evidence and should be treated like any other piece of proof. … Placing it in a special category as a 'rule' or 'presumption' or stating it creates a 'strong inference' attaches undue influence to same actor evidence and threatens to undermine the right to a jury trial by improperly easing the burden on employers in summary judgment and postverdict motions."[323] Although the California Supreme Court agreed to review the case, the parties then settled the matter, leaving in doubt the status of the "same actor rule" for purposes of FEHA cases.[324]

6.16.3 Requiring admissibility of "me too" evidence

Discrimination plaintiffs often seek to introduce evidence that other employees—who are not themselves plaintiffs—also suffered discrimination at the hands of the defendant employer. Federal and state courts generally treat "me too" evidence on a case-by-case basis, weighing the evidence's probative value against its potential to create undue prejudice, confusion, or waste of time. The U.S. Supreme Court, in 2008, confirmed that there is no rule necessarily requiring trial courts either to admit or to exclude such "me too" evidence.[325]

In California it's different. In 2011, a Court of Appeal decision overruled a trial court's exclusion of "me too" evidence. The trial court had held that evidence of sexual harassment, to be admissible, must have occurred in the plaintiff's presence, during her employment.[326] The Court of Appeal reversed, holding that evidence of sexual harassment toward nonparty female employees—outside the plaintiff's presence and without her contemporaneous knowledge—should have been admitted, to show the defendant's sexual bias.[327]

A 2018 Court of Appeal decision[328] further illustrates California's leniency about admitting evidence relating to sexual harassment. The jury rendered a verdict for the employer, but the Court of Appeal reversed and ordered a new trial on the ground that the trial court had erred on certain evidentiary issues. The Court of Appeal held that

- the plaintiff should have been permitted to testify about details of sexual electronic messages she had received from the alleged harasser even though she had since lost the messages,
- the trial court should have admitted "me too" testimony from four co-workers, all also allegedly harassed by the alleged harasser, who could present evidence going to his gender bias, and
- the trial court erred in admitting evidence that plaintiff had published on social media her abdominal tattoo, because that display was not "sexual conduct" with the alleged harasser and therefore was rendered inadmissible to show the plaintiff's consent to allegedly unwelcome sexual conduct.[329]

"Me too" evidence does have limits, even in California, where courts have limited the extent of such evidence to facts showing discrimination sufficiently similar to what the plaintiff allegedly suffered. Thus, one plaintiff, who alleged Asian and Japanese ancestry, permissibly was denied the chance to show that his Arab employer discriminated against all non-Arabs. The plaintiff could present evidence that other employees of East Asian or Japanese descent had experienced similar discrimination, but not that the employer had discriminated against non-Arabs generally.[330] Further, while "me too" evidence may be admitted to show intent or motive with respect to the plaintiff's own protected class, it is "never admissible to prove an employer's propensity to harass."[331]

---

1 Gov't Code §§ 12926(d), 12940(j)(4)(A).

2 42 U.S.C. §§ 2000e, 2000e(b); 29 U.S.C. § 630(b).

3 Gov't Code § 12940(c) (unlawful to "discriminate against any person [on any of the protected bases] in the selection, termination, training, or other terms or treatment of that person in any apprenticeship training program, any other training program leading to employment, an unpaid internship, or another limited duration program to provide unpaid work experience for that person").

[4] 42 U.S.C. § 1981(a)(b)(3); *Vaughan v. Anderson Reg'l Med. Ctr.,* 849 F.3d 588, 594 (5th Cir. 2017); *Comm'r of Internal Revenue v. Schleier*, 515 U.S. 323, 326 (1995).

[5] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

[6] *Id.*

[7] AB 9, 2019 bill amending Gov't Code §§ 12960, 12965 and reenacting a bill Governor Brown vetoed in 2018. The extended deadline for filing does not revive lapsed claims. Filing a complaint means filing an intake form with the DFEH, with the operative date of the verified complaint relating back to the filing of the form.

[8] 42 U.S.C. § 2000e-5(e)(1).

[9] *See* Gov't Code §§ 12965(b).

[10] *See* 42 U.S.C. § 2000e-5(f)(1).

[11] 42 U.S.C. § 12102(1)(A).

[12] *Bagatti v. Dep't of Rehab* 97 Cal. App. 4th 344, 360-61 & n.4 (2002).. *But see Nadaf-Rahrov v. Neiman Marcus Grp., Inc.*, 166 Cal. App. 4th 952, 972-75 (2008) (disagreeing with *Bagatti*).

[13] 42 U.S.C. §§ 12112(a), (b)(5)(A).

[14] *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 129 S. Ct. 846 (2009). Note, though, that in dictum the Supreme Court said that oppositional activity may consist of staying put and refusing to implement an unlawful order to discriminate. Extending protection for oppositional activity that far would not differ materially from the California standard.

[15] *McDonald v. Antelope Valley Cmty. Coll. Dist*., 45 Cal. 4th 88 (2008) (plaintiff's voluntary pursuit of internal administrative remedy will toll running of statute of limitations on FEHA claim, even if plaintiff voluntarily abandons the internal proceeding).

[16] *See Johnson v. Ry. Express Agency*, 421 U.S. 454 (1975).

[17] *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 135 (1st Cir. 2004); *Huseein v. Waldorf Astoria,* 134 F. Supp. 2d 591, 599 (S.D.N.Y. 2001); *EEOC v. Sambo's of Ga., Inc.*, 530 F. Supp. 86, 91 (N.D. Ga. 1981).

[18] *Groff v. DeJoy*, *Postmaster Gen.,* 600 U.S. 447, 471 (2023) (when determining whether an accommodation constitutes an "undue hardship," an employer must take into account "all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer") (internal quotations omitted).

[19] *Harris v. City of Santa Monica,* 56 Cal. 4th 203, 211 (2013) (plaintiff who proves a protected status was a substantial motivating factor for an adverse employment action can thereby obtain declaratory relief, injunctive relief, and reasonable attorney fees and costs, although the employer who proves it would have reached the same decision even absent that motivating factor can avoid further relief in the form of reinstatement, back pay, front pay, and noneconomic damages). The *Harris* result, while pro-plaintiff, did improve on the standard jury instruction, CACI 2500, which would have made employers liable for adverse employment actions whenever a protected status or activity "was a motivating reason/factor," where a "motivating factor" as "something that moves the will and induces action even though other matters may have contributed to the taking of the action"). The Court of Appeal has held, rather harshly, that an employer had waived the *Harris* defense (not yet announced) when it had failed to plead it in an answer. *Alamo v. Practice Mgmt. Info. Corp.,* 219 Cal. App. 4th 466, 470 (2013) (defendant "not entitled to an instruction on the mixed-motive or same-decision defense because it failed to plead that defense or any other affirmative defense alleging that it had a legitimate, nondiscriminatory or nonretaliatory reason for its discharge decision in its answer"). On the brighter side, the Court of Appeal has extended the *Harris* reasoning to a claim for tortious discharge in violation of public policy, where the public policy asserted is the FEHA. *Davis v. Farmers Ins. Exch.,* 245 Cal. App. 4th 1302, 1322-23 (2016) (affirming trial decision to give *Harris* jury instruction).

[20] *Gross v. FBL Fin. Servs., Inc.,* 557 U.S. 167 (2009) (under the federal ADEA, plaintiff alleging that adverse action was "because of" his age must "establish that age was the 'but-for' cause of the employer's adverse action"). Title VII has a different standard, because its own "because of" language was amended by the 1991 Civil Rights Act. *See* 42 U.S.C. § 2000e-5(g)(1)(B)(ii). The California Supreme Court in *Harris* crafted, via creative judicial interpretation, a result that closely resembles the legislative compromise that Congress crafted in the 1991 Title VII amendments.

[21] Gov't Code § 12926(o) ("Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, or veteran or military status includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.").

[22] Lab. Code §§ 1101, 1102 (under section 1101, employers must not make regulations or policies "[f]orbidding or preventing employees from engaging or participating in politics," becoming a political candidate, or "[c]ontrolling or directing ... the political activities or affiliations of employees"; under section 1102, employers must not "coerce or influence" employees "to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity").

[23] Gov't Code § 12940(a) (employers shall not "refuse to hire or employ" a person, or prevent them from participating in a "training program leading to employment," based on the person's "marital status").

[24] Gov't Code § 12940(a) (employers shall not "refuse to hire or employ" a person, or prevent them from participating in a "training program leading to employment," based on the persons "sexual orientation"); Gov't Code § 12926(s) (" 'Sexual orientation' means heterosexuality, homosexuality, and bisexuality.").

[25] 2 Cal. Code Regs. § 11030(d) (defining "sex stereotype" as "an assumption about a person's appearance or behavior, gender roles, gender expression, or gender identity, or about an individual's ability or inability to perform certain kinds of work based on a myth, social expectation, or generalization about the individual's sex").

[26] Gov't Code §§ 12920, 12921, 12926(r)(2), 12930(i), 12931, 12940(a)-(d), 12944(a), (c), 12949, 12955, 12955.8, 12956.1(b)(1) & 12956.2; see also 2 Cal. Code Regs. § 11030 (a), (b), (e).

[27] Gov't Code §12926(r)(1)(A) & (B); *see also* Gov't Code §12940(j)(4)(C). FEHA defines "sex" to include "[p]regnancy or medical conditions related to pregnancy" and "[c]hildbirth or medical conditions related to childbirth").

[28] Gov't Code § 12926(r)(1)(C) (protected status of "sex" includes "[b]reastfeeding or medical conditions related to breastfeeding").

[29] Gov't Code §§ 12926(q); *see also id.* §§ 12940(a), (*l*). The statute defines all these terms broadly: "[r]eligious creed," "religion," "religious observance," "religious belief," and "creed" include "all aspects of religious belief, observance, and practice, including religious dress and grooming practices"; "[r]eligious dress practice" includes "the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual observing a religious creed"; and "[r]eligious grooming practice" includes "all forms of head, facial, and body hair that are part of an individual observing a religious creed."

[30] Gov't Code §§ 12926(i)(2)(A), (B) ("genetic characteristics" can be either genes or chromosomes or inherited characteristics, if they are not presently associated with a symptom of disease or disorder but are known to cause or be statistically associated with the risk of causing a disease or disorder in an individual or that individual's offspring). But employers can discriminate on the basis of a medical conduction if the employee, "because of the … medical condition, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations." *Id.* § 12940(a)(2).

[31] Gov't Code §§ 11135, 12920, 12921, 12926(g), 12930(i), 12931, 12940(a)-(d), 12944(a) & (c), 12955, 12955.8, 12956.1(b)(1) & 12993. California defines "genetic information" to mean, as to any individual, information about "(A) the individual's genetic tests; (B) The genetic tests of family members of the individual; (C) The manifestation of a disease or disorder in family members of the individual." Gov't Code § 12926(g)(1). This definition includes "any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual." *Id.* § 12926(g)(2). "Genetic information" does not, however, include information about an individual's sex or age. *Id.* § 12926(g)(3).

[32] Gov't Code § 12940(a) (employers shall not "refuse to hire or employ" persons, or prevent them from participating in a "training program leading to employment," based on their "veteran or military status"); see also Military & Veterans Code § 394 (employers must not discriminate against—nor prejudice or injure—"a member of the military or naval forces of the state or of the United States").

[33] Health & Safety Code § 120980(f) ("the results of an HIV test ... shall not be used in any instance for the determination of ... suitability for employment").

[34] *See* Assembly Bill (AB) 60.

[35] Lab. Code § 230.5 qualifying crimes include: vehicular manslaughter while intoxicated, felony child abuse likely to produce great bodily harm or a death, assault resulting in the death of a child under eight years of age, felony domestic violence, felony physical abuse of an elder or dependent adult, felony stalking, solicitation for murder, a "serious felony," hit-and-run causing death or injury, felony driving under the influence causing injury, and sexual assault).

[36] Lab. Code § 1102.5 (employers must not implement rules, policies, or regulations that prevent employees from disclosing violations of state or federal law, and must not retaliate against employees for making such disclosures).

[37] Lab. Code § 6310 (employers must not discriminate because of reporting or complying with investigations of health and safety violations).

[38] Lab. Code § 98.6(a) (providing remedies for employees discriminated against for claiming or reporting a violation under the jurisdiction of the Labor Commissioner).

[39] Lab. Code § 132a (providing remedies for employees discriminated against for claiming or reporting a workers' compensation violation or workplace injury). For a more thorough discussion, see § 17.8.

[40] Lab. Code §§ 98.6(e), 1102.5(h), 6310(c).

[41] Lab. Code §§ 230.8, 233.

[42] Gov't Code § 12940(*l*), (m).

[43] Gov't Code §§ 12926, 12926.05.

[44] SB 188, 2019 bill amending Gov't Code § 12926 and adding subdivisions (w) and (x) (defining "race" to include "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles" and defining "protective hairstyles to include "such hairstyles as braids, locks, and twists").

[45] 2 Cal. Code Regs. § 11065(i).

[46] 42 U.S.C. §§ 12102(1) & (2) (defining "disability" and "major life activities").

[47] See ADA Amendments Act of 2008, available at https://www.govinfo.gov/content/pkg/PLAW-110publ325/pdf/PLAW-110publ325.pdf (visited Mar. 12, 2022).

[48] 42 U.S.C. § 12102(4)(E).

[49] 2 Cal. Code Regs. § 11065(d). California's broadened definition of "disability" came about through enactment of Assembly Bill 2222, effective 2001. The California Supreme Court, however, has opined that California always defined disability broadly, without regard to whether a limitation on a major life activity imposed a "substantial" limitation.

[50] Gov't Code § 12926.1(c); 2 Cal. Code Regs. § 11065(d) (adding autism spectrum, blindness, deafness, cerebral palsy, obsessive compulsive disorder, organic brain syndrome, post-traumatic stress disorder, and schizophrenia).

[51] Gov't Code § 12926(i) (mental condition), (m) (physical condition).

[52] 42 U.S.C. § 12102(4)(E).

[53] 2 Cal. Code Regs. § 11065(*l*).

[54] 2 Cal. Code Regs. § 11065(*l*).

[55] *Cassista v. Cmty. Foods, Inc*., 5 Cal. 4th 1050, 1052 (1993) ("weight may qualify as a protected "handicap" or "disability" within the meaning of FEHA if medical evidence demonstrates that it results from a physiological condition affecting one or more of the basic bodily systems and limits a major life activity") (superseded by SB 559 § 10 on other grounds).

[56] *Cornell v. Berkeley Tennis Club*, 18 Cal. App. 5th 908 (2017) (reversing a summary judgment for an employer that, in challenging the plaintiff's assertion that her obesity qualified as a disability, failed to present scientific or expert evidence that the obesity lacked a physiological cause).

[57] Gov't Code § 12926(o).

[58] *Rope v. Auto-Chlor Sys. of Washington, Inc.*, 220 Cal. App. 4th 635, 642 (2013) (superseded by statute on another ground); *see also Castro-Ramirez v. Dependable Highway Express, Inc*., 2 Cal. App. 5th 1028, 1037 (2016) (employee's association with physically disabled person is itself considered a disability under FEHA).

[59] *See* Gov't Code § 12940(d), (e).

[60] 2 Cal. Code Regs. § 11069.

[61] Gov't Code § 12940(e)(2).

[62] Gov't Code § 12940(e)(3).

[63] The job offer should not be contingent on anything other than the medical examination. *See Leonel v. Am. Airlines, Inc.*, 400 F.3d 702 (9th Cir. 2005) (unlawful under ADA and FEHA to require medical exam where job offer was also contingent on passing a background check).

[64] Gov't Code § 12940(e).

[65] 42 U.S.C. § 12112(d)(3) (employer "may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination if ... all entering employees are subjected to such an examination"); Gov't Code § 12940(e)(3) ("employer or employment agency may require a medical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties, provided that ... all entering employees in the same job classification are subject to the same examination or inquiry").

[66] Gov't Code § 12940(e)(3).

[67] 42 U.S.C. § 12112(b)(6) (employers must not "us[e] qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity"); Gov't Code § 12940(e)(3) (employers and employment agencies must not "require a medical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties [unless] the examination or inquiry is job related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry").

[68] 42 U.S.C. § 12112(b)(6) ("qualification standards, employment tests [and] other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities" are permitted where "the standard, test or other selection criteria ... is shown to be job-related for the position in question and is consistent with business necessity").

[69] Gov't Code § 12940(e) ("It is an unlawful employment practice, unless based upon a bona fide occupational qualification ... for any employer or employment agency to require any medical or psychological examination of an applicant, to make any medical or psychological inquiry of an applicant, to make any inquiry whether an applicant has a mental disability or physical disability or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.").

[70] 42 U.S.C. § 12112(b)(6) ("examination or inquiry" permitted where "shown to be job-related and consistent with business necessity."); Gov't Code § 12940(f)(2) ("examinations or inquiries" permitted where employer "can show [the examination or inquiry] to be job related and consistent with business necessity").

[71] *DFEH v. Avis Budget Grp., Inc.*, FEHC Dec. No. 10-05-P (Oct. 19, 2010).

[72] Gov't Code § 12940(a).

[73] Gov't Code § 12940(a)(1). *See also* 2 Cal. Code Regs. § 11067(b) (inability of employee or applicant to perform the job is a defense that the employer must prove).

[74] *Green v. State of Cal.*, 132 Cal. App. 4th 97, 102 (2005), *rev'd*, 42 Cal. 4th 254, 264 (2007).

[75] *Green v. State of Cal.*, 42 Cal. 4th 254 (2007).

[76] *Id.* at 271-73 (Werdegar, J., dissenting) (citing 2 Cal. Code Regs. § 7293.8(b)) (further arguing that the California Legislature had acquiesced in this agency interpretation by leaving it undisturbed when the Legislature amended the FEHA). *Green* has been followed consistently since. *E.g.*, *Castro–Ramirez v. Dependable Highway Express, Inc.,* 2 Cal. App. 5th 1028, 1037 (2016); *Wallace v. Cnty. of Stanislaus*, 245 Cal. App. 4th 109, 137-38 (2016).

[77] Health & Safety Code § 11362.5(d) provides: "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." While California led the way, at least 32 other states (together with the District of Columbia) have now enacted similar laws. *Gonzales v. Raich*, 545 U.S. 1, 5 n.1 (2005). www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html (last visited Feb. 22, 2023) ("Thirty-three states and the District of Columbia currently have passed laws broadly legalizing marijuana in some form.").

[78] The Compassionate Use Act has identified each as an example of a condition treated with medicinal marijuana. Health & Safety Code § 11362.5(b)(1)(A).

[79] Health & Safety Code § 11362.785 (emphasis added).

[80] *Ross v. Ragingwire Telecomm.*, 42 Cal. 4th 920 (2008). DFEH disability regulations issued in 2012 confirmed that medical marijuana use was not protected. *Ragingwire* was referenced in the regulation's history.

[81] *Id*. at 933-37 (Kennard, J. dissenting).

[82] *See Cnty. of Tulare v. Nunes*, 215 Cal. App. 4th 1188, 1196 (2013).

[83] 2 Cal. Code Regs. § 11071(d)(2)(A).

[84] *Espindola v. Wismettac Asian Foods, Inc*., 2022 WL 2287437 (9th Cir. June 24, 2022) (reversing summary judgment on FEHA claims and holding triable issue exists as to plaintiff's disability discrimination claim, failure to accommodate, and failure to engage in interactive process claims).

[85] 2 Cal. Code Regs. § 11069.

[86] Gov't Code § 12940(n). *See*, *e.g., DFEH v. Avis Budget Grp., Inc.*, FEHC Dec. Case No. 10-05-P (Oct. 19, 2010) (finding employer's repeated delays in requiring the plaintiff to submit to exam by employer's doctor and failure to respond to numerous inquiries by plaintiff, while plaintiff was on unpaid leave of absence, violates § 12940(n)).

[87] *Wysinger v. Auto. Club of S. Cal.*, 157 Cal. App. 4th 413, 425 (2007) (employer ignored arthritic employee's requests for a transfer that would shorten a long commute; FEHA allows independent cause of action for employees whose employers fail to engage in the interactive process; this provision does not require proof of the elements required by the ADA; federal ADA cases that hold that employers are not liable for refusal to engage in an interactive process are therefore inapposite). *But see Nadaf-Rahrov v. Neiman Marcus Grp., Inc.*, 166 Cal. App. 4th 952, 979-81 (2008) (California courts should follow federal rule that employer is liable for failing to engage in good-faith interactive process only if a reasonable accommodation was available). The Court of Appeal, in *Scotch v. Art Institute of Cal.,* 173 Cal. App. 4th 986, 994-95 (2009), reconciled *Wysinger* and *Nadaf-Rahrov* to hold that an employee must identify a reasonable accommodation that was available when the interactive process should have occurred.

[88] *Nadaf-Rahrov v. Neiman Marcus Grp., Inc.*, 166 Cal. App. 4th 952, 965-66, 971 (2008) (reviving disability discrimination claim of employee dismissed when her physician said she could not perform "work of any kind," because that information pertained to the current position and not all vacant jobs potentially available in the foreseeable future; substantial physical restrictions did not self-evidently prevent plaintiff from performing vacant desk jobs for which she was otherwise qualified; discovery commissioner erred in limiting request to stores in just two cities, even if plaintiff was not entitled to nationwide discovery); *Prilliman v. United Airlines*, 53 Cal. App. 4th 935, 950-51 (1997) ("employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship").

[89] 2 Cal. Code Regs. § 11068(c).

[90] *Sanchez v. Swissport, Inc.*, 213 Cal. App. 4th 1331, 1338, 1341 (2013) (plaintiff could proceed with FEHA disability claim even though already receiving 19 weeks of pregnancy leave; PDLL leave augments, rather than supplants, leaves set forth elsewhere in FEHA).

[91] Gov't Code § 12940(*l*)(4).

[92] *Castro-Ramirez v. Dependable Highway Express, Inc.*, 2 Cal. App. 5th 1028, 1038 (2016). The Court of Appeal modified its decision to withdraw the holding, while continuing to suggest that FEHA may reasonably be interpreted to require accommodation based on an employee's association with a physically disabled person.

[93] *See, e.g.*, *Larimer v. IBM Corp.*, 370 F.3d 698, 700 (7th Cir. 2004).

[94] 2 Cal. Code Regs. § 11065(p).

[95] *Id.* §§ 11065, 11069.

[96] *Id.* §§ 11065, 11069.

[97] *Id.* § 11068(b).

[98] 42 U.S.C. § 1981a(3) (in ADA cases where a discriminatory practice involves the provision of a reasonable accommodation, compensatory and punitive damages "may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business").

[99] *Wallace v. Cnty. of Stanislaus,* 245 Cal. App. 4th 109, 128 (2016).

[100] *Arnold v. Dignity Health*, 53 Cal. App. 5th 412 (2020).

[101] Gov't Code § 12941.

[102] *See* Gov't Code § 12941. The statute, effective 2000, overruled *Marks v. Loral Corp.*, 57 Cal. App. 4th 30 (1997), a decision holding that a reduction in force based on salary considerations would not be discriminatory even if it disproportionately affected older workers.

[103] *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005).

[104] AB 1687, 2016 bill adding Civ. Code § 1798.83.5(a).

[105] *IMDb.com, Inc. v. Becerra*, 2017 WL 772346, at *1 (N.D. Cal. Feb. 22, 2017) ("It's difficult to imagine how AB 1687 could not violate the First Amendment.").

[106] 29 C.F.R. § 1604.11 (1980).

[107] *See generally* LINDEMANN & KADUE, WORKPLACE HARASSMENT LAW (2012).

[108] *See* 26 U.S.C. § 162(q).

[109] "Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute." 9 U.S.C. § 402.

[110] *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 354 (2000); *Reno v. Baird,* 18 Cal. 4th 640, 647 (1998).

[111] Gov't Code § 12940(j)(4)(A).

[112] Gov't Code § 12940(j)(1).

[113] *Id*. (unlawful to harass "an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract"). By a 2016 amendment, any individual employed under "a special license pursuant to Section 1191 or 1191.5 of the Labor Code in a nonprofit sheltered workshop, day program, or rehabilitation facility" may sue for harassment or discrimination under FEHA. Gov't Code § 12926.05.

[114] Gov't Code § 12940(j)(3).

[115] *See* Gov't Code § 12940(j)(1); *State Dep't of Health Servs. v. Superior Ct.*, 31 Cal. 4th 1026, 1044 (2003) (employer with harassing supervisor cannot assert *Ellerth/Faragher* defense, but can escape liability for damages plaintiff could have avoided by reporting the harassment more promptly if (1) employer took reasonable steps to prevent and correct workplace harassment, (2) plaintiff unreasonably failed to use preventive and corrective measures employer provided, and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered).

[116] *See* § 6.5.5; Gov't Code § 12926(t).

[117] Gov't Code § 12940(i).

[118] *Miller v. Dep't of Corrections*, 36 Cal. 4th 446, 466 (2005).

[119] Gov't Code § 12940(j)(1), (k). *See Turman v. Turning Point of Cal., Inc.,* 191 Cal. App. 4th 53, 59-60 (2010) (employer must take immediate, appropriate corrective action in response to harassment complaints, even when harassment is "inherently part of the job").

[120] Gov't Code § 12950(b). For discussion of the California-imposed duty to prevent and correct harassment, see § 6.5.3.

[121] 2 Cal. Code Regs. § 11023(b), (c).

[122] Gov't Code § 12950.1.

[123] 2 Cal. Code Regs. §§ 11019(b), 11034(f)(1).

[124] 146 Cal. App. 4th 63 (2006), *review granted*, 57 Cal. Rptr. 3d 541 (Cal. April 18, 2007).

[125] *Id.* at 75.

[126] 47 Cal. 4th 686, 706 (2009).

[127] 18 Cal. 4th 640, 646-47 (1998).

[128] Gov't Code § 12940(k).

[129] Gov't Code § 12940(j)(1), (3).

[130] *Flait v. N. Am. Watch Corp.*, 3 Cal. App. 4th 467, 476 (1992) (citing Gov't Code § 12940(h)) (emphasis included in original).

[131] *Id.* at 475.

[132] *Id.* at 477.

[133] Gov't Code § 12950(b). The fact sheet (DFEH-185) is available at https://calcivilrights.ca.gov/Posters/?openTab=1 (visited Mar. 10, 2023).

[134] Gov't Code §§ 12950 and 12950.1. The DFEH must make available a one-hour and a two-hour on-line training course that employers can use and must make the training videos, existing informational posters, fact sheets, and on-line training courses available in multiple languages. Gov't Code § 12950.1(j), (k).

[135] Gov't Code § 12950.1(a).

[136] Gov't Code § 12950.1(a)(1), (3).

[137] Gov't Code § 12950.1(a)(1), (2), (3).

[138] Gov't Code § 12950.1(f).

[139] *Id*.

[140] The DFEH accepts complaints from employees that their employers have not complied with the law requiring that sexual harassment prevention training be provided. Such complaints filed after January 1, 2020 will be reviewed in light of the totality of the circumstances, which may include the availability of the DFEH's on-line training courses or the availability of qualified trainers. If the DFEH finds that the law has been violated, then it will work with employers to obtain compliance with the law.

[141] 2 Cal. Code Regs. § 110234, available at https://www.dfeh.ca.gov/shpt (last visited Mar. 29, 2024).

[142] *Id.* § 11024(a)(1), (3).

[143] *Id*. § 11024(a)(4)(A); *cf. Clopton v. Global Computer Assocs.*, 4 AD Cases 360 (C.D. Cal. 1995) (five-employee FEHA jurisdictional threshold means employees within California).

[144] 2 Cal. Code Regs. § 11024(a)(4), (9).

[145] *Id.* § 11024 (a)(12).

[146] *Id.* § 11024 (a)(2)(B).

[147] *Id.* § 11024 (a)(2)(F). *See also id.* § 11024 (c)(2).

[148] SB 970, 2018 bill adding Gov't Code § 12950.3. (The DFEH can seek an order requiring an employer to comply with these requirements.)

[149] Gov't Code § 12950.2 ("practical guidance on how to enable bystanders to recognize potentially problematic behavior and to motivate bystanders to take action when they observe problematic behaviors").

[150] See https://mandatedreporterca.com/training/general-training (last visited Mar. 29, 2024).

[151] AB 1963, 2020 bill amending Penal Code § 11165.7 to expand the list of mandated reporters to include human resource employees of a business of five or more employees that employs minors, as well as adults whose duties require direct contact with and supervision of minors in the performance of the minors' duties in the workplace.

[152] Gov't Code § 12950.1(h)(2).

[153] *See* Lab. Code §§ 1420-1434.

[154] AB 547, 2019 bill amending Lab. Code §§ 1420, 1425, 1429, 1429.5, 1431, and 1432.

[155] Lab. Code § 1700.50 et seq. Talent agencies must retain, for three years, records showing that those educational materials were provided.

[156] AB 3175, 2020 bill amending Lab. Code § 1700.52, effective Sept. 25, 2020, to require that a parent or legal guardian accompany age-eligible minors during employer-provided sexual harassment training made available on-line by the DFEH, and to certify to the Labor Commissioner that the training has been completed.

[157] SB 530, 2019 bill amending Gov't Code § 12950.1(*l*) and adding Lab Code § 107.5 et seq.

[158] AB 241, 2019 bill amending Bus. & Prof. Code §§ 2190.1, 3524.5 and adding § 2736.5(c) (requiring Board of Registered Nursing and the Physician Assistant Board to adopt regulations requiring implicit bias training by January 1, 2022).

[159] *Thompson v. City of Monrovia*, 186 Cal. App. 4th 860, 880 (2010); *Trujillo v. N. Cnty. Transit Dist.*, 63 Cal. App. 4th 280, 289 (1998). *See also Dickson v. Burke Williams, Inc.,* 234 Cal. App. 4th 1307, 1309 (2015) (reversing judgment for massage therapist alleging sexual harassment at work; "there cannot be a valid claim for failure to take reasonable steps necessary to prevent sexual harassment if, as here, the jury finds that the sexual harassment that occurred was not sufficiently severe or pervasive as to result in liability").

[160] *DFEH v. Lyddan Law Grp., LLP*, FEHC Dec. No. 10-04-P (Oct. 19, 2010) (respondent had no written anti-harassment policy or employee handbook, conducted no harassment prevention training, and did not independently investigate employee's complaints; FEHC imposed injunctive relief). *See also* 2 Cal. Code Regs. § 11023(a)(3) ("Department may independently seek non-monetary preventative remedies for a violation of Government Code section 12940(k) whether or not the Department prevails on an underlying claim of discrimination, harassment, or retaliation").

[161] *See, e.g., Mendoza v. W. Med. Ctr. Santa Ana,* 222 Cal. App. 4th 1334, 1344-45 (2014) (plaintiff's expert witness noted "numerous shortcomings in the investigation" into the plaintiff's complaint of harassment; "lack of a rigorous investigation by defendants is evidence suggesting that defendants did not value the discovery of the truth so much as a way to clean up the mess" uncovered by the plaintiff's complaint; "more thorough investigation might have disclosed additional character and credibility evidence for defendants to consider before making their decision"). *See also Nazir v. United Airlines, Inc.*, 178 Cal. App. 4th 243, 277-80 (2009) (inadequate investigation can evidence pretext).

[162] *Kotla v. Regents of Univ. of Cal.*, 115 Cal. App. 4th 283, 294 n.6, 295 n.8 (2004).

[163] *See, e.g., Page v. Superior Ct. (3NET Sys. Inc.)*, 31 Cal. App. 4th 1206, 1212-13 (1995); *Matthews v. Superior Ct. (Regents of the Univ. of Cal.)*, 34 Cal. App. 4th 598, 603-06 (1995).

[164] Gov't Code § 12940(j)(3). The California Legislature overruled *Carrisales v. Dep't of Corrections*, 21 Cal. 4th 1132 (1999), in which the California Supreme Court had recognized that FEHA does not apply to actions between co-workers in the absence of a supervisorial relationship.

[165] *State Dep't of Health Servs. v. Superior Ct.*, 31 Cal. 4th 1026, 1041 (2003).

[166] *Id.* at 1038-39.

[167] *Id.*

[168] *Id.* at 1044.

[169] *Vance v. Ball State Univ.*, 570 U.S. 421, 430-31 (2013) (upholding Seventh Circuit decision that had affirmed summary judgment for the employer; the employer is vicariously liable for harassment perpetrated by its employee only when the employer empowered the harasser to take "tangible employment actions against the victim," such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits).

[170] Gov't Code § 12926(t). California's definition of "supervisor," which has no Title VII counterpart, is "any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment." *Id.* This language mirrors the definition of "supervisor" appearing in the National Labor Relations Act. 29 U.S.C. § 152(11).

The U.S. Supreme Court in *Vance* declined to follow the NLRA definition of "supervisor": "[T]he NLRA may in some instances define 'supervisor' more broadly … . But those differences reflect the NLRA's unique purpose, which is to preserve the balance of power between labor and management … . That purpose is inapposite in the context of Title VII, which focuses on eradicating discrimination. An employee may have a sufficient degree of authority over subordinates such that … the employee should not participate with lower level employees in the same collective-bargaining unit (because, for example, a higher level employee will pursue his own interests at the expense of lower level employees' interests), but that authority is not necessarily sufficient to merit heightened liability for the purposes of Title VII." 570 U.S.

at 435 n.7. Query whether a California court would adopt this reasoning to limit the definition of supervisor under FEHA, or, instead, would choose to justify vicarious employer liability by relying mechanically on FEHA's literal statutory language.

171 Gov't Code § 12940(j)(1).

172 Civ. Code § 1708.5.

173 *Id.*

174 *See* § 5.11.2 (Ralph Civil Rights Act, Tom Bane Civil Rights Act).

175 Civ. Code § 1708.7.

176 Civ. Code § 51.9.

177 SB 224, amending Civ. Code § 51.9 and Gov't Code §§ 12930, 12948.

178 *Hughes v. Pair* 46 Cal. 4th 1035, 1048 (2009).

179 *Knoettgen v. Superior Ct.*, 224 Cal. App. 3d 11, 15 (1990) (prior sexual assault not discoverable in sexual harassment case).

180 *Tylo v. Superior Ct.*, 55 Cal. App. 4th 1379, 1388 (1997).

181 *Rieger v. Arnold*, 104 Cal. App. 4th 451, 464 (2002) (citing Evid. Code § 1106(b)).

182 *Oncale v. Sundower Offshore Servs., Inc.*, 523 U.S. 75, 80, 81 (1998).

183 36 Cal. 4th 446 (2005).

184 *Id.* at 451.

185 *Id*. at 464.

186 *Id.* at 469.

187 Gov't Code § 12940(j)(4)(C) ("Sexually harassing conduct need not be motivated by sexual desire.").

188 *Kelley v. Conco Co.*, 196 Cal. App. 4th 191 (2011).

189 *Taylor v. Nabors Drilling USA, LP*, 222 Cal. App. 4th 1228, 1238 (2014) (heterosexual male suffered sexual harassment when his co-workers' workplace verbal attacks on his heterosexual identity—calling him "queer," "faggot," "homo," and "gay porn star"—were used to harass him, regardless of whether the attacks against him were motivated by sexual desire).

190 SB 820, 2018 bill adding Civ. Proc. Code § 1001. The statutory language suggests that a violation of section 1001 would support a cause of action for civil damages. *Id.* § 1001(b).

191 SB 332, 2021 bill amending Civ. Proc. Code § 1001.

192 *Id.* § 1001(e).

193 *Id*. § 1001(c).

194 AB 3109, adding Civil Code § 1670.11.

195 SB 1300, adding Gov't Code § 12964.5(a).

196 SB 332, 2021 bill amending Gov't Code § 12964.5.

197 Gov't Code § 12964.5(d).

198 Gov't Code §§ 12964.5(b)(3), (4).

199 Gov't Code § 12964.5(e).

200 SB 1300, adding Gov't Code § 12923.

201 *Brooks* held that misconduct was insufficient to prove a sexually hostile environment where the harasser approached a co-worker as she was taking a call and put his hand on her stomach, commented on its softness, boxed her in as he stood by her chair, and forced his hand underneath her sweater and bra to fondle her breast, and approached her a second time as if he would fondle her again.

202 Notice of Approval of Regulatory Action (May 17, 2018), accessible at https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2018/05/NtcApproval1.pdf (visited Mar. 12, 2022).

203 2 Cal. Code Regs. § 11027.1(a).

204 2 Cal. Code Regs. § 11027.1(b).

205 2 Cal. Code Regs. § 11028.

206 2 Cal. Code Regs. § 11028(b), (c).

207 2 Cal. Code Regs. § 11028(a).

208 2 Cal. Code Regs. § 11028(k).

209 2 Cal. Code Regs. § 11028(*l*).

210 Gov't Code § 12951(b).

211 2 Cal. Code Regs. § 11028.

212 2 Cal. Code Regs. § 11028(d).

[213] 2 Cal. Code Regs. § 11028(k).

[214] 2 Cal. Code Regs. § 11028(*l*).

[215] 2 Cal. Code Regs. § 11028(f).

[216] 2 Cal. Code Regs. § 11028(i).

[217] Gov't Code § 12926(v) (expanding definition of "national origin" to include those who, notwithstanding their inability to provide their lawful presence in the United States, have obtained a driver's license under Motor Vehicle Code section 12801.9, which permits undocumented immigrants to obtain a special driver's license if they cannot submit satisfactory proof that their presence in the United States is authorized under federal law).

[218] Employers must not retaliate against an employee for reporting "a violation of or noncompliance with a ... federal rule or regulation." Lab. Code § 1102.5(a).

[219] The Supremacy Clause in Article 6 of the U.S. Constitution establishes the Constitution, the federal statutes, and the treaties of the United States as "the supreme law of the land."

[220] Lab. Code § 1197.5.

[221] Lab. Code § 1199.5.

[222] Lab. Code § 1197.5(b).

[223] *Id.*

[224] Lab. Code § 1197.5(a): "An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except where the employer demonstrates [a specified defense]."

[225] Lab. Code § 1197.5 (a)(1)(A)-(D) (sex), (b)(1)(A)-(D) (race and culture).

[226] This clarification came from the senator who introduced the Fair Pay Act legislation. Senator Hannah-Beth Jackson wrote the President pro Tempore of the Senate a letter printed in the California Senate Daily Journal on May 26, 2015: "[T]he amendments to this bill that strike 'work is performed at different geographic locations' and 'work is performed on different shifts or at different times of day' should not be construed as the Legislature's intent to make those factors unavailable to an employer responding to an equal pay complaint. Rather, the employer may claim a 'bona fide factor,' that may be specifically described by the employer as work that is performed at different geographic locations or work that is performed on different shifts or at different times of day, so long as the employer can prove that the factor is consistent with business necessity, as specified in the bill." *See* http://www.leginfo.ca.gov/pub/senate-journal/sen-journal-0x-20150526-1085.PDF) (last visited Mar. 25, 2024).

[227] Lab. Code § 1197.5(b): "An employer shall not pay any of its employees at wage rates less than the rates paid to employees of another race or ethnicity for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except where the employer demonstrates [a specified defense]."

[228] The prior law, appearing at Lab. Code §§ 1197.5(a)(1)(D)(3), (b)(1)(D)(3), stated: "Prior salary shall not, by itself, justify any disparity in compensation."

[229] The new law, appearing at Lab. Code §§ 1197.5(a)(4), 1197.5(b)(4), states: "Prior salary shall not justify any disparity in compensation."

[230] Lab. Code §§ 1197.5(a)(4), 1197.5(b)(4) ("Prior salary shall not justify any disparity in compensation. Nothing in this section shall be interpreted to mean that an employer may not make a compensation decision based on a current employee's existing salary, so long as any wage differential resulting from that compensation decision is justified by one or more of the factors in this subdivision.").

[231] Lab. Code § 1197.5(k)(1).

[232] Lab. Code §§ 1197.5(d), (i), (h).

[233] Lab. Code § 1197.5(f).

[234] Lab. Code § 1997.5(k).

[235] *Id.*

[236] Lab. Code § 1197.5(e).

[237] Under the Parity in Pay Ordinance, San Francisco employers, effective July 2018, must not ask job applicants about their salary histories. San Francisco Parity in Pay Ordinance, San Francisco Police Code Article 33J, https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_police/0-0-0-49223 (last visited Mar. 25, 2024).

[238] Lab. Code § 432.3.

[239] Lab. Code § 432.3(b).

[240] Lab. Code § 432.3(h) ("voluntarily and without prompting").

[241] Lab. Code § 1197.5.

[242] Lab. Code § 432.3(c)(1).

[243] AB 2282, 2018 bill amending Lab. Code §§ 432.3 and 1197.5.

[244] *Id*.

[245] SB 973, 2020 bill amending Gov't Code § 12930 and adding Chapter 10 (commencing with Gov't Code § 12999).

[246] SB 1162, 2022 bill amending Gov't Code § 12999 and Lab. Code § 432.2.

[247] Gov't Code § 12999(b)(3).

[248] Gov't Code § 12999(a)(1).

[249] Gov't Code § 1299(c).

[250] Gov't Code § 12999(a)(2).

[251] Civil Rights Department, California Pay Data Reporting: Frequently Asked Questions, https://calcivilrights.ca.gov/paydatareporting/faqs/ (last visited Mar. 27, 2024).

[252] California Pay Data Reporting: Frequently Asked Questions, https://calcivilrights.ca.gov/paydatareporting/faqs/.

[253] Lab. Code § 432.3(c)(3), (5).

[254] Lab. Code § 432.3(c)(2).

[255] Lab. Code § 432.3(m). The California Labor Commissioner's office confirmed that a set hourly rate or set piece rate may be included in place of a pay scale if an employer "intends to pay a set hourly amount or a set piece rate amount, and not a pay range." https://www.dir.ca.gov/dlse/california_equal_pay_act.htm (last visited Mar. 27, 2024).

[256] Labor Commissioner's Office, California Equal Pay Act: Frequently Asked Questions, https://www.dir.ca.gov/dlse/california_equal_pay_act.htm (last visited Mar. 27, 2024).

[257] *Id.*

[258] *Id.*

[259] Gov't Code § 12947.5(b)-(c). An employer may also seek an administrative exemption "for good cause shown[.] *Id.* § 12947.5(d).

[260] Gov't Code § 12926(r)(2).

[261] *Id.*

[262] Gov't Code § 12949 (employer can still impose certain dress and appearance standards).

[263] 2 Cal. Code Regs. § 11030(f).

[264] *Id.* § 11034(i)(4).

[265] *Id.* §§ 11034(e)(2) and 11034(e)(2)(B).

[266] *Id.* § 11034(i)(1).

[267] *Id.* § 11034(g).

[268] *Id.* §§ 11034(h)(3), 11034(h)(4). An employer is permitted to use an employee's gender or legal name as indicated in a government-issued identification document only if it is necessary to meet a legally mandated obligation, but otherwise must identify the employee in accordance with the employee's gender identity and preferred name. *Id.* § 11034(h)(4).

[269] *Friedman v. S. Cal. Permanente Med. Grp.*, 102 Cal. App. 4th 39 (2002) (veganism does not qualify as a religion for purposes of FEHA).

[270] Gov't Code § 12940(*l*)(1).

[271] Gov't Code § 12926(q).

[272] Gov't Code § 12940(*l*)(2).

[273] Gov't Code § 12940(*l*)(1).

[274] *Groff v. DeJoy, Postmaster Gen.,* 600 U.S. 447, 470 (2023).]

[275] *Id.* at 466-68.

[276] Gov't Code § 12940(l)(1).

[277] Gov't Code § 12926(u); 2 Cal. Code Regs. §§ 10159 *et seq.*

[278] Gov't Code § 12940(*l*)(3).

[279] *Groff,* 600 U.S. at 473.

[280] *Westendorf v. W. Coast Contractors of Nevada, Inc.*, 712 F.3d 417, 422 (9th Cir. 2013); *McCoy v. Pac. Mar. Ass'n*, 216 Cal. App. 4th 283, 288 (2013).

[281] Federal law may go further than indicated in text. In *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271 (2009), the Supreme Court held that a witness during a sexual harassment investigation engaged in protected oppositional activity by telling the company investigator that the alleged harasser had harassed her. In holding that oppositional activity is not limited to activity that the plaintiff initiates, the Court stated in dictum that oppositional activity can even include passive activity such as standing pat and refusing to implement an unlawful order to discriminate.

[282] *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1042-48 (2005).

[283] Gov't Code § 12940(*l*)(4) (unlawful to "retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision [regarding religious accommodation], regardless of whether the request was granted"); *id.* § 12940(m)(2) (unlawful to "retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision [regarding disability accommodation], regardless of whether the request was granted"). This amendment was in response to *Rope v. Auto-Chlor Sys. of Washington, Inc.*, 220 Cal. App. 4th 635 (2013), which held that a mere request for a disability accommodation is not itself oppositional activity and thus is not protected from retaliation.

[284] *Joaquin v. City of Los Angeles*, 202 Cal. App. 4th 1207, 1226 (2012) ("an employer may discipline or terminate an employee for making false charges, even where the subject matter of those charges is an allegation of sexual harassment").

[285] *McGrory v. Applied Signal Tech., Inc.*, 212 Cal. App. 4th 1510, 1528 (2013).

[286] *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1054 (2005).

[287] *Id.* at 1055.

[288] *Natl' R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002).

[289] *Yanowitz,* 36 Cal. 4th at 1058. *See also Dominguez v. Washington Mut. Bank*, 168 Cal. App. 4th 714, 724 (2008) (reversing summary judgment against claim of sexual-orientation harassment, where plaintiff alleged co-worker made homophobic verbal attacks on her, then ceased verbal attacks and began engaging in other *conduct* to impede plaintiff's ability to do her job; rejecting defendant's argument that the later conduct was different and unrelated in nature to the prior conduct; plaintiff raised triable issues as to whether later conduct constituted continuing FEHA violation); *Jumaane v. City of Los Angeles*, 241 Cal. App. 4th 1390, 1404 (2015) (continuing violation theory did not apply because time-barred acts of retaliation had already reached a threshold level of "permanence"; they had culminated in a suspension at which point the plaintiff knew that future efforts to end the unlawful conduct would have been futile).

[290] *Taylor v. City of Los Angeles Dep't of Water & Power*, 144 Cal. App. 4th 1216, 1237 (2006) (supervisor can be held personally liable for retaliation under FEHA); *Winarto v. Toshiba Am. Elec. Components, Inc.*, 274 F.3d 1276, 1288 (9th Cir. 2001) (same); *Walrath v. Sprinkel*, 99 Cal. App. 4th 1237, 1242 (2000) (same).

[291] *Reno v. Baird*, 18 Cal. 4th 640, 663 (1998) (FEHA does not create personal liability for supervisors who make discriminatory personnel management decisions); *Khajavi v. Feather River Anesthesia Med. Grp.*, 84 Cal. App. 4th 32, 38 (2000) (only employer, not supervisor, can be liable for tort of wrongful discharge in violation of public policy).

[292] Gov't Code § 12940(h) (unlawful for "any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part").

[293] *Jones v. The Lodge at Torrey Pines P'ship*, 42 Cal. 4th 1158, 1162 (2008).

[294] *Fitzsimons v. Cal. Emergency Physicians Med. Grp.*, 205 Cal. App. 4th 1423, 1428-29 (2012).

[295] *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 133 S. Ct. 2517, 2533 (2013).

[296] *Harris v. City of Santa Monica*, 56 Cal. 4th 203, 232 (2013); *Alamo v. Practice Mgmt. Info. Corp.*, 219 Cal. App. 4th 466, 478 (2013); see also *Mendoza v. W. Med. Ctr. Santa Ana*, 222 Cal. App. 4th 1334, 1340-41 (2014).

[297] 2 Cal. Code Regs. § 11057.

[298] *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). See also *Cummings v. Benco Bldg. Servs.*, 11 Cal. App. 4th 1383, 1387-88 (1992) (defendant's attorney fees available only if plaintiffs' lawsuit is deemed unreasonable, frivolous, meritless, or vexatious).

[299] *Mangano v. Verity, Inc.*, 167 Cal. App. 4th 944, 951 (2008) (affirming denial of defendant's motion for attorney fees even though plaintiff's rejection of Code of Civil Procedure section 998 offer made defendant the prevailing party; section 998 does not trump *Christiansburg* standard: defendant still must show the plaintiff's case was frivolous).

[300] SB 1300, 2018 bill amending Gov't Code § 12965(b) ("In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney fees and costs, including expert witness fees, *except that, notwithstanding Section 998 of the Code of Civil Procedure,* a prevailing 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.") (emphasis added).

[301] *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro*, 91 Cal. App. 4th 859, 868 n.42 (2001) ("The trial court should also make findings as to the plaintiff's ability to pay attorney fees, and how large the award should be in light of the plaintiff's financial situation."). See also *Villanueva v. City of Colton*, 160 Cal. App. 4th 1188, 1202 (2008) (trial court must consider non-prevailing party's ability to pay before assessing attorney fees under the FEHA, but where plaintiff offered no evidence that might warrant a reduced fee award, trial court did not abuse discretion in awarding attorney fees to defendant).

[302] *Young v. Exxon Mobil Corp.*, 168 Cal. App. 4th 1467, 1477 (2008) (employee dismissed for closing down 24-hour service station for several hours, in violation of company policy, yet sued for discrimination and harassment).

[303] *Robert v. Stanford Univ.*, 224 Cal. App. 4th 67, 71-73 (2014).

[304] *Williams v. Chino Valley Indep. Fire Dist.*, 61 Cal. 4th 97, 115 (2015).

[305] *Id.* at 115 (prevailing defendant should not be awarded costs and fees unless "the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so").

[306] *Scott v. City of San Diego*, 38 Cal. App. 5th 228, 243 (2019) (defendant that made offer of $7,000 and then prevailed at trial could not recover its $52,000 in post-offer costs absent finding that plaintiff was frivolous). *See also* Gov't Code § 12965(b) (amended to this effect).

[307] *Pollock v. Tri-Modal Dist. Servs*., 11 Cal. 5th 918, 950-51 (2021).

[308] *Blum v. Superior Ct.*, 141 Cal. App. 4th 418, 422 (2006) (DFEH complaint may be verified by attorney for complainant).

[309] *Rickards v. United Parcel Serv., Inc*., 206 Cal. App. 4th 1523, 1529 (2012) (reversing summary judgment granted to employer because Rickards had failed to file a verified DFEH complaint; the complaint that his attorney filed through DFEH's on-line automated system, though unsigned, was sufficient).

[310] *Wasti v. Superior Ct.*, 140 Cal. App. 4th 667, 673-74 (2006) (Gov't Code section 12962, which requires the complainant's attorney to serve the DFEH complaint on the respondent-employer within 60 days, does not create jurisdictional prerequisite to FEHA suit; rather, notice is required only when the DFEH is to investigate, not when plaintiff requests the immediate right to sue).

[311] *See* B. LINDEMANN, P. GROSSMAN & C. WEIRICH, EMPLOYMENT DISCRIMINATION LAW 27-49 to 27-60 (5th ed. 2012).

[312] *McDonald v. Antelope Valley Cmty. Coll. Dist*., 45 Cal. 4th 88, 112-14 (2008) (voluntary pursuit of internal administrative remedy before filing FEHA complaint will toll running of statute of limitations on FEHA claim; nothing in FEHA stands as a bar to the usual rule that limitations periods are tolled while a party pursues an alternate remedy; tolling may apply even if the plaintiff voluntarily abandons the internal proceeding).

[313] 2 Cal. Code Regs. § 10007(e)(2).

[314] *Foroudi v. The Aerospace Corp.*, 57 Cal. App. 5th 992, 1004 (2020).

[315] *Alch v. Superior Ct. (Time Warner Entm't)*, 122 Cal. App. 4th 339, 403 (2004) (age discrimination that violates FEHA also violates the UCL, Bus & Prof. Code § 17200); *Herr v. Nestle U.S.A., Inc.*, 109 Cal. App. 4th 779, 789-90 (2003) (plaintiff entitled to injunction under section 17200 for age discrimination as it gives unfair competitive advantage; rejecting the employer's contention that the UCL aims to protect consumers and competitors, not employees).

[316] *Alch v. Superior Ct. (Time Warner Entm't)*, 122 Cal. App. 4th 339, 404 (2004) (trial court lacked authority to award back pay on an age discrimination theory under the UCL; prevailing plaintiffs generally limited to equitable remedies such as injunctive relief and restitution).

[317] *See generally* B. LINDEMANN & D. KADUE, AGE DISCRIMINATION IN EMPLOYMENT LAW 538-39 (2003).

[318] *Reid v. Google, Inc.*, 155 Cal. App. 4th 1342 (2007), *review granted*.

[319] *Reid v. Google*, *Inc.*, 50 Cal. 4th 512 (2010).

[320] *See, e.g., Bradley v. Harcourt, Brace & Co.,* 104 F.3d 267, 270-71 (9th Cir. 1996); *Horn v. Cushman & Wakefield W., Inc.*, 72 Cal. App. 4th 798, 809 (1999).

[321] *Horn v. Cushman & Wakefield W., Inc.,* 72 Cal. App. 4th 798, 809 (1999) (citing Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991)).

[322] *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 354 (2000).

[323] *Harvey v. Sybase, Inc*., 161 Cal. App. 4th 1547, 1561 (2008), *review granted.* The Supreme Court initially agreed to decide whether FEHA plaintiffs must "present correspondingly stronger evidence of bias if the person responsible for the termination had previously treated the plaintiff favorably." But then the Supreme Court dismissed review. The ultimate result is that *Harvey* was depublished and cannot be cited as authority.

[324] *See also Nazir v. United Airlines, Inc.,* 178 Cal. App. 4th 243, 272, 273 (2009) ("no California case or statute has created a same actor presumption"; same-actor evidence should not have "some undue importance attached to it, for that could threaten to undermine the right to a jury trial by improperly easing the burden on employers in summary judgment").

[325] *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388 (2008).

[326] *Pantoja v. Anton*, 198 Cal. App. 4th 87, 92 (2011).

[327] *Id.*

[328] *Meeks v. AutoZone, Inc.,* 24 Cal. App. 5th 855 (2018).

[329] Evid. Code § 1106(a), (b):

> (a) In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff, unless the injury alleged by the plaintiff is in the nature of loss of consortium.
>
> (b) Subdivision (a) does not apply to evidence of the plaintiff's sexual conduct with the alleged perpetrator.

[330] *Hatai v. Dep't of Transp.*, 214 Cal. App. 4th 1287, 1297-98 (2013), *disapproved of on other grounds Williams v. Chino Valley Indep. Fire Dist.*, 61 Cal. 4th 97 (2015) (upholding decision to admit evidence that supervisor discriminated against employees who were of the same national origin and race as plaintiff, but to exclude evidence that supervisor discriminated against employees of protected classes to which plaintiff did not belong). Another Court of Appeal decision took a favorable view of "me too" evidence. *Johnson v. United Cerebral Palsy/Spastic Children's Found.*, 173 Cal. App. 4th 740 (2009) (reversing summary judgment for employer in pregnancy discrimination case because of "me too" evidence of other women fired for being pregnant, as this evidence, the court opined, went to the employer's motive, for purposes of casting doubt on the stated reasons for an adverse employment action).

[331] *Pinter-Brown v. Regents of Univ. of Cal.,* 48 Cal. App. 5th 55, 96 (2020) (rejecting "run of the mill propensity evidence" where no indication that other complainants or circumstances were similar to plaintiff).

7. Wage and Hour Laws

Federal wage and hour law stems from a 1938 federal statute, the Fair Labor Standards Act, which is enforced by the Wage Hour Division of the U.S. Department of Labor. California has a far more extensive regulation of wages and working conditions, which reflects several sources: the IWC Wage Orders, the Labor Code, judicial decisions, and DLSE interpretations.

The FLSA does not preempt more employee-protective state law. Accordingly, an employer who is subject to both federal and California wage and hour law must comply with whichever law is the more onerous.[1] And the more onerous version is almost always the California version. Thus, the California Supreme Court has repeatedly cited the "recognized principle that state law may provide employees greater protection than the FLSA."[2]

For example, California wage and hour law, unlike federal law:

- imposes a higher and ever-increasing minimum wage (see § 7.2),
- requires that the minimum wage be paid separately for each hour of work, without regard to wage averaging (see § 7.2),
- treats any time under the control of the employer as hours worked (workweek § 7.3),
- requires payment for travel time by nonexempt employees even if it occurs beyond normal working hours (see § 7.3),
- requires reporting-for-duty pay (§ 7.3),
- requires overtime premium pay in many situations beyond the federal standard of work in excess of 40 hours in a workweek—including time and one-half for work in excess of eight hours a day and on the seventh consecutive day in a workweek, and double-time for work in excess of 12 hours a day and work in excess of eight hours and on the seventh consecutive day in a workweek (see § 7.4),
- forbids use of the fluctuating-workweek method to compute the regular rate for salaried nonexempt workers (see § 7.4),
- requires employers to pay wages upon termination of employment, or suffer large "waiting time" penalties (§ 7.5),
- imposes salary and duties criteria, for various exemptions, more onerous than those imposed by federal law (see § 7.6),
- requires that wage and hour exemptions be narrowly construed, as opposed to having them receive simply a fair reading (see § 7.6),
- requires meal, rest, and recovery breaks (see §§ 7.8, 7.9),
- requires an extra hour of pay for each daily failure to provide a meal break (see § 7.10),

- requires an extra hour of pay for each daily failure to provide a rest or recovery break (see § 7.10),
- requires employers to provide employees with suitable seats wherever the nature of the work reasonably permits seating (see § 7.11),
- requires employers to maintain temperatures to provide reasonable comfort to employees consistent with industry-wide standards (see § 7.11),
- requires employers to pay for any uniforms and equipment that they mandate (see § 7.12),
- requires employers to pay for routine employee business expenses (see § 7.13),
- imposes special reporting requirements for piece-rate pay (see § 7.14)
- creates special requirements for commission payments (see § 7.15),
- creates special rules for bonus payments (see § 7.16),
- disallows tip credits (see § 7.18),
- treats earned vacation pay as a form of deferred wage (see § 7.19),
- restricts some employers' ability to schedule and staff employees as they chose (see §§ 7.22, 7.23),
- requires employer to issue periodic itemized wage statements (see § 16.3), and
- imposes potentially massive civil penalties for violations of wage and hour statutes (see § 7.25).

Moreover, California often eschews the guidance provided by analogous federal labor law. The DLSE has stated: "we cannot use the analysis employed by the federal courts in establishing the obligations of California employers under the unique provisions of the California Industrial Welfare Commission wage orders."[3] The California Supreme Court has made similar pronouncements—dismissive of federal law whenever the high court can read California law to be more plaintiff-friendly (see § 7.3.5).

To make matters still worse for employers, California courts decree that the California Labor Code, unlike the federal Fair Labor Standards Act, must be "liberally construed" to protect employees. (See § 7.5.) This rule of construction does not mean that "plaintiff always wins"; it just seems that way. The California Supreme Court did once say this: "A mandate to construe a statute liberally in light of its underlying remedial purpose does not mean that courts can impose on the statute a construction not reasonably supported by the statutory language."[4] Of course, that was not an employment case.

7.1 Requirements Imposed by IWC Wage Orders

7.1.1 Overview of Wage Orders

The Industrial Welfare Commission has issued 18 "Wage Orders" to cover a dozen broadly described industries and several occupations. Although the IWC no longer operates, the DLSE continues to enforce the Wage Orders. The Wage Orders remain in effect alongside the body of law enacted by the Legislature and are codified in the

Labor Code; these two sources of authority establish complementary regulations governing wage and hour claims.

The Wage Orders address monetary compensation and working conditions, covering such items as minimum wage, reporting-time pay, overtime premium pay, double-time premium pay, certain payroll deductions, employer-required uniforms and equipment, meal periods, and rest breaks. These requirements affect all employees who are not expressly exempted, and exemptions are interpreted narrowly. The Wage Orders impose further requirements, as to both exempt and nonexempt employees, with respect to such matters as change rooms and resting facilities, seats, temperature, and elevators. Many rules are identical from one Wage Order to the next.

In promulgating the Wage Orders, the IWC engaged in a quasi-legislative capacity;[5] a Wage Order thus deserves "the same dignity" as a statute and is considered "presumptively valid."[6] Every employer subject to a Wage Order must post the order in a conspicuous place seen by employees during work hours. Multiple occupational orders may apply to an employer not covered by an industry order. For a copy of the Wage Orders, see https://www.dir.ca.gov/iwc/wageorderindustries.htm. Printed versions of the industry Wage Orders, for workplace posting, can be ordered from http://www.dir.ca.gov/wp.asp.

It is not always clear which Wage Order applies to a particular workplace. In one case, workers sued the City of Los Angeles for denying meal and rest breaks. The workers drove vehicles used to pump out sewers and to transport refuse to collection locations. Although the Wage Orders generally exempt public employees, the plaintiffs thought they could rely on Wage Order 9, which applies to commercial drivers even if they are public employees. But the trial court, affirmed by the Court of Appeal, rejected this approach. The Court of Appeal held that Wage Order 9 applies to transportation workers only, and that the plaintiffs, who were involved in wastewater collection, were sanitation workers, not transportation workers. The Court of Appeal reasoned that for purposes of Wage Orders, it is the "main purpose of the business"—not the job duties of the employee—that determines whether a Wage Order applies. Although the workers here operated commercial vehicles to carry out their sanitary function, operating vehicles was not their employer's primary purpose, but was merely incidental to that purpose. Because the main purpose of the business was not transportation, Wage Order 9 did not apply.[7]

7.1.2 Summary of major Wage Order provisions

While each Wage Order is distinct, the Wage Orders address essentially the same subject matters, in essentially the same order, with often similar if not identical language. Here is a summary of the major recurring provisions.

§ 3 Hours and Days of Work: Employers must pay daily overtime, weekly overtime, seventh-day overtime, double time for daily hours more than 12, and double time for daily hours more than eight on the seventh consecutive workday. As to any alternative workweek schedule the employer establishes (subject to detailed requirements), the employer must maintain a regular hourly rate, accommodate employees' religious observances and conflicting schedules, and refrain from coercing employees to vote for or against a proposed alternative workweek. The employer must also honor an employee's right not to work more than 72 hours per week.

§ 4 Minimum Wage: California employers must pay the minimum wage, which, for all California employers, has been $15.50 since January 1, 2023. The federal minimum wage, meanwhile, has remained at $7.25 since July 2009.

§ 5 Reporting Time Pay: Employers must pay reporting-time pay to employees who must "report for work" and who are not provided with at least one-half the usual or scheduled work. Employers must also pay employees for at least two hours of work if they are called back to work without being provided with at least two hours of work. Reporting-time pay is not due if operations have ceased because of threats to employees or property, recommended closure by civil authorities, failure of public utilities, or other causes beyond the employer's control.

§ 6 Licenses for Disabled Workers: Certain sub-minimum wages apply for licensed disabled workers.

§ 7 Records: Employers must record each employee's full name, home address, occupation, social security number, birthdate (if under 18), must record when each work period begins and ends, and must record each meal period (although the employer need not record meal periods during which operations cease and need not record authorized rest periods). Employer must provide clocks in "all major work areas" or within a "reasonable distance." The employer must also record split-shift intervals, total daily hours worked, wages paid, other compensation furnished each payroll period, total hours worked each payroll period, applicable rates of pay, etc. Additionally, employers must furnish itemized statements of all deductions, inclusive dates of the period for which the employee is paid, the name of the employee or identifying number, the name of the employer, etc. Employers must make all required records available for inspection by the employee on reasonable request.

§ 8 Cash Shortage and Breakage: Employers must not deduct from wages for any cash shortage, breakage, or loss of equipment that was not caused by the employee's dishonest or willful act or by gross negligence.

§ 9 Uniforms and Equipment: Employers must provide and maintain any required employee uniform, a uniform being "apparel and accessories of distinctive design or color." Employers must provide and maintain any required tools or equipment, except for hand tools and equipment customarily required by the craft that are used by employees who earn at least twice the minimum wage. While employers may require reasonable deposits for employer-provided uniforms and equipment and written agreements for deductions for loss of unreturned items, employers must not deduct for "normal wear and tear."

§ 10 Meals and Lodging: Employers can take certain credits against minimum wage for employer-provided meals and lodging, and charge certain amounts of rent for required living at employer-provided lodging.

§ 11 Meal Periods: Employers must not make an employee work for a period of more than five hours without a 30-minute off-duty meal period, and must provide a "suitable place" for employees to eat if they are to eat on the premises. Exceptions: mutual-consent waivers if the work shift does not exceed six hours, and permissible "on duty" meal periods by mutual written agreement if the nature of the employee's work prevents relief from all duty.

§ 12 Rest Periods: Employers must authorize and permit 10-minute rest periods (which still count as working time) near the middle of each work period of four hours "or major fraction thereof" (more than two hours). Exception: Employers need not authorize a rest period for daily work time that is less than three and one-half hours.

§ 13 Change Rooms and Resting Facilities: Employers must provide suitable places to safekeep outer clothing during working hours and work clothing during nonworking hours, clean space to change clothing "in reasonable privacy and comfort" (separate from toilet rooms), and suitable facilities to rest during work hours.

§ 14 Seats: Employers must provide "suitable seats" when the nature of the work "reasonably permits." If the nature of the work does not reasonably permit the use of a seat, the employer still must make a suitable seat available nearby for use when employees are not engaged in active duties, so long as a seat would not interfere with the performance of those duties.

§ 15 Temperature: Employers must maintain, in each work area, temperatures providing "reasonable comfort, consistent with industry-wide standards for the nature of the process and the work performed." Employers also must remove "excessive heat or humidity" created by work and must maintain the temperature in toilet, resting, and change rooms at or above 68 degrees.

§ 16 Elevators: Employers must provide adequate elevators or escalators when employees work four or more floors above ground level.

§ 17 Exemptions: The DLSE can—on a showing of "undue hardship" to the employer and no material effect on employees—waive the requirements of sections 7, 12, 13, 14, 15, and 16 of the Wage Orders.

§ 18 Filing Reports: Referring to employer duties imposed by Labor Code section 1174(a).

§ 19 Inspection: Referring to employer duties imposed by Labor Code section 1174.

§ 20 Penalties: Violations of the Wage Order trigger criminal misdemeanor penalties (as described in Labor Code section 1199) as well as civil penalties in the amount of $50 per pay period for each underpaid employee for an initial violation and $100 per pay period for each underpaid employee for each further violation.

§ 22 Posting of Order: Employers must keep the Wage Order posted in an area where it may be easily read during the workday. Where that is not practical, employers must make a copy of the order available on request.

7.2 Minimum Wages

7.2.1 State-wide minimum wage

California, along with more than a dozen other states, imposes a higher minimum wage than does federal law. Effective January 1, 2024, California's minimum wage is $16.00 for all employers, regardless of the number of employees.[8] The federal minimum wage, by contrast, has remained at $7.25 since July 2009.

By 2016 legislation, the California minimum wage will continue to rise further in accordance with inflation.[9] For each year following 2022, the Department of Finance will calculate a yearly minimum wage increase at either 3.5% or the increase in the U.S. Consumer Price Index for Urban Wage Earners and Clerical Workers (U.S. CPI-W), whichever is lesser. The minimum wage will stay the same if that index is negative.

The Governor can pause minimum-wage hikes based on economic conditions, up to two times.

California heaps significant penalties on employers that fail to pay minimum wage. *First*, the underpaid employee is entitled to liquidated damages in an amount equal to the amount of the unpaid wages, plus interest thereon,[10] unless the employer shows that it had reasonable grounds, in good faith, to believe that its actions complied.[11] *Second*, the Labor Code imposes civil penalties of $100 per employee per pay period for a first, intentional, violation, and $250 per employee per pay period for repeated violations, on "[a]ny employer or other person acting either individually or as an officer, agent, or employee of another person" who fails to pay the minimum wage.[12] *Third*, the Labor Code imposes criminal penalties on "[e]very employer or other person acting either individually or as an officer, agent, or employee of another person" who "causes to be paid to any employee a wage less than the minimum fixed by" a Wage Order.[13]

7.2.2 The peculiar "pay separately for each hour" doctrine

In America generally, employers subject to the FLSA satisfy their duty to pay the minimum wage by paying an average hourly wage that meets the minimum, even if the employer does not separately compensate each hour of work within a workweek. And the FLSA also permits employers to pay employees a piece or commission rate, *without* specially compensating employees for non-productive working time, so long as their *average* hourly wage meets the minimum. In California, it's different.

Development of a peculiar doctrine. The DLSE historically has interpreted California law to require that employees be paid the minimum wage separately for each hour deemed to be time worked, regardless of what the employees earn on average.[14] Courts eventually have endorsed this California-specific approach.[15] The Court of Appeal held that drivers, paid on the basis of mileage and at certain hourly rates for certain tasks, must be paid additionally for each rest break: "a piece-rate compensation formula that does not compensate separately for rest periods does not comply with California minimum wage law."[16] The Court of Appeal reached a similar conclusion as to nonexempt commissioned sales employees, holding that they, too, must be paid separately for their rest breaks.[17]

This Cal-peculiarity received its judicial baptism in 2005, in a Court of Appeal decision reasoning that because Labor Code provisions reveal "a clear legislative intent to protect the minimum wage rights of California employees to a great extent than federally," California employers must provide "full payment of wages for all hours worked."[18] California courts then extended this "pay separately for every hour worked" concept to piece-rate workers. The Court of Appeal held that employers must separately pay employees the minimum wage for each hour worked—including waiting time and other time during which the employee does not earn a piece-rate. Under this interpretation of the minimum wage, an employer cannot average piece-rate earnings over the total hours worked, even if the employer guarantees that employees will earn, on average, the minimum wage for all hours worked.[19]

A federal court in California applied California's peculiar "pay separately for every hour worked" principle to employees paid on a commission basis.[20] In early 2017, the Court of Appeal followed suit, holding that the requirement to separately pay for rest-break time applies to employees paid on commission.[21] The "pay separately for every hour worked" doctrine has extended, in the context of piece-rate work, to require employers to pay separately for rest breaks, on the rationale that rest periods count as hours worked and are paid as such for workers earning an hourly wage, but are not separately paid for in the piece-rate context (see § 7.14).

A 2018 Court of Appeal decision, *Certified Tire & Service Centers Wage and Hour Cases*,[22] endorsed a creative variable hourly based compensation system that approximated the wages paid under a traditional commission or piece-rate plan. Automotive technicians earned an hourly wage, exceeding the minimum wage, for all hours worked. A technician's hourly rate could be higher, based on a formula that rewarded work billed to the customer. Billed dollars charged to a customer went into a formula that produced "production dollars," which were divided by the hours worked during the pay period to determine a "base hourly rate." If the base hourly rate exceeded the guaranteed minimum hourly rate, then the technician are paid the base hourly rate for all time worked during the pay period. If the base hourly rate were lower, then the guaranteed minimum hourly rate would apply for all such time worked.

The plaintiffs challenged this pay method because it required employees to perform work that could not generate production dollars (e.g., tire rotations, oil changes, cleaning, attending meetings) and thus could not increase the base hourly wage. The plaintiffs argued that these non-productive activities were uncompensated.

Certified Tire rejected this argument, because the pay plan was an hourly-based compensation system, not an activity-based compensation system: "Although the hourly rate differs from pay period to pay period because technicians have the opportunity to increase their guaranteed minimum hourly rate based on the generation of production dollars, the technicians are always paid on an hourly basis for all hours worked at a rate above minimum wage regardless of their productivity, and regardless of the type of activity in which they were engaged during those hours." The eminent good sense of this decision notwithstanding, the California Supreme Court

granted review and then vacated the *Certified Tire* decision with directions to the Court of Appeal to reconsider the decision in light of the Supreme Court's decision in *Oman v. Delta Air Lines.*[23]

Oman, decided in 2020, decided that the Delta Air Lines pay scheme complies with California minimum wage law. *Oman* ruled that California's legal limits on wage borrowing permit pay schemes that promise to compensate all hours worked at or above the minimum wage, even if particular components of scheme fail to attribute to each compensable hour a specific amount equal to or greater than the minimum wage.[24]

7.2.3 Local "living wage" ordinances

The national movement favoring a $15 or more minimum wage has won resounding approval in California, not only at the state level but in many municipalities that have adopted various forms of minimum wages—either for companies generally or for those companies that contract with local government.[25] In Southern California, minimum-wage ordinances apply in Long Beach, Los Angeles (City and County), Malibu, Pasadena, San Diego, Santa Monica, and West Hollywood. In Northern California, minimum-wage ordinances apply in Alameda, Belmont, Berkeley, Burlingame, El Cerrito, Cupertino, East Palo Alto, Emeryville, Foster City, Fremont, Half Moon Bay, Hayward, Los Altos, Menlo Park, Milpitas, Mountain View, Novato, Oakland, Palo Alto, Petaluma, Redwood City, Richmond, Sacramento, San Carlos, San Francisco, San Jose, San Leandro, San Mateo (City and County), Santa Clara, Santa Rosa, Sonoma, South San Francisco and Sunnyvale.

Application beyond city limits. Some ordinances can apply beyond the city limits. A Court of Appeal affirmed the application of the Hayward, California living wage ordinance to employees who lived or worked outside the city limits. The ordinance's failure to specify how it would apply in situations where contractors performed work outside of the municipality did not render it unconstitutionally vague. The Court of Appeal also permitted employees, as intended third-party beneficiaries of their employer's contract with the city, to sue to enforce their employer's contractual promise to comply with Hayward's living wage.[26]

San Francisco minimum wage. San Francisco has stretched the wage and hour envelope as much as any other California city, and the area of the minimum wage is no exception. Voters, by enacting Proposition J, made the minimum wage $14 as of July 2017. Proposition J made the minimum wage $15 by July 2018, with the minimum wage thereafter hiked to further levels as determined by annual changes in the cost of living. The minimum wage rose to $18.07 in July 2023.[27] On July 1, 2024, the San Francisco hourly minimum wage increased to $18.67.[28]

Here are a few examples of municipal minimum wages:

Berkeley. As of July 1, 2022, the minimum wage was raised to $16.99.[29] As of July 1, 2023, the minimum hourly wage was raised to $18.07, and effective July 1, 2024, it increased to $18.67.

Emeryville. As of July 1, 2022, the minimum wage was raised to $17.48.[30] As of July 1, 2023, the minimum wage was raised to $18.67. On July 1, 2024, the minimum increased to $19.36.

City of Los Angeles. The minimum wage rose to $12 in July 2017, with further annual raises each July. Beginning on July 2020, the minimum wage for employers with 26 or more employees was $15.00.[31] Effective July 1, 2022, the minimum wage was increased by $1.04 for a new minimum wage rate of $16.04.[32] Effective July 1, 2023, the minimum wage was again raised to $16.78.[33] On July 1, 2024, the minimum hourly wage increased to $17.28. In the City of Los Angeles, the minimum wage for hotel employees is determined annually based on a consumer price index. Effective July 1, 2023, the hotel workers' minimum wage rose to $19.73 for employees of hotels with 160 or more rooms.[34] On July 1, 2024, the hotel workers' minimum wage rose to $20.32 for employees of hotels with 160 or more rooms.

County of Los Angeles. Effective July 1, 2022, the minimum wage for Los Angeles County was $15.96, for employers of 26 or more employees.[35] Effective July 1, 2023, the minimum wage increased for all employees to $16.90.[36] On July 1, 2024, the minimum wage increased to $17.27. Beginning January 1, 2022, the

County's Chief Executive Officer began determining the adjusted rates of the minimum wage based on the Consumer Price Index, which shall take effect on July 1 of that year.[37] This practice will continue each year thereafter.[38]

Oakland. Under Measure FF, passed in 2014, the minimum wage rises with cost-of-living increases. The minimum wage from January 1, 2021 to January 1, 2022 was $15.06.[39] On January 1, 2023, the minimum wage was raised to $15.97 under Measure FF for non-hotel employees.[40] On January 1, 2024, the minimum wage was raised to $16.50 under Measure FF for non-hotel employees. Under Oakland's Measure Z (section 5.93), starting January 1, 2023, the hotel minimum wage increased from $16.38 to $17.37 per hour with health benefits, and from $21.84 to $23.15 per hour without health benefits.[41] On January 1, 2024, the hotel minimum wage increased to $17.94 per hour with health benefits, and to $23.91 per hour without health benefits.

Palo Alto. Palo Alto raised the minimum wage to $15.00 in January 2019 and $15.65 in January 2021.[42] Effective January 1, 2022, the minimum wage rate for the City of Palo Alto was increased to $16.45.[43] On January 1, 2023, the minimum wage rate for the City of Palo Alto was increased to $17.25.[44] On January 1, 2024, the minimum wage rate for the City of Palo Alto was increased to $17.80.

Richmond. The minimum wage was $15.54 since January 2022 and increased to $16.17 on January 1, 2023.[45] On January 1, 2024, the minimum wage rate increased to $17.20.

San Diego. The minimum wage was $15.00 since January 1, 2022 and increased to $16.30 on January 1, 2023.[46] On January 1, 2024, the minimum wage rate increased to $16.85.

San Jose. The minimum wage was $16.20 since January 2022 and increased to $17.00 on January 1, 2023.[47] On January 1, 2024, the minimum wage rate increased to $17.55.

Santa Monica. The Santa Monica ordinance generally tracks the minimum wage requirements of Los Angeles County.[48] The minimum wage reached $15.00 as of July 2021.[49] Starting on July 1, 2022, the minimum wage was increased to $15.96 per hour.[50] It increases by the annual Consumer Price Index thereafter, which Santa Monica posts annually on or near January 1.[51] The minimum wage was raised to $16.90 on July 1, 2023. The minimum wage beginning on July 1, 2024 is $17.27. The wage for hotels and businesses operating on hotel property matches the City of Los Angeles Citywide Hotel Worker Minimum Wage Rate; Santa Monica will post new rates annually on or near May 15.[52]

7.3 Pay For Hours Worked

7.3.1 Statutory right to recover contractual pay

Federal law empowers employees to sue employers for statutorily guaranteed minimum and overtime wages, but not for employer failures to pay higher, contractually promised, wages. In California it's different. California employees can sue under the Labor Code to recover wages required by **either** statute **or** contract.[53]

7.3.2 California counts as hours worked any time subject to the employer's control

The "hours worked" concept is central to both federal and California law. But the California concept is broader, requiring employers to pay wages where federal law does not.

Federal law considers time worked if it is spent predominantly for the employer's benefit, as opposed to the employee's benefit. California is different in two significant respects. *First*, California defines "hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so."[54] California law thus applies a broader definition of "hours worked" than the FLSA does.[55] *Second,* while the federal Portal-to-Portal Act specifies that employers need not pay for "walking, riding, or traveling to and from the actual place of performance of the

principal activity or activities … [the] employee is employed to perform," or for "activities … preliminary to or postliminary to [the] principal activity or activities," California law applies a broader standard. Nonetheless, California law does require, as under federal law, that the employer knew or should have known of the time alleged to be hours worked.[56]

Cases dramatically illustrate California's extraordinarily broad concept of hours worked. The Ninth Circuit, in a 2020 case interpreting California law, ruled in favor of truck drivers claiming minimum wages for the time they spent during legally required 10-hour "layovers." Upholding a jury verdict against the employer, the Ninth Circuit reasoned that the drivers could be under the employer's "control" during the layovers simply because the employer required them to ask permission to spend their layovers at home: "control may exist even when employees are permitted to perform personal activities if the employer imposes meaningful restrictions on the employee."[57] Meanwhile, the California Supreme Court, in a 2019 case, had addressed the distinction between FLSA and California standards as to hours worked, noting that FLSA-regulated work involves exertion that is controlled or required by the employer and that is pursued necessarily and primarily for the employer's benefit, while California-regulated work, by contrast, is any time spent under the control of the employer.[58]

In 2020 the California Supreme Court went a further step in *Frlekin v. Apple, Inc.*,[59] a referral from the Ninth Circuit that the Supreme Court accepted to decide this question: "Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages, bags, or personal technology devices voluntarily brought to work purely for personal convenience by employees compensable as 'hours worked' within the meaning of California Industrial Welfare Commission Wage Order No. 7?"[60] The Supreme Court, in a unanimous decision, answered this question in the affirmative.

At issue in *Frlekin* was whether a retail store had to pay employees for the time they spent undergoing bag checks and other security procedures as they left the store. *Frlekin* began with California's peculiar test for "hours worked": whether the employee's time was subject to the control of the employer. *Frlekin* noted that, under this test, time is compensable regardless of whether it is spent "working," and noted that California in this respect deviates from more limited federal law.

Frlekin rejected the ground on which the employer won summary judgment from the trial court, which had reasoned that searches of items were not compensable if the employees voluntarily brought the items to the workplace for their own personal convenience. *Frlekin* distinguished authority holding that employers are not liable for the time that employees voluntarily spend commuting on an employer-provided shuttle, because the shuttle rides primarily benefit employees, while security checks—reflecting the employer's interest in deterring theft—primarily benefit the employer. Accordingly, "the potential antecedent 'choice' by some employees not to bring any searchable items to work does not invalidate the compensation claims of the bag-toting … employees who are required to remain on the employer's premises while awaiting an exit search of those items."[61]

Frelkin emphasized that "with regard to cases involving *onsite* employer-controlled activities, the mandatory nature of an activity is not the only factor to consider"—indeed, courts should consider additional factors, such as "the location of the activity, the degree of the employer's control, whether the activity primarily benefits the employee or employer, and whether the activity is enforced through disciplinary measures."[62]

Following the California Supreme Court's decision, the Ninth Circuit reversed the district court's summary judgment for the employer, and ordered the district court to grant summary judgment for the plaintiffs on the issue of compensability.[63]

In 2024, the California Supreme Court further addressed this concept in *Huerta v. CSI Electrical Contractors,* a case presenting certified questions from the Ninth Circuit, regarding the compensability of time workers spent

waiting at a security checkpoint and traveling to and from the employer parking lot.[64] The construction workers in *Huerta* were building a solar power facility on privately-owned land, with allegedly lengthy delays in entering and exiting the site resulting from the particular ingress and egress restrictions. A private road provided access between a guard shack, located at the perimeter of the land and the employee parking lots, located several miles away at the construction site. At the beginning of the workday, Huerta was required to report to a security gate located about ten to fifteen minutes from the employee parking lot. Cars formed a long line outside the security gate, while security guards scanned each worker's badge, and occasionally looked inside cars and truck beds. This same procedure occurred at the end of the work day, and it could take up to a minute or more per vehicle, thereby causing exit delays of between five and thirty minutes. Compounding the delay at the security checkpoint was the fact that two endangered species lived on the land, which caused the California Department of Fish and Wildlife to limit the speed workers could travel to 20 miles per hour, prohibited them from playing music (which might disturb the animals), and required that a biologist ensure the road was clear of these species each morning.

The California Supreme Court found that time spent on employer premises waiting in a personal vehicle to scan an identification badge and have a security guard peer into a personal vehicle was compensable as "hours worked." It concluded that Huerta was subject to employer control while waiting in the line to exit through the security gate—even while in his personal vehicle. The Court reached this conclusion because the search was for CSI's benefit (i.e., preventing theft of tools and endangered species on the site), and the employee was required to do more than merely present a badge in order to exit (i.e., undergo the examination of the vehicle). The Court did not create a rule of general application, but rather relied on the presence and activities of the security guards to distinguish this case from more typical situations like stopping at a gate at a parking garage to exit, swiping a card or using a key to unlock a door to exit the employer's building, or flashing an identification card to bypass a security line.

7.3.3 Reporting time pay and split shift pay

Reporting time. Nonexempt employees sometimes report for work, only to find that the expected work is not available. When that happens, California employers must pay for at least one-half the scheduled work (with the pay to be no less than two hours nor more than four hours).[65] Nonexempt employees also sometimes report for work a second time within the same workday to find less than two hours of work to perform on the second reporting. When that happens, the employer must pay two hours "at the employees' regular rate of pay, which shall not be less than the minimum wage."[66]

The Court of Appeal has rejected a plaintiff's claim that, as to a 45-second termination meeting he was summoned to attend, he should have received four hours of pay instead of the two hours of pay that he did receive. The Court of Appeal reasoned that on the day in question the plaintiff was scheduled for a meeting of unspecified length and so was not entitled to anything beyond the two-hour minimum.[67]

The Court of Appeal has also clarified that because reporting-time pay is due only when the employee has work for less than one-half the scheduled shift, an employer can schedule short meetings and pay for only the length of the meeting. The example the Court of Appeal gave was a meeting scheduled for one and one-half hours, but lasting only one hour. In that case, no reporting-pay would be due, the Court of Appeal said, because the employer furnished work for more than one-half the scheduled time.[68]

The traditional meaning of "report for work" is to show up at the workplace at the appointed time, ready to work. That certainly was the phrase's meaning when the relevant Wage Order language was enacted, in 1947. But in 2019 an activist Court of Appeal decision held (at the pleadings stage) that employees potentially "report for work" if, while subject to an on-call schedule, they comply with an employer requirement to telephone two hours before

the shift to see if work is available that day.[69] The majority opinion—expressing solicitude for the plight of workers whose on-call schedules "significantly limit" their ability to "earn income, pursue an education, care for dependent family members, and enjoy recreation time"—held that employees potentially "report for work," and thereby would be eligible for reporting pay if they then receive no work, simply by calling the employer to report their availability; they need not in these circumstances travel to the workplace to "report for work." A well-reasoned dissenting opinion bemoaned this judicial activism: "[O]ur fundamental task in interpreting Wage Orders is ascertaining the drafters' intent, not drawing up interpretations that promote the Court's view of good policy. … It is our Legislature's responsibility to enact any necessary legislation to address any hardship to employees who are required to call the employer to discover if they must report for work."[70] Note that this decision was procedurally in the context of reviewing a trial court's order sustaining a demurrer to the reporting time pay claim at the pleadings stage. Although the appellate decision reversed and permitted this claim to clear a demurrer, it was not a ruling on the merits. On remand, the trial court later entered a ruling denying class certification based on the multiple individualized questions presented by the plaintiff's theory of liability as to how a call-in shift amounted to "reporting" for work.

The California Supreme Court did not accept review of the Court of Appeal's decision reversing the demurrer and allowing the plaintiff's claim to proceed. And then the Ninth Circuit, in a 2020 decision, similarly held that employees who must call in to check whether they will work a "call-in shift" are potentially entitled to reporting-time pay *and* are *also* potentially entitled to pay for the time of the call and to reimbursement of any personal phone expense incurred in the call.[71] In subsequent 2020 cases, federal district courts have extended this rationale further in denying a motion to dismiss, finding that "'report for work' may include making oneself available to receive a call to report for duty" when subject to discipline from the employer.[72]

Split shifts. Some nonexempt employees have a work schedule interrupted by nonpaid, nonworking hours (other than meal breaks), with a designated beginning and quitting time. The DLSE opines that an interruption exceeding one hour may give rise to a split shift.[73] Under the Wage Orders, California employers must pay split-shift employees "one hour's pay at the minimum wage … in addition to the minimum wage for that workday."[74] The commonsensical interpretation of this Wage Order provision is that split-shift employees, if they get paid more than the minimum wage, are entitled to any difference between what they actually earned and what they would have earned had they received the minimum wage for their entire shift plus an extra hour.[75] The Court of Appeal has adopted this interpretation, rejecting the plaintiff's argument that a split-shift employee is automatically entitled to an extra hour of wages paid at the rate of the minimum wage.[76]

7.3.4 Travel time

Commuting. Under the FLSA, as amended by the Portal-to-Portal Act, employers need not pay for the time an employee spends traveling to and from work, so long as the travel itself is not integral to the work performed. In California it's different: travel time is compensable if the employee is subject to the control of the employer, even if the employee is not working. Under this doctrine, even commuting time in California is compensable if the employer requires its employees to travel to work on its buses.[77] The Ninth Circuit has highlighted the difference between federal and California law, with the Ninth Circuit holding that where employees were required to use company vehicles for commuting purposes, the commute was not compensable under the federal Employment Commuter Flexibility Act, but was compensable under California law, which requires that employees be paid for all time during which they are subject to the employer's control.[78] A Court of Appeal decision has recognized that, even in California, time spent traveling in an employer-provided vehicle, even one loaded with equipment and tools, is not compensable if using that vehicle is "optional and voluntary."[79]

In a 2020 case, the Court of Appeal considered whether service technicians who repair copiers at customer sites were entitled to pay for their commuting time, because they used their personal vehicles to transport company tools and equipment to the customer work sites. The Court of Appeal reversed a summary judgment for the

employer, reasoning that if the commuting technicians carried a volume of tools and parts that did not allow the technicians to use their commute time effectively for their own purposes, then they are deemed subject to the employer's control during that time for purposes of determining hours worked and entitlement to wages.[80]

In another 2020 travel-time case reversing a summary judgment for the employer, the Court of Appeal addressed Wage Order No. 16, involving construction and other industries. At issue was the pay required for the 30-40 minutes of daily travel from a refinery's electronic entry gate to the assigned job site. In a suit brought to recover wages for that time, the trial court granted summary judgment for the employer, relying on the CBA's designation of that travel time as "non-compensable commuting time." The Court of Appeal reversed, holding that a CBA may not bargain away the nonwaivable right to be paid no less than the minimum wage for employer-mandated travel time. That right appears in section 5(A) of Wage Order 16, which mandates payment of wages, at regular or premium rates, for "employer-mandated travel that occurs after the first location where the employee's presence is required by the employer." Section 5(D) provides a CBA exemption, but that exemption applies only to regular and premium rates, and does not waive the separate requirement that employees receive not less than the minimum wage.[81]

In 2024, the California Supreme Court held that time spent on employer premises in a personal vehicle, driving from the employee parking lot to the security gate—subject to certain employer rules—*could possibly* be compensable as "employer-mandated travel" but not "hours worked" within the meaning of Wage Order 16.[82] Part of the reasoning for this conclusion was that the mere fact that the employee is required to follow employer-mandated rules relating to safe travel *does not* render the employee subject to employer control (i.e., not "hours worked"). Under the language of the Wage Order at issue, travel time is compensable when an employee travels between two locations, and the employee's presence at the first location serves some employment-related purpose. When an employee must be present at a location because it is the lone means of ingress/egress to a worksite, that does not necessarily render the employee's presence at that location "required by the employer."

Overnight travel. Under federal law, hours worked do not include non-working travel time spent beyond normal working hours. California is different, treating as hours worked any compulsory travel time, because it is time subject to the control of the employer, regardless of whether the employee actually works during that time.[83]

7.3.5 On-call time

Federal law applies two factors in assessing whether "on call" time is entitled to compensation: (1) the degree to which the on-call employee is free to engage in personal activities and (2) the agreements between the parties.[84] In California it's different. The California DLSE deems irrelevant any agreement between the parties as to whether on-call time is compensable. Instead, the essential test for compensability is simply whether the employer imposed restrictions on the on-call employee's ability to engage in personal activities so as to render the employee subject to the employer's control. Employers can minimize the impact of on-call compensability by paying for on-call time at some wage (e.g., the minimum wage) that is lower than the normal wage.

Sleeping time. The Court of Appeal has held that ship-board employees who worked 14 consecutive shifts of 12-hour days (followed by 14 days off), and who were otherwise on call, were entitled to pay for *all* their on-call hours, because of the requirement that they sleep aboard ship and remain within no more than 45 minutes of the ship at all times. The Court of Appeal rejected federal authority that would consider agreements between the parties governing pay for on-call work, because California law depends on the employer's control, without regard to agreements.[85]

One sensible Court of Appeal decision held that if an employee is on a 24-hour shift, then an employer can deduct up to eight hours as noncompensable sleep time, so long as (1) the sleep is uninterrupted, (2) the employer provides the on-call employee a comfortable place to sleep, and (3) the employee has agreed in writing that this period would not be compensated. But then the California Supreme Court took this decision for review[86] and issued a sweeping decision that further highlights how peculiar California employment law can be.[87] The Supreme Court held that on-site, on-call construction site security guards were entitled to pay for all their on-call time, *including their sleeping time*, even though federal regulations regarding resident employees would permit the employer and employee to make reasonable agreements about the amount of uncompensated free time, and to exclude eight hours of sleep time from a 24-hour shift.

More generally, the Supreme Court emphasized generally the differences between federal law and more employee-friendly California law, proclaiming that California courts should not incorporate a federal standard on compensable time absent convincing evidence that California authorities intended to incorporate the federal standard.[88]

7.3.6 Security procedures

Under the FLSA, time that employees spend undergoing post-shift security screenings is *not* compensable. The Supreme Court so held in 2014, reasoning that this screening activity for warehouse employees was not "integral and indispensable to the principal activities that an employee is employed to perform," and thus was exempted from FLSA requirements by the Portal to Portal Act of 1947.[89]

California, however, has no analogous exemption, and makes time compensable wherever an employee is under the employer's control. Federal district courts in California have routinely certified classes of retail workers who sought pay for the time they spent cooperating in routine bag checks upon departing the store.[90] In 2020, the California Supreme Court definitively determined that the time that employees spend undergoing post-shift security screenings was compensable as "hours worked," even where the process was voluntary.[91]

This rule has also been extended to time spent on Covid screenings to enter the workplace.[92]

As discussed in § 7.3.2, in 2024, the California Supreme Court held that time workers spent waiting at a security checkpoint for security guards to inspect the workers' personal vehicle was, based on the facts of the case, compensable as hours worked.[93]

7.4 Computing Wages Owed

7.4.1 Employer duty to record hours

California employers must record and maintain (in addition to name, address, and other personal information) voluminous data as to each employee. The items that employers must record include gross wages earned, net wages earned, total hours worked, the number of any piece-rate units earned, any applicable piece-rate, inclusive dates of pay periods, all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each rate, the time each work period and meal period began and ended, and all deductions made.[94] California employers must not prohibit employees from maintaining their own personal record of the hours they have worked or the piece-rate units they have earned.[95]

7.4.2 Workday and workweek calculation

For purposes of computing daily and weekly overtime pay, employers must count the hours worked within each "workday" and "workweek." Employers often designate the workweek as beginning at midnight on Sunday and the workday to begin at midnight each day, though the workday and workweek can begin at any time the employer

designates (or at different times for different groups of employees). Time worked within the designated workday counts toward daily overtime, and time worked within the designated workweek counts toward weekly overtime.

California courts have found "artificial" workweek designations unlawful if those designations aim to avoid overtime obligations. One Court of Appeal decision held that employees who worked 14-day shifts from Tuesday to Tuesday on boats could recover seventh day overtime compensation on both the seventh and 14th days of each consecutive 14-day work period, even though the employer's designated workweek began on Monday at 12:01 a.m. and ended on Sunday at midnight, as the Court of Appeal found that the employer had artificially designated its workweek to avoid overtime obligations.[96]

7.4.3 The *de minimis* doctrine—Not

Federal courts applying the FLSA have recognized that some work time off the clock is too short, sporadic, or difficult to record to be compensable.[97] This time is considered *de minimis* (too trivial to care about). *De minimis* is a doctrine rather than an affirmative defense that a defendant must plead.[98] Exemplifying the doctrine in action are rulings that the time spent to undergo certain bag checks while exiting a retail store was *de minimis* and thus not compensable.[99]

But does the judicially created *de minimis* doctrine, originating in cases interpreting federal law, also apply in California? Although the DLSE and the Court of Appeal long acknowledged that the *de minimis* doctrine applies under California law,[100] the California Supreme Court, in its 2018 *Troester v. Starbucks Corp.* decision,[101] concluded otherwise.

The case came to the Supreme Court on a referral from the Ninth Circuit, which certified this question that the Supreme Court agreed to review: "Does the federal Fair Labor Standards Act's de minimis doctrine, as stated in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946) and *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984), apply to claims for unpaid wages under the California Labor Code sections 510, 1194, and 1197?"[102]

Troester is another classic example of California public policy deviating from analogous federal policy, with the result that the California standard is more onerous on employers. *Troester* first held that California statutes and regulations have not adopted the federal *de minimis* doctrine. *Troester* emphasized that courts "liberally construe the Labor Code and wage orders to favor the protection of employees," and that the California Supreme Court has "recognized the divergence between IWC wage orders and federal law, generally finding state law more protective than federal law."[103]

Moreover, *Troester* held that although the *de minimis* doctrine exists as a general background principle, it would not apply to the facts at hand, where the employer required the employee to work off the clock several minutes per shift. *Troester* specifically declined to "decide whether there are circumstances where compensable time is so minute or irregular that it is unreasonable to expect the time to be recorded."[104] Meanwhile, *Troester* was generally skeptical of the *de minimis* doctrine: "one of the main impetuses behind the … doctrine in wage cases is 'the practical administrative difficulty of recording small amounts of time for payroll purposes.' … But employers are in a better position than employees to devise alternatives that would permit the tracking of small amounts of regularly occurring worktime. … [T]echnological advances may help with tracking small amounts of time. … [W]e decline to adopt a rule that would require the employee to bear the entire burden of any difficulty in recording regularly occurring worktime."[105]

Making matters worse, a Ninth Circuit opinion applying *Troester* reversed summary judgment for a retail employer with respect to off-the-clock exit inspections, where the trial court had found that the unpaid exit delays were small, irregular, or administratively difficult to record (i.e., *de minimis*). The Ninth Circuit rejected the employer's argument that the exit delays were *de minimis* even under *Troester*. The Ninth Circuit interpreted *Troester* to mandate pay where "employees are regularly required to work off the clock" for times that are more than "minute," "brief," or "trifling," and rejected the employer's argument that there should be a 60-second threshold, by which otherwise compensable periods as long as 59 seconds could be disregarded.[106]

7.4.4 "Rounding"

Historically, federal law and state law permitted employers to compute employee work time by using a rounding method, "provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked."[107] For instance, in a 2012 decision, the Court of Appeal held that an employer's policy of rounding employees' time clock entries to the nearest tenth of an hour was lawful because the rounding policy was facially neutral and did not systematically under-compensate employees for time worked.[108]

Subsequently, in a 2018 opinion, another Court of Appeal rejected a challenge to a health care employer's practice of rounding time to the nearest quarter-hour. The rounding system in question was neutral on its face and, in practice, overcompensated employees as a whole. The plaintiffs did not raise a triable issue as to the validity of the system by citing that they and a bare majority of employees at a single hospital suffered a net loss of compensable time during a discrete period.[109]

The Ninth Circuit likewise has followed a common-sense approach to evaluating an employer's practice of rounding to the nearest quarter-hour, recently affirming summary judgment for an employer whose rounding practice complied with both the FLSA and California wage and hour laws and was neutral in design and in outcome.[110]

But the California Supreme Court began to sow seeds of doubt about rounding in its 2021 *Donohue v. AMN Services, LLC.* decision, which held that employers may not round time to measure compliant meal periods.[111] *Donohue* rejected the employer's argument that rounding of meal periods was permissible on the ground that it resulted in overpayment of *wages* to employees over time. *Donohue* clarified that the relevant inquiry was not on regular wages but on *premium pay* for meal period violations. As to that premium pay "the rounding policy is not neutral. It never provides employees with premium pay when such pay is not owed, but it does not always trigger premium pay when such pay is owed."[112] *Donohue* also inserted, in dictum, some ominous commentary about rounding generally, reminding litigants that the California Supreme Court has never approved the validity of a facially fair and neutral rounding practice, and observing that evolving technology has reduced the practical advantages that commended rounding to judges in the first place.[113]

In *Camp v. Home Depot USA, Inc.*, the Court of Appeal took up the California Supreme Court's invitation to reevaluate the legality of rounding under California law.[114] In *Camp*, the employer had a practice of recording employee time punches to the minute, but then rounding the time worked to the nearest quarter-hour. One of the plaintiffs in the case lost a total of 470 minutes over the course of four and a half years due to the employer's rounding policy.[115] But because the employer's rounding policy was facially neutral and, on average, did not undercompensate employees, the trial court granted summary judgment in favor of the employer on the rounding claim.

The Court of Appeal reversed and remanded for further determination, holding that pursuant to Labor Code section 510, employees must be compensated for all time worked. As to the plaintiff who lost time due to the rounding policy, the employer had not paid the employee for over seven hours of work, and this amount of time

could not be considered *de minimis*. The Court of Appeal stated that where employers who "can capture and [have] captured the exact amount of time an employee has worked during a shift, the employer must pay the employee for 'all the time' worked …" According to the Court of Appeal, there is "no provision in California law that privileges arithmetic simplicity over paying employees for all the time worked."

On February 1, 2023, the California Supreme Court granted review of *Camp v. Home Depot USA, Inc.* Given the California Supreme Court's prior commentary in *Donohue* regarding rounding, there is risk that the California Supreme Court will significantly restrict—if not eliminate—employers' ability to use time-rounding policies.

In any event, a "rounding" practice should not be confused with an "exception reporting" practice that gives employees a "grace period" to clock in a few minutes before or after the scheduled shift, while simultaneously forbidding any work outside the scheduled shift (subject to expressly authorized exceptions, and subject to the employee indicating the scheduled hours or some expressly different amount of hours were worked each day and week). Under this system, the electronically recorded time would not be the measure of hours worked but rather would serve as a method to confirm attendance.[116] California courts have not (yet) rejected this federally approved practice, which can work well with respect to fixed schedules from which deviations are rare and where employees cannot, as a practical matter, perform work before or after the designated shift times.

7.4.5 Overtime premium pay

In America generally, employers must pay nonexempt employees at an overtime premium rate (1.5 times the regular hourly rate) only to the extent that they work over 40 hours per week. In California it's different. Nonexempt employees typically also earn *daily* overtime—premium pay for work over eight hours a day, and for the first eight hours of work on a seventh consecutive workday in a workweek.[117] There is also a premium pay rate of *double* the regular rate for work performed over 12 hours a day and over eight hours on the seventh consecutive workday in a workweek. These special premiums apply even where the working time does not exceed 40 hours a week.

A 2011 Court of Appeal decision recognized that California employers could mitigate some of the harshness of these requirements by a mutual agreement with employees to pay a fixed salary that covers all hours worked, including overtime,[118] but in 2012 the California Legislature eliminated this option, forbidding employers to use such agreements.[119]

Salaried nonexempt employees: fluctuating workweek method for overtime pay calculations not permitted. California law differs from federal law on how to calculate overtime pay for salaried nonexempt employees. Federal law permits employers to use the "fluctuating workweek" method, which recognizes the economic reality that the weekly salary covers all hours worked that week, so that only the overtime "premium" is due for overtime hours.

California, by contrast, requires the use of the "fixed workweek" method, which irrebuttably presumes that the weekly salary is paid only for a 40-hour workweek (at most).[120] Under this method, both overtime premium *and* base salary would be due for each overtime hour worked. As shown below, the "fixed workweek" method results in greater liability where employers have misclassified salaried nonexempt employees as exempt.

Under the federal "fluctuating workweek" method, the regular rate for a given week for a nonexempt salaried employee is the weekly salary divided by the total number of hours worked that week. Consider an employee paid $800 per week who works 50 hours one week: the regular rate for that week would be $16 per hour ($800 divided by 50), and the overtime premium rate would be $24. The amount of premium pay due for that week would be ten

hours of overtime times $8 per hour, or $80, because for the ten overtime hours the employee has already been paid the regular rate of $16, and would be entitled to only an additional $8 per hour (0.5 times the regular rate).

In California the regular rate would be higher. For the same nonexempt salaried employee, working the same hours, the regular rate would be $800 divided by only 40 hours (not the 50 hours actually worked).[121]

The regular rate would thus be $20, making the premium rate $30. In addition, because the fixed workweek method presumes that a salary covers only the first 40 hours of work, the employee would be entitled to extra pay in the amount of ten hours multiplied by the entire premium rate of $30, not just the extra $10 per hour.

The federal and California methods thus diverge at two junctures: (1) how to calculate the *regular* rate of pay, and (2) what multiplier to apply to the amount due. As to the *regular rate*, the federal fluctuating-workweek method divides weekly salary by all hours worked in a week, while the California fixed-workweek method divides weekly salary by only 40 hours. As to *the multiplier*, the fluctuating workweek multiplies the regular rate by 0.5, while the fixed-workweek multiplies the regular rate by 1.5. Thus, the employee who has $80 of weekly premium pay elsewhere in America would have $300 in California:

	Weekly Salary	Weekly Hours	Regular Rate	Multiplier	OT Hours	OT Pay
Fluctuating Workweek	$800.00	50	$16.00	0.5	10	$80.00
Fixed Workweek	$800.00	50	$20.00	1.5	10	$300.00

7.5 Wage Payment Rules

Full and prompt payment of wages due "is a fundamental public policy" of California.[122] Various Labor Code provisions require immediate (or otherwise prescribed) payment of wages upon an employee's discharge, layoff, or resignation,[123] require regular payment of wages,[124] and prohibit an employer from insisting that an employee release wage claims before paying the employee all wages that are undisputably due.[125] California courts hold that these and similar statutes, considered "remedial in nature," must be liberally construed, "with an eye to promoting the worker protections they were intended to provide."[126]

7.5.1 Payment during employment

The Labor Code aims to "ensure that employees receive their full wages at specified intervals while employed, as well as when they are fired or quit,"[127] and this protection applies not only to hourly employees but even to highly paid executives and salespeople.[128] Labor Code sections 204, 204b, and 205 set forth detailed requirements for establishing regular paydays. Section 207 requires that employers post notices identifying when and where wages are paid. Nonexempt employees must be paid at least semimonthly and must be paid no later than seven days after the close of the pay period.[129] A failure to pay wages due in a pay period can result in penalties of $100 or $200 per employee per pay period plus 25% of the unpaid wages.[130] Court of Appeal decisions have held that this worker-protection legislation entitles all employees—even highly paid executives making very large salaries under a written employment agreement—to sue for wages under the Labor Code and to recover attorney fees for a successful wage claim.[131]

7.5.2 Method and place of payment

The payment of wages must be in a form redeemable in cash on demand, without discount, at an established place of business within California.[132] Labor Code sections 208 and 209 require that an employer pay final wages due at the place of employment (when the employee is fired) or the employer's offices (when the employee quits), and to make the final paychecks of striking workers available on the next regular payday.

Payment by direct deposit. Employers generally may satisfy their obligation to pay wages by making direct deposits to the employee's account in a California bank, provided that the employee has voluntarily consented to this form of wage payment during employment.[133]

Payment by debit card. The DLSE has opined that California employers can meet their duty to pay wages in cash or by negotiable instruments through the means of an electronic debit card, so long as the employee has agreed in writing to this method of payment and so long as the employee can use the card without fee for the first transaction in each pay period, to permit immediate free access to the entirety of the wages.[134] However, employers should ensure that this option is in addition to other methods of wage payment, including traditional paper checks.

7.5.3 Payment upon termination of employment

What are the "wages" that must be paid upon termination? A failure to provide an employee with a required meal or rest or recovery break entitles the employee, under Labor Code section 226.7(c), to one additional hour of pay. Does the employer's failure to pay that extra hour give rise to a section 203 penalty for failing to pay timely termination wages? One might think the correct answer is No, in that the extra hour of pay is a remedy for a violation, not some wage earned through the employee's labor. The Court of Appeal held as much in a 2016 decision.[135] The Supreme Court upset reliance on that sensible result by granting review of the question in another case,[136] but then deemed the matter moot because of a later development affecting that case.[137] A 2019 Court of Appeal decision confirmed that a failure to pay meal or rest premium pay is not a failure to pay "wages" and thus does not trigger any penalty for an untimely wage payment.[138] But then the California Supreme Court granted review of this decision and issued a devastating opinion in 2022, in *Naranjo v. Spectrum Security Services, Inc.*[139]

At issue in *Naranjo* was whether meal premium payments owed because of meal-break violations were "wages earned and unpaid at the time of discharge" under Labor Code section 201. Willful failures to pay such wages trigger statutory penalties under Labor Code section 203. The employer argued that the meal premium pay required by section 226.7(c) is a remedy for a statutory violation rather than wages earned through work. But *Naranjo* disagreed, reasoning that any meal-break violation has occurred because an employee had worked too long into a shift, and similarly reasoning that meal premium wages are "earned" in that they were due because of the employee's efforts—the employee worked too long in the light of the meal-break requirements. It mattered not to the high court that its decision was deviating from existing law—established by lower California appellate decisions—that the Legislature over the years had not sought to change.[140] Upon remand, the appellate court in *Naranjo* held that section 203 and section 226 penalties were not warranted as to the meal period claims at issue in that case, because the employer's violation was not "willful" such that section 203 penalties were supported, and also holding that "there was a good faith dispute regarding whether premium pay constituted 'wages' that must be reported on wage statements."[141] On May 6, 2024, the California Supreme Court announced its decision affirming the Court of Appeal.[142] It ruled that the "good faith" defense applies to claims seeking to impose penalties under California Labor Code section 226. Thus, in order to establish entitlement to penalties, an employee must show that an employer's failure to comply with section 226(a) was both knowing and intentional.

Payment of vacation pay upon termination. Unless otherwise provided by a collective bargaining agreement, the wages that the employer must pay a departing employee include all accrued, unused vacation pay. Vacation pay due at the time of termination must be calculated at the final rate of pay on the basis of daily accrual, even if accrual of vacation pay ordinarily has been calculated on an annual, monthly, or weekly basis.[143] It is an open question whether "final rate of pay" is the equivalent of "regular rate of pay" for purposes of paying accrued, unused vacation at termination.[144] (See § 7.19.)

Timing of payment. Many states permit employers to pay final wages in the regular payroll cycle. In California it's different. California employers must pay a discharged employee in full on the day of discharge.[145] An employee who quits must be paid not later than 72 hours of the notice of resignation, or earlier, at the time of quitting, if the employee has given at least 72 hours of notice.[146] If an employer does not comply with these requirements, then the employee is entitled to waiting time penalties from the due date, in an amount of up to 30 days of' wages. (See § 7.5.4).

The California Supreme Court has decided that an employer owed waiting-time penalties to an employee who had not *resigned*, but rather had *retired*. At issue was whether Labor Code sections 202 and 203, which authorize a suit by an employee who "quits" employment, likewise authorize a suit by an employee who has retired. The high court answered in the affirmative, reasoning that employees retiring fall into the broader category of employees who have "quit" employment within the meaning of the general prompt payment rule of sections 202(a) and 203.[147]

Payment by direct deposit. California law once "deemed terminated" the employee's authorization of direct deposit if the employee was fired or quit. The Legislature reformed that annoying law, however, to permit employers to make the final payment of wages by the previously authorized method of direct deposit.[148]

When is the day of discharge? Because of the severe waiting-time penalties imposed, employers must establish the day of discharge. The day of discharge is not necessarily the last day on which work is performed. In cases of suspected employee misconduct, many California employers suspend an employee without pay pending further investigation or deliberation regarding the decision whether to discharge the employee. This approach enables an employer to have the final paycheck ready on the day of discharge. If, however, the employer reaches its final decision to discharge, and releases the employee from employment, before the day of final pay, the employer would risk waiting-time penalties.

When are temporary employees discharged? A "temporary employee" might be called to work for a fixed-term assignment, and then wait a few days before taking the next assignment. Is there a "discharge"—requiring immediate payment of all earned wages—every time a temporary assignment ends? In a case involving an individual hired for a one-day modeling job and then not promptly paid for her services, the Court of Appeal relied on the plain meaning of the statutory term "discharge" to hold that an employee whose temporary assignment simply runs its course has not been "discharged" and, therefore, cannot recover waiting-time penalties for lack of an immediate payment; rather, final payment can occur at some mutually agreed time or other reasonable time.[149] The California Supreme Court then swept this pro-employer ruling off the books and held that the employer's obligation to pay all earned wages upon termination of employment is not limited to a situation where an employee is released from an ongoing employment relationship, but also applies upon completion of the specific job assignment or time duration for which the employee was hired.[150]

Special relief for certain employers of temporary employees. The Legislature, responding to the special needs of certain employers of temporary workers, has adopted a sensible approach to final pay that in a business-friendly state would apply to all employers. As to final pay for temporary service employees working for certain employment agencies, a 2008 law generally permits weekly payments, "regardless of when the

assignment ends," subject to certain exceptions pertaining to daily work assignments, labor disputes, and other special situations.[151]

Similarly as to print shoot employees, the Photoshoot Pay Easement Act of 2019 authorizes payment of wages to "print shoot employees"—individuals hired for a limited duration to render services relating to a still-image shoot for use in print, digital, or internet media—on the next regular payday after the employment ends, rather than subjecting the employer to liability for failing to pay final wages on the last day of employment. Further, final wages can be mailed or made available to the employee at a location specified by the employer in the county where the employee was hired or worked, and the payment is deemed to occur on the date that pay is mailed or made available.[152] Motion picture employers enjoy similar special legislation.[153]

7.5.4 Waiting-time penalties

Willful failure to pay wages due upon termination can result, under section 203 of the Labor Code, in a "waiting time" penalty equal to the employee's daily rate of pay for up to 30 working days.[154] The employer's good faith belief that no wages are owed is a defense,[155] but ignorance of the law or mistakes in calculation generally are not defenses to waiting time penalties claims.[156] (See § 13.3.)

Although penalties most obviously apply to failures to pay timely for work done during the final pay period, the DLSE and courts have also applied the penalty where the final paycheck fails to cover wages earned at any time during employment.

Absent some constitutionally imposed limitation,[157] the amount of the waiting-time penalty does not depend on the amount of wages unpaid at the time of termination. Thus, an employer who has underpaid an employee by a grand total of $1, and who does not discover the underpayment until more than 30 working days after the employee has quit, could owe the employee penalties, measured by 30 working days, or six weeks, of wages. The Court of Appeal has held that trial judges lack discretion to reduce the amount of waiting-time penalties.[158] A trial judge can effectively reduce the amount of penalty, however, by finding that part of the delay in payment resulted from inadvertent clerical error and thus was not willful.[159]

To make matters still worse for employers, the limitations period for claiming waiting-time penalties is three years, not the one-year period generally applying to penalty claims. One Court of Appeal decision held that a claim for penalties based only on the late payment of final wages (where the employer had already paid the underlying wages due) should be subject to the one-year statute of limitations,[160] but the California Supreme Court held that a three-year period applies instead.[161]

Softening the blow somewhat, the same California Supreme Court decision held that waiting-time penalties are not recoverable as restitution under California's Unfair Competition Law,[162] in that those penalties "would not restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest."[163] Accordingly, plaintiffs seeking waiting-time penalties cannot use a UCL claim to extend the limitations period to four years.

However, an employee asserting a claim under Labor Code section 203 is also entitled to seek recovery of attorney fees.[164]

The Office of the Chief Counsel of the IRS has opined on the tax treatment of this California peculiarity, stating that section 203 penalties are not wages for purposes of employment tax. According to this opinion, an employer

paying section 203 penalties need not withhold taxes for the terminated employee or pay employer-side payroll taxes.[165]

7.6 "White Collar" Exemptions from Wage Requirements

Section 1(A) of most of the Wage Orders states that sections 3 through 12 of the Wage Orders do *not* apply to employees covered by the administrative, professional, or executive exemptions. Section 1(C) indicates that the same is true for outside salespeople. The California administrative, professional, and executive exemptions resemble the corresponding federal exemptions, but an employer generally will find it harder under California law than under federal law to establish that an employee is exempt.

For one thing, federal wage and hour law is not inherently pro-plaintiff, while California wage and hour law definitely is. A 2018 U.S. Supreme Court decision considered whether service advisors at an auto dealership qualified under an FLSA overtime exemption that applies to salespeople primarily engaged in servicing automobiles. The Ninth Circuit, finding the statutory language ambiguous, ruled for the plaintiff under a "principle that exemptions to the FLSA should be construed narrowly."[166] The U.S. Supreme Court "reject[ed] this principle as a useful guidepost for interpreting the FLSA. … The narrow-construction principle relies on the flawed premise that the FLSA pursues its remedial purpose at all costs. … But the FLSA … exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement. … We thus have no license to give the exemption anything but a fair reading."[167] California, meanwhile, is radically different. Its high court proclaims that wage and hour exemptions are "narrowly construe[d] … against the employer."[168]

7.6.1 Salary requirement

Under both federal and state law, an employee must be salaried to qualify as an administrative, professional, or executive employee. Thus, with some specific exceptions (e.g., computer professionals, physicians), all hourly paid employees are nonexempt, regardless of their duties or their level of pay.

Minimum salary. For exemptions requiring a salary basis, the salary paid must meet a certain numerical minimum. Under federal law, the salary basis is met so long as the weekly salary is at least $684 (equating to an annual salary of $35,568).[169] In California it's different. To qualify as a salaried exempt employee, a California employee must earn a salary that is at least twice the monthly state minimum wage for full-time (40 hours per week) employment.[170] So as California's minimum wage escalates, the minimum pay needed to meet the salary basis escalates accordingly. For employers with more than 25 employees, the minimum weekly salary for an exempt California employee as of 2024 is $1,248 (twice the minimum wage of $15.50 and equivalent to an annual salary of $66,560).

A Court of Appeal decision has held that a guaranteed minimum monthly commission draw for financial advisers did not equal a "salary," and thus the advisors were not paid the minimum salary required for the administrative exemption. Reversing a summary judgment for the employer, the Court of Appeal reasoned that, to qualify as salary, payments must be predetermined, and that draw against future commissions paid if the financial advisers fell below a certain level did not qualify as "salary." The Court of Appeal held that advances on not-yet-earned commissions do not constitute wages under California law. The employer's pay structure thus did not satisfy the salary basis test, and the administrative exemption for employees paid a monthly salary equivalent to at least twice the state minimum wage for full-time employment therefore did not apply.[171]

Vacation deductions for partial-day personal absences? In interpreting the salary requirement, federal regulators have permitted employers some flexibility in charging an employee's PTO bank for partial-day absences from work. But the DLSE argued that California vacation pay, being "vested," cannot be deducted for partial-day absences without destroying the salary basis. A 2005 Court of Appeal decision rejected this theory,

holding that California employers may require the use of accrued vacation for partial-day absences without causing otherwise exempt employees to become nonexempt under the salary basis test.[172]

A 2009 DLSE opinion letter followed this position, opining that deductions from accrued sick-leave and vacation balances generally do not destroy an employee's salary basis.[173] Because the 2005 case involved a leave policy that made deductions from an employee's PTO bank only for partial-day absences of at least four hours, some employers made PTO adjustments for partial-day absences only when they were four hours or more. In 2014, however, the Court of Appeal held that deductions from accrued vacation time are permissible in California regardless of the length of the exempt employee's partial-day absence.[174]

7.6.2 Executive exemption

A California exempt executive must (1) be primarily engaged in managing a department or subdivision of it, (2) supervise at least two other individuals, (3) have the authority to hire or fire other employees, or effectively recommend the same, (4) customarily and regularly exercise discretion and independent judgment in the performance of job duties (i.e., have the authority to make an independent choice free from immediate supervision with respect to matters of significance), and (5) be "primarily engaged" in exempt duties.[175]

Executive activities include interviewing, selecting, and training employees, setting and adjusting pay rates and work hours, directing the work of subordinates, evaluating employee efficiency and productivity, resolving employee complaints, disciplining employees, planning the work, determining techniques to use, deciding types of material, supplies and machinery to use, purchasing same, and engaging in work directly and closely related to those activities, or properly viewed as a means to carry them out.

Nonexempt tasks include performing the same kind of work as subordinates, performing production or service work that is not part of the supervisory function, making sales or replenishing stock, performing routine clerical duties, checking or inspecting goods in a production operation, and performing maintenance work.

No appreciation for multi-tasking. Federal law, in determining whether an employee is executive exempt, recognizes that concurrent performance of exempt and nonexempt work can count as exempt for purposes of the executive exemption. For example, federal regulations interpreting the FLSA state: "An assistant manager can supervise employees and serve customers at the same time without losing the exemption."[176] In California it's different. The Court of Appeal has held that an activity must be categorized as either exempt or nonexempt, based on the employee's purpose for engaging in such activity.[177]

No sole-charge exemption. Federal law formerly provided for a "sole-charge exception" for executives at separate establishments, which allowed employers to treat the manager of an establishment as exempt irrespective of the primary duty test, so long as there were at least two full-time employees or their equivalents under the manager's supervision at the location.[178] California has never recognized this exception.

7.6.3 Professional exemption

A California exempt professional must be (1) either (a) licensed or certified by California and primarily engaged in law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting, or (b) primarily engaged in an occupation commonly recognized as a learned or artistic profession requiring knowledge of an advanced type customarily acquired by prolonged academic study, or (c) engaged in original and creative work dependent primarily on invention, imagination, or artistic talent, or (d) engaged in work that is predominantly intellectual and varied in character, and (2) customarily and regularly exercising discretion and independent judgment in the performance of those activities.[179]

Under the narrow limits of California's professional exemption, pharmacists and registered nurses, who are exempt professionals under federal law and in many states, generally cannot qualify as exempt professionals in California.[180]

7.6.4 Administrative exemption

A California exempt administrative employee must be primarily engaged in (1) customarily and regularly exercising discretion and independent judgment[181] in the performance of intellectual work (office or non-manual work of substantial importance directly related to management policies or the general business operation of the employer or its customers; not production or sales work), or (2) directly assisting an exempt executive or administrator, with only general supervision, or work along specialized or technical lines requiring special training, experience, or knowledge; or execute special assignments.[182] Exempt administrative employee activities include servicing the business by, for example, advising management on policy determinations, planning, negotiating, representing the company, purchasing, and business research, and also by engaging in work that is directly and closely related to those activities, or properly viewed as a means of carrying them out.

In *Bell v. Farmers Ins. Exchange*,[183] the Court of Appeal considered whether insurance claims adjusters were administrative employees. *Bell* construed the Wage Orders to add a "role" test to the traditional "duties" test: *Bell* would not even reach the issue of whether the job satisfies the duties test unless the employee serves in an "administrative capacity."[184] *Bell* distinguished administrative work from "production" work, the latter being work needed to create whatever product or service the business sells, as opposed to administrative work necessary to support the production.[185] *Bell* held that work of insurance claims adjusters was inherently production work, rendering them ineligible for the administrative exemption.[186]

But the FLSA regulations provide that an administratively exempt employee can provide administrative support to the employer *or the employer's customers*.[187] Thus, *Bell* conceded "that the administrative / production worker dichotomy is a somewhat gross distinction that may not be dispositive in many cases. ... For example, some businesses, such as management consulting firms, may provide services that clearly pertain to business administration, even though they are activities that the businesses exist to produce and market."[188]

Bell placed California law at odds with analogous federal law. Federal decisions have refused to apply *Bell*'s reasoning in FLSA insurance adjuster cases,[189] and the 2004 FLSA regulation amendments clarify that insurance adjusters can be covered by the administrative exemption "whether they work for an insurance company or another type of company."[190] Several federal decisions have concluded that insurance adjusters are exempt under the FLSA.[191] A further indication that *Bell* had limited effect was a 2007 Ninth Circuit decision,[192] which held that insurance adjusters, as a rule, qualify for the administrative exemption, and which criticized *Bell* for its overbroad construction of the meaning of "production work."[193]

California peculiarity reasserted itself, however, in 2007, when the Court of Appeal decided *Harris v. Superior Court (Liberty Mutual)*.[194] Despite the opportunity to move away from *Bell* and toward the federal view of the administrative exemption, *Harris* went the other way, taking an even narrower view than *Bell* concerning what jobs qualify as "administrative." *Harris* concluded that "only work performed at the level of *policy or general operations* (emphasis in original) can qualify as 'directly related to management policies or general business operations," and that "work that merely carries out the particular, day-to-day operations of the business is production, not administrative, work."[195] *Harris* thus departed significantly from traditional analysis of the administrative exemption, rejecting many federal decisions that interpret the administrative / production dichotomy much differently.[196]

A strong dissent in *Harris* challenged the majority's conclusions. The California Supreme Court granted review of *Harris* in 2007, and finally issued its decision in 2011.[197] The Supreme Court unanimously reversed the Court of Appeal and remanded for further proceedings.[198] The high court distinguished *Bell* as involving a stipulation that

the plaintiffs' work there was "routine and unimportant" and as relying on the 1998 version of a Wage Order, which was superseded by a 2001 version that incorporates relevant aspects of federal regulations.

The high court explained that modern-day, post-industrial, service-oriented businesses may not follow the administrative/production worker dichotomy, and that courts should not strain to apply the dichotomy where it does not fit. Thus, while the dichotomy might still have use as an analytical tool, the Court of Appeal erred in applying the administrative / production worker dichotomy as a dispositive test.

7.6.5 The quantitative requirement for "white collar" exemptions

In America generally, a "white collar" exemption applies where an employee must, as a "primary duty," perform exempt tasks and, in doing so, regularly and customarily exercise discretion and independent judgment. In interpreting "primary duty,"[199] the U.S. Department of Labor does not treat the amount of time spent by the employee on those duties as the sole test. The DOL recognizes that an employee might be an exempt executive without spending most of working time in managerial duties.[200]

In California, it's different. In an analogous situation involving the exemption for outside salespeople,[201] the California Supreme Court ruled that the test for exempt versus nonexempt duties is a "purely quantitative approach," gauging whether "more than one-half" of an employee's time is spent on exempt duties. In so holding, the California Supreme Court declined to follow the DOL's regulation that "reclassifies intrinsically nonexempt sales work as exempt based on the fact that it is incidental to sales."[202]

The quantitative test applies for other exemptions as well, including the executive exemption.[203]

7.7 Other Exemptions

7.7.1 Alternative workweek schedule

To accommodate employers and employees who want flexible hours, certain California Wage Orders permit alternative work schedules (AWS), including "four-day workweek" arrangements, whereby nonexempt employees can work schedules in excess of eight hours per day without daily overtime. These arrangements require specified secret-ballot election procedures by employees in readily identifiable work units (such as a division, department, job classification, shift, or facility). The results of the election must be reported within 30 days to:

> Division of Labor Statistics and Research
> Attn: Alternative Workweek Election Results
> Department of Industrial Relations
> P.O. Box 420603
> San Francisco, CA 94142-0603

While most employers use 10-hour alternative work schedules, longer schedules likely are permissible, subject to the foregoing procedures, provided that the employee is paid overtime for all hours over ten in the workday.[204] There is additional flexibility for certain employees in the healthcare industry, who can adopt schedules that include shifts of up to 12 hours payable at straight time.

Labor Code section 511 provides that an employer may adopt an AWS only if two-thirds of the affected employees approve the AWS in a secret vote. Specific AWS requirements appear in the applicable Wage Orders. Wage Order 1, for the manufacturing industry, permits adoption of an AWS only upon satisfying these requirements: (1) the employer proposes an AWS in writing, (2) two-thirds of the affected employees vote to adopt the proposed AWS, in a secret ballot conducted during regular working hours at the work site, (3) the

employer has made a written disclosure regarding the effects of the proposed arrangement on wages, hours, and benefits, and has held at least one meeting at least 14 days before the vote, (4) the results of the election have been timely reported to the Division of Labor Statistics and Research, (5) employees have not been required to work the new hours for at least 30 days after election results were announced, and (6) the employer has not coerced any employee's vote.

Employers adopting an AWS must follow the specific rules in the applicable Wage Order or face liability for unpaid overtime. The Court of Appeal delivered this lesson in a 2018 decision. A machine operator manufacturing plastic bags worked 12-hour shifts that paid the regular rate for the first 10 hours of work and then an overtime rate for the next two hours. He sued for unpaid daily overtime wages for the time worked after eight hours. Four different time periods were involved, but the Court of Appeal held that as to each the employer was liable because the employer could not provide that it or its predecessor had met all the AWS requirements, including a written disclosure, a pre-vote meeting, a vote, a 30-day waiting period, and a report to the state.[205]

7.7.2 Computer professionals

California exempts from overtime pay requirements computer professionals who are primarily engaged (1) in work that is intellectual or creative requiring the exercise of discretion and independent judgment and (2) in duties that consist of (a) applying systems analysis techniques and procedures (e.g., determining hardware, software, or system functional specifications), or (b) designing, developing, documenting, analyzing, creating, testing, or modifying computer systems or programs, or (c) documenting, testing, creating, or modifying the design of software or hardware, or (d) duties associated with being highly skilled in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.

Under California law, an employer seeking to establish the computer professional exemption must meet all of the foregoing requirements plus a compensation requirement. By a 2007 amendment, employers met that requirement, effective January 1, 2008, by paying $36 an hour or the annualized full-time salary equivalent (whereas, under federal law, a computer professional is required to be compensated at least $27.63 hourly).[206] That rate is subject to annual increases in accordance with the California Consumer Price Index for Urban Wage Earners and Clerical Workers.[207] As of January 2022, the minimum hourly rate is $53.80, and the minimum annual salary is $115,763.35.[208]

7.7.3 Advanced practice nurses

California is peculiar in not recognizing a professional exemption for registered nurses (RNs) engaged in the practice of nursing, i.e., engaged primarily in patient care. California permits an exemption only for "advanced practice nurses" (APNs), such as certified nurse midwives, certified nurse anesthetists, and certified nurse practitioners.[209] The distinction between RNs and APNs is that the latter undergo months or years of specialized education and training, must be state-licensed, and perform duties that otherwise only physicians could perform.

7.7.4 Outside salespersons

Under federal law, an employee qualifies as overtime exempt as an outside salesperson by regularly engaging outside the workplace in selling services or the use of facilities if the nonsales activities do not exceed 20% of the time worked.[210] Sales activity includes work incidental to or in conjunction with outside sales, including incidental deliveries and collections. The time devoted to various duties is important, but not necessarily controlling. A routeman who calls on customers and takes orders for products delivered from stock, and who receives compensation commensurate with a volume of products sold, is employed for the purpose of making sales.[211] Thus, the federal exemption focuses on the employee's "primary function," not on how much work time is spent selling, and the 20 percent cap on nonexempt (i.e., nonsales) work does not apply to nonsales activities that are "incidental" to outside sales, including deliveries.

In California it's different. While California has a statutory overtime exemption for outside salespeople,[212] its Wage Orders define the term narrowly, as an adult "who customary and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders of contracts for products, services or use of facilities."[213] This definition does not mention the primary function for which the person is employed and focuses, quantitatively, on whether "more than half the working time" is devoted to "selling ... or obtaining orders or contracts." Moreover, the California definition does not reclassify intrinsically nonsales work as exempt based on the fact that it is incidental to sales.

In its 1999 *Ramirez v. Yosemite Water* decision, the California Supreme Court held that California's exemption for outside salespersons—by not tracking the language of the federal exemption and by using its own definition of "outside salespersons"—intends to deviate from federal law, to "provide, at least in some cases, greater protection for employees."[214] At issue was whether a routeman delivering bottled water was exempt from overtime as an outside salesperson. While remanding the case for further proceedings, *Ramirez* strongly implied that the plaintiff could be nonexempt under California law even if he was exempt under federal law.

Ramirez left unresolved several questions:

- What does it mean to "customarily and regularly" spend more than one-half of the work time on outside sales? FLSA regulations define "customarily and regularly" as "more than occasionally but less than constantly." If an employee has a habit of often spending two or three days working away from the employer's place of business, but spends the overall majority of all work time at the employer's place of business, would that qualify as "customarily and regularly" spending more than one-half the work time outside?

- How does one attribute time that the employee spends before a sales visit preparing to make the visits, or the time spent after the visit to complete paper work on the sale? *Ramirez* mentions that the employer argued that it would be absurd to exclude those tasks from the "outside sales" calculation, but did not explain how those duties should be analyzed under the exemption.

- What constitutes "away from the employer's place of business"? Clearly delivering water to a customer's home would qualify, but what if the employee is in a job making customer contact by telephone? Is any time selling outside the employee's designated "office" considered time "away from the employer's place of business"?

- How does an employer enforce reasonable expectations that its employees spend most of their time outside selling? Where the employer encourages selling, but allows the employees to make sales any way they want without tracking their movements, what is the employer's reasonable expectation as to "outside sales" activity?

In 2022, the California Court of Appeal held in a class action case that the "pertinent inquiry" regarding whether an employee works away from the employer's place of business is the degree to which the employer "maintains control or supervision" over the working conditions and employee's hours.[215] Noting that the exemption was created to address the difficulty employers have in overseeing salespeople who control their own schedule, the court held that the outside salesperson exemption thus does not apply where, at the direction of the employer, an employee works at a fixed site not owned or leased by the employer.[216]

Sick pay implications. See § 7.7.5 below.

7.7.5 Commissioned sales employees

The federal exemption. A commissioned salesperson in a "retail or service establishment" is exempt from overtime requirements if the salesperson is paid more than 1.5 times the federal minimum wage and earns pay mostly in the form of commissions on goods or services.[217] Federal minimum wage payments are satisfied by a total of pay (whether in commissions, base salary, advances, or some combination) that, when divided by hours worked during the pay period, meet the minimum wage.

The California version. The California requirements for the exemption are (1) total compensation exceeding 1.5 times the California minimum wage and (2) at least 50% of total pay from commissions.[218] (For discussion of what California considers a true commission, see § 7.15.1.) This exemption applies to overtime pay but still obliges California employers to pay the minimum wage to commissioned sales employees for all hours worked, and to provide meal periods and rest breaks.

Many employers reconcile commissions and pay them on a monthly basis. California courts have acknowledged that employers can pay a commission in anticipation of its being earned.[219] But in 2014 the California Supreme Court complicated the basis for the commissioned-employee exemption by stating that it is not proper for an employer to attribute commissions paid in one pay period to other pay periods to make up any shortfall in meeting the pay requirements of the exemption.[220] This means that employees must be paid more than one-half of their pay in commissions each pay period in order to be exempt as a commissioned employee.

Sick pay implications. In 2016, the DLSE issued an opinion letter regarding California's Healthy Workplaces, Healthy Families Act of 2014. In this letter, the DLSE opined that the term "exempt," as used in Labor Code section 246(k), refers only to those employees who satisfy both the salary and duties tests of the professional, executive, or administrative exemptions.[221] Thus, according to the DLSE, the term "exempt" does not include those employees who are exempt from overtime under the outside sales exemption or the commissioned employee exemption. Therefore, for purposes of sick pay, California employers should look to Labor Code sections 246(*l*)(1) or (2)—which articulate the two methods used to calculate sick pay for nonexempt employees—when determining how to calculate sick time for commissioned employees, even if they qualify as exempt from overtime as either an outside salesperson or a commissioned employee.

7.7.6 Collective bargaining agreements

Union-friendly California, in Labor Code section 514, created an overtime exemption for employees covered by certain collective bargaining agreements.[222] Accordingly, state overtime-pay requirements do not apply to "an employee covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of the employees, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage."[223] The Court of Appeal has clarified that for purposes of this exemption the governing definition of "overtime" is provided by the CBA, not the Labor Code.[224]

One might think that the section 514 exemption would cover an overtime claim by any plaintiff who enjoys all the described CBA-provided benefits. After all, the rationale of a CBA exemption is that a worker who is adequately protected by a union does not need statutory protection. So there is little reason to suppose that the CBA exemption would be lost if some *other* member of the collective bargaining unit—someone not suing—does not enjoy all the described benefits. The CBA exemption would be of very limited practical benefit to an employer if, for example, *every* member of the collective bargaining unit must earn at least 130% of the state minimum wage. (As of 2024, 130% of the minimum wage for larger employers is $20.80 (1.3 * $16.00)—a wage higher than what typical probationary employees earn.)

Yet some courts have held that employers cannot invoke the CBA exemption against overtime claims—even when the plaintiff earns at least 130% of the minimum wage—if some *other* represented employee earns wages below that level. Several federal district court decisions thus refused to apply the CBA overtime exemption even though the plaintiffs themselves enjoyed all the described benefits of a CBA.[225] These courts both relied mainly on a mechanical linguistic analysis. They noted that section 514 applies to "an employee" covered by a CBA so long as the CBA covers certain employment terms for "the employees" and provides 130% of the minimum wage "for those employees."

Parsing this language, these courts concluded: "The plural term 'those employees' refers back to the statute's earlier use of 'the employees' [instead of 'that employee'] which … means all employees covered by the CBA."[226] Neither court, though thus placing crucial reliance on the use of the singular versus the plural of the term "employee," acknowledged a cardinal rule of construction appearing in the Labor Code: "The singular number includes the plural, and the plural the singular."[227]

7.7.7 Truck drivers transporting goods in interstate commerce

Commercial truck drivers who operate large trucks to transport goods in interstate commerce are generally exempt from California overtime law, just as they are under federal law.[228]

7.7.8 RLA preemption or exemption

California's pesky "minimum wage paid separately for each hour worked" doctrine is preempted by collective bargaining agreements entered into under the Railway Labor Act, which also applies to airlines. The Court of Appeal thus upheld a summary judgment against airline attendants challenging the airline's practice of paying, pursuant to a CBA, just $1.60 an hour for their time waiting for an airline to be readied for flight. The Court of Appeal held that "the IWC order [mandating a minimum wage] was preempted by the RLA and that enforcement of the IWC order would burden interstate commerce."[229]

The RLA has not worked as a defense, however, with respect to section 226 claims for inadequate wage statements. In a 2020 case, the California Supreme Court considered whether an airline could rely on the RLA-based exemption that appears in Wage Order 9, for transportation workers, in a lawsuit by airline crew members alleging that the employer's wage statements failed to list the employer address and to state hours worked and applicable wage rates. The question was whether the plaintiff crew members fell outside the protections of section 226 because they were covered by a CBA entered into in accordance with the RLA. Wage Order 9 provides that it does not "cover those employees who have entered into a collective bargaining agreement under and in accordance with the provisions of the Railway Labor Act, 45 U.S.C. Sections 151 *et seq.*" The Supreme Court reasoned that reliance on this exemption did not shield the employer from a section 226 suit, because section 226 itself contains no similar exemption: "Despite numerous opportunities, … the Legislature has never followed the IWC's lead and enacted an exemption to Section 226 for employees operating under a collective bargaining agreement entered under the Railway Labor Act. We see no basis for importing the Railway Labor Act exemption when the Legislature itself has not chosen to do so."[230]

7.7.9 Agricultural workers

The federal FLSA exempts "agricultural work" from the overtime rules, but here, as elsewhere, California is outstanding in the wage and hour field. Wage Order 14 entitles agricultural employees to daily overtime for hours worked in excess of ten hours in a day. And, under 2016 legislation, gradual annual changes—beginning in 2019 and culminating in 2025—will give all agricultural workers the same daily overtime and daily double-time

entitlements that apply to non-agricultural workers.[231] This chart summarizes, for both larger and smaller employers, the phase-in process for agricultural overtime pay requirements.

26+ Employees			< 26 Employees		
Effective date	**1.5 * Reg. Rate**	**2 * Reg. Rate**	**Effective date**	**1.5 * Reg. Rate**	**2 * Reg. Rate**
1/1/2019	> 9.5 hrs/day, > 55 hrs/week	n/a	1/1/2022	> 9.5 hrs/day, > 55 hrs/week	n/a
1/1/2020	> 9 hrs/day or > 50 hrs/week	n/a	1/1/2023	> 9 hrs/day or > 50 hrs/week	n/a
1/1/2021	> 8.5 hrs/day, or > 45 hrs/week	n/a	1/1/2024	> 8.5 hrs/day or > 45 hrs/week	n/a
1/1/2022	> 8 hrs/day or > 40 hrs/week	> 12 hrs/day	1/1/2025	> 8 hrs/day or > 40 hrs/week	> 12 hrs/day

Wage Order 14, meanwhile, continues to define agricultural employees as workers engaged in:

- the preparation, care, and treatment of farm land, pipeline, or ditches,
- the sowing and planting of any agricultural (generally, farm) or horticultural (generally, garden, orchard, or nursery) commodity,
- the care of any agricultural or horticultural commodity,
- the harvesting of any agricultural or horticultural commodity,
- the assembly and storage of any agricultural or horticultural commodity,
- the raising, feeding and management of livestock, fur bearing animals, poultry, fish, mollusks, and insects,
- the harvesting of fish for commercial sale as defined by Fish and Game Code section 45, or
- the conservation, improvement, or maintenance of a farm and its tools and equipment.

7.8 Meal Periods

Section 11 of most Wage Orders states: “No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes.” An off-duty meal period may be unpaid, but unless the employee is relieved of all duty during the 30-minute meal period, the entire period counts as time worked. Labor Code sections 226.7 and 512 also address meal periods. Section 226.7 forbids an employer to require an employee to work during any meal or rest period that is mandated by an IWC order.[232] Section 512 requires that employers “provid[e]” 30-minute meal periods for employees working more than five hours (one meal period) or working more than ten hours (two meal periods).[233] Additional breaks may be required for employees

working shifts of more than fifteen hours, depending on the applicable Wage Order. (As to the meaning of "provide," a word that does not appear in the Wage Orders, see § 7.8.5.)

Section 11 applies only to nonexempt workers. A literal interpretation of Section 512, however, could extend a general meal-period entitlement to *all* employees, exempt as well as nonexempt. The DLSE noted this point in opining that exempt employees as well as nonexempt employees are entitled to meal periods.[234] Yet the DLSE also acknowledged that "no premium pay may be imposed on an employer who fails to provide a meal period to an exempt employee."

7.8.1 Record-keeping requirement

Section 7 of the Wage Orders requires that the employer keep accurate information with respect to each required meal period.[235]

7.8.2 On-duty meal periods

On-duty meal periods are permitted only if (1) the nature of the work prevents the employee from being relieved of all duty during the meal period, (2) the employer and employee have agreed in writing to the on-duty meal period, and (3) the agreement states that the employee may revoke the agreement, in writing, at any time.[236]

The DLSE has opined that the nature of the work permits on-duty meal periods only in very limited circumstances, such as where the employer's operations make it virtually impossible to provide the employee with an off-duty meal period.[237] To further limit the utility of the on-duty meal period, Court of Appeal decisions have indicated that the employer must determine an employee's "nature of the work" under the circumstances pertaining to each assignment, instead of choosing, more efficiently, to have a blanket policy by which employees sign an on-duty meal period agreement in advance of particular assignments.[238]

A 2019 Court of Appeal decision, involving a permissible on-duty meal period in the public housekeeping industry, held that an employer must provide meal periods of at least 30 minutes regardless of whether they are on-duty or off-duty.[239] The Court of Appeal thus rejected the argument of a 24-hour residential care facility that its on-duty meal periods need not be 30 minutes long.

7.8.3 Waiver of meal periods

Employers cannot condition employment on waiver of a meal period.

Waiver of first meal period. If the employee works no more than six hours in a day, then the employee's duty to provide a meal period may be waived by "mutual consent" of employer and employee.[240] The consent can be written or oral. The Court of Appeal has held that an employer can rely on a collective bargaining agreement as a means for employees to waive their first meal period for shifts that do not exceed six hours. No "magic words" are needed for the CBA to meet the requirement that a statutory right must be waived in clear and unmistakable language.[241]

Waiver of second meal period. An employee who works more than ten hours in a day, and who is thus entitled to two 30-minute meal periods, may waive the employee's right and employer's duty with respect to a second meal period, if the employee has not waived the first meal period. The waiver of the second meal period may be written or oral, and applies only for shifts of 12 or fewer hours.[242]

A special meal period waiver provision in IWC Wage Order 5, section 11(D), permits "employees in the health care industry" to waive one of their two meal periods, regardless of whether the employee works more than 12

hours, if the waiver is "documented in a written agreement that is voluntarily signed by both the employee and the employer." But in 2015 the Court of Appeal ruled that section 11(D) waivers are invalid, reasoning that the IWC was powerless to deviate from Labor Code section 512, which allows employees to waive second meal periods only if the shift does not exceed 12 hours.[243] After the Supreme Court agreed to review this surprising result, the Legislature repudiated the Court of Appeal's decision, and declared that section 11(D) waivers have always been valid since 2000.[244] The California Supreme Court, instead of simply acknowledging this legislative declaration, remanded the matter to the Court of Appeal to decide whether the legislation merely restated existing law or changed it, and, if there was a change, whether the change should apply retroactively.[245] On remand, the Court of Appeal recognized that section 11(D) validly authorizes waivers of second meal periods in the health industry.[246]

7.8.4 Timing of meal periods

The California Supreme Court has ruled that an employer timely provides meal breaks so long as the first meal period is provided no later than the end of the fifth hour of work (for work shifts exceeding five hours) and the second meal period (for work shifts exceeding ten hours) is provided no later than the end of the tenth hour of work.[247]

No *de minimis* rule as to unprovided meal periods. There is no *de minimis* exception to the timing requirement for a meal period. In 2018, the Court of Appeal rejected an employer's argument that it lawfully provided meal periods that began "slightly" after the end of the fifth hour of work.[248] The basis for applying the *de minimis* doctrine was absent, the Court of Appeal reasoned, because "there is no indication of a practical administrative difficulty recording small amounts of time for payroll purposes."

The California Supreme Court reaffirmed this reasoning in a 2020 decision, which addressed the *length* of meal periods—in the context of disapproving rounding—but which used language that would also apply to the *timing* of meal periods: "even relatively minor infringements on meal periods can cause substantial burdens to the employee," so that the law requires "premium pay for any violation, not matter how minor."[249]

7.8.5 Meaning of "provide"

As explained above, California employers must not employ an employee for a work period exceeding five hours "without providing" a 30-minute meal period.[250] In this context, what does "provide" mean?

No duty to ensure break is taken. The Court of Appeal once held that employers must ensure that employees actually take their meal breaks.[251] The California Supreme Court corrected this mistake in 2012, holding that employers must "provide" a meal period only in the sense that they must timely and adequately relieve the employees of duty; the employer need not police the break or otherwise ensure that the employee refrain from working during the break.[252]

Meal breaks, like rest breaks, need not be taken if that is the employee's own choice. See § 7.9.2 (discussing case law holding that an employer was not liable when an employee failed to report rest breaks interrupted by co-workers). If the employer knows or should know that the employee has decided to work during a scheduled meal period, then the employer's obligation is to pay for the working time, not to pay the hour of premium pay that would be due for a meal-period violation.[253]

Do time records alone prove a violation? The Court of Appeal in 2019 recognized that an employer is not liable for short, late, or missed meal periods absent proof that the employer actually failed to provide a meal period.[254] The plaintiffs sued under the Unfair Competition Law, asserting that the employer's failure to pay meal period premiums constituted an unfair business practice that triggered premium pay on every occasion that time records showed a short, late, or missed meal period. The Court of Appeal affirmed summary judgment against this claim, explaining that the plaintiff's theory would impose liability regardless of whether the employer actually broke the

law by failing to provide a meal period. The decision reaffirms the basic point that an employer is not automatically liable for every short, late, or missed meal period.

But the California Supreme Court dashed employer hopes on this score with its 2021 decision in *Donohue v. AMN Services, LLC*.[255] *Donohue*—adopting as the law what had only been a two-justice concurrence in the *Brinker* case—held that time records showing noncompliant meal periods raise a rebuttable presumption of violations. What's more, *Donohue* cast doubt on the employer's ability to rebut that presumption with employee certifications that they had received the opportunity to take all meal periods to which they were entitled. Because in *Donohue* the employer had rounded meal-period time to the nearest 10 minutes, the employees reviewing their time records would not have been alerted to potentially noncompliant meal periods. The Supreme Court proclaimed: "It is the employer's duty to maintain accurate time records; the law does not expect or require employees to keep their own time records to uncover potential meal period violations."

Importantly, *Donohue* provides that employers may rebut the presumption of violations arising from time records showing non-compliant meal periods "with evidence of bona fide relief from duty or proper compensation."[256] Such evidence may include proof that "employees were compensated for noncompliant meal periods or that they had in fact been provided compliant meal periods during which they chose to work," and can even extend to "[r]epresentative testimony, surveys, and statistical analysis."

Can employers use rounded time to see if they are providing 30-minute meal periods? No! The California Supreme Court reversed the Court of Appeal decision in *Donohue*[257] holding that an employer could apply a rounding policy to meal periods. The appellate court decision reasoned that the endorsement of rounding in *See's Candy* (see § 7.4.4) extends to meal periods and therefore a trial court need only consider how often a policy results in rounding up and rounding down recorded work time, not the number of meal period violations that are assessed or avoided.[258] The high court, conversely, unanimously held that rounding meal periods is impermissible, even if the rounding overall favors employees, because each short or late meal period is itself a violation triggering an extra hour of premium pay. Heeding its mandate to "liberally construe the Labor Code and wage orders to favor the protection of employees," the Supreme Court reasoned that "even relatively minor infringements on meal periods can cause substantial burdens to the employee," so that the law requires "premium pay for any violation, no matter how minor."

7.8.6 Meal periods on premises

Federal regulations state that employers need not pay employees for time spent during any "bona fide" meal period—a period in which the employee is completely relieved of duty for the purpose of eating.[259] The employer need not permit the employee to leave the premises during a meal period, if the employee is otherwise completely freed from duties during the period.[260] In California it's different.

California courts have followed a DLSE interpretation that employees who must remain on the employer's premises during meal periods have not been freed from duty, and thus must be paid for that time even if the employees were free to use their on-premises time in whatever way they saw fit.[261] In 2012, the California Supreme Court in *Brinker* generally endorsed the DLSE's interpretation.[262]

But meal periods accompanied by a requirement to stay on the premises can be lawful, under the right circumstances. A 2018 Ninth Circuit decision held that employees eating discounted meals on premises were not under the employer's control and were still relieved of all duties during the meal period. The Ninth Circuit thus upheld a special program that gave employees the option to buy discounted meals so long as they followed a rule to eat the meal on premises (to prevent employees from abusing their privileges by buying discounted meals for

others). The Ninth Circuit rejected the plaintiff's argument that restricting the employees' movement during the meal period made it an "on duty" meal period, which would be inconsistent with the requirement to provide off-duty meal periods.[263]

7.8.7 Federal Motor Carrier preemption

Employers of truck drivers had hoped that California meal and rest requirements were preempted by the Federal Aviation Administration Authorization Act of 1994, but those hopes were dashed in 2014, when the Court of Appeal held that the FAAAA does not preempt California's meal- and rest-break requirements.[264]

Meanwhile, however, in 2018, the Federal Motor Carrier Safety Administration (FMCSA) declared that its hours-of-service regulations for commercial motor vehicle drivers preempt California rules for meal and rest breaks.[265] The FMCSA determined that the California rules create an "unreasonable burden on interstate commerce" by imposing "significant and substantial costs stemming from decreased productivity and administrative burden."[266] In doing so the FMCSA reversed a determination it had made in 2008 that it lacked the power to preempt the California rules. On review, the Ninth Circuit upheld the FMCSA determination. The determination was not arbitrary or capricious, the Ninth Circuit reasoned, because California rules require more breaks, more frequently, and with less flexibility than is the case under federal regulations.[267]

But in yet another turn of events, on August 14, 2023, the FMCSA announced that it would be accepting petitions for waiver from its previous decisions to preempt meal and rest break rules in California.[268] According to the agency's notice in the federal register, the FMCSA will consider granting waivers based on various practical, non-legal factors that will include: safety, parking shortages, and consideration of "whether enforcement of a State's meal and rest break laws as applied to interstate property-carrying or passenger-carrying CMV drivers will dissuade carriers from operating in that State," and "whether any such effect will weaken the resiliency of the national supply chain." The scope of the waivers that the FMCSA might consider granting remains unclear, however, and on December 6, 2023, the FMCSA requested public comment on whether, and the extent to which, enforcement of state meal and rest break laws will impact driver health and safety, truck parking shortages, carrier operations in the states, and national supply chain resiliency.[269]

7.8.8 Statutory exemptions from meal period requirements

Collective bargaining agreements. Union-friendly California has created some meal-period exemptions for certain employees covered by collective bargaining agreements. The meal-period requirements do not apply to certain construction workers, commercial truck drivers, security officers, and gas or electrical utility workers if (1) their employment is governed by a "valid collective bargaining agreement" that expressly provides for such things as meal periods and final and binding arbitration of meal-period disputes and (2) their regular wage is 30% more than the state minimum wage.[270] The meal and rest break requirements do not apply to airline cabin crew employees who are covered by a collective bargaining agreement that addresses meal and rest breaks, or, under certain circumstances, if the employees are represented by a labor organization but not yet covered by a valid collective bargaining agreement.[271] The meal and rest break requirements also do not apply to hospital, clinic, or public health employees who provide or support direct patient care if the employees are covered by a collective bargaining agreement that provides for meal and rest periods and the agreement provides a "monetary remedy" that is no less than "one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided."[272]

Certain truck drivers transporting commercial feed. Truck drivers transporting commercial livestock feed to "remote, rural areas" may take a meal period after the sixth hour if their regular rate of pay is at least one and a half times the state minimum wage and the driver is eligible for overtime pay. Drivers must still be provided a second meal period by the end of the tenth hour.[273]

7.8.9 Liability for noncompliant meal periods

Failure to provide a required compliant meal period (i.e., uninterrupted, off-duty, continuous, 30 minutes) incurs liability for an extra hour of pay per day at the employee's regular rate of pay (see § 7.10) and also can trigger section 558 of the Labor Code, which creates a civil penalty of $50 per employee per pay period for an initial violation, and $100 per employee per pay period for additional violations.[274]

7.9 Rest and Recovery Breaks

Section 12 of most Wage Orders states: "Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period."[275] A rest break must be paid: "Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages."[276] Section 12 applies only to nonexempt workers.

Failure to provide a required rest break makes the employer liable for an extra hour of pay for each day in which a required rest break is not authorized and permitted. Labor Code section 226.7 forbids an employer to require an employee to work during a prescribed rest break.[277]

7.9.1 Amount and timing of rest breaks

The Wage Orders entitle employees to 10 minutes of "net rest time" for every four hours worked or "major fraction thereof," with the rest break to be available near the middle of the work period, insofar as is practicable.[278] Under DLSE interpretations, employers must authorize and permit a first rest break if the daily work time is at least three and one-half hours and a second rest break if the work time has extended beyond six hours.[279]

In 2012, the California Supreme Court's *Brinker* decision endorsed this interpretation, while also observing that employers must authorize and permit a third rest break for work in excess of 10 hours.[280] The Wage Order's reference to "net rest time" indicates that employees might be entitled to additional rest time if they need to spend minutes walking to and from a designated rest area.[281]

7.9.2 Meaning of "authorize and permit"

An employer can be liable for failing to provide rest breaks if the employer has encouraged employees to skip rest breaks by failing to notify employees that breaks are available, where the employer is aware that employees are not taking breaks.[282]

There is no liability if employees freely choose not to take their authorized and permitted rest breaks. The Court of Appeal so acknowledged in a case in which a registered nurse sued a hospital for rest-break violations.[283] She argued that her meal and rest breaks were cut short by work-related questions from co-workers. The trial court correctly granted summary judgment for the employer because, whenever the nurse reported a missed break, the hospital paid her an extra hour of wages. Although co-workers occasionally interrupted her breaks with questions, they left her alone whenever she reported she was on a break, and she was never told by a supervisor to end a break early. The fact that charge nurses sometimes looked at the clock while she was taking her breaks did not reasonably imply pressure by her employer to end her breaks early.

7.9.3 Record keeping

Employers need not record rest breaks.[284]

7.9.4 Rest areas required

Employers must provide a rest area, separate from toilet rooms, where the employee may choose to take the rest break, [285] and arguably must also allow employees to leave the work premises during rest breaks (see § 7.9.8 below).

7.9.5 Calculation of rest break time

The DLSE has opined that employees must be permitted to take their ten minutes of rest in an uninterrupted block (e.g., one ten-minute break, not two five-minute breaks)[286] and that the "net rest time" language prohibits an employer from counting as rest time any time that the employee must take to move from one work position to another, or to a rest area.[287]

7.9.6 Toilet breaks excluded

The DLSE interprets the Wage Orders to forbid an employer to count any separate use of toilet facilities as a rest break.

7.9.7 Rest break time counted as hours worked

The time spent on a rest break counts as working time.[288]

7.9.8 "On duty" rest breaks *not* permitted

Because rest breaks count as time worked, one would think that an employee who takes a break while remaining on premises, available for emergencies, would still be receiving a valid rest break, so long as work demands do not actually interrupt the break. Yet in 2016 the California Supreme Court upset long-standing employer expectations on this issue in *Augustus v. ABM Securities Inc.* A Los Angeles trial judge ruled, in 2012, that security guards who must carry their pagers while on break were thereby denied their rest breaks, regardless of whether they were ever paged.

The result was a judgment against the security company in an amount exceeding $100 million. In 2015, the Court of Appeal reversed the trial court, holding that on-call rest breaks are still valid rest breaks, unless the employer actually interrupts the break by calling the employee to duty during the break. The Court of Appeal noted that the standard was whether the employer had breached its duty "not [to] require an employee to work during a meal or rest or recovery period."[289] Thus, the Court of Appeal concluded that the employer, in merely requiring the security guards to be on call during breaks, did not breach this duty, because the guards could pursue personal activities during the breaks: "remaining available to work is not the same as actually working."[290]

The California Supreme Court then agreed to review the case to address two issues: (1) Do Labor Code section 226.7 and Wage Order 4 require that employees be relieved of all duties during rest breaks? (2) Are security guards who remain on call during rest breaks performing work during that time? In 2016, the Supreme Court answered in an unexpected opinion that disrupted the sensible outcome reached by the Court of Appeal.[291] *Augustus* adopted a simplistic, radical interpretation of the rest-break requirement that disregarded contrary long-standing Labor Code interpretations by the DLSE.

The simplistic view adopted in *Augustus* is that a "rest period" must be "a period of rest," which to the high court meant a period wholly free of any work duty. *Augustus* thus overturned long-settled employer expectations by announcing that rest breaks, like meal periods, must be completely "duty free": an employee on a rest break who must be "at the ready, tethered by time and policy to particular locations or communications devices," has not been afforded the statutorily required rest break. Under this radical view, as the dissenting opinion suggests,

merely requiring an employee on break to stay on premises, or to carry a radio in the case of an emergency, may make the rest break non-compliant, even if the employee's break is never interrupted.[292]

In 2017, the DLSE responded to *Augustus* by revising its response to a frequently asked question about rest breaks, stating that now employers may *not* require employees to remain on the premises during their rest breaks:

> Q. Can my employer require that I stay on the work premises during my rest period?
>
> A. No, your employer cannot impose any restraints not inherent in the rest period requirement itself. In *Augustus v. ABM Security Services* … the California Supreme Court held that the rest period requirement "obligates employers to permit and authorize employees to take-off-duty rest periods. That is, during rest periods employers must relieve employees of all duties and relinquish control over how employees spend their time." … As a practical matter, however, if an employee is provided a ten minute rest period, the employee can only travel five minutes from a work post before heading back to return in time.[293]

Augustus imposes extraordinary burdens on businesses that need to have workers on call for emergencies while needing them in practice only rarely. Private ambulance operators, arguing that fully complying with *Augustus* would cost municipalities tens of millions of dollars, induced California voters to pass Proposition 11 in 2018, to provide that ambulance operators can require ambulance employees to remain on call during meal and rest breaks in order to respond to 911 calls, with employers to reschedule breaks that were actually interrupted.

Despite *Augustus*, the dust has not settled as to whether employees must be allowed to leave the premises during rest breaks. In fact, some courts have recently limited *Augustus* to its facts (e.g., on-call security guards), indicating that there is not necessarily a requirement to allow offsite rest periods.[294]

7.9.9 Federal Aviation Administration Authorization Act preemption?

Employers of truck drivers had hoped that California meal- and rest-break requirements were preempted by the Federal Aviation Administration Authorization Act of 1994, but those hopes were dashed in 2014. (See § 7.8.7).

7.9.10 Federal Motor Carrier Act preemption?

In 2021, the Ninth Circuit affirmed the Federal Motor Carrier Safety Administration's (FMCSA) 2018 determination that its hours-of-service regulations for commercial motor vehicle drivers preempt California rules for meal and rest breaks. (See § 7.8.7).

7.9.11 Recovery breaks

As of 2014, California employers must afford employees a "recovery period," to "prevent heat illness."[295] Employers must not require employees to work during a recovery period that is "mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division or Occupational Safety and Health."[296]

The recovery period counts as hours worked.[297]

7.9.12 Exemption for safety-sensitive positions at petroleum facilities

Certain unionized workers who hold "safety-sensitive positions" at petroleum facilities are exempted from rest-break rules.[298] A "safety-sensitive position" is a position whose duties reasonably include responding to emergencies in the facility and carrying communication devices. In 2020 the Legislature extended this special exemption until 2026.[299]

The exemption applies only to workers covered by a collective bargaining agreement and subject to Wage Order 1. If such a worker's rest period is interrupted to respond to an emergency, then the employer must pay the worker one hour of pay.

7.9.13 Exemption for certain security officers

In 2020, perhaps inspired by the special exemption for certain petroleum workers, the Legislature created a rest-break exemption for unionized registered private patrol operators. Yielding to the common sense that it furthers the public interest to have security officers who can respond to emergency situations without delay, the new law permits employers to require certain security officers to remain on the premises and on call during paid rest periods, and to carry and monitor a communication device. Affected security officers can, consistent with the employer obligation to provide rest breaks, be required to remain on the premises during rest periods, to remain on call, and to carry and monitor a communication device, so long as the security officer can restart a rest period anew as soon as practicable if the rest period is interrupted.[300]

7.9.14 Liability for unprovided rest breaks

Failure to provide a required rest break incurs liability for an extra hour of pay per day at the employee's regular rate (see § 7.10) and also can trigger section 558 of the Labor Code, which creates a civil penalty of $50 per employee per pay period for an initial violation, and $100 per employee per pay period for further violations.[301]

No double recovery. The extra hour of pay is in lieu of, not in addition to, the money needed to recover the wages lost by a denied rest break. The Court of Appeal so held in an unpublished 2020 case. Piece-rate farmworkers sued their employer for failing to pay for rest breaks. The plaintiffs sought minimum wage for the time they went unpaid, in addition to the "additional hour of pay" they were entitled to under Labor Code section 226.7. The Court of Appeal held that the trial court properly awarded damages under only one of the two theories asserted. Although both theories were legitimate, the rule against double recovery precluded awarding money under both theories. Plaintiffs were entitled to pay only once for each injury suffered. Although the trial court should have allowed plaintiffs to choose their route for recovery, they were not prejudiced in being forced to accept damages under the statute (the extra hour of pay), which maximized their recovery.[302]

7.10 The "One Additional Hour of Pay"

A California employer that "fails to provide an employee a meal or rest or recovery period in accordance with a state law" must "pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest or recovery period is not provided."[303] The Court of Appeal has held that an employer that fails to provide both a meal period and a rest period must pay up to two premium hourly payments per work day – one for each type of break violation.[304]

The foregoing does not apply to employees who are exempt from meal, rest, or recovery period requirements "pursuant to other state laws."[305]

7.10.1 Pay is characterized as a "wage" for purposes of the statute of limitations

The extra hour of pay—a fixed amount due regardless of how long work intrudes into the meal or rest break—resembles a penalty in that the payment does not correspond to the amount of break time denied. As discussed below, "penalty" is the legal characterization that employer-defendants have preferred. And in fact 22 of the 24 Court of Appeal justices who considered the issue agreed with the employers' view that the extra hour of pay is indeed a penalty, as did the DLSE in a Precedent Decision.[306]

In 2007, however, the California Supreme Court, in *Murphy v. Kenneth Cole Productions*, erased all of that pro-employer authority by ruling, unanimously, that the extra hour of pay is what the plaintiffs always said it is: a

"premium wage."[307] *Murphy* justified its result with repeated references to the California rule that "statutes governing conditions of employment are to be construed broadly in favor of protecting employees," even though the relevant provision, a statute of limitations, appears not in the Labor Code but in the Code of Civil Procedure.[308]

7.10.2 Potential implications of treating meal payments as wages

Murphy's decision to characterize the extra hour of pay as a wage implicated several issues:

- The limitations period for a wage claim is three years (for violation of a statutory obligation to pay wages) instead of the one-year period for a penalty claim. *Murphy* held that the limitations period for a meal-pay claim under the Labor Code was three years. (And the period could be four years when plaintiffs sue, as they typically do, under the Unfair Competition Law as well.)

- Restitution for unpaid wages is available under California's Unfair Competition Law,[309] with its four-year statute of limitations.[310] Is the extra hour of pay subject to recovery as restitution? One might think the correct answer is "no," as the extra hour of pay is a wage earned through labor. But the Supreme Court in 2022 held that meal premiums—due because of meal-period violations—indeed are "earned wages."[311]

- Tax withholding and employer taxes would be required on payments of wages. Does the extra hour of pay amount to wages for tax purposes? (The IRS has suggested that the answer is yes.)[312]

- Attorney fees are recoverable for a wage claim.[313] Would a claim for the extra hour of pay entitle the prevailing party to attorney fees? California does have a Labor Code provision authorizing the award of attorney fees in a case claiming unpaid wages, but the California Supreme Court, in a case where the *employer* won and sought attorney fees, held that a claim for meal pay is *not* a claim for wages and that therefore the employer could not recover its attorney fees. (See § 5.12.)

- Prejudgment interest is recoverable on a wage claim at the rate of ten percent per annum, under Labor Code section 218.6.[314] Is the extra hour of pay subject to prejudgment interest? The answer is "yes," but the interest rate is the constitutionally provided rate of seven percent instead of the ten percent rate that section 218.6 provides.[315]

- All earned wages are due upon discharge of employment.[316] Is the extra hour of pay a wage that must be paid by the time employment terminates? Though multiple Court of Appeal decisions have said "no," the Supreme Court in a 2022 decision said "yes." (See § 7.5.3.)

- Additional civil penalties might apply under PAGA (see § 5.15). Is the extra hour of pay itself a civil penalty or does PAGA create a civil penalty on top of the extra hour of pay? Some plaintiffs, as if to prove the axiom that "no good deed goes unpunished," have sought PAGA penalties as to each meal premium an employer has paid, on a theory that the payments reflect employer admissions that the employer had failed to provide a meal period. Courts have disagreed on whether the extra hour of pay itself functions as a "civil penalty" such that PAGA would not create an additional civil penalty.[317] But even if an extra PAGA penalty applies with respect to unprovided meal or rest or recovery periods, an employer's administrative practice of automatically paying premium pay for each short, late, interrupted, or missed meal period would not be an admission that the employer had failed to provide a meal period.

7.10.3 Attorney fees

Attorney fees denied for meal and rest break claims. In 2020, the Court of Appeal held that claims for failure to provide meal and rest breaks are not claims "brought for the nonpayment of wages" within Labor Code section 218.5, which entitles the prevailing party to reasonable attorney fees. The Court of Appeal explained that the remedy for failure to provide meal or rest breaks is an additional hour of pay—often described in the case law as "premium wages"—but that does not turn a lawsuit for denied meal or rest breaks into a lawsuit for nonpayment of wages. Further, the plaintiff was not entitled to attorney fees under section 203 (for waiting-time penalties) or section 226 (for wage-statement penalties), either, because actions for failure to provide meal or rest breaks do not entitle employees to pursue derivative penalties under those sections.[318]

7.10.4 Further issues involving the "one additional hour of pay"

Extra hour of pay must be paid at the regular rate of pay. Until 2021, there was an open debate whether the additional hour of pay for noncompliant breaks must be paid at the usual hourly rate or regular rate of pay. Although Labor Code section 226.7(c) specifies a particular way to measure the extra hour of pay—the employee's "regular rate of compensation"—plaintiffs argued that the proper measure is the "regular rate" used for overtime-pay purposes. The "regular rate" often will be higher than the usual hourly wage (as, for example, when an employee during a relevant workweek works some hours subject to a shift premium). At other times the "regular rate" will be lower than the usual hourly wage (as, for example, when an employee during a workweek gets a "controlled standby" wage, set at a low rate). Proponents of "usual hourly rate" cited the Legislature's decision not to adopt the "regular rate" term of art, while choosing instead to adopt the phrase "regular rate of compensation." The DLSE seemed to have agreed.[319]

Then, in 2021, the California Supreme Court dealt yet another blow to employers, in *Ferra v. Loews Hollywood Hotel. Ferra* decided that the extra hour of pay must be paid at the regular rate of pay; that is, the employer must calculate extra hour of pay the same way the employer would calculate the regular rate for overtime purposes.[320] Then, pouring salt into the employer wound it had just created, the Supreme Court held that its *Ferra* decision applies retroactively.[321]

Must the pay be recorded in wage statements? Is the extra hour of pay something that employers must record in the wage statement (see § 16.3)? One might think not, as the extra hour of pay is not truly wages "earned" and does not represent "hours worked," and thus logically does not fall within a category of the items that the wage statement must include. Indeed, in 2019, the Court of Appeal held in *Naranjo v. Spectrum Security Services, Inc.,* that "unpaid premium wages for meal break violations do not entitle employees to additional remedies" under section 226 if their "pay statements during the course of the violations include the wages earned for on-duty meal breaks, but not the unpaid premium wages."[322] But then the California Supreme Court struck again. Its 2022 decision in *Naranjo* held that both paid *and unpaid* meal premium pay must be reported as "wages earned." (See § 16.3.)

7.11 Suitable Seats and Comfortable Temperatures

Most California Wage Orders require employers to provide employees "with suitable seats when the nature of the work reasonably permits the use of seats."[323] The relevant provision has two independent parts: sections 14(A) and 14(B). Section 14(A) requires that seats be provided when the nature of the work reasonably permits, while section 14(B) requires that seats be placed nearby for use when the employees "are not engaged in the active duties of their employment."

The Wage Order does not authorize any monetary remedy, but a Labor Code provision forbids employment conditions prohibited by a Wage Order,[324] and the PAGA statute empowers employees who experience Labor

Code violations to seek civil penalties of $100 or $200 per employee, per pay period (see §§ 5.15, 7.25). Plaintiffs' lawyers have invoked this once-obscure seating rule in representative actions against retailers, grocery stores, banks, hotels, pharmacies, warehouses, and other employers whose employees often must work while standing.

7.11.1 Early decisions

Until 2009, no published decision had addressed a seating claim. In 2005, in *Hamilton v. San Francisco Hilton*,[325] a trial court rejected the seating claim of a guest service agent who challenged a hotel's requirement to stand at the front desk. The trial court granted the hotel summary judgment because (1) standing and continual mobility throughout the front office area were essential functions of the job and (2) seated employees could not safely use a computer, fit their knees and legs in the confined workspace, or open a cash drawer. Further, the hotel could reasonably decide that guest service agents should stand to serve guests—a business judgment about image and brand that a court should not "second guess."

In 2009, however, a federal district judge in San Francisco breathed new life into seating claims, ruling that a store cashier could pursue such a claim.[326] And then, in 2010, two California appellate courts recognized the viability of seating claims.[327] In 2013, the Ninth Circuit further enlivened seating claims by holding that employees need not request a seat to trigger their employer's duty to provide one.[328] But other aspects of the employer's duty to provide a seat remained unsettled.

7.11.2 The California Supreme Court's pro-employee decision in *Kilby*

In 2013, the Ninth Circuit, hearing consolidated appeals, asked the California Supreme Court to resolve these issues of first impression:[329]

> (1) Does the phrase "nature of the work" refer to an individual task performed during the workday, or does "nature of the work" require a holistic look at the entire range of duties? And if the holistic approach applies, then should courts consider the entire range of duties if the employee spends more than one-half of the time on tasks that reasonably allow the use of a seat?
>
> (2) In deciding whether the nature of the work "reasonably permits" the use of a seat, should courts consider the employer's business judgment, the physical layout of the workplace, and the employee's physical characteristics?
>
> (3) Must the employee prove what a "suitable seat" would be?

In 2016 the California Supreme Court, in *Kilby v. CVS Pharmacy*, answered these questions.[330] *First, Kilby* rejected both the employers' argument that the entire job must be considered holistically and the plaintiffs' argument that the job must be considered task by task. *Kilby* held instead that the proper focus is on the tasks performed at a given location. The trier of fact is to "consider whether it is feasible for an employee to perform each set of location-specific tasks while seated."[331]

Second, Kilby ruled that while the employer's business judgment, although not controlling, is a factor to consider in determining whether the nature of the work reasonably permits seating: "An objective inquiry properly takes into account an employer's reasonable expectations regarding customer service and acknowledges an employer's role in setting job duties. It also takes into account any evidence submitted by the parties bearing on an employer's view that an objective job duty is best accomplished standing."[332] The physical layout of a workplace is also relevant.[333] By contrast, the employee's physical characteristics were not relevant in the case presented, which did not raise any issue about potential reasonable accommodations needed for particular workers.[334]

Third, *Kilby* held that the employer, not the employee, bears the burden of proving that no suitable seating exists.[335]

Kilby also reached out to make a pro-employee decision on an issue not even before it. *Kilby* held that if other job duties take the employee to a location where he must work while standing, he would be entitled to a seat, under section 14(B), during "lulls in operation."[336]

Kilby encouraged more seating claims, while encouraging California employers to re-evaluate every location that requires standing to see if the nature of the work reasonably permits the use of seats at that location. The evaluation might involve considerations regarding safety, ergonomics, and the impacts on customer service.

7.11.3 Suitable Seating Claims Post-*Kilby*

In 2022 the Court of Appeal addressed the issue of "lulls" under section 14(b), in *LaFace v. Ralphs Grocery Co.* The trial judge, following a bench trial, found that a grocery store need not provide seating to its cashiers. The liability issue on appeal was whether the trial judge had erred in denying the plaintiff's claim under section 14(B).[337] *LaFace* was affirmed, holding that even when lulls occurred in a cashier's primary duties, the cashiers were still expected to move about the store fulfilling various other tasks: "Sitting in or near the checkstands when there are no customers in line instead of cleaning, restocking, assisting other departments, or fishing [for customers], would interfere with the performance of the cashiers' other duties."[338] *LaFace* stated that employees cannot create a "lull in operations" simply by choosing not to perform their job duties.[339]

In 2023 Seyfarth obtained a defense verdict following an eleven-day bench trial on a suitable seating claim.[340] The Court concluded that the totality of the circumstances demonstrated that employees had significant job tasks that required standing, or were done best while standing, and that providing a seat was likely to lessen performance and increase safety hazards. Additionally, the Court concluded that the employer had made a reasonable, good-faith business decision that standing employees provided, and were perceived to provide, better customer service and such a decision was entitled to weight as it was not arbitrary or a mere preference.

Recently, the Court of Appeal upheld summary judgment in favor of an employer in a case in which the plaintiff claimed working in the cash booth of a drive-thru reasonably permitted the use of a seat.[341] The defendant employer presented evidence that included an ergonomics expert and argued that no suitable seat exists for the position. The Court of Appeal agreed, finding that the plaintiff did not raise a genuine issue of material fact as to whether suitable seating exists.

7.11.4 Workplace temperatures providing reasonable comfort

Appearing in the Wage Orders right after the once-obscure section 14 (on suitable seating) is the still more obscure section 15, which addresses workplace temperature:

> (A) The temperature maintained in each work area shall provide reasonable comfort consistent with industry-wide standards for the nature of the process and the work performed.
>
> (B) If excessive heat or humidity is created by the work process, the employer shall take all feasible means to reduce such excessive heat or humidity to a degree providing reasonable comfort. Where the nature of the employment requires a temperature of less than 60° F., a heated room shall be provided to which employees may retire for warmth, and such room shall be maintained at not less than 68°.
>
> (C) A temperature of not less than 68° shall be maintained in the toilet rooms, resting rooms, and change rooms during hours of use.
>
> (D) Federal and State energy guidelines shall prevail over any conflicting provision of this section.

Enterprising plaintiffs' lawyers, invoking PAGA, have sued companies to seek civil penalties for failing to maintain temperatures to "provide reasonable comfort with industry-wide standards." No published case thus far has provided guidance on the provision. One welcome development in temperature jurisprudence has been a federal district court decision dismissing a section 15 claim where the plaintiff could not cite an applicable "industry-wide standard" applying to temperature in the defendant's business establishment.[342]

On July 23, 2024, Cal/OSHA implemented a new standard to its General Industry Safety Orders that covers California Heat Illness Prevention in Indoor Places of Employment.[343] The new section applies to all indoor work areas where the temperature (or heat index) equals or exceeds 87 degrees Fahrenheit when employees are present or 82 degrees Fahrenheit when employees are wearing clothing that restricts heat removal. Workplaces are required to monitor the temperature, keep accurate records of the temperature, provide access to potable drinking water and cool-down areas, provide training on heat illness factors, reduce risk factors associated with high temperatures, and establish, implement, and maintain an effective Heat Illness Prevention Plan.[344]

7.12 Restrictions on Having Employees Pay for Costs of Business

California employers must themselves incur all the costs incurred in the normal operation of business, without requiring employees to act as insurers against ordinary business losses. California courts thus have invalidated many wage deductions taken to cover business losses that have resulted from factors beyond the employee's control or from simple employee carelessness.[345] The DLSE also has taken this position.[346]

7.12.1 Employers cannot use wage deductions to cover business expenses

Wage Order upheld by California Supreme Court. Section 8 of most Wage Orders reads: "No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee."

The Supreme Court upheld this provision in *Kerr's Catering Service v. Department of Industrial Relations*,[347] deciding that employers cannot make payroll deductions that would make employees financially responsible for business losses that did not result from the employees' gross negligence or willful misconduct. The employees at issue sold food from lunch trucks. They earned wages plus a commission based on their sales, with the commission reduced by any cash shortages. *Kerr's Catering* upheld the Wage Order on the rationale that the concept of protecting employees from wage deductions already existed in various Labor Code provisions: section 221 forbids an employer to collect back from an employee wages already paid, and sections 400-410 limit employers' rights to seek cash bonds from employees.

Rule against business-expense deductions applied to exempt employees. The DLSE has opined that the Labor Code itself, rather than just section 8 of the Wage Orders, bars the deductions expressly barred by section 8. That DLSE interpretation would mean that the anti-deduction rules protect *exempt* employees as well as the *nonexempt* employees protected by the Wage Orders.[348]

Development of general concept. The concept stated in *Kerr's Catering*—that California employers must not make employees insurers for general business losses—extends to other contexts, making certain commission and bonus plans suspect under California law (see §§ 7.15, 7.16).

7.12.2 Payment for uniforms

California employers who require employees to wear uniforms must pay for the uniforms and their maintenance.[349] A uniform is any distinctively designed or colored wearing apparel or accessory, although items of unspecified design that are usual and generally usable in the occupation (e.g., white shirts, dark pants, black shoes and belts) are not considered to be part of a uniform.[350] In one case, a retailer settled a DLSE enforcement action in which the DLSE contended that a dress code requiring the wearing of a blue shirt and tan or khaki pants constituted a uniform requirement.[351]

Section 9(C) of most Wage Orders states that employer-provided uniforms must be returned by the employee upon completion of the job. The employer may require a reasonable deposit as security for the return, provided that the employer follows the specific requirements of Labor Code section 400, et seq. Pursuant to this process and with prior written authorization by the employee, the employer may deduct from the employee's last check the cost of the uniforms, but must not deduct for normal wear and tear.

7.12.3 Payment for tools or equipment

Section 9(B) of most Wage Orders provides that employers who require tools or equipment to perform a job must provide and maintain them, although employees who are paid at least twice the minimum wage may be required to provide and maintain hand tools and equipment customarily required in their trade or craft. Section 9(C) provides that with tools and equipment, as with uniforms, employers may require a reasonable deposit and may, with prior written authorization, make deductions for items not returned by employees.

Employers must provide and maintain necessary tools and equipment even if such need was caused not by the employer itself, but by an uncontrollable act such as a government mandate. In 2023, the Court of Appeal held that Governor Newsom's 2020 stay-at-home order issued at the outset of the COVID-19 pandemic did not obviate an employer's liability to reimburse employees—who were required to work from home due to such order—for business expenses that were incurred and necessary to perform their work.[352] In that case, an employee who had begun working from home because of the Governor's shut-down mandate sued for unreimbursed expenses, such as internet access, telephone headsets and service, and computers and computer accessories. The Court held that because the expenses were necessary for employees to perform their duties, and the company provided such services and equipment when employees were allowed to work from company offices, the fact of working from home did not change the company's responsibility. In other words, employers may not avoid liability for providing tools and equipment (or reimbursing employees for those costs) even if the decision to work away from the office was at the direction of an outside entity, such as the government. (For a deeper discussion of employers' requirement to indemnify employees for necessary business expenses, see § 7.13, *infra*.)

7.12.4 Cost of medical examinations

California employers must not deduct from a paycheck the cost of a medical examination for the employee.[353]

7.12.5 Debt repayment (employee loans)

Any payroll deduction used to satisfy a debt that the employee owes the employer is valid only if the deduction was approved in writing by the employee. Any deduction of a "balloon" payment from a final paycheck is unlawful.[354]

7.12.6 Barriers to employer recovery of wage overpayments

The Court of Appeal has held that an employer must not make payroll deductions to recoup inadvertent overpayments of salary, because any such deduction would violate attachment and garnishment statutes.[355] The DLSE has opined that an employer making regular, predictable, and expected overpayments (such as where the

employer pays a set amount on the assumption that employees have worked a given number of hours, without yet checking on the exact number of hours worked) can recover those overpayments through deductions in the next paycheck, but only if the employer has prior written authorization to make those deductions and only if the employee still receives, after the deductions, not less than the minimum wage. Further, even with that authorization, according to the DLSE, there can be no deduction from the final paycheck.[356]

7.12.7 Other forbidden deductions

General Labor Code prohibition. California employers generally must not deduct from employee paychecks except as the deductions are authorized by law or made with the employee's written consent.[357]

Independent Contractors. As the "ABC test" for independent contractors is applied pursuant to *Dynamex* and AB 5, franchisors and others must proceed with caution when deducting from the pay of individuals classified as independent contractors, as a finding of misclassification has been found to support a claim for improper deductions of management, sales, and marketing fees.[358]

Tips. California employers must not deduct tips or gratuities from wages. For discussion of this and other peculiar rules on tips, see § 7.18.

7.13 Indemnification of Employee Expenses

Under Labor Code section 2802, California employers must indemnify employees for money that they necessarily expend or lose in direct consequence of discharging their duties or as a result of following their employer's direction.[359] An employee who successfully sues the employer for indemnification is entitled to reasonable attorney fees and costs.[360] A prevailing employee also would be entitled to interest on an award, at the rate applicable in civil actions, from the date on which the employee incurred the necessary expenditure or loss.[361]

Although in effect since 1937, section 2802 traditionally was simply a means to obtain employer "indemnification" only in the narrow sense of the word: "to reimburse (another) for a loss suffered because of a third party's act or default."[362] Examples of these cases are noted below (see § 7.13.1, 7.13.2). More recently, however, employees have invoked section 2802 to seek indemnification for other kinds of employee expenses (see § 7.13.3).

7.13.1 Indemnification for routine business expenses

Although judicial decisions interpreting section 2802 typically have addressed circumstances in which an employee seeks indemnification for lost or damaged tools or equipment, or for the legal expenses incurred to defend a lawsuit arising out of the employee's job duties, the DLSE has interpreted section 2802 to apply more broadly, to require employers to cover routine employee business expenses. For example, the DLSE opines that section 2802 requires employers to indemnify employees for such expenses as auto expenses (for other than commuting), client entertainment, and cell phone charges.[363]

A 2005 Court of Appeal decision, *Gattuso v. Harte-Hanks Shoppers, Inc.*, endorsed the DLSE's extension of section 2802 to car mileage expenses.[364] The California Supreme Court reviewed this case, and issued its own decision in 2007.[365] The high court's decision assumed, without officially deciding, that section 2802 does indeed require employers to indemnify employees for their ordinary business expenses.[366]

At issue in *Gattuso* was whether the employer could satisfy a duty to indemnify necessary expenses by increasing the employee's overall pay, as opposed to paying for expenses as they were incurred and claimed on expense reports. *Gattuso* held that an employer can choose among various alternative methods to pay employee mileage

expenses, including (1) tracking the actual costs to the employee for necessary fuel, insurance, depreciation, and service, and paying that amount, (2) paying the employee a lump sum payment each month so long as the lump sum actually covers all necessary mileage expenses, (3) paying a per-mile rate, such as the IRS mileage rate, or (4) increasing the employee's commission rate, with the extra commissions being devoted to cover employee expenses.[367]

This employer victory was partial only. *First*, *Gattuso* held that because Labor Code section 2804 prohibits employers and employees from waiving the right to indemnity, employees will always be entitled to payment for all necessary expenses, meaning that the employer who provides a fixed expense allowance or an enhanced commission rate must ensure that payments actually cover all necessary expenses.[368] *Second*, *Gattuso* held that the employer must provide some method or formula to identify the amount of the combined employee compensation payment that is intended to provide expense reimbursement. *Gattuso* also stated that, going forward, employers must identify the portion of wages allocated to expenses on itemized wage statements.[369]

Another decision has held what *Gattuso* implies—that California employers must indeed indemnify employees for their reasonable and necessary business expenses. In that case, FedEx delivery drivers, arguing that they were employees, not independent contractors, sued FedEx under section 2802 for reimbursement of work-related expenses.[370] The Court of Appeal affirmed the trial court's finding that the drivers were employees for purposes of section 2802 and that FedEx had failed to indemnify the drivers fully for their business expenses.

Duty to solicit requests for reimbursement? A federal district court has held that employers can be liable for business expenses even when the employee has failed to submit required expense reports. The court reasoned that the law focuses not on whether an employee requests reimbursement of expenses but rather on whether the employer either knows or has reason to know that the employee has incurred a reimbursable expense. If the employer has that actual or constructive knowledge, then it must exercise due diligence to ensure that the employee is paid.[371]

Cell-phone expense reimbursement. The Court of Appeal has held that an employer that required its customer service managers to use their personal cell phones for business must reimburse the managers for a reasonable percentage of their cell phone bills.[372] The trial court had denied certification of a proposed class of 1,500 managers, reasoning that a class trial was unmanageable in light of individualized issues as to whether particular class members paid their own phone bills and whether they had service plans that provided for unlimited minutes. In either case, the trial court ruled, the employer's practice of requiring personal cell-phone use might not have caused an employee to incur any actual expense.

The Court of Appeal, however, reversed the denial of class certification, because it disagreed with the trial court's interpretation of section 2802. The Court of Appeal held that section 2802 always requires reimbursement when an employee relieves the employer of a business expense, regardless of whether the employee actually incurred an extra expense in doing so: "Otherwise, the employer would receive a windfall because it would be passing its operating expenses onto the employee. Thus, to comply with section 2802, the employer must pay some reasonable percentage of the employee's cell phone bill."[373] The Court of Appeal left for another day the enormous practical difficulties involved in calculating individual damages. Nor did the Court of Appeal address other issues (such as tax issues and issues of the regular rate of pay) that would arise if employers respond to the Court of Appeal's ruling by over-paying employees for their actual expenses.

Employer-required clothing. In 2019 the Court of Appeal held that a restaurant need not pay for the slip-resistant safety shoes the employer required, because the employees did not have to buy shoes of a particular brand, style, or design, and could wear these basic, non-uniform wardrobe items outside of work. The shoes

therefore did not qualify under Labor Code section 2802 as "necessary expenditures ... incurred by the employee[s] in direct consequence of the discharge of [their] duties."[374]

Commuting expenses. In a 2020 case involving travel time, the Court of Appeal held that the same factors governing whether service technicians are entitled to wages for their commuting time also govern whether they are entitled to reimbursement for their commuting mileage expenses. The ultimate question was whether they were required to transport company tools and equipment in their personal vehicles that were so voluminous that the service technicians were unable to use their commutes for their own personal purposes.[375]

Remote working expenses. The Covid-19 pandemic has led to an increase in litigation over reimbursement of expenses incurred by employees who work remotely—such as expenses for home internet access, utilities, and the use of home office space. Courts have concluded that the reasonableness of such expenses depends in large part on whether employees had the option to use the employer's facilities and services such as internet.[376]

In a recently filed class action, an employee challenged his employer's reimbursement of only "incremental" home internet costs incurred by remote employees – i.e., only those costs above what employees would normally incur if they were not working from home. The Northern District of California declined to certify the class, citing evidence that many employees had received reimbursements of more than a "reasonable percentage" of their home internet costs, in compliance with Labor Code section 2802.[377]

As noted above, in 2023, the California Court of Appeal expanded the scope of reimburseable expenses for remote workers.[378] A trial court dismissed a lawsuit for reimbursement of business expenses incurred while working from home, on grounds that the Governor's 2020 stay-at-home order was an "intervening cause," *i.e.*, the plaintiff could not successfully allege facts that the employer directly caused its employees to incur the business expenses at issue. On appeal, the Court of Appeal reversed, holding that expenses need not be directly caused by the employer in order to be subject to reimbursement. Instead, the analysis depends upon whether the expenses incurred were directly related to the employee's duties—the statute does not have carve-outs for intervening causes.

Direct patient care workers. Legislation enacted in 2020 requires employers to reimburse employees who provide direct patient care—and applicants for such positions—for any expense or cost of employer-provided or employer-required educational programs or training, including residencies, orientations, or competency validations necessary for direct patient care employment.[379]

Public employers. It remains a grey area whether, and when, public employers must reimburse employees for business expenses. In 2023, the California Court of Appeal held that California State University was not required to reimburse a professor for remote teaching expenses, because applying Labor Code section 2802 would "infringe upon its sovereign governmental powers in two ways." "It would limit the discretion vested in CSU to establish policies for employee reimbursement for necessary expenses, and would potentially divert limited educational funds from CSU's core function to pay not only legal judgments but potentially huge additional amounts to outside parties."[380] However, the decision was limited to the facts of the case and does not create a bright-line rule: "We do not hold that section 2802 can never apply to CSU, only that it does not apply in this case because Krug's claim falls squarely within the ambit of CSU's vested authority to set the terms for employee expense reimbursement." Further lawsuits against public employers may provide clarity.

7.13.2 Special insurance status of expense claims as not "wage and hour" claims

Insurance policies for employment practices liability often cover wrongful termination and discrimination claims while excluding coverage for "wage and hour" claims. In 2019 the Court of Appeal held that this policy exclusion should be interpreted narrowly, to apply only to claims involving the duration of work or pay for work. The plaintiffs sued on traditional wage and hour claims and also sued for reimbursement of business-related expenses. The defendant employer tendered its defense on the expense claim to an insurance carrier, which denied coverage. The employer then sued the carrier for breach of contract and declaratory relief. The Court of Appeal ruled against the carrier, reasoning that "wage and hour ... law(s)" are only those laws concerning duration of time worked or remuneration received in exchange for work. The Court of Appeal noted that the reimbursement statutes (Labor Code section 2800 et seq.) do not mention wages or hours and do not appear in the Labor Code sections addressing compensation or working hours. Moreover, expense reimbursement is not pay for labor or services.[381]

7.14 Payment by Piece-Rate

Legislation effective in 2016 dealt a blow to piece-rate employers already reeling from hostile judicial decisions.[382] (See § 7.2.2.) This legislation codified the judge-made "pay separately for every hour worked" doctrine as to piece-rate wages, and requires that employers must:

- Pay piece-rate employees for rest and recovery breaks (and all periods of "other nonproductive time") separately from, and in addition to, their piece-rate pay. "Other nonproductive time" is defined as "time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis."[383] The law specifies a formula for calculating the required pay rate for rest breaks.

- Provide piece-rate employees with wage statements that include the pay period, the total hours of compensable rest and recovery breaks, the rate of pay for those breaks, and the gross wages paid for those breaks during the pay period.

- List, for the pay period, the total hours of other non-productive time, the pay rate for that time, and the gross wages paid, if the employer does not pay a base hourly rate for all hours worked (in addition to piece-rate wages).[384]

In 2019 the Court of Appeal rejected a constitutional challenge to the piece-rate statute. The plaintiffs were agricultural and construction employers who reasonably relied upon a fair piece-rate compensation system to pay their employees. These employers found the 2016 law so unclear that it was impossible for them to know how to comply and whether to elect to commit to the requirements necessary to claim a complicated affirmative defense available under the statute. Rejecting this claim, the Court of Appeal affirmed a denial of relief, reasoning that the statutory phrase "other nonproductive time" is not unconstitutionally vague.[385]

DLSE guidance. The DLSE has issued a Fact Sheet and Frequently Asked Questions regarding the piece-rate law. Among the highlights:

- *Employers may not realize they have "piece-rate" employees.* The DLSE suggests that the piece-rate law applies to employers that pay employees only partly on a piece-rate basis. For example, an employer may pay piece-rates on certain days of the week and pay hourly wages on other days. The DLSE's wage-rate calculation examples indicate that during a week where an employee performs piece-rate work on some days but not others, the employer must (1) include earnings from days in which no piece-rate work was performed in calculating the average hourly wage for the week, and (2) pay the average hourly wage

for all rest breaks during the week, even if the employee performed no piece work on a given day. This guidance arguably deviates from the intent of the statute, because on days where the employee performs no piece-rate work, there should be no need to have rest breaks paid at a higher hourly rate.

- *Commissions are (mostly) not "piece-rates."* The DLSE Fact Sheet offers some comfort to employers by clarifying that the new law does not apply to commissioned employees. But the DLSE warns that some payments labelled as "commissions" may actually be piece-rates, such as where the employee receiving "commissions" is not principally involved in selling the product or service or where the payment is not calculated as a percentage of the product or service sold. In addition, the DLSE further notes that the California Court of Appeal has found similar rest break compensation requirements to apply to commission-earning employees ("[N]ote that while section 226.2 applies only to piece-rate employees, the court in *Vaquero v. Stoneledge Furniture LLC*, 9 Cal.App.5th 98 (2017), found that similar pay requirements apply to commission employees, including the right to be compensated separately for required rest breaks.") See also § 7.15.

- *Another "regular rate" trap for the unwary.* The DLSE Fact Sheet creates a potential pitfall on how to calculate the "total compensation" for the workweek. The DLSE advises that all "remuneration" included in calculating the regular rate of pay for purposes of overtime premium pay (e.g., the value of meals, lodging, and other non-monetary remuneration) should also be included in determining the total compensation and average hourly rest-break rate for piece-rate employees. The DLSE thus added a further layer of complication for employers that had hoped to look only to the total hourly and piece-rate pay in determining the average hourly rest break rate. Employers may, however, exclude payments that are not included in the regular rate of pay, such as vacation payments, gifts, and travel expenses.

- *Rest period time need not be separately tracked.* Providing some relief to employers from the potential burdens of this law, the DLSE advises that employers need not separately track actual rest break time taken by piece-rate employees. Instead, employers must pay for all compensable (legally required) rest breaks at the specified rate, and record these minutes on the wage statement. The employer need not record the actual number of minutes employees take for rest breaks or report those minutes on wage statements.

7.15 Payment of Commissions

Employees earn commissions in accordance with the level of products or services that they sell. Employees who earn more than 1.5 times the minimum wage and whose total pay consists mostly of commissions are exempt from California overtime requirements. (See § 7.7.5.) Nonexempt employees paid on commission must receive, through a draw against commissions or otherwise, at least the minimum wage for all hours worked in each pay period. And the Court of Appeal has held that these employees must also be paid separately, at the minimum wage, for the time spent on rest breaks.[386]

7.15.1 What payments qualify as commissions?

To qualify as receiving "commission" wages, the employee must be involved principally in sales activities (not on product creation or rendering service), and the compensation must depend on the level of sales.[387] The DLSE has defined commissions narrowly, as wages paid based on a percentage of the sale, and argues that wages paid for the number of units is really a piece-rate, not a commission rate.[388] But the Court of Appeal has rejected this narrow interpretation in the context of a pay plan for car salespersons.[389] At issue was a Labor Code provision stating that commissions for employees of licensed vehicle dealers consist of "compensation paid to any person

for services rendered in the sale of such employer's property or services and based proportionately upon the amount or value thereof."[390]

The Court of Appeal concluded that fixed payments of $150 for each car sold or leased qualified as payments that would count towards determining whether a car salesperson made most of her pay from commissions and thus qualified as exempt from overtime requirements. The Court of Appeal reasoned that a uniform payment for each vehicle sold was "proportionate—a one-to-one proportion. The pay will rise and fall in direct proportion to the number of vehicles sold."[391]

The Court of Appeal has also recognized that payments reflecting a percentage of the adjusted gross profit on the sale of a product or service can qualify as commissions. The employees at issue placed candidates with client companies and, once the candidate was successfully placed, received a percentage of the adjusted gross profit from the placement, as determined by a formula that included the employer's costs and expenses. The Court of Appeal, rejecting the plaintiff's argument that this formula was too "complex" to qualify as a commission, reasoned that the payments "were sufficiently related to the price of services sold to constitute commissions for purposes of the commissioned employees exemption."[392]

7.15.2 When are commissions earned?

Commissions generally are earned upon the completion of a sale and any post-sale contingencies set forth in the commission plan.[393] The DLSE recognizes that employers may set reasonable conditions that must occur before a commission is considered "earned." One opinion letter states: "Commissions are due and payable after the reasonable conditions precedent of the employment agreement have been met. If commissions cannot be calculated until after an event has happened then the commissions are not 'earned' within the meaning of [Labor Code] Section 204 until the happening of that event so long as the event is reasonably tied to the calculation."[394]

The Court of Appeal has stated that preconditions to earning the commission must be "clearly expressed," must "relate to the sale," and "cannot merely serve as a basis to shift the employer's cost of doing business to the employee."[395]

7.15.3 Advances and chargebacks

Employers may advance commissions on a sale and then charge back the advance if the sale does not go through.[396] Thus, if the employer advances an employee a commission for selling a magazine subscription, then the advance can be "charged back" against future commissions (cancelling out commissions generated in future sales) if the purchaser cancels the subscription within one month.[397] The employer's position is strongest if the earning criteria in the plan are clear, the employee has authorized the chargeback arrangement in writing, and the arrangement ensures that the employee will always be paid the applicable minimum wage.[398]

Advances paid against commissions to be earned may be recovered at termination of employment only if there is a specific written agreement to that effect and, for nonexempt employees, only to the extent that the recovery does not invade the minimum wage or any overtime premium pay.

The Court of Appeal struck down a chargeback arrangement in *Hudgins v. Neiman Marcus*. In that case, a retailer addressed the problem of rescinded sales in certain sections of the store by imposing on all sales commissions in each section a pro rata deduction for "unidentified returns" (items returned that could not be tracked to a particular sales associate). *Neiman Marcus* concluded that this unidentified-returns policy effected a "forfeiture of commissions individually earned," on the rationale that "[a]s to those items of merchandise the customer decides to keep, the sales associate has clearly earned his or her commission at the moment that the sales documents are completed and the customer takes possession of the purchased items."[399]

Neiman Marcus concluded that the policy was unlawful under California law because the policy effectively required sales associates to "repay a portion of commissions" on "completed sales" to compensate the employer for commissions paid on sales that other employees did not complete—amounts that would otherwise be a business loss that "the conscientious sales associate has done nothing to cause."[400]

Neiman Marcus contrasted this unlawful practice with a lawful practice that "identified returns, [where] the sale is reversed and the individual sales associate is required to return the commission because *his or her* sale was rescinded."[401] While *Neiman Marcus* did not decide whether an "identified returns" policy would necessarily be lawful, the DLSE has interpreted *Neiman Marcus* as allowing a chargeback of commissions paid to an employee for identified returns.[402]

7.15.4 Written contracts required for commission agreements

Employers contracting for services within California and contemplating payment in the form of commissions must put the commission agreement in writing and describe how commissions are computed and paid.[403] Further, employers must give a signed copy of that agreement to each commissioned employee, and obtain a signed receipt from the employee.[404]

The statute defines "commission" for these purposes as "compensation paid to any person for services rendered in the sale of such employer's property or services and based proportionately upon the amount or value thereof."[405] But the following forms of pay do not qualify as "commissions": (1) short-term productivity bonuses such as those paid to retail clerks, (2) temporary, variable incentive payments that increase, but do not decrease, payment under the written contract, and (3) bonus and profit-sharing plans, unless the employer offered to pay a fixed percentage of sales or profits as pay for work performed.

7.16 Bonuses

A bonus is money paid in addition to ordinary salary or wages. The Labor Code does not expressly address bonuses. Courts treat a bonus as a form of wages. Entitlement to a bonus is a matter of contract law, as modified by California statutory law. Courts consider an offer of a bonus as a binding unilateral contract that the employee accepts by beginning performance under the bonus plan.

Unless a bonus plan expressly provides otherwise, California bonuses are often treated as earned pro rata and payable, as wages, upon termination. Further, if the reason an employee has not earned a bonus is that the employer has dismissed the employee without cause, then a California court likely would hold that the employee is entitled to a pro rata share of the bonus, on the theory that the employer is at fault for preventing the performance needed to earn the bonus.[406]

But if a written bonus plan clearly requires the employee to remain employed until a certain date, then an employer can deny the entire bonus if an employee, before that date, voluntarily resigns or is dismissed for good cause.[407]

7.16.1 Bonuses affected by the employer's workers' compensation costs

Some employers base bonuses in part on how successfully the company has avoided workers' compensation costs. Labor Code section 3751, however, forbids an employer to deduct from employee earnings, either directly or indirectly, "to cover the whole or any part of the cost" of workers' compensation.[408] A 2003 Court of Appeal decision (*Ralphs I*) interpreted section 3751 to mean that workers' compensation costs must be ignored in the

calculation of a profit-based bonus plan.[409] This ruling, had it remained in effect, would have invalidated countless traditional profit-based bonus plans, including those for CEOs.

But then, in 2007, the California Supreme Court overruled *Ralphs I* in a decision (*Ralphs II*) involving the same employer and the same bonus plan.[410] *Ralphs II* holds that traditional bonus systems based on net profits are lawful, even if net profits necessarily reflect workers' compensation costs together with other business losses. *Ralphs II* distinguished (a) a profit-based bonus plan from (b) a bonus or commission plan that first promises a payment and then reduces the promised payment to adjust for business losses. The latter plan, *Ralphs II* explained, would unlawfully charge employees for the company's cost of doing business.[411]

A profit-based plan, by contrast, does "not create an expectation or entitlement in a specified wage, then take deductions or contributions from that wage to reimburse [the employer] for its business costs." Rather, each employee receives, in addition to a guaranteed wage paid regardless of profit, a promised supplemental incentive compensation based on a profit to be calculated for a relevant period of operation. The bonus plan thus does not recapture or deduct from what the employer had originally promised,[412] but rather rewards employees' "cooperative and collective contributions" by giving them a portion of profits that the employer "would otherwise be entitled to retain itself."[413]

Notwithstanding the "reason and common sense" *Ralphs II* thus invoked, the decision drew the support of just four of the seven justices. The three dissenters protested that the Labor Code must be read liberally in the employee's favor: "Section 3751 prohibits the pass-through of workers' compensation costs in the broadest possible terms."[414] The dissenters insisted: "What [the employer] cannot do in constructing its formula is include factors the Legislature has decided should play no role in the calculation of employment compensation. Workers' compensation is such a factor."[415]

Profit-based bonuses in California thus squeaked by the Supreme Court with a vote of 4-3.

7.16.2 Bonuses affected by cash and merchandise shortages

Where bonuses depend on net profits, which depend in turn on such items as theft and cash shortages, plaintiffs have claimed that the bonus calculation amounts to a deduction in violation of section 8 of the Wage Orders. *Ralphs I* distinguished between nonexempt employees (covered by section 8) and exempt employees (not covered by section 8).[416] As to exempt employees, *Ralphs I* held that California employers lawfully may calculate bonuses using a formula that includes deductions for cash and merchandise shortages, because that calculation appropriately encourages exempt employees to manage the business to increase revenue while minimizing expenses. With regard to nonexempt employees, however, *Ralphs I* held that the employer's profit-based bonus calculation would unlawfully require them to bear the costs of management.

The California Supreme Court's *Ralphs II* decision, which overruled *Ralphs I* with respect to its interpretation of Labor Code section 3751, also overruled *Ralphs I* with respect to its view that employers must not deduct cash and merchandise shortages in calculating profits for purposes of a profits-based bonus for nonexempt employees.[417] But *Ralphs II* was a hotly contested, 4-3 decision, and the three dissenting justices, while arguing that the employer unlawfully considered workers' compensation costs in its profits-based bonus plan, suggested that they would also find unlawful the "deduction of cash and merchandise shortages."[418]

7.16.3 Longevity bonuses involving restricted company stock

The California Supreme Court, in *Schachter v. Citigroup*, upheld a voluntary employee incentive compensation plan that permitted employees to take shares of restricted company stock at a reduced price in lieu of receiving a portion of annual cash compensation.[419] The plan provided that the stock did not vest unless the employee was still employed on a specified date, and that the employee would forfeit the stock—and the portion of cash

compensation that had been paid in the form of the restricted stock—if the employee quit or was dismissed for cause before the vesting date.

An employee who took restricted stock and then quit before the vesting date sued to challenge the forfeiture provisions. The employee argued that the forfeiture violated Labor Code requirements that employees be paid all earned, unpaid wages upon termination or resignation, and a Labor Code provision that prohibits agreements that purport to circumvent those requirements. *Schachter* rejected the employee's challenge because, according to the terms of the incentive plan, there were no earned, unpaid wages remaining unpaid upon termination of employment. That is, the plan provided a longevity bonus, which was never earned because the employee quit before the relevant date.

Even in granting the employer a victory, however, *Schachter* found it necessary to opine that bonuses, commissions, and other incentive compensation may have to be paid where the worker does not quit but is fired: "If the employee is discharged before completion of all of the terms of the bonus agreement, and there is not valid cause, based on conduct of the employee, for the discharge, the employee may be entitled to recover at least a pro rata share of the promised bonus." For this proposition *Schachter* cited no law but rather a DLSE Manual provision and a DLSE opinion letter. *Schachter*'s dictum did not address how the Supreme Court would interpret a longevity bonus plan that expressly requires continued employment to a given date, regardless of the reasons for the termination of employment, but *Schachter*'s language strongly implies that a California employer could not deny the bonus if the employer has dismissed the employee without cause.

7.16.4 Retroactive bonus overtime pay

Employers must pay overtime premium pay on non-discretionary bonuses paid to nonexempt employees.

The federal method. A bonus amount must be included in the workweek in which it was earned. When the bonus earnings cannot be identified with particular workweeks, employers can adopt any "reasonable and equitable method of allocation" of the bonus to the relevant workweeks, such as assuming that employees earned an equal amount of bonus each hour of the relevant period and determining the resultant hourly increase by dividing the total bonus by the number of hours worked during the period for which the bonus is paid. "The additional compensation due for the overtime workweeks in the period may then be computed by multiplying the total number of statutory overtime hours worked in each such workweek during the period by one-half this hourly increase,"[420] in recognition of the fact that the employee already has received the straight-time portion of the bonus.

Peculiar California method for "flat sum" bonuses. For years, the DLSE, while recognizing that the federal method is proper to calculate overtime premium pay on a formula bonus, such as a production bonus,[421] took a peculiar approach to a "flat sum" bonus, such as a payment of $300 for working through the end of a season. As to a "flat sum" bonus, the DLSE opined that the employer must calculate the regular rate by dividing the amount of the bonus by the straight-time hours worked, and then multiply that rate by 1.5 (for overtime) or 2.0 (for double-time) to calculate the amount of overtime pay or double-time pay.

The DLSE insisted that this peculiar arithmetic was needed to avoid a dilution of the bonus regular rate that, in the DLSE's imagination, would somehow encourage employers to assign more overtime hours to bonus-earners.[422] There was no particular law behind the DLSE's position, as opposed to a policy preference that overtime work must be discouraged whenever and wherever and however possible.

Thus, while federal law would determine a regular bonus rate on a "flat sum" bonus by dividing the bonus by all hours worked and then multiplying the number of overtime hours by 0.5 times the regular rate to determine the amount of bonus overtime pay, California would more than triple the amount of bonus overtime pay, by requiring employers to divide the bonus by only the straight-time hours worked and then multiply the number of overtime hours by 1.5 times the regular bonus rate.

In 2016, the Court of Appeal, in *Alvarado v. Dart Container Corp.*, rejected the DLSE's notion, holding that California law follows federal law as to calculating "flat sum" bonuses.[423] The employer in *Alvarado* calculated weekly bonus overtime pay. The employer's method essentially divided the $15 weekly bonus by all weekly hours worked (both straight-time and overtime) to yield a bonus regular rate, and then multiplied one-half that amount by the number of weekly overtime hours to produce the weekly bonus overtime pay. The plaintiff claimed that this method of compliance with the federal method failed to pay overtime premium pay due under Labor Code sections 510 and 1194. The employer prevailed on summary judgment. The trial court found no legal basis for the plaintiff's proposed formula, because federal law did not conflict with the employer's method, and because the plaintiff was relying on notions of California public policy lifted from a dictum in the DLSE Enforcement Manual that lacks any legally binding effect. Thus, the Court of Appeal affirmed the trial court's sensible result, recognizing that California employers may use the federal method to calculate the overtime pay due on bonuses. But then the California Supreme Court intervened, to take review of the case.[424]

In 2018 the Supreme Court in *Alvarado* reversed.[425] Exalting mechanical logic over practical reality, *Alvarado* endorsed the DLSE's approach and thus required that the "flat sum" bonus be divided by just straight-time hours (not all hours) and that the resulting regular bonus rate be multiplied by the number of overtime hours and by 1.5, not 0.5. *Alvarado* rejected an approach that would divide the bonus by all hours worked, because that approach would result in a "progressively decreasing regular rate of pay as the number of overtime hours increases, thus undermining the state's policy of discouraging overtime work."[426] This strictly logical approach blinks practical reality. Consider a worker earning a $15 bonus during a 50-hour week. By *Alvarado*'s reasoning, the federal method (dividing $15 by all 50 hours worked—yielding a bonus regular rate of $0.30, multiplied by 0.50 and 10 overtime hours to generate $1.50 in weekly bonus overtime pay) somehow would encourage the employer to create more overtime hours than if the employer used the DLSE method (dividing $15 by just the 40 hours of straight time—yielding a regular bonus rate of $0.375, multiplied by 1.50 and 10 overtime hours to generate $5.625 in weekly bonus overtime pay).

Alvarado cited no evidence—in the form of an empirical study or otherwise—to support its speculation about an employer's incentive to create overtime in this scenario. Nor had the DLSE provided any such evidence when it invented its peculiar "flat sum" bonus rule in the first place. Would an employer really create more overtime—paying time and one-half for each such hour—in order to dilute the bonus regular rate by a few cents? This practical consideration was something *Alvarado*'s theoretical musing did not begin to contemplate.

In a remarkable concurring opinion, four of the seven Supreme Court justices acknowledged that the "spare language" of statutory law could have left employers "somewhat uncertain about how to proceed," and that the DLSE Manual was not an "authoritative construction by a state agency." The four concurring justices further acknowledged that employers who "fully intended to comply with state overtime laws" "may now be faced with substantial penalties"—an "unfortunate" state of affairs that "conceivably could have been avoided had an interpretative regulation of this subject been promulgated through formal APA rulemaking." The concurring justices nonetheless agreed that *Alvarado*'s new interpretation should apply retroactively, even if, "[r]egrettably," "more was not done to help employers meet their statutory responsibilities."[427]

7.17 Hazard Pay

During the Covid-19 pandemic, California grocery, drug store, and other front-line workers sold essential products, stocked shelves, cleaned buildings, and otherwise kept the economy moving. Dozens of California cities and counties took action—often in haphazard ways—to provide these workers with premium pay, commonly called "hazard pay" or "hero pay." But no politicians asked taxpayers to fund this effort. Rather, local governments imposed a mandate on local businesses to pay workers—sometimes immediately and sometimes even retroactively—hourly wage hikes of $3, $4, or $5. The State of California, meanwhile, took no supervisory role, declining to preempt these local initiatives that confronted larger employers with a patchwork of inconsistent obligations.

The California Grocers Association launched legal challenges to the hazard pay ordinances, arguing that they violated the affected employers' right to equal protection and that they were preempted by the National Labor Relations Act.

By mid-2021, dozens of local jurisdictions had adopted hazard pay ordinances, requiring additional wages ranging from $3 to $5. These ordinances have now expired, as has the California State Covid-19 Supplemental Paid Sick Leave law, which expired on December 31, 2022.

These local efforts began in January 2021 and then spread across the state like a coronavirus. They all addressed the scope of coverage (which employers and employees are covered), the amount of required hazard pay, and the duration of the ordinance. Many also addressed additional topics such as prohibiting retaliation, providing credits for employer-initiated hazard pay, requiring posted notice of the ordinance at the workplace, and requiring record-keeping standards. And some, of course (this being litigation-friendly California), created private rights of action against non-complying employers.

Although the hazard pay ordinances have expired, employers should be aware of potential claims by employees stemming from alleged failures by employers to provide hazard pay. Employers should refer to the statute of limitations for the relevant law or ordinance if presented with such a claim.

The City of Los Angeles's Premium Hazard Pay for On-Site Grocery and Drug Retail Workers Ordinance served as a template for other local jurisdictions. The Los Angeles ordinance included these key terms:

Premium pay was extra. The pay was in addition to all other forms of compensation and reimbursement.

Employer. A Los Angeles covered "employer" was (1) a grocery, drug, or retail store with (2) more than 300 employees nationwide and more than 10 employees on site within the jurisdiction at a store that (3) *either* (a) primarily sold grocery items (including both food and household goods) *or* (b) sold various prescription and nonprescription medicines, along with other sundries *or* (c) was a retail store with over 85,000 square feet of retail space, 10% of which was dedicated to either groceries or drug retail.

Employee. A Los Angeles covered "employee" was any individual who, during a particular week (1) performed at least two hours of work for a covered employer within the city and (2) is entitled to the California minimum wage.

Depending on the ordinance, salaried managers may or may not have earned hazard pay. So while Los Angeles exempted managers and Daly City exempted managers, supervisors, and confidential labor relations employees, San Francisco provided both hourly and salaried employees to hazard pay to the extent that they earned less than $35 per hour (whether paid hourly or by an equivalent salary, based on a 40-hour workweek).

The hazard pay laws (known to many employers as “hap-hazard” laws) also commonly contained the following features.

Anti-retaliation: Most ordinances stated that employers could not discharge employees, reduce their compensation, or otherwise discriminate against them for asserting their rights under the ordinances.

Credit for previous employer-initiated hazard pay: The ordinances typically allowed employers who were voluntarily providing hazard pay to offset the amount already being paid against the mandated additional pay. The credit typically must have been clearly identified on wage statements.

Enforcement: Most ordinances empowered not only local enforcement officials but also employees to sue the employer for violations of the ordinance.

Notice: The ordinances usually required employers to post a notice in a conspicuous spot at the workplace, to provide a copy of the notice to employees, or both.

7.18 Tips

In America generally, employers may use a “tip credit” by which they can count the amount of tips that customers leave for employees toward payment of the employee’s minimum wage: federal law and many state laws permit an employer to pay a tipped employee a sub-minimum base wage as low as one-half the minimum wage, provided that the amount of tips brings the actual wage up to the minimum wage.[428]

In California it’s different. A California statute forbids any employer to take any “gratuity or a part thereof … left for an employee by a patron, or … require an employee to credit the amount … of a gratuity against … the wages due the employee.” “Every gratuity” is the “sole property of the employee” for whom it was left.”[429]

Accordingly, employers of California service employees encounter a triple whammy. *First*, the state minimum wage is considerably higher than the federal minimum wage (see § 7.2). *Second*, the tip credit permitted by federal law is forbidden under California law: every “gratuity” becomes the sole property of the employee to whom it is paid, regardless of the base rate of pay, which means that the employee must receive at least the minimum hourly wage *in addition to* how many tips the employee receives.[430] *Third*, certain limitations apply to any “tip pooling” scheme.[431] For example, tips from the pool must not go to any “agent” of the employer.[432]

The California Supreme Court has held that service employees lack a statutory right to sue for unlawful tip-pooling,[433] but suggested that employer diversion of gratuities might be tantamount to actionable conversion.[434] And a 2019 Court of Appeal decision suggested further remedies, including a claim for restitution under the Unfair Competition Law.[435] In that case, food and beverage banquet service employees alleged that the banquet facility’s “mandatory service charge” of 21 percent should have gone exclusively to service staff but instead went to the employer and to managers and other non-service employees, even though the customers paying this charge reasonably thought the charge was a gratuity for service staff. The plaintiffs sought restitution and sued for interference with contract and for breach of implied contract.

The Court of Appeal, finding “service charge” a vague term, rejected the employer’s argument that a “service charge” can never be a gratuity.[436] The Court of Appeal concluded that the allegations supported a claim that customers intended the service charge to be a gratuity for the service staff, not management, and permitted the lawsuit to proceed. The court held the core question was whether “a reasonable customer would believe the charge was a gratuity intended for the benefit of” the class of employees in question. In assessing whether a

service charge is considered a gratuity by a reasonable customer in the industry, the Court may consider several factors, including written contracts between the parties, the subjective intentions of the customers, and custom and practice in the industry.

As to tips paid by credit card, California employers must pay the employee the full amount of the gratuity indicated by the customer on the credit card slip, without deducting for any processing fees, and must pay the gratuity to the employee no later than the next regular payday following the date the patron authorized the credit card payment.[437]

7.19 Vacation Pay

California differs from most states by treating accrued vacation as a form of wages.[438] More specifically, by virtue of a Supreme Court interpretation of Labor Code section 227.3,[439]

- earned vacation must not be forfeited,
- unused vacation pay must be paid on termination of employment, at the final rate of pay,
- vacation pay is deemed to be earned daily,
- "use it or lose it" policies are unenforceable, and
- "paid time off" is treated as vacation.

Section 227.3's vacation rules apply "[u]nless otherwise provided by a collective bargaining agreement." The Court of Appeal has interpreted this exemption narrowly, holding that section 227.3 rules apply even to union-represented employees unless their CBA "clearly and unmistakably waives" section 227.3 rights.[440]

7.19.1 Accrued vacation pay is a form of wages

An employer need not provide any paid vacation at all. But if the employer does so, then California treats vacation pay as wages earned on a daily basis and not subject to any forfeiture and requires that all earned, unused vacation be paid upon termination of employment at the final rate of pay, regardless of when the vacation was earned or whether the employee had become eligible to use the vacation.[441] The basis for this peculiar doctrine is a California statute, Labor Code section 227.3, which provides that "all vested vacation shall be paid" to terminating employees "as wages at [their] final rate" and that no employer policy shall provide for "forfeiture of vested vacation time upon termination."[442] Because the right to be paid for the amount of vacation time offered by an employer constitutes deferred wages for services rendered, the employee is entitled to receive pay, at the time of termination, for the pro rata share earned during the time that the employee rendered services to the employer.

According to an unpublished Ninth Circuit ruling in *Mills v. Target Corporation*, the "final rate" means the employee's "final wage rate," as opposed to the final base hourly rate.[443] The *Mills* Court held that this includes an employee's base pay and any pay differentials at the time of termination. However, the decision did not address whether an employee's regular rate of pay must be used for the final payout if the employee receives other compensation, other than shift differentials, that would potentially impact their regular rate of pay. As a result, some uncertainty around that issue exists.

Section 227.3 also empowers the Labor Commissioner to "apply the principles of equity and fairness" "in the resolution of any dispute with regard to vested vacation time." Pursuant to this broad, vague mandate, the DLSE has promulgated interpretations that employers may find arbitrary and capricious.

7.19.2 Impermissible "use it or lose it" policies and permissible caps

Many employers provide that paid vacation time, if not used within a given time (such as a calendar year), is forfeited. You must "use it or lose it." In California it's different. Because California law deems vacation pay to be a form of wages that vests daily, it is not subject to forfeiture. Accordingly, "use it or lose it" vacation policies are not enforceable in California.[444] Nonetheless, employers can approximate the result of a "use it or lose it" policy by implementing a "no further accrual" policy. That policy permissibly may provide that once employees accrue a particular number of vacation days (an accumulation "cap"), they no longer continue to earn vacation until they take vacation to reduce the accumulated number of unused vacation days below the cap.[445] The DLSE has opined, however, that the level of the cap must be reasonable. The DLSE has withdrawn an opinion letter that arbitrarily required the cap to be 1.75 times the annual vacation accrual rate.[446]

7.19.3 Problems with denying vacation pay to short-term employees

Vacation pay is deemed to have been earned from the first day of employment if the vacation pay plan provides that an employee has earned a given amount of vacation pay (e.g., two weeks) upon completion of the first six months or one year of employment. Thus, if California employers want to avoid paying accrued vacation pay to terminating short-term employees, then they must clearly provide that no vacation is earned for some specific initial period of time.[447] If an employer also wants to permit an employee to take vacation immediately after that initial period, then it can arrange for the employee to take the vacation pay in the form of an advance against wages to be earned in the future, pursuant to a written agreement. But the DLSE has opined that California employers must not deduct from a final paycheck to recover for advanced, unearned vacation.[448]

7.19.4 "Personal time off" policies

Some employers have combined vacation and sick leave to create an overall benefit typically called "personal time off." This arrangement has administrative advantages, but enhances employer liability under California law because California will treat PTO as simply vacation by another name unless use of the PTO is conditioned upon a specific event, such as illness, an anniversary date, or a holiday. Moreover, employers with a PTO policy should ensure that the policy complies with the requirements of the California Paid Sick Leave Law (see § 2.14), unless they maintain a separate California Paid Sick Leave policy and bank of hours. A PTO arrangement also has "kin care" implications (see § 2.11).

7.19.5 Sabbaticals

Some employers provide long-term employees with a sabbatical: a paid leave to promote retention and increase productivity upon the employees' return to work. An employer thus might entitle employees to an eight-week paid leave—in addition to regular vacation—once they complete seven years of service. The DLSE acknowledges that a true sabbatical is not subject to the anti-forfeiture rules that protect regular vacation. But the DLSE insists that a "sabbatical" is really just extra vacation unless the leave (a) is awarded in addition to earned vacation, (b) occurs only after lengthy employment (such as seven years), (c) is granted for an extended period longer than the normal vacation, and (d) is provided only to high level managers and advanced professionals.[449]

One Court of Appeal decision, *Paton v. Advanced Micro Devices, Inc.*,[450] rejected the DLSE's arbitrary view that true sabbaticals are offered only to high-level or professional employees,[451] but *Paton* generally adopted the DLSE's approach and declined to define a clear set of rules on which employers could rely to ensure that the sabbaticals they grant will not be mistaken for vacation.[452]

The trial court in *Paton* had granted summary judgment to an employer sued by former salaried employees who claimed that the employer's failure to pay them for unused sabbatical leaves amounted to an unlawful forfeiture of vested vacation pay. The leaves—available for eight weeks once an employee reached seven years of employment—were in addition to regular vacation.

Paton distinguished regular vacation—deferred compensation typically earned in proportion to the length of employment—with a true sabbatical, which *Paton* defined as a leave designed to "provide incentive for experienced employees to continue with and improve their service to the employer."[453] *Paton* reversed the summary judgment for the employer, reasoning that because the employer imposed no condition on how employees used their sabbaticals, a reasonable jury could find that the sabbatical was really just extra vacation for long-term employees.[454]

Paton declined to apply a definitive test that would distinguish a sabbatical from a regular vacation. Rather, *Paton* announced a four-factor test to determine if a particular form of unconditional leave qualifies as a true sabbatical: (1) whether the leave is granted infrequently (e.g., every seven years), (2) whether the length of the leave is adequate to achieve the employer's purpose (an unconditional leave should be longer than regular vacation), (3) whether (as always must be the case) the sabbatical is granted in addition to the average vacation given in the relevant labor market, and (4) whether the employee is expected to return to work once the leave ends.[455]

7.19.6 ERISA preemption

Some employers have sought to avoid California vacation law by funding vacation pay through an ERISA plan.[456]

7.19.7 Claims for vacation pay do not accrue until termination

The DLSE, in an unusually pro-employer opinion letter, once decided that the time for an employee to claim vacation pay begins to accrue when the vacation pay is earned. Employers that had used improper "use it or lose it" vacation plans could at least limit their liability to long-term employees by disregarding vacation pay earned beyond the statutory limitations period.

But the Court of Appeal then held that a claim for unused vested vacation pay accrues only upon termination of employment, not before, regardless of when the vacation pay was earned.[457] An employee suing for unpaid vacation pay at the end of employment thus can rely on vacation earned at any time during the employment. Notably, employers must also pay out accrued vacation whenever they furlough or lay off employees, when there is no specific return date within the normal pay period.[458]

7.19.8 Employers can pay vacation benefits at lower rates during employment

The vacation pay statute requires that an employer pay an employee, upon termination, "all vested vacation … as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served."[459] The Court of Appeal has recognized that this provision does *not* require employers to pay vacation at the employee's regular rate *during* employment. The Court of Appeal thus affirmed the dismissal of a claim by employees complaining that they during their employment they received vacation pay in flat sums of $500 or so per week instead of receiving their (higher) regular rate of weekly pay.[460]

7.19.9 Transition to "no vacation" or "unlimited vacation" policies?

Peculiar California vacation law inspired some employers to discontinue traditional paid vacation in favor of "unlimited time off" policies. The thinking was that at-will employers could prospectively change vacation plans. While employees could retain any accrued, unused vacation pay, the employer would pay off that balance at

some point, such as when the new policy began or when employment ends. The new policy would take care to avoid suspicion that it is a "subterfuge" to hide an unlawful "use it or lose it" policy. Thus, the policy would not specify limits on how much time off employees may take. But the policy would include safeguards, such as (1) requiring manager approval for significant lengths of time off, (2) imposing a business-needs requirement to ensure that employees remain available during critical periods, and (3) specifying that time off taken for leaves of absences or for sabbaticals would not be paid. This kind of policy might work for certain exempt employees.

"Unlimited paid time off" policies for nonexempt employees, meanwhile, would seem impracticable. Nonexempt employees by their nature generally require supervision, which is incompatible with policies that give employees discretion to manage the time needed to do their work. Likewise, while exempt employees get paid the same regardless of how many hours they work, nonexempt employees generally get paid for all time worked, which employers must record; that arrangement would be at odds with an unlimited time-off policy.

So how does an "unlimited PTO" policy fare when legally challenged? Early results were not promising. In a 2020 case, the Court of Appeal ruled in favor of exempt employees seeking pay for vacation time that they argued they accrued despite their employer's unlimited, no-accrual vacation policy. The employer thought it had an "unlimited PTO" policy because the employer did not promise specific amounts of paid vacation and did not cap how much vacation employees could take. But the employer had no written statement that PTO was unlimited, and the employer in practice expected employees to take just two to four vacation weeks per year.

The Court of Appeal, while disclaiming any holding that all nonspecific PTO policies would require payment of "unused" vacation upon termination of employment, upheld a trial court finding of an implied cap: "an employer cannot avoid Section 227.3 by leaving the amount of vacation time undefined in its policy while impliedly limiting the time actually available for approval."[461]

The Court of Appeal said that an unlimited PTO plan might avoid final-pay obligations if it was in writing and (1) did not provide for additional wages but rather for a flexible work schedule, (2) specified employee and employer obligations and the consequences for failing to schedule time off, (3) allowed employees to take time off or to work fewer hours instead of taking time off, and (4) was "administered fairly" so it was not a de facto "use it or lose it" policy and so that it did not result in "inequities," such as where some employees work long hours with minimal time off while others work fewer hours with more time off.[462]

7.20 Personal Liability for Wage and Hour Violations

Unpaid wages. Some employees seeking unpaid wages have sued corporate officials personally. In its 2005 decision in *Reynolds v. Bement*, the California Supreme Court limited this practice by holding that corporate officers, directors, and shareholders cannot be personally liable for unpaid overtime wages as an "employer," even if they exercised control over the payment of wages.[463] *Reynolds* also rejected a theory that the individual defendants were jointly liable for directing or participating in tortious conduct. *Reynolds* explained: a "simple failure to comply with statutory overtime requirements" does not qualify as tortious.[464]

Finally, *Reynolds* held that the individual defendants could not be liable for "conspiring" with their corporate employer to withhold wages because corporate agents acting on the corporation's behalf are not considered to be co-conspirators.[465] At the same time, however, *Reynolds* encouraged plaintiffs not to despair, by speculating as to circumstances where personal liability for unpaid wages could still be possible. *First*, the Labor Commissioner can continue to use the broad definition of "employer" found in the Wage Orders to seek financial recovery from individuals in administrative hearings.[466] *Second*, in cases of thinly capitalized corporations that have played fast and loose with the corporate form, the "alter ego" doctrine can make controlling individuals liable for unpaid wages. *Third*, huge civil penalties ($100 per underpaid employee per pay period) could be sought by aggrieved

employees under PAGA, against "any person acting on behalf of an employer who violates, or causes to be violated," a statute or Wage Order regarding wages.[467]

The Court of Appeal has held that a company's president, sole shareholder, and director could be individually liable, both as a joint employer and as an alter ego. At issue was a suit by restaurant employees against their former employer, Koji's, for unpaid wages, inadequate wage statements, and failure to provide meal and rest breaks. Koji's went out of business, but the employees also sued Arthur Parent, Koji's president, sole shareholder, and director. The trial court, after a bench trial, rejected the plaintiffs' contention that Parent was a joint employer. The trial court was concerned that if Parent were held liable because of his control as sole shareholder and president of Koji's, then all owners of closely held corporations would suffer the same fate. But the Court of Appeal reversed, holding that Parent could be individually liable as a joint employer because he was the "big boss" who hired and fired managers and laid off the employees.[468] The Court of Appeal also held that personal liability could be possible on an "alter ego" theory, emphasizing that the theory applies not only when a sham corporate entity is formed to commit a misdeed, but also when the corporate form is used to circumvent a statute or to accomplish some other wrongful purpose.[469]

Penalties. The "A Fair Day's Pay Act" added Labor Code section 558.1 to enhance the Labor Commissioner's enforcement authority to recover civil penalties.[470] Under section 558.1, any employer or any "other person acting on behalf of an employer" may be held liable for violations of the directives appearing in the Wage Orders and in various provisions of the Labor Code. The Legislature defines "other person acting on behalf of an employer" as "a natural person who is an owner, director, officer, or managing agent of the employer."[471] The "managing agent" definition mirrors the definition found in California's punitive damages statute. Under that statute and case law, "managing agents" are all employees who exercise substantial independent authority and judgment in their corporate decision-making such that their decisions ultimately determine corporate policy.

The Courts of Appeal have been a bit inconsistent in applying the Act. In one case, restaurant employees seeking unpaid wages sued their corporate employer and also Paolo Pedrazzani—the corporation's owner, president, secretary, and director. The employees invoked PAGA to seek civil penalties under Labor Code sections 558 and 1197.1, which authorize recovery of civil penalties against the employer "or other person acting on behalf of an employer" who violates or causes a violation of those statutes. After a bench trial, the trial court issued civil penalties against Pedrazzani individually as an "other person" who caused violations of the overtime and minimum wage statutes. The Court of Appeal affirmed, reasoning that Pedrazzani could be personally liable for civil penalties—even in the absence of a viable "alter ego" theory—because sections 558 and 1197.1 authorize the Labor Commissioner to recover civil penalties, and because PAGA authorized plaintiffs to recover those penalties in the Labor Commissioner's place: "California … has decided that both the employer and any 'other person' who causes a violation of the overtime pay or minimum wage laws are subject to specified civil penalties." The Court of Appeal concluded that if a party other than the employer committed or caused to be committed violations of the overtime and minimum wage laws, then that party is personally liable for "certain civil penalties regardless of the identity or business structure of the employer."[472]

In another case, a former truck driver sought penalties from his former employer and the employer's owner for meal and rest period violations. The Court of Appeal found the employer's owner personally liable under section 558.1, even though the owner was not personally involved in the actions that led to the violations. The Court of Appeal concluded that to be personally liable, the individual does not necessarily need to have been involved in "the day-to-day operations of the company" or have "authored the challenged employment policies or specifically approved their implementation." To be personally liable, the Court found that the owner "must have had some

oversight of the company's operations or some influence on the corporate policy that resulted in Labor Code violations."[473]

Some courts, however, have found no liability for owners. In one case, service technicians for television satellite systems brought a class action lawsuit against their LLC employer and an LLC member, claiming they were misclassified as independent contractors. The Court of Appeal ruled that the individual defendant was not personally liable under section 558.1 because she did not qualify as an "owner" under the statute. In order to be liable as an "owner," the individual defendant must have been "personally involved in the purported violation."[474] If there was no such finding, then she must have had "sufficient participation in the activities of the employer," such that she could have been "deemed to have contributed to" the violations. The Court of Appeal concluded that although the LLC member signed class member paychecks, this did not give rise to the inference that the LLC member's involvement with the employer contributed to the alleged misclassification violations.

Recently, in upholding both a private right of action and individual liability under section 558.1, the Court of Appeal interpreted the statute as reflecting the Legislature's intent to convey that discretion to prosecute an individual under the statute (even where the employer can satisfy any judgment) rests with the party prosecuting the claim, and not with the court.[475] The Court of Appeal reasoned that "the party prosecuting the wage violation may not need to pursue such liability in the event the employer satisfies any outstanding judgment."[476] This, however, does not mean that the employee must limit whom she seeks a judgment against in litigation.[477]

"Conversion" is not a viable theory of recovery. In 2019, the California Supreme Court did push back a bit on personal wage-and-hour liability by rejecting tort claims for conversion as a basis for seeking unpaid wages from an individual.[478]

Alter ego. In 2020, the Court of Appeal upheld a judgment of almost $500,000 for unpaid wages, attorney fees, and costs against a couple who owned a small travel company.[479] These individual owners were found to be personally liable as alter egos. The Court of Appeal explained that the alter ego doctrine arises when individual defendants have used "the corporate form unjustly and in derogation of the plaintiff's interests. In certain circumstances the court will disregard the corporate entity and will hold the individual shareholders liable for the actions of the corporation."[480] Alter ego liability depends on (1) "such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist" and (2) whether "adherence to the fiction of separate existence would, under the circumstances, promote fraud or injustice."[481] Here, it was critical that the individual owners commingled personal and corporate assets, using corporate funds to pay their personal rent and using personal funds to pay the plaintiff's salary. The evidence supported a finding of alter ego even though there was no evidence that the business was undercapitalized or was a mere shell or conduit for the individual defendants' personal business.

Garment industry. As of January 1, 2022, "Brand Guarantors"—companies sitting atop the garment supply chain—are liable for wage violations committed by their garment manufacturing suppliers, even if the ultimate seller of the garment has been completely unaware of any violation.[482] In other words, clothing "brands" and holding companies—and even retailers—could now be jointly liable with the contractors from whom they purchase t-shirts, hats, or even belts to sell for the contractor's wage and hour violations, and perhaps even for violations by the contractor's subcontractor. Prudent employers might have their garment manufacturing vendors audited for wage and hour compliance.

7.21 Broadened Definition of Employer?

7.21.1 Joint employers

In 2010, in *Martinez v. Combs*, the California Supreme Court held that the Wage Orders endorse a broad definition of "employer" that extends beyond the definition of "employer" ordinarily used in interpreting federal statutes (i.e., the common law definition). The California Wage Order definition of employer extends to anyone who (1) exercises control over wages, hours, or working conditions, (2) suffers or permits a worker to work, or (3) engages a worker to work, thereby creating a common law relationship.[483] *Martinez* reaffirmed, however, that this definition of employer does not impose liability on individual corporate agents who were acting within the scope of their agency, even if this would leave workers without a remedy because their primary employer has gone bankrupt. In the case before it, *Martinez* found that merchants who purchased produce from a strawberry farmer were not the "employers" of the farmer's agricultural workers where only the farmer had the power to hire and fire the workers, to set their wages and hours, and to tell them when and where to report to work.

In 2012, the Court of Appeal, in *Patterson v. Domino's Pizza*, further promoted a broad notion of employment liability. At issue was whether a pizza franchisor could be held liable for torts and FEHA violations perpetrated against a teenage pizza store employee by the manager of a pizza store franchisee.[484] The Court of Appeal held that liability for the franchisor was possible, on the basis of a franchise contract that gave the franchisor extensive control over the pizza store franchise's local operations, and on the basis of extra-contractual evidence suggesting that the franchisor exercised extensive local management control over the franchisee in areas including employee conduct and discipline. In 2014, the California Supreme Court reversed, albeit by a 4-3 vote, holding that uniform marketing and operational plans do not automatically make the franchisor liable for the actions of the franchisee's supervisors. Rather, to be considered an employer, the franchisor would have to retain or assume a "general right of control" over the business.[485]

But the Court of Appeal has continued efforts to expand the scope of employer liability. In 2014, the same Court of Appeal justice who wrote the opinion in *Patterson v. Domino's Pizza* wrote a similarly expansive decision in *Castaneda v. Ensign Group, Inc.*[486] A nursing assistant, seeking unpaid minimum and overtime wages earned at a rehabilitation care center, sued Ensign Group, a holding company that owned the care center. The trial court granted summary judgment to Ensign because Ensign did not manage the care center. But the Court of Appeal reversed, holding that a parent corporation could be liable for a wholly owned subsidiary's wage and hour violations, even if the parent corporation did not directly hire, fire, or supervise the employees in question. The Court of Appeal opined that where the parent corporation exercised structural and managerial control over the subsidiary, and thus could have ensured that the subsidiary's practices complied with California labor law, there is a basis to hold them liable for the subsidiary's violations. The Court of Appeal, in reference to *Martinez v. Combs*, concluded that there is a potential basis for liability where a parent company fails "to perform the duty of seeing to it that the prohibited condition does not exist."[487] To support its conclusion, the Court of Appeal cited evidence that Ensign required care center employees to follow Ensign "core values," to use Ensign "forms and templates in the course of doing their jobs," and to use particular computer and billing and operational systems.[488]

Nonetheless, in a 2019 wage and hour case, the Court of Appeal rebuffed efforts to impose joint employer status on the owner of a premises where another company employed a worker.[489] The Court of Appeal affirmed summary judgment for a gas station owner that was sued for unpaid wages, failure to provide meal breaks, and failure to authorize and permit rest breaks by a gas station manager who worked for the owner's operating company. The Court of Appeal held that the gas station owner was not a joint employer because the operating company alone made decisions on recruiting, interviewing, hiring, disciplining, promoting, and discharging employees, had sole control over payroll functions, and had its own employee handbook and set its own meal and

break policies. The gas station owner could ask the operating company to "remove" an employee from a station "for good cause shown," but the operating company had sole authority to discharge employees.[490] It was immaterial that the gas station owner provided operation manuals and conducted station inspections that were given to the operator. The Court of Appeal concluded that (1) the operating company had sole control over the plaintiff's wages and hours, (2) the gas station owner had no right to fire him and no role in either allowing him to work or preventing him from working, and (3) the gas station owner lacked the right to control the manner and means by which the plaintiff did his work.[491]

ABC test not extended to joint employer issue. The Supreme Court, in the context of whether a worker hired by a company is its employee or independent contractor, has adopted an "ABC test" that heavily tilts toward employee status. (See § 19.6.) Both the Court of Appeal and the Ninth Circuit have rejected plaintiffs' efforts to apply the ABC test to issues of joint employment. In 2019 the Court of Appeal stated: "the ABC test in *Dynamex* does not fit analytically with and was not intended to apply to claims of joint employer liability."[492] Similarly, the Ninth Circuit stated that *Dynamex* "has no bearing here, because no party argues that Plaintiffs are independent contractors."[493] Thus, while a defendant must satisfy the ABC test to defend its classification of a worker as an independent contractor, it need not satisfy the ABC test in resisting a claim that it is a joint employer.

The California Supreme Court thus far has declined to address this issue. In *Vasquez v. Jan-Pro Franchising International*, the high court rebuffed the plaintiff's effort to expand the review of whether the *Dynamex* ruling is retroactive to the further question of whether *Dynamex*'s ABC test governs issues of joint employment.[494]

"Client employers." The Legislature has created special liability for "client employers." A client employer is an entity that obtains workers from a labor contractor to work within the entity's usual course of business—for example, payroll, temporary staffing, and employee leasing agencies. Client employers share with their labor contractors "all civil legal responsibility and civil liability for all [nonexempt] workers supplied by that labor contractor," in connection with the payment of wages and the securing of workers' compensation coverage.[495] Thus, if a client employer's labor contractor fails to pay all wages or fails to procure sufficient workers' compensation coverage for the contractor's own nonexempt employees, the client employer can also be liable for these failures. The statute defines "wages" expansively, by reference to Labor Code section 200, to include incentive compensation, bonuses, and vacation pay.[496] Client employers also have non-delegable responsibilities for worksite occupational health and safety.

Of course, client employers can seek contractual indemnity against labor contractors that create liability for the client employer.

Payroll companies. The Court of Appeal stemmed the tide toward expanding notions of joint employment in *Goonewardene v. ADP, LLC*, where a plaintiff suing for unpaid wages, wrongful termination, and inadequate wage statements sued her employer's payroll company on a theory that the payroll company was her joint employer.[497]

The Court of Appeal, citing prior authority,[498] rejected the plaintiff's contention that the payroll company was her joint employer, because the payroll company did not control her wages or her working conditions.[499]

The Supreme Court took review of the decision but not on the issue of joint employment. The Supreme Court instead granted review of the Court of Appeal's decision to let the lawsuit proceed against the payroll company on various theories of liability (contract, negligent representation, and professional negligence), and in a 2019 decision determined that none of these theories was viable.[500] (See § 16.3.7).

The Court of Appeal addressed a production company's joint employer status in a 2020 case, reversing a summary judgment in favor of a firm that agreed to stand in the place of a television production company

(because the firm was a signatory to the relevant CBA while the production company was not). The firm could be liable as an employer not only because it had signed the CBA but also because the firm had the power of control over the plaintiff's work.[501]

7.21.2 Other liability imposed for another employer's Labor Code violations

Customers of delinquent port drayage motor carriers. Legislation enacted in 2019 requires the DLSE to post on its website a list of port drayage motor carriers that have any unsatisfied judgment or assessment or any "order, decision, or award" finding illegal conduct as to various wage/hour issues, specifically including independent contractor misclassification and derivative claims. The new law also extends joint and several liability to the customers of these drayage motor carriers for their future wage violations of the same nature.[502]

Direct construction contractors. Legislation enacted in 2018 clarified Labor Code section 218.7, which created joint liability for construction contractors and subcontractors. The new legislation repealed the express provision that relieved direct contractors for liability for anything other than unpaid wages and fringe or other benefit payments or contributions owed.[503]

Temporary employment agencies. The Court of Appeal has held that a staffing agency with its own compliant policy on meal periods need not police the meal periods of its employees who were working on a client employer's premises, and that the staffing company, as an alleged joint employer, was not vicariously liable for the client employer's own violations.[504] Under this authority, joint employers are not vicariously liable for each other's Labor Code violations, but rather are liable for their own conduct.

In 2018, the Court of Appeal held in *Castillo v. Glenair, Inc.,* that workers who settled their wage and hour suit against a staffing company could not then sue the client employer on identical claims, because the client employer and the staffing company were in privity with one another for purposes of the wage and hour claim, and the client company was an agent of the staffing company with respect to the staffing company's payment of wages to its employees who worked at the client company.[505]

In 2020, the Court of Appeal introduced further mischief into joint-employer litigation by disagreeing with *Castillo* and permitting a nurse—a staffing agency employee who had sued and settled with the staffing agency—to then sue the worksite employer (a hospital) on the same claims.[506] The agreement settling the first lawsuit had not named the worksite employer as a released party, but the second lawsuit still should have been barred under the traditional doctrine of res judicata, or claim preclusion, as had been held in *Castillo*. The Court of Appeal, affirming the trial court, held that the settlement in the first suit did not bar the nurse's second suit, because the staffing agency and the hospital were not in privity, and because the hospital was not a released party under the settlement agreement. A strong dissenting opinion pointed out that "*Castillo* at least has the virtue of stating clear rules on which parties on all sides can easily rely going forward. I do not find *Castillo* to be so plainly wrong as to justify creating a split of authority in this area."[507] Nevertheless, in 2022, the California Supreme Court issued the final word by affirming the appellate court's decision and disapproving of *Castillo*.[508]

Successor employers. Under a law effective in 2021, a successor to any judgment debtor is liable for any wages, damages, and penalties owed to judgment debtor's former workforce pursuant to a final judgment.[509]

7.22 Restrictions on Scheduling and Work Quotas

7.22.1 One day of rest every seven days

California generally entitles employees to a day of rest every seven days, except where the hours of work do not exceed 30 hours in one week or six hours in one day.[510] This statutory requirement was in place, without litigious contention, since 1937. But then the PAGA statute, in 2004, created opportunities for plaintiffs' counsel to seek civil penalties for a wide variety of Labor Code violations.

Thus it was that former Nordstrom employees, invoking PAGA, sued the department store company for having employers work on a seventh day, without the employees' written consent. This paternalistic theory of employer liability would hurt employees who, for their own reasons—wanting more money, satisfying personal scheduling preferences—want to work on the seventh day. When a federal district court dismissed their claim, the plaintiffs appealed to the Ninth Circuit.

The Ninth Circuit wrestled with the following questions concerning how to interpret the relevant Labor Code provisions: *First*, what are the seven days: the employer's regular workweek, or any group of consecutive seven days? *Second*, does the exemption from the day-in-rest requirement apply when an employee works fewer than six hours in any one day of the seven days, or does the exemption apply only when an employee works fewer than six hours in each day during the seven days? *Third*, when the statute prohibits an employer to "cause" employees to miss a day of rest, does "cause" mean force, coerce, pressure, schedule, encourage, reward, permit, or something else?

In 2017, the California Supreme Court, on a referral from the Ninth Circuit, answered the three questions, in *Mendoza v. Nordstrom, Inc. First,* as to the question of "which seven days?," *Mendoza* determined that employees are entitled to at least one day of rest during each workweek, and not during a rolling period of any seven consecutive days.[511] *Second*, as to the exemption for employees working shifts of six or fewer hours, *Mendoza* held that the exemption applies only to those employees who never exceed six hours of work on any day of the workweek or more than 30 hours in a week.[512] *Third*, as to what it means for an employer to "cause" an employee to work a seventh day, *Mendoza* held that an employer may not induce an employee to forgo a protected day of rest, but the employer may permit or allow the employee to do so.[513]

7.22.2 Retail scheduling.

Retail employers throughout America generally have the discretion to schedule their workforces in accordance with their own business needs, without regard for employee preferences. In California it's different, or at least it's different in San Francisco. In 2014 the San Francisco Board of Supervisors enacted two first-of-a-kind ordinances, commonly referred to as the "Retail Workers' Bill of Rights." These ordinances impose obligations on "Formula Retail Establishments"[514] with 20 or more employees in San Francisco. Before a new employee's first day of employment, Formula Retail employers must provide a good-faith written estimate of the employee's expected minimum number of scheduled shifts per month, and the days and hours of those shifts. But this estimate is not a contractually binding promise.[515]

Formula Retail employers also must provide employees with their schedules two weeks in advance, including any on-call shifts, and must provide advance notice of any changes to the employees' biweekly schedule (not including employee-requested sick leave, time off, shift trades, or additional shifts).[516] If changes are made to the employee's schedule with less than seven days' notice but more than 24 hours' notice, then the Formula Retail employer must pay one hour of pay, at the employee's regular hourly pay, for each shift change. If changes are made with less than 24 hours' notice, then the Formula Retail employer must pay two or four hours of "predictability pay," depending on the duration of the shift.[517]

"Predictability pay"—owed in addition to any regular pay—is for employees working a shift in these circumstances:

Advance Notice	Length of Shift	Predictability Pay Owed
< 7 days but 24 hours or more	Any length	1 hour
< 24 hours	4 hours or less	2 hours
< 24 hours	> 4 hours	4 hours

Further, Formula Retail Employers must treat part-time employees the same as full-time employees with respect to (1) starting hourly wage, (2) access to employer-provided paid and unpaid time off (which is prorated for part-time workers), and (3) eligibility for promotions, subject to certain qualifications.[518]

7.22.3 Warehouse quotas

As of January 1, 2022, large employers that run California warehouse distribution centers are subject to peculiar new requirements. The Warehouse Quotas law, enacted in 2021, creates more than a dozen new sections of the Labor Code.[519] The law reacts to perceived threats to employee health and safety posed by any work quota, which the new law defines as a "work standard under which an employee is assigned or required to perform at a specified productivity speed, or perform a quantified number of tasks, or to handle or produce a quantified amount of material, within a defined time period and under which the employee may suffer an adverse employment action if they fail to complete the performance standard."[520] The law applies to any entity that employs, within California, 100 or more employees at a single warehouse distribution center or 1,000 or more employees at one or more warehouse distribution centers.[521]

To counter the perceived threats, the Warehouse Quotas law creates these main provisions.

- Employers must give each employee a written description of any applicable quota and the potential adverse employment actions that could result from failing to meet the quota.[522]
- Employers must not enforce quotas to the extent that enforcement would "prevent[] compliance with meal or rest periods, use of bathroom facilities, including reasonable travel time to and from bathroom facilities, or occupational health and safety laws."[523]
- Any employee actions to comply with occupational health and safety laws must be considered time on task and productive time for purposes of any quota or monitoring system.[524]
- Employees who believe a quota has violated their rights are entitled to request and receive a written description of each applicable quota and a copy of the most recent 90 days of the employee's own personal work speed data.[525]
- Any adverse action against an employee taken within 90 days of that employee asserting quota-related rights creates a rebuttable presumption of unlawful retaliation against the employee.[526]
- Violations of the law can be pursued by the DLSE and the employees themselves can sue for injuncitive relief and be awarded attorney fees if they prevail.[527]

7.23 Worker Retention and Staffing Requirements

7.23.1 Grocery worker retention

Some California cities, including Los Angeles,[528] Santa Monica,[529] San Francisco,[530] and Gardena[531] have "worker retention" ordinances that require purchasers of major supermarkets to retain certain members of the pre-existing workforce for at least 90 days, subject only to the employer's right to fire a worker for cause. Other ordinances of this kind similarly protect service workers in the event that one city contractor replaces another. In 2008, the California Grocers Association obtained an injunction against enforcement of the Los Angeles grocery worker retention ordinance, and in 2009 the Court of Appeal, in a 2-1 decision, upheld the injunction, ruling that the ordinance is unconstitutional because it conflicts with the California Retail Food Code and is preempted by the National Labor Relations Act.[532]

But then the California Supreme Court held otherwise, reversing the Court of Appeal to rule that the worker-retention ordinance was not preempted by the California Retail Food Code or the National Labor Relations Act and that the Retail Food Code did not violate equal protection.[533] The U.S. Supreme Court declined to hear the California Grocers Association's request to review the case.[534]

The California Legislature has followed the municipalities' lead. As of 2016, a "successor grocery employer" must retain current grocery workers for 90 days after the "change in control" of a grocery store.[535] At the end of the 90 days, the new employer must prepare a written performance review for each worker and "consider offering" continued employment if the worker has performed satisfactorily.[536] Notably, this statewide law does not preempt any city or county ordinance that provides greater protection to eligible grocery workers.[537]

7.23.2 "Right to Recall" laws

Shortly after the Covid-19 pandemic hit in early 2020, several California cities passed so-called "right to recall" laws. These laws require certain employers to give priority in hiring to workers laid off because of the pandemic. On April 16, 2021, the State of California passed its own right to recall law.[538]

The statewide law applies to hotels, private clubs, event centers, airport hospitality operations, airport service providers, and entities that provide building services (i.e., janitorial, maintenance, or security services) to office, retail, or commercial buildings.[539] These employers must first offer any new positions to workers who were terminated because of a nondisciplinary reason related to the pandemic (e.g., because of a slowdown in business).[540] To be qualified for rehire, the worker must have (1) worked for the employer for at least six months in the twelve months prior to January 1, 2020 for at least two hours a week, and (2) have held the same or similar position when they were laid off.[541]

The obligation to offer to rehire qualified workers can survive business ownership changes, restructuring, and relocation, if the business conducts the same or similar operations using substantially the same assets.[542]

Although the law does not give allegedly aggrieved workers the right to sue in court, it authorizes the Labor Commissioner to investigate and seek substantial damages. For example, in March 2022, the Labor Commissioner cited a Southern California resort for $3.3 million in damages and penalties for not rehiring hotel workers in compliance with California's right-of-recall law.[543]

The law's provisions can be waived in a collective bargaining agreement, though the waiver must be express and in clear terms. The law will expire on December 31, 2024.[544]

Similar, but not identical, right to recall laws have been passed by several California cities, including Oakland,[545] Santa Clara,[546] Monterey County,[547] Los Angeles,[548] San Diego,[549] Long Beach,[550] Santa Monica,[551] and Glendale.[552]

The following cities passed Covid-era right to recall ordinances, which have now expired: San Francisco,[553] Carlsbad,[554] and Pasadena.[555] The statewide law does not preempt these local laws, so both the state and local laws must be consulted for employers with operations in these cities.

7.23.3 Employee staffing

Employers throughout America generally have the discretion to staff their workforces in accordance with their own business needs, without regard for current workforce preferences. In California it's different, or at least it is in San Francisco, San Jose, Emeryville, Los Angeles, and Berkeley.

San Francisco – Formula Retailers. Before hiring new employees or using contractors or a temporary services or staffing agency to perform work in a Formula Retail Establishment, Formula Retail employers[556] must first offer the additional work to existing part-time employees if: (1) the part-time employee is qualified to do the additional work, as reasonably determined by the employer, and (2) the additional work is similar to work the employee has performed for the employer.[557] Further, Formula Retail employers need offer only the number of hours needed for the part-time employee to reach 35 hours of work in a week.

The Formula Retail employer must deliver a written offer of the additional hours, or post the offer in a conspicuous location in the workplace where employee notices customarily appear. The part-time employees must be provided 72 hours to accept the additional hours, after which the employer may hire new employees or use contractors to work the additional hours. If a Formula Retail Establishment changes ownership, then the new Formula Retail employer, or "successor employer," must retain for 90 days those employees of the previous Formula Retail employer—the incumbent employer—who worked for at least six months prior to the change of ownership (other than supervisory, managerial, or confidential employees) for 90 days.

The successor employer must retain each eligible employee under the same terms of employment with respect to job classification, compensation, and number of work hours that governed the employee and the incumbent employer. During the 90-day retention period, an eligible employee is immune from discharge without cause.

Incumbent employers must provide and the successor employer must maintain a "retention list" that includes the employee's name, contact information, date of hire, rate of pay, average number of weekly hours during the six months preceding the change in control, and occupational classification. The successor and incumbent employers must also post certain notices, and the successor employer must make employment offers to workers on the retention list based on seniority or pursuant to an existing collective bargaining agreement.[558]

San Francisco Family Friendly Workplace Ordinance. San Francisco's Family Friendly Workplace Ordinance requires employers to provide flexible or guaranteed work arrangements for employees with qualifying caregiving responsibilities, unless the request poses an undue hardship to the employer. (See § 2.3.7.)

San Jose. Under San Jose's "Opportunity to Work Ordinance," covered employers must offer part-time nonexempt employees additional work hours before hiring any new or temporary employees.[559] The City of San Jose has provided guidance on the enforcement of the measure on the city website.[560] The ordinance covers San Jose employers that exercise control over the wages, hours, or working conditions of any employee and are subject to San Jose's business tax, or have a business in San Jose that is exempt under state law from the tax imposed by Chapter 4.76.[561]

For chain businesses and franchisees, the ordinance counts all employees, including both full and part-time employees, regardless of whether they work in San Jose.[562] An "employee" is anyone who, in a calendar week,

works at least two hours for an employer, and who qualifies as an employee under a company's direct or indirect control as to wages, hours, or working conditions who is entitled to minimum wage.[563] A covered employer must offer incumbent employees (if they have the skill and experience to perform) extra hours of work before the employer uses temporary employees or hires new employees. Employers need not provide the additional hours if doing so would create entitlement to overtime or other premium wages.[564]

Employers must also post notice of the rights created by the ordinance,[565] must use a "transparent and non-discriminatory process" to distribute hours among existing employees,[566] must retain records for new hires that show the employer's efforts to first offer the additional work to existing part-time employees for a four year period,[567] and must preserve, for four years, employees' work schedules and any other records required to demonstrate compliance with the ordinance.[568] San Jose can address violations by issuing fines of up to $50 per violation and by seeking civil penalties in court.[569]

The ordinance also authorizes private actions: a person not offered work under the ordinance can sue for lost wages, penalties, and attorney fees.[570] The ordinance's employee-friendly retaliation provision creates a rebuttable presumption that retaliation has occurred whenever employees claim that they have suffered an adverse employment action within 90 days of complaining about a violation of the ordinance.[571]

The ordinance exempts scheduling provisions contained within a collective bargaining agreement, if the CBA explicitly waives the ordinance in clear and unambiguous terms.[572] Additionally, San Jose can exempt businesses from complying with the ordinance where the business works in good faith to comply and where compliance would be impracticable, impossible, or futile.[573]

Emeryville. The Fair Workweek Ordinance, effective in 2017, covers all retail and food service businesses with more than 56 employees worldwide, or 20 or more employees in Emeryville.[574] Businesses must post work schedules 14 days in advance.[575] Any new hours not so scheduled can be declined by the employee.[576] Employers must pay extra wages for making schedule changes between one and 14 days before the shift.[577] Employers cannot hire for new positions unless they have first offered the new schedules to existing employees.[578] The additional hours can be divided among several existing employees as long as the employer does not discriminate among employees when dividing hours.[579]

Employers cannot divide up hours to avoid the benefits required under the Affordable Care Act.[580] Employers must give employees at least 72 hours to accept the offer of additional work.[581] If the time of additional hours needed will last less than two weeks, then the employer must give the employee at least 24 hours to accept the hours.[582] The offer and the acceptance of hours must be communicated in writing, with records to be retained for at least three years.[583] Employers must provide good-faith estimates of work schedules in writing before a new employee starts their employment.[584]

Employees can request changes to the schedule before commencing work.[585] Employers must respond to employees' requests in writing regarding schedule changes that are approved or rejected.[586] New employees must be immediately given their first two weeks of scheduled work upon hire.[587] The only exceptions to the Emeryville scheduling requirements are for circumstances when the employees or the place of business are threatened, when public utilities fail, or when there is an act of nature such as a natural disaster or civil unrest.[588] Employee-to-employee changes are also exempt, but the employer cannot help to facilitate shift-swapping.[589]

Employees also have a right to decline work hours that occur within 11 hours of the end of the previous day's shift or during the 11 hours following a shift that spanned two days. Employees who work these shifts must agree to do so in writing, and employers must pay them 1.5 times their regular rate for any hours worked with fewer than 11 hours of time off between shifts.[590] Employers must post notice of employee's rights under the ordinance.[591] They

must also provide notice to new employees upon hire.[592] Employers must not retaliate against employees for exercising their rights under the ordinance.[593]

Penalties apply to employers that fail to notify employees of their rights, fail to provide a work schedule in a timely manner, fail to provide predictability pay for changes with less than 24 hours' notice, fail to offer existing employees work before hiring, fail to maintain adequate payroll records for three years, and fail to give the City access to payroll records.[594] Employees may also file their own lawsuits.[595]

Los Angeles. The Los Angeles City Council passed the Fair Work Week ordinance, which went into effect on April 1, 2023.[596] It included a 180-day grace period for penalties.[597]

The ordinance defines an employer as any retail business with over 300 employees globally.[598] Notably, individuals employed through staffing agencies and employees of certain subsidiaries and franchises count toward the 300-person total.[599] To be considered an employer under the ordinance, entities must also identify as a retail business in the North American Industry Classification System (NAICS) within retail trade categories and subcategories 44 through 45. (These categories include establishments primarily engaged in retailing merchandise and rendering services incidental to the sale of merchandise.)[600]

The ordinance defines an employee as anyone working in the City of Los Angeles two hours or more per week for an employer and who is entitled to be paid at least minimum wage under section 1197 of the California Labor Code and the California Industrial Welfare Commission's published Wage Orders.[601]

Employers must provide a good faith scheduling estimate and a notice of rights.[602] This good faith estimate must be provided within ten days of an employee's request.[603] If there is a substantial deviation from the estimate, the employer must have a documented business reason for the change.[604]

Employees also have the right to request a preference for certain hours, times, or locations.[605] Employers may accept or deny requests, provided that they notify the employee in writing of the reason for any denial.[606]

Additionally, employers must provide work schedules to their employees at least 14 days in advance by either posting or transmitting them by electronic means (or another means reasonably calculated to provide notice).[607] Employers must provide written notice of any employer-initiated changes that occur after the advance notice period.[608] Finally, if an employer changes the schedule, employees can decline any hours not included in the original schedule. Any consent to a schedule change must be in writing.[609] Employers must also post a City-issued notice of rights.[610]

Before hiring new employees (or bringing on contractors or temps), an employer must offer work to current qualified employees if the additional work would not result in overtime.[611] Additional hours offered to current qualified employees must be conspicuously posted for at least 72 hours before hiring a new employee (unless all employees confirm they are not interested in the new hours, in which case, the employer can fulfill its staffing needs).[612] Employees who accept offers under these circumstances are not entitled to predictability pay (described below) if the additional hours result in schedule changes.[613]

"Predictability pay" will be required when a schedule is changed under certain circumstances.[614] Employers will owe one hour of pay at the regular rate for changes in time, date, or location that do not result in loss of employee time, or that add more than 15 minutes to an employee schedule.[615] Employers will also owe half the employee's regular rate of pay for time not worked if the employer reduces the scheduled time by 15 minutes or more.[616]

However, predictability pay is not required for the following: employee-requested schedule changes; employees voluntarily accepting schedule changes due to another employee's absence; hours changed as a result of the employee's violation of law or the employer's policies; the employer's operations are compromised due to force majeure; or where extra hours would result in overtime payments.[617]

Employees are required to give employers written notice of any alleged violations and an opportunity to cure before filing a claim with the City.[618] Employers have 15 days to cure alleged violations.[619]

The City can recover up to $500 per violation per each employee.[620] Both employees and the City will also be entitled to administrative penalties that accrue on a daily basis.[621] Employees will be able to enforce the ordinance through a private right of action and attorney fees will be awarded to prevailing plaintiffs.[622] (However, an entity enforcing the ordinance on behalf of the public shall only be entitled to equitable, injunctive, and/or restitutionary relief, and reasonable attorney fees.[623])

Los Angeles County. In the spring of 2024, Los Angeles County passed a Fair Work Week Ordinance,[624] which is set to go into effect in July 2025 for retail employers located in the unincorporated areas of the County. It closely tracks the city of Los Angeles's Fair Work Week Ordinance.

The Ordinance will apply to Retail Employers that employ at least 300 employees worldwide, including individuals employed by staffing agencies and certain subsidiaries and franchises.[625] Under the Ordinance, "Retail Employees" include individuals who perform at least two hours of work within the unincorporated areas of Los Angeles County, qualify for minimum wage under California law, and are assigned a primary work location and duties that support retail operations (like retail stores or warehouses).[626]

Covered employees must receive their work schedule 14 calendar days in advance of the work period, and have a right to decline any hours not included in such work schedule.[627] If an employer changes the work schedule after the 14-day period, it must have documented consent from impacted employees.[628] Employers must also provide a good faith estimate of their work schedule to a prospective employee before hire, and to a current employee within 10 calendar days of a request.[629]

Employees will be entitled to predictability pay for changes made to their work schedule within the notice period under certain circumstances.[630] Employers will owe one hour at the regular rate of pay for any change to a scheduled date, time, or location that results in no loss of hours or results in adding more than 15 minutes of work.[631] Employers will also owe half of the employee's regular rate of pay when (1) time is subtracted from a shift before or after the employee reports to work; (2) changes to the start or end time of a shift results in a loss of more than 15 minutes; (3) the date of a shift changes; (4) a shift is cancelled; and (5) the employer schedules the employee for an on-call shift if the employee is not called in.[632]

However, predictability pay is not required for employee-initiated schedule changes, scheduled changes resulting from another employee's absence that an employee accepts, or changes made due to a violation of law or policy.[633] Predictability pay also is not owed when work operations are compromised (e.g., a natural disaster), or if the schedule change adds hours that will require payment of overtime.[634]

Additionally, employers must offer additional hours to current qualified employees at least 72 hours before hiring a new employee, contractor, or temporary hire.[635]

The Ordinance also prevents employers from scheduling employees to work a shift that starts less than 10 hours from the employee's last shift without written consent and payment of time and a half for each hour of the subsequent shift.[636]

Employers must post a "Notice of Retail Employee's Workweek Rights." Employers also must maintain for three years all related records for both current and former employees (such as work schedules, copies of written offers to employees for additional work hours, and good faith estimates of work schedules).[637] Aggrieved employees may file an administrative complaint or a civil action for nonpayment of wages and penalties.[638]

7.24 How Does California Law Affect Multi-State Employees?

7.24.1 Out-of-state residents who temporarily work in California

In paying employees, employers traditionally apply the wage and hour laws of the state where the employee resides or performs the most work, even when an employee occasionally works elsewhere. When multi-state employees work in California, however, it can be different.

***Sullivan v. Oracle*.** In this 2011 decision, the California Supreme Court held that non-California residents who work in California for a California-based employer were subject to California daily overtime laws if they performed their California work for whole days.[639] *Oracle* also held that California's UCL applies to this work.[640]

Although *Oracle* explicitly limited its decision to the circumstances of that case, the decision raised questions about its broader implications:

- whether *Oracle* applies to partial days of work performed within California by non-California residents,
- whether other wage and hour provisions, not just California's daily overtime provisions, apply to nonresident employees who work in California, and
- whether *Oracle*'s rationale extends to employees who work daily overtime in California for employers who are not based in California.

The California Supreme Court provided guidance on these and other questions in two 2020 decisions involving airline crew members.

The airline cases. Various California class actions on behalf of pilots and flight attendants hit several major U.S. airlines and wound up before three different federal judges. The actions claimed that the airlines' complex pay systems caused them to violate California statutes mandating minimum wage, timely wage payment, and adequate wage statements. The federal judges applied different rules to reach differing outcomes. The cases found their way to the Ninth Circuit, which referred five issues to the California Supreme Court:

> (1) Does the Railway Labor Act exemption in Wage Order 9 (for transportation workers) bar a wage statement claim by an employee who is covered by a collective bargaining agreement?
>
> (2) Does Labor Code section 226 apply to wage statements provided by an out-of-state employer to an employee who resides in California, receives pay in California, and pays California income tax on wages, but who does not work principally in California or any other state?
>
> (3) Do section 226 and the statute on timely wage payment (Labor Code section 204) apply to wage statements and wage payments provided by an out-of-state employer to an employee who, in the relevant pay period, works in California only episodically and for less than a day at a time?
>
> (4) Does California minimum wage law apply to all work performed in California for an out-of-state employer by an employee who works in California only episodically and for less than a day at a time?

(5) Does the *Armenta/Gonzalez* bar on averaging wages apply to a pay formula that generally awards credit for all hours on duty, but that, in certain situations resulting in higher pay, does not award credit for all hours on duty?

In addressing these questions, the California Supreme Court shared some general observations:

- "[W]hen it comes to the regulation of interstate employment, it is not sufficient to ask whether the relevant law was intended to operate extraterritorially or instead only intraterritorially, because many employment relationships and transactions will have elements of both. The better question is what kinds of California connections will suffice to trigger the relevant provisions of California law."[641]

- "[T]he connections that suffice for purposes of one statute may not necessarily suffice for another. There is no single, all-purpose answer to the question of when state law will apply to an interstate employment relationship or set of transactions. As is true of statutory interpretation generally, each law must be considered on its own terms."[642]

- The geographic scope of Labor Code section 204 (requiring timely wage payment) and Labor Code section 226 (requiring itemized wage statements) should be the same. The two statutes work "hand in hand" in that "Section 226 regulates the information an employer must provide in connection with wage payments, while Section 204 regulates when an employer must pay an employee for hours worked. … [W]hen an employee must be paid (the subject of § 204), and what information must accompany each such required payment (the subject of § 226) are necessarily linked."[643]

- For purposes of the geographical scope of section 226, no weight is assigned to the employee's residence, where the employee receives wages, where the employee pays taxes, or the employer's location (as opposed to the employee's base of operations).[644]

The Supreme Court answered the five questions as follows:

1. **When the Wage Order RLA exemption applies.** The RLA exemption applies only to Wage Order 9 requirements, not to the broader requirements imposed by section 226. (See § 5.7.)

2. **When section 226 applies to multi-state employees.** Section 226 applies to all employees whose principal place of work is in California. The principal place of work for an employee is in California if the employee works mostly in California. And even if the employee does not work mostly in any single state, the principal place of work for an employee is in California if employee's base of work operations is in California.

3. **The limited geographical scope of sections 204 and 226.** These sections do not apply to pay periods in which an employee works only episodically and for less than a day at a time in California. These sections do apply if the employee works primarily in this state during the pay period, or if the employee does not work primarily in any state but is operationally based in California.

4. **How minimum wage is determined.** State law limits on wage borrowing permit pay schemes that promise to pay for all hours worked at or above the minimum wage, even if particular components of those schemes fail to attribute to each compensable hour a specific amount equal to or greater than the minimum wage. (See § 7.2.)

5. **The geographical scope of minimum wage law is not determined.** The Supreme Court did not reach the question of whether California's minimum wage laws apply to out-of-state employers or to employees who work in California only episodically and for less than a day at a time.[645]

A Ninth Circuit decision extended the California Supreme Court's holding to California-based employees who worked for a California-based employer.[646] That decision, *Bernstein v. Virgin America, Inc.*, involved a California-based airline's California-based flight attendants—who either lived in California or were based in California for business purposes.[647] The California flight attendants spent 31.5% of their time working within California, and did

not spend most of their time working in any one state.[648] Citing these facts, and the airline's California base, the Ninth Circuit held that California law on overtime, breaks, and wage statements applied to the flight attendants.[649]

Bernstein couched its holding in the facts before it—employees for a California-based company who spent a significant percentage of their time in California and less than 50% of their time in any other state.[650] Nevertheless, *Bernstein* emphasizes that employers must tread carefully around California wage and hour laws with California-based employees even when those employees spend a majority of their time out of state.

Offshore cases. The Court of Appeal applied the Supreme Court's lessons in the airline cases in a case featuring ship-bound employees of a Louisiana-based company who serviced oil platforms off the shore of California, while residing in other states. Because the ship was docked in and sailed to reach its work destinations, the employees mostly worked within California, and so California law, not Louisiana law, governed their wage and hour claims. The Court of Appeal explained that California's wage and hour laws apply to any workers, regardless of residency, who perform all or most of their work in California.[651]

7.24.2 Using the UCL to pursue FLSA claims for work done outside of California

Sullivan v. Oracle also ruled on the plaintiffs' ambitious claim that they could use California's UCL to pursue FLSA violations that occurred *outside* of California.[652] On this issue the California Supreme Court ruled for the employer, concluding that the UCL applies only to work performed within California.[653]

7.25 Civil Penalties

7.25.1 Civil penalties collectible by the Labor Commissioner

Failure to comply with Wage Orders triggers a civil penalty of $50 for each affected employee for each pay period of underpayment for any initial violation, and $100 for each affected employee for each relevant pay period for each further violation.[654] Special penalties (which the California Supreme Court has called an extra hour of premium pay) apply to violations of meal-period and rest-break requirements.[655]

Violations of the Labor Code also can trigger civil penalties. Civil penalties, whether created by a Wage Order or by the Labor Code, can be recovered by the Labor Commissioner. Under California's peculiar PAGA statute (explained immediately below), civil penalties can also be recovered in private lawsuits by aggrieved employees acting as private attorneys general.

7.25.2 Private recovery of civil penalties for Labor Code violations

Various Labor Code provisions historically have subjected employers to enormous civil penalties. The California Legislature believed, however, that the civil penalties potentially available against scofflaw employers were too small, and were too rarely sought. This belief led to the Labor Code Private Attorneys General Act of 2004 (PAGA).

PAGA amended certain Labor Code provisions (such as sections 210, 225.5, and 1197.1) to double the existing per-employee, per-pay-period civil penalties from $50 for a first violation and $100 for further violations to $100 for a first violation and $200 for further violations, and created new penalties as well (see below).

More generally, PAGA created a new civil penalty for each Labor Code violation except those for which a civil penalty already was provided.[656]

PAGA penalties can also apply to Wage Order violations, by virtue of a Labor Code section that incorporates Wage Order provisions within the Labor Code.[657] Charted below are some commonly applicable Labor Code provisions, together with common Wage Order provisions, and the associated civil penalties.

"LC 210" refers to civil penalties imposed by section 210 for certain wage payment violations—$100 per employee for the first violation, $200 per employee for each later violation or for willful or intentional violation, plus 25% of the amount unlawfully withheld.[658]

"LC 225.5" refers to civil penalties imposed by section 225.5 for certain additional wage payment violations—$100 per employee for first violation, $200 per employee for each later violation or for willful or intentional violation, plus 25% of the amount unlawfully withheld.[659]

"LC 558" refers to civil penalties imposed by section 558 for violations of certain Labor Code provisions and Wage Order provisions regulating hours and days of work: $50 per "underpaid employee" per each pay period of underpayment for the first violation (in addition to an amount sufficient to recover underpaid wages), and $100 per underpaid employee per each pay period for each further violation (in addition to an amount sufficient to recover underpaid wages).[660]

"LC 1197.1" refers to civil penalties imposed under section 1197.1 for failure to pay minimum wage—$100 per underpaid employee per pay period for the first intentional violation and $250 per underpaid employee per pay period (regardless of intent) for each further occurrence of the "same specific offense."

These penalties are "in addition to an amount sufficient [for an employee] to recover underpaid wages and liquidated damages pursuant to section 1194.2, and any applicable penalties imposed under section 203."[661]

"LC 2699" refers to the prospect that PAGA has created a new penalty for violation of the provision in question, in the amount of $100 per employee per pay period for the first violation and $200 per employee per pay period for each further violation.[662]

We group Labor Code provisions, for ease of reference, into these categories:

- provisions forbidding certain conditions of employment (§ 7.25.3 below),
- provisions forbidding certain employer inquiries or surveillance (§ 7.25.4 below),
- provisions governing hiring employees (§ 7.25.5 below),
- provisions governing paying wages during employment (§ 7.25.6 below),
- provisions governing paying wages at termination of employment (§ 7.25.7 below),
- provisions governing paying benefits to employees (§ 7.25.8 below),
- provisions governing indemnification of employees (§ 7.25.9 below),
- provisions governing required employer disclosures (§ 7.25.10 below),
- provisions governing scheduling and work quotas for employees (§ 7.25.11 below),
- provisions governing accommodating employees (§ 7.25.12 below),

- provisions governing respecting protected activities of employees (§ 7.25.13 below),
- provisions governing safety conditions of employees (§ 7.25.14 below),
- provisions governing labor organizations (§ 7.25.15 below),
- provisions governing minor status of employees (§ 7.25.16 below), and
- miscellaneous provisions (§ 7.25.17 below).

7.25.3 Impermissible conditions of employment

LC §	Description	Penalty
226.8	**Willful Misclassification as Independent Contractor.** Employers must not willfully misclassify workers as independent contractors or impose deductions or charges on such employees that are unlawful to impose on employees.	$5,000 to $25,000
407	**Illegal Consideration to Secure Employment.** Employers must not condition employment on investment in or purchase of stock in business.	**LC 2699**
432.2	**Polygraph and Similar Tests.** Employers must not require applicants or employees to take polygraph, lie detector, or similar tests or examinations as a condition of employment or continued employment. Any "request" that employees take the test must be accompanied by written notice of this code section.	**LC 2699**
432.3	**Salary History Inquiries Forbidden.** Employers must not inquire into salary history, and, in deciding whether to offer employment, may not rely on salary history. Salary history disclosed voluntarily and without prompting may be relied upon in setting salary but cannot itself justify any disparity in pay.	**LC 2699**
432.5	**Forcing Written Agreement to Illegal Terms of Employment.** Employers must not require applicants or employees to agree to any term or condition of employment that the employer knows to be unlawful.	**LC 2699**
450	**No Coercion to Patronize Employer.** Employers must not require employees to patronize the employer or other person in purchases of things of value, such as equipment or supplies. Employers must not charge employees to submit employment applications.	**LC 2699**
1051	**Employee Photos and Fingerprints**. An employer commits a misdemeanor if the employer requires employees or applicants to be fingerprinted or photographed if the employer intends to give the fingerprints or photos to a third person, to the possible detriment of the employee or applicant, or the employer fails to take all reasonable steps to prevent such a violation.	**LC 1054:** treble damages; **LC 2699**
2870-2872	**Employee Inventions.** Employers must not require or enforce contract provisions that assign rights in employee inventions if developed entirely on employee's own time, without using employer's equipment, supplies, facilities, or trade secret information. ***Exception:*** inventions that either (1) at time of conception or reduction to practice, relate to employer's business or employer's actual or demonstrably anticipated research or development, or (2) result from work by employee for employer. Any employment agreement requiring employees to assign invention rights to the employer must include written notice that agreement does not apply to any invention that would qualify under this section.	**LC 2699**

7.25.4 Impermissible employer inquiries or surveillance

LC §	Description	Penalty
432.7	**No Inquiries Regarding Arrest That Did Not Lead to Conviction or That Occurred When the Applicant was a Juvenile.** Employers must not ask employees or applicants about arrests or detentions that have not led to conviction. Employers must not ask about or use information about participation in diversion programs. Employers must not ask about a conviction that has been judicially dismissed or ordered sealed pursuant to law. Employers must not seek, or use as a factor in determining any condition of employment, information regarding participation in diversion programs or arrests or detentions, unless the arrest led to conviction. And employers must not ask applicants about arrests or detentions that occurred when the individual was a juvenile, and must not seek—or use as a factor in determining any condition of employment—information regarding arrests or detentions that occurred when the individual was a juvenile. Employers may ask employees/applicants about arrests pending trial, but must not rely on them for any adverse employment decision unless it results in a conviction. ***Exceptions*:** an employer is not prohibited from asking an applicant about the information above if (1) the employer is required by law to obtain information regarding conviction of an applicant; (2) the applicant is required to possess or use a firearm in the course of employment; (3) an individual convicted of a crime is prohibited by law from holding the position sought, regardless of whether that conviction was expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation; and (4) the employer is prohibited by law from hiring an applicant who has been convicted of a crime. In addition, health care employers defined in section 1250 of the Health & Safety Code may ask certain applicants about arrests under any section specified in Penal Code section 290 and Health & Safety Code section 11590. Health care employers may also inquire into arrests and detentions that occurred when the applicant was a juvenile when the information concerns a matter before the juvenile court in which the applicant has been found to have committed a felony or misdemeanor that occurred within five years preceding the job application. Health care employers must provide applicants with a list describing specific offenses under Penal Code section 290 and Health & Safety Code section 11590 for which disclosure is sought. Health care employers may not uncover sealed records by the juvenile court.	Actual damages or $200, whichever is greater; treble damages or $500, whichever is greater; costs and reasonable attorney fees. Any intentional violation is a misdemeanor punishable by fine not to exceed $500.
432.8	**No Inquiries Regarding Marijuana Arrests Over Two Years Old.** Employers must not ask employees or applicants to disclose misdemeanor marijuana arrests or convictions that are over two years old, or consider those arrests or convictions in making employment decisions.	**LC 2699**
435	**No Audio or Video Recording in Private Areas.** Employers must not record by audiotape or videotape any activity in locker rooms, restrooms, or any other area where employees change clothes, unless authorized by court order.	**LC 2699**

LC §	Description	Penalty
1171.5	**Inquiries re: Immigration Status.** In employment proceedings, no inquiry is permitted into a person's immigration status, unless the inquiry is necessary to comply with federal immigration law.	**LC 2699**

7.25.5 Hiring

LC §	Description	Penalty
432.3	**Salary Inquiries.** Employers in hiring must not seek or rely on an applicant's prior compensation and benefits. Employers must, on reasonable request, provide the applicant with "the pay scale" for the position applied for. Employers may consider, in setting a salary, prior salary information the applicant discloses voluntarily and without prompting. But prior salary cannot itself justify a pay disparity.	**LC 2699**
970	**Misrepresentation of Employment Conditions to Induce Employee Move.** Employers must not induce employees to move from one location to another by misrepresenting the kind, character, length of work, housing conditions surrounding work, or existence or non-existence of labor disputes.	**LC 972**: double damages; **LC 2699**
973	**Notice of Strike in Employment Advertisements.** Employers must include notice in any job advertisement of any strike, lockout, or trade dispute. The ad must also (1) identify the person placing the ad and (2) anyone the person represents in placing the ad.	**LC 2699**
976	**No Willful Misleading Regarding Compensation or Commissions**. In job advertisements or communications, employers must not willfully mislead or falsely represent to an employee or applicant the compensation or commissions that may be earned.	**LC 2699**
1021	**Hiring Unlicensed Workers by One Without State Contractor's License.** Employer incurs a civil penalty if it lacks a valid contractor's license and employs a worker to perform services for which such a license is required.	$200 per person contracted with per day
1021.5	**Hiring Unlicensed Independent Contractor by One Holding State Contractor's License.** Employers who hold a valid contractor's license incur civil penalties by hiring as an independent contractor, for services requiring a license, someone who cannot establish independent contractor status or who lacks a license.	$200 per employee per day

LC §	Description	Penalty
2810-2810.3	**Client Liability for Entering Into a Contract for Labor or Services if There are Insufficient Funds to Comply with Laws or Regulations.** Client employers must not contract for labor or services with a construction, farm labor, garment, janitorial, security guard, or warehouse contractor, if the client employer knows or should know that the contract does not include enough money for the contractor to comply with labor laws or regulations. Otherwise the client employer must share with the labor contractor civil liability for all workers supplied by the labor contractor for the payment of wages, and the failure to obtain valid workers' compensation coverage. A client employer that is a household goods carrier permitted by the Public Utilities Commission is excluded from liability.	**LC 2810(g)(1): $250-$1,000**

7.25.6 Paying wages (pre-termination)

LC §	Description	Penalty
203.1	**Bad Check.** If an employer's final paycheck is not honored due to nonsufficient funds, then the employee can recover penalties of up to 30 days of continuing wages and fringe benefits. (The title of this section refers to the building and construction industries, but the language of the statutory provision is not so limited.)	**203.1**
204	**Paydays**. Employers must pay nonexempt employees at least semi-monthly on designated paydays, paying, for work done between the 1st and 15th, no later than the 26th, and paying, for work done between the 16th and the end of month, no later than the 10th of the next month. Employers must pay all overtime wages no later than payday for the next regular payroll period. (Under section 204(c), employees covered by a collective bargaining agreement with different pay arrangements are subject to the CBA.) For earning periods other than between the 1st and 15th of the month and the 16th and last day of the month, employers must pay wages within seven calendar days of the end of the period. Employers may make monthly payments to salaried executive, administrative, and professional employees by the 26th if the entire month's salary, including the unearned portion, is then paid.	**LC 2699 or LC 210:** statutory penalties by employee suit
204b	**Weekly Paid Employees.** Employers must pay weekly paid employees by the next weekly payday for work done in a week on or before a payday, and by seven days after the next weekly payday for work done in a week after the payday for that week.	**LC 210**
204.2	**Nonexempt Salaried Executive, Administrative, Professional Employees.** Salaries earned for labor performed in excess of 40 hours in a calendar week are due by the 26th day of next calendar month in which such labor was performed, unless employees are covered by a CBA that provides different pay arrangements.	**LC 210**

LC §	Description	Penalty
204.3	**Compensatory Time Off.** Employers can provide comp time off in lieu of overtime pay to nonexempt employees at same rate employees would have earned overtime pay if (1) a written agreement is in place before work is performed, (2) the employee has not accrued comp time > 240 hours, (3) the employee makes a written request for comp time in lieu of overtime, and (4) the employee is scheduled to work no less than 40 hours in a workweek. Any comp time must be paid at employee's rate of pay at time of payment. At termination, comp time must be paid at the higher of (i) the current pay rate or (ii) the average pay rate over prior three years. Employees shall be permitted to use comp time within a "reasonable time" of a request to use it, if it does not unduly interrupt operations. Reasonable time is determined by (A) normal work schedule, (B) anticipated peak workloads based on past experience, (C) emergency requirements for staff and services, and (D) availability of qualified substitute staff. Upon request, employers shall pay overtime pay in cash in lieu of comp time off for any comp time that has accrued for at least two pay periods.	**LC 2699**
206	**Payments Where There Is a Dispute.** Employers must timely pay all wages conceded to be due. Employers who dispute a portion of an employee's claim must pay the undisputed portion. If the Labor Commissioner finds the employee's claim valid, then the employer must pay the balance within ten days of notice of finding, or risk treble damages for willful failure to pay.	**LC 2699:** treble damages (on top of any other penalty)
206.5	**Release of Unpaid Wages Void.** Employers must "not require the execution of a release of a claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of those wages has been made." Any release so executed is void. By a 2008 amendment, "execution of a release" includes requiring an employee, as a condition of being paid, to execute a statement of the hours … worked during a pay period which the employer knows to be false."	**LC 2699**
207	**Notice of Paydays.** Employers must post notices of regular time and place of payment.	**LC 2699**
208	**Payment at Separation.** Employers must pay discharged employees at place of discharge. Employer must pay quitting employee at the office or agency of the employer in the county where the employee worked.	**LC 2699**
209	**Payment of Striking Employees.** Employer must pay striking employee all unpaid wages on the next regular payday, and must return all employee deposits, money, or other guaranty.	**LC 2699**
212(a)	**Payment by Check or Cash.** Employers must pay wages in negotiable instruments (i.e., checks) or cash, and maintain sufficient funds to cover the check for at least 30 days. Coupons redeemable in goods or services are not legal payment.	**LC 225.5**
213(d)	**Direct Deposit.** Employers may deposit wages in a bank account of the employee's choice with voluntary authorization, including timely termination wages.	**LC 2699**

LC §	Description	Penalty
216	**Falsely Denying Wages Due.** Employers commit a misdemeanor if they (i) willfully refuse to pay, after a demand is made, wages due that they have the ability to pay, or (ii) falsely deny the amount or validity of a wage demand, with an intent to secure a discount, or with the intent to harass or delay or defraud.	**LC 225.5**
219	**No Contracting Around These Rules.** Employers must not circumvent wage rules by private agreement.	**LC 2699**
221	**No Kickbacks.** Employers must not collect or receive from employees any part of the wages paid by employer to employee.	**LC 225.5**
222	**Withholding Prohibited.** Employers must not withhold any portion of agreed-upon wages unless authorized by law (such as taxes) or by employee (*see* Lab. Code § 224).	**LC 225.5**
222.5	**Withholding for Medical/Physical Exams Prohibited.** Employers must pay for any required medical examination.	**LC 2699**
223	**No Secret Payment Below Scale.** Employers must not secretly pay lower wage while purporting to pay wages required by statute or contract.	**LC 225.5**
240-243	**Failing to Pay Wages Adjudged Due Under Sections 200-234.** Employers who fail to timely pay wages adjudged to be due are subject to bond requirements and injunctions. Sanctions increase for multiple violations within a 10-year period.	**LC 2699**
300	**Limits on Wage Assignments.** No wage assignment is valid unless it meets the specific requirements of section 300, including a signed written statement specifying transaction for which assignment occurs, spousal consent, notarization, and a maximum 50% of wages assigned. An assignment is revocable at any time.	**LC 2699**
351	**Ownership of Gratuities (Tip Pooling).** Employers must not take any portion of gratuities left for employees. No deductions allowed for cost to process tips left on credit card. Credit card tips must be paid next regular payday.	**LC 2699**
353	**Record of Gratuities.** Employers must record gratuities received either from employees or indirectly by wage deductions. Records must be open for the Department of Industrial Relations' inspection at all reasonable hours.	**LC 2699**
356	**Not Contracting Around Gratuity Laws.** Employers must not attempt to circumvent the gratuity laws with private agreements.	**LC 2699**

LC §	Description	Penalty
510	**Daily, Weekly, Seventh-Day Overtime.** Employers must pay nonexempt employees 1.5 times the regular rate for > eight hours per workday, 40 hours per workweek, or eight hours on the seventh consecutive day of work in workweek. Employers must pay double time for work > 12 hours in workday or eight hours on the seventh consecutive workday. Employers must pay for all time, including travel time, spent from the first place where employers require an employee's presence. Employers need not pay overtime rates to employees if CBA covers wages, hours of work, and working conditions, provides premium rate for overtime, and imposes regular wage of at least 1.3 times the minimum wage.	**LC 558**
511	**Alternative Workweek.** Employers may adopt a four-day ten-hour regular workweek without paying daily overtime after eight hours, if two-thirds of employees so choose in a secret ballot election subject to strict specific procedures. Any work over 40 hours in a week, or over regularly scheduled hours in an alternative workday up to 12 hours, must be paid at 1.5 times the employee's regular rate. Hours over 12 in a workday and after eight hours on a day that the employee is not normally scheduled to work must be paid at double time. Employers must make reasonable effort to accommodate those who cannot work more than 8 hours per day. ***Exception:*** Where CBA covers wages, hours of work, and working conditions, and provides premium wage rates for overtime and a regular hourly rate of not less than 30 percent more than the state minimum wage.	**LC 558**
513	**Makeup Work Time.** Employers may approve written employee requests to make up lost time at straight time rates, provided the request is not solicited by the employer and the employee does not work more than 11 hours in any workday or 40 hours in any workweek, and that the make-up hours be performed in the same workweek in which the time was lost. Each incident of makeup work must be requested by the employee and reduced to a written agreement. Managers must not encourage employees to request to make up work time.	**LC 558**
1197-1197.1	**No Payment of Less Than Minimum Wage Fixed by IWC or by State or Local Law.** Employers must not pay less than the minimum wage fixed by the IWC or any applicable state or local law. Penalties for an intentional first violation are $100 per employee per pay period, and penalties for a further violation, whether or not the first was intentional, are $250 per employee per pay period.	**LC 1197.1; LC 203**
1197.5	**No Gender, Race, or Ethnicity-Based Wage Discrimination or Retaliation.** Employers must not pay less for "substantially similar work" because of sex, race, or ethnicity. Employers must maintain (for at least three years) records regarding wages, job classifications, and other terms and conditions of employment. Employers have the burden to establish a reason other than gender accounts for any pay discrepancy. Prior salary will not, by itself, justify any disparity in compensation.	**LC 210**

7.25.7 Termination of employment

LC §	Description	Penalty
201	**Payment of Wages Upon Discharge.** Employers must pay immediately upon discharge all wages due (including salary, hourly wage, overtime, accrued vacation, and benefits).	**LC 203:** "waiting time" penalty, up to 30 working days
201.3	**Temporary Service Employees.** Employers may pay weekly, "regardless of when the assignment ends," with certain specified exceptions: employers must pay daily to nonexempt, non-clerical employees assigned to work on a day-to-day basis and to employees working for a client engaged in a trade dispute; employers must pay temporary employees on the day of discharge; and employees who quit must be paid in accordance with Labor Code section 202.	**LC 203**
201.5	**Special treatment for Motion Picture Employers.** These employers get to pay final wages on the next regular pay day and payment is deemed as of the date of mailing or when the pay is made available for pick-up, whichever date is earlier.	**LC 203**
201.6	**Special Treatment for Photo Print Employers.** These employers get to pay final wages on the next regular pay day and payment is deemed as of the date of mailing or when the pay is made available for pick-up, whichever date is earlier.	**LC 203**
202	**Payment of Wages Upon Resignation.** Payment is due on last day of work where employee resigns with > 72 hours of notice. To extent employees fail to give 72 hours' notice, employers must pay final wages within 72 hours of quitting. Employers may pay by mail if the resigning employee so requests, providing an address.	**LC 203**
227.3	**Vacation Payment at Termination.** Absent an exception that applies for employees subject to certain collective bargaining agreements, employers must pay separating employees all unused vested vacation time, as wages.	**LC 203**
2926-2927	**Employer Must Pay All Wages Earned Through Termination.** Employer must pay employees all wages earned through the time of dismissal or resignation.	**LC 2699**

7.25.8 Paying benefits

LC §	Description	Penalty
227	**Failure to Make Benefits Payments.** Employers must not fail to remit to the appropriate state agency withholdings from an employee's wages that were made pursuant to state, local, or federal law. Employers must not willfully fail to make benefits payments under terms of health or welfare fund, pension fund or vacation plan, other employee benefit plan, negotiated industrial promotion fund, or CBA.	**LC 2699**

LC §	Description	Penalty
233	**Kin Care Leave.** Employers who have a sick leave policy must permit employees to use one-half of annual sick leave accrual to attend to employees' sick children, parents, spouses, domestic partners, sick children of domestic partners, grandparents, grandchildren, and siblings.	**LC 2699**
246	**Paid Sick Days.** California employees are entitled to paid sick days for prescribed purposes, accrued at a rate of no less than one hour for every 30 hours worked. Employees can use accrued sick days beginning on the 90th day of employment. Employers may limit use of paid sick days to 40 hours or five days per year. Employers must comply with notice, posting, and recordkeeping requirements. ***Exemptions***: Employees whose employment is governed by a CBA that provides for the payment of wages, hours of work, working conditions, and premium overtime (with a regular hourly rate of not less than 1.3 times the minimum wage), paid sick or similar leave, and final and binding arbitration of disputes regarding the paid sick days provision. Also exempt are construction employees covered by CBAs with specific provisions, in-home supportive service providers, and certain air carrier and flight personnel, as well as employees who are exempt from payment of overtime wages by statute or the Wage Orders and employees who are directly employed by state government.	**LC 248.5**
2800.2	**Notification of Cal-COBRA and COBRA.** Employers must give Cal-COBRA notices (which can include notice to former employee spouses and former spouses).	**LC 2699**
2803.4	**Medical Eligibility Not an Exception to ERISA Health Benefits.** Employers must not reduce or deny ERISA health plan benefits because of Medi-Cal or Medicaid eligibility.	**LC 2699**
2803.5	**Compliance With Laws Regarding Health Coverage for Children of Employees.** All employers must comply with laws regarding health benefits for employees' children.	**LC 2699**
2806	**15 Days' Notice to Discontinue Health Benefits.** Employers must give 15 days' notice of plans to discontinue offer of non-ERISA health benefits.	**LC 2699**
2807	**HIPP Notice.** Employers must give former employees standardized written description of California Health Insurance Premium Program.	**LC 2699**
2808	**Explanation of Benefits.** Employers must explain all health coverages they offer. Employers must give notice to terminated employees of all continuation, disability extension, and conversion coverage options under any employer-sponsored coverage for which the employee may remain eligible after employment.	**LC 2699**
2809	**Explanation of Employer-Managed Deferred Compensation Plan.** Employers who offer employer-managed deferred compensation plans must notify employees in writing of financial risks, and must (by itself or through plan manager) provide quarterly reports of financial condition of employer and financial performance.	**LC 2699**

LC §	Description	Penalty
2802.1	**Section 2802 in Direct Patient Care Context.** Section 2802 applies to any expense or cost of any employer-provided or employer-required educational program or training for an employee providing direct patient care or an applicant for direct patient care employment.	**LC 2699** **LC 98** **LC 1197.1**

7.25.9 Indemnification

LC §	Description	Penalty
231	**Employer Must Pay for Driver's License Physical.** Employers that require driver's license of employees must pay cost of any required physical examination, except where examination was taken before employee applied for employment.	**LC 2699**
401	**Payment for Bonds or Photos.** If employer requires a photograph or bond of an employee, then employer must bear the cost.	**LC 2699**
402-403	**Employer Acceptance of Cash Bonds.** Employers must not require cash bonds unless employee/applicant is entrusted with property of equal value or employer regularly advances goods to employee. All cash bonds require written agreement, deposit in bank account, and withdrawal only by signature of both employer and employee/applicant. When employee/applicant returns the money or property and fulfills agreement, employer must immediately return the bond money, with interest.	**LC 2699**
405	**Use of Property Put Up as Bond.** Employer must not use employee property for any purpose other than liquidating accounts. Employer must hold property in trust and not mingle it with other property. No contract shall abrogate this section.	**LC 2699** **Pen. Code 484o**
406	**All Property Is a Bond.** Any property employee/applicant puts up as part of employment contract is deemed to be put up as a bond, regardless of wording of contract.	**LC 2699**
2800	**Indemnification.** Employers must indemnify employees for any loss caused by the employer's "want of ordinary care."	**LC 2699**
2802	**Indemnification for Necessary Expenditures.** Employers must indemnify employees for necessary expenditures or losses incurred by employees in direct consequence of discharge of duties, or of obedience to employer directions, even though unlawful, unless employee, when obeying directions, thought them unlawful.	**LC 2699** **LC 98** **LC 1197.1**
2802.1	**Section 2802 in Direct Patient Care Context.** Section 2802 applies to any expense or cost of any employer-provided or employer-required educational program or training for an employee providing direct patient care or an applicant for direct patient care employment.	**LC 2699** **LC 98** **LC 1197.1**

7.25.10 Required employer disclosures

LC §	Description	Penalty
226(a)	**Itemized Wage Statements.** Employers must provide with each wage payment an itemized statement showing (1) gross wages earned, (2) total hours worked by the employee, except for exempt employees paid solely by salary, (3) the number of piece-rate units earned and any applicable piece-rate if employee is paid on piece-rate basis, (4) all deductions, provided, that all deductions made on written orders of employee may be aggregated and shown as one item, (5) net wages earned, (6) inclusive dates of period for which the employee is paid, (7) name of the employee and either the last four digits of the employee's social security number or an employee identification number other than the employee's social security number, (8) the name and address of legal entity that is the employer, and (9) all hourly rates in effect during the pay period and the number of hours worked at each rate. The employer must maintain a copy of the statement and the record of deductions for at least three years at the place of employment or at a central location within California, although a copy can take the form of a computer-generated record that shows all the information required. Temporary services employers must record the rate of pay and total hours worked for each temporary services assignment.	**LC 2699 (default penalty); LC 226.3 (heightened penalties for non-provision of wage statements):** $250 per employee per violation in an initial citation, and $1,000 for each subsequent citation[663]
226(b) & (c)	**Request to Review Payroll Records.** Employers required to keep section 226(a) data must give current and former employees the right to inspect or receive a copy of the records pertaining to their employment, upon reasonable request. Employers may take reasonable steps to ensure the employees' identities. Employers who provide copies may charge employees the actual cost of reproduction. Employers who receive a request to inspect or copy records must comply within 21 calendar days of the request.	**LC 226(f):** $750, to employee or to DLSE
227.5	**Annual Benefits Statement.** Employers must give annual statements, upon written request, to employees covered by employer-funded health or welfare funds, pension funds, vacation plans, or other employee benefits plans.	**LC 2699**
432	**Copies of Documents Signed by Employee.** Employers must provide, on request, a copy of any document that an employee or applicant has signed to obtain or hold employment.	**LC 2699**
1174	**Employer Obligations to Provide Information to IWC and DLSE.** Employers must comply with all IWC information requests, must allow IWC or DLSE free access to sites to investigate and inspect employment records, must record names and addresses of all employees and the ages of all minors, and must keep at a central California location, or at establishments where employees work, payroll records (for not less than three years) showing daily hours worked and wages paid. Employer must not prohibit employees from maintaining personal records of the number of hours worked or (if relevant) the numbers of piece-rate units earned.	**LC 1174.5:** $500

LC §	Description	Penalty
1198.5	**Employee Right to Inspect Personnel Records.** Employers must—upon written request and at reasonable intervals and times—provide a copy and make available for inspection the personnel records that relate to a current or former employee's performance or to any grievance concerning the employee. The employer must comply within 30 calendar days of receiving a written request, unless the employer and employee, or the employee's representative, agree to a date up to 35 calendar days after the employer receives a written request. Employers need not make records available when the employee is required to render service to the employer, if the requester is the employee. As to current employees, employers must make personnel records available where the employee reports to work or at another location agreeable to the requester, with no loss to the employee if he or she is the requester. As to former employees, employers must make personnel records available where it stores the records, unless the parties agree in writing to a different location. Employers must maintain a copy of personnel records for at least three years after employment. ***Exceptions:*** Employers need not disclose (1) records relating to investigation of possible crime, (2) letters of reference, and (3) records that were (A) obtained before employment, (B) prepared by identifiable examination committee members, or (C) obtained for a promotional examination.	**LC 1198.5(k):** $750 to employee or to DLSE
1400-1408	**California WARN.** Employers who own or operate any facility employing 75+ employees within the last 12 months must give 60-day written notice of any mass layoff (50+ employees within 30 days), relocation (moving > 100 miles), or termination of business at that facility. ***Exception:*** where physical calamity or act of war is the reason for the mass layoff, relocation, or termination.	**LC 1403**:$500 for each day of violation
1409-1413	**Relocation of Call Center.** A call center employer shall not order a relocation of its call center, or one or more of its facilities or operating units within a call center, unless notice of the relocation is provided in accordance with section 1401. If a call center employer is required to provide notice under subdivision (a) of section 1401 and this section, the call center employer may provide a single notice; however, a notice of the relocation of a call center shall include, "This notice is for the relocation of a call center" at the top of the notice.	**LC 1410.5, 1403: $500 for each day of violation**
2751	**Contract of employment for commissions.** California employers paying commissions must put the commission arrangement in a written contract and give the employee a signed copy.	**Uncertain**

LC §	Description	Penalty
2810	**Retention of contractors.** A California business that retains certain contractors can be liable to the contractor's employees for Labor Code violations if the business knew or should have known that the relevant agreement did not include enough money to permit the contractor to satisfy all applicable federal, state, and local labor laws.	**LC 2810(g):** actual damages or $250 for the first violation and $1,000 for each further violation
2810.5	**"Wage Theft" Act notice.** California employers must notify employees, at the time of hire, of (1) the rates of pay and the basis thereof (e.g., hourly, salary, commission, etc.), including any applicable overtime rates, (2) allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances, (3) the regular designated payday, (4) the employer's name (including any dba name) and its address and telephone number, (5) the name, address, and telephone number of the employer's workers' compensation insurance carrier, (6) the employee's rights to accrue and use sick leave, to request and use accrued paid sick leave, to be free of retaliation for using or requesting accrued paid sick leave, and to file a complaint against an employer who retaliates, (7) information regarding any state or federal emergency or disaster declaration applicable to the county or counties where the employee will work that was issued within 30 days before the employee's first day of employment, and that may affect their health and safety during employment, and (8) any other information the Labor Commissioner deems "material and necessary."	n/a as to notice statutes, per **LC 2699(g)(2)**
2930	**Shopping Investigator.** Employers who base discipline or dismissal of an employee on a shopping investigator's report by an outside agency must give the employee, before imposing discipline or dismissal and before concluding an interview that might result in discipline or dismissal, a copy of the report.	**LC 2699**
3550	**Workers' Compensation Posting.** Employers must post, where it may be easily read by employees during the workday, a notice with the information specified in this section.	**LC 6431:** up to $12,471 per violation **LC 3550**
3551	**Workers' Compensation Notice to New Hires.** Employers must give new hires, by end of first pay period, information contained in the workers' compensation posting, provided in English and Spanish.	**LC 2699**
3553	**Workers' Compensation Notice to Employee Victims of Crime.** Employers must tell workplace crime victims they are eligible for workers' compensation for resulting injuries, including psychiatric injuries. This notice must be either personal or by first-class mail, within one working day of the workplace crime, or within one working day of when employer reasonably should have known of crime.	**LC 2699**

7.25.11 Scheduling and Work Quotas

LC §	Description	Penalty
226.7	**Meal/Rest/Recovery Periods.** Employers must not require employees to work during any meal or rest or recovery period mandated by state law and must pay employees "one additional hour of pay at the … regular rate … for each workday that the meal or rest or recovery period is not provided." A mandated rest or recovery period counts as hours worked for which there can be no deduction from wages. That is, recovery and rest breaks must be compensated as hours worked. ***Exception:*** exempt employees.	**LC 226.7(c):** one hour of pay; LC 2699
512	**Mandatory Meal Period.** Employers must provide a 30-minute meal period if employee works more than five hours, though parties can waive meal period where total work period does not exceed six hours. Employers must provide second meal period if employee works more than ten hours, though parties can waive second meal period by written agreement where total work period does not exceed 12 hours and where the first meal period was not waived.	**LC 226.7(c)** **LC 558**
551, 552	**One Day of Rest in Seven.** Employers must not cause employees to work more than six of seven days. Days of rest may be accumulated throughout the month if all rest days are given in the month. ***Exceptions*** (sections 554, 556): emergencies, work to protect life or property from loss, certain railroad-related work, certain agricultural work, employees who work less than six hours daily or 30 hours weekly.	**LC 2699**
850-854	**Pharmacy Workers.** Employees who sell drugs or medicine at retail locations or who compound physician's prescriptions must not work more than an average of nine hours per day, or for more than 108 hours in any two consecutive weeks or for more than 12 days in any two consecutive weeks. Except on Sundays and holidays, and except for a meal period (not more than one hour), the hours of work permitted per day by this chapter shall be consecutive. ***Exceptions:*** hospitals employing one person to compound prescriptions; "emergencies" that involve accident, death, sickness or epidemic.	**LC 2699**

LC §	Description	Penalty
2100-2112	**Warehouse work quotas.** Large warehouse distributor employers that utilize work quotas are subject to various requirements. • Employers must give each employee a written description of any applicable quota and the potential adverse employment actions that could result from failing to meet the quota. • Employers must not enforce quotas to the extent that enforcement would "prevent[] compliance with meal or rest periods, use of bathroom facilities, including reasonable travel time to and from bathroom facilities, or occupational health and safety laws." • Any employee actions to comply with occupational health and safety laws must be considered time on task and productive time for purposes of any quota or monitoring system. • Employees who believe a quota has violated their rights are entitled to request and receive a written description of each applicable quota and a copy of the most recent 90 days of the employee's own personal work speed data. • Any adverse action against an employee taken within 90 days of that employee asserting quota-related rights creates a rebuttable presumption of unlawful retaliation against the employee. • Violations of the law can be pursued by the DLSE and the employees themselves can sue for injunctive relief and be awarded attorney fees if they prevail.	**LC 2699**

7.25.12 Accommodating employees

LC §	Description	Penalty
230(a)	**Jury Duty Leave.** Employers must not discharge or discriminate against employees for taking time off for jury service, after the employee gives reasonable notice that the employee is required to serve, and must permit employees on such leave to use otherwise available vacation, personal leave, or compensatory time off, unless otherwise provided by a CBA. The entitlement of any employee under this section shall not be diminished by any CBA.	**LC 2699**
230(b)	**Witness Duty Leave.** Employers must not discharge, discriminate, or retaliate against employees for taking time off to testify under subpoena or other court order, and must permit employees on such leave to use otherwise available vacation, personal leave, or compensatory time off, unless otherwise provided by CBA. No employee entitlement under this section shall be diminished by any CBA.	**LC 2699**

LC §	Description	Penalty
230(c)	**Domestic Violence/Sexual Assault/Stalking Leave.** Employers must not discharge or discriminate or retaliate against victims of domestic violence, sexual assault, or stalking for taking time off from work to seek relief to help ensure health, safety, or welfare of victim or victim's child, and must permit employees on such leave to use otherwise available vacation, personal leave, or compensatory time off, unless otherwise provided by CBA. Where possible, employees must give reasonable advance notice. Employers must not take action on basis of unscheduled absence if employee completes certification as set forth in section 230(d)(2)(A)-(C). Employers must engage in the interactive process and provide reasonable accommodations for victims of domestic violence, sexual assault, or stalking who request an accommodation for safety while at work. Employers must maintain confidentiality of employees who request leave, to extent required by law. No employee entitlement under this section shall be diminished by any CBA.	**LC 2699**
230.1	**Additional Rights for Victims of Domestic Violence / Sexual Assault/Stalking.** Employers with 25+ employees must not discharge or discriminate or retaliate against victims of domestic violence, sexual assault, or stalking for taking time off from work to (1) seek medical attention for injuries caused by domestic violence, sexual assault, or stalking, (2) obtain services from domestic violence shelter, program, or rape crisis center as a result of domestic violence or sexual assault, (3) obtain psychological counseling related to an experience of domestic violence, sexual assault, or stalking, (4) participate in safety planning and take other actions to increase safety from future domestic violence, sexual assault, or stalking, and must permit employees on such leave to use otherwise available vacation, personal leave, or compensatory time off, unless otherwise provided by CBA. Although employees must give reasonable advance notice where possible, employers must not take action on the basis of unscheduled absence if employee completes certification as set forth in section 230(d)(2)(A)-(C). Employers must maintain confidentiality of employees who request leave, to the extent required by law. No employee entitlement under this section shall be diminished by any CBA. This section does not create employee rights to unpaid leave exceeding that permitted by the federal Family and Medical Leave Act.	**LC 2699**
230.2	**Crime Victim Leave.** Employers must permit a crime victim, and a crime victim's immediate family member, registered domestic partner, or child of registered domestic partner, to leave work to attend judicial proceedings related to the crime, and must permit employees on the leave to use otherwise available vacation, personal leave, or compensatory time off. Employers must keep the reason for this leave confidential. Employers must not discriminate against employees for taking the leave.	**LC 2699**

LC §	Description	Penalty
230.3	**Volunteer Leave.** Employer must not discharge or discriminate against employees for taking time off to perform emergency duty as a volunteer firefighter, a reserve peace officer, or emergency rescue personnel (which includes an officer, employee, or member of a disaster medical response team sponsored by the state). ***Exception*:** employers that are public safety agencies or providers of emergency medical services, where employer determines the employee's absence hinder public safety or emergency medical services.	**LC 2699**
230.4	**Training Leave for Fire, Law Enforcement, and Emergency Rescue Personnel.** Employers with 50+ employees must provide leaves (two weeks per calendar year) for fire, law enforcement, or emergency personnel training. An employee who works for an employer with at least 50 employees, who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because the employee has taken time off for training leave, is entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.	**LC 2699**
230.5	**Victim of Specified Offenses Leave.** Employers must not discharge or discriminate or retaliate against victims of specified offenses for taking time off from work to appear in court to be heard at any proceeding in which a right of the victim is at issue. Specified offenses include vehicular manslaughter while intoxicated, felony child abuse likely to produce great bodily harm or a death, assault resulting in the death of a child under eight years of age, felony domestic violence, felony physical abuse of an elder or dependent adult, felony stalking, solicitation for murder, "serious felony," hit-and-run causing death or injury, felony driving under the influence causing injury, and sexual assault. The employee must give reasonable advance notice, unless not feasible.	**LC 2699**
230.7	**School Discipline Leave for Parents.** Employers must not discriminate against parents or guardians who take time off for school appearance under Education Code § 48900.1 (child suspended), upon reasonable notice of the appearance.	**LC 2699**
230.8	**School Activities Leave.** Employers must not discriminate against parents, guardians, or grandparents with custody of K-12 children, for attending licensed child day care facility, for taking off up to 40 hours each year, not exceeding eight hours per calendar month, to participate in activities of school or licensed child day care facility of employee's children, upon reasonable notice of absence, and must permit use of existing vacation, personal leave, or compensatory time off for this absence (unless it is vacation period that all eligible employees take at same time every year), unless otherwise provided by CBA entered into before January 1, 1995, and in effect on that date. If both parents work for same employer, only the first to ask is entitled to leave. No CBA may diminish an entitlement under this section. The Legislature has expanded "parent" to include a parent, guardian, stepparent, foster parent, or grandparent of, or a person who stands in loco parentis to, a child. "Child care provider or school emergency" includes a request that the child be picked up from school or child care, behavioral/discipline problems, closure or unexpected unavailability of the school (excluding planned holidays), or a natural disaster.	Treble lost wages & work benefits for willful refusal to rehire, promote, or restore employee eligible for rehire or promotion **+LC 2699**

LC §	Description	Penalty
233	**Kin Care Leave.** Employers who have a sick leave policy must permit employees to use one-half of annual sick leave accrual to attend to employees' sick children, parents, spouses, domestic partners, and sick child of domestic partners.	**LC 2699**
1025	**Accommodation of Employee Attending Drug or Alcohol Rehab.** Employers with 25+ employees must accommodate those who voluntarily enter drug or alcohol rehabilitation, if accommodation does not impose "undue hardship" on employer, though employers can deny employment to those whose current use of alcohol or drugs renders them unable to perform job duties, or to perform them in manner that would not endanger health or safety of individual or others.	**LC 2699**
1027	**Accrued Sick Time for Rehabilitation.** Employers must allow employees to use their accrued sick leave while attending an alcohol or drug rehabilitation program.	**LC 2699**
1030-1034	**Lactation Accommodation.** Employers must provide break time and a lactation room that is not a bathroom, is in close proximity to the employee's work area, is shielded from view, is free from intrusion while the employee is lactating, is safe, clean, and free of hazardous materials, contains a surface to place a breast pump and personal items, contains a place to sit, has with access to electricity or alternative devices (e.g., extension cords, charging stations) that may be needed to operate an electric or battery-powered breast pump, and has access to a sink with running water and a refrigerator suitable for storing milk. If a multipurpose room is used for lactation and other uses, lactation must take precedence over the other uses. There is an undue hardship exemption for employers with fewer than 50 employees.	**LC 1033**:$100 penalty per violation, plus premium pay for rest break violation
1041-1044	**Literacy Accommodation.** Employers with 25+ employees must reasonably accommodate employees with personal literacy problems who seek assistance, absent unreasonable hardship. Employer must provide information about literacy programs, but need not give paid leave for literacy training. Employers must take reasonable steps to ensure employee privacy regarding literacy problems. Employer must not discharge employee for revealing illiteracy if job performance is satisfactory.	**LC 2699**
1510	**Organ and bone marrow donors.** Employers must grant paid leaves of up to 30 business days in a one-year period for organ donors, for the purpose of donating an organ to another person, and paid leaves of up to five business days in a one-year period for bone marrow donors, for the purpose of donating bone marrow to another person. Employers must also grant an additional unpaid leave of absence, not exceeding 30 business days in a one-year period, to organ donors, for the purpose of donating the employee's organ to another person.	**LC 2699**

7.25.13 Respecting protected activities

LC §	Description	Penalty
98.6	**Lawful Off-Duty Conduct.** Employers must not discharge or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for engaging in conduct protected by section 96(k) (lawful off-premises conduct occurring during nonworking hours).	**98.6(b)(3):** $10,000, awardable to employee
98.6	**Exercising Labor Code Rights.** Employers must not discriminate, retaliate, or take any adverse action against employees or applicants for exercising rights under the Labor Code, including bona fide claims with the Labor Commissioner. If an employer engages in action prohibited by this section within 90 days of the protected activity specified in this section, there is a rebuttable presumption in favor of the employee's claim.	**98.6(b)(3):**$10,000, awardable to employee
132a	**Workers' Compensation Claims.** Employers must not discriminate against workers who file workers' compensation claims or indicate intent to do so.	**LC 2699**
232	**Disclosure of Wages.** Employers must not (a) require that employees refrain from disclosing their wages, (b) require employees to sign waiver of this right, or (c) discharge, discipline, or otherwise discriminate against employees who disclose their wages.	**LC 2699**
232.5	**Disclosure of Working Conditions.** Employers must not (a) require that employees refrain from disclosing information about employer's working conditions, (b) require employees to waive that right, or (c) discharge, discipline, or otherwise discriminate against employees who disclose information about employer's working conditions. This section does not permit disclosure of proprietary information, trade secrets, or other legally privileged information.	**LC 2699**
234	**Kin Care Absences.** Employers must not count kin-care absences as absences that may lead to discipline, discharge, demotion, or suspension.	**LC 2699**
244(b)	**Ban on retaliatory reporting of suspected citizenship or immigration status.** An employer commits an "adverse action" if it reports to a government agency the suspected citizenship or immigration status of an employee, former employee, or prospective employee, or of that individual's family member, because the individual has exercised rights under the Labor, Government, or Civil Codes.	**LC 2699**
246.5	**Use of paid sick leave.** Employees may use paid sick leave for the employee's or a family member's health condition, including preventive care, and for the employee's time off in connection with sexual violence or stalking, and employers must not retaliate against an employee for those authorized uses of paid sick leave.	**LC 248.5**
432.6	**Refusing to waive right, forum, or procedure as to Labor Code or FEHA rights as condition of employment.** Employers must not retaliate or threaten to retaliate for exercising the right to refuse to waive.	**LC 2699**

LC §	Description	Penalty
921-922	**Employee Rights to Organize.** Employers must not attempt to influence or interfere with workers' rights to join or support a union. Employers must not force employees to agree not to join a union.	**LC 2699**
923	**Selection of Bargaining Representative or With Concerted Activities.** Public policy gives employees the right to be free of interference, restraint, or coercion in designating representatives or in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection."	**LC 2699**
1024.6	**Employee Updating Personal Information.** Employers must not discharge or in any manner discriminate, retaliate, or take any adverse action against an employee because the employee has updated or attempted to update the employee's personal information, based on a lawful change of name, social security number, or federal employment authorization document.	**LC 2699**
1025	**Drug and Alcohol Rehabilitation.** Employers regularly employing 25 or more employees shall reasonably accommodate any employee who wishes to voluntarily enter and participate in an alcohol or drug rehabilitation program, provided that this reasonable accommodation does not impose an undue hardship on the employer.	**LC 2699**
1031-1034	**Asserting Right to Lactation Accommodation.** Employers must not retaliate against any employee asserting a right to lactation accommodation.	**LC1033:** $100
1101	**Employee Political Affiliations.** Employers must not restrict employees from participating in politics or running for political office. Employers must not control or direct political activities or affiliations of employees.	**LC 2699**
1102	**No Influence or Coercion in Political Activities.** Employers must not use threat of discharge or other adverse employment action to influence or coerce employees regarding a political action or political activity.	**LC 2699**

LC §	Description	Penalty
1102.5	**Whistleblower Protection.** Employers must not adopt or enforce rules against providing information to (a) state or federal agencies, (b) a person with authority over the employee, or (c) another employee who has authority to investigate, discover, or correct the violation or noncompliance, or against providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee providing the information has reasonable cause to believe the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties. Employers must not retaliate against an employee for engaging in these activities, where the employee has reasonable cause to believe the information discloses violation of state or federal statute or non-compliance with a regulation, regardless of whether disclosing the information is part of the employee's job duties. Employers must also not retaliate against an employee because the employee is a family member of a person who has, or is perceived to have, engaged in any acts protected by this section.	**LC 1102.5(f):** civil penalty (for an employer that is a corporation or LLC) up to $10,000 per violation
6310	**No Discrimination vs. Safety Whistleblowers.** Employers must not discharge or discriminate against employees who bring safety complaints either to employer or to administrative agency, or employee's representative (i.e., union), who start or participate in proceedings to enforce safety rights, or who participate in an occupational health and safety committee pursuant to an IIPP under section 6401.7. Employers also must not retaliate against an employee because the employee is a family member of a person who has—or is perceived to have—engaged in bringing safety complaints.	**LC 2699**
6311	**No Discipline for Refusal to Work in Violation of Safety Laws Where Violation Would Create Hazard.** Employers must not discharge, lay off, or fail to pay employees who refuse to work because of violation of safety or health law, where violation would create real and apparent hazard to any employee.	**LC 2699**

7.25.14 Safety conditions

LC §	Description	Penalty
2260	**Sanitary Facilities.** All employers must comply with sanitary facilities standards adopted by the Occupational Safety & Health Standards Board.	**LC 2699**
2350	**Workplace Free from Effluvia and With Sufficient Toilets.** Employers must provide a clean workplace free of foul smelling vapors, and must provide sufficient number of bathrooms; If there are five or more employees who are not all of the same gender, sufficient gender-designated bathrooms must be provided.	**LC 2699**
2351	**Proper Ventilation.** Every factory or workshop operator must ventilate every workplace to prevent injury to employee health by injurious vapors, gases, dust, or other impurities generated by the work.	**LC 2699**

LC §	Description	Penalty
2353	**Fans.** Employers must use properly fitted exhaust fans or blowers with pipes and hoods to prevent dust, filaments, or injurious gases from escaping into the atmosphere of any room where employees work.	**LC 2699**
2440	**First Aid.** All employers must comply with standards for medical services and first aid adopted by Occupational Safety & Health Standards Board.	**LC 2699**
2441	**Free, Fresh, and Pure Drinking Water.** Employers must provide fresh, free, and pure drinking water for employees, at reasonable and convenient times and places.	**LC 2441(a):** offenses subject to $50-$200 fines
2650-2667	**Industrial Homework.** No industrial homework is permitted in various industries, including manufacture of food items, garments, toys and dolls, tobacco, drugs and poisons, bandages and other sanitary goods, explosives, fireworks. Licenses are required for other industrial homework.	**LC 2699; LC 2658.5**
6314	**Workplace Inspections by Division of Occupational Safety and Health.** Employers must give DOSH free access to employer premises to inspect and gather information (including statistics and physical materials), and to speak privately with employees regarding safety issues. Employers must post and comply with any order to preserve accident site or related physical materials.	**LC 2699**
6318	**Posting Citations, Orders, Actions Related to OSHA Violations.** Employers must post, at or near each place of violation and for three working days or until condition is abated, whichever is longer, any DOSH citation or order. Employers also must post notice regarding abatement of violation. The employee notification must include (1) notice that the division investigated the workplace and found one or more workplace safety or health violations; (2) notice that the investigation resulted in one or more citations or orders, which the employer is required to post at or near the place of the violation for three working days or until the unsafe condition is corrected, whichever is longer; (3) notice that the employer is required to communicate any hazards at the workplace to employees in a language and manner they understand; and (4) contact information for the division and the internet website where employees can search for citations against their employer.	**LC 2699**
6325	**Removal of Notices Prohibiting Entry to Hazardous Area.** No unauthorized person shall remove a DOSH notice preventing entry into an area DOSH has identified as an imminent hazard to employees until the hazard has been determined to be abated.	**LC 2699**
6326	**Entry / Use of Hazardous Area.** After notice has been posted pursuant to section 6325, it is unlawful for anyone to enter the area or use or operate equipment or device before it is made safe (except for purpose of abating safety issue), or to deface, destroy, or remove the notice without the division's authority.	**LC 2699; LC 6326**
6328	**Postings.** Employers must post safety notices in both English and Spanish. For postings, see http://www.dir.ca.gov/wpnodb.html.	n/a; **LC 2699(g)(2)**

LC §	Description	Penalty
6386	**Laboratory Employers and Hazardous Substances.** Laboratory employers must ensure that labels regarding hazardous substances are not removed or defaced, and must maintain any material safety data sheets received with shipments of hazardous substances and ensure they are readily available to laboratory employees.	**LC 2699**
6398	**Notice to Employees Who Work with Hazardous Substances.** Employers must (a) timely make available Material Safety Data Sheets (MSDS) to employees, collective bargaining representatives, or employees' physicians, (b) furnish MSDS information, either in writing or through training, to employees exposed to hazardous substance, and (c) inform employees of rights to this information.	**LC 2699**
6399	**Employers Must Obtain Updated MSDS from Manufacturers on Request from Employee, Union, Physician.** Employer must request MSDS from manufacturer within seven days of request by employee, union rep, or employee's physician, if employer (a) has not requested MSDS on the substance within prior 12 months and does not have MSDS on the substance, or (b) has not requested update to MSDS from manufacturer within past six months. Employers who do not receive response from manufacturer within 25 days of request must send copy of request to director with note that no response has been received.	**LC 2699**
6399.7	**No Discrimination Against Whistleblowers.** Employers must not discharge or discriminate against employees for filing complaints or instituting proceeding relating to hazardous substances.	**LC 2699**
6400	**Safe and Healthful Environment Required.** Employers, including joint employers, must furnish a safe and healthful workplace.	**LC 2699**
6401, 6403, 6406	**Employers Must Provide and Maintain Safety Devices.** Employers must supply safety devices and safeguards and processes reasonably adequate to render employment safe and healthful. Employer must do everything reasonably necessary to protect employee safety and health. Employers must not (a) remove or damage any safety device or warning furnished for use in employment, (b) interfere with the use thereof, or (c) interfere with process adopted for employee protection, or (d) fail or neglect to do every other thing reasonably necessary to protect the life, safety, and health of employees.	**LC 2699**
6401.7	**Injury Illness Prevention Program Required.** Employers must maintain effective injury prevention programs, timely correct unsafe and unhealthy conditions and practices, comply with employee training obligations, and record steps taken to implement their IIPPs.	**LC 2699**
6402	**No Employees in Unsafe Places.** Employers must not require or permit employees to go or be anywhere that is not safe and healthful.	**LC 2699**
6404	**All Workplaces Must Be Safe and Healthful.** Employers must not occupy or maintain any place of employment that is not safe and healthful.	**LC 2699**

LC §	Description	Penalty
6404.5	**Smoking Restrictions.** Employers generally must prohibit smoking in all enclosed workplace spaces. **Exceptions:** (1) 20% of guestroom accommodations in lodging establishments, (2) retail or wholesale tobacco shops and private smokers' lounges, (3) cabs of motortrucks, (4) theatrical production sites, if smoking is an integral part of the theatrical story, (5) medical research or treatment sites, if smoking is integral to research and treatment, (6) private residences, except for licensed family day care homes, (7) patient smoking areas in long-term health care facilities. Penalties are $100 for a first violation, $200 for a second violation within one year, and $500 for each further violation within one year.	**LC 6404.5**
6407	**Compliance Mandatory.** Employers must comply with occupational safety/ health standards, with Health & Safety Code § 25910 (relating to spraying of asbestos), and with all rules, regulations, and orders that apply to its own conduct.	**LC 2699**
6408	**Obligation to Provide Information and Access.** Employers must give employees information in various ways, as prescribed by regulations: (a) post information about employee rights and obligations under occupational safety and health laws, (b) post each citation issued under section 6317, at or near place where violation occurred, (c) tell employees or their representatives they can observe monitoring or measuring of employee exposure to hazards conducted pursuant to [OSHA] standards promulgated under section 142.3, (d) allow access by employees or their representatives to accurate records of exposures to potentially toxic materials or harmful physical agents, (e) notify any employee exposed to toxic materials or harmful physical agents in concentrations or at levels exceeding those prescribed by an applicable standard, order, or special order, and inform employee of corrective action being taken.	**LC 6431:** up to $12,471 per violation; increased yearly based on CPI
6409	**Filing Physician's Report on Industrial Injury or Illness.** Every physician as defined in section 3209.3 who tends to an injured employee must file electronically a complete report with the Division of Workers' Compensation and the employer, or, if insured, with the employer's insurer, within five days of the initial examination.	**LC 6413.5:** $50 to $200 for pattern of or willful violations
6409.1	**Obligations to File Reports on Industrial Injury or Illness.** Employers must report to the Department of Industrial Relations—or, if insured, to the insurer—any injury or illness that results in time lost beyond the day of the incident, or which requires medical treatment beyond first aid, and must file amended report if employee dies as result of illness/injury. For serious illness, injury, or death, employers must report immediately to DOSH by telephone or email.	**LC 6413.5**, plus **LC 6409.1(b):** $5,000+ for failure to report serious illness, injury or death
6410	**Recordkeeping Requirements.** Reports required by sections 6409 and 6409.1 must be maintained.	**LC 6431:** up to $12,741 per violation

LC §	Description	Penalty
6411	**Completing Forms from the Division.** Employers receiving forms with directions from Division of Labor Statistics & Research must complete them correctly, and give a good reason for any failure to answer.	**LC 2699**
7156	**No Obstruction of Safety.** Employers must not—in employing or directing work building construction, repairing, painting, or cleaning of any house, building, or structure—(a) knowingly or negligently furnish or erect improper scaffolding, slings, ladders, or other mechanical contrivances, (b) hinder or obstruct any DOSH official trying to inspect that equipment, or (c) deface or remove any official notice that equipment has been declared unsafe.	**LC 2699**
7328-7329	**Safety Devices on Windows.** Employers must not employ or direct anyone to perform window-washing services without requisite safety devices on buildings over three stories high, absent exception.	**LC 2699** **LC 7328**

7.25.15 Labor organizations

LC §	Description	Penalty
1011	**Misrepresentation of Labor Engaged in Production, Manufacture, or Sale of Products.** Employers must not misrepresent the kind, nature, and character of labor employed, the extent of labor employed, the number or kind of persons employed, that a particular kind of laborers is employed when in fact another kind is employed. Employers thus not misrepresent that union labor is used when it is not, or that an item is “made in America” when it was made elsewhere.	**LC 1011:** $100-$1,000 or imprisonment for not less than 20 nor more than 90 days, or both
1012	**Misrepresentation of Union Labor Employed.** Employers must not willfully misrepresent or falsely state that union labor was employed in the manufacture, production, or sale of articles or performance of services.	**LC 1012:** up to $1,000, or misdemeanor imprisonment of up to 90 days
1015	**Forgery of Union Label or Trademark.** Employers must not willfully forge a union label or other mark, with intent to sell items to which unauthorized label is attached.	**LC 2699** **LC 1015**
1016	**Unauthorized Use of Union Label or Trademark.** Employers must not willfully use union label, trademark, insignia, seal, device or form of advertisement without authorization.	**LC 2699** **LC 1016**
1122	**Employer-dominated Employee Groups.** Employers are liable for organizing employee groups that are employer-financed or dominated.	**LC 2699**
1130-1136.2	**No Professional Strikebreakers.** Employers must not willingly or knowingly hire or use professional strikebreakers.	**LC 2699** **LC 1136**

7.25.16 Status of minors

LC §	Description	Penalty
1299	**Files on Minors.** Employers of minors must keep on file all relevant permits and certificates to work or to employ such minors. The files shall be open at all times to the inspection of the school attendance and probation officers, the State Board of Education, and the officers of the Division of Labor Standards Enforcement.	**LC 2699**
1302	**Employers Must Permit Inspections of Files on Minors.** Employers must allow attendance supervisor or probation officer to enter workplace to inspect work permits regarding minors.	**LC 2699**
1311.5	**Child Protection Act of 2014.** Employers must not discriminate, discharge, or threaten any adverse action against any individual for filing a claim for Labor Code violations that arose while the individual was a minor. The statute of limitations for Labor Code claims are tolled until the aggrieved individual attains the age of majority.	$25,000-$50,000 for each class "A" violation, as defined in LC 1288
1391	**Work Hours for Minors 16-17 Years Old.** Minors 16-17 years old must not work more than eight hours within 24 hours, more than 40 hours within one week, or before 7 a.m. or after 7 p.m. on any day preceding a schoolday, except that they can work during the evening preceding a nonschoolday until 12:30 a.m. of the nonschoolday. When school is in session, minors 16-17 years old must not work more than four hours in a schoolday unless they are employed in "personal attendant" occupation, school-approved work experience, or cooperative vocational education program, or have a work permit.	fines up to $10,000 for willful violation
1391.1	**Minors Work Between 10 p.m.-12:30 a.m.** Minors 16-18 years old enrolled in work experience or cooperative vocational education programs may work after 10 p.m. but not later than 12:30 a.m. if not detrimental to health, education, or welfare of minor and with approval of parent and work experience coordinator, but work between 10 p.m. to 12:30 a.m. is subject to minimum wage paid to adults.	**LC 2699**
1391.2	**Minors Who Have High School Equivalency Can Be Employed As Adults.** For minors under 18 who have completed high school equivalency can be employed on same terms as adults, if paid in manner equivalent to adults.	**LC 2699**

7.25.17 Miscellaneous

LC §	Description	Penalty
1050, 1052	**No Misrepresentations to Prevent Reemployment.** Employers commit a misdemeanor if they make misrepresentations to prevent a former employee from obtaining new job, or if they fail to take all reasonable steps to prevent such a violation.	**LC 1054:** treble damages

LC §	Description	Penalty
1061	**Employment of Displaced Janitors.** Successor service contractors must hire janitor-employees who worked for former service contractor for at least four months, and retain them 60 days absent substantiated cause not to do so (based on performance or conduct). Contractors must state this requirement in all initial bid packages, and must make written job offers in primary language or other language in which the offeree is literate. The same wages and benefits are not required. The offer shall state time it will remain open (not < ten days). If fewer employees are needed, then seniority within job classification shall be basis for layoffs. Contractors must also identify employees not retained and reason therefore, to place them on preferential hiring list. Contractors must give each retained employee a written performance evaluation at end of 60 days. If the evaluation is satisfactory, then the contractors must offer continued employment, which may be at will.	**LC 2699**
1703	**Talent services contracts.** Contracts between an artist and a talent service must contain certain provisions (e.g., description of services to be performed, duration of the contract) to protect the artist.	**Unclear**
1703.4	**Prohibited acts by talent services agencies.** Agencies must not make unsupported advertisements or representations about auditions or other employment opportunities for artists, must not charge an artist for an audition or employment opportunity, must not charge artists other than certain specified fees, and must not own, operate, or have a financial interest in a talent listing service. A talent listing service shall not have a financial interest in a talent service agency, shall not list an opportunity without permission, shall maintain a copy of all listings, and shall not make advertisements or representations suggesting affiliation with a talent service agency.	**Unclear**

7.26 Criminal Penalties

As occasionally indicated above, Labor Code provisions often, if not typically, provide for misdemeanor penalties (fines and imprisonment) for any willful violation.[664] Criminal penalties can apply even for neglecting to comply with certain provisions of the Labor Code or with any order or ruling of the Industrial Welfare Commission.[665]

---

1 *See, e.g., Aguilar v. Ass'n for Retarded Citizens,* 234 Cal. App. 3d 21, 34-35 (1991).

2 *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 592 (2000); *see generally Ramirez v. Yosemite Water Co.,* 20 Cal. 4th 785, 795 (1999) ("IWC's wage orders, although at times patterned after federal regulations, also sometimes provide greater protection than is provided under federal law in the Fair Labor Standards Act"); *see, e.g., Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1535 n.10 (2008) (noting DLSE's refusal to defer to federal authority analyzing whether on-call time is "hours worked" because, under California law, "the existence of an agreement regarding the understanding of the parties (as to the compensation policy) is of no importance. The ultimate consideration in applying the California law is determining the extent of the control exercised.'') (cleaned up).

3 DLSE Opinion Letter 1994.02.03-3 at 2 (contrasting federal and California definitions of "hours worked" and noting that California has not enacted the Portal-to-Portal Act).

4 *Meyer v. Sprint Spectrum, L.P.*, 45 Cal. 4th 634, 645 (2009).

5 *Indus. Welfare Com. v. Superior Ct.*, 27 Cal. 3d 690, 702 (1980) ("Judicial authorities have repeatedly emphasized that in fulfilling its broad statutory mandate, the IWC engages in a quasi-legislative endeavor, a task which necessarily and properly requires the commission's exercise of a considerable degree of policy-making judgment and discretion").

6 *Brinker Rest. Corp. v. Superior Ct. (Adam Hohnbaum)*, 53 Cal. 4th 1004, 1027 (2012).

[7] *Miles v. City of Los Angeles*, 56 Cal. App. 5th 728, 738 (2020) ("Plaintiffs argue we need not determine whether the Sanitation Bureau's 'primary purpose' was transportation in determining whether plaintiffs were employed in the transportation industry. The point is irrelevant because the Sanitation Bureau's only purpose is sanitation. Transportation of wastewater and pollutants is merely incidental to that purpose.").

[8] Lab. Code § 1182.12.

[9] *Id*.

[10] Lab. Code § 1194.2(a).

[11] Lab. Code § 1194.2(b).

[12] Lab. Code § 1197.1(a).

[13] Lab. Code § 1199(b).

[14] *See* DLSE Enforcement and Policies Manual § 47.7 (2002); DLSE Opinion Letter 2002.01.29.

[15] *E.g., Balasanyan v. Nordstrom, Inc.*, 913 F. Supp. 2d 1001 (S.D. Cal. 2012) (Labor Code requires employer to directly compensate salespeople at least minimum wage for any time spent on non-commission-producing activity, in addition to paying contractually required commission or guaranteed minimum draw rate for time spent making sales), *mandamus denied*, *In re Nordstrom, Inc.*, 719 F.3d 1129 (9th Cir. 2013). See also *Gonzalez v. Downtown LA Motors, LP*, 215 Cal. App. 4th 36 (2013) (for piece-rate employees, a separate minimum wage applies for non-productive hours worked) (review denied); *Quezada v. Con-Way Freight, Inc.*, 2012 WL 2847609, at *6-7 (N.D. Cal. July 11, 2012) ("California law does not allow an employer to 'build in' time for non-driving tasks into a piece-rate compensation system"; "Labor Code requires employees to be paid an hourly rate for all time performing tasks other than driving"), *mandamus denied*, *In re Con-Way Freight Inc.*, 720 F.3d 1136 (9th Cir. 2013).

[16] *Bluford v. Safeway Stores, Inc.*, 216 Cal. App. 4th 864 (2013).

[17] *Vaquero v. Stoneledge Furniture, LLC*, 9 Cal. App. 5th 98, 110 (2017) ("We agree with *Bluford* that Wage Order No. 7 requires employers to separately compensate employees for rest periods if an employer's compensation plan does not already include a minimum hourly wage for such time. … All of the federal courts that have considered this issue of California law have reached a similar conclusion and have held employers must separately compensate employees paid by the piece for nonproductive work hours.").

[18] *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314, 323 (2005) (California protects "the minimum wage rights of California employees to a great extent than federally"; utility pole workers thus could seek the minimum wage for all hours worked, including nonproductive time such as travel time in company vehicles and time spent completing paperwork).

For federal court cases following *Armenta*, see *Quezada v. Con-Way Freight, Inc.,* 2012 WL 2847609, at *2, 6 (N.D. Cal. July 11, 2012) (employer must pay directly for "all hours worked" and thus could not rely on payments per mile driven, plus an hourly wage for plant work; employer must also pay separately for vehicle inspections, paperwork completion, etc.); *Cardenas v. McLane FoodServs., Inc.,* 796 F. Supp. 2d 1246, 1249-53 (C.D. Cal. 2011) (employer must pay truck drivers for pre- and post-shift inspections, as that time was not included in the hourly rate); *Ontiveros v. Zamora,* 2009 WL 425962 (E.D. Cal. Feb. 20, 2009) (employer cannot just pay mechanics for the number of repairs completed, but must also pay them for hours worked while not performing repairs).

[19] *Gonzalez v. Downtown LA Motors*, LP, 215 Cal. App. 4th 36 (2013) (automotive service technicians paid a "piece-rate" basis for repair work must also be paid a separate hourly minimum wage for time they spent during their shifts waiting for vehicles to repair or performing other non-repair tasks directed by their employer).

[20] *Balasanyan v. Nordstrom, Inc.*, 913 F. Supp. 2d 1001, 1007 (S.D. Cal. 2012) (dismissing FLSA minimum wage claim while permitting California minimum wage claim to continue, because, under California law, "employees must be directly compensated at least minimum wage for all time spent on activities that do not allow them to directly earn wages"; thus store salesperson paid with commissions, with guarantee of being paid, on average, at least the minimum wage, was still separately owed the California minimum wage for non-sales activities such as stocking merchandise).

[21] *Vaquero v. Stoneledge Furniture, LLC,* 9 Cal. App. 5th 98, 110 (2017).

[22] *Certified Tire & Serv. Ctrs. Wage & Hour Cases*, 28 Cal. App. 5th 1 (2018).

[23] 9 Cal. 5th 762 (2020).

[24] *Id*. at 789.

[25] *See* Lab. Code § 1205(c) (authorizing jurisdictions to impose labor standards through "exercise of local police powers or spending powers").

[26] *Amaral v. Cintas Corp.*, 163 Cal. App. 4th 1157 (2008).

[27] *See* http://sfgsa.org/index.aspx?page=411 (last visited Apr. 30, 2024).

[28] *Id*.

[29] *See* www.cityofberkeley.info/MWO (last visited Apr. 30, 2024).

[30] *See* https://www.ci.emeryville.ca.us/1024/Minimum-Wage-Ordinance (last visited Apr. 30, 2024).

[31] *See* https://www.minimum-wage.org/california/los-angeles-minimum-wage (visited last Apr. 30, 2024).

[32] *See* https://wagesla.lacity.org/sites/g/files/wph1941/files/2022-02/2022%20MWR%20Increase%20Notice.pdf (last visited Apr. 30, 2024).

[33] *See* https://wagesla.lacity.org/ (last visited Apr. 30, 2024).

[34] *See* https://wagesla.lacity.org/sites/g/files/wph1941/files/2023-05/2023%20CHWMWO%20Wage%20Chart.pdf (last visited Apr. 30, 2024).

[35] *See* https://dcba.lacounty.gov/minimum-wage-for-businesses/ (last visited Apr. 30, 2024).

[36] *Id*.

[37] *Id*.

[38] *Id*.

[39] See https://cao-94612.s3.amazonaws.com/documents/Measure_FF_English_Poster_Set_2022.pdf (last visited Apr. 30, 2024).

[40] See https://cao-94612.s3.amazonaws.com/documents/English_Measure_FF_Poster_Set_20231.pdf (last visited Apr. 30, 2024).

[41] See https://cao-94612.s3.amazonaws.com/documents/English_Measure_Z_wage_poster_2022.pdf (last visited Apr. 30, 2024) and https://cao-94612.s3.amazonaws.com/documents/English_Measure_Z_Poster_Set_2023.pdf (last visited Apr. 30, 2024).

[42] See https://www.cityofpaloalto.org/Business/Business-Resources/Minimum-Wage (last visited Apr. 30, 2024).

[43] *Id*.

[44] See https://www.cityofpaloalto.org/files/assets/public/doing-business/minimum-wage-notice-and-flyer-2023-english.pdf (last visited Apr. 30, 2024).

[45] See http://www.ci.richmond.ca.us/2615/Minimum-Wage-Ordinance (last visited Apr. 30, 2024).

[46] See https://www.sandiego.gov/compliance/minimum-wage (last visited Apr. 30, 2024).

[47] See https://www.sanjoseca.gov/your-government/departments-offices/public-works/labor-compliance/minimum-wage-ordinance (last visited Apr. 30, 2024).

[48] See https://www.santamonica.gov/minimum-wage (last visited Apr. 30, 2024).

[49] *Id*.

[50] *Id*.

[51] *Id*.

[52] *Id*.

[53] *See* Lab. Code § 218.5(a) ("In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney s fees and costs to the prevailing party if any party to the action requests attorney fees and costs upon the initiation of the action."); DLSE Opinion Letter 2002.01.29 at 10-11 (arguing that Labor Code sections 221-223 provide "a statutory basis "for the enforcement of non-overtime contract based wage claims"; "California law explicitly prohibits employers from paying employees less than the wages required under any statute or … contract … .").

[54] 8 Cal. Code Regs. § 11040(2)(K).

[55] *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 588 (2000) (federal labor law differs substantially from state law with respect to concept of hours worked); *Troester v. Starbucks Corp.,* 5 Cal. 5th 829, 837-42 (2019 (same); *Frlekin v. Apple, Inc.*, 8 Cal. 5th 1038 (2020) (same); Wage Order 4, in section 2(K), highlights the distinction between California and federal law on this point, defining "hours worked" to include "all the time the employee is suffered or permitted to work, whether or not required to do so," and also "the time during which an employee is subject to the control of an employer," while stating that within the health care industry the term "hours worked" means simply "the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act."

[56] *Jong v. Kaiser Found. Health Plan, Inc.*, 226 Cal. App. 4th 391 (2014) (upholding summary judgment against a nonexempt pharmacy manager's claim for unpaid off-the-clock work, where the manager was aware of Kaiser's timekeeping rules and policy of paying for all hours worked and presented no evidence that Kaiser management knew or should have known of his unreported overtime hours).

[57] *Ridgeway v. Walmart Inc*., 946 F.3d 1066, 1077 (9th Cir. 2020) (the employer's argument that the law should not require pay for time when the law compels the drivers not to work has "logical appeal, but it does not follow California law. In California, an employer must pay minimum wages whenever it controls the employee."). Ultimately, "the question of control boils down to whether the employee may use break or non-work time however he or she would like." *Id.* at 1079. Yet, as the Ninth Circuit also noted: "there is no clear definition of what constitutes employer control under California law." *Id.* at 1090.

[58] *Stoetzl v. California Dep't of Hum. Res.*, 7 Cal. 5th 718 (2019) (holding, in a case involving a state employer of correctional officers, that the state's Pay Scale Manual rather than the Wage Order applies and reversing summary judgment for the employer as to duty-integrated walk time, which may be compensable under the Pay Scale Manual). The Supreme Court also rejected a walk-time claim by a subclass of union-represented employees who were subject to a CBA, holding that the legislatively approved CBA governed pay for that activity and that there was no allegation that the state employer had failed to pay that amount. A dissenting opinion by Justice Liu, joined by Justice Cuellar, argued that the Supreme Court should have applied the Wage Order definition of compensable work time as to the claim for minimum wages.

[59] 8 Cal. 5th 1038 (2020).

[60] *Id*. at 1042.

[61] *Id.* at 1054. *Frlekin* applies retroactively, even though the result surprised many in the employer community. *Frlekin* concluded that the result should have been foreseeable given the distinction the Supreme Court sees between (a) an employer's control over a voluntary commuting service meant to benefit employees and (b) an employer's control over premises exercised to serve its own security-related needs.

[62] *Id.* at 1056.

[63] *Frlekin v. Apple, Inc.*, 973 F.3d 947 (9th Cir. 2020).

[64] *Huerta v. CSI Elec. Contractors,* 15 Cal. 5th 908 (2024).

[65] IWC Wage Orders § 5(A) (exceptions apply for Acts of God and other causes beyond the employer's control).

[66] IWC Wage Orders § 5(B) (exceptions apply for Acts of God and other causes beyond the employer's control).

[67] *Price v. Starbucks*, 192 Cal. App. 4th 1136, 1147 (2011).

[68] *Aleman v. AirTouch Cellular,* 209 Cal. App. 4th 556, 569-74 (2012).

[69] *Ward v. Tilly's, Inc.*, 31 Cal. App. 5th 1167, 1171 (2019).

[70] *Id.* at 1191 (Egerton, J., dissenting).

[71] *Herrera v. Zumiez, Inc.*, 953 F.3d 1063 (9th Cir. Mar. 19, 2020).

[72] *DiMercurio v. Equilon Enters. LLC*, No. 19-cv-04029-JSC, 2020 WL 227262 (N.D. Cal. Jan 15, 2020); *Wood v. Marathon Ref. Logistics Servs. LLC,* No. 19-CV-04287-YGR, 2020 WL 1877713 (N.D. Cal. Apr. 15, 2020) (expressly deferred determining whether this standby time was subject to the *Ward v. Tilly's* standard or the more traditional test for controlled standby).

[73] *Id.*

[73] DLSE Opinion Letter 2002.12.11.

[74] IWC Wage Orders § 4(C) (an exception applies for employees residing at the place of employment). "Split shift" is defined elsewhere: "Split shift" means a work schedule that the employer has interrupted with non-paid non-working periods, other than "bona fide rest or meal periods." Wage Orders § 2(Q).

[75] *See*, *e.g., Galvez v. Federal Express Inc.*, 2011 WL 1599625, at *8-9 (N.D. Cal. April 28, 2011) ("The plain language of the split shift regulation reflects an intent to ensure that an employee who works a split shift must be compensated highly enough so that he or she receives more than the minimum wage for the time actually worked plus one hour.").

[76] *Aleman v. AirTouch Cellular,* 209 Cal. App. 4th 556, 575 (2012) ("compensation was not owed because every time [the employee in question] worked a split shift, he was paid a total amount greater than the minimum wage for all hours worked plus one additional hour").

[77] *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 584 (2000) (employer that requires employees to travel to work site on its buses must compensate them for time spent traveling on buses and for time spent waiting for buses after employee has arrived at designated waiting site at designated time; time subject to control of employer is hours worked under definition provided in California Wage Order). *Cf. Overton v. Walt Disney Co.*, 136 Cal. App. 4th 263 (2006) (where employer provided employees with parking a mile distant from the work site and provided shuttle that employees were permitted *but not required* to take between parking lot and work site, employer need not compensate employees for time spent on shuttle). *See generally Frlekin v. Apple Inc.*, 8 Cal. 5th 1038, 1051 (2020) ("Commuting is an activity that employees ordinarily initiate on their own, prior to and after their regular workday, and is not generally compensable.").

[78] *Rutti v. Lojack Corp.*, 596 F.3d 1046 (9th Cir. 2010).

[79] *Hernandez v. Pac. Bell Tel. Co.*, 29 Cal. App. 5th 131 (2018) ("[B]ecause the plaintiffs here were *not required* to use the company vehicle to commute to work, they were not under the control of the employer. Further, simply transporting tools and equipment during commute time is not compensable work where no effort or extra time is required to effectuate the transport.") (emphasis in original).

[80] *Oliver v. Konica Minolta Bus. Sols. U.S.A., Inc.*, 51 Cal. App. 5th 1 (2020).

[81] *Gutierrez v. Brand Energy Servs. of Cal., Inc.*, 50 Cal. App. 5th 786 (2020).

[82] *Huerta v. CSI Elec. Contractors,* 15 Cal. 5th 908 (2024).

[83] DLSE Enforcement Policies and Interpretations Manual § 46.1.1 (2002) (California does not distinguish between compulsory travel during "normal" working hours and compulsory travel outside "normal" hours, because these "distinctions, and treatment of some of this time as noncompensable, are purely creatures of the federal regulations, and are inconsistent with state law").

[84] *See*, *e.g.*, *Berry v. Cnty. of Sonoma*, 30 F.3d 1174, 1180 (9th Cir. 1994) ("the two predominant factors in determining whether an employee's on-call waiting time is compensable overtime are (1) the degree to which the employee is free to engage in personal activities; and (2) the agreements between the parties) (internal quotation marks omitted). *See generally* 29 C.F.R. § 785.14-17 (examples on whether, under the FLSA, an employee is waiting to be engaged or is engaged to wait).

[85] *Seymore v. Metson Marine, Inc.*, 194 Cal. App. 4th 361, 365 (2011).

[86] *Mendiola v. CPS Sec. Sols., Inc.*, 217 Cal. App. 4th 851 (2013), *review granted*, No. S212704, 163 Cal. Rptr. 3d 1 (2013).

[87] *Mendiola v. CPS Sec. Sols.*, 60 Cal. 4th 833 (2015).

[88] *Id.* at 843 ("we decline to import any federal standard, which expressly eliminates substantial protections to employees, by implication"; "where the language or intent of state and federal labor laws substantially differ, reliance on federal regulations or interpretations to construe state regulations is misplaced") (citations omitted).

[89] *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 135 S. Ct. 513, 519 (2014).

[90] *See, e.g., Kurihara v. Best Buy Co.*, 2007 WL 2501698 (N.D. Cal. Aug. 30, 2007); *Rodriguez v. Nike Retail Servs., Inc.*, 2016 WL 8729923 (N.D. Cal. Aug. 19, 2016); *Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 311 F.R.D. 590, 593 (C.D. Cal. 2015); *Cervantez v. Celestica Corp.*, 253 F.R.D. 562 (C.D. Cal. 2008).

[91] *Frlekin v. Apple Inc.*, 8 Cal. 5th 1038, 1042 (2020) ("Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages, bags, or personal technology devices voluntarily brought to work purely for personal convenience by employees compensable as 'hours worked' within the meaning of Wage Order 7? For the reasons that follow, we conclude the answer to the certified question is, yes."). See § 7.3.2.

[92] *See, e.g., Boone v. Amazon.com Servs., LLC,* 562 F. Supp. 3d 1103 (E.D. Cal. 2022) (denying motion to dismiss; holding that the complaint alleged time spent on COVID screening was under the employer's control and therefore compensable).

[93] *Huerta v. CSI Elec. Contractors,* 15 Cal. 5th 908 (2024).

[94] Lab. Code § 226(a); Wage Orders § 7.

[95] Lab. Code § 1174(d).

[96] *Seymore v. Metson Marine, Inc.*, 194 Cal. App. 4th 361, 365 (2011) ("We agree with plaintiffs that it is not permissible for Metson to artificially designate the workweek in such a way as to circumvent the statutory requirement to pay overtime rates for the seventh consecutive day worked in a workweek.").

[97] *See*, *e.g., Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984) (approximately 7-8 minutes spent each day, before the shift started, reading log book and exchanging information was *de minimis* because it was irregular and difficult to monitor).

[98] *Corbin v. Time Warner*, 821 F.3d 1069, 1080 (9th Cir. 2016).

[99] *E.g., Chavez v. Converse*, No. 5:15-cv-03546-NC (N.D. Cal. October 11, 2017) (granting summary judgment to employer where average inspections took a few seconds and did not take more than 10 daily minutes in the aggregate, and where there were legitimate business reasons not to place time clocks at the front of the store); *Rodriguez v. Nike Retail Servs., Inc.*, 2017 WL 4005591 (N.D. Cal. Sept. 12, 2017) (generally the same).

[100] DLSE Enforcement Policies and Interpretations Manual § 47.2.1 (2002) (citing *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984): "In recording working time, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded." *See also Gomez v. Lincare*, 173 Cal. App. 4th 508, 527 (2009) (following *Lindow* but reversing summary judgment for employer where plaintiff raised evidence that unpaid time was more than *de minimis*).

[101] *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018).

[102] *Troester v. Starbucks Corp.*, No. 14-55530 (9th Cir. June 2, 2016).

[103] *Troester,* 5 Cal. 5th at 839.

[104] *Id.* at 848.

[105] *Id.*

[106] *Rodriguez v. Nike Retail Servs., Inc.*, 928 F.3d 810, 818 (9th Cir. 2019) (reversing summary judgment for employer) ("[W]e understand the rule in *Troester* as mandating compensation where employees are regularly required to work off the clock for more than 'minute' or 'brief' periods of time.").

[107] 29 C.F.R. § 785.48(b); DLSE Enforcement and Policies Manual §§ 47.1, 47.2 (2002).

[108] *See's Candy Shops, Inc. v. Superior Ct.*, 210 Cal. App. 4th 889, 903 (2012).

[109] *AHMC Healthcare, Inc. v. Superior Ct.*, 24 Cal. App. 5th 1014, 1027-28 (2018) (granting employer's petition for writ of mandate and directing trial court to enter an order granting summary adjudication in the employer's favor); *see also Donohue v. AMN Servs., LLC,* 29 Cal. App. 5th 1068 (2018) (affirming summary judgment for employer because rounding policy was fair and neutral on its face and as applied), *review granted*, No. S253677 (Cal. Mar. 27, 2019). *Donohue* addressed rounding only with respect to meal periods but noted that the Supreme Court has never endorsed rounding and that one justification for rounding—practicality—may be disappearing in light of modern evolving technological means of recording time. For further discussion of *Donohue*, see § 7.8.

[110] *Corbin v. Time Warner Ent.-Advance Newhouse P'ship*, 821 F.3d 1069 (9th Cr. 2016).

[111] *Donohue v. AMN Servs., LLC*, 11 Cal. 5th 58 (2021).

[112] *Id*. at 73.

[113] *Id*. at 74 ("[The defendant employer here] eventually switched to a new timekeeping system that does not round time punches after this lawsuit was filed. As technology continues to evolve, the practical advantages of rounding policies may diminish further.").

[114] *Camp v. Home Depot U.S.A., Inc.*, 84 Cal. App. 5th 638, 642 (2022).

[115] There were two plaintiffs in *Camp*. The plaintiff who was *overpaid* due to the employer's rounding policy abandoned her appeal and the Court of Appeal did not consider whether the rounding policy was lawful as to this employee.

[116] *See* 29 C.F.R. § 516.2(c) (employees working on fixed schedules).

[117] Wage Orders § 3.

[118] *Arechiga v. Press,* 192 Cal. App. 4th 567, 574 (2011) ("explicit mutual wage agreements remain valid in California").

[119] Lab. Code § 515(d)(2) ("Payment of a fixed salary to a nonexempt employee shall be deemed to provide compensation only for the employee's regular, nonovertime hours, notwithstanding any private agreement to the contrary.").

[120] *Skyline Homes, Inc. v. Dep't of Indus. Relations*, 165 Cal. App. 3d 239, 245 (1985).

[121] Lab. Code § 515(d) (regular rate for nonexempt salaried employee is 1/40th of weekly salary).

[122] It is a crime for a California employer to willfully refuse to pay wages after demand is made or to falsely dispute the demand in order to coerce an agreement to compromise or delay payment. Lab. Code § 216. *Gould v. Maryland Sound Indus., Inc.*, 31 Cal. App. 4th 1137, 1147 (1995) (wage payment law reflects fundamental public policy).

[123] Lab. Code §§ 201, 202.

[124] Lab. Code § 204.

[125] Lab. Code § 206.5.

[126] *Prachasaisoradej v. Ralphs Grocery Co.,* 42 Cal. 4th 217, 227 (2007).

[127] *On–Line Power, Inc. v. Mazur*, 149 Cal. App. 4th 1079, 1085 (2007).

[128] *See, e.g., Sciborski v. Pac. Bell Directory*, 205 Cal. App. 4th 1152, 1166 (2012); *Lindell v. Synthes USA*, 155 F. Supp. 3d 1068 (E.D. Cal. 2016).

[129] Lab. Code § 204.

[130] Lab. Code § 210.

[131] *On-Line Power, Inc. v. Mazur*, 149 Cal. App. 4th 1079 (2007) (citing Lab. Code § 218.5). See generally *Smith v. Rae-Venter Law Grp.*, 29 Cal. 4th 345, 350 (2002) (employee denied wages may sue both for breach of contract and for violation of Labor Code).

[132] Lab. Code § 212.

[133] Lab. Code § 213(d).

[134] DLSE Opinion Letter 2008.07.07.

[135] *Ling v. P.F. Chang's China Bistro, Inc.*, 245 Cal. App. 4th 1242, 1261 (2016) ("We understand that the remedy for a section 226.7 violation is an extra hour of pay, but the fact that the remedy is measured by an employee's hourly wage does not transmute the remedy into a wage as that term is used in section 203, which authorizes penalties to an employee who has separated from employment without being paid. … Because a section 203 claim is purely derivative of `an action for the wages from which the penalties arise,' it cannot be the basis of a fee award when the underlying claim is not an action for wages.").

[136] *Stewart v. San Luis Ambulance, Inc.*, No. S246255 (Cal. Jan. 3, 2018) (granting Ninth Circuit's request to decide this issue: "Do violations of meal period regulations, which require payment of a 'premium wage' for each improper meal period, give rise to claims under section[] 203 … of the California Labor Code … ?").

[137] *Stewart* involved ambulance workers. But then on November 6, 2019, the voters approved Proposition 11, the Emergency Ambulance Employee Safety and Preparedness Act, leading the Supreme Court to conclude: "resolution of the questions posed by the Ninth Circuit Court of Appeals is no longer "necessary ... to settle an important question of law."… We therefore dismiss consideration of the questions."

[138] *Naranjo v. Spectrum Sec. Servs.*, 40 Cal. App. 5th 444, 474 (2019) ("an employer's failure, however willful, to pay section 226.7 statutory remedies does not trigger section 203's derivative penalty provisions for untimely wage payments").

[139] *Naranjo v. Spectrum Sec. Servs., Inc.*, 13 Cal. 5th 93 (2022).

[140] *Id*. at 116 ("Spectrum urges that the weight of lower court authority indirectly supports its view: Because the Legislature has taken no action in response to the existing case law, Spectrum argues, the Legislature has effectively acquiesced in its conclusions. Legislative acquiescence arguments of this type rarely do much to persuade; even when a clear consensus has emerged in the appellate case law, we have noted that legislative inaction supplies only a weak reed upon which to lean in inferring legislative intent.") (cleaned up).

[141] *Naranjo v. Spectrum Sec. Servs., Inc.*, 88 Cal. App. 5th 937 (2023).

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

[143] Lab. Code § 227.3.

[144] *Cinnamon Mills v. Target Corp.*, No. EDCV201460JGBKKX, 2020 WL 6526361, at *5 (C.D. Cal. Aug. 28, 2020) (employer underpaid vacation wages at termination by omitting incentive compensation from the calculation of the plaintiff's "final rate of pay" at termination).

[145] Lab. Code § 201.

[146] Lab. Code § 202.

[147] *McLean v. State of Cal.*, 1 Cal. 5th 615, 624 (2016).

[148] *Id.* ("If an employer discharges an employee or the employee quits, the employer may pay the wages earned and unpaid at the time the employee is discharged or quits by making a deposit authorized pursuant to this subdivision, provided that the employer complies with the provisions of this article relating to the payment of wages upon termination or quitting of employment.").

[149] *Smith v. Superior Ct. (L'Oreal USA)*, 123 Cal. App. 4th 128, 134-35 (2004), *rev'd*, 39 Cal. 4th 77 (2006).

[150] *Smith v. Superior Ct. (L'Oreal USA)*, 39 Cal. 4th 77 (2006).

[151] Lab. Code § 201.3(b) provides in part:

> (1) Except as provided in paragraphs (2) to (5), inclusive, if an employee of a temporary services employer is assigned to work for a client, that employee's wages are due and payable no less frequently than weekly, regardless of when the assignment ends, and wages for work performed during any calendar week shall be due and payable not later than the regular payday of the following calendar week. A temporary services employer shall be deemed to have timely paid wages upon completion of an assignment if wages are paid in compliance with this subdivision.
>
> (2) If an employee of a temporary services employer is assigned to work for a client on a day-to-day basis, that employee's wages are due and payable at the end of each day, regardless of when the assignment ends, if each of the following occurs: (A) The employee reports to or assembles at the office of the temporary services employer or other location. (B) The employee is dispatched to a client's worksite each day and returns to or reports to the office of the temporary services employer or other location upon completion of the assignment. (C) The employee's work is not executive, administrative, or professional, as defined in the wage orders of the Industrial Welfare Commission, and is not clerical.

(3) If an employee of a temporary services employer is assigned to work for a client engaged in a trade dispute, that employee's wages are due and payable at the end of each day, regardless of when the assignment ends.

(4) If an employee of a temporary services employer is assigned to work for a client and is discharged by the temporary services employer or leasing employer, wages are due and payable as provided in Section 201.

(5) If an employee of a temporary services employer is assigned to work for a client and quits his or her employment with the temporary services employer, wages are due and payable as provided in Section 202.

[152] SB 671, 2019 bill amending Lab. Code §§ 203, 203.1, 220, and adding Lab. Code § 201.6.

[153] Lab. Code § 201.5.

[154] See Lab. Code § 203. *See Mamika v. Barca*, 68 Cal. App. 4th 487, 492-93 (1998) (penalty provided for in section 203 is 30 workdays, not merely 30 calendar days).

[155] *Smith v. Rae-Venter Law Grp.*, 29 Cal. 4th 345, 354 & nn.2-4 (2002) (citing 8 Cal. Code Regs. § 13520: "a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203"). *See also Choate v. Celite Corp.*, 215 Cal. App. 4th 1460, 1468 (2013) (employer not liable when it acted in good faith); *Road Sprinkler Fitters Local Union No. 669 v. G&G Fire Sprinklers, Inc.*, 102 Cal. App. 4th 765 (2002).

[156] *Davis v. Morris*, 37 Cal. App. 2d 269, 274-75 (1940).

[157] Although no California appellate authority seems to have addressed the constitutionality of imposing a penalty of thirty days' wages for a relatively minor underpayment of wages, courts have recognized that a "penalty prescribed [can be] so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992).

[158] *Diaz v. Grill Concepts Servs., Inc.*, 23 Cal. App. 5th 859, 874 (2018) ("Labor Code section 203 does not imbue trial courts with the discretion to waive or reduce waiting time penalties.").

[159] *Nishiki v. Danko Meredith, APC,* 25 Cal. App. 5th 993 (2018) (as to initial delay in payment the employer's failure to pay termination wages was not willful, because an inadvertent clerical error resulted in the wrong amount being shown on the paycheck; but delay in sending a corrected check was willful and warranted waiting-time penalties).

[160] *McCoy v. Superior Ct. (Staffing Servs., Inc.)*, 157 Cal. App. 4th 225 (2007).

[161] *Pineda v. Bank of Am., NA*, 50 Cal. 4th 1389, 1398 (2010) ("[W]e conclude . . . section 203(b) contains a single, three-year limitations period governing all actions for section 203 penalties irrespective of whether an employee's claim for penalties is accompanied by a claim for unpaid final wages.").

[162] *Pineda v. Bank of Am., NA*, 50 Cal. 4th 1389 (2010).

[163] *Id.* at 1401 (internal citations omitted).

[164] *Naranjo v. Spectrum Sec. Servs., Inc.,* 13 Cal. 5th 93, 112 (2022) ("an employee suing for failure to pay wages by the deadline . . . is suing for nonpayment of wages for purposes of an attorney fee award under Labor Code section 218.5.")

[165] Office of Chief Counsel Advice Memorandum 201522004, https://www.irs.gov/pub/irs-wd/201522004.pdf (last visited May. 26, 2022). The Chief Counsel's advice memo, provided to field or service center employees, is not something that a taxpayer can cite as precedent.

[166] *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (describing Ninth Circuit opinion).

[167] *Id.* (internal quotation marks and citations omitted).

[168] *Peabody v. Time Warner Cable, Inc.,* 59 Cal. 4th 662, 667 (2014).

[169] 29 C.F.R. § 541.600(a).

[170] Lab. Code § 515(a).

[171] *Semprini v. Wedbush Sec., Inc.*, 57 Cal. App. 5th 246 (2020).

[172] *Conley v. PG&E Co.*, 131 Cal. App. 4th 260, 271 (2005) ("[N]othing in California law … precludes an employers from following the federal rule that permits them to require the use of vacation leave for partial-day absences without causing otherwise exempt employees to become nonexempt under the salary basis test.").

[173] DLSE Opinion Letter 2009.11.23.

[174] *Rhea v. Gen. Atomics,* 227 Cal. App. 4th 1560, 1575-76 (2014) ("We conclude that regardless of whether the absence is at least four hours or a shorter duration, a requirement that exempt employees use Annual Leave time for a partial day absence does not violate California law.").

[175] *See* IWC Wage Orders § 1(A)(1).

[176] 29 C.F.R. § 541.106(b).

[177] *Heyen v. Safeway Inc.*, 216 Cal. App. 4th 795, 827 & n.8 (2013) (rejecting argument that trier of fact should account for simultaneously performing exempt and nonexempt tasks, such as actively managing store while also checking and bagging customer grocery purchases; noting that California Legislature has not elected to follow the federal regulation).

[178] *See* old 29 C.F.R. § 541.113.

[179] *See* IWC Wage Orders § 1(A)(3).

[180] "[P]harmacists employed to engage in the practice of pharmacy, and registered nurses employed to engage in the practice of nursing, shall not be considered exempt professional employees, nor shall they be considered exempt … unless they individually meet the criteria established for exemption as executive or administrative employees." IWC Wage Orders § 1(A)(3)(f).

[181] An employee who merely applies knowledge in following prescribed procedures or in determining which procedure to follow does not exercise "discretion and independent judgment," but rather is simply applying skill and knowledge. "Discretion and independent judgment" consists of comparing and evaluating possible courses of conduct, and making a decision after considering the various possibilities.

[182] *See* IWC Wage Orders § 1(A)(2).

[183] *Bell v. Farmers Ins. Exch.*, 87 Cal. App. 4th 805 (2001).

[184] *Id.* at 812.

[185] *See, e.g., Dalheim v. KDFW-TV*, 918 F.2d 1220, 1230 (5th Cir. 1990) ("The distinction § 541.205(a) draws is between those employees whose primary duty is administering the business affairs of the enterprise from those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market.").

[186] *Bell*, 87 Cal. App. 4th at 823-28.

[187] 29 C.F.R. §§ 541.2(a), 541.201.

[188] *Bell*, 87 Cal. App. 4th at 826.

[189] *E.g.*, *Miller v. Farmers Ins. Exch.*, 481 F.3d 1119 (9th Cir. 2007) (criticizing *Bell's* interpretation of the administrative/professional dichotomy and finding insurance adjusters categorically to qualify as exempt employees).

[190] 29 C.F.R. § 541.203(a). *See also* former C.F.R. § 541.205(c)(5) (identifying insurance adjusters within the universe of employees often covered by the administrative exemption). The current regulations still require an adjuster to meet the duties test to qualify as exempt, which requires the adjuster to perform such activities as "interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damages estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation."

[191] *E.g.*, *Munizza v. State Farm Mut. Auto. Ins. Co.*, 103 F.3d 139 (9th Cir. 1996) (memorandum); *Blinston v. Hartford Accident & Indemn. Co.*, 20 Wage & Hour Cas. (BNA) 6 (W.D. Mo. 1970).

[192] *Miller v. Farmers Ins. Exch.*, 481 F.3d 1119 (9th Cir. 2007).

[193] 481 F.3d at 1124, 1132.

[194] 154 Cal. App. 4th 164 (2007), *review granted*, No. S156555 (Cal. Sept. 21, 2007).

[195] *Id*. at 177.

[196] *But see Combs v. Skyriver Commc'ns, Inc.*, 159 Cal. App. 4th 1242 (2008) (upholding trial court finding that manager of capacity planning and director of network operations was exempt as administrative employee, focusing on "salary" and "duties" tests set forth in IWC Wage Order 4-2001 rather than administrative/production worker dichotomy set forth in *Bell v. Farmers Ins. Exchange*, 87 Cal. App. 4th 805 (2001), where plaintiff primarily engaged in work "directly related to management policies or general business operations" that involved customary and regular exercise of discretion and independent judgment).

[197] 53 Cal. 4th 170 (2011).

[198] *Harris v. Superior Ct. (Liberty Mut. Ins. Co.)*, 53 Cal. 4th 170 (2011).

[199] 29 C.F.R. § 541.700(a).

[200] 29 C.F.R. § 541.106(a)-(c).

[201] *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785 (1999).

[202] 20 Cal. 4th at 852.

[203] *Batze v. Safeway, Inc.*, 10 Cal. App. 5th 440, 444-45 (2017) (affirming trial court's ruling for employer that first and second assistant managers spent more than one-half of their workweek in managerial tasks and that they met all the other qualifications to be exempt from overtime rules).

[204] *Mitchell v. Yoplait*, 122 Cal. App. 4th Supp. 8 2004) (upholding, as authorized by Lab. Code § 511(b), alternative workweek schedule by which employees in relevant work unit voted for three twelve-hour shifts and one six-hour shift a week, by which only the last two hours in each twelve-hour shift were considered overtime entitled to time-and-one-half wages, with no overtime premium pay being due for the ninth and tenth hours of work on the twelve-hour shifts).

[205] *Maldonado v. Epsilon Plastics, Inc.,* 22 Cal. App. 5th 1308, 1327-28 (2018).

[206] 29 C.F.R. § 541.600(d).

[207] Lab. Code § 515.5.

[208] Overtime Exemption for Computer Software Employees, https://www.dir.ca.gov/oprl/ComputerSoftware.htm#:~:text=In%20accordance%20with%20Labor%20Code,from%20%24112%2C065.20%20to%20%24115%2C763.35%20effective (last visited Mar. 25, 2024).

[209] *See* IWC Wage Orders § 1(A)(3)(g).

[210] 29 C.F.R. § 541.5.

[211] 29 C.F.R. § 541.505(b).

[212] Lab. Code § 1171.

[213] IWC Wage Order 4, §§ 1(C), 2(M).

[214] *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 798 (1999).

[215] *See Espinoza v. Warehouse Demo Servs.,, Inc.*, 86 Cal. App. 5th 1184, 302 Cal. Rptr. 3d 820 (2022).

[216] *Id.*

[217] 29 CFR § 779.412.

[218] IWC Wage Orders 4 and 7, § 3(D) (overtime pay requirements do not apply to employees whose earnings exceed one and one-half times the minimum wage if more than one-half of those earnings are commissions).

[219] *See Koehl v. Verio, Inc.*, 142 Cal. App. 4th 1313, 1329-37 (2006) (employer may legally advance commissions to employees before they meet all conditions for payment). The DLSE agrees: "The stipulated sum may not be considered to be a draw against commissions if the circumstances show that it was simply paid as a salary; but if the draw actually functions as an integral part of a true commission basis of payment, then the actual commissions paid, even though less than the draw, will qualify as compensation which represents commissions on the sale of good or services." DLSE Enforcement Policies and Interpretations Manual, § 50.6.4.2 (June 2002). The DLSE Manual also states: "Consistent commission earnings below, at, or near the draw are indicative of a commission plan that is not bona fide." *Id.* § 50.6.1(4).

[220] *Peabody v. Time Warner Cable, Inc.*, 59 Cal. 4th 66 (2014).

[221] https://www.dir.ca.gov/dlse/opinions/2016-10-11.pdf (last visited Mar. 25, 2024).

[222] CBA-related exemptions also apply to sick-leave requirements, see § 2.14, and to meal-break requirements, see § 7.9. There are other CBA-related exemptions as well: Lab. Code § 226.75(f)(2) (rest breaks for employees in safety-sensitive positions at petroleum facilities), 1198.5(q)(4) (inspection of personnel records), 2810.5(c)(3) (written notice of employment information), and 2699.6(a) (PAGA claims for construction employees).

[223] Lab. Code § 514.

[224] *Vranish v. Exxon Mobil Corp.*, 223 Cal. App. 4th 103, 107 (2014) (upholding summary judgment for the employer) (California Legislature allowed unionized employers to contract for not only the *rate* of overtime pay, but also *when* overtime pay will begin). *See also Curtis v. Irwin Indus. Inc.*, 913 F.3d 1146, 1154 (9th Cir. 2019) (following *Vranish* as correctly interpreting California law as to whether the section 514 CBA overtime exemption applies, absent convincing evidence that the California Supreme Court would reject that interpretation).

[225] *E.g., Sarmiento v. Sealy, Inc.*, 2019 WL 3059932, at *6-9 (N.D. Cal. July 12, 2019); *Huffman v. Pac. Gateway Concessions LLC*, 2019 WL 2563133, at *4-6 (N.D. Cal. June 21, 2019).

[226] *Sarmiento*, 2019 WL 3059932, at *7 (quoting *Huffman*, 2019 WL 2563133, at *5).

[227] Lab. Code §§ 5, 13.

[228] See generally Wage Order 9 (Transportation Industry) § 3(L) (overtime provisions do not apply to employees whose hours of service are regulated by the U.S. Department of Transportation or by Title 13 of the California Code of Regulations, regulating hours of drivers).

[229] *Fitzgerald v. Skywest Airlines*, 155 Cal. App. 4th 411 (2007); *see also Seitz v. Int'l Bhd. of Teamsters*, 2021 WL 5577015, at *2 (N.D. Cal. Nov. 30, 2021) (holding that a plaintiff's claims under sections 222 and 223 of the California Labor Code were preempted by the RLA because "to determine whether [Defendant] withheld wages owed to [Plaintiff]….would require an interpretation of the collective bargaining agreement, and therefore 'must be resolved through grievance and arbitration'") (quoting *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 253 (1994)).

[230] *Ward v. United Airlines*, 9 Cal. 5th 732, 746 (2020)); *accord Gunther v. Alaska Airlines, Inc.*, 72 Cal. App. 5th 334, 340 (holding that flight attendants covered by a collective bargaining agreement negotiated persuant to the RLA were nonetheless entitled to Section 226 compliant wage statements); *see also Ward v. United Airlines*, 986 F.3d 1234, 1244 ("we conclude that plaintiffs' claims under California Labor Code § 226 are not preempted by the RLA"*).*

[231] Lab. Code §§ 860-862.

[232] Lab. Code § 226.7(b).

[233] Lab. Code § 512(a) (preempted by *Int'l Bhd. of Teamsters, Loc. 2785 v. Fed. Motor Carrier Safety Admin.*, 986 F.3d 841, 857–58 (9th Cir. 2021), from applying to drivers of property-carrying commercial motor vehicles).

[234] DLSE Enforcement Policies and Interpretations Manual § 45.2.2 (2002) ("Labor Code § 512, requiring an employer to provide a meal period, does not exclude any class of employee. Consequently, it would appear that exempt employees are also entitled to meal periods in accordance with that section. However, the premium pay provided in Labor Code § 226.7 for failure to provide the meal period only applies if the meal period is required by the applicable IWC Order. The IWC Orders specifically excluded exempt employees from the coverage of the IWC meal period requirement. Thus, no premium pay may be imposed on a employer who fails to provide a meal period to an exempt employee.").

[235] IWC Wage Orders § 7(A)(3) (requiring that the employer keep accurate "[t]ime records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.").

[236] IWC Wage Orders § 11(C).

[237] DLSE Opinion Letter 2002.09.04, at 3 (opining that on-duty meal periods are not allowed for shift manager at fast food restaurant; reasoning that "[t]here is nothing that would appear so inherently complex about the running of a fast food outlet that would make the shift manager's presence utterly indispensable so as to preclude this manager from getting his or her well deserved, and legally required, off-duty meal break").

[238] *See, e.g., Lubin v. Wackenhut Corp.*, 5 Cal. App. 5th 926, 941 (2016) (reversing order decertifying class of security guards claiming a denial of meal periods; plaintiffs could pursue a theory that liability had resulted "from Wackenhut's policy of requiring all employees to sign on-duty meal agreements and allowing client preference to dictate whether an employee had an off-duty or on-duty meal period, rather than itself determining, as the employer, whether the nature of the work at each site prevented its employees from having an off-duty meal period"); *Faulkinbury v. Boyd & Assocs., Inc.*, 216 Cal. App. 4th 220, 234 (2013) (disapproved of on other grounds *by Noel v. Thrifty Payless, Inc.*, 7 Cal. 5th 955, 986 n.15 (2019)) (directing trial court to grant certification on meal-period claim by security guards: "by requiring blanket off-duty meal break waivers in advance from all security guard employees, regardless of the working conditions at a particular station, [the employer] treated the off-duty meal break issue on a classwide basis").

[239] *L'Chaim House, Inc. v. DLSE*, 38 Cal. App. 5th 141, 144 (2019) (affirming DLSE's citation to employer for failing to provide meal periods; "an on-duty meal period is not the functional equivalent of no meal period at all. On-duty meal periods are an intermediate category requiring more of employees than off-duty meal periods but less of employees than their normal work.").

[240] IWC Wage Orders § 11(A); Lab. Code § 512(a).

[241] *Ehret v. WinCo Foods, LLC,* 26 Cal. App. 5th 1, 9 (2018). (affirming summary judgment to employer; rejecting plaintiffs' argument that a meal period waiver cannot be enforced unless it uses "the word 'waiver,' or 'waived,' or 'waiving'").

[242] IWC Wage Orders § 11(B); Lab. Code § 512(a) (neither Wage Order nor statute requires a writing).

[243] *Gerard v. Orange Coast Mem'l Med. Ctr.* ("*Gerard I*"), 234 Cal. App. 4th 285 (2015), *review granted*, No. S225205 (Cal. May 20, 2015) (agreeing to decide (1) Is the health care industry meal period waiver provision in section 11(D) of Industrial Wage Commission Order No. 5-2001 invalid under Labor Code section 512, subdivision (a)? (2) Should the decision of the Court of Appeal partially invalidating the Wage Order be applied retroactively?).

[244] SB 327, amending Lab. Code § 516 (stating "the healthcare employee meal period waiver provisions ... were valid and enforceable on and after October 1, 2000, and continue to be valid and enforceable").

[245] No. 225205 (Aug. 17, 2016) (remanding case with directions to vacate its decision and to reconsider the cause in light of the enactment of Statutes 2015, chapter 505 (Sen. Bill No. 327 (2015-2016 Reg. Sess.)).

[246] *Gerard v. Orange Coast Mem'l Med. Ctr.* ("*Gerard II*"), 9 Cal. App. 5th 1204, 1214 (2017) (affirming denial of class certification and summary judgment to employer; "[W]e hold Senate Bill 327 represents a clarification of the law before our decision in *Gerard I*, consistent with our reconsidered view above, rather than a change in the law.").

[247] *Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1040-41 (2012) (holding that "absent waiver, section 512 requires a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work and that "Wage Order No. 5 does not impose additional timing requirements"; "[T]he employer is not obligated to police meal breaks and ensure no work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay … .").

[248] *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 524 (2018) (affirming denial of summary judgment to employer and affirming PAGA judgment in favor of employee).

[249] *Donohue v. AMN Servs., LLC*, 11 Cal. 5th 58, 69-70 (2021) (reversing summary judgment to employer).

[250] Lab. Code § 512(a).

[251] *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949, 963 (2005) (reversing summary judgment to employer; "employers have an 'affirmative obligation to ensure that workers are actually relieved of all duty'") (citing DLSE Opinion Letter 2002.01.28, at 1).

[252] *Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1040-41 (2012) ("the employer is not obligated to police meal breaks and ensure no work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations"). With *Brinker*, the California Supreme Court joined the overwhelming weight of federal case law on this point of California law. *See, e.g., Brown v. Federal Express Corp.*, 249 F.R.D. 580, 585 (C.D. Cal. 2008) (denying class certification and rejecting argument that employers must ensure that employees take breaks); *Gabriella v. Wells Fargo Fin., Inc.*, 2008 WL 3200190 (N.D. Cal. Aug. 28, 2008) (denying motion for class certification while applying standard that employers need only make break periods available to its employees); *Perez v. Safety-Kleen Sys., Inc.,* 253 F.R.D. 508, 514 (N.D. Cal. 2008) (granting motion for summary judgment in part, denying plaintiffs' motion for class certification, and applying the "make available" standard); *Salazar v. Avis Budget Grp.*, 251 F.R.D. 529 (S.D. Cal. 2008) (denying motion for class certification because class members could not show they were forced to miss breaks); *Kenny v. Supercuts*, 252 F.R.D. 641, 645 (N.D. Cal. 2008) (same).

[253] *Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1040 (2012) ("Proof an employer had knowledge of employees working through meal periods will not alone subject the employer to liability for premium pay.").

[254] *Esparza v. Safeway, Inc.*, 36 Cal. App. 5th 42 (2019).

[255] *Donohue v. AMN Servs., LLC*, 11 Cal. 5th 58, 61 (2021) (reversing summary judgment to employer; holding "that time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations, including at the summary judgment stage").

[256] *Id.* at 77-78.

[257] *Donohue v. AMN Servs., LLC*, 11 Cal. 5th 58, 61 (2021) (reversing summary judgment to employer; holding "that employers cannot engage in the practice of rounding time punches—that is, adjusting the hours that an employee has actually worked to the nearest preset time increment—in the meal period context. The meal period provisions are designed to prevent even minor infringements on meal period requirements, and rounding is incompatible with that objective.").

[258] *Donohue v. AMN Servs., LLC*, 29 Cal. App. 5th 1068 (2018) (rejecting argument that rounding policy could not apply to meal period punches; trial court need only consider how often policy results in rounding up and down; rejecting argument that plaintiff often got short

meal periods and was discouraged from taking them, where signed attestations of meal period compliance accompanied every timesheet reflecting late or short meal periods), *review granted*, No. S253677 (Cal. Mar. 27, 2019).

[259] 29 C.F.R. § 785.19(a) (recognized as invalid by *Havrilla v. United States*, 125 Fed. Cl. 454 (2016)); 29 C.F.R. § 785.2 (federal regulations "provide only a 'practical guide for employers and employees as to how the office representing the public interest in its enforcement will seek to apply it'"; however, "[t]he ultimate decisions on interpretations of the act are made by the courts") (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 138 (1944)).

[260] 29 C.F.R. § 785.19(b).

[261] *E.g., Bono v. Enter., Inc. v. Bradshaw*, 32 Cal. App. 4th 968, 971, 975-77 (1995) (disapproved of on other grounds by *Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996)) (affirming judgment denying employer's request for injunctive relief against DLSE enforcement position that employers must pay employee for their meal time if the employer requires the employee to remain on employer premises during lunch; "When an employer directs, commands or restrains an employee from leaving the work place during his or her lunch hour and thus prevents the employee from using the time effectively for his or her own purposes, that employee remains subject to the employer's control [and] that employee must be paid.").

[262] *Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1036 (2012) ("the DLSE argues … the wage order's meal period requirement is satisfied if the employee (1) has at least 30 minutes uninterrupted, (2) is free to leave the premises, and (3) is relieved of all duty for the entire period [citing DLSE Opinion Letter Nos. 1988.01.05, 1996.07.12]. We agree with this DLSE interpretation of the wage order.").

[263] *Rodriguez v. Taco Bell Corp.*, 896 F.3d 952, 956-57 (9th Cir. 2018) (affirming summary judgment to employer).

[264] *Godfrey v. Oakland Port Servs. Corp.*, 230 Cal. App. 4th 1263-75 (2014) (affirming judgment to employees; rejecting employer's argument that California law was preempted by FAAAA, which provides that states may not enact laws "related to … service of any motor carrier ... with respect to the transportation of property") (citing *People ex rel. Harris v. Pac Anchor Transp., Inc.*, 59 Cal. 4th 772, 778 (2014) (reciting presumption against federal preemption of traditional state regulation over wages and hours, and holding that FAAAA does not affect UCL claim, not involving meal and rest breaks, by truck drivers claiming that they are employees misclassified as independent contractors)). *See also Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 647-50 (9th Cir. 2014) (reversing summary judgment to employer; holding that FAAA does not preempt California's meal-and-rest break laws, even though 9 of 13 federal district court decisions had ruled in favor of employers).

[265] 49 C.F.R. § 395.3 (hours-of-service regulation for commercial motor vehicle drivers).

[266] California's Meal and Rest Break Rules for Commercial Motor Vehicle Drivers; Petition for Determination of Preemption, 83 Fed. Reg. 67470, at 67478-79 (Dec. 28, 2018).

[267] *Int'l Bhd. of Teamsters, Loc. 2785 v. Fed. Motor Carrier Safety Admin.*, 986 F.3d 841, 846 (9th Cir.), *cert. denied sub nom. Trescott v. Fed. Motor Carrier Safety Admin*., 142 S. Ct. 93 (2021) ("California's Labor Commissioner, certain labor organizations, and others now petition for review of the FMCSA's preemption determination. Because the agency's decision reflects a permissible interpretation of the Motor Carrier Safety Act of 1984 and is not arbitrary or capricious, we deny the petitions for review.").

[268] California and Washington Meal and Rest Break Rules; Notice of Waiver Provision; 88 Fed. Reg. 55111, 55112 (Aug. 14, 2023).

[269] California and Washington Meal and Rest Break Rules; Petitions for Waiver of Preemption Determinations, 88 Fed. Reg. 89010, 89010-89012 (Dec. 26, 2023).

[270] Lab. Code § 512(e), (f). A valid CBA qualifies for that exemption if it "expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for meal periods for those employees, final and binding arbitration of disputes concerning application of its meal period provisions, premium wage rates for all overtime hours worked, and a regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate." Lab. Code § 512(e)(2). *See generally Araquistain v. Pac. Gas & Elec. Co.,* 229 Cal. App. 4th 227, 236 (2014) (affirming summary judgment against meal-pay claim of unionized gas company employee; the CBA exemption applies because the CBA provides for a "meal period" even though during that period the employee was not necessarily relieved of all work duties). *Araquistain* decided that a CBA expressly provided for meal periods by permitting employees to eat their meals during work hours. "This conclusion comports with the clear intent of the Legislature to afford additional flexibility with regard to the terms of employment of employees in certain occupations, so long as their interests are protected through a collective bargaining agreement." *Id.* at 238.

[271] Lab. Code § 512.2 (a)(1), (2).

[272] Lab. Code § 512.1(d), (e).

[273] AB 2610, 2018 bill adding Lab. Code § 512(b)(2) ("[A] commercial driver employed by a motor carrier transporting nutrients and byproducts from a commercial feed manufacturer subject to Section 15051 of the Food and Agricultural Code to a customer located in a remote rural location may commence a meal period after six hours of work, if the regular rate of pay of the driver is no less than one and one-half times the state minimum wage and the driver receives overtime compensation in accordance with Section 510.").

[274] *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 520 (2018) (affirming PAGA judgment in favor of employee; discussing section 558 civil penalties for unprovided meal periods); *Brewer v. Premier Golf Props., LP*, 168 Cal. App. 4th 1243, 1253-54 (2008) (section 558 establishes civil penalties for violating meal and rest break requirements).

[275] IWC Wage Orders § 12(A).

[276] IWC Wage Orders § 12(A).

[277] Lab. Code § 226.7(b).

[278] IWC Wage Orders § 12(A).

[279] DLSE Enforcement Policies and Interpretations Manual § 45.3.1 (2002) (any time exceeding two hours is a "major fraction"); *see also* IWC Wage Orders § 12(A) ("a rest period need not be authorized for employees whose total daily work time is less than three and one-half ($3^{1/2}$) hours.").

[280] *Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1028-32 (2012) ("Employees are entitled to 10 minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on").

[281] DLSE Opinion Letters 1995.06.02 & 2002.02.22.

[282] *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949, 963 (2005) (reversing summary judgment to employer; "The XATA computer system did not include a code for rest breaks. This may have encouraged drivers not to take their 10–minute breaks. Drivers said they felt pressured not to take their rest breaks because rest breaks 'were not on the list of delays that were paid.' One plaintiff stated: 'Because of the pressure to complete trips quickly, and the fact that a rest break would cost me money, I never took a rest break except when I was waiting in line to load or unload.' Apparently, the defendant's management was aware that some drivers were not taking rest breaks.").

[283] *David v. Queen of the Valley Med. Ctr.*, 51 Cal. App. 5th 653, 661-63 (2020) (affirming summary judgment to employer).

[284] IWC Wage Orders § 7(A)(3) ("authorized rest periods need not be recorded").

[285] IWC Wage Orders § 13(B) ("Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours.").

[286] *See* DLSE Opinion Letter 2002.02.22, at 1.

[287] *See* DLSE Opinion Letter 1986.01.03.

[288] IWC Wage Orders § 12(A) ("Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.")

[289] Lab. Code § 226.7.

[290] *Augustus v. ABM Sec. Servs., Inc.*, 182 Cal. Rptr. 3d 676, 686 (2015) (reversing summary judgment to employees).

[291] No. S224853 (Cal. Apr. 29, 2015). The Supreme Court agreed to decide these issues: (1) Do Labor Code section 226.7, and Wage Order 4 require that employees be relieved of all duties during rest breaks? (2) Are security guards who remain on call during rest breaks performing work during that time under the analysis of *Mendiola v. CPS Sec. Sols., Inc.*, 60 Cal. 4th 833 (2015)?

[292] *Augustus v. ABM Sec. Servs., Inc*., 2 Cal. 5th 257 (2016) (Kruger, J., concurring and dissenting).

[293] FAQ, Rest Periods/Lactation Accommodation, available at https://www.dir.ca.gov/dlse/FAQ_RestPeriods.htm (last visited Apr. 21, 2024).

[294] *See, e.g.*, *Schmidtberger v. W. Ref. Retail, LLC*, 2021 WL 5024714, at *22 (C.D. Cal. Sept. 28, 2021) (denying class certification; "The Court … rejects Plaintiff's contention that a policy of requiring employees stay on the premises during rest breaks is invalid facially."); *Figueroa v. Delta Galil USA, Inc.*, 2021 WL 1232695, at *6 (C.D. Cal. Mar. 30, 2021) (denying class certification; "[P]laintiff's argument embeds the notion that California workers are entitled to 10-minute rest breaks **outside** the workplace. This is not the law.") (emphasis in original); *Bowen v. Target Corp.*, 2020 WL 1931278, at *6-7 (C.D. Cal. Jan. 24, 2020) (dismissing rest break claim; "a policy that prohibits employees from leaving the property during rest periods—without more—'is not sufficient to establish employer control"); *Le v. Walgreen, Co.*, 2020 WL 3213684, at *7 (C.D. Cal. April 27, 2020) (denying class certification; "[P]laintiffs' argument that a policy requiring an employee to remain on-premises [during rest breaks] violates California law is incorrect."); *Ritenour v. Carrington Mortg. Servs*., *LLC,* 2018 WL 5858658, at *7 (C.D. Cal. Sept. 12, 2018) (denying class certification where plaintiffs failed to show a rest period policy "requiring employees to remain on site is facially invalid" of that it conflicts with *Augustus*); *Hubbs v. Big Lots Stores, Inc.*, 2018 WL 5264141, at *4-5 (C.D. Cal. Mar. 16, 2018) (dismissing rest break claim; "an employer may require an employee to remain 'on premises' during such rest periods"); *Bell v. Home Depot U.S.A., Inc.*, 2017 WL 1353779, at *2 (E.D. Cal. Apr. 11, 2017) (affirming summary judgment to employer; employer's argument that *Augustus* implied on-premises rest periods were legal as "more persuasive and accurate" than employee's argument to the contrary).

[295] Lab. Code § 226.7(a).

[296] Lab. Code § 226.7(b).

[297] Lab. Code § 226.7(d).

[298] AB 2605, 2018 bill adding Lab. Code § 226.75. This urgency bill took effect immediately upon Governor Brown's signing of the bill into law on September 20, 2018, and was set to expire January 1, 2021. AB 2605 was a direct response to *Augustus v. ABM Security Services*.

[299] AB 2479, 2020 bill extending, past January 1, 2021 and until January 1, 2026, the exemption in Labor Code § 226.75 that applies to rest periods for specified employees who hold safety-sensitive positions at petroleum facilities, to the extent they must carry and monitor communication devices and respond to emergencies, or remain on the employer's premises to monitor the premises and respond to emergencies.

[300] AB 1512, 2020 bill amending Lab. Code § 226.7 to create, till January 1, 2027, a rest-break exemption for the security industry. The employer must be a registered private patrol operator and the affected security officer employees must be registered under the Private Security Services Act. A later, uninterrupted rest period would qualify as a compliant rest period. If a security officer cannot take an uninterrupted rest period of at least 10 minutes for every four hours worked (or major fraction thereof), the officer must be paid one additional hour of pay at the base hourly rate. AB 1512, like AB 2605, was a direct response to *Augustus v. ABM Security Services*.

Labor Code section 226.7(f) now provides:

"(1) An employee employed in the security services industry as a security officer who is registered pursuant to the Private Security Services Act (Chapter 11.5 (commencing with Section 7580) of Division 3 of the Business and Professions Code) and who is employed by a private patrol operator registered pursuant to that chapter, may be required to remain on the premises during rest periods and to remain on call, and carry and monitor a communication device during rest periods. If a security officer's rest period is interrupted, the security officer shall be permitted to restart the rest period anew as soon as practicable. The security officer's employer satisfies that rest period obligation if the security officer is then able to take an uninterrupted rest period. If on any workday a security officer is not permitted to take

an uninterrupted rest period of at least 10 minutes for every four hours worked or major fraction thereof, then the security officer shall be paid one additional hour of pay at the employee's regular base hourly rate of compensation.

"(2) For purposes of this subdivision, the term "interrupted" means any time a security officer is called upon to return to performing the active duties of the security officer's post prior to completing the rest period, and does not include simply being on the premises, remaining on call and alert, monitoring a radio or other communication device, or all of these actions.

"(3) This subdivision only applies to an employee specified in paragraph (1) if both of the following conditions are satisfied:

"(A) The employee is covered by a valid collective bargaining agreement.

"(B) The valid collective bargaining agreement expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for rest periods for those employees, final and binding arbitration of disputes concerning application of its rest period provisions, premium wage rates for all overtime hours worked, and a regular hourly rate of pay of not less than one dollar more than the state minimum wage rate."

[301] *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal. App. 4th 1112, 1152-53 (2012) (disapproved of on other grounds by *ZB, N.A. v. Superior Ct.*, 8 Cal. 5th 175 (2019)) (section 558 sets forth civil penalties for denied rest breaks); *Brewer v. Premier Golf Props., LP*, 168 Cal. App. 4th 1243, 1253-54 (2008) (section 558 establishes civil penalties for employers violating meal- and rest-break requirements).

[302] *Sanchez v. Martinez*, 54 Cal. App. 5th 535, 547 (2020).

[303] Lab. Code § 226.7(c). See IWC Wage Orders § 11(D) (meal periods), § 12(B) (rest periods). *See also* Lab. Code § 558(a) (civil penalty for violating IWC Wage Order).

[304] *United Parcel Serv. Wage & Hour Cases,* 196 Cal. App. 4th 57, 69 (2011) (affirming trial court order that up to two premium payments are allowable per work day; "we believe it is more reasonable to construe [section 226.7] as permitting up to two premium payments per workday—one for failure to provide one or more meal periods, and another for failure to provide one or more rest periods.").

[305] Lab. Code § 226.7(e).

[306] *See*, *e.g.*, *Mills v. Superior Ct.*, 135 Cal. App. 4th 1547 (2006) (recognizing penal nature of meal-period pay); *Murphy v. Kenneth Cole Prods., Inc.*, 134 Cal. App. 4th 728 (2005) (same), *rev'd*, 40 Cal. 4th 1094 (2007); *Caliber Bodyworks, Inc. v. Superior Ct.*, 134 Cal. App. 4th 365, 380 n.16 (2005) (same). A DLSE decision, *Hartwig v. Orchard Commercial, Inc.,* DLSE Case No. 12-56901RB (2005), was effectively overruled by the California Supreme Court's *Murphy*'s decision. The Labor Commissioner on occasion has designated an order, decision, or award as a Precedent Decision. *See* Gov't Code § 11425.60. The *Hartwig* decision was the first to receive that special status. The *Hartwig* opinion fully reviewed the wage versus penalty issue and concluded that the additional hour of pay is indeed a penalty. The *Murphy* decision, however, makes *Hartwig* a dead letter.

[307] *Murphy v. Kenneth Cole Prods.*, 40 Cal. 4th 1094, 1099-1110 (2007) (affirming judgment to employee; "We conclude that the remedy provided in Labor Code section 226.7 constitutes a wage or premium pay and is governed by a three-year statute of limitations").

[308] *Id*. at 1103.

[309] Bus. & Prof. Code § 17200.

[310] Bus. & Prof. Code § 17200.

[311] *Naranjo v. Spectrum Sec. Servs., Inc.*, 13 Cal. 5th 93 (2022).

[312] In a May 29, 2015 advice memorandum (which "may not be used or cited as precedent"), the IRS Office of Chief Counsel indicated that while section 203 ("waiting time") penalties are not taxable as wages, section 226.7 payments may be: "[As to] … meal and rest period payments made under California Labor Code section 226.7[,] … if an employer fails to provide an employee a meal period or rest period in accordance with State requirements, the employer must pay the employee one additional hour of pay at the employee's regular rate of compensation for each day that the meal or rest period is not provided. Because the meal and rest period payments are essentially additional compensation for the employee performing additional services during the period when the meal and rest periods should have been provided, it appears those payments are wages for federal employment tax purposes." IRS Memorandum No. 201522004 at 6.

[313] Lab. Code § 218.5.

[314] Lab. Code § 218.6.

[315] *Naranjo v. Spectrum Sec. Servs., Inc.*, 13 Cal. 5th 93 (2022).

[316] Lab. Code § 201.

[317] *Compare Ruelas v. Costco Wholesale Corp.*, 2015 WL 1359326, at *2 (N.D. Cal. Mar. 25, 2015) (granting employer's motion for judgment on the pleadings "because Section 226.7(c) penalties do cover Section 512 meal-period violations, PAGA does not apply") *with Wert v. U.S. Bancorp*, 2016 WL 1110302, at *4 (S.D. Cal. Mar. 22, 2016) (disagreeing with *Ruelas* and holding both statutory penalties under the Labor Code and civil penalties under PAGA could be recovered for the same violation).

[318] *Betancourt v. OS Rest. Servs., LLC*, 49 Cal. App. 5th 240, 248, 252 (2020) (reversing attorney fees award to employee; "actions for nonprovision of meal or rest periods do not entitle employees to pursue the derivative penalties in sections 203 [waiting time] and 226 [wage statement violations]"; plaintiff did not sue "for nonpayment of wages, which is the necessary predicate for an award of fees under section 218.5"), *overruled on other grounds by Naranjo v. Spectrum Sec. Servs., Inc.*, 13 Cal. 5th 93 (2022).

[319] DLSE Enforcement Policies and Interpretations Manual § 49.1.2.4(9) (2002) (extra hour of pay for a meal period or rest break violation is in the nature of legally required premium pay and thus is not included in computing the regular rate of pay).

[320] *Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal. 5th 858, 863 (2021) (reversing summary judgment to employer; "We hold that the terms are synonymous: 'regular rate of compensation' under section 226.7(c), like 'regular rate of pay' under section 510(a), encompasses all nondiscretionary payments, not just hourly wages.").

[321] *Id.* at 880 ("[W]e reject Loews's request that we apply our decision only prospectively.").

[322] *Naranjo v. Spectrum Sec. Servs., Inc.*, 40 Cal. App. 5th 444 (2019), *review granted*, No. S258966 (Cal. Jan. 2, 2020).

[323] Wage Orders § 14 ("(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats. (B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.").

[324] Lab. Code § 1198 ("The employment of any employee … under conditions of labor prohibited by the order is unlawful.").

[325] No. 04-431310 (S.F. Sup. Ct. 2005).

[326] *Currie-White v. Blockbuster Inc.*, 2009 WL 2413451, at *3 (N.D. Cal. Aug. 15, 2009) (dismissing PAGA claim based on suitable seating but with leave to amend; "[P]laintiff has failed to plead any facts to support her conclusory allegation that 'the nature of cashier work reasonably permits the use of seats' …The Court, however, will afford plaintiff an opportunity to file an amended complaint curing this deficiency.").

[327] *Bright v. 99 Cents Only Stores, Inc.*, 189 Cal. App. 4th 1472, 1481 (2010) (reversing dismissal of PAGA claim based on suitable seating; "[W]e conclude section 2699, subdivision (f)'s civil penalties are available for a violation of section 1198, based on failure to comply with Wage Order No. 7, subdivision 14."); *Home Depot USA v. Superior Ct.*, 191 Cal. App. 4th 210 (2010).

[328] *Green v. Bank of Am. NA,* 512 Fed. App'x 665, 666 (9th Cir. 2013) (reversing dismissal of complaint for failure to allege that plaintiff had requested a seat; "The district court erred when it assumed a requirement, not in the text of the Wage Order, that employees must request seating before it is offered.").

[329] *Kilby v. CVS Pharmacy*, *Inc.*, 739 F.3d 1192, 1193-94 (9th Cir. 2013).

[330] *Kilby v. CVS Pharmacy*, *Inc.,* 63 Cal. 4th 1 (2016).

[331] *Id.* at 17-18.

[332] *Id.* at 21-22.

[333] *Id.* at 20-21.

[334] *Id.* at 21-23.

[335] *Id.* at 24 ("An employer seeking to be excused from the requirement bears the burden of showing compliance is infeasible because no suitable seating exists.").

[336] *Id.* at 19.

[337] *LaFace v. Ralphs Grocery Co*., 75 Cal. App. 5th 388 (2022). *LaFace* also held that there is no right to a jury trial for PAGA claims: "On balance, we cannot conclude that such an action [under PAGA] has a pre-1850 common law analog that would call for the right to a jury trial under the California Constitution." See § 5.15.3.

[338] *Id.* at *12.

[339] *Id.* at *12 ("Despite these expectations, employees sometimes did not engage in their expected job duties. However, their decision to remain at their checkstands rather than perform their other expected tasks does not constitute a lull in the operation of those other duties.").

[340] *Canela v. Costco Wholesale Corp.*, No. 2013-1-cv-248813 (Santa Clara Sup. Ct. 2023).

[341] *Luckett v. McDonald's Rests. of Cal., Inc.*, No. B317481, 2023 WL 8290252 (Cal. Ct. App. Nov. 30, 2023).

[342] *Fobroy v. Video Only, Inc.*, No. C-13-4083 EMC, 2014 WL 6306708, at *6 (N.D. Cal. Nov. 14, 2014) (granting summary judgment against Wage Order section 15 temperature claims for a failure to "introduce evidence of deviation from applicable 'industry wide-standards'").

[343] 8 Cal. Code Regs. § 339.

[344] See Department of Industrial Relations Heat Illness Prevention in Indoor Places of Employment summary. https://www.dir.ca.gov/oshsb/Indoor-Heat.html (last visited Mar. 21, 2024); Cal/OSHA Heat Prevention Guidance and Resources, https://www.dir.ca.gov/dosh/heatillnessinfo.html (last visited Aug. 5, 2024).

[345] *E.g., Hudgins v. Neiman-Marcus Grp., Inc.*, 34 Cal. App. 4th 1109 (1995) (unidentifiable returns of merchandise not attributed to sales made by particular employee could not be deducted from commissions); *Quillian v. Lion Oil Co.*, 96 Cal. App. 3d 156 (1979) (unlawful to determine bonus payments by deducting amount of cash shortages for sales). *See also Sciborski v. Pac. Bell Directory*, 205 Cal. App. 4th 1152 (2012) (unlawful to unilaterally declare commission was unearned and use self-help to deduct funds from wages already paid; although employers and employees may agree on certain conditions to a sales commission being earned, permitting an employer to recoup advances if the conditions are not satisfied, those conditions must be clearly expressed, generally in writing, and must relate to the sale and cannot merely serve as a basis to shift the employer's cost of doing business to the employee).

[346] DLSE Enforcement Policies and Interpretations Manual §§ 11.2.1-11.2.3 (2002). As the DLSE has stated in an opinion letter: "[Labor Code provisions] announce the long-standing policy of the State of California in regard to an employer's obligation to pay all costs his employee expends or loses in carrying out the duties of the employment. … As is clear from the [Labor Code], under the California law, an employer may not 'pass through' the normal costs of operating a business to the employee he hires. Debiting an employee's earned wages to cover a normal operating expense of the employer is not allowed in California." DLSE Opinion Letter 2000.08.01 at 4.

[347] 57 Cal. 2d 319 (1962).

[348] Lab. Code § 224 (arguably suggesting that any valid deduction must be authorized by state or federal law or expressly authorized in writing by the employee, or in a collective bargaining agreement, to cover health or pension plan payments). Two cases indirectly support

this view: *Hudgins v. Neiman Marcus, Inc.*, 34 Cal. App. 4th 1109 (1995) (suggesting without deciding that Labor Code itself bars deductions for innocently caused business losses); *Quillian v. Lion Oil Co.*, 96 Cal. App. 3d 156 (1979) (applying anti-deduction rule to gas station store manager without addressing whether manager was exempt, on apparent assumption that Labor Code provisions discussed in *Kerr's Catering* directly bar deductions for business losses, rather than simply authorize the IWC to issue Wage Orders against those deductions).

[349] IWC Wage Orders § 9.

[350] IWC Wage Orders § 9; DLSE Enforcement Policies and Interpretations Manual § 45.5.5 (2002).

[351] See *Dep't of Indus. Rels. v. UI Video Stores*, *Inc.*, 55 Cal. App. 4th 1084, 1088 (1997) (Blockbuster Video settled action brought by DLSE alleging that dress code requirements for its 1,914 employees violated section 9(A) of Wage Order 7).

[352] *Thai v. Int'l Bus. Machines Corp.*, 93 Cal. App. 5th 364 (2023), *review denied* (Oct. 11, 2023).

[353] Lab. Code § 222.5.

[354] *Barnhill v. Robert Saunders & Co.*, 125 Cal. App. 3d 1 (1981) (employers may not seek self-remedies not available to other creditors). The DLSE has opined that employers may take deductions to recover debts owed them, "provided that the amount of the deduction from any one paycheck cannot exceed the amount authorized by the employee for any such deduction, and that after making any such authorized deduction, the employee must still receive no less than the minimum wage." DLSE Opinion Letter 1999.09.22–1 at 3. Otherwise, the employer must "pursue a civil action to recover any unpaid debt from the employee." *Id.* The DLSE also has opined that deductions cannot be taken from final wages, even with employee authorization. DLSE Opinion Letter 2008.11.25-1. While this opinion may be inconsistent with *Barnhill*, employers should use caution when recovering employee debts or overpayments at termination.

[355] *California State Employees' Ass'n v. State of California*, 198 Cal. App. 3d 374 (1988) (salary deductions to recoup prior overpayments violated attachment and garnishment laws).

[356] DLSE Opinion Letter 2008.11.25 at 4.

[357] *See* Lab. Code § 224.

[358] *See, e.g., Roman v. Jan-Pro Franchising Int'l, Inc.*, 342 F.R.D. 274 (N.D. Cal. 2022).

[359] Lab. Code § 2802.

[360] Lab. Code § 2802(c).

[361] Lab. Code § 2802(b).

[362] BLACKS LAW DICTIONARY 342 (2d pocket ed. 2001).

[363] *E.g.*, DLSE Opinion Letter 2001.03.19 (section 2802 requires reimbursement of client entertainment expenses where entertainment encouraged by employer); DLSE Opinion Letter 1998.11.05 (section 2802 requires reimbursement of mandated auto insurance premiums above statutory minimum); DLSE Opinion Letter 1993.02.22-3 (section 2802 requires reimbursement for actual cost of operating employee's vehicle in the course of employment).

[364] *Gattuso v. Harte-Hank Shoppers, Inc.*, 35 Cal. Rptr. 3d 260 (2005), *review granted*, No. S139555 (Cal. Feb. 22, 2007).

[365] *Gattuso v. Harte-Hank Shoppers, Inc.*, 42 Cal. 4th 554 (2007).

[366] *Id.* at 560 n.3 ("In the trial court, Harte-Hanks argued in the alternative that section 2802 did not require employers to reimburse employees 'for routine expenses of employment such as car expenses,' but only for losses caused by third parties. Both the trial court and the Court of Appeal rejected that argument, and Harte-Hanks does not assert it in this court. Accordingly, we do not address it here.").

[367] 42 Cal. 4th at 568-71, 574.

[368] *Id.* at 570-71.

[369] *Id.* at 574 n.6, 575-76.

[370] *Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal. App. 4th 1 (2007).

[371] *Stuart v. RadioShack*, 2009 U.S. Dist. LEXIS 57963 (N.D. Cal. June 25, 2009) (Judge Chen).

[372] *Cochran v. Schwan's Home Serv., Inc.*, 228 Cal. App. 4th 1137 (2014).

[373] *Id.* at 1144.

[374] *Townley v. BJ's Rests., Inc.*, 37 Cal. App. 5th 179 (2019).

[375] *Oliver v. Konica Minolta Bus. Sols. U.S.A., Inc.*, 51 Cal. App. 5th 1 (2020) ("Defendant concedes that if service technicians are owed wages for their commute time, then they are also owed reimbursement for commuting mileage under section 2802.").

[376] *See, e.g., Morel v. HTNB Corp*., 2022 WL 17170944, at *4 (S.D. Cal. Nov. 21, 2022) (granting employer's motion to dismiss section 2802 claim with leave to amend; "[the plaintiff] fails to allege if or how he and the putative class members were required to use phones, data plans, or internet access that were not provided by the company, or how [the employer] required him or the putative class members to incur expenses related to home office space, mortgage or rent, property taxes, homeowner's insurance, and utilities. For example, if [the employee] could have used company provided phones, data plans, or internet access, then [the employee's] choice to use a personal phone, data plan, or internet access may have been unreasonable.").

[377] *Williams v. Amazon.com Servs. LLC*, 2023 WL 2396330, *2 (N.D. Cal. March 7, 2023).

[378] *Thai v. Int'l Bus. Machines Corp*., 93 Cal. App. 5th 364, 372 (2023), *review denied* (Oct. 11, 2023).

[379] AB 2588, 2020 bill adding Lab. Code § 2802.1.

[380] *Krug v. Bd. of Trustees of Cal. State Univ.*, 94 Cal. App. 5th 1158, 1167–68 (2023).

[381] *S. Cal. Pizza Co., LLC v. Certain Underwriters at Lloyd's London*, 40 Cal. App. 5th 140 (2019).

[382] Lab. Code § 226.2.

[383] Lab. Code § 226.2 (first paragraph).

[384] This relatively new statute has survived a constitutional challenge. *Nisei Farmers League v. Cal. Labor & Workforce Dev. Agency*, 30 Cal. App. 5th 997 (2019) (section 226.2 is not facially unconstitutional as the language of the statute is sufficiently clear to provide adequate notice of the conduct the statute prohibits or requires).

[385] *Id.* at 1014.

[386] *Vaquero v. Stoneledge Furniture, LLC*, 9 Cal. App. 5th 98, 110 (2017) ("We agree with *Bluford* that Wage Order No. 7 requires employers to separately compensate employees for rest periods if an employer's compensation plan does not already include a minimum hourly wage for such time. … All of the federal courts that have considered this issue of California law have reached a similar conclusion and have held employers must separately compensate employees paid by the piece for nonproductive work hours.").

[387] *See generally Muldrow v. Surrex Sols. Corp.*, 208 Cal. App. 4th 1381, 1394, 1396 (2012).

[388] DLSE Enforcement Policies and Interpretations Manual § 2.5.4 (2002).

[389] *Areso v. CarMax, Inc.*, 195 Cal. App. 4th 996, 1009 (2011) (paying salespersons a uniform payment per product sold irrespective of sales price qualifies as commission, because commissioned wages can be based proportionately on the amount or value sold).

[390] Lab. Code § 204.1.

[391] 195 Cal. App. 4th at 1008.

[392] *Muldrow v. Surrex Sols. Corp.*, 208 Cal. App. 4th 1381, 1392, 1396 (2012).

[393] DLSE Opinion Letter 2003.04.30 (noting that sometimes commissions payments can be considered not yet earned where the customer's payment may be required to complete a sale and where post-sale servicing may be part of salesperson's duty to earn the commission).

[394] DLSE Opinion Letter 2002.12.09-2, at 2. *See also Peabody v. Time Warner Cable, Inc.*, 59 Cal. 4th 662, 668 (2014) (commissions are owed only when they have been earned, even if it is on a monthly, quarterly, or less frequent basis). Under section 204, earned commissions must be paid at least as frequently as semi-monthly.

[395] *Sciborski v. Pac. Bell Directory*, 205 Cal. App. 4th 1152, 1171 (2012).

[396] *DeLeon v. Verizon Wireless, LLC,* 207 Cal. App. 4th 800, 803 (2012) ("Verizon Wireless may legally advance commission payments to its retail sales representatives before completion of all conditions for payment, and charge back any excess advance over commissions earned against future advances should the conditions not be satisfied.").

[397] DLSE Opinion Letter 2002.06.13, at 2 (permissible to recover from future commissions advances for sales not completed). See also *De Leon v. Verizon Wireless, LLC,* 207 Cal. App. 4th 800 (2012) (upholding employer policy of advancing commissions that were earned only when customer did not discontinue cell phone service during applicable chargeback period of up to one year)*; Steinhebel v. Los Angeles Times,* 126 Cal. App. 4th 696 (2005) (upholding employer policy of advancing commissions to subscription salespeople and charging advance back if subscriber cancels within 28 days).

[398] *Koehl v. Verio*, 142 Cal. App. 4th 1313 (2006) (upholding compensation plan whereby employer could recover unearned commissions if certain conditions were not met, where recovery was authorized in writing by employee and did reduce standard base pay; Labor Code section 224 creates a broad exception to anti-chargeback rule stated in Labor Code section 221).

[399] *Hudgins v. Neiman Marcus Grp., Inc.*, 34 Cal. App. 4th 1109, 1112 (1995) (commission plan that accounted for returns of merchandise originally sold was not enforceable to extent that plan prorated "unidentified returns" that could not be attributed to individual sales persons).

[400] *Id*. at 1123. *See also Aguilar v. Zep*, 2014 WL 4245988, at *16 (N.D. Cal. Aug. 27, 2014) ("Even if a contract exists ..., an employer cannot shift the cost of doing business to an employee ... . [Where] routine business expenses that shift the cost of doing business to the employee [are deducted from the employees' commission-based compensation,] ... [t]he fact that the [employees] consented to the practice is irrelevant.").

[401] *Hudgins,* 34 Cal. App. 4th at 1122 (emphasis in original).

[402] See DLSE Opinion Letter 1999.01.09, at 2 n.2. *See also Marr v. Bank of Am., NA*, 506 Fed. Appx. 661 (9th Cir. 2013) ("Deductions from ... commissions are permitted ... when (1) the deductions are tied to the employee's sales rather than general business expenses, and (2) the employee agrees to the deductions by contract.").

[403] Lab. Code § 2751(a).

[404] Lab. Code § 2751(b).

[405] Lab. Code § 2751(c) ("commissions" for purposes of Labor Code section 2731 has the meaning set forth in Labor Code section 204.1).

[406] *Neisendorf v. Levi Strauss & Co.*, 143 Cal. App. 4th 509 (2006) upheld the denial of a bonus on the ground that the bonus plan expressly restricted payments to those persons employed by the company on the payout date, thus permitting the employer to avoid paying employees dismissed for cause between the end of the period in which the bonus was earned and the payout date, but the court left open the question whether the employer could deny an earned bonus to an employee who was absent by the payout date through no fault of the employee).

[407] *Lucian v. All States Trucking Co.*, 116 Cal. App. 3d 972, 976 (1981) ("an employee who voluntarily leaves his employment before the bonus calculation date is not entitled to receive it").

A different result might obtain if the employer requires the employee to remain employed after *the calculation date*. The DLSE, emphasizing that bonus law is subject to "principles of equity," declined to approve a bonus arrangement that paid ordinary bonuses soon after they were calculated but that deferred part of extraordinarily large bonuses until the next fiscal year, and that would deny payment of the deferred portion to an employee who failed to remain employed until then. Although the employer explained that the purpose of the deferred payment was to encourage continued employment, the DLSE questioned why deferred payment applied only to extraordinarily large bonuses. DLSE Opinion Letter 1993.01.19, at 3 ("an argument could be fashioned which would convince a court that making an employee wait for an ascertainable bonus simply because the amount of the bonus exceeded a certain figure would be inequitable under certain circumstances").

[408] Lab. Code § 3751(a).

[409] *Ralphs Grocery Co. v. Superior Ct.*, 110 Cal. App. 4th 694 (2003) (acknowledging that creating incentives for managers to reduce workplace injuries and resulting workers' compensation costs advances goal of workers' compensation system, but reasoning that "plain language" of § 3751 forbade Ralphs Grocery to consider workers' compensation costs in calculating management bonuses).

[410] *Prachasaisoradej v. Ralphs Grocery Co.*, 42 Cal. 4th 217 (2007).

[411] An example of the decisions the Supreme Court distinguished is *Quillian v. Lion Oil Co.*, 96 Cal. App. 3d 156 (1970), which affirmed a judgment for a gasoline station manager who recovered unpaid bonus wages. The employer had unlawfully reduced the manager's bonus by deducting from the predetermined amount of the manager's bonus the full dollar amount of the cash and merchandise shortages at the gas station. *Id.* at 163.

[412] 42 Cal. 4th at 237.

[413] *Id*. at 228.

[414] *Id.* at 248 (Werdegar, J., dissenting).

[415] *Id.* at 252.

[416] *Ralphs Grocery Co. v. Superior Ct.*, 110 Cal. App. 4th 694 (2003).

[417] *Prachasaisoradej v. Ralphs Grocery Co.*, 42 Cal. 4th 217, 244 (2007) ("Ralphs' profit-based supplementary ICP, designed to reward employees beyond their normal pay for their collective contribution to store profits, did not violate the wage protection policies of Labor Code sections 221, 400 through 410, or 3751, or Regulation 11070, insofar as the Plan included store expenses such as workers' compensation costs, cash and merchandise shortages, breakage, and third party tort claims in the profit calculation.").

[418] *Id.* at 248 n.4 (Werdegar, J., dissenting).

[419] *Schachter v. Citigroup, Inc.*, 47 Cal. 4th 610 (2009).

[420] 29 C.F.R. § 778.209(b).

[421] DLSE Enforcement Policies and Interpretations Manual § 49.2.4 (2002) ("Since the bonus was earned during straight time as well as overtime hours, the overtime "premium" on the bonus is half-time or full-time (for double time hours) on the regular bonus rate. The regular bonus rate is found by dividing the bonus by the total hours worked during the period ..., including overtime hours.").

[422] DLSE Enforcement Policies and Interpretations Manual §§ 49.2.4.2–49.2.4.3 (2002).

[423] *Alvarado v. Dart Container Corp.*, 243 Cal. App. 4th 1200 (2016).

[424] *Alvarado v. Dart Container Corp.*, 243 Cal. App. 4th 1200 (2016), *review granted*, No. S232607 (May 11, 2016). The question presented on review is: "What is the proper method for calculating the rate of overtime pay when an employee receives both an hourly wage and a flat sum bonus?"

[425] 4 Cal. App. 5th 542 (2018).

[426] *Id*. at 568.

[427] *Id.* at 574-75 (Cantil-Sakauye, C.J., concurring).

[428] See 29 C.F.R. § 531.50(a).

[429] Lab. Code § 351 (providing in full: "No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer. Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for. An employer that permits patrons to pay gratuities by credit card shall pay the employees the full amount of the gratuity that the patron indicated on the credit card slip, without any deductions for any credit card payment processing fees or costs that may be charged to the employer by the credit card company. Payment of gratuities made by patrons using credit cards shall be made to the employees not later than the next regular payday following the date the patron authorized the credit card payment.").

[430] Lab. Code § 351 (employer shall not "require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer"). *See Henning v. IWC*, 46 Cal. 3d 1262 (1988) ("tip credits" allowed under federal law forbidden under California law). A violation is an unfair business practice, making recovery possible, as a matter of restitution, under California's Unfair Competition Law, B&P Code § 17200. *Application Grp., Inc. v. Hunter Grp., Inc.*, 61 Cal. App. 4th 881, 907-08 (1998).

[431] Lab. Code § 351 ("Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for."). *Cf. Avidor v. Sutter's Place, Inc.,* 212 Cal. App. 4th 1439 (2013) (permitting tip pooling among card dealers, casino hosts, porters, card control employees, and housekeeping employees where dealers allocated 10% of tips to pool and no employee in pool was an "agent" of the employer); *Leighton v. Old Heidelberg, Ltd.*, 219 Cal. App. 3d 1062 (1990) (permitting tip pooling among waiters, buspersons, and bartenders, where all participants gave direct service to customer and the allocation of 15% of waiter's tip to busperson and 5% to bartender accorded with "industry practice").

[432] See *Avidor*, 212 Cal. App. 4th at 1451 (citing Lab. Code § 350).

[433] *Lu v. Hawaiian Gardens Casino, Inc.*, 50 Cal. 4th 592 (2010) (Labor Code § 351 does not provide a private right to sue, as violation of a statute does not necessarily create a private cause of action; instead, a right to sue must be conferred by Legislature in either statutory language as shown in legislative history).

[434] *Id.* at 603-04 ("To the extent that an employee may be entitled to certain misappropriated gratuities, we see no apparent reason why other remedies, such as a common law action for conversion, may not be available.").

[435] *O'Grady v. Merchant Exch. Prods., Inc.*, No. A148513 (Cal. Ct. App. Oct. 31, 2019) (reversing trial court's sustainal of the defendant employer's demurrer).

[436] *Id.* at 780-81.

[437] Lab. Code § 351.

[438] Labor Code section 227.3 provides: "Unless otherwise provided by a collective bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. The Labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness."

[439] *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774 (1982).

[440] *Choate v. Celite Corp.*, 215 Cal. App. 4th 1460, 1462, 1467 (2013) (employer owed terminated employees vacation pay earned on a pro rata basis even though the CBA affirmatively addressed vacation payments upon termination, and limited vacation pay for terminated employees to the vacation allotment for the year of termination, because the CBA did not specifically "mention either the statutory protection being waived or, at a minimum, the statute itself").

[441] *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774 (1982).

[442] Lab. Code § 227.3.

[443] *Mills v. Target Corp.*, 2023 WL 2363959 (9th Cir. Mar. 6, 2023)..

[444] *Henry v. Amrol, Inc.*, 222 Cal. App. 3d Supp. 1 (1990).

[445] *Boothby v. Atlas Mechanical, Inc.*, 6 Cal. App. 4th 1595 (1992).

[446] The November 22, 2005, withdrawal of the offending opinion—DLSE Opinion Letter 1993.05.17, at 2 ("a worker must have at least nine months after the accrual of the vacation within which to take the vacation before a cap is effective")—is noted at www.dir.ca.gov/dlse/OpinionLetters-Withdrawn.htm (visited May. 26, 2022). *See also* DLSE Enforcement Policies and Interpretations Manual § 15.1.4.1 (vacation policies providing "that all vacation must be taken in the year it is earned (or in a very limited period following the accrual period) are unfair and will not be enforced by the Division. (See the detailed discussions of these issues at O.L. 1991.01.07 and 1993.08.18).").

[447] California employers can impose a waiting period before any vacation pay begins to accrue. *Minnick v. Auto. Creations, Inc.*, 13 Cal. App. 5th 1000, 1007-09 (2017) (upholding dismissal of vacation-pay claim by employee leaving employment after six months, where policy stated that no vacation is earned during the first year of employment; employers can "front-load" vacation at the beginning of the second year of employment, before the vacation is fully earned, while providing that an employee who leaves employment during the second year will receive only the vested portion of vacation pay); *Owen v. Macy's, Inc.*, 175 Cal. App. 4th 462, 472 (2009) (denying claim for vacation pay for employee terminated during first six months of employment, where employee handbook stated that the amount of vacation earned during the first six months of employment is zero).

[448] DLSE Opinion Letter 1998.09.17, at 3 (citing *California State Employees' Ass'n v. State of Cal.*, 198 Cal. App. 3d 374 (1988) (salary deductions to recoup prior overpayments violated attachment and garnishment laws)).

[449] DLSE Opinion Letter 1987.07.13-1, at 1.

[450] 197 Cal. App. 4th 1505 (2011).

[451] *Id.* at 1522 ("we are not persuaded that employers must limit sabbaticals to upper management or professional employees").

[452] *Paton* did suggest, however, that an employer can help ensure a leave's sabbatical status by specifying that the leave is for a special employer purpose: the court would "have little trouble concluding" that a leave program is a sabbatical if the leave "is granted for a specified sabbatical project (other than rest and recreation)." *Id.* at 1521.

[453] *Id.*

[454] The Court of Appeal explained that the overall critical inquiry was the true purpose of the program, and that it was not necessarily dispositive that employees were expected to return from leave, that the leave exceeded "normal" vacation, that the leave was offered only every five or seven years, that the leave was designed to be competitive with other companies, and that other employees assumed the absent employee's duties during the leave. *Id.* at 1523-24.

[455] *Id.* at 1522.

[456] *See*, *e.g., Cal. Hosp. Ass'n v. Henning*, 770 F.2d 856, *modified*, 783 F.2d 946 (9th Cir. 1985); *Milan v. Rest. Enter. Grp., Inc.*, 14 Cal. App. 4th 477 (1993). *See also Bell v. H.F. Cox, Inc.*, 209 Cal. App. 4th 62, 73 (2012) (reversing summary judgment against claim of unlawfully denied termination vacation pay; employer could not win on defense of ERISA preemption on its motion for summary judgment, because plaintiffs raised triable issue of fact that the vacation benefits plan was funded from employer's general assets and not—as ERISA would require—from a separate trust).

[457] *Church v. Jamison*, 143 Cal. App. 4th 1568 (2006).

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

[459] Lab. Code § 227.3.

[460] *Bell v. H.F. Cox, Inc.*, 209 Cal. App. 4th 62, 75 (2012) (affirming summary judgment for the employer: Section 227.3 applies only to termination payout, and does NOT require that vacation be paid at the employee's regular rate of pay during employment; "Neither Labor Code section 227.3 nor any other authority cited by plaintiffs supports the proposition that, apart from the situation where an employee is terminated with unused vacation time, a vacation benefits policy must provide for payment of vacation time at an employee's regular rate of pay.").

[461] *McPherson v. EF Intercultural Found., Inc.*, 47 Cal. App. 5th 243, 265 (2020).

[462] *Id.* at 268-60.

[463] *Reynolds v. Bement*, 36 Cal. 4th 1075 (2005), *abrogated by Martinez v. Coombs*, 49 Cal. 4th 35, 50 n.12 (2010), to the extent *Reynolds* limited definition of "employer" to the common law definition.

[464] *Reynolds*, 36 Cal. 4th at 1090.

[465] *Id.* at 1087-88, 1090. *See also Bradstreet v. Wong*, 161 Cal. App. 4th 1440, 1461 (2008) (where now-bankrupt corporations failed to pay earned wages, the corporate shareholders, officers, and managing agents are not personally liable for unpaid wages absent any indication that they were corporate alter egos; absent finding that employees performed labor for individuals rather than for the benefit of corporate employers, or that corporate agents appropriated corporate funds that otherwise would have paid wages, an order requiring those individuals to pay wages would not be "restitutionary," as it would not replace any money or property that individuals took directly from employees). *Bradstreet* was abrogated by *Martinez v. Coombs*, 49 Cal. 4th 35, 50 n.12 (2010), to the extent *Bradstreet* followed *Reynolds v. Bement* as to the definition of "employer."

[466] A later Court of Appeal case, *Jones v. Gregory*, 137 Cal. App. 4th 798 (2006), strongly questioned the proposition that the Labor Commissioner has any more authority than a private litigant does to pursue a claim for unpaid wages against individuals in addition to the traditional employer. *Id.* at 805-08. This decision was abrogated by the California Supreme Court in *Martinez v. Coombs*, 39 Cal. 4th 35, 50 n.12 (2010), and it was disapproved of on other grounds by *ZB, N.A. v. Superior Ct.*, 8 Cal. 5th 175 (2019).

[467] *Reynolds,* 36 Cal. 4th at 1088-89.

[468] *Turman v. Superior Ct. (Koji's Japan Inc.)*, 17 Cal. App. 5th 969, 986 (2017). The Court of Appeal also suggested that California's definition of employer under the Wage Order can be as broad as the FLSA's definition, for purposes of imposing personal liability. *Id.* at 987 (finding there are "similar factors applicable to determining federal joint employer liability, notwithstanding the separate definitions of the term employer under state and federal law"). Meanwhile, the trial court also "failed to address whether Parent might be a joint employer under the definitions of the term 'employer' applicable to plaintiffs' claims under the unfair competition law, the tip misappropriation statute, and PAGA." *Id.* at 974.

[469] *Id.* at 980-81.

[470] *See* Lab. Code §§ 98, 558.1.

[471] Lab. Code § 558.1(b).

[472] *Atempa v Pedrazzani*, 27 Cal. App. 5th 809, 820 (2018).

[473] *Espinoza v. Hepta Run, Inc.*, 74 Cal. App. 5th 44, 60 (2022).

[474] *Usher v. White*, 64 Cal. App. 5th 883, 896 (2021).

[475] *Seviour-Iloff v. LaPaille*, 80 Cal. App. 5th 427, 446 (2022).

[476] *Id.*

[477] *Id.*

[478] *Voris v. Lampert*, 7 Cal. 5th 1141, 1156-58 (2019) (affirming judgment on pleadings to part-owner; "We see no sufficient justification for layering tort liability on top of the extensive existing remedies demanding that this sort of error promptly be fixed.").

[479] *Kao v. Holiday*, 58 Cal. App. 5th 199 (2020) (affirming award of unpaid wages, attorney fees, and costs against company and individual owners, jointly and severally, under alter ego doctrine).

[480] *Id.* at 205 (internal citation omitted).

[481] *Id.* (internal citation omitted).

[482] SB 62, 2021 bill amending Labor Code §§ 1174.1, 2670, 2671, 2673, 2673.1, and 2675.5 and adding Labor Code § 2673.2. Labor Code § 2673.1(a) makes "a garment manufacturer, contractor, or brand guarantor" jointly and severally liable for unpaid compensation, attorney fees, and civil penalties owed to workers down the supply chain. *See also* Lab. Code § 2671(d) (defining various terms).

[483] *Martinez v. Coombs*, 49 Cal. 4th 35 (2010).

[484] *Patterson v. Domino's Pizza, LLC*, 207 Cal. App. 4th 385 (2012) (reversing a summary judgment that the trial court had granted for Domino's, the franchisor), *review granted*, No. S204543 (Cal. Oct 10, 2012).

[485] *Patterson v. Domino's Pizza, LLC*, 60 Cal. 4th 474 (2014).

[486] 229 Cal. App. 4th 1015 (2014).

[487] *Id.* at 1020.

[488] *Id.* at 1021.

[489] *Henderson v. Equilon Enter., LLC*, 40 Cal. App. 5th 1111, 1121-25 (2019).

[490] *Id.* at 1116.

[491] *Id.* at 1121-25.

[492] *Id.* at 1130 (the ABC test was adopted to address claims that workers have been misclassified as independent contractors rather than covered employees, and was not intended to apply to claims of joint employer liability; the governing standard for determining the existence of a joint employment relationship remains *Martinez*). *See also Curry v. Equilon Enter., LLC*, 23 Cal. App. 5th 289, 314 (2018) ("[T]he Supreme Court's policy reasons for selecting the `ABC' test are uniquely relevant to the issue of allegedly misclassified independent contractors." In the "joint employment context, the alleged employee is already considered an employee of the primary employer; the issue is whether the employee is also an employee of the alleged secondary employer."). The Court of Appeal in *Curry* reasoned that "the 'ABC' test set forth in *Dynamex* is directed toward the issue of whether employees were misclassified as independent contractors. Placing the burden on the alleged employer to prove that the worker is not an employee is meant to serve policy goals that are not relevant in the joint employment context." *Id.*

[493] *Salazar v. McDonald's, Inc.,* 944 F.3d 1024, 1032 (9th Cir. 2019).

[494] *See Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 10 Cal. 5th 944 (2021).

[495] Lab. Code § 2810.3.

[496] Lab. Code § 2810.3(a)(3)(D).

[497] *Goonewardene v. ADP, LLC*, 5 Cal. App. 5th 154 (2016), *review granted*, No. S238941 (Cal. Feb. 15, 2016) (agreeing to decide: "Does the aggrieved employee in a lawsuit based on unpaid overtime have viable claims against the outside vendor that performed payroll services under a contract with the employer?").

[498] *Futrell v. Payday Cal., Inc.*, 190 Cal. App. 4th 1419, 1432 (2010) (affirming summary judgment for payroll company sued as plaintiff's joint employer with respect to wage and wage-statement claims; payroll company did not control wages or conditions of employment by virtue of performing the "ministerial tasks of calculating pay and tax withholding, and by also issuing paychecks, drawn on its own bank account").

[499] *Goonewardene*, 5 Cal. App. 5th at 166-71.

[500] *Goonewardene v. ADP, LLC*, 6 Cal. 5th 817 (2019).

[501] *Mattei v. Corp. Mgt. Sols., Inc.*, 52 Cal. App. 5th 116, 127-29 (2020).

[502] SB 1402, 2018 bill adding Lab. Code § 2810.4.

[503] AB 1565, 2018 bill amending Lab. Code § 218.7.

[504] *Serrano v. Aerotek, Inc.*, 21 Cal. App. 5th 773, 784 (2018) (affirming summary judgment for staffing company because it could be held liable only for its own breach of duty, not vicariously liable for the other alleged joint employer's breach of duty) (disapproved of on other grounds by *Donohue v. AMN Servs., LLC*, 21 Cal. App. 5th 773 (2018).

[505] *Castillo v. Glenair, Inc.*, 23 Cal. App. 5th 262, 266 (2018) (workers cannot "bring a lawsuit against a staffing company, settle that lawsuit, and then bring identical claims against the company where they have been placed to work").

[506] *Grande v. Eisenhower Med. Ctr.*, 44 Cal. App. 5th 1147, 1162-63 (2020), ***aff'd***, 13 Cal. 5th 313 (2022).

[507] *Grande*, 44 Cal. App. 5th at 1168 (Ramirez, P.J. dissenting).

[508] *Grande v. Eisenhower Med. Ctr.*, 13 Cal. 5th 313 (2022).

[509] AB 3075, 2020 bill adding Lab. Code § 200.3. The new law states that successorship is established if the alleged successor (1) uses substantially the same facilities or substantially the same workforce to offer substantially the same services as the judgment debtor, (2) has substantially the same owners or managers that control the labor relations as the judgment debtor, (3) employs as a managing agent any person who directly controlled the wages, hours, or working conditions of the affected workforce of the judgment debtor, or (4) operates a business in the same industry and the business has an owner, partner, officer, or director who is an immediate family member of any owner, partner, officer, or director of the judgment debtor.

[510] Lab. Code §§ 551 ("Every person employed in any occupation of labor is entitled to one day's rest therefrom in seven."), 552 ("No employer of labor shall cause his employees to work more than six days in seven,"), and 556 ("Sections 551 and 552 shall not apply to any employer or employee when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof.").

[511] *Mendoza v. Nordstrom, Inc.*, 2 Cal. 5th 1074, 1087 (2017) (cautioning that the-day-of rest rule requires that "[i]f at one time an employee works every day of a given week, at another time shortly before or after she must be permitted multiple days of rest in a week to compensate, and on balance must average no less than one day's rest for every seven").

[512] *Id.* at 1087-90 (deferring to IWC and DLSE interpretations that the "six hours or less" in a day exemption means six hours or less in every day of the week).

[513] *Id*. at 1091 ("an employer's obligation is to apprise employees of their entitlement to a day of rest and thereafter to maintain absolute neutrality as to the exercise of that right. An employer may not encourage its employees to forgo rest or conceal the entitlement to rest, but is not liable simply because an employee chooses to work a seventh day.").

[514] These are businesses located in San Francisco that fall under the Planning Code's definition of "Formula Retail Use," except that the business must have at least 11 retail sales establishments worldwide. The Planning Code defines "Formula Retail Use" as a type of retail sales establishment that is standardized in terms of two or more of the following indicators: array of merchandise, façade, décor and color scheme, uniforms, signage, and trademark or servicemark. This definition includes businesses that some may not consider to be "retail," such as bars, gyms, massage parlors, movie theatres, banks, and credit unions. San Francisco Planning Code, § 303.1(b).

[515] San Francisco Labor and Employment Code Article 42 § 42.4(a)(1), available at https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_laboremployment/0-0-0-1320#JD_42.4 (last visited Mar. 20, 2024).

[516] *Id.* § 42.4(b).

[517] *Id.* § 42.4(c)(2).

[518] *Id.* § 42.5, available at https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_laboremployment/0-0-0-1347 (last visited Mar. 20, 2024).

[519] AB 701, 2021 bill codified in Lab. Code §§ 2100-2112.

[520] Lab. Code § 2100(h).

[521] Lab. Code § 2100(f).

[522] Lab. Code § 2101.

[523] Lab. Code § 2102.

[524] Lab. Code § 2103(a).

[525] Lab. Code § 2104(a).

[526] Lab. Code § 2105.

[527] Lab. Code §§ 2107, 2108.

[528] Los Angeles Municipal Code Ch. XVIII §181.

[529] Santa Monica Municipal Code Art. 5 Ch. 5.40.

[530] San Francisco Police Code Art. 33D § 3300D.

[531] Gardena Municipal Code Tit. 5 Ch. 5.10.

[532] *Cal. Grocers Ass'n v. City of Los Angeles*, 176 Cal. App. 4th 51 (2009).

[533] *Cal. Grocers Ass'n v. City of Los Angeles*, 52 Cal. 4th 177 (2011).

[534] *California Grocers Ass'n v. City of Los Angeles*, 2012 WL 171152 (U.S. Jan. 23, 2012) (denying petition for writ of certiorari).

[535] Lab. Code §§ 2500-2522.

[536] Lab. Code § 2506(d).

[537] Lab. Code § 2520

[538] Lab. Code § 2810.8.

[539] Lab. Code § 2810.8(a).

[540] SB 93, 2021 bill codified in Lab. Code § 2810.8(b).

[541] *Id.*

[542] Lab. Code § 2810.8(b)(6).

[543] See California Department of Industrial Relations News Release, March 3, 2022, available at https://www.dir.ca.gov/DIRNews/2022/2022-23.html (last visited Mar. 21, 2024).

[544] Lab. Code §§ 2810.8(g), 2810.8(i).

[545] Oakland Municipal Code Tit. 5 Ch. 5.95.

[546] Santa Clara Municipal Code Tit. 9 Ch. 9.70.

[547] Monterey County Municipal Code Tit. 3 Ch. 3.16.

[548] Los Angeles Municipal Code Ch. XX Art. 4-72J-A;B.

[549] San Diego Municipal Code Art. 11 § 311.

[550] Long Beach Municipal Code Tit. 5 Ch. 5.55.

[551] Santa Monica Municipal Code Art. 4 Ch. 4.66.030.

[552] Glendale Municipal Code Tit. 8 Ch. 8.10.

[553] San Francisco Police Code Art. 33K §3300K.1.

[554] Carlsbad Municipal Code Tit. 5 Ch. 5.70, https://records.carlsbadca.gov/WebLink/DocView.aspx?id=5141156&dbid=0&repo=CityofCarlsbad&cr=1 (last accessed Aug. 26, 2024).

[555] Pasadena Municipal Code Tit. 5 Ch. 5.80; 5.82.

[556] Under the Formula Retail Employee Rights Ordinances, an employer is any person who owns or operates a Formula Retail Establishment with 20 or more employees in San Francisco. This count includes corporate officers or executives who, directly or indirectly, exercise control over the wages, hours, or working conditions of any individual. *See* San Francisco Police Code Art. 33G § 3300G.3.

The count also includes workers who perform at least two hours of work per week within San Francisco or who are scheduled for an on-call shift for at least two hours, but who are not required to report to work, even if the bulk of their work takes place somewhere else. *Id.* When there are less than 20 employees in any given week during a calendar year, a business's number of employees is calculated by

using the average number of people employed by the business per week during the previous year. As a result, temporary or seasonal employees count towards the total to the extent that their employment affects the weekly average number of employees. *See* Final Rules, available at https://sf.gov/sites/default/files/2022-12/FRERO%20Final%20Rules.pdf (last visited Mar. 23, 2023).

[557] A Formula Retail employer need not offer a part-time employee any shift for which the employer would have to pay the part-time employee daily or weekly overtime rates for any part of the shift.

[558] *See* San Francisco Police Code Article 33F, available at http://sfgov.org/olse/formula-retail-employee-rights-ordinances (last visited Mar. 21, 2024).

[559] See San Jose 2016 Ballot Measure E, adding Chapter 4.101 to the San Jose Municipal Code, Opportunity to Work Ordinance, available at https://library.municode.com/ca/san_jose/codes/code_of_ordinances?nodeId=TIT4REFIBUTA_CH4.101OPWOOR (last visited Mar. 20, 2022).

[560] See San Jose's Opportunity to Work Ordinance, Opportunity to Work, available at 636686520685800000 (sanjoseca.gov) (last visited Mar. 21, 2024).

[561] San Jose Municipal Code § 4.101.090; see also San Jose Municipal Code § 4.12.060.

[562] San Jose Municipal Code § 4.101.090(A), (B).

[563] *Id.* § 4.101.030(C); *see also* San Jose Municipal Code § 4.100.030.

[564] San Jose Municipal Code § 4.101.040(A).

[565] *Id.* § 4.101.050(A). San Jose's Office of Equality Assurance has issued the Official Notice that covered employers must post; https://www.sanjoseca.gov/home/showpublisheddocument/20073/636686520677200000 (visited Mar. 20, 2023).

[566] *Id.* § 4.101.040(A).

[567] *Id.* § 4.101.050(B).

[568] *Id.*

[569] San Jose Municipal Code § 4.101.050(B); *see also* San Jose Municipal Code § 4.100.090.

[570] San Jose Municipal Code § 4.101.060(B).

[571] *Id.*; *see also* San Jose Municipal Code § 4.100.070.

[572] San Jose Municipal Code § 4.101.110; *see also* San Jose Municipal Code § 4.100.050.

[573] San Jose Municipal Code § 4.101.080.

[574] https://www.ci.emeryville.ca.us/1136/Fair-Workweek-Ordinance (last visited Mar. 21, 2024).

[575] Emeryville Municipal Code § 5-39.03(b).

[576] Emeryville Municipal Code § 5-39.04(b).

[577] Emeryville Municipal Code § 5-39.04(c).

[578] Emeryville Municipal Code § 5-39.05(a).

[579] Emeryville Municipal Code § 5-39.05(b).

[580] *Id.*

[581] Emeryville Municipal Code § 5-39.05(c).

[582] *Id.*

[583] Emeryville Municipal Code § 5-39.05(d) and (e).

[584] Emeryville Municipal Code § 5-39.03.

[585] *Id.*

[586] *Id.*

[587] *Id.*

[588] Emeryville Municipal Code § 5-39.04(d).

[589] *Id.*

[590] *Id.*

[591] Emeryville Municipal Code § 5-39.08.

[592] *Id.*

[593] Emeryville Municipal Code § 5-39.10(d).

[594] Emeryville Municipal Code § 5-39.10.

[595] Emeryville Municipal Code § 5-39.10(b).

[596] Los Angeles Municipal Code Ch. XVIII Art. 5 § 185-87; Art. 8 § 188.

[597] *Id.* § 187.07(c).

[598] *Id.* § 185.01(d).

[599] *Id.*

[600] *Id.*

[601] *Id.* § 185.01(c).

[602] *Id.* § 185.02.

[603] *Id.*

[604] *Id.*

[605] *Id.*at § 185.03.

[606] *Id.*

[607] *Id.* § 185.04.

[608] *Id.*

[609] *Id.*

[610] https://wagesla.lacity.org/sites/g/files/wph1941/files/2023-03/FWW%20Poster%202023.pdf (English version, last visited Mar. 21, 2024). Posters must be in English, Spanish, Chinese (Cantonese and Mandarin), Hindi, Vietnamese, Tagalog, Korean, Japanese, Thai, Armenian, Russian, Farsi, and any other language spoken by at least five percent of employees at the worksite.

[611] *Id.* § 185.05.

[612] *Id.*

[613] *Id.*

[614] *Id.* § 185.06.

[615] *Id.*

[616] *Id.*

[617] *Id.*

[618] *Id.* § 188.05.

[619] *Id.*

[620] *Id.* § 188.07.

[621] *Id.* § 188.08.

[622] *Id.* § 188.07.

[623] *Id.* § 188.09.

[624] Amendment to Title 8 of the Los Angeles Municipal Code, available at https://file.lacounty.gov/SDSInter/bos/supdocs/189905.pdf (last visited May 9, 2024).

[625] *Id.,* Ch. 8.102.030(O).

[626] *Id.*, Ch. 8.102.030(N).

[627] *Id.*, Ch. 8.102.060.

[628] *Id.*

[629] *Id.*, Ch. 8.102.040.

[630] *Id.*, Ch. 8.102.080(A).

[631] *Id.*

[632] *Id.*

[633] *Id.*, Ch. 8.102.080(B).

[634] *Id.*

[635] *Id.*, Ch. 8.102.070.

[636] *Id.*, Ch. 8.102.100.

[637] *Id.*, Ch. 8.102.130.

[638] *Id.*, Ch. 8.102.260.

[639] *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1206 (2011). The nonexempt employees at issue in *Sullivan* were Colorado and Arizona residents who, as Instructors, trained customers in California to use Oracle software. *Oracle* arose in an usual procedural posture. The Ninth Circuit, hearing an appeal from a federal district court, certified three questions of California law for the California Supreme Court to decide: *First*, does the California Labor Code apply to overtime work performed in California for a California-based employer by out-of-state plaintiffs in the circumstances of this case, such that overtime pay is required for work in excess of eight hours per day or in excess of forty hours per week? *Second*, does Cal. Bus. & Prof. Code § 17200 apply to the overtime work described in question one? *Third*, does

§ 17200 apply to overtime work performed outside California for a California-based employer by out-of-state plaintiffs in the circumstances of this case if the employer failed to comply with the overtime provisions of the FLSA?" *Sullivan v. Oracle Corp.,* 557 F.3d 979, 983 (9th Cir. 2009).

[640] *Oracle*, 51 Cal. 4th at 1206.

[641] *Ward v. United Airlines, Inc.*, 9 Cal. 5th 732, 752 (2020).

[642] *Id.*

[643] *Oman v. Delta Air Lines, Inc.*, 9 Cal. 5th 762*,* 776 (2020).

[644] *Ward*, 9 Cal. 5th at 758, 760.

[645] Some courts have limited *Ward*'s breadth. In *McPherson v. EF Intercultural Found., Inc.*, 47 Cal. App. 5th 243 (2020), the Court of Appeal held that California's vacation pay laws did not extend to some out-of-state employees. *McPherson* noted that *Ward* considered overtime laws, not generally all of California's wage and hour laws. *Id.* at 260. *McPherson* then held "[w]e cannot conclude California intended section 227.3—a law that governs the payment of unused vested vacation time when an employee's employment *ends*—to apply under the circumstances here: where a nonresident, exempt employee of a non-California employer has periodically performed work within California, has received no California wages, and has paid no California income taxes on any wages earned." *Id.* at 272.

[646] *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127 (9th Cir. 2021).

[647] *Id.* at 1133.

[648] *Id.*

[649] *Id.* at 1145.

[650] *Id.* at 1133*.*

[651] *Gulf Offshore Logistics, LLC v. Superior Ct. (Norris)*, 45 Cal. App. 5th 285 (2020). The California Supreme Court granted review and transferred the case to the Court of Appeal for reconsideration following the *Ward* and *Oman* decisions, but the initial holdings were upheld, albeit in an unpublished decision. *Gulf Offshore Logistics, LLC v. Superior Ct.*, 272 Cal. Rptr. 3d 356 (2020), *review denied* (Mar. 24, 2021).

[652] *Oracle*, 51 Cal. 4th at 1207-08.

[653] *Id*.

[654] Lab. Code § 558(a).

[655] *See* Lab. Code § 226.7.

[656] Lab. Code § 2699(f).

[657] "The maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful." Lab. Code § 1198.

[658] Lab. Code § 210(a).

[659] Lab. Code § 225.5(a), (b).

[660] Under Labor Code section 98(a), the Labor Commissioner can hold a hearing to determine civil penalties due under section 558 against any employer or other person acting on behalf of an employer, including an individual liable under section 558.1.

[661] Lab. Code § 1197.1(a)(1) and (2).

[662] Lab. Code § 2699(e) and (f). Employers have a limited right to cure certain wage-statement violations before an aggrieved employee may sue under PAGA. Specifically, an employer can cure wage-statement violations as to providing either the inclusive dates of the pay period or the name and address of the legal entity that is the employer. An employer can take advantage of this provision only once for the same violation of the statute during each 12-month period.

[663] *Gunther v. Alaska Airlines, Inc.*, 72 Cal. App. 5th 334, 355 (2021) (holding that heightened penalties for an employer's violation of wage statement statute, rather than default civil penalties under PAGA, apply only where the employer fails to provide wage statements or keep required records; the "choice is not … between a penalty under section 226.3 and no penalty for an inadequate wage statement. Instead, the question is which penalty provision applies—the default penalty in section 2699, subdivision (f) or the heightened penalty under section 226.3").

[664] *E.g.*, Lab. Code §§ 1199, 1199.5 (violations of Lab. Code §§ 1171-1205); Lab. Code § 1197.2 (misdemeanor for employer who willfully fails to pay and has the ability to pay a final court judgment or Labor Commissioner order for all wages due to an employee who, within 90 days of the date that the judgment was entered or the order became final, has quit or been discharged): Lab. Code § 226.6 (misdemeanor fine or imprisonment—in addition to any other penalty provided by law—for employer that knowingly and intentionally violates the provisions of section 226 or aids in violating any provision of section 226).

[665] *E.g.*, Lab. Code § 1199(c); Lab. Code § 1175 (violation of Lab. Code § 1174).

8. Employee Benefits

8.1 Domestic Partners

California helped lead the national trend toward recognizing unmarried domestic partners as the equivalent of married couples for various purposes. Domestic partners in California—two adults who have chosen to share each other's lives in an intimate, committed relationship of mutual care—may file a Declaration of Domestic Partnership with the Secretary of State. As of 2020, all couples who are eligible to be married can register as domestic partners, regardless of age or sexual orientation.[1] Thus, opposite-sex couples can now register as domestic partners, even if neither is over age 62.[2]

Domestic partners enjoy the same rights, protections, and benefits as California spouses, including any right to use sick time, take CFRA-protected leave, or receive paid family leave to care for a spouse with a qualifying health issue.[3] Couples may register their domestic partnership if both partners are at least age 18.[4] California grants registered domestic partners workplace rights with respect to unemployment insurance (where one partner quit a job to relocate because of the employment of the other partner)[5] and kin care leave, allowing employees to use paid sick leave to care for an ill domestic partner.[6]

Registered domestic partners can also sue for marital status discrimination under the California Unruh Civil Rights Act (for discrimination in public accommodations), and it is likely that California courts would allow domestic partners to sue for marital status discrimination in employment discrimination lawsuits as well.[7]

8.1.1 Same rights and responsibilities as spouses

Under the Domestic Partner Rights and Responsibilities Act of 2003, registered domestic partners in California have virtually all the rights and responsibilities afforded to married spouses.[8] California employers must give domestic partners the same legal treatment as spouses in most areas of state law. One probable effect is that the California Family Rights Act, which grants leave to an employee to care for a sick spouse, also requires leave for an employee to care for a sick registered domestic partner.[9]

8.1.2 Insurance benefits

Employers must offer dependent care coverage for domestic partners under the same terms and conditions as spousal coverage, with the insurance premium for this coverage exempt from taxable wages under state law.[10] The Insurance Equality Act provides that California group health insurance policies shall be deemed to provide coverage for registered domestic partners that is equal to the coverage provided to a spouse of an employee, insured, or policyholder.[11]

Every health care service plan contract and every health insurance policy that is marketed, sold, or issued to a California resident must extend identical coverage to same sex and opposite sex spouses and domestic partners.[12] Further, it can be a crime in California to discriminate between the coverage: for (a) heterosexual spouses or domestic partners; and (b) partners in same-sex relationships.[13]

California also mandates equality in health coverage for same sex and opposite sex couples (whether domestic partners or spouses) for every group health care service plan contract (HMO) and every group health insurance policy that is marketed, issued, or delivered to a California resident.[14]

In 2013, the U.S. Supreme Court, in *United States v. Windsor*,[15] struck down section 3 of the federal Defense of Marriage Act as unconstitutional. *Windsor* requires that same-sex marriages be recognized for all federal purposes, as long as the marriage was valid in the jurisdiction where it was entered into.

In 2015, in *Obergefell v. Hodges*, the U.S. Supreme Court again addressed same-sex marriage, and required full equality between same-sex and opposite-sex spouses under federal and state law.[16] This decision clarified that health benefits provided to same-sex spouses are no longer taxable to the employee under either federal or state law. *Obergefell* did not, however, apply to unmarried same-sex partners who are in a domestic partnership or civil union. As a result, nothing in *Obergefell* changed the domestic partner coverage requirements for insured health plans in California.

On December 13, 2022, the Respect for Marriage Act was signed into law, repealing the federal Defense of Marriage Act, which had defined marriage as between a man and a woman.[17] Unlike *Obergefell*, which requires states to both recognize and license same-sex marriages, the Respect for Marriage Act requires states to recognize same-sex marriages from other states, ***but does not*** require states to license same-sex marriages. The Respect for Marriage Act, therefore, codifies a portion of the *Obergefell* decision into federal law. The Respect for Marriage Act also requires states to recognize interracial marriages (codifying *Loving v. Virginia*[18] into law) and permits individuals to bring a private right of action for any violation of the Respect for Marriage Act. Although these changes offer more protection for same-sex marriages by codifying case law, the Respect for Marriage Act has no practical impact on current administration of employee benefit plans because *Windsor* and *Obergefell already* require employers to treat same-sex and opposite-sex spouses the same for benefit purposes.

After *Windsor*, *Obergefell,* and the Respect for Marriage Act, same-sex domestic partnerships remain legal and unchanged. Therefore, a same-sex domestic partnership is still a legal option in addition to a same-sex marriage. As a result, fully insured benefits are still subject to California insurance laws and employers must continue to recognize same-sex domestic partnerships.

8.2 Required Coverage

8.2.1 Autism and Pervasive Developmental Disorder Coverage.

Every health care service contract and health insurance policy must cover medical services related to autism.[19] This means providing coverage for behavioral health treatment, including applied behavioral analysis.[20] Health care service plans and health insurers must maintain an adequate network of qualified autism providers, and the law imposes specific requirements on autism service providers with respect to treatment plans they prescribe. This law, originally set to sunset in 2017, has been extended indefinitely.[21] On October 8, 2023, Governor Newsom approved Senate Bill No. 805, which expands insurance coverage to other forms of evidence-based behavioral health treatment options.[22] Under prior laws and regulations promulgated thereunder, the definition for qualified providers essentially limited coverage to providers who use applied behavioral analysis. The new law directs the California Department of Development Services to issue new regulations by July 1, 2026, to address the use of behavioral health professionals and behavioral health paraprofessionals in behavioral health treatment group practice.[23] Thus, insurance coverage will have to include additional providers for behavioral health treatment.

8.2.2 Maternity Services Coverage.

Every group and individual health insurance policy must cover maternity services, which include such things as prenatal care, ambulatory care maternity services, involuntary complications of pregnancy, neonatal care, and

inpatient hospital maternity care (including labor and delivery and postpartum care).[24] This definition is subject to change when the federal Patient Protection and Affordable Care Act defines the scope of benefits to be provided under its own maternity benefit requirement.[25] There are exceptions for specialized health insurance, Medicare supplement insurance, CHAMPUS-supplement insurance, or TRI-CARE supplement insurance, or to hospital indemnity, accident-only, or specified disease insurance.[26]

8.2.3 Group Coverage Maintained During Pregnancy Leave.

As discussed above (§ 2.1), California employers must maintain and pay for coverage for eligible employees who take pregnancy disability leave under a group health plan, throughout the leave (up to four months over a 12-month period), at the level and under the conditions coverage would have existed had the employee continued in continuous employment during the leave.[27]

8.2.4 Consumer Balance Billing Protections.

The federal No Surprises Act (NSA) went into effect on January 1, 2022. The NSA was enacted to prohibit health plans, providers, and facilities from issuing surprise medical billing for out-of-network emergency services, out-of-network non-emergency services provided at an in-network facility, and out-of-network air ambulance services.[28] However, pre-NSA, California had existing balance billing protections under the Knox-Keene Health Care Service Plan Act of 1975 and AB 72 (collectively, "California Balance Billing Laws") that protect consumers from surprise medical billing for out-of-network emergency services and non-emergency services provided by out-of-network providers at an in-network facility.[29] Although the NSA and California Balance Billing Laws overlap, the NSA does not generally supplant California Balance Billing Laws. Instead, the NSA generally applies to self-insured health care service plans whereas California Balance Billing Laws apply to insured health care service plans, such as Health Maintenance Organizations (HMOs). Note, however, with respect to air ambulance services provided by out-of-network providers, the federal Airline Deregulation Act preempts California Balance Billing Laws; thus, NSA protections apply to insured medical plans when determining cost-sharing for out-of-network air ambulance services.[30]

On October 8, 2023, Governor Newsom approved Assembly Bill (AB) No. 716, which limits the amount consumers may be billed for out-of-network ground ambulance service.[31] Specifically, under the new law, the out-of-pocket cost for out-of-network ground ambulance transportation for consumers will be limited to the in-network cost-sharing rates of their health plans, or in the case of uninsured individuals, the maximum out-of-pocket to the applicable Medicare or Medi-Cal rate, whichever is greater.[32] Further, under the new law, non-network ambulance providers are prohibited from balance billing patients for amounts in excess of the in-network cost-sharing or Medicare/Medi-Cal rates, as applicable, or sending patients to collections for amounts in excess of these new cost-sharing amounts.[33] Ultimately, the new law aims to increase transparency in ambulance costs by requiring certain insurance plans to pay locally-set rates for out-of-network ambulance providers, which will be reported annually by the California Emergency Medical Services Authority.[34] Note however, the new law only applies to state-regulated health insurance or health plans that are subject to the California Knox-Keene Act, California Insurance Code, and regulation by the California Department of Managed Healthcare. This means health plans that are fully or partially self-funded are not subject to (all or some of) the provisions in the new law.

8.3 Cal-COBRA

The federal Consolidated Omnibus Budget Reconciliation Act (COBRA)[35] generally requires employers of 20 or more employees who offer a group health care plan to offer the option of continuing health care coverage for up to 18 months if coverage is lost or reduced.[36] Members of the employee's family must also be given the opportunity to continue their coverage.[37]

California law operates with respect to employers too small to be covered by federal COBRA and with respect to periods following the federal COBRA period.[38] Under Cal-COBRA, employers of 2-19 employees must offer 36 months (not just 18) of continuation coverage.[39]

Cal-COBRA provides an extension for those who have exhausted their 18 months on federal COBRA (or 29 months for disabled individuals) for a total extension that cannot exceed 36 months. [40] This special Cal-COBRA extension applies to insured plans where the employer's master policy is issued in California. If the group master policy is not issued in California, then the employer must employ 51% or more of its employees in California and have its principal place of business in California.

The legislation directly regulates only the health care service plan or insurer, and not employers as such. But presumably an employer will find it more expensive to purchase group coverage as the provider knows that it has a 36-month continuation coverage tail as well as mandatory conversion coverage obligations. In addition, many insurers require the employer to notify them of a Cal-COBRA qualifying event.

California has a Health Insurance Premium Program (HIPP), by which the state will pay the insurance premiums of qualifying individuals under COBRA, Cal-COBRA, or OBRA (the extension of COBRA for up to 29 months for disabled individuals). California employers of 20 or more employees must give a HIPP notice to terminating employees.[41] California employers must give a notice of rights to convert group medical coverage into individual coverage, within 15 days of the termination of group coverage.[42] Termination doesn't occur until the end of any continuation period (e.g. COBRA, extensions, OBRA).[43]

8.4 Mandatory Employer-Funded Health Care

8.4.1 Health care security laws

Employers generally can decide whether to provide health care to employees (subject to penalties under the Patient Protection and Affordable Care Act for certain employers who do not provide a minimum level of health insurance coverage to full-time employees). In California it's different, or at least it is in San Francisco.

The San Francisco Health Care Security Ordinance requires employers engaging in business in the City of San Francisco that have on average at least 20 employees during a quarter to make "health care expenditures" for their employees who work in San Francisco or to make payments directly to the City.[44] The Ninth Circuit has upheld the San Francisco ordinance against a challenge that ERISA preempts the ordinance.[45]

On November 10, 2020, San Francisco's Board of Supervisors unanimously passed yet another Covid-related ordinance: the Healthy Airport Ordinance.[46] This Ordinance amends the HCAO to require employers of employees covered by the Quality Standards Program at SFO to either: (a) provide family health insurance at no cost to those employees; or (b) contribute to a Medical Reimbursement Account at the City on the employees' behalf at a rate of $10.30 per hour worked. The Healthy Airport Ordinance applies to employees covered by SFO's Quality Standards Program (QSP). This Resolution required the implementation of minimum standards for hiring, training, performance management, and compensation and benefits for employees covered by the QSP. QSP-covered employees are those who either: (1) require Airport Badge issuance with Airfield Operations Area (AOA) access, and work in and around the AOA to perform their job duties; or (2) are directly involved in passenger and facility security or safety (e.g., checkpoint screenings, passenger check-ins, and skycap and baggage check-in and handling).

Employers of QSP-covered employees must choose to either provide them with no-cost family health insurance (including coverage for their dependents) or pay $10.30 per hour (up to $412 per week) on behalf of the employee to the City Option Program.[47]

To comply with the family health insurance requirement, benefits must include: (1) at least one plan that is offered at no cost to the covered employee, provides a level of coverage that is designed to provide benefits that are actuarially equivalent to at least 90% of the full actuarial value of the benefits provided under the Plan, and includes all benefits listed in California's Essential Health Benefit Benchmark Plan; and (2) be offered to covered employees within 30 days of their start date. An amendment to the ordinance would: (i) allow employers offering multiple health benefit plans to charge a limited share of premium costs on more expensive plans, and (ii) clarify who must be covered by the family health benefits offered under the ordinance.

A covered employee may voluntarily waive an offer of health plan benefits by providing proof of a current health plan coverage, including coverage for their dependents, and completing the Voluntary Waiver Form.

Compliance requirements cannot be waived in a collective bargaining agreement. It will be important for unionized employers to carefully consider whether they can unilaterally impose changes to comply with the Ordinance without bargaining with their unions. Employers also may want to consider whether they can avail themselves of any labor law-related preemption arguments with respect to their labor contracts.

Originally, employers had to either provide family health insurance by March 21, 2021 or contribute to the City Option Program by April 15, 2021. An amendment to the ordinance delayed the deadline for health insurance coverage to April 1, 2021.

The OLSE has the right to charge an employer the amount owed plus annual interest of 10% from the date payment was due and liquidated damages, in addition to any other rights or remedies available under the terms of any employer agreement or applicable law.

8.4.2 Health care mandate

Although the individual mandate penalty at the federal level was eliminated by the Tax Cuts and Jobs Act of 2017, California (among other states) enacted similar penalties at the state level. California residents must either have qualifying health insurance coverage, obtain an exemption, or pay an "individual shared responsibility penalty" (generally the higher of either a flat penalty per household member or 2.5% of gross household income) when filing state income taxes.[48] For the 2023 tax year, the penalty for not having coverage the entire year is at least $900 per adult and $450 per dependent under age 18 or 2.5% of gross household income, whichever is higher.[49] The California Franchise Tax Board has yet to release the flat penalty amount for the 2024 tax year.

The employer's responsibility is to report employee health insurance information to the California Franchise Tax Board, unless the insurance carrier does it. Currently, federal forms 1095-B (Health Coverage), 1095-C (Employer-Provided Health Insurance Offer and Coverage), and Form 3895 (California Health Insurance Marketplace Statement) are accepted as forms of proof.[50]

8.5 Explanation Of Benefits

8.5.1 Discontinuation of medical coverage

Before discontinuing medical, surgical, or hospital coverage, California employers must give all covered employees at least 15 days advance written notice.[51] This notice requirement does not, however, apply to welfare plans that are subject to ERISA.

8.5.2 Notice of available medical benefits

California employers must explain to employees, in at least outline form, the benefits provided under employer-sponsored health coverage, including the identity of the provider organization(s), and must give terminated employees notification of all continuation, disability extension, and conversion options under any employer-sponsored coverage for which the employee may remain eligible after employment terminates.[52]

8.5.3 Disclosures for deferred compensation plans

California employers who offer employer-managed deferred compensation plans must provide each employee, before the employee's enrollment in the plan, written notice of the reasonably foreseeable financial risks concerning participation in the plan, together with historical information to date as to the performance of plan investments and documents showing the employers' financial condition through at least the immediately preceding year.

Employers that directly manage investments of such a plan must also provide quarterly reports for each plan investment fund and the actual performance of the employee's investment.[53]

8.6 CalSavers Retirement Savings Program

CalSavers is a state-run program governed by the California Code of Regulations and overseen by the California Secure Choice Retirement Savings Investment Board.[54] When CalSavers was enacted, participation was mandatory for an "eligible employer," which was defined as any private California employer with five or more employees at least one of whom is age 18 or older, that does not sponsor a tax-qualified retirement plan.[55] However, on August 26, 2022, SB 1126 amended CalSavers to expand the definition of "eligible employer" to include, with certain exceptions, a person or entity engaged in a business, industry, profession, trade, or other enterprise in the state, whether for profit or not for profit, that has at least *one* eligible employee and that satisfies the requirements to establish or participate in a "payroll deposit retirement savings arrangement."[56,57] As a result, any private California employer with four or fewer eligible employees are now also subject to CalSavers. Such employers may voluntarily register with CalSavers beginning January 1, 2023. The amended mandatory registration deadlines are as follows:

- Employers with more than 100 employees had to register by September 30, 2020.
- Employers with more than 50 employees must register by June 30, 2021.
- Employers with five or more employees must register by June 30, 2022.
- Employers with four or fewer employees must register by December 31, 2024.[58]

Sole proprietorships, self-employed individuals, and other business entities that do not employ any individuals other than the owners of the business are exempt from CalSavers.[59]

Under CalSavers, employees make after-tax contributions to Roth IRAs that are created on their behalf. CalSavers also has an automatic enrollment feature, meaning that unless an employee opts out (or elects a different contribution rate) within 30 days of receiving enrollment materials, the employee is automatically enrolled at a contribution rate equal to 5% of compensation. Thereafter, a 1% automatic escalation applies each January 1, up to maximum of 8%.[60]

Absent an affirmative investment election, contributions are invested in a capital preservation investment (CalSavers Money Market Fund) for 30 days. After those 30 days have elapsed, unless the employee makes an alternative election, contributions (and earnings) are invested in the applicable target date funds based on the employee's age and assumed retirement at age 65.[61] Employers pay no fees; instead, as of June 1, 2023, participants pay fees based on a combination of a Fixed Account Fee ($4.50 per quarter ($18.00 annually)) and Annualized Asset-Based Fees (ranging from 0.325% to 0.49% of the account balance, depending on the investment choice(s)).[62] A challenge to the program as being preempted by ERISA was rejected by the Ninth Circuit.[63]

Employers that, without good cause, fail to comply with CalSavers may be subject to a penalty of $250 per eligible employee and an additional penalty of $500 per eligible employee if noncompliance continues after notice from the California Franchise Tax Board.[64]

8.7 Large Group Health Insurance

On October 7, 2021, Governor Newsom approved SB 280 requiring large group health insurance policies issued, amended, or renewed on or after July 1, 2022, to cover medically necessary basic health care services, including physician services, hospital inpatient and ambulatory care services, diagnostic laboratory services, diagnostic and therapeutic radiologic services, home health services, preventive health services, emergency health care services, and hospice care services.[65] The law prohibits discriminatory benefit designs and marketing practices that have the effect of discouraging the enrollment of individuals in protected classifications.[66] Insurers that violate this law are liable for an administrative penalty of up to $2,500 for the first violation, and up to $5,000 for the second.[67] The liability increases to $15,000 or $100,000 for the first and second violation, respectively, if the discrimination is a general practice or was knowingly committed.[68]

On October 8, 2021, Governor Newsom approved SB 255 authorizing an association of employers to offer a large group health care service plan contract or large group health insurance policy consistent with ERISA if certain requirements are met, including: (1) that the association is headquartered in California; (2) has continuously been a Multi-Employer Welfare Arrangement under ERISA (MEWA) since before March 23, 2010; and (3) that the large group health care service plan contract or large group health insurance policy have provided a specified level of coverage since January 1, 2019.[69]

8.8 Reproductive Health Rights

On June 24, 2022, the U.S. Supreme Court in *Dobbs v. Jackson Women's Health Org.*[70] overturned long-standing precedent in *Roe v. Wade*[71] and *Planned Parenthood v. Casey,*[72] holding that the U.S. Constitution does not confer a right to abortion and that the authority to regulate abortion lies with individual states. In response, California voters approved Proposition 1 to guarantee the right to abortion and contraception.[73] Therefore, California employers may continue to provide coverage for abortion services.

8.9 Commuter Benefits

8.9.1 San Francisco Commuter Benefits Ordinance

The San Francisco Commuter Benefits Ordinance applies to employers with 20 or more employees nationwide that have a San Francisco location and San Francisco business registration certificate.[74] Under this ordinance, a covered employer must provide at least one of the following programs:

- Pre-tax benefit: A program, consistent with section 132(f) of the Internal Revenue Code, allowing covered employees to elect to exclude from taxable wages costs incurred for transit passes or vanpool charges, up to the maximum amount allowed by federal tax law (up to $315 per month for 2024);

- Employer-paid benefit: A program whereby the employer supplies a transit pass for the public transit system requested by each covered employee or reimbursement for equivalent vanpool charges equal to the cost of an adult San Francisco MUNI Fast Pass; or

- Employer-provided transit: A free employer-provided vanpool, bus, or similar multi-passenger vehicle.[75]

San Francisco-based employees, including those covered by collective bargaining agreements, who average 10 hours per week must be covered by a commuter benefits program.[76] The waiting period for an employee to begin participating in such program cannot be longer than one month.[77] Covered employers must offer a commuter benefits program regardless of whether its business is located near transit.[78] Covered employers who are subject to the ordinance must submit a one-time compliance report form to the San Francisco Environment Department.[79]

The San Francisco Commuter Benefits Ordinance does not apply to employers with an average of 50 or more full-time employees at all locations across the Bay Area combined. Instead, such employers are subject to the Bay Area Commuter Benefits Program described below.[80]

Covered employers who fail to comply with the San Francisco Commuter Benefits Ordinance requirements may be subject to administrative fines or civil penalties from the San Francisco Environment Department.[81]

8.9.2 Bay Area Commuter Benefits Program

Employers with an average of 50 or more full-time employees per week within the geographic boundaries of the Bay Area Air Quality Management District (the "Bay Area") must offer commuter benefits to covered employees. Employees who perform an average of at least 20 hours of work per week within the previous calendar month within the Bay Area, excluding seasonal or temporary employees, must be covered.[82] Covered employers must offer at least one of the following benefits:

- Pre-tax benefit: A program, consistent with section 132(f) of the Internal Revenue Code, allowing covered employees to elect to exclude from taxable wages costs incurred for transit passes or vanpool charges, up to the maximum amount allowed by federal tax law (up to $315 per month for 2024);

- Employer-paid benefit: A subsidy to offset the monthly cost of commuting via transit or by vanpool. The subsidy must be either the monthly cost of commuting via transit or vanpool or $75 (adjusted annually consistent with the California Consumer Price Index for San Francisco-Oakland-San Jose), whichever is lower. An optional subsidy for bicycle commuting costs may also be provided in addition to subsidies for transit and vanpool costs;

- Employer-provided transit: A free employer-provided vanpool, bus, or similar multi-passenger vehicle;

- Alternative commuter benefit: An alternative commuter benefit program that provides at least the same reduction in single-occupant vehicle trips as any one of the three options above. An alternative commuter benefit program must be proposed in writing, complying with the guidelines issued by Air Pollution Control Officer (APCO), and approved in writing by the APCO; or

- Telework: A company-wide policy allowing telework for one or more days per week for all employees whose assignments can be performed remotely.[83]

Furthermore, covered employers must designate a Commuter Benefits Coordinator who is responsible for implementing the commuter benefits program and complying with the Bay Area Commuter Benefits Program requirements. After initial registration with the Bay Area Air Quality Management District, covered employers must update and verify their registration information on an annual basis.[84]

Covered employers must also provide an annual notice of the commuter benefits program to all covered employees. The notice must include information on the type of commuter benefits offered, how the covered employee may apply for and receive the benefit, and contact information for further information about the commuter benefit.[85] Covered employers must provide commuter benefits information as part of the benefits package to all newly hired employees.[86]

Covered employers who fail to comply with the Bay Area Commuter Benefit Program requirements may be subject to a civil penalty under California's air pollution control laws.[87]

8.10 San Francisco Healthy Airport Ordinance

Under the San Francisco International Airport (SFO) Quality Standards Program (QSP), employers must comply with the Healthy Airport Ordinance (HAO).[88] Applicable employers can comply with the HAO in two ways: (1) by offering each covered employee (*i.e.,* employees covered by QSP at SFO) and their dependents a "platinum" plan that meets certain requirements free of charge to the covered employee; or (2) by paying the HAO fee rate per hour ($10.30 per hour for 2024) on behalf of the employee to the City Option Program.[89] Employers may be subject to penalties for failing to comply with the HAO.[90]

On August 29, 2023, the Ninth Circuit Court of Appeals revived a challenge by an airline trade association, Airlines for America ("A4A"), to the Healthy Airport Ordinance.[91] The lower court held that there is a judicial presumption that the City's actions are not preempted by federal law.[92] In reversing, the Ninth Circuit held that the City acted as a regulator in enacting the ordinance.[93] Therefore, there is no such judicial presumption and the case was permitted to continue in the lower court. The Ninth Circuit's decision was based in large part on the ability of the Airport Director to assess hefty civil penalties that the Court held carried the force of law and therefore made the City a regulator.[94] These penalties include daily fines (with potential increases at the Airport Director's discretion), and the ability to collect liquidated damages of up to $100 for each one-week pay period for each employee for whom the airline has neither offered health plan benefits nor made payments into the fund. The Court also noted that the City can enforce these provisions in a municipal administrative proceeding.[95] If the City were acting as a market-participant merely managing the airport as a private party would, its actions could not be preempted. Because the City is acting as a regulator, however, the lower court's presumption that the ordinance cannot be preempted was incorrect and A4A's challenge was allowed to proceed. This holding is significant. From time to time, employers and their associations have been stopped by Ninth Circuit courts when they attempted to argue that state and local benefits laws are preempted by ERISA and other federal laws due to the market-participant exception to preemption. The Ninth Circuit has now rejected the market-participant exception, at least based on the penalty provisions of the San Francisco law.

---

1 SB 30, 2019 bill amending Fam. Code § 297.

2 *Id.*

3 *Id.*

4 Fam. Code § 297(b)(3). A person under age 18 who otherwise meets the requirements for a domestic partnership may also register upon obtaining a court order and parental consent. Fam. Code § 297.1.

[5] Unemp. Ins. Code § 1256.

[6] Lab. Code §§ 233, 245.5(c)(4).

[7] *See Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824 (2005).

[8] Fam. Code § 297.5(a) ("Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.").

[9] *See* https://ca.db101.org/ca/situations/workandbenefits/rights/program2c.htm (last visited Mar. 21, 2024).

[10] Rev. & Tax. Code § 17021.7.

[11] Ins. Code § 10121.7(f).

[12] *Id.; see also* Ins. Code § 10112.5(a)(2)(B).

[13] Health & Safety Code §§ 1374.58, 1367.30; Ins. Code §§ 10112.5 & 10121.7. The provisions requiring equal domestic partner coverage appear within the Knox-Keene Health Care Service Plan Act of 1975, which makes a willful violation of the act a crime.

[14] *Id.*

[15] 570 U.S. 744 (2013).

[16] 576 U.S. 644 (2015).

[17] Pub. L. No. 117-228 (Dec. 13, 2022).

[18] 388 U.S. 1 (1967).

[19] Health & Safety Code §§ 1374.73-1374.74; Ins. Code § 10144.51.

[20] *Id.*

[21] California Assembly Bill No. 796 (2016 Regular Session).

[22] SB 805, 2023, amending Health & Safety Code § 1374.73, Ins. Code § 10144.51 and Welf. & Inst. Code § 4686.4.

[23] *Id.*

[24] Ins. Code §§ 10123.865, 10123.866.

[25] *Id.*

[26] *Id.*

[27] Gov't Code § 12945(a)(2). Employers may recover from employees the premium paid to maintain their coverage during a leave to the extent that (1) employees fail to return to work after the pregnancy disability leave and (2) the failure to return from leave is for a reason other than either (a) taking leave under the California Family Rights Act or (b) the continuation, recurrence, or onset of a condition that entitles the employee to a pregnancy disability leave or other circumstances beyond the employee's control.

[28] Consolidated Appropriations Act of 2021, Pub. L. No. 116-260 (Dec. 27, 2020).

[29] Knox-Keene Health Care Service Plan Act of 1975, Health & Safety Code §§ 1340 *et seq.*; AB 72 (Stats. 2016, Ch. 492), Health & Safety Code §§ 1371.30, 1371.31, 1371.9.

[30] *Id.*

[31] AB 716, 2023, adding Health & Safety Code §§ 1371.56, 1797.124, and 1797.233 and repealing § 1376.11, and adding Ins. Code § 10126.66 and repealing § 10352.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] 29 U.S.C. § 1161.

[36] 29 U.S.C. § 1162.

[37] *Id.*

[38] Health & Safety Code §§ 1366.20 *et seq.*; Ins. Code §§ 10128.50 *et seq.* (California Continuation Benefits Replacement Act, or "Cal-COBRA").

[39] Health & Safety Code §§ 1366.21(e), 1366.27(a)(1); Ins. Code §§ 10128.50(b), 10128.57(a)(1).

[40] Health & Safety Code § 1366.29; Ins. Code § 10128.59.

[41] Lab. Code § 2807.

[42] Health & Safety Code § 1373.6.

[43] *Id.*

[44] San Francisco CA Admin. Code ch. 14, §§ 14.1-14.7.

[45] *Golden State Rest. Ass'n v. City & Cnty. of San Francisco*, 546 F.3d 639, 648-61 (9th Cir. 2008), *cert. denied*, 130 S. Ct. 3487 (2009).

[46] San Francisco Healthy Airport Ordinance (HCAO Amendment), available at https://sf.gov/information/understanding-healthy-airport-ordinance (last visited Mar. 11, 2024).

[47] *Id.*

[48] State of California Franchise Tax Board, Personal Health Care Mandate, available at https://www.ftb.ca.gov/about-ftb/newsroom/health-care-mandate/personal.html (last visited Mar. 21, 2024).

[49] 18 Cal. Code Regs. § 26000.61010; 2023 Instructions for Form FTB 3853.

[50] *Id.*

[51] Lab. Code § 2806.

[52] Lab. Code § 2808.

[53] Lab. Code § 2809.

[54] CalSavers Retirement Savings Program, available at https://www.calsavers.com/ (last visited Mar. 11, 2024); *see also* California Secure Choice Retirement Savings Investment Board, available at https://www.treasurer.ca.gov/calsavers/ (last visited Mar. 11, 2024).

[55] 10 Cal. Code Regs. § 10000(m); *see also* 10 Cal. Code Regs. § 10000(aa) (defining "tax-qualified retirement plan" as a retirement plan that qualifies for favorable federal income tax treatment under Internal Revenue Code sections 401(a), 401(k), 403(a), 403(b), 408(k), or 408(p)).

[56] SB 1126, amending 21 Cal. Gov. Code §§ 100000 and 100032.

[57] 21 Cal. Gov. Code § 100000(h) (defining "payroll deposit retirement savings arrangement" as an arrangement by which an employer allows employees to remit payroll deduction contributions to a retirement savings program, which may include an IRA, and in the case of a payroll deduction IRA arrangement, to remit specifically to an IRA").

[58] 10 Cal. Code Regs. § 10002.

[59] Cal. Gov. Code § 100000(d)(1).

[60] 10 Cal. Code Regs. § 10005(a).

[61] 10 Cal. Code Regs. § 10005(a)(4).

[62] CalSavers Retirement Savings Program, Frequently Asked questions, Fees & Costs, available at https://www.calsavers.com/home/frequently-asked-questions.html (last visited Mar. 11, 2024).

[63] *See Howard Jarvis Taxpayers Ass'n v. California Secure Choice Ret. Sav. Program,* 997 F.3d 848 (9th Cir. 2021), *cert. denied sub nom. Howard Jarvis Taxpayers Ass'n v. California Secure Choice Ret. Sav. Program,* No. 21-558, 2022 WL 585886 (U.S. Feb. 28, 2022).

[64] Cal. Gov. Code § 100033(b).

[65] SB 280, amending Ins. Code §§ 10112.281 and 10112.282.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] Health & Safety Code § 1357.503; Ins. Code § 10753.05.

[70] 592 U.S. 215 (2022).

[71] 410 U.S. 113 (1973).

[72] 505 U.S. 833 (1992).

[73] CAL. CONST. Art. I, § 1.1.

[74] SAN FRANCISCO, CAL Env't Code § 427.

[75] SAN FRANCISCO, CAL Env't Code § 427(b).

[76] SAN FRANCISCO, CAL Env't Code § 427(a)(3); Frequently Asked Questions – Commuter Benefits Program, available at https://www.sfenvironment.org/frequently-asked-questions-faqs-about-commuter-benefits-program (last visited Mar. 20, 2024).

[77] *Id.,* Frequently Asked Questions – Commuter Benefits Program.

[78] *Id.*

[79] Commuter Benefits Compliance Reporting Form, available at https://sfenvironment.org/sf-commuter-benefits-ordinance-compliance-form (last visited Mar. 20, 2024).

[80] Frequently Asked Questions – Commuter Benefits Program.

[81] SAN FRANCISCO, CAL Env't Code § 427(c)(3); Rule No. SFE13-01-CBO, available at https://www.sfenvironment.org/files/policy/sfe_tr_commuterbenefitsregs_reg_sfe13-01-cbo.pdf (last visited Mar. 20, 2024).

[82] Cal. Gov. Code § 65081; Bay Area Air Quality Management District's Regulation 14, available at https://www.baaqmd.gov/~/media/dotgov/files/rules/regulation-14-rule-1-bay-area-commuter-benefits-program/documents/rg1401.pdf?la=en&rev=62a4555512da4e39a435814e9f3be923 (last visited Mar. 20, 2024).

[83] Bay Area Air Quality Management District's Regulation 14; Bay Area Commuter Benefits Program Frequently Asked Questions (updated as of May 14, 2021), available at https://511.org/sites/default/files/pdfs/FAQs%20-%205.14.21.pdf (last visited Mar. 20, 2024).

[84] Bay Area Air Quality Management District's (Air District) Regulation 14.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] Healthy Airport Ordinance, available at https://sfbos.org/sites/default/files/o0235-20.pdf (visited Mar. 21, 2024); Amendment to the Health Airport Ordinance, effective Mar. 21, 2021, available at https://sfgov.org/olse/sites/default/files/HAO%20Amendment%2003.02.21_0.pdf (last visited Mar. 21, 2024).

[89] *Id.*; San Francisco Healthy Airport Ordinance (Amendment to the Health Care Accountability Ordinance Implementation Guidance), available at https://sfgov.org/olse/sites/default/files/HCAO%20-%20Healthy%20Airport%20Ordinance%20FAQs%2004.30.21.pdf (visited Mar. 21, 2024); Healthy Airport Ordinance, https://www.sf.gov/information/healthy-airport-ordinance#:~:text=Provide%20employees%20covered%20by%20SFO's,to%20the%20City%20Option%20Program. (last visited Mar. 21, 2024).

[90] Healthy Airport Ordinance, available at https://sfbos.org/sites/default/files/o0235-20.pdf (last visited Mar. 21, 2024).

[91] *Airlines for America v. City and County of San Francisco*, 78 F.4th 1146 (9th Cir. 2023).

[92] *Id.* at 1150.

[93] *Id.* at 1154-55.

[94] *Id.* at 1152-53.

[95] *Id.* at 1153.

9. Special Posting, Distribution, and Notice Requirements

9.1 Posting Requirements

All California employers must meet workplace posting obligations.[1] For example, in addition to the information required by federal law, California employers must post the following items:

- the Labor Commissioner template poster, or the employer's own poster, to notify employees of forthcoming immigration-agent inspections of I-9 Forms or other employment records,[2]
- the poster titled "Safety and Health Protection on the Job," available from the Department of Industrial Relations, Division of Occupational Safety and Health,[3]
- the poster S-500, on Emergency Phone Numbers, available from the Department of Industrial Relations, Division of Occupational Safety and Health,[4]
- the poster DFEH-E09P (titled "Your Rights and Obligations as a Pregnant Employee") (applying to employers with five or more employees), available from the California Civil Rights Division (CRD), which must be posted in English and translated into any other language spoken by at least 10% of the workforce,[5]
- the poster CRD 100-21 (titled "Family Care & Medical Leave & Pregnancy Disability Leave") (applying to employers with 50 or more employees), available from the CRD, which must be posted in English and translated into any other languages spoken by at least 10% of the workforce,[6]
- the poster CRD-EO4P (titled "The Rights of Employees who are Transgender or Gender Nonconforming") (applying to all employers), available from the CRD,[7]
- the poster titled "Healthy Workplaces/Healthy Family Act of 2014 Paid Sick Leave," which is available from the Department of Labor Standards Enforcement (DLSE), or a poster that includes all of the information contained in the DLSE Paid Sick Leave Posting,[8]
- the poster DWC 7 on Notice to Employees—Injuries Caused by Work, revised 2016, which must be posted in both English and Spanish where there are Spanish-speaking employees,[9]
- the poster on Notice of Workers' Compensation Carrier and Coverage, which must be posted in both English and Spanish where there are Spanish-speaking employees, obtained from the employer's workers' compensation insurance carrier,[10]
- the poster on Human Trafficking for employers in certain industries, including transportation and some health care, available from the Department of Justice,[11]
- the poster CRD-E07P (titled "California Law Prohibits Workplace Discrimination and Harassment"), available from the CRD,[12]

- the poster titled “Payday Notice,” available from the Department of Industrial Relations,[13]
- the poster on Time Off to Vote, available from the Secretary of State’s Office, Election Division,[14]
- the posters DE 1857A and DE 1857D, on Notice to Employees: Unemployment Insurance and Disability Insurance and Family Temporary Disability Insurance Benefits (also called Paid Family Leave Insurance Benefits), available from the Employment Development Department,[15]
- the poster titled “California Minimum Wage,” available from the Department of Industrial Relations,[16]
- a list of employee rights and responsibilities under the whistleblower laws, including the telephone number of the whistleblower hotline for the Office of the Attorney General, all in lettering larger than 14-point type, a sample of which is available from the Department of Industrial Relations,[17]
- no-smoking signage,[18] and
- the applicable Wage Order, available from the Department of Industrial Relations.[19] Employers must post the Wage Order most recently amended to increase the minimum wage. (See § 7.2.4.)

Employers using hazardous and toxic substances must post a notice titled “Access to Medical and Exposure Records,” to explain the activities involved in complying with access to medical records provisions.[20]

California municipalities impose their own special posting requirements. For example, San Francisco requires the following notices to be posted:

- the San Francisco Family Friendly Workplace Ordinance Poster (applying to all employers with 20 or more employees, including part-time employees, regardless of where they work), to display at each San Francisco workplace or job site,[21]
- the San Francisco Health Security Ordinance Poster (applying to all San Francisco businesses with 20 or more employees and to nonprofit organizations with 50 or more employees), to display at each San Francisco workplace or job site in English, Spanish, Chinese, and any other language spoken by at least five percent of the employees at the workplace or job site,[22]
- the San Francisco Minimum Wage Poster (applying to all employers with employees working within the City and County of San Francisco), to display at each San Francisco workplace or job site in English, Spanish, Chinese, and any other language spoken by at least five percent of the employees at the workplace or job site,[23]
- the San Francisco Paid Sick Leave Poster (applying to all employers with employees working within the City and County of San Francisco), to display at each San Francisco workplace or job site in English, Spanish, Chinese, and any other language spoken by at least five percent of the employees at the workplace or job site,[24]
- the San Francisco Public Health Emergency Leave Poster (applying to businesses with 500 or more employees worldwide), to provide to San Francisco employees in a manner calculated to reach all employees by posting in a conspicuous place at each San Francisco workplace, via electronic communication, and/or by posting in a conspicuous place in the employer’s web-based or app-based

platform in English, Spanish, Chinese, and any language spoken by at least five percent of the employees who are, or prior to the Public Health Emergency were, at the workplace or job site,[25]

- the San Francisco Formula Retail Employee Rights Poster (applying to formula retail establishments with at least 40 stores worldwide and 20 or more employees in San Francisco, as well as their janitorial and security contractors), to display in a conspicuous at each San Francisco workplace or job site in English, Spanish, Chinese, Tagalog, and any other language spoken by at least five percent of the employees at the workplace or job site,[26]

- the San Francisco Paid Parental Leave Poster (applying to all employers with at least 20 employees), to display at each San Francisco workplace or job site in English, Spanish, Chinese, and any other language spoken by at least five percent of the employees at the workplace or job site,[27]

- the San Francisco Fair Chance Ordinance Poster (applying to employees and applicants for positions within the City and County of San Francisco, if the current or prospective employer has 20 or more employees worldwide), to display at each San Francisco workplace, job site, or other location under the employer's control frequently visited by its employees or applicants in English, Spanish, Chinese, and any other language spoken by at least five percent of the employees at the workplace, job site, or other location,[28] and

- the Consideration of Salary History Ordinance Poster (effective July 2018, applying to employers in the City and County of San Francisco), to display at each San Francisco workplace, job site, or other location under the employer's control frequently visited by its employees or applicants in English, Spanish, Chinese, and any other language spoken by at least five percent of the employees at the workplace, job site, or other location.[29]

- the San Francisco Military Leave Pay Protection Act Poster, which applies to any employer who operates in the geographic boundaries of San Francisco and has more than 100 employees worldwide. [30] The poster is provided in English, Chinese and Filipino.

Additionally, as a result of the Covid-19 global pandemic, the Department of Public Health recommends that San Francisco businesses post signage reminding individuals of the following Covid-19 prevention best practices to reduce transmission: (1) Get vaccinated and boosted; (2) Stay home if sick; (3) Wear a mask indoors if you are unvaccinated; and (4) Clean your hands.[31] Operators or hosts of indoor "Mega-Events" (events with more than 1,000 attendees) are urged to conspicuously post signage at entrances regarding pre-entry vaccination and testing requirements.[32]

Other California cities—such as Los Angeles, San Diego, and Santa Monica—have their own paid sick leave, Covid-19 supplemental paid sick leave, minimum wage, Covid-19-related health department orders, and other employment statutes. And many of these laws require their own postings. For example, the City of Los Angeles requires the following notices to be posted:

- the Los Angeles Office of Wage Standards Wage and Sick Time Notice, to display in a conspicuous place at any workplace or job site where any Los Angeles employee works, in English, Spanish, Chinese (Cantonese and Mandarin), Hindi, Vietnamese, Tagalog, Korean, Japanese, Thai, Armenian, Russian, and Farsi, and any other language spoken by at least five percent of the employees at the workplace or job site),[33] and

- the Los Angeles Fair Chance Initiative for Hiring Ordinance Notice (applying to employers located or doing business in the City of Los Angeles that have 10 or more employees in Los Angeles), to display a

notice informing applicants of the provisions of the Ordinance in a conspicuous place at every workplace, job site or other location in the City of Los Angeles under the employer's control and visited by applicants.[34]

Los Angeles County has its own posting requirements, including Covid-19-related posting requirements.

California employers must comply with not only the posting requirements imposed by the State of California (see above), but also with the posting requirements in each California county and city in which they have employees working.

9.2 Distribution Requirements

9.2.1 Distribution required to all employees

California employers must provide all California employees the following information:

- an annual notice about pregnancy disability leave, or update the employee handbook, to include all required information,[35]
- a sexual harassment information sheet, available from the CRD,[36] and
- an annual notice that they may be eligible for the federal and California Earned Income Tax Credit (EITC), with such notice to be provided within one week of when the company provides any worker with an annual income summary such as a Form W-2 or a Form 1099 (see § 16.6).[37]
- As of January 1, 2022, California employers can distribute required notices and posters under the California Labor Code as an email attachment.[38] Email distribution, however, "shall not alter the employer's obligation to physically display the required posting."[39] This does not apply to posting requirements under the FEHA or FMLA.[40]

9.2.2 New hire distribution requirements

California employers must provide all new California hires the following information:

- California Form DE-4 (Employee's Withholding Allowance Certificate),[41]
- a notice that California tendentiously calls a Wage Theft Notice, containing pay rates and other basic information, including information about the California Paid Sick Leave Law (see §§ 2.14,16.1),[42]
- a pamphlet DE 2515, on State Disability Insurance Provisions, which is available from the Employment Development Department,[43]
- a pamphlet describing workers' compensation rights, available in both English and Spanish, by the end of the first pay period,[44]
- a form that the employee may use to notify the employer of the employee's personal physician or personal chiropractor,[45]
- a pamphlet DE 2511, explaining Paid Family Leave Benefits (see § 2.4) (which also must go to incumbent employees leaving work to attend to a sick relative),[46]

- a form notifying each employee of the right to take protected leave for domestic violence, sexual assault, or stalking and not to be discharged, discriminated, or retaliated against because of the employee's status as a victim of domestic violence, sexual assault, or stalking (this form also must also be provided to other employees upon request),[47]

- a fact sheet (CRD-185), entitled "Sexual Harassment Fact Sheet,"[48] and

- a California lactation accommodation Policy.[49]

9.2.3 Special event distribution requirements

California employers must also distribute information to California employees as follows:

- to any employee who informs the employer of her pregnancy (or sooner if the employee inquires about reasonable accommodation, transfer, or pregnancy disability leaves), poster CRD-E09P (called "Your Rights and Obligations as a Pregnant Employee"), and, for employers with 5 or more employees, poster CRD-100-21 (called "Family Care and Medical Leave (CFRA Leave) and Pregnancy Disability Leave"), on Family Care/Medical Leave/Pregnancy Disability Leave,[50]

- to any employee who makes an inquiry about or requests parental leave, a California-compliant lactation accommodation policy,[51]

- to any worker victimized by a workplace crime, a notice of eligibility for workers' compensation for injuries resulting from the crime, including psychiatric injuries, either personally or by first-class mail within one working day of the place of employment crime, or within one working day of the date the employer reasonably should have known of the crime,[52]

- to any employee who is unable to work because of illness, injury, or hospitalization because of conditions not related to work, or who is disabled because of pregnancy, childbirth, or related conditions, Pamphlet DE 2515 (called "State Disability Insurance Provisions") available from the Employment Development Department (even though the pamphlet was issued upon hire of the employee),[53]

- to any employee placed on a leave of absence, Pamphlet DE 2320 (called "For Your Benefit"), available from the Employment Development Department,[54]

- to any employee who takes time off work to care for a seriously ill child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or registered domestic partner, or to bond with a new child (either by birth, adoption, or foster care placement), Pamphlet DE 2511 (called "Paid Family Leave Benefits") available from the Employment Development Department,[55]

- notice to employees, before they enroll in certain employer-managed deferred compensation plans, of the reasonably foreseeable financial risk accompanying participation in the plan, and quarterly information about the performance of the plan, and[56]

- required notices posted when the Division of Occupational Safety and Health (DOSH) issues a workplace health or safety citation or order. These notices must be written in "the top seven non-English languages used by limited-English-proficient adults in California, as determined by the most recent American Community Survey by the United States Census Bureau."[57] Currently the required languages are Spanish, Cantonese, Mandarin, Vietnamese, Tagalog, Korean, and Armenian.[58] The notices are also required to be posted in Punjabi if that is not one of the top seven languages.[59]

9.2.4 Distribution requirements upon interruption of employment or benefits

Unemployment compensation information. California employers must give written notice of a change in employment status to employees whose continuous employment status is being disrupted because of dismissal, layoff, or leave of absence.

The notice must contain (1) the employer's name, (2) the employee's name, (3) the last four digits of the employee's social security number, (4) the type of action (e.g., termination, layoff, leave of absence, or a change in status from employee to independent contractor), and (5) date of the action. Additionally, when a California employer discharges, lays off, or places an employee on a leave of absence, the employer must provide the employee with Pamphlet DE 2320 (called "For Your Benefit"), available from the Employment Development Department.[60]

Health insurance information. California employers, whether public or private, must provide to terminating employees with health insurance both the federal COBRA notice (for employers covered by COBRA) and a standardized written description of the California Health Insurance Premium Program (HIPP), which is available from the State Department of Health Services.[61]

---

1 For an overview, see www.dir.ca.gov/wpnodb.html (last visited Mar. 20, 2024).

2 Lab. Code § 90.2(a)(1) (poster to contain the name of the immigration agency, the date the employer received the notice, the nature of the inspection to the extent known, and a copy of any Notice of Inspection of I-9 Employment Eligibility Verification form).

3 Lab. Code § 6328; *see also* https://www.dir.ca.gov/wpnodb.html (last visited Mar. 20, 2024).

4 8 Cal. Code Regs. § 1512(e); *see also* https://www.dir.ca.gov/wpnodb.html (last visited Mar. 20, 2024).

5 2 Cal. Code Regs. § 11049.

6 2 Cal. Code Regs. §§ 11095, 11096. Former "Notice A" and "Notice B" posters have been eliminated and replaced by the following: (1) "Your Rights and Obligations as a Pregnant Employee" notice (DFEH-E09P) replaces "Notice A" and addresses pregnancy disability leave as well as California Family Rights Act (CFRA); and (2) employers with 50 or more employees must replace "Notice B" with "Family Care and Medical Leave (CFRA Leave) and Pregnancy Disability Leave" notice (DFEH-100-21).

7 Govt. Code § 12950(a)(2).

8 Lab. Code §§ 247(a), (b). The poster must state all of the following: (1) an employee is entitled to accrue, request, and use paid sick days, (2) the amount of sick days provided for by the California Paid Sick Leave Law; (3) the terms of use of paid sick days, (4) that the employer must not retaliate or discriminate against an employee for requesting or using paid sick days, and (5) that an employee has the right under the California Paid Sick Leave Law to file a DLSE complaint against an employer that retaliates or discriminates against the employee. (See § 2.14.); *see also* https://www.dir.ca.gov/DLSE/ab1522.html#:~:text=Starting%20on%20January%201%2C%202024,should%20post%20the%20new%20poster. (last visited Mar. 28, 2024).

9 8 Cal. Code Regs. § 9881; *see also* https://www.dir.ca.gov/dwc/forms/dwcform7_2010.pdf (last visited Mar. 28, 2024).

10 Lab. Code § 3550; *see also* https://www.dir.ca.gov/wpnodb.html (last visited Mar. 28, 2024).

11 Civ. Code § 52.6; *see also* https://www.dir.ca.gov/wpnodb.html (last visited Mar. 28, 2024).

12 Gov't Code §§ 12900 *et seq.; see also* https://www.dir.ca.gov/wpnodb.html (last visited Mar. 20, 2024).

13 Lab. Code § 207.

14 Elections Code § 14001 *et seq.; see also* https://www.dir.ca.gov/wpnodb.html (last visited Mar. 20, 2024).

15 *See* https://www.dir.ca.gov/wpnodb.html (last visited Mar. 20, 2024).

16 *See* https://www.dir.ca.gov/wpnodb.html (last visited Mar. 20, 2024).

17 Lab. Code § 1102.8.

18 Lab. Code § 6404.5(c)(1).

19 *See* www.dir.ca.gov/IWC/WageOrderIndustries.htm (visited Mar. 20, 2024).

20 California General Industry Safety Order (GISO) 3204.

21 San Francisco Admin. Code § 12Z.8(b).This must be posted in English, Spanish, Chinese, and any language spoken by at least 5% of the employees at the workplace or job site.

22 San Francisco Admin. Code § 14.3(e)(2).

23 San Francisco Admin. Code § 12R.5(b).

[24] San Francisco Admin. Code § 12W.5(b).

[25] San Francisco Public Health Emergency Ordinance § 6.

[26] San Francisco Police Code § 3300F.7(b).

[27] San Francisco Admin. Code § 3300H.5.

[28] San Francisco Police Code § 4905(c).

[29] San Francisco Police Code § 3300J.5(b).

[30] San Francisco Labor & Employment Code Article 15; *see also* https://www.sf.gov/sites/default/files/2023-12/MLPPA%20Poster%20May2023.pdf?_gl=1*121qky5*_ga*NzgzNDYwNjA2LjE2ODg2ODEzNzk.*_ga_BT9NDE0NFC*MTcxMTY0ODc1MS40LjEuMTcxMTY0ODg0NS4wLjAuMA..*_ga_63SCS846YP*MTcxMTY0ODc1MS40LjEuMTcxMTY0ODg0NS4wLjAuMA.. (last visited Mar. 28, 2024). Additional poster requirements apply to contractors. *See* https://www.sf.gov/labor-law-posters (last visited Aug. 7, 2024).

[31] City and County of San Francisco Department of Public Health Order of the Health Officer No. C19-07y (Safer Return Together) (updated Dec. 21, 2022).

[32] *Id.*

[33] Los Angeles Municipal Code § 188.03.A.

[34] Los Angeles Municipal Code § 189.04.B.

[35] 2 Cal. Code Regs. § 11049(d)(3).

[36] Gov't Code § 12950.

[37] Rev. & Tax. Code § 19853. This notice requirement applies to any California employer that must provide unemployment insurance to employees under the Unemployment Insurance Code. See Rev. & Tax. Code § 19852(a). A sample notice appears on the EDD website at www.edd.ca.gov.

[38] Lab. Code § 1207.

[39] *Id.*

[40] *Id.*

[41] *See* https://edd.ca.gov/en/payroll_taxes/Rates_and_Withholding#de4 (last visited Mar. 20, 2024).

[42] Lab. Code § 2810.5; *see also* https://www.dir.ca.gov/dlse/governor_signs_wage_theft_protection_act_of_2011.html (last visited Mar. 20, 2024).

[43] *See* https://edd.ca.gov/en/disability/employer_requirements/ (last visited Mar. 20, 2024).

[44] Lab. Code § 3551.

[45] *Id.*

[46] *See* https://edd.ca.gov/en/disability/employer_requirements/ (last visited Mar. 20, 2024).

[47] Lab. Code § 230.1(h). If an employer elects not to use the form developed by the Labor Commissioner, the notice provided by the employer to the employees shall be substantially similar in content and clarity to the form developed by the Labor Commissioner.

[48] Gov't Code § 12950.

[49] As of 2020, California employers must include a compliant lactation accommodation policy in the employee handbook or set of policies and must distribute this policy to new employees upon hire and when an employee asks about or requests parental leave. Lab. Code § 1034(c).

[50] 2 Cal. Code Regs. § 11049; https://calcivilrights.ca.gov/publications/#requiredBody (last visited Mar. 20, 2024).

[51] Lab. Code § 1034(c).

[52] Lab. Code § 3553.

[53] *See* https://edd.ca.gov/en/disability/employer_requirements/ (last visited Mar. 20, 2024).

[54] *See* https://edd.ca.gov/en/Payroll_Taxes/Required_Notices_and_Pamphlets (last visited Mar. 20, 2024).

[55] *See* https://edd.ca.gov/en/disability/employer_requirements/ (last visited Mar. 20, 2024).

[56] Lab. Code § 2809.

[57] Lab. Code § 6318.

[58] California Census 2020 Language and Communication Access Plan, accessible at https://census.ca.gov/wp-content/uploads/sites/4/2019/06/LACAP.pdf.

[59] Lab. Code § 6318.

[60] Unempl. Ins. Code § 1089; 22 Cal. Code Regs. §1089-1. For forms, see www.edd.ca.gov/payroll_taxes/Required_Notices_and_Pamphlets.htm (visited Mar. 20, 2024).

[61] Lab. Code § 2807.

10. Employee Access to Personnel Records

10.1 Personnel Records

California employers must permit current and former employees, or their representatives, to inspect and obtain a copy of the "personnel records" maintained by the employer relating to the employee's performance or to any grievance concerning the employee. The deadline is 30 days from the employer's receipt of the employee's written request, not necessarily the date of the request, although the employee (or the representative) and the employer may agree to extend this deadline to 35 days.[1] The request must be in writing, and employers may create a request form that employees can choose to use.[2] The form must be made available to employees, or to representatives, upon verbal request.[3]

For current employees, the employer must, within 30 days, or up to 35 days by mutual agreement, (a) make the personnel records available where the employee reports to work or another place mutually agreed upon by the employer and the requester, or (b) permit the employee to inspect the personnel records where the records are stored, with no loss of pay for the employee.[4]

For former employees, employers must maintain personnel records for four years after termination of employment.[5] To make records available to former employees, employers may use the location where records are stored, use a mutually agreed-upon location, use the mail (and be reimbursed for postage), or—for employees terminated for harassment or workplace violence—use a location within a reasonable driving distance from the employee's residence or provide a copy of the records by mail.[6]

As to former employees, employers need only comply with one yearly request to inspect or copy; and as to an employee representative, employers need only comply with 50 requests per month.[7] Employer obligations do not apply during a lawsuit against the employer, or to employees covered by a valid collective bargaining agreement with specified provisions.[8]

"Personnel records" under Labor Code section 1198.5 do not include records relating to an investigation of criminal conduct, letters of reference, ratings, reports, or records obtained before the employee's employment, prepared by identifiable examination committee members, or obtained in connection with a promotional examination,[9] and employers can redact names of nonsupervisory employees from personnel records before submitting a copy or permitting an inspection.[10]

Failure to timely comply entitles the employee or the Labor Commissioner to recover a penalty of $750, plus injunctive relief and attorney fees.[11]

10.2 Signed Employee Instruments

California employers must provide to an employee or a job applicant (and, presumably, a former employee), upon request, a copy of any document that the employee has signed concerning the employee's employment or application for employment.[12] The request need not be written, and there is no specified time for complying and no prescribed penalty.[13] California employers should think about any signed documents related to "obtaining" or "holding" employment.[14] Examples include job applications, handbook acknowledgments, arbitration agreements, job descriptions, and any signed policy acknowledgments (anti-harassment, retaliation, discrimination, at-will

employment, meal/rest break policies, etc.).[15] This is distinct from the broader right to know and related rights under CCPA (see Chapter 4).

10.3 Shopping Investigator's Report

Employees disciplined on the basis of a report by a shopping investigator must be given a copy of the report before discipline is imposed.[16]

10.4 Payroll Records

California employers must comply with oral or written requests from current or former employees to inspect and copy their payroll records within 21 calendar days.[17] A "copy" includes a duplicate of the itemized statement provided to an employee or a computer-generated record that accurately shows all of the information required under California law.[18] Failure to comply entitles the current or former employee, or the Labor Commissioner, to recover a $750 penalty from the employer, plus a potential PAGA penalty.[19] Courts can also issue injunctive relief and attorney fees are similarly available to ensure compliance.[20]

California employers must provide itemized wage statements to employees, and permit employees to inspect those records and obtain a copy.[21] (See § 16.3.) Employers must provide the employee a copy of the wage statements or computer-generated record upon request, rather than just providing an opportunity for an "inspection."[22]

These rights are distinct from the broader right to know and related rights under CCPA (see Chapter 4). Associated requests may be comingled.

California employers must make work records available to state inspectors.[23]

---

1 Lab. Code § 1198.5(a), (b)(1).

2 Lab. Code § 1198.5(b)(2).

3 Lab. Code § 1198.5(b)(2).

4 Lab. Code § 1198.5(c)(2).

5 Gov't Code § 12946(a) (California employers must maintain and preserve employee personnel files for a minimum of four years after termination).

6 Lab. Code § 1198.5(c)(3)(A), (B).

7 Lab. Code § 1198.5(d), (p).

8 Lab. Code § 1198.5(n), (q)(1)-(4).

9 Lab. Code § 1198.5(h).

10 Lab. Code § 1198.5(g).

11 Lab. Code § 1198.5(k)-(m).

12 Lab. Code § 432.

13 *Id*.

14 Seyfarth Shaw LLP, "The Peculiar 'Personnel-ity' of California Personnel File Inspection Laws," EMPLOYMENT LAW OUTLOOK (2016), https://www.laborandemploymentlawcounsel.com/2016/12/the-peculiar-personnel-ity-of-california-personnel-file-inspection-laws/ (last visited Mar. 8, 2022).

15 *Id*.

16 Lab. Code § 2930(a).

17 Lab. Code § 226(c).

18 Lab. Code § 226(a).

19 Lab. Code § 226(f), (h).

[20] *Id*.

[21] Lab. Code § 226(a), (b). And criminal liability is also possible for "any employer ... or any officer, agent, employee, fiduciary, or other person" who knowingly violates this requirement. Lab. Code § 226.6.

[22] Lab. Code § 226(b).

[23] Lab. Code § 1174. Section 1174.5 imposes civil penalty of five hundred dollars ($500) on "any person employing labor who willfully fails to maintain the records required by subdivision (c) of section 1174 or accurate and complete records required by subdivision (d) of Section 1174, or to allow any member of the commission or employees of the division to inspect records" under this section. Section 1175 imposes criminal liability on "[a]ny person, or officer or agent thereof" who violates this requirement.

11. Employer Retention of Records

California employers must retain certain records that are not addressed by federal law and certain records must be retained for periods longer than federal law requires. Listed below are peculiar California legal requirements. Recommended retention periods may be even longer than the legal requirements below because of federal laws and longer statutes of limitation. California retention requirements include:

- wage statements (pay stubs) (three years),[1]
- job applicant records (four years), those records to include "data regarding the race, sex, and national origin of each applicant and for the job for which he or she applied,"[2]
- help wanted ads (two years)[3]
- wage (payroll) records (three years)[4]
- child labor certificates (three years)[5]
- personnel records (four years),[6]
- employee health records (for hospitals, three years after termination of employment; 30 years for toxic exposure related records),[7]
- pension and welfare plan information (two years),[8]
- employee contracts (four years for written contracts),
- business records regarding total annual sales volume and goods purchased (two years),[9]
- job title and wage rate history,[10] and
- records of workplace violence hazard identification, evaluation, and correction; violent incident logs; training records; and records of workplace violence incident investigations (five years).[11]

---

1 Lab. Code § 226(a). Although the legal requirement is three years, the California statute of limitations governing claims of unfair business practices (which can include unpaid wages) suggests a retention period of at least four years are prudent. Bus. & Prof. Code § 17208.

2 Gov't Code § 12946(a) (California employers are required to maintain and preserve all applicant personnel records for a minimum of four years); 2 Cal. Code Regs. § 11013 (b), (c) (DFEH regulations on recordkeeping and applicant data). "For recordkeeping purposes only, 'applicant' means any individual who files a formal application or, where an employer or other covered entity does not provide application forms, any individual who otherwise indicates to the employer or other covered entity a specific desire to be considered for employment. An individual who simply appears to make an informal inquiry or who files an unsolicited resume upon which no employment action is taken is not an applicant." 2 Cal. Code Regs. § 11013(b)(1).

3 2 Cal. Code Regs. §11013(c) (requiring employers to keep for two years "[a]ny personnel or other employment records made or kept by any employer or other covered entity dealing with any employment practice and affecting any employment benefit of any applicant or employee.")

4 Lab. Code § 1174(d); Lab. Code § 1197.5 (e) (both three years). California unemployment insurance regulations require retention of wage records for four years after a wage payment on which UI contributions are due. 22 Cal. Code Regs. § 1085-2(c).

5 Lab. Code §§ 1174(d), 1299.

6 Gov't Code § 12946(a) (California employers must maintain and preserve personnel records and files for a minimum period of four years after the records and files are initially created or received and, in the case of applicants or terminated employees, for a minimum period of

four years after the date of the employment action taken); Lab. Code § 1198.5(c)(1) (not less than three years after termination); 22 Cal. Code Regs. § 70725 (hospitals must keep personnel files for no less than three years after termination).

[7] 22 Cal. Code Regs. § 70723(c) (hospital employee health records must be kept for three years). Medical records related to chemical and toxics exposure must be kept for duration of employment plus 30 years. 8 Cal. Code Regs. § 3204(d)(1)(a).

[8] 2 Cal. Code Regs. § 11013(c).

[9] 2 Cal. Code Regs. § 11013(a) (California employers of 100 or more employees and certain apprenticeship programs must prepare a California Employer Information Report—or substitute a federal report such as an EEO-1—containing information about dollar volume of the business and retain the information for two years from the date of preparation).

[10] Lab. Code § 432.3(b) (California employers shall maintain records of job title and wage rate history for each employee for the duration of the employment plus three years after termination of employment).

[11] Senate Bill 553(f)(1) (effective July 1, 2024, California employers shall maintain records relating to their comprehensive workplace violence plan for up to five years).

Seyfarth

12. Covenants Not to Compete

12.1 General Prohibition

12.1.1 The broad statutory language

Most states enforce agreements by which employees agree not to compete with the employer for a reasonable period after employment, within a reasonable geographical area. In California it's different. Section 16600 of its Business and Professions Code broadly declares that, with a few narrow exceptions, "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[1]

Effective January 1, 2024, the legislature amended section 16600, purportedly to reflect recent court decisions, declaring it "shall be read broadly . . . to void the application of any noncompete agreement in an employment context, or any noncompete clause in an employment contract, no matter how narrowly tailored, that does not satisfy an exception in this chapter."[2]

The legislature also took the opportunity to require employers to notify all current and former employees (who were employed after January 1, 2022) who are bound by a noncompete clause that the noncompete clause is void (if it does not satisfy an exception). Failure to provide such notice violates unfair competition laws.[3]

12.1.2 The literal judicial interpretation

This broad statutory language notwithstanding, some courts once upheld contractual restrictions that did not totally restrain trade but rather simply limited how trade could be pursued. In 2008, however, the California Supreme Court, in *Edwards v. Arthur Andersen*,[4] ruled that even narrowly drawn restraints are contractually invalid, unless they fall within a specific statutory exception, e.g., an agreement in connection with the sale or dissolution of a business organization.[5] *Edwards* thus struck down a provision in an employment agreement restricting a departing employee from serving the employer's customers. *Edwards* rejected the view that California law permits agreements that only "partially" or "narrowly" restrict an employee's ability to practice a trade or profession. The legislative updates to the law in 2024 were purportedly intended to codify the *Edwards* decision.

In 2020, the Supreme Court clarified that certain business-to-business non-competes are permissible to further legitimate business interests, such as licensing and joint collaboration agreements.[6] More recently, in late 2021, the Court of Appeal took the position that a company's solicitation of certain executive employees subject to fixed-term employment agreements was a violation of Business and Professions Code sections 17200, *et. seq.*[7] In upholding the lower court's injunction, the Court of Appeal recognized the public policy underlying section 16600, but ultimately rejected the soliciting employer's arguments in light of countervailing policies "favoring the stability and predictability of fixed-term employment relationships."[8]

12.1.3 Disregard for "blue penciling" and other approaches used in other states

In some states, courts can "blue pencil" (redraw) an overly broad noncompete covenant to save the covenant's lawful portions. California courts, however, refuse to enforce employment agreements with an anti-competitive effect even if the parties have agreed to "save" the clause to the extent possible.[9] In a case where former employees challenged the enforceability of their agreement not to solicit the employer's customers, the Court of Appeal declared the agreement invalid under California law, even though the agreement called for New Jersey

law to apply. The Court of Appeal concluded that the agreement ran afoul of California law because the non-solicitation provision was "not narrowly tailored to protect trade secrets and confidential information."[10]

In another customer solicitation case, the Court of Appeal overturned a preliminary injunction against former employees soliciting customers, because California law "bars a court from specifically enforcing (by way of injunctive relief) a contractual clause purporting to ban a former employee from soliciting former customers to transfer their business away from the former employer to the employee's new business."[11] At the same time, the Court of Appeal said that a trial court could enjoin "tortious conduct (as violating either the Uniform Trade Secrets Act and/or the Unfair Competition Law) by banning the former employee[s] from using trade secret information to identify existing customers, to facilitate the solicitation of such customers, or to otherwise unfairly compete with the former employer."[12] Accordingly, California seems to make solicitation of customers by a former employee in California enjoinable only where the solicitation involves misappropriation of trade secrets.

California's broad ban on covenants restraining trade can apply even if the parties entered into the covenant in a state where such covenants are lawful.[13] This peculiar hostility to noncompete covenants has encouraged a "race to the courthouse" to get a dispute heard in the state most congenial to a party's litigation interest.[14] So California became a favored forum for parties seeking judicial declarations that covenants not to compete are invalid.[15]

12.1.4 The limited effectiveness of forum-selection provisions

Some employers have sought to avoid California determinations of their employment agreements by convincing federal courts to enforce forum-selection clauses that call for litigation to occur exclusively in some other designated state.[16] But a forum-selection clause addresses only the site of the adjudication, not the choice of which state's law to apply, so an out-of-state court could still apply California law.[17]

In 2013, the U.S. Supreme Court addressed the enforceability of forum-selection clauses.[18] This decision, although not involving an employment dispute, suggested that (1) forum-selection clauses calling for litigation to occur exclusively in a state other than California are valid, and (2) such clauses can require that, upon transfer of a California-based action to a non-California jurisdiction, the law of that jurisdiction should apply.[19]

In 2016, however, the California Legislature further hindered an employer's ability to leverage forum-selection clauses. Labor Code section 925 dramatically reduces the reach of forum-selection clauses. The law forbids employers to require an employee "who primarily resides and works in California" to agree to a contractual provision that would either "[r]equire the employee to adjudicate outside of California a claim arising in California," or "[d]eprive the employee of the substantive protection of California law with respect to a controversy arising in California." (See § 5.3.) The principal loophole is for contracts where the employee is represented by legal counsel in negotiating the contract. Section 925, obviously, greatly curtails an employer's ability to use non-California courts to enforce noncompete covenants.

Effective January 1, 2024, the California Legislature further prohibited attempts by an employer to use the laws of another state by adding section 16600.5 to the Business and Professions Code. This new law provides that any non-compete clause is "unenforceable regardless of where and when the contract was signed" — even if the contract is valid under another state's laws — no matter how narrowly tailored the provision is. Notably, this law does not require that the employee work or reside in California when the agreement was signed. If this law is upheld by courts, a noncompete provision that is otherwise enforceable under different state laws will become invalid when the employee moves into California. Prospective, current, or former employees may bring a private action to enforce their new right and may recover reasonable attorney fees and costs. Arguably, this legislative expansion levels the playing field and makes California employers more competitive by allowing them to hire employees who are bound by an out-of-state non-compete agreement.

12.1.5 The ban on noncompete covenants as applied to buy-sell contracts

Section 16600's ban on noncompete covenants is subject to a statutory exception applying upon the sale of all or substantially all of a business, including its goodwill.[20] But the Court of Appeal has held that when the sale involves two separate agreements—a stock purchase agreement and an employment agreement—the agreements must be read together. The Court of Appeal concluded that the employment agreement's covenant not to compete or solicit, which was not designed to protect the acquired company's goodwill, failed to qualify under the "sale of business" exception.[21]

In 2022, the California Court of Appeal enforced a non-solicitation-of-customers provision.[22] The defendant had founded several real estate development firms. In a complex series of transactions, he consolidated these firms into a new entity—that he owned—sold fifty percent of his ownership interest to a third party, and was hired as the CEO. Four years later, he was terminated for cause. He formed a new company and solicited his "past and potential future customers."[23]

The Court of Appeal focused on the consolidation phase of the transaction to find that the defendant had transferred all or substantially all of his businesses. Further, the defendant owned the new entity when he consolidated his businesses, but the Court of Appeal held that this was immaterial. The court focused on whether he sold or otherwise disposed of all of his business interests when he conveyed his entire ownership stake in his various companies.[24] Because he did, the sale of business exception applied and the non-solicitation provision was properly enforced.

12.1.6 The ban as applied to settlement agreements

Settlement agreements, like contracts generally, are enforceable, notwithstanding California's ban on noncompete covenants, to the extent that the settlement agreement protects trade secrets. In a settlement of a trade secret lawsuit, the parties agreed to a stipulated injunction by which defendants would refrain from contacting customers on plaintiff's customer list (allegedly including trade secrets). When a dispute arose about compliance with this stipulated injunction, the plaintiff successfully moved for an order of contempt. The Court of Appeal held that the stipulated injunction was facially valid, as it existed to protect trade secrets.[25]

12.1.7 The ban as applied to third-party contracts

The ban on noncompete covenants extends even to contracts to which an employee is not a party, which the California legislature confirmed as part of its updates effective in 2024.[26] Before this legislative change, both federal and state courts had recognized that certain business-to-business non-competes are permissible to further legitimate business interests.

At issue in one case was a provision in a contract between a consulting firm and its customer that the customer would not hire the consulting firm's employees for 12 months following the contract's termination. This provision aimed to protect the consulting firm's key asset—the expertise of its consultants—by discouraging the firm's customers from hiring away the firm's consultants. When the customer breached this provision, the consulting firm successfully sued its customer to recover damages. But the Court of Appeal reversed, reasoning that because "the interests of the employee trump the interests of the employers as a matter of public policy," "it logically follows that a broad-ranging contractual provision such as the one at issue here cannot stand."[27]

The Court of Appeal concluded in 2007 that "enforcing this clause would present many of the same problems as covenants not to compete and unfairly limit the mobility of an employee who actively sought an opportunity with [the customer]."[28] The Court of Appeal allowed that a "more narrowly drawn and limited no-hire provision" might be permissible under California law, but noted that the provision in question covered all hiring (not just solicitation by the customer) and covered all of the consultant firm's employees (not just those who worked for the customer or

those whom the consulting firm even employed at the time). Outweighing this "broad provision" was "the policy favoring freedom of mobility for employees."[29]

More recently, in 2020, the California Supreme Court held that business-to-business non-compete agreements are not per se void and that the rule of reason applies to such contracts.[30] At issue in that case was an agreement to jointly develop a novel drug. This agreement ended when one party resolved a patent dispute by agreeing to terminate all contracts "related to the development" of this novel drug. The Court limited *Edwards* to employee non-competition agreements, and explained that "[n]othing about *Edwards* indicates a departure from . . . precedent to also invalidate reasonable contractual limitations on business operations and commercial dealings."

The Ninth Circuit, in 2021, also clarified that non-solicitation provisions in business-to-business collaboration agreements are not per se violations of the Sherman Act.[31] Both parties in that case were health care staffing agencies who had entered into a subcontractor agreement with a non-solicitation provision. The Ninth Circuit ruled that the non-solicitation provision was an ancillary restraint that did not unlawfully restrict competition and had important pro-competitive benefits for the health care market.

The interplay between these two cases and the new law remains to be seen.

12.2 Implications for Wrongful Termination

California courts have held that where an employee refuses to sign a document containing an unlawful covenant not to compete, the employer violates public policy and incurs tort liability if the employer responds by firing the employee.[32] The legislative updates effective in 2024 also confirmed that employees may bring a private action for injunctive relief, recovery of actual damages, and recovery of reasonable attorney fees and costs. The Court of Appeal has extended that principle to hold that an employer could be liable for wrongful termination if it fired an employee for breaching a noncompete covenant that the employee had entered into with a *former* employer.[33] The Court of Appeal reasoned that the new employer's decision to fire the employee in those circumstances amounted to enforcing a no-hire agreement between the old and new employers—an agreement that was void as an unlawful noncompete agreement.[34]

12.3 "No Rehire" Clauses

Employment settlement agreements traditionally have provided that the settling plaintiff—now a former employee—would never re-apply for employment, and that the defendant could deny employment to the plaintiff without recourse. Before 2020, such "no rehire" clauses were common even in California, but one case held that in particular circumstances a no-rehire clause could be an unlawful restraint of the former employee's right to engage in a lawful profession, trade, or business. In a 2015 decision, the Ninth Circuit held that the trial court, which had enforced a settlement agreement with a "no rehire" clause, had abused its discretion by narrowly characterizing section 16600 as applying only to "covenants not to compete," when section 16600 actually applies more broadly to any contractual "'restraint of a substantial character,' no matter its form or scope."[35]

The case involved unusual facts, arising in an usual procedural posture. The plaintiff was an emergency medicine physician who sued for unlawful termination of his staff privileges at a medical facility. The parties negotiated a settlement agreement that contained a no-rehire clause but then the plaintiff sought to renege on the basis that the no-rehire clause was contrary to public policy as expressed in section 16600. The district court rejected this concern, reasoning that section 16600 addresses only "covenants not to compete." But the Ninth Circuit disagreed, holding that the no-rehire clause might constitute a substantial restraint of trade, depending on whether the former employer so dominated emergency medicine in California that the no-rehire clause could

effectively constrain the plaintiff's freedom to practice medicine.[36] The Ninth Circuit declined to rule on the merits, remanding the case for further factual development.

On remand, the district court again found that the "no rehire" provision was not a restraint of a substantial character, and ordered enforcement of the agreement. The plaintiff appealed, and the Ninth Circuit reversed.[37] Reasoning that "a contractual provision imposes a restraint of a substantial character if it significantly or materially impedes a person's lawful profession, trade, or business," the Ninth Circuit held that the provision at issue—forbidding the plaintiff from working at "any [defendant]-contracted facility"—went too far, considering the defendant's large footprint in the relevant market.[38] Thus, "no re-hire" provisions of the sort traditionally found in settlement agreements must be drafted carefully to avoid imposing any substantial restraint on the former employee's profession, trade, or business.

Moreover, as of 2020, the California Legislature has banned virtually all "no rehire" clauses in settlement agreements. Subject to certain specified exceptions, no settlement agreement may restrict a settling "aggrieved person" from obtaining employment with the employer against which that person has filed a claim, or with the employer's parent company, subsidiary, division, affiliate, or contractor. The exceptions are these: (1) The parties may agree to end a current employment relationship; (2) A "no rehire" clause is permissible if the employer has determined, in good faith, that the settling party engaged in sexual harassment or sexual assault. Further, of course, an employer retains its right to deny employment to current employees and job applicants whenever "there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person."[39]

Subsequent legislation in 2020 modified the second exception (where the settling party engaged in certain misconduct). Under this updated law, the employer invoking this exception must have documented its determination of sexual assault or sexual harassment before the settling party filed a claim against the employer. While this new provision narrowed the second exception, another new provision expanded the exception to include "any criminal conduct"—not just sexual harassment or sexual assault.[40]

12.4 Permissible Contractual Restrictions

Section 16600, while broad, is not unlimited. Certain contractual restrictions, while arguably within some unthoughtful notion of a "restraint of trade," are nonetheless enforceable.

12.4.1 Duty of loyalty existing during employment

During employment, employers, even in California, are entitled to their employees' undivided loyalty. This principle was put to the test in a 2020 Court of Appeal decision, which rejected the argument that an employee's promise to his employer not to form a separate, competing company was somehow unenforceable as against California public policy. The Court of Appeal thus affirmed a ruling in favor of Techno Lite, Inc., against former employees found liable for intentional interference with contractual relations, intentional interference with prospective economic advantage, fraud, and unfair competition.

In the underlying case, Techno Lite, a seller of lighting transformers, employed Scott Drucker, who formed Emcod, LLC to operate as a "backup" for Techno Lite customers. Techno Lite allowed Drucker to operate Emcod because he promised that he would run Emcod on his own time, and that Emcod would not compete with Techno Lite in the lighting industry. When Drucker resigned, Techno Lite sued him, alleging that he used Emcod to siphon off Techno Lite's accounts and divert its business to Emcod. Discovery revealed that while Drucker was an employee, emails had gone to Techno Lite customers to switch them over to Emcod, representing that Emcod's owners were in the process of buying out Techno Lite. In affirming judgment for Techno Lite, the Court of Appeal made these observations: [41]

- Business & Professions Code section 16600 does not prevent an employer from limiting employee during employment. California law does not authorize an employee to transfer his loyalty to a competitor. During employment, employers are entitled to their employees' undivided loyalty.
- An employee's promise not to compete with the employer while the employee remains employed is not void.
- While an employee may secretly incorporate a competing business before departing, the employee may not use the employer's time, facilities, or proprietary secrets to build the competing business.
- Soliciting an employer's customers may constitute a violation of the employee's duty of loyalty.
- The Supreme Court's decision in *Edwards v. Arthur Andersen*[42] did not address—much less invalidate—an employee's agreement not to undermine his current employer's business by surreptitiously competing with it while being paid by the employer.
- An employer has no duty to monitor employees for non-compliance with their promise not to compete. Rather, those employees have a duty to disclose their intention to compete.

12.4.2 Covenants not to solicit or raid employees

During employment, an employee, even in California, owes a duty of loyalty to the employer—which can include a duty not to solicit co-workers to leave employment.[43]

A 1985 Court of Appeal decision in *Loral v. Moyes* upheld a limited agreement by an executive not to solicit his former co-workers for a period of time after his employment.[44] Whether such an agreement is valid after the California Supreme Court's 2008 decision in *Edwards v. Arthur Andersen* is unclear. A federal court case applying California law, however, held that provisions forbidding solicitation of employees would remain enforceable if they were limited in duration and scope.[45] (Of course, an anti-raiding provision may be of scant practical comfort to many employers, because former employees—or their new employers—are free to hire people who make unsolicited requests to join the new employer.)

A 2018 Court of Appeal decision dealt a blow to employee non-solicitation agreements, however. An employer had its travel nurse recruiters agree that during their employment and for one year thereafter they would not "directly or indirectly solicit or induce, or cause others to solicit or induce, any employee of the Company … to leave the service of the Company." The employer then sued the former nurse recruiters for breach of contract when they invited their former co-workers to join a competing company.

The Court of Appeal, doubting the "continuing viability" of *Loral v. Moyes*, struck down this non-solicitation provision under section 16600.[46] The Court of Appeal reasoned that even if *Loral* did survive *Edwards*'s broad interpretation of section 16600, the restriction here was not a reasonably narrow restriction with slight effect, but rather would keep the recruiting nurses from competing in their chosen profession.[47]

Some state and federal courts have followed this 2018 Court of Appeal decision and have found non-solicit covenants void, while other courts have continued to apply *Loral*. As part of its updates effective in 2024, the California legislature addressed non-solicitation covenants by amending section 16600 of the Business and Professions Code to provide that it is not limited to contracts where the person being restrained is a party to the contract.[48] This statutory change indicates that such covenants may well be within its ambit and likely puts an end to traditional employee non-solicitation agreements.

12.4.3 Protection of trade secrets

Employers remain free, of course, to contract with their employees to protect employer trade secrets.[49] It may seem superfluous for an employer to contract for protection of trade secrets, when statutory protection for those trade secrets already exists (see § 12.5). But formal employment agreements could help define trade secrets, provide additional deterrents to misappropriation of trade secrets, provide contractual remedies, and call for special procedures to seek trade secret protection, such as a provision for injunctive relief and a provision for prevailing-party attorney fees, at least for certain employees.

But such agreements should be judicious. An "overly restrictive" agreement can "operate as a de facto noncompete provision."[50] In 2020, the Court of Appeal addressed a case involving a company that engaged in a highly computerized form of equities trading known as statistical arbitrage.[51] It sought to protect its information by requiring employees to sign a series of agreements which defined "Confidential Information" so broadly as to prevent employees from ever working again in securities trading, much less in statistical arbitrage. The Court of Appeal held this overly-broad agreement was "void *ab initio* and unenforceable."[52]

12.5 Protection of Trade Secrets

Virtually every state, including California, has enacted the Uniform Trade Secrets Act.[53] The UTSA could forbid a former employee from using the former employer's trade secrets, such as confidential client lists, to solicit clients.[54]

12.5.1 Application to customer lists

Some, but not all, customer lists qualify for protection as trade secrets. Important factors to consider are whether the names are generally known or readily ascertainable to others in the same business, and how much effort one would need to compile the list.[55]

12.5.2 Application to employee identities

A 2018 Court of Appeal decision rejected an employer's effort to sue its former employees (certain traveling nurses) for raiding the employer's employees; the employer claimed that the traveling nurses' names and contact information were trade secrets. This information was not a trade secret, the Court of Appeal held, because the traveling nurses at issue had applied for employment elsewhere before they were recruited by the former-employee-defendants, and their identities were widely known within the industry.[56]

12.5.3 Inapplicability of "inevitable disclosure" doctrine

In many jurisdictions, courts help employers victimized by disloyal departing employees by applying the "inevitable disclosure" doctrine, which holds that an employer can enjoin a former employee from working for a competitor where the employee's duties with the competing employer are such that the employee would inevitably disclose the former employer's trade secrets. In California it's different. The Court of Appeal has rejected the inevitable disclosure doctrine.[57] Employers concerned about theft of trade secrets can, however, use California's version of the Uniform Trade Secrets Act, which authorizes injunctions against threatened misappropriation of trade secrets.[58]

12.5.4 Preemption of common law claims premised on trade secret misappropriation theory?

Formerly, employers could clearly pursue tort claims for employee theft or misuse of company information, even if the misappropriated information was not a trade secret.[59] But California courts have held that the California Uniform Trade Secrets Act (CUTSA) preempts tort claims—such as conversion, breach of loyalty, and tortious interference—that rely on the same nucleus of facts as a trade secret misappropriation claim.[60]

Some federal court decisions have been more kind to employers, holding that the CUTSA does not preempt a tort claim when the claim relies on different facts or theories of liability than those supporting a trade secret claim,[61] and that a CUTSA defendant's motion to dismiss on the basis of CUTSA preemption "cannot be addressed until it is determined whether the allegedly misappropriated information constitutes a trade secret."[62]

But a federal district court has held that the trade secret status of allegedly misappropriated information can be determined on a motion to dismiss, and that the CUTSA preempts an employer's claims for misappropriation of proprietary non-trade secret information unless (1) the information was "made property by some provision of positive law;" or (2) the non-trade secret claims allege "wrongdoing that is material[ly] distinct [from] the wrongdoing alleged in a [C]UTSA claim."[63] The Court of Appeal has provided a narrower interpretation of the CUTSA's preemptive effect, by finding that claims for breach of fiduciary duty, unfair competition, interference with business relations and conversion were not preempted by the CUTSA.[64]

12.5.5 Additional remedy under the federal Defend Trade Secrets Act?

The federal Defend Trade Secrets Act (DTSA) creates a new cause of action for trade secret misappropriation. The DTSA shares some features with the CUTSA, but does not preempt the CUTSA. Among the differences between the federal DTSA and the state CUTSA is that the DTSA does not contain an express preemption provision displacing common law claims based on the misappropriation of trade secrets.

But it remains questionable that a California DTSA plaintiff could pursue state tort claims based on taking confidential information, because tort claims may be preempted by the CUTSA, regardless of whether a CUTSA claim is actually pleaded.[65] In any event, the DTSA has allowed employers to sue in federal court for trade secret theft where they may been limited to state court before.

12.6 Preventing Data Theft with the Computer Fraud and Abuse Act?

Until recently, California employers could augment trade secret claims against former employees with claims brought under the federal Computer Fraud and Abuse Act.[66] Although a criminal statute, the CFAA authorizes civil remedies for certain violations, including unauthorized access of computer systems to steal company data. The CFAA has enabled employers to obtain injunctions requiring the return of stolen data and the recovery of the employer's investigation costs, regardless of whether the misappropriated information was a trade secret.

So it was that a Ninth Circuit panel, in *United States v. Nosal*, held that a former employee "exceeds authorized access" to data on the employer's computer system under the CFAA where the employee takes actions on the computer that are contrary to the employer's written policies on acceptable use, such as prohibitions against copying files to help a third party compete with the employer.[67]

But then the Ninth Circuit, *en banc*, held that so long as the employer has authorized an employee to use the computer, there is no CFAA liability for taking information from the company database, even if that action violated company policy.[68] *Nosal* makes California and other states within the Ninth Circuit peculiar in that *Nosal* rejects the views of three other circuits that have permitted employers to pursue CFAA claims against employees who violate computer-use policies or who violate their duties of loyalty.[69]

The U.S. Supreme Court recently held, however, that an individual does not "exceed authorized access" within the meaning of the CFAA by misusing access to obtain information that is otherwise available to that person, consistent with the Ninth Circuit approach outlined in *Nosal*. [70]

But *Nosal* left open the possibility of viable claims against former employees who, after leaving the company's employ, have gained gain unauthorized access to company computers. A federal jury eventually convicted Nosal

under the CFAA for conspiring with other former employees to use the password of a current company employee (Nosal's former secretary) to access his former employer's computers.

The Ninth Circuit affirmed the conviction, finding that the statutory definition of "without authorization" was unambiguous, and that "[u]nequivocal revocation of computer access closes both the front door and the back door" to protected computers, thus making use of a password shared by an authorized system user to circumvent the revocation of the former employee's access a crime.[71]

12.7 California Penal Code Section 502: An Alternative to the CFAA

In 2015, the Ninth Circuit, while remaining hostile to CFAA claims against employees who have "exceeded authorized access" to employer computers, identified an alternative to the CFAA. In *United States v. Christensen*,[72] six individuals, convicted of computer fraud, bribery, racketeering, wiretapping, and identity theft, got their CFAA convictions vacated on the ground that the CFAA addresses restrictions on access to information, not restrictions on use. But *Christensen* also analyzed Penal Code section 502, essentially the state law equivalent to the CFAA. The Ninth Circuit noted that section 502 "does not require *unauthorized* access. It merely requires *knowing* access."[73]

The Ninth Circuit noted that "the term access … includes logging into a database with a valid password and subsequently taking, copying, or using the information in the database improperly."[74] Like the CFAA, Penal Code section 502 provides for a civil remedy.[75]

---

1 Bus. & Prof. Code § 16600. The narrow statutory exceptions pertains to limited transactions described in Business & Profession Code sections 16601 (sale of a business), 16602 (departure of a partner from a partnership), and 16602.5 (termination of interest in a limited liability company).

2 Bus. & Prof. Code § 16600 (b)(1).

3 Bus. & Prof. Code § 16600.1 (b)(1).

4 *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008) (invalidating provision in employer's proposed separation agreement that would have prohibited former employee from performing services for certain clients, because that restraint—even though narrow and leaving a substantial portion of the market open to the former employee—exceeded statutory protections for trade secrets, and rejecting "narrow restraint" exception articulated by Ninth Circuit as a misreading of California law).

5 Bus. & Prof. Code §§ 16601 (corporations), 16602 (partnerships), 16602.5 (limited liability corporations).

6 *Ixchel Pharma, LLC v. Biogen, Inc.*, 9 Cal. 5th 1130 (2020).

7 *Twentieth Century Fox Film Corp. v. Netflix, Inc.* No. B304022, 2021 WL 5711822 (Cal. App. 5th Dec. 2, 2021) (unpolished and not citable in California courts).

8 *Id*.

9 *Kolani v. Gluska*, 64 Cal. App. 4th 402 (1998) (broad covenant not to compete cannot be saved from illegality by giving it a narrowed construction).

10 *Dowell v. Biosense Webster, Inc.*, 179 Cal. App. 4th 564 (2009).

11 *The Retirement Grp. v. Galante*, 176 Cal. App. 4th 1226, 1238 (2009) (relying on Bus. & Prof. Code § 16600).

12 *Id.*

13 *Application Grp. Inc. v. Hunter Grp. Inc.*, 61 Cal. App. 4th 881, 885 (1998) (permitting employee signing covenant in Maryland to challenge the covenant upon moving to California while working for same employer, because California's strong policy in protecting movement of employees invalidates noncompete covenant even though it was valid under Maryland law).

14 *See Advanced Bionics Corp. v. Medtronic, Inc.*, 29 Cal. 4th 697 (2002) (former employee moved to California to work for California employer and sued in California court one day before former employer sued in Minnesota).

15 *Application Grp., Inc. v. Hunter Grp., Inc.*, 61 Cal. App. 4th 881 (1998) (California and Maryland litigants disputing whether noncompete covenant was valid).

16 *See, e.g., Harstein v. Rembrandt IP Sols.*, 2012 WL 3075084 (N.D. Cal. 2012) (granting defendant's motion to dismiss for improper venue, even if the Pennsylvania forum called for in the employment agreement could cause a different legal outcome in the plaintiff's action for declaratory relief to invalidate a covenant to compete); *AJZN, Inc. v. Yu*, 2013 WL 97916 (N.D. Cal. 2013).

17 *Meras Eng'g, Inc., v. CH20, Inc.*, 2013 WL 146341 (N.D. Cal. 2013) (locating the forum in the state of Washington would not dictate that Washington's substantive law would apply).

[18] *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568 (2013).

[19] *Id*. at 583.

[20] Bus. & Prof. Code § 16601 ("sale of a business" exception).

[21] *Fillpoint, LLC v. Maas*, 208 Cal. App. 4th 1170 (2012).

[22] *Blue Mountain Enters., LLC v. Owen*, 74 Cal. App. 5th 537 (2022).

[23] *Id.* at 544.

[24] *Id.*

[25] *Wanke, Indus., Com., Residential, Inc. v. Superior Ct.*, 209 Cal. App. 4th 1151 (2012).

[26] Bus. & Prof. Code § 16600.1.

[27] *VL Sys., Inc. v. Unisen, Inc.*, 152 Cal. App. 4th 708, 714 (2007).

[28] *Id.* at 716.

[29] *Id.* at 718. *See also Siricom v. Ebislogic, Inc.*, 2012 WL 4051222 (N.D. Cal. Sept. 13, 2012) (section 16600 voids contract by which one company agreed not to solicit employees working for the other contracting company; Supreme Court's *Edwards* decision forecloses continued reliance on *Webb v. West Side Dist. Hosp.*, 193 Cal. App. 3d 946, 951(1983), which upheld, under a "rule of reason," an agreement that required a hospital to pay an additional fee it if directly hired any doctor originally placed there by a staffing company).

[30] *Ixchel Pharma, LLC v. Biogen, Inc.*, 9 Cal. 5th 1130 (2020).

[31] *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.,* 9 F.4th 1102 (9th Cir. 2021).

[32] *Walia v. Aetna, Inc.,* 93 Cal. App. 4th 1213 (2001) (upholding $1.26 million award for salesperson dismissed for refusing to sign agreement with noncompete covenant; "California public policy condemns non-compete agreements. Walia was presented with one, she refused to sign it and, as a consequence of this refusal, she was fired. A *Tameny* claim [for tortious dismissal in breach of public policy] occurs when an employer discharges an employee for refusing to do something that public policy condemns."); see *also Thompson v. Impaxx, Inc.*, 113 Cal. App. 4th 1425 (2003); *D'Sa v. Playhut, Inc.*, 85 Cal. App. 4th 927 (2000) (non-solicitation clauses are allowable only when they protect trade secrets or confidential proprietary information); *Siricom v. Ebislogic, Inc.,* 2012 WL 4051222 (N.D. Cal. 2012) (including invalid noncompete covenant in vendor contract was unfair business practice Business & Profession Code section 16600).

[33] *Silguero v. Creteguard, Inc.*, 187 Cal. App. 4th 60, 66 (2010) (the plaintiff—fired by a new employer because his employment breached a noncompetition agreement he had signed with his old employer—could pursue "a *Tameny* claim for wrongful termination in violation of the public policy in section 16600 prohibiting noncompetition agreements").

[34] *Id.* at 70.

[35] *Golden v. Cal. Emergency Physicians Med. Grp.*, 782 F.3d 1083, 1090 (9th Cir. 2015).

[36] *Id.* at 1092-93.

[37] *Golden v. Cal. Emergency Physicians Med. Grp.*, 896 F.3d 1018 (9th Cir. 2018).

[38] *Id*. at 1026 ("This interference with Dr. Golden's ability to seek or maintain employment with third parties easily rises to the level of a substantial restraint, especially given the size of CEP's business in California.").

[39] AB 749, 2019 bill adding Civ. Proc. Code § 1002.5. Subsection (c) offers these definitions: (1) an "aggrieved person" is someone who has filed a claim against the person's employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process; (2) "sexual assault" is conduct that would constitute a crime under various sections of the Penal Code, assault with intent to commit any of those crimes, or an attempt to commit any of those crimes; (3) "sexual harassment" is sexual harassment as defined in FEHA.

[40] AB 2143, 2020 bill amending Civ. Proc. Code § 1002.5. Section 1002.5 now reads:

(a) An agreement to settle an employment dispute shall not contain a provision prohibiting, preventing, or otherwise restricting a settling party that is an aggrieved person from obtaining future employment with the employer against which the aggrieved person has filed a claim, or any parent company, subsidiary, division, affiliate, or contractor of the employer. A provision in an agreement entered into on or after January 1, 2020, that violates this section is void as a matter of law and against public policy.

(b) Nothing in subdivision (a) does any of the following:

(1) Preclude the employer and aggrieved person from making an agreement to do either of the following:

(A) End a current employment relationship.

(B) Prohibit or otherwise restrict the settling aggrieved person from obtaining future employment with the settling employer, if the employer has made and documented a good faith determination, before the aggrieved person filed the claim that the aggrieved person engaged in sexual harassment, sexual assault, or any criminal conduct.

(2) Require an employer to continue to employ or rehire a person if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person.

(c) For purposes of this section:

(1) "Aggrieved person" means a person who, in good faith, has filed a claim against the person's employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process.

(2) “Sexual assault” means conduct that would constitute a crime under section 243.3, 261, 262, 264.1, 286, 287, or 289 of the Penal Code, assault with the intent to commit any of those crimes, or an attempt to commit any of those crimes.

(3) “Sexual harassment” has the same meaning as in subdivision (j) of section 12940 of the Government Code.

[41] *Techo Lite, Inc. v. Emcod, LLC*, 44 Cal. App. 5th 462 (2020).

[42] *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008) (invalidating provision in employer’s proposed separation agreement that would have prohibited former employee from performing services for certain clients, because that restraint—even though narrow and leaving a substantial portion of the market open to the former employee—exceeded statutory protections for trade secrets, and rejecting “narrow restraint” exception articulated by Ninth Circuit as a misreading of California law).

[43] *Bancroft-Whitney v. Glen*, 64 Cal. 2d 327 (1966) (managers may not take steps to set up competing business); *GAB Bus. Servs. v. Lindsey & Newsom Claim Servs.*, 83 Cal. App. 4th 409 (2000) (company officer liable for breach of fiduciary duty for using inside knowledge of employee skills and salaries to recruit employees for employer’s competitor).

[44] *Loral v. Moyes*, 174 Cal. App. 3d 268, 275, 279 (1985) (employer could not keep departing employee from competing, but could reasonably limit how he can compete; the contractual “restriction only slightly affects employees. They are not hampered from seeking employment with [the defendant’s new employer] nor from contacting [the defendant]. All they lose is the option of being contacted by him first.”).

[45] *Thomas Weisel Partners LLC v. BNP Paribas*, 2010 WL 546497, at *8 (N.D. Cal. 2010).

[46] *AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc.*, 28 Cal. App. 5th 923, 938 (2018) (*Loral*’s “use of a reasonableness standard to analyze a non-solicitation clause appears to conflict with *Edwards*’s interpretation of Section 16600, which reads the plain language of the statute to prevent a former employer from restraining a former employee from engaging in the employee’s ‘lawful profession, trade, or business of any kind,’ absent statutory exceptions not germane here”).

[47] *Id.* at 937-39 (unlike the former employee in *Loral*—an executive officer—the individual defendants in *AMN Healthcare* were nurse recruiters, so that the effect of the non-solicitation clause would not just restrict competition in a limited way but would restrain former employees from engaging in their chosen profession).

[48] Bus. & Prof. Code § 16600.

[49] *Readylink Healthcare v. Cotton*, 126 Cal. App. 4th 1006, 1022 (2005) (“Misappropriation of trade secrets information constitutes an exception to section 16600.”).

[50] *Brown v. TGS,* 57 Cal. App. 5th 303, 319 (2020).

[51] *Id.* at 306.

[52] *Id.* at 319.

[53] Civ. Code § 3426 et seq.

[54] *Reeves v. Hanlon,* 33 Cal. 4th 1140 (2004).

[55] *Morlife, Inc. v. Perry*, 56 Cal. App. 4th 1514 (1997).

[56] *AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc.*, 28 Cal. App. 5th 923 (2018).

[57] *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443 (2002).

[58] Civ. Code § 3426.2(a); *Central Valley Gen. Hosp. v. Smith*, 162 Cal. App. 4th 501 (2008).

[59] *Courtesy Temp. Serv., Inc. v. Camacho*, 222 Cal. App. 3d 1278, 1292 (1990) (“cases are legion holding that a former employee’s use of confidential information obtained from his former employer to compete with him and to solicit the business of his former employer’s customers is regarded as unfair competition”); *Bancroft-Whitney Co. v. Glen*, 64 Cal. 2d 327, 351 (1966) (unfair competition and breach of fiduciary duty claims involving disclosure of employee’s salary to competitor are actionable “even if the information regarding salaries is not deemed to be confidential”).

[60] *Silvaco Data Sys. v. Intel Corp.*, 184 Cal. App. 4th 210 (2010) (citing Civ. Code § 3426.7(b)); *K.C. Multimedia, Inc. v. Bank of Am. Tech. & Ops., Inc.*, 171 Cal. App. 4th 939 (2009).

[61] *Amron Int’l Diving Supply, Inc. v. Hydrolinx Diving Commc’n, Inc.*, 2011 WL 5025178 (S.D. Cal. Oct. 21, 2011). *See also Think Village-Kiwi, LLC v. Adobe Sys., Inc.*, 2009 WL 902337, at *2 (N.D. Cal. April 1, 2009) (claims for misappropriation and breach of confidence not superseded to extent that plaintiff is pleading in the alternative that the stolen information might be proprietary but not a trade secret); *Ali v. Fasteners for Retail, Inc.*, 544 F. Supp. 2d 1064, 1072 (E.D. Cal. 2008).

[62] *Amron Int’l Diving Supply, Inc. v. Hydrolinx Diving Commc’n, Inc.*, 2011 WL 5025178 (S.D. Cal. Oct. 21, 2011) (existence of trade secret is question of fact not subject to motion to dismiss). *See also Leatt Corp. v. Innovative Safety Tech., LLC*, 2010 WL 2803947, at *6 (S.D. Cal. July 15, 2010) (“Plaintiffs’ unfair competition and tortious interference claims are not preempted by the UTSA to the extent they depend on the misappropriation of otherwise confidential or proprietary, but not trade secret, information as well as upon knowledge of Plaintiffs’ prospective business relationships.”).

[63] *SunPower Corp. v. Solarcity Corp.*, 2012 WL 6160472 (N.D. Cal. Dec. 11, 2012).

[64] *Angelica Textile Servs., Inc. v. Park*, 220 Cal. App. 4th 495, 507-09 (2013).

[65] *See, e.g., Total Recall Techs. v. Luckey*, 2016 WL 19979, at *8 (N.D. Cal. Jan. 16, 2016) (granting 12(b)(6) motion to dismiss common law claims as preempted, notwithstanding that plaintiff “[b]y strategy … has studiously avoided assertion of any trade secret claims”).

[66] 18 U.S.C. §§ 1030 *et seq*.

[67] 642 F.3d 781, 785, 787-89 (9th Cir. 2011). The defendant was a former employee of an executive search company who left to start a competitor and then convinced former co-workers—still with the company—to access the company's confidential database to send him client information. These co-workers had authorized access to the database, but in forwarding the information were violating a company policy against disclosing confidential information.

[68] *United States v. Nosal*, 676 F.3d 854 (2012) (en banc).

[69] The court stated: "We remain unpersuaded by the decisions of our sister circuits [the Fifth, Seventh, and Eleventh] that interpret the CFAA broadly to cover violations of corporate computer use restrictions or violations of a duty of loyalty."

[70] *Van Buren v. United States,* 141 S. Ct. 1648, 1652-62 (2021).

[71] *United States v. Nosal*, 844 F.3d 1024, 1028 (9th Cir. 2016).

[72] *United States v. Christensen*, 828 F.3d 763 (9th Cir. 2015).

[73] *Id*. at 789 (emphasis in original).

[74] *Id*.

[75] Pen. Code § 502(e)(1).

13. Procedural Quirks Regarding Termination of Employment and Post-Termination

13.1 Cal-WARN Act

The federal Worker Adjustment and Retraining Notification Act of 1988[1] requires employers to provide 60 calendar days of notice regarding plant closings and mass layoffs. Not to be outdone, California in 2002 enacted its own WARN act. The scope of Cal-WARN exceeds the scope of federal WARN in two major respects: (1) Cal-WARN applies to companies that are too small to be covered by WARN, and (2) Cal-WARN applies to business decisions affecting groups of employees that are too small to be covered by WARN. (For a summary of these and other differences between California and federal WARN law, see § 13.1.4.)

California employers who implement a mass layoff or relocate or terminate operations at any industrial or commercial facility at which they have employed 75 or more persons within the preceding 12 months must first give the affected employees 60 days of notice. “Employees” includes some temporary and seasonal as well as part-time employees. An “employee” is one who has been employed for at least six of the 12 months preceding the triggering event.

A “mass layoff” means a layoff during any 30-day period of 50 or more employees at a covered establishment. A “relocation” is the removal of all or substantially all of the operations at the facility to a different location 100 miles or more away. “Termination” is the cessation or substantial cessation of the operations of the facility. Does the mass transfer of employees from one employer to another, with no other change in the terms and conditions of employment, constitute a “layoff”? One California appellate court has said no: a layoff under Cal-WARN is “a separation from a position for lack of funds or lack of work,”[2] and that language did not apply where employees continued to work as they had before.[3] The Court of Appeal, upholding a judgment against an employer for more than $200,000, held that “mass layoffs” could include four- to five-week furloughs, even though the term “mass layoff” in the federal WARN statute includes only layoffs that involve employment losses exceeding six months.[4]

13.1.1 Recipients of notice

The notice must go to (a) the affected employees, (b) the EDD, (c) the local workforce investment board, and (d) the chief elected officer of each city and county government within which the triggering event occurs. The notice should also include the elements required under the federal WARN Act.[5]

13.1.2 Exemptions

Cal-WARN exempts employees in the broadcasting, motion picture industries, and certain occupations in the drilling, logging, and mining industries, if those employees were hired with the understanding that their employment was limited to the duration of a particular project. The law also does not apply to those employed in seasonal jobs, if they were hired with the understanding that the job was seasonal and temporary.

Before the Covid-19 pandemic, there were three exigent-circumstances exceptions to the law’s requirements. The first was for “physical calamity,” the second was for “act of war,” and the third was for situations where the employer actively seeks capital or business to avoid or postpone a relocation or termination, and where the employer reasonably and in good faith believed that giving 60 days’ notice would preclude the employer from

obtaining the capital or business. This third exemption applies only to relocations and terminations, not mass layoffs. To claim this exemption, the employer must give the EDD documentation under penalty of perjury.

The Covid-19 pandemic temporarily altered the exemption landscape. In March 2020, Governor Gavin Newsom issued an Executive Order allowing California employers to avail themselves of the "unforeseeable business circumstances" exception to the notice requirement that previously was available only under the federal WARN Act.[6] The Executive Order suspended Cal-WARN's 60-day notice requirement where the triggering termination, relocation, or layoff resulted from Covid-related business circumstances that were not reasonably foreseeable at the time notice would have been required. The Governor's Executive Order was in effect March 4, 2020 and ended on July 1, 2021. This exercise of executive power suggests future governors may employ similar measures in cases of emergency that cause significant layoffs statewide.

13.1.3 Remedies for violation

A non-complying employer is liable to each affected employee for back pay and the value of benefits lost, for a period of up to 60 days. This liability is subject to offsets for payments made by the employer as separation wages or continued benefits during the period. The employer is also subject to a civil penalty of not more than $500 for each day of the violation, but this penalty is not imposed if the employer pays the employees what is due within three weeks of the triggering event. The penalty may also be reduced if the employer can prove that it acted in good faith. Affected employees, local governments, and employee representatives may sue employers under Cal-WARN, and prevailing plaintiffs may recover attorney fees.

13.1.4 Rules for call centers

Amendments to Cal-WARN effective in 2023 prohibit a call center employer from ordering a relocation of its call center, or one or more facilities or operating units within a call center comprising at least 30 percent of the call center's or operating unit's total volume when measured against the average call volume for the previous 12 months, outside the United States without providing at least 60 days prior notice.[7]

13.1.5 Comparing Cal-WARN with federal law

Cal-WARN differs in some material respects from the federal WARN Act, creating compliance traps for employers that plan reductions in force while having only federal law in mind.

Issue	Federal Law	California Law
Employer responsible for notice	The employer	The company and any parent corporation ordering the reduction in force.
Definition of employer	Employer of 100 full-time employees or full- and part-time employees who work 40 or more hours weekly	Employer of 75 full- or part-time employees at establishment (any industrial or commercial facility) during the 12 months preceding the date on which notice is required.

Issue	Federal Law	California Law
Triggering event	Plant closing affecting 50+ employees during a 30-day period; mass layoff of 500+ employees during a 30-day period, or layoff of 50+ employees constituting at least one-third of the active workforce; or, if employment losses during a 30-day period fail to meet those thresholds, employment losses for multiple groups of workers that, when aggregated, meet the threshold level during any 90-day period through either a plant closing or mass layoff, unless employment losses during the 90-day period resulted from separate and distinct actions and causes.	Layoff within any 30-day period of 50 or more employees, or cessation (or substantial cessation) of all (or substantially all) operations of a covered establishment, or relocation of operations of a covered establishment to a different location 100 or more miles away.
Definition of "employment loss"	An employment termination other than a discharge for cause, a withdrawal or resignation, or a retirement; a layoff exceeding six months; or a reduction in work hours of a specified amount.	For a mass layoff, a separation from a position for lack of funds or lack of work, with no stated minimum length of separation.
Exceptions	Exceptions include business circumstances "not reasonably foreseeable" and the sale of a going business	Generally no exception for business circumstances "not reasonably foreseeable" or for sale of business (except as interpreted under case law), but California has adopted the federal WARN exception for business circumstances "not reasonably foreseeable" relating to the Covid-19 pandemic through the end of the declared State of Emergency.
Those to be notified	Affected employees, union representative, state displaced worker's unit, local government	Affected employees, EDD, local work force investment board, city elected official, chief county elected official.

13.2 Notices Required

13.2.1 Notification of all continuation, disability extension, and conversion coverage options

California employers must notify terminating employees of all continuation, disability extension, and conversion coverage options under any employer-sponsored coverage for which the terminating employee may remain eligible after employment ends.[8]

13.2.2 Health Insurance Continuation Notices (Cal-COBRA)

Employers with 2-19 employees covered by Cal-COBRA must give terminating employees and their qualified beneficiaries timely notice of their rights to continuation coverage under Cal-COBRA. Employees covered by federal COBRA and their qualified beneficiaries must get a COBRA election notice after a qualifying event (including termination of the covered employee) and another election notice (when exhaustion of their federal COBRA approaches) to enroll in Cal-COBRA for an additional period of continued health insurance benefits beyond the federal COBRA period. (See § 8, Employee Benefits.)[9]

13.2.3 EDD Change of Status

California employers must provide employees who are terminating employment, either voluntarily or involuntarily, with written notice of the change of employment relationship and the employee's potential entitlement to unemployment compensation benefits.[10] This form must be provided immediately upon termination.

13.2.4 HIPP notice

Under the California Health Insurance Premium Program (HIPP), California employers with 20 or more employees must give a HIPP notice to terminating employees with health insurance. The form is available from the State Department of Health Services.[11]

13.3 Final Pay Checks

13.3.1 Time of payment

California employers generally must pay discharged employees in full on the day of discharge. An employee without a written contract for a definite period who resigns must be paid within 72 hours of the notice of resignation. (See § 7.5, Wage Payment Rules.)

13.3.2 Wages due

The final check must include all wages earned and unpaid.[12] "Wages" includes all amounts for labor performed by employees of every description, whether the amount is determined by time, task, piece, commission, or other method of calculation.[13] Vested vacation is paid "as wages" to the terminating employee.[14] Wages do not include employee business expenses.[15] Where wages are not calculable until after termination, the employer must pay the wages as soon as the amount is ascertainable.[16]

13.3.3 Paying all accrued used vacation pay

See § 7.19, Vacation Pay.

13.3.4 Penalties

Willful failure to fully pay a discharged or resigning employee can result in substantial "waiting time" penalties under Labor Code section 203. As to any amount owed but unpaid, the employer's defense for failure to pay promptly is limited.

"Willful" for the purpose of assessing a penalty does not require a refusal to pay, an evil motive, or a purpose to defraud workers; "willful" merely means that there was a failure to pay that was within the employer's control.[17] Inability to pay is not a defense.[18] The employer's ignorance of the requirement to pay is also not a defense.[19] Where the wages are not calculable until after termination, waiting-time penalties would begin to run when the employer knows the ascertainable amount and fails to pay.[20]

Courts and the DLSE have rejected a defense of "conditional payment" (i.e., an employer promises to pay the employee as soon as the employer is paid from another source, such as a general contractor).[21] The penalty imposed is an amount not exceeding 30 working days of pay. (See § 7.5.)

Further penalties may be due if the employer fails to pay after a Labor Commissioner hearing. If the Labor Commissioner finds that the employee's claim for wages is valid, then the claim is due and payable within 10 days after receipt of notice by the employer that the wages are due. An employer who has the ability to pay and who willfully refuses to pay those wages within 10 days will be subject to an additional penalty of treble the amount owed.[22]

13.4 Separation Agreements

13.4.1 Limitations on broad releases of claims

Settlement agreements, including severance or separation agreements presented to some employees upon termination of employment, typically provide for a general release of any claims the former employee may have against the employer. California imposes obstacles to the use of broad release language.

Waiver of unknown claims. A California statute provides that a general release does not include unknown claims.[23] That is why California settlement agreements often contain explicit language purporting to waive the protection of this statutory provision.

Waiver of unwaivable statutory protections. Courts often uphold a general release of "any and all claims and causes of action" as not applying to claims that, as a matter of law, cannot be waived. The Court of Appeal held that this kind of language impermissibly purports to waive a former employee's unwaivable right to indemnification,[24] and that the employer's insistence on this general release, with no appropriate carve-out, violated public policy.[25]

The California Supreme Court, fortunately, ruled that such a superfluous carve-out was unnecessary: a contract provision whereby an employee releases "any and all" claims does not encompass nonwaivable statutory protections.[26] Employers generally have finessed the issue with release language specifying what had always seemed obvious—that the release agreement does not cover any right that, as a matter of law, cannot be waived.

Employers should, however, take note that as of January 1, 2024, California law explicitly voids any noncompete provision in an employment contract unless it meets the narrow exceptions of Business and Professions Code section 16600 *et seq*.[27] Furthermore, employers are subject to a February 14, 2024, deadline to notify current and former employees who had signed an employment agreement containing a noncompete provision that it was now void in the state.

13.4.2 Release of claims for wages

Employers settling accounts with a departing employee often consider making the payment of a bonus, or other deferred compensation, a part of the settlement package, in an effort to gain additional leverage over the employee. This practice can backfire in California. Labor Code section 206.5 makes it a misdemeanor for an employer to "require the execution of any release of any claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of such wages has been made." Any such release is null and void.[28]

The Court of Appeal has recognized, however, that enforceable agreements can settle wage claims so long as there was a "good faith dispute" as to whether the wages were owed.[29]

13.4.3 Release of USERRA claims

Federal USERRA claims[30] can be released, much like other statutory claims, so long as the release of the USERRA claim is "clear, convincing, specific, unequivocal, and not under duress."[31] But not in California. One Court of Appeal decision ruled, without careful analysis, that a broad release of state and federal claims was unenforceable as to USERRA claims.[32] The plaintiff learned of his dismissal upon returning to work from a military leave. He signed an agreement that promised him six weeks' salary in exchange for his release of claims under any "federal or state law … relating to claims or rights of employees." The plaintiff signed the agreement to get the money and then sued under USERRA.

Although the trial court found that he had released his USERRA-based wrongful termination and contract claims, the Court of Appeal reversed, relying on no authority other than a mechanical reading of the statutory language that USERRA "supersedes any ... contract, agreement … or other matter that reduces, limits, or eliminates in any manner any [USERRA] right or benefit."[33]

13.4.4 Restrictions on limitations on testimony

No provision in a California "contract or settlement agreement" can waive a party's right to testify in a legal proceeding about "alleged criminal conduct or alleged sexual harassment" perpetrated by the other contracting party or its agents or employees where the party has been required or requested to attend the proceeding by a court order, a subpoena, or a written legislative or administrative request.[34] (See §§ 6.5.13, 20.1.)

13.4.5 Limitations on non-disclosure provisions in sexual harassment settlements

No provision in a California agreement to settle a legal complaint can prohibit disclosure of "factual information" related to a claim filed in that proceeding if the information is "regarding" (1) sexual assault, (2) sexual harassment, (3) workplace harassment or discrimination, (4) failure to prevent discrimination or harassment in the workplace, or (5) retaliation for reporting or opposing harassment or discrimination in the workplace.[35] The "amount paid" to resolve any complaint may still be kept confidential.[36] The law is silent on keeping non-monetary settlement terms confidential.

Unless a government agency or "public official" is a party, it is permissible to prevent the disclosure of "all facts" regarding alleged sexual harassment or discrimination that would lead to the discovery of the claimant's identity (including court filings), if the claimant requests confidentiality.[37]

13.4.6 Limitations on no-rehire provisions

Agreements to settle employment disputes in California cannot prohibit, prevent, or otherwise restrict an aggrieved settling party from obtaining future employment with the employer complained against, or with that employer's parent company, subsidiary, division, affiliate, or contractor. The parties may, nevertheless, enter into an agreement to end a current employment relationship.[38] (See § 12.3.)

The restriction also does not apply if the employer has made and documented a good faith determination, before the aggrieved person filed the claim, that the aggrieved person engaged in sexual harassment, sexual assault, or any criminal conduct. And an employer need not employ or rehire any individual if the employer has a legitimate non-discriminatory or non-retaliatory reason to terminate the employment relationship or deny rehire to that individual.[39]

13.4.7 Separation agreements

Separation agreements requiring a second release after a period of continued employment (including leave) can be problematic, because California employers must not require employees—either as a condition of employment, or in exchange for a raise or bonus, or as a condition of continuing employment—to agree to any of the following:

- A statement that the employee has no FEHA claim against the employer.
- A release of the right to pursue a FEHA claim or to notify a governmental entity of the claim.
- An agreement (such as a nondisparagment clause) not to disclose" information related to conditions in the workplace.[40] As amended by SB 331, effective January 1, 2022, nondisparagment clauses and similar contractual provisions must include (in substantial form): "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or

discrimination or any other conduct that you have reason to believe is unlawful."[41]. Information about unlawful acts in the workplace is broadly defined to include information pertaining to harassment or discrimination or any other conduct that the employee has reasonable cause to believe is unlawful.[42]

These restrictions could complicate once-common agreements contemplating one release upon signing, a short-term continuation of employment, and then a second release covering all claims through the date of separation.

SB 331 also added provisions to Government Code section 12964.5 specifically applicable to separation agreements. In addition to adding the language above to non-disparagement/nondisclosure provisions, an employer offering an employee or former employee a separation agreement must notify the employee of the right to consult an attorney and provide the employee with "a reasonable time period of not less than five business days" to do so. Employees may sign earlier as long as the decision to sign earlier is knowing and voluntary, not induced through employer fraud or misrepresentation or inspired by a threat to withdraw or alter the offer (or by providing different terms to employees who sign earlier).[43]

These restrictions do not apply to provisions in a negotiated settlement agreement that releases a FEHA claim the employee has filed with a court, administrative agency, ADR forum, or through the employer's internal complaint process.[44] "Negotiated" means that the agreement is voluntary, deliberate, and informed, that the agreement provides consideration of value to the employee, and that the employee is given notice and an opportunity to retain an attorney or is represented by an attorney.[45]

13.5 Worker Retention Laws

Grocery store employers are subject to certain 90-day employee-retention requirements in the event of a change in control of a grocery store. In 2019, the City of Santa Monica enacted retention protections for workers in the hotel industry, except where those rights have been waived by a collective bargaining agreement.[46] Following a qualifying change of control at a hotel, a successor employer must offer eligible hotel employees at least ninety days of employment, during which the employer cannot terminate the employee except for good cause based on individual performance or conduct.[47] Exceptions to the requirement to hire employees from the incumbent hotel employer include (1) managerial, supervisory, or confidential employees, (2) if the successor hotel employer has reasonable and substantiated cause not to retain that eligible hotel worker based on individual performance or conduct while employed by the incumbent hotel employer, and (3) if the successor employer requires fewer hotel workers than the incumbent hotel employer.[48] At the end of the hotel worker retention period, a successor hotel employer must provide a written performance evaluation to each retained hotel worker. If the hotel worker's performance was satisfactory, the successor hotel employer must consider offering the hotel worker continued employment.[49] Enforcement is available via civil action by an aggrieved person or the city, and remedies that include, among others, actual damages, an injunction, civil penalties, and attorney fees.[50] For other worker retention and staffing requirements, see § 7.23.

13.6.1 Recall Rights

In 2021, the legislature enacted SB 93, which addressed Covid 19-related layoffs and subsequent recall rights in the hospitality industry.[51] The "employers" affected by the bill are those who own or operate an "enterprise," which is defined as a hotel, private club, event center (e.g., concert halls, stadiums, sports arenas, racetracks, coliseums, and convention centers), airport hospitality operation, airport service provider, or the provider of building service (i.e., janitorial, building maintenance, or security services) to office, retail, or other commercial buildings.[52] The law benefits laid-off employee whose most recent separation from active service was due to a reason related to the Covid-19 pandemic, including a public health directive, government shutdown order, lack of business, a reduction in force, or other economic, nondisciplinary reason.[53] Among other obligations, the statute decrees that within five business days of establishing a position, a covered employer must offer its laid-off

employees all job positions that become available for which the laid-off employees are qualified. A laid-off employee is qualified for a position if the employee held the same or similar position at the enterprise at the time of the employee's most recent layoff with the employer.[54] The statute calls for enforcement through the DLSA.[55] The statute is waivable through a collective bargaining agreement.[56] SB 93 will sunset on December 31, 2024.

Employees working in the City of Santa Monica who were laid off for economic, non-disciplinary reasons by employers whose worksites are located in designated areas of the city and generate sufficient revenue, are entitled to be recalled if they meet certain criteria.[57] A laid-off employee must be given an renewed offer of employment if the employee held the same or similar position at the same site of employment at the time of the employee's most recent separation from active service with the employer, or is or can be qualified for the position with the same training that would be provided to a new employee hired into that position.[58] The ordinance also specifies which qualified employees deserve preference.[59] The terms of this ordinance can be waived by collective bargaining agreement, and violations of the ordinance are enforceable by civil action, including an action by the City, with remedies that include an injunction, attorney fees, and punitive damages.[60]

---

1 29 U.S.C. §§ 2101-2109.

2 *Int'l Bhd. of Boilermakers v. Nassco Holdings, Inc.*, 17 Cal. App. 5th 1105 (2017); Lab. Code § 1400.5(d).

3 *MacIsaac v. Waste Mgmt. Collection & Recycling, Inc.,* 134 Cal. App. 4th 1076 (2005).

4 *Int'l Bhd. of Boilermakers v. Nassco Holdings, Inc.*, 17 Cal. App. 5th 1 at 1117 ("the entire thrust of the legislative effort in enacting the California WARN Act was to provide greater protection to California workers than was afforded under the federal law").

5 Lab. Code § 1401(b).

6 Executive Order N-31-20.

7 Lab. Code §§ 1409-1413.

8 Lab. Code § 2808(b) (employers must give notice of all continuation, disability extension, and conversion coverage); see also Lab. Code § 2800.2(a) (employers are solely responsible for notification of conversion coverage rights from group coverage to individual coverage under the Insurance Code (insured plans) and Health and Safety Code (HMOs)).

9 Lab. Code § 2807(a); *see also* Health & Safety Code §§ 1366.20 et seq. and § 1366.25 (notices).

10 Unempl. Ins. Code § 1089; 22 Cal. Code Regs. § 1089-1.

11 Lab. Code § 2807(b). See Health Insurance Premium (HIPP) Notice to Terminating Employees (DHCS form 9061). This notice must be provided if the terminating employee is eligible for Company-provided health insurance benefits. The form is available on-line at the California Department of Health Services website, https://www.dhcs.ca.gov/services/Documents/DHCS-9061.pdf (last visited Mar. 20, 2022).

12 Lab. Code §§ 201(a), 227.3.

13 Lab. Code § 200; *see also DLSE v. UI Video Stores, Inc.,* 55 Cal. App. 4th 1084 (1997). In *Naranjo v. Spectrum Sec. Servs., Inc.*, 13 Cal. 5th 93 (2022), the California Supreme Court reversed the lower court and held that premiums paid for missed meal and rest periods constitute wages that must be reported on wage statements and timely paid at termination.

14 Lab. Code § 227.3.

15 *Hagin v. Pac. Gas & Elec.*, 152 Cal. App. 2d 93 (1957).

16 DLSE Enforcement Policies and Interpretations Manual § 4.6 (2002).

17 *Davis v. Morris*, 37 Cal. App. 2d 269 (1940).

18 DLSE Enforcement Policies and Interpretations Manual § 4.6.1 (2002).

19 *Hale v. Morgan*, 22 Cal. 3d 388 (1978). *See also Zaremba v. Miller*, 113 Cal. App. 3d Supp. 1, 6 (1980); *Davis v. Morris*, 37 Cal. App. 2d at 274.

20 DLSE Enforcement Policies and Interpretations Manual § 4.6 (2002).

21 *Zaremba v. Miller*, 113 Cal. App. 3d Supp. at 5.

22 Lab. Code § 206(b).

23 Civ. Code § 1542 ("A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.").

24 Lab. Code § 2804 (any express or implied agreement to waive benefits of section 2802—requiring employer indemnification of expenditures or losses employee incurs in direct consequence of job duties—is "null and void").

[25] *Edwards v. Arthur Andersen LLP*, 142 Cal. App. 4th 603 (2006) (former employer's insistence on invalid release—arguably covering section 2802 indemnity claims—in exchange for ending an non-competition agreement was wrongful act supporting action for intentional interference with prospective economic advantage where job offer by successor employer required execution of the release), *review granted*, No. S147190 (Cal. Nov. 29, 2006).

[26] *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 954-55 (2008).

[27] See discussion *supra* § 12.01..

[28] Lab. Code § 206.5.

[29] *Chindarah v. Pick Up Stix, Inc.*, 171 Cal. App. 4th 796, 803 (2009). *See also Aleman v. AirTouch Cellular,* 209 Cal. App. 4th 556, 577-78 (2012) (release of wage claim was enforceable, notwithstanding section 206.5, because a bona fide dispute existed as to whether wages were owed, and because the plaintiff received extra payment for releasing the disputed claim); *Watkins v. Wachovia Corp*., 172 Cal. App. 4th 1576, 1587 (2009) (when bona fide wage dispute exists, disputed amounts are not due, so dispute can be settled with a release and a payment, even if the payment is for less than the total wages claimed).

[30] The USERRA prohibits employers from discriminating against employees because of their military service. 38 U.S.C. § 4301(a). Section 4311(a) of the USERRA also forbids employers to deny re-employment or retention in employment based on employees' military service.

[31] *Breletic v. CACI, Inc.*, 413 F. Supp. 2d 1329, 1337-38 (N.D. Ga. 2006).

[32] *Perez v. Uline, Inc.*, 157 Cal. App. 4th 953, 958 (2007) ("The statute plainly states that a contract may not limit the protections of USERRA, which prohibits termination of employment based on membership in the military or performance of military service. Thus, defendant's assertion that the agreement waived the protections of USERRA cannot be sustained.").

[33] *Id.* at 957-58 (quoting 38 U.S.C. § 4302(b)).

[34] Civ. Code § 1670.11.

[35] Civ. Proc. Code § 1001(a)(3). As originally drafted, section 1001(a)(3) covered agreements restricting factual disclosures about sexual harassment and sexual discrimination. The law was expanded to cover all forms of workplace discrimination and harassment by SB 331, which passed in 2021. The expanded provisions are effective for agreements entered into on or after January 1, 2022.

[36] Civ. Proc. Code § 1001(e).

[37] Civ. Proc. Code § 1001(c).

[38] Civ. Proc. Code § 1002.5(a), (b)(1)(A).

[39] Civ. Proc. Code § 1002.5(b)(1)(B), (b)(2).

[40] Gov't Code § 12964.5(a)(1).

[41] Gov't Code § 12964.5(a)(1)(B)(ii).

[42] Gov't Code § 12964.5(c).

[43] Gov't Code § 12964.5(b)(4).

[44] Gov't Code § 12964.5(d).

[45] Gov't Code § 12964.5(d)(2).

[46] Santa Monica Municipal Code § 4.67.110.

[47] Santa Monica Municipal Code §§ 4.67.050(b), 4.67.050(c).

[48] Santa Monica Municipal Code §§ 4.67.050(b), 4.67.050(g).

[49] Santa Monica Municipal Code § 4.67.050(f).

[50] Santa Monica Municipal Code § 4.67.120.

[51] SB 93, 2021 bill codified in Lab. Code § 2810.8.

[52] Lab. Code § 2810.8(a).

[53] *Id*.

[54] *Id.* § 2810.8(b).

[55] *Id.* § 2810.8(d).

[56] *Id.* § 2810.8(g).

[57] Santa Monica Municipal Code §§ 4.66.010 *et seq*.

[58] Santa Monica Municipal Code § 4.66.030(a).

[59] Santa Monica Municipal Code § 4.66.030(a).

[60] Santa Monica Municipal Code §§ 4.66.040-4.66.050.

14. Health and Safety Law

14.1 Injury and Illness Prevention Program

California employers must prepare a comprehensive written injury and illness prevention program (IIPP)[1] and keep records of the steps taken to implement and maintain the IIPP.[2] An IIPP must include (a) identification of who is responsible for implementing the IIPP, (b) a system to ensure that employees comply with safe and healthy work practices, (c) a system for communicating with employees on occupational health and safety matters, (d) a system to identify and evaluate workplace hazards, including scheduled periodic inspections to identify unsafe conditions and work practices, (e) procedures for investigating occupational injuries and illnesses, (f) the methods and procedures for correcting unsafe or unhealthy conditions and work practices in a timely manner, (g) an occupational health and safety training program, and (h) procedures to allow for employee access to the IIPP.

Employers that operate health care facilities must include within their prevention programs (as part of the IIPP or as a separate document) a "patient protection and health care worker back and musculoskeletal injury prevention plan," which includes a "safe patient handling policy" for all patient care units.[3]

14.2 "Be a Manager, Go to Jail" Act

The Corporate Criminal Liability Act of 1989 makes individual managers criminally liable for failing to disclose "a serious concealed danger."[4]

14.3 Proposition 65

The Safe Drinking Water and Toxic Enforcement Initiative of 1986 (aka Proposition 65) requires that businesses with 10 or more employees give clear warning to anyone they knowingly expose to a toxic chemical. (Hence the cryptic messages puzzling restaurant patrons regarding the toxic dangers of the wine they might be drinking.) As of August 2018, businesses must provide "clear and reasonable" warnings regarding Proposition 65 listed chemicals.[5] For businesses in general, this new requirement typically means displaying signs advising of known carcinogens on site. Many California employers will comply with the new requirements through the Cal/OSHA-required workplace hazardous communication (HazCom) program. For occupational exposures that are not covered by the HazCom program, posting new signs will meet the requirements.

14.4 Cal/OSHA Hazard Communication Standards

California employers whose employees may be exposed to hazardous chemicals must identify the chemicals and maintain a communication and training program, which includes training and notifying employees at the time of their initial assignment, and whenever a new chemical hazard is introduced into their work area, among other requirements.[6]

14.5 Anti-Retaliation Provisions

Employees may file complaints of discrimination with the Division of Occupational Safety and Health (DOSH) (commonly referred to as Cal/OSHA), alleging retaliation for complaining about unsafe working conditions. Employees may also sue.[7] For employees who complain about unsafe patient care and conditions at a health

care facility, there is a rebuttable presumption that any adverse employment action that occurs within 120 days of the complaint was in retaliation for the complaint.[8]

14.6 Tobacco Smoking

Smoking is forbidden in enclosed spaces in nearly all California workplaces, and employers must not designate smoking break rooms for employees.[9] A few workplaces are exempted, such as smoking guestrooms in hotels (limited to 20% of the rooms), tobacco shops and smokers' lounges, theatrical production sites (if smoking is an integral party of the story), certain medical research or smoking treatment sites, private residences (except for family day care homes), and patient smoking areas in long-term health care facilities.[10] The smoking ban includes the use of e-cigarettes and vaping devices that contain nicotine.

14.7 Drug-free Workplace

California employers that receive state government contracts or grants must (1) publish and provide to each employee a statement that prohibits the unlawful manufacture, sale, distribution, dispensation, possession, or use of controlled substances, and lists the actions to be taken against employees who violate that prohibition, and (2) establish a drug-free awareness program.[11] California's 2018 legalization of recreational marijuana has not impaired an employer's legal ability to enforce a drug-free workplace. That said, starting in 2024, employers will no longer be able to discipline or terminate a worker because of the worker's off-the-job cannabis use.[12]

14.8 Repetitive Motion Injuries (RMIs)

Under California's first-in-the-nation ergonomics regulation, employers with 10 or more employees must create a program to minimize repetitive motion injuries ("RMIs") if (1) two or more employees suffer RMIs within the previous 12 months, (2) the injuries occur in jobs requiring the same repetitive motion, such as word processing, assembly, or loading, (3) the injuries result predominantly (more than 50%) from the repetitive job, and (4) a licensed physician diagnoses the injury as a musculoskeletal injury.[13]

The prevention program must consist of (1) worksite evaluation of each job similar to the one where the injury occurred in order to reduce exposures that have caused RMIs, and (2) training employees regarding the exposures, methods employed to reduce exposures, symptoms and consequences associated with RMIs, and the importance of reporting them.

14.9 "Hands off that Smartphone!"

California drivers operating a moving vehicle must not use a cell phone unless the phone permits hands-free listening and talking and is so used while driving.[14] They also must not hold or operate any electronic wireless communication device unless the device is designed and configured to allow voice-operated and hands-free operation, and it is so used while driving.[15]

Employers whose employees drive on duty should have policies prohibiting unlawful use of electronic devices, to minimize the prospect that related employee-committed torts will be considered a predictable risk of employment (see § 5.10).[16]

14.10 UCL Actions for Cal/OSHA Violations

Employers facing a workplace accident could already expect to face the wrath of administrative agencies and even criminal prosecutors. As a result of a 2018 California Supreme Court decision, there is still more: the

prospect of civil actions under the Unfair Competition Law (UCL). In *Solus Industrial Innovations v. Superior Court*, a water heater explosion at Solus Industrial Innovations, Inc. left two employees dead. The Division of Occupational Safety and Health issued citations for alleged Cal/OSHA violations. While Solus appealed to the Cal/OSHA Appeals Board, the California Bureau of Investigations investigated and forwarded its findings to the Orange County district attorney, who filed criminal charges against the plant manager and maintenance supervisor for felony violations of the Labor Code.

The district attorney also sued Solus under the UCL and the Fair Advertising Law, alleging that maintaining an unsafe work environment amounted to an unfair business practice and that stating commitments to workplace safety standards amounted to false advertising. Solus convinced the Court of Appeal that these claims were preempted by the federal OSHA statute, but then the district attorney obtained review by the California Supreme Court.

A unanimous Supreme Court reversed.[17] *Solus* held that federal OSHA did not preempt a civil action. Rather, California law preempted federal OSHA—in a reversal of traditional preemption. *Solus* explained that federal OSHA occupies the field of workplace safety and health, but permits states to create their own regulatory plans subject to federal review and approval. Federal OSHA thus provides a regulatory "floor" under which state plans may not fall, but states may enact broader workplace safety protection than found under federal OSHA.[18]

And California, of course, has done that. According to *Solus*, federal OSHA, by allowing states to provide broader protections, anticipates that states may use enforcement mechanisms other than administrative litigation under the state plans to further their aims. *Solus* concluded that civil litigation is not foreclosed by the federal statutory scheme. To make the employers' plight more precarious still, *Solus* noted that UCL and unfair-advertising actions may be brought by both government officials and by persons who have suffered an "injury in fact."[19]

14.11 Injury & Illness Recordkeeping and Reporting

California employers must report "any serious injury or illness, or death" of any employee to the nearest Cal/OSHA District Office within eight hours.[20] Serious injury or illness means any injury or illness occurring in a place of employment or in connection with employment that requires inpatient hospitalization for other than medical observation or diagnostic testing, or in which an employee suffers an amputation, the loss of an eye, or any serious degree of permanent disfigurement, but does not include any injury or illness or death caused by an accident on a public street or highway, unless the accident occurred in a construction zone. Because the definition includes "occurring in a place of employment," this reporting rule applies regardless of whether the injury, illness, or death was work-related. Therefore, employers must report even incidents such as heart attacks or brain aneurisms that occur at work, or illnesses where symptoms first manifest in the workplace, even if they have no relation to the work environment.

Legislation effective January 2019 is another example of California deciding to deviate from federal standards. Cal/OSHA now may issue recordkeeping citations for errors in Cal/OSHA forms for up to five years,[21] as opposed to the six-month limitations period endorsed by federal OSHA.

14.12 Single-User Restrooms

An FEHC regulation requires that all single-user toilet facilities in any California business establishment, place of public accommodation, or government agency be identified as all-gender facilities.[22] Specific signage requirements apply.[23] But companies in certain industries covered by Cal/OSHA must still separately mark non-flushing toilet facilities for men and women.[24]

14.13 Workplace Violence Requirements for Health Care Providers

California health-care employers, home health and hospice providers, and emergency responders have specific requirements related to the prevention of workplace violence for their employees. They must develop workplace violence prevention plans, train their employees, and keep records related to workplace violence incidents.[25] The violence prevention plans must be in writing, must be specific to the hazards and corrective measures for the unit, service, or operation, and must be available to employees at all times.[26]

These employers must report incidents involving the use of physical force against an employee by a patient (or a person accompanying a patient). This is true where the use of force results in, or has a high likelihood of resulting in, injury, psychological trauma, or stress, or the incident involved the use of a firearm or other dangerous weapon.

The regulations also require employers to take immediate corrective action where a hazard was imminent and take measures to protect employees from identified serious workplace violence hazards within seven days of the discovery of the hazard. Additionally, the employers must maintain a "Violent Incident Log."

Certain acute care and special hospitals also must report violent incidents that resulted in an injury, involved the use of a firearm or other dangerous weapon, or present an urgent or emergent threat to the welfare, health or safety within 24 hours and all incidents within 72 hours.

14.14 Electronic Submission of Cal/OSHA Forms

Certain California employers must electronically submit annual injury and illness data from Cal/OSHA 300A forms by March 2 of the year after the calendar year covered by the form. This requirement applies to establishments with 250 or more employees, as well as to establishments in designated industries with 20-249 employees.[27] Some designated industries include agriculture, utilities, construction, and manufacturing, among others.

14.15 Valley Fever Training—"There's Fungus Among Us!"

Construction employers with employees working at worksites in counties where Valley Fever (a dirt-dwelling microscopic fungus) is highly endemic must provide annual effective awareness training on Valley Fever to all employees, and must provide training before employees begin work reasonably anticipated to cause exposure to substantial dust disturbance.[28]

14.16 Wildfire Smoke Protection

Cal/OSHA's emergency regulation to protect workers from wildfire smoke went into effect in July 2019. The regulation applies to most outdoor workplaces where the current Air Quality Index (AQI) for airborne particulate matter 2.5 micrometers or smaller (PM2.5) is 151 or greater, and where employers should reasonably anticipate that employees could be exposed to wildfire smoke. However, employers with employees who are exposed to an AQI of 151 or greater for less than one hour during a shift are exempt. Other exemptions apply such as, for example, situations in which employees are in enclosed vehicles in which the air is filtered by a cabin air filter and windows and doors are kept closed. Under the regulation, covered employers must provide training and instruction to employees about wildfire smoke, and reduce worker exposure to wildfire smoke in various ways such as providing filtered air when feasible and respiratory protection.[29]

14.17 Protection From Covid-19

14.17.1 Cal/OSHA Non-Emergency Covid-19 Standard

The non-emergency COVID-19 standard took effect on February 3, 2023, and does not expire until February 3, 2025. The non-emergency COVID-19 standard is less burdensome than the previous Cal/OSHA emergency COVID-19 standard, and because it incorporates by reference certain public health recommendations, requirements have eased substantially in recent months as public health officials have recommended responding to COVID-19 in the same manner as other routine respiratory illnesses. That being said, employers do still need to, among other things, conduct contact tracing when there's been an employee COVID-19 case, provide notice to close contacts, comply with heighted protocols during "outbreaks" and "major outbreaks," require masking for 10 days for employees who test positive, report "major outbreaks" to Cal/OSHA, and offer no-cost testing when there's been a workplace close contact. Cal/OSHA has published voluminous interpretive guidance on the permanent standards in the form of frequently asked questions.[30] The FAQs state that they will be updated on an ongoing basis. Cal/OSHA also has a model Covid-19 Prevention Program.

14.17.2 Covid-19 Notifications and Reporting

California employers were previously required to notify employees when there had been a Covid-19 case identified in the workplace, regardless of whether the employees were identified as "close contacts." The notice also had to include information on Covid-19-related benefits and protections, and explain the disinfection and safety measures to be taken at the worksite in response to the potential exposure. As of January 1, 2024, employers no longer need to provide this notice, but records of the written notices must be retained for 3 years.[31]

14.18 Beefed Up Enforcement

As of January 1, 2022, Cal/OSHA's enforcement power was dramatically enhanced via legislation that created a rebuttable presumption that an employer with multiple worksites has committed an "enterprise-wide" violation if Cal/OSHA determines that either of the following factors "is true":[32]

(1) The employer has a non-compliant written policy or procedure, or

(2) Cal/OSHA "has evidence of a pattern or practice of the same violation or violations committed by that employer involving more than one of the employer's worksites."

This presumption has the effect of creating an enterprise-wide violation for any written policy and procedure violations unless an employer can show that its other worksites have different, compliant, written policies and procedures. Appeal of an enterprise-wide violation will stay abatement, but if the violation is affirmed, abatement will be required across all of the employer's California worksites. Enterprise-wide citations will carry the same penalties as willful or repeated citations, i.e., up to $134,334 per violation.

The legislation also authorizes Cal/OSHA to seek an injunction restraining certain uses or operations of employment if it has grounds to issue a citation. This is a massive expansion of Cal/OSHA enforcement power; previously, Cal/OSHA could only seek an injunction if "the condition of any employment or place of employment or the operation of any machine, device, apparatus, or equipment constitutes a serious menace to the lives or safety of persons about it."

And finally, there's now an "egregious violation" category for citations. Cal/OSHA can issue an egregious violation if it finds that at least one of the following seven criteria "is true":

(1) The employer, intentionally, through conscious, voluntary action or inaction, made no reasonable effort to eliminate the known violation, or

(2) The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses. “Catastrophe” means the inpatient hospitalization, regardless of duration, of three or more employees resulting from an injury, illness, or exposure caused by a workplace hazard or condition.

(3) The violations resulted in persistently high rates of worker injuries or illnesses.

(4) The employer has an extensive history of prior violations of this part.

(5) The employer has intentionally disregarded their health and safety responsibilities.

(6) The employer’s conduct, taken as a whole, amounts to clear bad faith in the performance of their duties under this part.

(7) The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that may be in place.

14.19 Workplace Violence Prevention Plan Requirements in 2024

In late 2023, Governor Newsom signed SB 553, which requires nearly all California employers to create, adopt, and implement written Workplace Violence Prevention Plans that include numerous elements, annual workplace violence prevention training, violent incident logs, and the creation and retention of various records.[33] Under the new law, the Cal/OSHA Standards Board is required to adopt workplace violence standards codifying SB 553 no later than December 31, 2025. But regulations or not, Cal/OSHA is empowered and directed to start enforcing SB 553 on July 1, 2024.

The new requirements apply to nearly all employers and employees in California, except employers previously covered by Cal/OSHA’s Violence Prevention in Health Care standard, employees who telework from a location of their choosing that is outside of employer control, locations not open to the public where fewer than 10 employees work at a given time, Department of Corrections and Rehabilitation, and law enforcement agencies.

The law defines “workplace violence” broadly as any act of violence or threat of violence that occurs in a place of employment, including threats involving a firearm or dangerous weapon regardless of whether employee injuries are sustained, threats against an employee that result in or have a high likelihood of resulting in injury, psychological trauma, or stress, regardless of whether actual injuries are sustained. This definition is very broad, meaning a seemingly innocuous comment to some might be considered workplace violence based on the perception of an employee.

The model Workplace Prevention Plan published by Cal/OSHA includes all of the required information necessary for compliance. In addition to reporting, employers must also provide employees with initial training when the Plan is first established and conduct annual trainings to cover the Plan, how to report workplace violence hazards and incidents, how to seek assistance to prevent or respond to workplace violence, corrective measures implemented by the employer, strategies to avoid physical harm, and information about the violent incident log and how employees can obtain a copy.

Employers must retain the log for 5 years and omit personal identifying information. Records of workplace violence incident investigations (which may not include medical information) are also subject to the 5-year retention requirement. Employees are entitled to view and copy the log within 15 calendar days of a request.

SB 553 also expands Code of Civil Procedure § 527.8 to authorize collective bargaining representatives, not just employers, to petition for TROs on behalf of employees, allowing even more relief for employees faced with threats and violence. SB 553 also expands upon the actionable conduct necessary to give rise to a TRO and

amends Section 527.8 to allow employers to seek a TRO on behalf of their employee where the employee suffers harassment—and not simply violence or threats of violence.

14.20 Changing Standard For Protection From Indoor Heat-Related Illness and Injury

For almost 20 years, Cal/OSHA has distinguished itself from Federal OSHA in several ways, including maintaining a heat illness prevention standard with respect to employees working outdoors. Cal/OSHA also cited employers for indoor heat illness hazards under its Injury and Illness Prevention Program regulations. In 2016, SB 1167 was signed into law, which required Cal/OSHA to submit a proposal to the Standards Boards for new regulations on employee protection from indoor heat hazards.[34] Since 2016, Cal/OSHA has revised the indoor heat standard several times, and the new standard is set to be adopted in March 2024.

Once adopted, the regulation will apply all indoor work areas where the temperature is 82 degrees Fahrenheit or greater and there are employees present. There are, however, exceptions to the requirements such as when employees are working from home/teleworking, have limited exposure to indoor heat, or face imminent life-threatening situations. The standard also requires employers to establish and maintain one or more cool down areas at all times, to encourage employees to take cool-down breaks, and to provide employees access to fresh, pure, suitably cool, and free of cost water close to work and cool-down areas. The regulation also requires employers to have effective emergency response procedures, closely monitor new employees during heat waves, and train employees on indoor heat illness prevention.

---

1 Lab. Code § 6401.7.

2 8 Cal. Code Regs. § 3203(b).

3 8 Cal. Code Regs. § 5120.

4 Pen. Code § 387(a).

5 27 Cal. Code Regs. §§ 25600, *et seq.*

6 8 Cal. Code Regs. § 5194.

7 Lab. Code §§ 6310-6311.

8 Health & Safety Code § 1278.5.

9 Lab. Code § 6404.5(c).

10 Lab. Code § 6404.5(e)(1-7).

11 Gov't Code § 8350 et seq.

12 Gov't Code § 12954.

13 8 Cal. Code Regs. § 5110.

14 Veh. Code § 23123(a): "A person shall not drive a motor vehicle while using a wireless telephone unless that telephone is specifically designed and configured to allow hands-free listening and talking and is used in that manner while driving."

15 Veh. Code § 23123.5(a): "A person shall not drive a motor vehicle while holding and operating a handheld wireless telephone or an electronic wireless communications device unless the wireless communications device is specifically designed and configured to allow voice-operated and hands-free operation, and it is used in that manner while driving."

16 *Cf. Ayon v. Esquire Deposition Sols., LLC*, 27 Cal. App. 5th 487 (2018) (affirming summary judgment for deposition service company whose employee, while using her cell phone, drove her vehicle into the plaintiff; her conversation was with a company court reporters, but the undisputed testimony was that the conversation was personal only and did not pertain to company business).

17 *Solus Indus. Innovations, LLC v. Super. Ct.*, 4 Cal. 5th 316 (2018).

18 *Id.* at 346 ("Neither do the UCL or FAL claims obstruct another of the federal OSH Act's purposes, namely to encourage the States 'to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws.'") (internal citations omitted).

19 *Id*. at 340 ("Actions to enforce the UCL or FAL, which may be brought by government officials and by individuals who have suffered injury in fact … , address the overarching legislative concern … to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition.") (internal quotation marks omitted).

20 8 Cal. Code Regs. § 342.

[21] AB 2334 (an amendment to Gov't Code § 65915, resurrecting the substance of a suspended Obama Administration rule providing for a longer statute of limitations for recordkeeping violations). The Trump Administration had suspended the rule. AB 2334 directs Cal/OSHA to "monitor" federal rulemaking and, if federal OSHA has "eliminated or substantially diminished" electronic recordkeeping requirements, Cal/OSHA must "evaluate how to implement changes necessary to protect the goals" of the proposed rule issued by the Obama Administration in May 2016. AB 2334 also revives an Obama Administration rule amounting to a five-year statute of limitations for recordkeeping violations., specifying that a recordkeeping violation "occurrence" continues until it is corrected, Cal/OSHA discovers the violation, or the duty to comply with the requirement no longer applies. California employers thus can expect to see citations issued by Cal/OSHA for violations going back beyond the normal six-month limitations period.

[22] Health & Safety Code § 118600(a).

[23] 24 Cal. Code Regs. § 11.B.216.

[24] 2 Cal. Code Regs. § 11034.

[25] 8 Cal. Code Regs. § 3342.

[26] *Id.*

[27] See 8 Cal. Code Regs. § 14300.41, including Appendix H, for a list of specific covered employers.

[28] AB 203, 2019 bill adding Lab. Code § 6709.

[29] 8 Cal. Code Regs. § 5141.1

[30] Cal/OSHA, https://www.dir.ca.gov/DOSH/Coronavirus/Covid-19-NE-Reg-FAQs.html (last visited Mar. 6, 2023).

[31] Labor Code § 6409.6.

[32] SB 606, 2021 bill codified in Lab. Code §§ 6317, 6317.8, 6317.9, 6323, 6324, 6429, and 6602

[33] SB 553, 2023 bill amending, repealing, and adding to Code of Civil Procedure § 527.8, amending and adding to Labor Code §§ 6401.7 and 6401.9.

[34] SB 1167, adding to Labor Code § 6720.

15. Unemployment Compensation

15.1 Conditions for Eligibility

Both full-time and part-time employees may be eligible for unemployment compensation in California if they meet certain eligibility criteria.[1] Unemployment benefits will reflect whether the employee (1) has earned more than a set amount in the past, (2) is unemployed (or has suffered a reduction in hours and is earning less than the weekly benefit amount) through no fault of the employee, and (3) is able, available, and actively seeking work.[2]

Legislation imposing the ABC test to determine whether a worker classified as an independent contractor is really an employee also applies to the Unemployment Insurance Code.[3] The Legislature, declaring that the "motion picture and television production industry is an essential part of the California economy with its historical and current base in California," has provided that motion picture production workers, for purposes of unemployment insurance coverage, will get credit for out-of-state work if the individual is a California resident, is hired and dispatched from the state, and intends to return to the state to seek reemployment following the out-of-state work.[4]

Claimants for unemployment benefits cannot be disqualified solely because they are available for part-time work.[5] If claimants restrict their availability to part-time work, they may still be considered able and available for work if all of the following conditions exist: (1) the claim is based on part-time employment, (2) the claimant is actively seeking and is willing to accept work under essentially the same conditions as existed while the wage credits were accrued, and (3) the claimant imposes no other restrictions and is in a labor market in which a reasonable demand exists for the part-time services that the claimant offers.[6]

15.2 Ineligibility and Disqualification

Discharge for misconduct results in disqualification for unemployment compensation benefits.[7] But California creates a rebuttable presumption that the employee was discharged for reasons other than misconduct.[8] The employer bears the overall burden of proving "misconduct."[9] Misconduct is conduct showing "willful or wanton disregard of the employer's interest."[10]

Mere inefficiency, unsatisfactory conduct, poor job performance, ordinary negligence, and good faith errors in judgment are not misconduct.[11] The California Supreme Court has concluded that an employee's refusal to sign a disciplinary notice was not misconduct but, at most, a good faith error in judgment that did not disqualify him from unemployment benefits.[12]

Voluntary termination of employment also generally disqualifies an individual for unemployment compensation.[13] And an employee can "constructively quit" by engaging in conduct that gives the employer no reasonable alternative but to discharge her.[14]

The Court of Appeal has considered a case in which an employee on leave had requested unacceptable assurances before she returned to work. The employer thus treated her as having quit and the Unemployment Insurance Appeals Board upheld the denial of her claim for benefits. But the Court of Appeal ruled for the former employee, holding that the employer should have called her bluff and ordered her to return to work without her conditions being met, instead of preemptively dismissing her on an assumption that she would stick by her request for unacceptable conditions.[15]

Further, quitting does not disqualify the employee for unemployment benefits if the quitting was for good cause. Good cause to quit is a real, substantial, compelling factor causing a reasonable person genuinely desirous of retaining employment to leave work under same circumstances.[16] A quit generally is for good cause for employees who leave because they have:

- suffered discrimination unlawful under FEHA,[17]
- suffered sexual harassment,[18]
- needed to accommodate the job relocation of a spouse or a domestic partner,[19] or
- left employment to protect their families or themselves from domestic violence.[20]

15.3 The Claims Process

15.3.1 Determination of eligibility

The California Employment Development Department (EDD) makes its initial determination on the basis of the former employee's claim and the employer's response. A party dissatisfied with that determination can request a hearing before an administrative law judge (ALJ). The employer has the burden of proof to show that the employee was discharged for misconduct. The ALJ's decision can be appealed to the UIAB. (*See* § 1.7.)

The UIAB's determination can be reversed in court. A 2020 Court of Appeal decision prejudicially abused its discretion in refusing to consider additional evidence proffered by a fired employee applying for unemployment insurance benefits. He disputed the chronology of events adopted by the ALJ (who had upheld the denial of benefits) and belatedly sought to submit a declaration setting the record straight. The Court of Appeal held that the UIAB's refusal to consider the declaration was a prejudicial abuse of discretion.[21]

15.3.2 Responding to claims

Employers often have ignored EDD requests for information about an employee's separation and sometimes have agreed not to respond to such requests as part of a separation agreement with the employee. A California employer that does so, however, potentially incurs significant penalties. While these penalties have long existed in California, they have not frequently been enforced.[22] To address the perceived problem of having unemployment insurance benefits paid in error, Congress passed the Federal Trade Adjustment Assistance Extension Act of 2011, which mandated that all states implement changes to unemployment insurance laws, including new "UI integrity" provisions to penalize employers (as well as their agents and third-party administrators) that (1) were at fault for failing to respond timely or adequately to agency requests for information about claimed unemployment compensation benefits that were subsequently overpaid, and (2) had engaged in a pattern of failing to respond timely or adequately to such requests.

The California Legislature thus amended the California Unemployment Insurance Code to provide that if an employer willfully makes a false statement or representation or willfully fails to report a material fact concerning a claimant's employment termination, the employer is subject to a penalty of "an amount not less than 2 nor more than 10 times the weekly benefit amount of that claimant."[23] If *both* the employer and the employer's agent engaged in such conduct, then separate penalties apply to each of them.[24] Accordingly, California employers must timely and adequately respond to initial requests for information from the EDD, and should no longer agree with employees to ignore those requests or to provide inaccurate information about the reasons for an employee's separation. If the employer, as part of a separation agreement, does not want to protest the employee's unemployment benefits claim, then the agreement should provide that while the employer will not protest any

unemployment benefits claim, the employer will provide complete, truthful, and accurate information in response to any claim for unemployment insurance benefits.

15.3.3 No issue preclusion

The ALJ's decision in an unemployment compensation proceeding is not admissible, at least in state court,[25] and has no preclusive effect in a later proceeding.[26]

15.3.4 Transcript provided

Witnesses before the ALJ give tape-recorded testimony under oath. Parties can obtain copies of the tape. That testimony can be used against the witness in a later legal proceeding.[27]

---

1 Unempl. Ins. Code §§ 1253, 1253.8, 1253.9.

2 Unempl. Ins. Code § 1253.

3 AB 5, 2019 bill codified in Lab. Code § 2775(b)(1).

4 SB 271, 2019 bill amending Unemp. Ins. Code §§ 602, 603.

5 Unempl. Ins. Code § 1253.8.

6 *Id.*

7 Unempl. Ins. Code § 1256.

8 *Id.*

9 *Id.*

10 *Amador v. Unemployment Ins. Appeals Bd*., 35 Cal. 3d 671, 678 (1984).

11 *Id.*

12 *Paratransit, Inc. v. Unemployment Ins. Appeals Bd. (Medeiros)*, 59 Cal. 4th 551, 559 (2014). The Supreme Court reversed a 2012 Court of Appeal decision that had found that the employee's refusal to sign a disciplinary action form was "misconduct" that justified the denial of unemployment benefits.

13 Unempl. Ins. Code § 1256.

14 22 Cal. Code Regs. § 1256-1(f).

15 *Kelly v. Unemployment Insurance Appeals Bd.,* 223 Cal. App. 4th 1067, 1077-79 (2014) (employer, to avoid liability for benefits, needs evidence that the employee took action that actually prevented the employer from retaining the employee, such as making an unequivocal demand that the employer meet some condition that it had no obligation to meet, and that the employees reasonably would have known to result in termination; employer cannot rely on the employee's mere request, however "irritating or ungracious" such a request may be).

16 22 Cal. Code Regs. § 1256-3.

17 Unempl. Ins. Code § 1256.2 provides:

(a) Except as otherwise provided in subdivision (b), an individual who terminates his or her employment shall not be deemed to have left his or her most recent work without good cause if his or her employer deprived the individual of equal employment opportunities on any basis listed in subdivision (a) of Section 12940 of the Government Code, as those bases are defined in Sections 12926 and 12926.1 of the Government Code.

(b) Subdivision (a) does not apply to the following: (1) A deprivation of equal employment opportunities that is based upon a bona fide occupational qualification or applicable security regulations established by the United States or this state, specifically, as provided in Section 12940 of the Government Code. (2) An individual who fails to make reasonable efforts to provide the employer with an opportunity to remove any unintentional deprivation of the individual's equal employment opportunities.

18 Unempl. Ins. Code § 1256.5.

19 *See* Unempl. Ins. Code § 1256.

20 *See id.*

21 *Land v. California Unemployment Ins. Appeals Bd.,* 54 Cal. App. 5th 127, 144-45 (2020).

22 *See* Unempl. Ins. Code § 1142.

23 Unempl. Ins. Code § 1142(a).

24 Unempl. Ins. Code § 1142(a)(3).

25 An administrative finding that an employee is entitled to benefits, or that an employer's explanation for firing the employee is dubious, still may be admissible in federal court. *See, e.g., Baldwin v. Rice*, 144 F.R.D. 102, 105-07 (E.D. Cal. 1992) ("a state legislature cannot purport

to make binding pronouncements of law concerning what evidence may be privileged or otherwise inadmissible in a federal court action involving claims based on federal law").

[26] Unempl. Ins. Code § 1960 ("Any finding of fact or law, judgment, conclusion, or final order made by a hearing officer, administrative law judge, or any person with the authority to make findings of fact or law in any action or proceeding before the appeals board, shall not be conclusive or binding in any separate or subsequent action or proceeding, and shall not be used as evidence in any separate or subsequent action or proceeding, between an individual and his or her present or prior employer brought before an arbitrator, court, or judge of this state or the United States, regardless of whether the prior action was between the same or related parties or involved the same facts."). *See also Pichon v. Pac. Gas & Elec. Co.,* 212 Cal. App. 3d 488 (1989) (UIAB decision finding that an individual was discharged for misconduct does not estop him from relitigating in court the reasons for his discharge).

[27] *See, e.g.*, Evid. Code § 780(h) (trier of fact determining credibility of a witness may consider prior inconsistent statement); Evid. Code § 1220 (admissibility of admissions).

16. Employer Reporting, Disclosure Requirements

16.1 New Hires

16.1.1 Reporting

Although the duty comes from federal law, all California employers must report to the California New Employee Registry, within 20 days of the start of work, the following information about each newly-hired or rehired[1] California employee (whether full-time, part-time, temporary, or seasonal): the employee's first and last name and middle initial, social security number, home address, and start-of-work date.[2] The employer must also report the employer's business name and address, California employer payroll tax account number, Federal Employer Identification Number, Branch Code (if an employer was assigned a Branch Code number), and a contact person's name and telephone number.

This requirement applies to employees hired as part of the acquisition of an ongoing business. Form DE 34, suitable for this purpose, can be found on-line.[3] The penalty for failing to report is $24 per hire, and $490 if the failure is "the result of conspiracy between the employer and employee not to supply the required report or to supply a false or incomplete report."[4] Multistate employers that file reports electronically may elect to report all new hires to one state in which they have employees.[5]

16.1.2 Disclosure

California's self-righteously entitled Wage Theft Protection Act requires employers to notify employees in writing, at the time of hire, of these facts: (1) the employee's rate or rates of pay and the basis thereof (e.g., hourly, salary, commission, etc.), including any applicable overtime rates, (2) allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances, (3) the regular payday designated by the employer, (4) the name, address (physical address of the employer's main office or principal place of business and a mailing address, if different), and telephone number of the employer, including any "doing business as" names used by the employer, (5) the name, address, and telephone number of the employer's workers' compensation insurance carrier, and (6) any other information the Labor Commissioner deems "material and necessary."[6] Employers must now also include information about paid sick leave rights in the Wage Theft Prevention Act Notice that employers must provide to nonexempt employees upon hire (see § 2.14.1).[7]

Employers must give written notice of any changes to this information within seven calendar days, unless the changes are reflected in a timely itemized wage statement or other writing.[8] The statute exempts government employees, employees who are exempt from the payment of overtime wages under California law, and employees covered by certain collective bargaining agreements.[9]

Temporary services employers must include in the notice the name, the physical address of the main office, the mailing address (if different from the physical address) of the main office, and the telephone number of the legal entity for whom the employee will perform work, and any other information the Labor Commissioner deems "material and necessary."[10] Exempted from these requirements are security services companies that solely provide security services and that are licensed by the California Department of Consumer Affairs.[11]

The Labor Commissioner has prepared a template "Notice to Employee" that employers may use to fulfill their statutory obligations.[12] The DLSE also has issued Frequently Asked Questions (FAQs) regarding the notice to

employees required under the Wage Theft Protection Act.[13] Employers may consider whether to use the DLSE template or to use a customized notice, but must ensure that it is disclosing all of the required information.

16.2 Retention of Independent Contractors

California businesses that must file federal Form 1099-MISC must give the EDD identifying information about individual independent contractors who perform work in California and receive payment exceeding $600 or contract for such a payment. The business must provide this information to the EDD within 20 days of either making payments totaling $600 or more or entering into a contract for $600 or more with an independent contractor in any calendar year, whichever is earlier. The EDD provides a downloadable form to record basic information about the business and the independent contractor, including taxpayer identification number and the dates of the contract's beginning and end or when calendar year payments reach $600.[14]

Because the law aims to enhance enforcement of child support obligations, its requirements do not apply to independent contractors that are corporations, general partnerships, or limited liability businesses.[15] Failure to timely report this information triggers civil penalties, just as with respect to the failure to report new hires (see § 16.1.1), and the penalties are higher if the business and the contractor conspired not to report.

16.3 Itemized Wage Statements

16.3.1 Items the wage statement must record

General requirements. When paying wages, California employers must provide employees with an "accurate itemized statement" that states such items as "gross wages earned," "total hours worked," specified deductions, "net wages earned," and so on.[16] Employers need not report total hours worked by exempt employees.[17]

Piece rates. Wage statements to piece-rate workers must disclose the piece rate and the number of piece-rate units, as well as the total hours of compensable rest and recovery periods, the rate of compensation for those periods, and the gross wages paid for rest and recovery periods during the pay period. In addition, if the employer does not pay a piece-rate employee a base hourly rate (of at least minimum wage) for all hours worked, then the employer must separately record the total hours of "nonproductive" (non-piece-rate) time, the rate of compensation for such hours, and the gross wages paid for those hours during the pay period.[18]

Employment agencies. If a farm labor contractor is the employer, the wage statement must contain "the name and address of the legal entity that secured the services of the employer."[19] Temporary services employers must include the "rate of pay and the total hours worked for each temporary services assignment."[20]

Paid sick leave balances. Employers must show paid sick leave balances on wage statements or in a separate document presented contemporaneously (see § 2.14.1).

Meal, rest, and recovery period pay. Must wage statements record premiums paid for unprovided meal, rest, or recovery breaks? One might think "no," because premium pay is not an "earned wage." In 2018 the California Supreme Court accepted a referral from the Ninth Circuit that raised this issue but, because of intervening developments, never reached it.[21] Then in 2019 the California Court of Appeal decided that an employer was not liable for wage statements that failed to record meal premium pay. The Court of Appeal noted that the employer's obligation is only to state "wages earned" and reasoned that the extra hour of pay owed for failing to provide breaks is not an amount earned by performing labor, but is rather a statutory remedy for employer conduct.[22] But in 2022, the California Supreme Court reversed the Court of Appeal and upset employer expectations. In *Naranjo v. Spectrum Security Services*, the California Supreme Court held that (1) meal premium pay is an earned wage

for wage-statement purposes and (2) wages earned must be reported on a wage statement regardless of whether they have been paid.[23]

Amounts that *should* have been paid. Must wage statements record amounts that *should* have been, but were not paid? One might think no, because the purpose of wage statements is to let employees check the employer's math as to what has been paid. The Court of Appeal thus once rejected an argument that an employer's failure to pay overtime premium pay necessarily results in deficient wage statements. The wage statements did correctly record the hours actually worked and the pay actually received. That was good enough. There was no further requirement that the wage statement shows the overtime premium pay that the employees *should have been paid*. The Court of Appeal reasoned that if failure to pay overtime wages at the appropriate rate generates an injury that justifies penalties for an inadequate wage statement, then there would be an apparently unintentional double recovery.[24] This rationale has been upset, however, by the California Supreme Court's 2022 *Naranjo* decision, which reasons that wage statements must report any earned wages, regardless of whether they were paid.[25]

16.3.2 Items the wage statement need not record

Statutory exemptions. Wage statements need not show total hours worked by the employee if (1) the employee is a salaried, exempt employee or (2) the employee is exempt from the payment of minimum wage and overtime under any of these exemptions: (a) persons employed in an executive, administrative, or professional capacity, (b) outside salespersons, (c) computer software professionals who are paid on a salaried basis, (d) individuals who are parent, spouse, child, or legally adopted child of the employer, (e) participants, director, and staff of a live-in alternative or incarceration rehabilitation program, (f) any crew member employed on a commercial passenger fishing boat, and (g) any individual participating in a national service program provided in any applicable order of the Industrial Welfare Commission.[26]

Vacation pay. Wage statements need not record the accrued amount of vacation pay. Although in some contexts vacation pay is a "wage" that vests over time, unused vacation time does not become quantifiable until the employee leaves employment. Thus, vacation pay is not "wages earned" until the termination of employment. Further, since vacation pay is to be paid at the "final rate," the amount of vacation balance will depend on the particular circumstances surrounding the termination of employment.[27]

Events applying to prior pay period. The Court of Appeal has rejected claims that wage statements must (1) record events occurring in a prior pay period and (2) deliver wage statements immediately to terminating employees, with the final paycheck.[28] As to the first claim, the Court held that a wage statement need not include the hourly rates and hours worked with respect to a bonus yet to be calculated at the end of the month, quarter, or year: "there were no applicable hourly rates in effect during the pay period which defendant was required to include in the wage statement." As to the second claim, the Court held that final wage statements were timely by being mailed by the day after termination of employment, because section 226 requires only that wage statements be furnished "semimonthly" *or* "at the time of each payment of wages." This holding rejected—as a "void underground regulation"—the Labor Commissioner's more restrictive interpretation of the statute.

Social Security Numbers. Originally, wage statements were required to show the employee's social security number. Upon realizing that this requirement created risks of identity theft, the California Legislature permitted employers to use alternatives to the SSN, such as an employee-identification number *or* just the last four digits of the SSN. As of 2008, wage statements must use such alternatives and can no longer use entire SSNs.[29]

16.3.3 The "injury" requirement

Often meaningless requirement of "injury." Wage-statement violations can result in employer liability in the amount of actual damages or a penalty of $50 per employee for the initial pay period in which a violation occurs and $100 per employee for each further pay period in which a violation occurs, up to a maximum of $4,000, *plus* costs and attorney fees.[30] These penalties accrue only if the employee has suffered an "injury" as a result of the employer's knowing and intentional failure to comply with the wage statement statute.[31]

The "injury" requirement once meant that trivial imperfections did not create monetary employer liability. One Court of Appeal decision concluded that deprivation of information on a wage statement "standing alone is not a cognizable injury."[32] An employee had alleged that his wage statements failed to include the total hours worked, the net wages earned, and all applicable hourly rates of pay.[33] Although the employee claimed that absence of this information on his wage statement "caused confusion and possible underpayment of wages due" and resulted in a "mathematical injury" requiring reconstruction of time and pay records, the Court concluded that the absence of information, standing alone, was not a cognizable injury, as it did not result in the type of injury that required "computations to analyze whether the wages paid in fact compensated [the employee] for all hours worked."[34]

But then the California Legislature broadened the definition of what constitutes a wage-statement injury. The Labor Code now *deems* an injury to occur if the employer (a) fails to provide a wage statement or (b) fails to provide accurate and complete information and the employee cannot "promptly and easily" determine, from the wage statement alone, items such as (1) gross wages earned during the pay period, (2) total hours worked, except for employees who are exempt from the payment of overtime under the administrative, professional, or executive exemptions, (3) the number of piece-rate units earned and any applicable piece-rate if the employee is paid on a piece-rate basis, (4) all deductions, (5) net wages earned during the pay period, (6) the inclusive dates of the pay period, (7) the employee's name and the last four digits (only) of the employee's social security number or the employee's identification number, (8) the employer's name and address, (9) the hourly rates and corresponding hours worked at each rate (and, if the employer is a temporary services employer, the rate of pay and the total hours worked for each temporary services assignment).[35] The Legislature clarified that a "knowing and intentional failure" does not include an isolated and unintentional payroll error due to a clerical or inadvertent mistake.[36]

16.3.4 Hypertechnical violations are still violations

Substantial compliance with wage-itemization requirements is not necessarily a defense. The Court of Appeal has quoted with approval a DLSE opinion that "failure to list the precise number of hours worked during the pay period conflicts with the express language of the statute and stands in the way of the statutory purpose." "If it is left to the employee to add up the daily hours shown on the time cards or other records so that the employee must perform arithmetical computations to determine the *total hours worked* during the pay period, the requirements of Section 226 would not be met."[37]

The numerous picayune wage-statement requirements have created lucrative paydays for opportunistic plaintiffs' counsel eager to play "gotcha" at an employer's expense. Among the alleged hyper-technical violations causing employers to spend heavily to defend themselves—and sometimes causing them to incur huge penalties—are:

- Neglecting to total all hours worked, even though the wage statement lists all the various types of hours individually.
- Accidentally showing net wages as "zero" where an employee is paid by direct deposit.
- Omitting either the start or end date of the regular pay period.

- Not showing how many hours were worked at each applicable rate.
- Recording an incomplete employer name (e.g., “Summit” instead of “Summit Logistics, Inc.”).
- Recording an incomplete employer address.
- Failing to provide employee ID numbers, or reporting all nine SSN digits instead of just the last four digits.

Prominent among the hypertechnical complaints have been those seeking penalties for failing to state the full “name and address of the legal entity that is the employer,” as required by section 226(a)(8). Such lawsuits have occurred when a wage statement for First Transit Transportation, LLC referred to “First Transit,” when a wage statement for Wal-Mart Stores, Inc. referred to “Walmart,” and when a wage statement for Longs Drugs Stores California, Inc. referred to “Longs Drug Stores.”[38] In 2019, the Court of Appeal upheld an employer-name claim, even though the employer’s full name appeared on the attached pay check. Stating the full employer name there was insufficient because the requirement is to state the employer name “as a detachable part of the check.”[39]

Companies have also been sued for failing to state “the inclusive dates of the period for which the employee is paid,” as required by section 226(a)(6), when the wage period stated only the first or last date of the pay period.[40]

Some common sense occasionally emerges in judicial interpretations of wage-statement requirements. The Court of Appeal has recognized that separately listing the total number of regular hours worked and the total number of overtime hours, without separately summing up the two figures, complies with the requirement of section 226(a)(2) to list “total hours worked.”[41] A similar signal victory for common sense occurred in 2019, when the Court of Appeal rejected a claim that a wage statement violated section 226(a)(8) by stating the employer’s registered fictitious business name (YRC Freight) instead of the name registered with the California Secretary of State (*YRC Inc.*) and by providing only a five-digit zip code (66211) instead of a ZIP+4 Code (66211-*1213*).[42]

Hope lives on for employers. In 2021, two decisions rejected wage-statement liability for hyper-technical violations. In one case, the wage statement displayed earnings in two categories: a standard hourly rate and an overtime rate of 0.5 times the regular rate.[43] The employee argued that by showing “0.5 times the regular rate of pay rather than 1.5,” the statement “failed to identify the correct rate of pay for overtime wages.” The Court of Appeal rejected the employee’s argument, holding that the wage statement was compliant because it showed “(1) the standard hourly rate determined by contract or other agreement between the employee and the employer and (2) the overtime premium hourly rate, determined by statute, that must be added to the employee’s standard wages to compensate the employee for working overtime.” The Court of Appeal also rejected the employee’s aggressive theory that wage statements must always show overtime at 1.5x the regular rate of pay, explaining that the regular rate may differ from the standard hourly rate if “an employee earns multiple standard hourly rates, or other compensation.”

In another case, the Ninth Circuit overturned a $5.8 million PAGA award against Walmart for alleged wage statement deficiencies.[44] There, Walmart paid a performance-based bonus at the end of each quarter that was to be factored into the regular rate for overtime. But because the bonus was not determined until the quarter ended, Walmart made “an after-the-fact adjustment to overtime pay,” which calculated “the difference between the employees’ overtime pay rate over the quarter and the employees’ overtime rate” as if the bonus had been paid as part of the base rate of pay. Walmart then reported both the bonus and the adjusted overtime pay as lump sums on wage statements at the quarter end, without including hourly rates of pay or hours worked for the adjusted overtime pay. The Ninth Circuit held that Walmart’s wage statements were compliant because there was no “hourly rate in effect during the pay period” for the overtime adjustment: the “overtime adjustment is no ordinary overtime pay with a corresponding hourly rate. It is a non-discretionary, after-the-fact adjustment to compensation based on the overtime hours worked and the average of overtime rates over a quarter.”

In the same case, the Ninth Circuit rejected the employee's additional argument that Walmart violated the wage statement law by not including the "dates of the period for which the employee is paid" on his Statement of Final Pay, which the employee received along with his final paycheck when he was terminated in the middle of a pay period.[45] The Ninth Circuit noted that so long as an employer furnishes a wage statement on or before the semi-monthly deadline, it complies with the law. Here, while Walmart did not include the dates of the period for which the employee was paid on the Statement of Final Pay, Walmart provided the final wage statement at the end of the next pay period, which was sufficient.

16.3.5 PAGA pile-on penalties.

An employee aggrieved by an inadequate wage statement is not limited to the statutory penalties provided for in section 226. The employee can also pile on by invoking PAGA,[46] to seek additional civil penalties.[47] PAGA plaintiffs seeking civil penalties for a section 226 violation need not show that a wage-statement violation was "knowing and intentional" or that it caused any employee any injury. Rather, PAGA plaintiffs need only show that the employer failed to provide an accurate or itemized statement that contained each item of information called for by Labor Code section 226(a).[48]

And it gets even worse. While PAGA default penalties are more than steep enough ($100 per aggrieved employee per pay period for the initial violation and $200 per aggrieved employee per pay period for each further violation), Labor Code section 226.3 is even more draconian. Section 226.3 provides wage-statement penalties of $250 per employee per violation "in an initial citation" and $1,000 per employee "for each violation in a subsequent citation." A 2011 Court of Appeal held that under section 226.3 an employer's misunderstanding of the law is not "inadvertent" and thus cannot shield the employer from the imposition of penalties.[49]

But does section 226.3 apply when the wage statement is merely defective as opposed to missing altogether? Section 226.3 by its terms applies when "the employer fails to provide the employee a wage deduction statement or fails to keep the records required" by section 226(a)—not when the employer merely provides a wage statement that is somehow inadequate. Yet the Court of Appeal in *Raines v. Coastal Pacific Food Distributors*, an under-analyzed 2018 opinion, endorsed a PAGA plaintiff's proposal to rely on section 226.3's higher schedule of penalties. *Raines* acknowledged that "[s]ome courts have read Section 226.3 to limit civil penalties to only those instances where the employer failed to provide any wage statement or to keep records," yet found "more persuasive a decision that found Section 226.3 sets out a civil penalty for *all* violations of Section 226."[50] And what did *Raines* find persuasive? A breezy conclusion that if only the PAGA default penalties were applied then somehow "the purpose of the statute would be thwarted."[51]

In 2021, however, a little adult supervision arrived on the scene. The Court of Appeal, in *Gunther v. Alaska Airlines*,[52] rejected the *Raines* conclusion that section 226.3 applies to a merely defective wage statement. *Gunther* holds that a PAGA claim for such a wage statement invokes the default $100/$200 civil penalties found in PAGA instead of the higher penalties called for by section 226.3. The trial judge in *Gunther*, citing *Raines*, had imposed $25 million in PAGA penalties for wage statements that lacked some of the information called for by section 226(a). Reversing this result, *Gunther* looked to the "plain meaning" of the statutory language to conclude that section 226.3's "heightened penalties … apply only where the employer either fails to provide a wage statement or fails to keep required records as required" by section 226(a). Accordingly, the defendant's incomplete wage statements would trigger only PAGA's default penalties.

16.3.6 Electronic wage statements

The DLSE has advised that even though the statute refers to the wage statement as a "detachable part of the check," employers can meet wage itemization requirements by giving employees access to electronic wage

statements, provided that employees can print hard copies at no cost at nearby locations and that wage statements are electronically stored for at least three years.[53]

16.3.7 Special record retention requirement and employee right to a copy

Many employers traditionally did not keep copies of wage statements provided to employees, because distributing those copies was the role of a third-party payroll administrator retained for that purpose. Employers now, however, must maintain copies of wage statements for up to three years.[54] A copy can consist of a computer-generated record rather than an actual duplicate copy.[55] Legislation enacted in 2018, purporting to state existing law, provides that employees have the right "to receive" a copy of—not just inspect or copy—their pay statements.[56]

16.3.8 Liability for payroll companies?

Employers often contract out certain payroll functions to companies that hold themselves out as experts in the field. These payroll companies thus prepare wage statements and perform related payroll functions on behalf of the employer. In one case, an employee sued the payroll company (as well as her employer) for failing to break down her regular, overtime, and double-time hours, and for failing to provide for proper payment of her wages. The Court of Appeal held that the plaintiff could sue the payroll company on theories of contract (the employee was a third-party beneficiary of the payroll company's contract with the employer), negligent misrepresentation (the employee reasonably relied on wage statements the payroll company prepared), and professional negligence (in that the employer had retained the payroll company to assist in discharging its legal duties to the employee).[57]

In 2019, the California Supreme Court took review of this decision and held that "a payroll company cannot properly be considered an employer of the hiring business's employee that may be liable under the applicable labor statutes for failure to pay wages that are due."[58] The Supreme Court also rejected all three theories of liability against the payroll company: (1) liability to the employee, as a third-party beneficiary, for breach of the payroll company's contract with the employer, (2) negligent calculation of wages, in breach of the payroll company's duty of care to the employee, and (3) negligent misrepresentation to the employee by the payroll company.

The contract claim failed because a third party can sue for breach of contract only if (a) the third party is likely to benefit from the contract, (b) the contracting parties intended to provide a benefit to the third party, and (c) permitting the third party to sue for breach is consistent with the contractual objectives and the contracting parties' reasonable expectations. The contract here—between an employer and a payroll company—aimed to benefit the employer, not its employees, no matter that employees benefit in receiving proper wages.[59]

And the tort claims failed because it is neither necessary nor proper to impose on payroll companies a duty of care as to the labor law obligations that employers owe to employees. The Supreme Court recognized that having payroll companies defend wage suits, with the costs of defense passed on to employers through an increased cost of the payroll company's services, would conflict with the parties' contractual objectives and the reasonable expectations of the employer and the payroll company.[60]

The negligence claims also failed because, for various reasons, it is neither necessary nor appropriate to impose on payroll companies a tort duty of care as to obligations owed to an employee under the Labor Code and Wage Orders. *First,* the law already provides employees with complete remedies against the employer for any wage loss. *Second*, a deterrent against payroll company misconduct already exists in the contractual obligations owed to the employer. *Third*, the payroll company has no special relationship with the employee. *Fourth*, imposing a duty of care on the payroll company could induce it to place the employee's interests above those of the employer

with whom the payroll company has contracted. *Fifth*, imposing such a duty of care would complicate wage and hour litigation and make it harder to settle.[61] (See § 7.21.)

16.4 Executive Compensation

Under the California Corporate Disclosure Act, publicly traded corporations must report to the Secretary of State the salary and certain stock option rights of the five most highly compensated executives who are not on the board of directors.[62]

16.5 Filing Job Applications

California once required employers, that require job applicants to sign an application for employment, to file the application form with the DLSE.[63] That provision was repealed in 2004.

16.6 EITC Information

Pursuant to the California Earned Income Tax Credit Information Act, California employers must notify all employees of both the federal and state Earned Income Tax Credit.[64] Specifically, employers must, within a week of providing an employee any annual wage summary (e.g., Form W-2), deliver to or mail the employee written notice regarding the employee's possible eligibility for earned income tax credit under federal and state law.[65] Merely posting this information on an employee bulletin board would not satisfy this notification duty.[66]

---

1 *See* http://www.edd.ca.gov/payroll_taxes/new_hire_reporting.htm (visited Mar. 21, 2024) (defining a "rehired" employee as "any employee who is rehired after a separation of at least 60 consecutive days").

2 *See* http://www.edd.ca.gov/payroll_taxes/new_hire_reporting.htm (visited Mar. 21, 2024); *see also* Unemp. Ins. Code § 1088.5.

3 For forms, see https://www.edd.ca.gov/pdf_pub_ctr/de340.pdf (visited Mar. 21, 2024).

4 Unemp. Ins. Code § 1088.5(e).

5 Unemp. Ins. Code § 1088.5(d)(3) (further requiring that "[a]ny employer that transmits reports pursuant to this paragraph shall notify the Secretary of Health and Human Services in writing as to which state the employer designates for the purpose of sending reports").

6 Lab. Code § 2810.5.

7 Lab. Code § 2810.5(a)(1)(H) (employer must provide notice "[t]hat an employee: may accrue and use sick leave; has a right to request and use accrued paid sick leave; may not be terminated or retaliated against for using or requesting the use of accrued paid sick leave; and has the right to file a complaint against an employer who retaliates").

8 Lab. Code § 2810.5(b).

9 Lab. Code § 2810.5(c).

10 Lab. Code § 2810.5(a)(3).

11 *Id.*

12 *See* www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf (visited Mar. 21, 2024).

13 *See* http://www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html (visited Mar. 21, 2024).

14 Form DE 542, https://edd.ca.gov/pdf_pub_ctr/de542.pdf (visited Mar. 18, 2024).

15 Unemp. Ins. Code § 1088.8.

16 Lab. Code § 226(a). The nine required items are "(1) gross wages earned, (2) total hours worked by the employee, except as provided in subdivision (j) [for exempt employees], (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee and, … if the employer is a temporary services employer as defined in Section 201.3, the rate of pay and the total hours worked for each temporary services assignment."

17 Lab. Code § 226(j).

18 Lab. Code § 226.2(a)(2).

[19] Lab. Code § 226(a). A "farm labor contractor" is defined as "any person who, for a fee, employs workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection therewith one or more of the following services: furnishes board, lodging, or transportation for those workers; supervises, times, checks, counts, weighs, or otherwise directs or measures their work; or disburses wage payments to these persons." Lab. Code § 1682(b).

[20] Lab. Code § 226(a)(9).

[21] In *Stewart v. San Luis Ambulance, Inc.,* No. S246255 (Cal. Jan. 3, 2018), the Supreme Court accepted a request from the Ninth Circuit, 878 F.3d 883 (certifying question), to decide, among other issues, this issue: "Do violations of meal period regulations, which require payment of a 'premium wage' for each improper meal period, give rise to claims under section … 226 of the California Labor Code where the employer does not include the premium wage in the employee's pay or pay statements during the course of the violations?" But then the voters approved Proposition 11, the Emergency Ambulance Employee Safety and Preparedness Act (Gen. Elec. (Nov. 6, 2018), leading the Supreme Court to conclude: "resolution of the questions posed by the Ninth Circuit Court of Appeals is no longer necessary ... to settle an important question of law. … We therefore dismiss consideration of the questions."

[22] *Naranjo v. Spectrum Sec. Servs.*, 40 Cal. App. 5th 444, 474 (2019), ***aff'd in part, rev'd in part and remanded,*** 13 Cal. 5th 93 (2022) (failure to pay meal or rest period premiums does not trigger any penalty for untimely wages, because the required extra hour of pay for unprovided breaks is a statutory remedy for employer conduct, not an amount for "labor, work, or service ... performed personally by the person demanding payment") (citing definition of "wage" in Lab. Code § 200(b)).

[23] *Naranjo v. Spectrum Sec. Servs., Inc.*, 13 Cal. 5th 93, 102 (2022), ("The primary issue before us is whether this extra pay for missed breaks constitutes 'wages' that must be reported on statutorily required wage statements during employment (Lab. Code, § 226) and paid within statutory deadlines when an employee leaves the job (id., § 203). We conclude, contrary to the Court of Appeal, that the answer is yes.").

[24] *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308, 1336 (2018) (reversing award of wage statement penalties; rejecting plaintiffs' argument that "any failure to pay overtime at the appropriate rate also generates a wage statement injury justifying the imposition of wage statement penalties" because it would lead to "an apparent unintentional double recovery").

[25] *Naranjo v. Spectrum Sec. Servs., Inc.*, 13 Cal. 5th 93, 119-120 (2022) (rejecting employer's reliance on *Maldonado* because that decision recognized '[w]age statements should include the hours worked at each rate and the wages *earned*' — not just wages actually paid" (quoting *Maldonado*, 22 Cal. App. 5th at 1336) (emphases original)).

[26] Lab. Code § 226(j).

[27] *Soto v. Motel 6 Operating, LP*, 4 Cal. App. 5th 385, 391-92 (2016) (affirming dismissal of complaint: "vacation pay cannot be fairly defined as 'gross wages earned' or 'net wages earned' under section 226, subd. (a)(1) or (5) until the termination of the employment relationship. The employee has vested rights to paid vacation or vacation wages during the time of his employment, but these rights do not ripen and become an entitlement to receive the monetary value of the benefit as wages until the separation date."). *See also Mora v. Webcor Constr., L.P.*, 20 Cal. App. 5th 211 (2018) (affirming dismissal of complaint; employer need not record on wage statements any payment to a union vacation trust fund; the plaintiff did not exercise any control over this money, which was transferred to a trust).

[28] *Canales v. Wells Fargo Bank, N.A.*, 23 Cal. App. 5th 1262, 1268, 1271 (2018).

[29] Lab. Code § 226(a)(7).

[30] Lab. Code § 226(e).

[31] Lab. Code § 226(e); *see also Price v. Starbucks Corp.,* 192 Cal. App. 4th 1136, 1142 (2011).

[32] *Price v. Starbucks Corp*., 192 Cal. App. 4th 1136, 1143 (2011) (affirming dismissal of wage statement claim where plaintiff merely "speculates on the 'possible underpayment of wages due,' which is not evident from the wage statements attached to the complaint").

[33] *Id.* at 1143.

[34] *Id.* (distinguishing cases where injury arose from inadequate wage statements that required employees to engage in discovery and perform mathematical computations to reconstruct time records to see if they were correctly paid); *cf. Wang v. Chinese Daily News, Inc.*, 453 F. Supp. 2d 1042, 1050 (C.D. Cal. 2006), *aff'd on other grounds*, 623 F.3d 743 (9th Cir. 2010) (wage statements inaccurately listed hours worked and omitted hourly wage); *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949, 956 (2005) (inaccurate hours on wage statements).

[35] Lab. Code § 226(e)(2)(A), (B).

[36] Lab. Code § 226(e)(3). In reviewing compliance with these provisions, the factfinder can consider whether the employer, before an alleged violation, adopted and complied with a set of policies, procedures, and practices that fully comply with section 226. The amendment deeming technical violations to cause "injury" were held to "clarify" rather than change the law and thus the amendment could apply retroactively. *Lubin v. Wackenhut Corp.*, 5 Cal. App. 5th 926, 959 (2016) (Labor Code section 226(e)(2)(B)(i) "clarifies that injury arises from defects in the wage statement, rather than from a showing that an individual experienced harm as a result of the defect").

[37] *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949, 955 (2005) (reversing summary judgment to employer; quoting with apparent approval DLSE Opinion Letter 2002.05.17, at 3, 6) (emphasis in original).

[38] *See Clarke v. First Transit, Inc.*, 2010 WL 11459322, at *2 (C.D. Cal. 2010) (PAGA claim); *Mays v. Wal-Mart Stores, Inc.*, 2019 WL 365898, at *5 (C.D. Cal. 2019) (PAGA claim); *Jones v. Longs Drug Stores California, Inc.*, 2010 WL 11508656, at *1 (S.D. Cal. 2010 (PAGA claim).

[39] *Noori v. Countrywide Payroll & HR Solutions, Inc.*, 43 Cal. App. 5th 957, 965 (2019) (reversing dismissal of wage statement claim). Meanwhile, on the wage statement, it was sufficient there to use an acronym for the employer's fictitious business name.

[40] *Drum v. Saks & Co.*, 95 F. Supp. 3d 1221, 1225 (S.D. Cal. 2015); *McKenzie v. Federal Express Corp.*, 765 F. Supp. 2d 1222, 1225 (C.D. Cal. 2011).

[41] *Morgan v. United Retail Inc.*, 186 Cal. App. 4th 1136, 1147, 1149 (2010) (affirming summary adjudication to employer; "The employee could simply add together the total regular hours figure and the total overtime hours figure shown on the wage statement to arrive at the sum of hours worked.").

[42] *Savea v. YRC Inc.*, 34 Cal. App. 5th 173, 176 (2019) (affirming dismissal of complaint; "YRC did not violate section 226, subdivision (a)(8) by providing its fictitious business name as the employer name on its wage statements or by providing an employer address that did not contain a mail stop code or ZIP+4 Code.").

[43] *Gen. Atomics v. Superior Ct*., 64 Cal. App. 5th 987, 990 (2021), *rev. denied* (Sept. 15, 2021) (reversing trial court and awarding summary judgment to employer).

[44] *Magadia v. Wal-Mart Assocs., Inc.*, 999 F.3d 668, 680 (9th Cir. 2021) (reversing judgment and award of damages to employee on wage statement claim).

[45] *Id.* at 682.

[46] Lab. Code § 2699.5.

[47] Lab. Code § 2699(f)(2).

[48] *Lopez v. Friant & Assocs., LLC*, 15 Cal. App. 5th 773, 784 (2017) (reversing summary judgment to employer; "Because section 226(e)(1) sets forth the elements of a private cause of action for damages and statutory penalties, its requirement that a plaintiff demonstrate 'injury' resulting from a 'knowing and intentional' violation of section 226(a) is not applicable to a PAGA claim for recovery of civil penalties."). *See also Raines v. Coastal Pac. Food Distributors, Inc.*, 23 Cal. App. 5th 667, 676-77, 679-80, 681 (2018) (reversing summary judgment to employer on PAGA claim; where wage statement shows overtime hours and total overtime payment, plaintiff could use simple arithmetic to derive the missing hourly rate, satisfying the statutory exception to the "deemed to suffer injury" provision that applies where "a reasonable person would be able to readily ascertain the information without reference to other documents or information"; by contrast, PAGA has no "injury" requirement and so plaintiff could proceed with her PAGA claim though a "trial court has discretion in awarding civil penalties and may reduce the award for technical violations that cause no injury").

[49] *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement*, 192 Cal. App. 4th 75 (2011) ("inadvertent" is not defined in the statute, it should receive its "plain and commonsense meaning"—unintentional, accidental, or not deliberate).

[50] *Raines v. Coastal Pac. Food Distribs., Inc.*, 23 Cal. App. 5th 667, 674-75 (2018) (reversing summary judgment to employer on PAGA claim) (emphasis in original).

[51] *Id*. at 675.

[52] *Gunther v. Alaska Airlines, Inc.*, 72 Cal. App. 5th 334 (2021).

[53] DLSE Opinion Letter 2006.07.06.

[54] Lab. Code § 226(a) ("a copy of the [wage] statement and the record of the deductions shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California").

[55] Lab. Code § 226(a) ("For purposes of this subdivision, 'copy' includes a duplicate of the itemized statement provided to an employee or a computer-generated record that accurately shows all of the information required by this subdivision.").

[56] SB 1252, amending Lab. Code § 226(b) ("An employer … shall afford current and former employees the right to inspect or receive a copy of records pertaining to their employment.").

[57] *Goonewardene v. ADP, LLC,* 5 Cal. App. 5th 154, 174, 183 (2016) (reversing dismissal of complaint in part), *review granted*, No. S238941 (Cal. Feb. 15, 2016).

[58] *Goonewardene v. ADP, LLC*, 6 Cal. 5th 817 (2019) (affirming dismissal of complaint as to payroll company on causes of action for breach of contract, negligence, and negligent misrepresentation).

[59] *Id.* at 821.

[60] *Id.*

[61] *Id.* at 841.

[62] Corp. Code § 1502.1(a)(4).

[63] Lab. Code § 431 (repealed in 2004 by S.B.1809).

[64] Rev. & Tax. Code § 19853 ("An employer shall notify all employees that they may be eligible for the federal and the California EITC within one week before or after, or at the same time, that the employer provides an annual wage summary, including, but not limited to, a Form W-2 or a Form 1099, to any employee.").

[65] *Id*. Pursuant to Rev. & Tax. Code § 19854(a), the notice furnished to employees regarding the availability of the federal and the California EITC shall state as follows:

BASED ON YOUR ANNUAL EARNINGS, YOU MAY BE ELIGIBLE TO RECEIVE THE EARNED INCOME TAX CREDIT FROM THE FEDERAL GOVERNMENT (FEDERAL EITC). THE FEDERAL EITC IS A REFUNDABLE FEDERAL INCOME TAX CREDIT FOR LOW-INCOME WORKING INDIVIDUALS AND FAMILIES. THE FEDERAL EITC HAS NO EFFECT ON CERTAIN WELFARE BENEFITS. IN MOST CASES, FEDERAL EITC PAYMENTS WILL NOT BE USED TO DETERMINE ELIGIBILITY FOR MEDICAID, SUPPLEMENTAL SECURITY INCOME, FOOD STAMPS, LOW-INCOME HOUSING, OR MOST TEMPORARY ASSISTANCE FOR NEEDY FAMILIES PAYMENTS. EVEN IF YOU DO NOT OWE FEDERAL TAXES, YOU MUST FILE A FEDERAL TAX RETURN TO RECEIVE THE FEDERAL EITC. BE SURE TO FILL OUT THE FEDERAL EITC FORM IN THE FEDERAL INCOME TAX RETURN BOOKLET. FOR INFORMATION REGARDING YOUR ELIGIBILITY TO RECEIVE THE FEDERAL EITC, INCLUDING INFORMATION ON HOW TO OBTAIN THE IRS NOTICE 797 OR ANY OTHER NECESSARY FORMS AND INSTRUCTIONS, CONTACT THE INTERNAL REVENUE SERVICE BY CALLING 1-800-829-3676 OR THROUGH ITS WEB SITE AT WWW.IRS.GOV.

YOU ALSO MAY BE ELIGIBLE TO RECEIVE THE CALIFORNIA EARNED INCOME TAX CREDIT (CALIFORNIA EITC) STARTING WITH THE CALENDAR YEAR 2015 TAX YEAR. THE CALIFORNIA EITC IS A REFUNDABLE STATE INCOME TAX CREDIT FOR LOW-INCOME WORKING INDIVIDUALS AND FAMILIES. THE CALIFORNIA EITC IS TREATED IN THE SAME MANNER AS THE FEDERAL EITC AND GENERALLY WILL NOT BE USED TO DETERMINE ELIGIBILITY FOR WELFARE BENEFITS UNDER CALIFORNIA LAW. TO CLAIM THE CALIFORNIA EITC, EVEN IF YOU DO NOT OWE CALIFORNIA TAXES, YOU MUST FILE A CALIFORNIA INCOME TAX RETURN AND COMPLETE AND ATTACH THE CALIFORNIA EITC FORM (FTB 3514). FOR INFORMATION ON THE AVAILABILITY OF THE CREDIT, ELIGIBILITY REQUIREMENTS, AND HOW TO OBTAIN THE NECESSARY CALIFORNIA FORMS AND GET HELP FILING, CONTACT THE FRANCHISE TAX BOARD AT 1-800-852-5711 OR THROUGH ITS WEB SITE AT WWW.FTB.CA.GOV.

[66] Rev. & Tax. Code § 19853(d) ("The employer shall not satisfy the notification required . . . by posting a notice on an employee bulletin board or sending it through office mail. However, these methods of notification are encouraged to help inform all employees of the federal and the California EITC.").

17. Workers' Compensation

The California workers' compensation system, since the early 1900s, has compensated employees for work-related injuries. It is a no-fault system, entitling injured workers to benefits without having to prove that the injury was the employer's fault. The system is a tradeoff: while injured workers get benefits without proof of employer negligence, generally those benefits are the exclusive remedy. The workers' compensation benefits are paid by either the employer (if the employer is authorized to self-insure) or by the employer's workers' compensation insurance carrier.[1]

While comprehensive details of California's workers' compensation system[2] are beyond the scope of this modest monograph, that system intersects with employment law generally at various points, discussed briefly below.

17.1 Jurisdiction

California will take workers' compensation jurisdiction over any injury, wherever it occurs, if the contract of hire was made in California. More problematic has been the case where an out-of-state worker suffers an injury (or part of a continuous trauma) in California. Traditionally, California with its generous workers' compensation benefits, has been a favorite forum for out-of-state workers, because California would take jurisdiction over injuries occurring in California even if the employee was in California only temporarily or only in a way that was incidental to work primarily done outside of California. During 2015, however, statutory and case law developments reversed that trend, resulting in a significant restriction of California's exercise of jurisdiction over claims by out-of-state employees. California now will decline jurisdiction if an out-of-state employee of an out-of-state employer has executed a contract of hire designating choice of law and venue for another state for purposes of workers' compensation benefits. Furthermore, California in any event will not exercise jurisdiction without a showing of minimum contacts and a state interest in the claimed injury in California.[3]

17.2 Disability Discrimination

Under California's very liberal definition of "disability," virtually all job-related injuries will entitle the worker not only to compensation benefits but to protection as a disabled worker.[4]

17.3 Privacy Implications

Medical information regarding an injured worker that an insurance carrier obtains during workers' compensation proceedings may be shielded from disclosure to the employer except insofar as the information is related to diagnosis of the condition for which compensation is claimed or is needed for the employer to modify the employee's work duties (see § 4.7.2).

17.4 Workers' Compensation Preemption

Remedies obtained through administrative agencies (see §§ 1.7, 1.8), may provide the exclusive remedy with respect to certain theories of liability that would otherwise be available to an employee suing an employer, although the scope of workers' compensation preemption in California is very narrow compared to that of most states (see § 5.7.1).

17.5 Compensation Implications

California employers must not deduct the cost of workers' compensation from employee earnings.[5]

17.6 Good Faith Personnel Actions

While California workers' compensation broadly covers any injury arising out of employment, including psychiatric illness or injury, compensation for psychiatric injury may be denied when the employee has been employed less than six months (unless the stress resulted from "sudden and extraordinary" conditions, as opposed to "regular and routine" employment events), when the injury resulted from lawful, non-discriminatory, good faith personnel actions, or when the psychiatric claim was first made after notice of the employee's dismissal.[6]

17.7 Temporary Labor

To protect employers that use a temporary employment agency or that join with another employer to perform work under their dominion and control, one party may assume all responsibility for the provision of workers' compensation benefits to those workers. The agreement has to be in writing, expressly stating which entity will provide the benefit. The responsible entity then must purchase or provide for the benefits for the protection to be implemented.[7]

17.8 Coverage of Employees Only

17.8.1 Workers covered

Any person rendering service for another, other than an independent contractor, is presumed to be an employee for purposes of workers' compensation liability.[8]

As of 2017, the definition of employees subject to coverage changed.[9] Now, unless they affirmatively opt out, coverage is extended to "working members of a company." Previously any working officer or director of a privately held corporation or partner or managing member of a partnership or limited liability company was automatically excluded from coverage unless he or she affirmatively elected coverage. To avoid coverage, any officer, director, or partner owning 15% of issued and outstanding stock, or an individual who is a general partner of a partnership, or managing member of a limited liability company must affirmatively opt out of coverage by signing a waiver under penalty of perjury confirming that he or she meets at least one of the qualifications and elects to waive coverage. This rule applies to "in force" policies, as well as to new policies.

17.8.2 Independent contractors

Workers' compensation insurance is not required for independent contractors who work for a California employer. Correct classification of a worker as an independent contractor is essential, because if a person improperly labeled as an independent contractor is injured while doing work for a company, then the company may have to pay for the medical bills for the injured worker. Similarly, if an employee hired by an improperly classified independent contractor to do some work is hurt, and the "independent contractor" does not carry workers' compensation insurance, then the company engaging the "independent contractor" may have to cover medical bills and compensation for the injured worker.

In November 2020, Proposition 22, the Protect App-Based Drivers and Services Act (see § 19.7), was approved by a majority of California voters resulting in certain gig workers who use app-based platforms to provide services becoming independent contractors by statute. As a result of the passage of Proposition 22, California added sections 7448 *et seq.* to the Business and Professions Code. These sections remove from the definition of

"employee" any person who provides services using an application-based referral platform. As such, these workers are not employees within the meaning of California law and the Workers' Compensation Appeals Board thus lacks jurisdiction over injuries suffered in the course of performing their duties.

As to other workers, it depends if the hiring entity is within an occupation or business covered by AB 5 or the successor law AB 2257. Entities so covered must meet the ABC test to avoid workers' compensation coverage for the workers in question, while entities not so covered must meet the *Borello* test to avoid workers' compensation coverage for the workers in question (see § 19.7).

17.9 Discrimination Against Injured Workers—Labor Code § 132a

Section 132a makes it unlawful to discharge, to threaten to discharge, or to discriminate "in any manner" against a California worker who has made known any intent to file for workers' compensation benefits or who has received a workers' compensation rating, award, or settlement. This prohibition extends to protect workers who were injured in jobs for a prior employer.

Section 132a has been interpreted liberally, so that even a uniformly administered rule regarding termination of employment (e.g., a rule that anyone on disability leave for more than a year will be dismissed) can be unlawful, unless the employer shows that its discharge of the injured worker was based on "business necessity."[10] A violation is a misdemeanor. Civil remedies include reinstatement, back pay, and an increase by one-half in the employee's workers' compensation benefits, or $10,000, whichever is less.

While civil remedies are available under section 132a, a violation of this statute does not give rise to a common law wrongful termination claim, since the statute contains limitations in scope and remedy.[11]

The logical sweep of section 132a, as interpreted, arguably might reach even the continuation of medical benefits for an injured worker on leave. But the WCAB has held that an employer may discontinue medical benefits for employees on leave because of work-related injury, provided that the discontinuation was pursuant to an ERISA benefit plan.[12] Moreover, the California Supreme Court has held that, beyond the termination context, the antidiscrimination rule of section 132a simply requires that workers with industrial injuries be treated no worse than their co-workers who have sustained no workplace injury.[13]

17.10 Covid-19

Under 2020 legislation, there was until 2023 a rebuttable presumption of workers' compensation compensability for Covid-19 infections. For employers of five or more, the presumption arose that any employee testing positive for Covid-19 had contracted the disease in the workplace, if certain circumstances were met. The law required employer reporting to workers' compensation insurers or claims administrators and imposed stiff fines for non-compliance.[14] Those presumptions expired January 1, 2024, but employees are still able to establish the compensability of Covid-19 claims under standard rules for compensability for diseases. In 2023, the California Supreme Court reviewed a case brought by an employee's spouse for a Covid-19 injury and found that while the spouse's claims were not barred by the Workers' Compensation Act's exclusivity provision, policy considerations cautioned against imposing a tort duty to the members of an employee's household.[15]

---

1 Lab. Code § 3700 (employer may secure coverage by buying insurance coverage or securing state certificate of consent to self-insure).

2 Lab. Code §§ 3751. *See also supra* § 7.7.1.

3 *See* Lab. Code § 3600.5(b)(c); *McKinley v Arizona Cardinals*, 78 Cal. Comp. Cases 23 (2013); *Federal Ins. Co. v WCAB* (Johnson), 221 Cal. App. 4th 1116, 78 Cal. Comp. Cases 1257 (2013).

4 *See generally* § 3.4 (interactive process required for worker with job-related injury), § 6.3 (broad definition of "disability").

[5] Lab. Code §§ 3200-6002.

[6] Lab. Code § 3208.3(d) (employee must have been employed for at least six months to obtain compensation for psychiatric injury); Lab. Code § 3208.3(h) (no compensation for psychiatric injury payable if injury "substantially caused by a lawful, nondiscriminatory, good faith personnel action), with employer to bear the burden of proof). *See San Francisco Unified Sch. Dist. v. WCAB,* 190 Cal. App. 4th 1 (2010) ("substantially caused" means that the personnel action was responsible for "at least 35 to 40 percent of the causation from all sources combined," and both industrial and nonindustrial causes make up the total causation); *Northrop Grumman Corp. v. WCAB*, 103 Cal. App. 4th 1021 (2002) (reversing award to worker psychiatrically injured by investigation that was lawful, nondiscriminatory, good faith personnel action under Lab. Code § 3208.3(h)).

[7] Lab. Code § 3602(d).

[8] Lab. Code § 3357.

[9] In 2016, the Legislature amended Labor Code sections 3351 and 3352 and repealed section 6354.7.

[10] *Judson Steel Corp. v. WCAB*, 22 Cal. 3d 658, 667 (1978).

[11] *Dutra v. Mercy Med. Ctr., Mount Shasta*, 209 Cal. App. 4th 750, 754 (2012) (distinguishing *City of Moorpark v. Superior Ct.*, 18 Cal. 4th 1143, 1158 (1998), which held that section 132a does not provide an exclusive remedy for employee suing under FEHA for disability discrimination under the common for wrongful termination; "section 132a does not qualify under case authority as the type of policy that can support a common law action for wrongful termination").

[12] *Navarro v. A&A Farming & W. Grower Ins. Co.*, 67 Cal. Comp. Cas. 145 (2002).

[13] *State Dep't of Rehab. v. WCAB*, 30 Cal. 4th 1281 (2003) (not unlawful to require injured employees to use sick and vacation leave when away from the workplace seeking medical treatment for workplace injuries, where other, non-injured employees likewise must use leave time to seek medical care).

[14] SB 1159, 2020 bill adding Lab. Code § 77.8 and repealing Lab. Code §§ 3212.86, 3212.87, and 3212.88, effective immediately upon Governor Newsom's signing of SB 1159 on September 17, 2020.

[15] *Kuciemba v. Victory Woodworks, Inc.*, 14 Cal. 5th 993 (2023) (holding employers have no duty of care under California tort law to prevent the spread of Covid-19 to the household members of employees (e.g., spouses), but also holding that the household member's claims are not barred by the exclusive remedy doctrine).

Seyfarth

18. Rights of Organized Labor

18.1 Agricultural Workers

In America generally, collective bargaining laws do not protect farm workers, as the National Labor Relations Act (NLRA) exempts agricultural labor. In California, the home of Cesar Chavez, it's different. Since 1975, the California Agricultural Labor Relations Act (ALRA) has given farm workers the right to be recognized at the bargaining table, under state procedures similar to those used under the NLRA. But the ALRA goes a big step further.

Mandatory mediation and conciliation. While the NLRA simply requires employers to bargain, and does not mandate results, the California Legislature, in 2002, amended the ALRA to add provisions on "mandatory mediation and conciliation" (MMC).[1] Under the MMC provisions, the ALRA imposes, on growers who refuse to meet union demands, a neutral mediator who can decree the terms of a binding contract, subject to final approval by the Agricultural Labor Relations Board (ALRB).

A grower successfully challenged the MMC process in 2015. In 1992, the United Farm Workers of America (UFW) had been certified as the union for the grower's agricultural employees. The parties held an introductory negotiating session in early 1995. The UFW then disappeared, only to reassert its status as the employees' certified bargaining representative 17 years later, in 2012. The grower asserted that the UFW, by its lengthy absence, had abandoned its status as bargaining representative. The ALRB ruled against the grower and ordered it to submit to the MMC process, and then adopted the mediator's proposed collective bargaining agreement in a final order. The Court of Appeal held that the ALRB had abused its discretion in rejecting the grower's claim that a union's abandonment of its members barred the union's MMC request. The Court of Appeal held further that the MMC process both violated equal protection and invalidly delegated legislative authority, in violation of the California Constitution.

But then the California Supreme Court granted review of this decision[2] and, in 2017, ruled in the UFW's favor on all issues.[3] *First*, the high court held that the MMC provisions are constitutional. *Second*, the high court held that an employer may not refuse to bargain with a union, whether during the ordinary bargaining process or during MMC, on the basis that the union has abandoned its representative status. The high court reasoned that the legislature intended to reserve the power to decertify unions to employees and labor organizations alone. Allowing employers to raise an abandonment defense, the high court concluded, would frustrate that intent and undermine the ALRA's comprehensive scheme of labor protections for agricultural employees.

Special union access rule. In America generally, employers can prohibit nonemployee union organizers from promoting their union on company property, as long as the union has other available channels of communication with employees and the employer prohibits similar promotions by other organizations.[4] In California it's different. The ALRB in 1975 adopted an emergency regulation to grant union organizers the right to enter growers' property during nonworking times to solicit the support of grower employees for a union.[5] This cal-peculiar union right does not depend on whether union organizers lack reasonable access to employees. Rather, the access regulation empowers union organizers—numbering two for every 15 employees—to enter private property for one hour before the start of work, for one hour after work ends, and for one hour during the lunch break, for 120 days during the calendar year. In a 1976 decision the California Supreme Court rejected a grower's argument that this state-authorized encroachment on private property violated the Takings Clause of the Fifth Amendment.[6]

A couple of growers then mounted a new challenge to the access regulation, after they rebuffed efforts of union organizers to invade their land. The dispute resulted in unfair labor practice charges being filed with the ALRB. The growers then sued ALRB members in federal court for an injunction against the enforcement of the access regulation, because the regulation appropriates the growers' property (by giving union organizers an easement) without compensation, in violation of the Fifth Amendment. The federal district court rejected this argument in a ruling that was affirmed by a divided Ninth Circuit panel.[7] The Ninth Circuit denied a rehearing *en banc*, but eight Ninth Circuit judges dissented from the denial.[8]

The U.S. Supreme Court then took review of the case, to consider whether "the uncompensated appropriation of an easement that is limited in time constitutes a per se physical taking under the Fifth Amendment." The Supreme Court, in 2021, issued a 6-3 opinion in *Cedar Point Nursery v. Hassid*,[9] which reversed the Ninth Circuit. *Hassid* held that the California access regulation violated the Takings Clause of the Fifth Amendment of the U.S. Constitution, which applies to the states via the Fourteenth Amendment, and which prohibits the government from taking private property for public use "without just compensation." Physical takings must be compensated, and the California access regulation amounted to a physical taking by appropriating the owners' right to exclude third parties from their land—"one of the most treasured rights" of property ownership.[10] By granting access to third-party union organizers, even for a limited time, the California access regulation confers a right to physically invade the growers' property and thus constitutes an unconstitutional physical taking without compensation.

18.2 Anti-Injunction Laws Regarding Mass Picketing

In America generally, employers can obtain injunctions against union-generated mass picketing that disrupts with business operations. In California it's different. California favors union speech. The 1975 Moscone Act limits the equity jurisdiction of courts with respect to labor disputes by declaring that conduct relating to a "labor dispute," such as peaceful picketing, "shall be legal, and no court … shall have jurisdiction to issue any restraining order or preliminary or permanent injunction which, in specific or general terms, prohibits any person or persons, whether singly or in concert, from [engaging in the specified conduct]."[11]

Further favoring unions is California Labor Code section 1138.1, which creates virtually insurmountable obstacles to any employer trying to enjoin union interference with business operations during a labor dispute.

Section 1138.1 requires that employers seeking a temporary restraining order as to a labor dispute must produce live witnesses at a hearing (not just written declarations under oath), must prove that law enforcement is unable or unwilling to protect the employer's property, and must furnish "clear proof" (instead of the traditional "preponderance of the evidence") that the defendant union actually participated in or authorized unlawful acts.[12]

These pro-union statutes attracted serious constitutional scrutiny in 2010 and 2011, when two Court of Appeal decisions struck them down as unconstitutional because their pro-union favoritism discriminates on the basis of the content of speech. In one case, a trial court relied on these statutes to deny an injunction against union agents trespassing on store premises to distribute flyers urging shoppers to boycott the store for failing to employ union workers. The Court of Appeal held that the statutes unconstitutionally favor speech related to a labor dispute over speech related to other issues: California could not constitutionally keep courts from exercising their equity jurisdiction to enjoin trespassing union agents just as they enjoin other trespassers.[13]

In the other case, involving the same union and the same store employer, but in a different judicial district, the union used an "informational picket line" to tell shoppers that store workers were not unionized. Again, the statutes in question tied the hands of a judge who otherwise could enjoin the trespassing. The Court of Appeal in this second case also held the statutes unconstitutional, reasoning that there "is no compelling reason for the

state to single [pro-union speech] out as the only form of speech that can be exercised despite the objection of the owner of private property upon which the speech activity occurs."[14]

But then the California Supreme Court, in 2012, re-tilted the playing field in favor of unions by invalidating these appellate decisions and issuing its own decision.[15] The Supreme Court upheld the constitutionality of the Moscone Act and section 1138.1 as being "justified by the state's interest in promoting collective bargaining to resolve labor disputes, the recognition that union picketing is a component of the collective bargaining process, and the understanding that the area outside the entrance of the targeted business is 'the most effective point of persuasion.'" For support, the Supreme Court cited other laws protecting labor-related speech in the context of economic regulations, and U.S. Supreme Court decisions that "support the proposition that labor-related speech may be treated differently than speech on other topics."

A concurring opinion cited the portion of the Moscone Act that proscribes unlawful conduct—such as breach of the peace, disorderly conduct, and blocking of ingress and egress—to stress that the Moscone Act and section 1138.1 do not protect union conduct that involves violence or aims to harm businesses by using tactics that go beyond "persuasion of patrons to labor's position." The concurring opinion stated that using more signs or individuals in a small area than reasonably required to publicize a dispute would be unlawful. But since these legal observations are not part of the majority opinion, it is unclear how much weight lower courts will give them.

In another development related to the privileged nature that California has conferred upon pro-union activities, the Court of Appeal, applying California's constitutional protection of free speech to a private shopping mall, has held it was unconstitutional for the mall, having permitted union picketing of mall premises, to prohibit picketing by an animal rights' organization that was protesting the practices of a pet shop located within the mall.[16]

18.3 Regulating Advertising for Strike-Breakers

Any advertisement seeking persons to work during a California trade dispute must contain certain disclosures, such as the fact of a dispute and the name of the advertiser and the employer who is represented.[17]

18.4 Gag Orders for State Government Contractors

A union-inspired statute provided that employers contracting with or providing services to the state must not use state money to assist, promote, or deter union organization. State contractors were also forbidden to hold meetings on state property to assist, promote, or deter union organizing.

Employers subject to this law had to certify in writing and maintain accounting records to prove that there had been no misuse of funds. Among the penalties for violation were a fine of repayment of the state funds plus a penalty equal to twice the amount of repayment. Taxpayers could sue to enforce this law, and prevailing plaintiffs could recover attorney fees.[18]

When California employers challenged this restriction on employer speech as preempted by the National Labor Relations Act, the Ninth Circuit, in a 2006 *en banc* decision, ruled 12-3 that the legislation was valid.[19] The U.S. Supreme Court then held otherwise, ruling, 7-2, that federal labor law preempts the California legislation, because that legislation impermissibly regulated within "a zone protected and reserved for market freedom."[20]

18.5 Right to Leaflet in Private Shopping Malls

In America generally, the property rights of shopping mall owners permit them to exclude leafleting, as the constitutional right of free speech applies only against governmental, not private, action. In California, it's different. In a 2007 case, the California Supreme Court, ruling in favor of labor organizers, held that the right to free speech

under the California Constitution "includes the right to urge customers in a shopping mall to boycott one of the stores in the mall."[21] Thus, a union may intrude upon the premises of a private shopping mall to urge a boycott of tenant stores, even though that activity interferes with the store's business.

In the underlying case, a union having a labor dispute with a newspaper prepared leaflets describing the newspaper's mistreatment of workers and distributed the leaflets outside a department store, because the store advertised in the newspaper. Mall officials told the union members, who were breaking a mall rule against urging boycotts of mall stores, that they were trespassing. The union filed an unfair labor practice charge against the mall with the NLRB. When the NLRB held that the mall's rules violated the NLRA, the mall appealed to the D.C. Circuit. Because "no California court has squarely decided whether a shopping center may lawfully ban from its premises speech urging the public to boycott a tenant," that court asked the California Supreme Court to decide whether the mall's rule was lawful.[22]

The California Supreme Court ruled for the labor organizers and against the shopping mall. The Supreme Court first found that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." Accordingly, the mall's content-based restriction on constitutionally protected speech required a "compelling interest" under the "strict scrutiny" test. Brushing aside the mall's concern that encouraging a boycott interferes with the store's business operation, the Supreme Court concluded that the mall's anti-boycott rule was invalid: "[t]he Mall's purpose to maximize the profits of its merchants is not compelling compared to the Union's right to free expression."[23] Therefore, the mall could not enforce its anti-boycotting rule against the union.

A strong dissenting opinion urged the California Supreme Court to join the "judicial mainstream" by overruling California precedent that the property rights of shopping malls must yield to free-speech considerations. The dissent observed that California's peculiar law in this respect "has received scant support and overwhelming rejection around the country"; indeed, 14 states with free speech-provisions in their constitutions almost identical to California's had rejected the peculiar California rule. And four states that previously had adopted a similar approach to California's (Colorado, Massachusetts, New Jersey, and Washington) were "generally retreating."[24]

Thus, while courts generally respect property rights in the context of private sidewalks or private parking lots of stand-alone stores,[25] California, in peculiar fashion, holds that shopping malls must remain open to the public for general speech purposes, subject only to reasonable time, place, and manner restrictions, meaning that unions in California have free rein to urge primary or secondary boycotts of stores inside privately owned shopping malls.

18.6 Access to Private Employee Information

Although employees generally have a strong privacy interest in their home addresses and telephone numbers, the California Supreme Court has ruled that the County of Los Angeles must provide that information for its employees, including its non-union employees, to the union representing county employees. The Supreme Court acknowledged that this disclosure would amount to a serious invasion of privacy but felt that the invasion was justified on the basis that the union owed a duty of fair representation to all employees in the bargaining unit, and needed the requested information to communicate fully with the employees.[26]

18.7 Collective Bargaining Agreement Waiver Issues

Assembly Bill (AB) 1654, effective January 2019, provided an exemption for employees in the construction industry from the Private Attorneys General Act of 2004 (PAGA) if employees' collective bargaining agreements met certain requirements.[27] To qualify for a PAGA exemption, the CBA must:

- apply to working conditions, wages, and hours of work of employees in the construction industry,
- ensure employees receive a regular hourly wage not less than 30% more than the minimum wage,
- prohibit Labor Code violations redressable by PAGA,
- contain a grievance and binding arbitration procedure to redress Labor Code violations remedied by PAGA,
- expressly waive the requirements of PAGA in clear and unambiguous terms, and
- authorize an arbitrator to award all remedies available under PAGA, except for penalties payable to the LWDA.

Similarly, on January 1, 2022, Senate Bill (SB) 646 went into effect, which provides a limited exception from PAGA for certain janitorial employees performing work pursuant to a collective bargaining agreement.[28] For the exception to apply, the janitorial employees must be covered under a CBA in effect before July 1, 2028, that expressly provides for the wages, hours of work, and working conditions of employees, and provides premium wage rates for all overtime hours worked. The CBA must also:

- ensure non-probationary employees receive total hourly compensation, inclusive of wages, health insurance, pension, training, vacation, holiday, and fringe benefit funds, not less than 30% more than the state minimum wage,
- prohibit Labor Code violations redressable by PAGA,
- provide for a grievance and binding arbitration procedure to redress those violations, and allow the union to pursue a grievance on behalf of all affected employees,
- expressly waive the requirements of PAGA in clear and unambiguous terms, and
- authorize an arbitrator to award any and all remedies otherwise available under the Labor Code, except for penalties payable to the LWDA.

Although SB 646 only covers the property services industries and janitorial employees, the passage of the bill along with AB 1654 raise potential for other industries to seek similar exemptions from PAGA.

---

1 Lab. Code §§ 1164-1164.13.

2 *Gerawan Farming, Inc. v. ALRB (United Farm Workers)*, 189 Cal. Rptr. 3d 261 (2015), *review granted*, 191 Cal. Rptr. 3d 497 (Cal. Aug. 19, 2015). The Supreme Court agreed to decide whether (1) the MMC process violates the equal protection clauses of the state and federal Constitutions, (2) the MMC process effects an unconstitutional delegation of legislative power, (3) an employer can oppose a certified union's request for referral to the MMC process by asserting that the union has abandoned the bargaining unit.

3 *Gerawan Farming, Inc. v. ALRB (United Farm Workers)*, 3 Cal. 5th 1118 (2017), *cert. denied*, 139 S. Ct. 60 (2018).

4 *NLRB v. Babcock*, 351 U.S. 105 (1956).

5 8 Cal. Code Regs. § 20900. Perhaps this cal-peculiar regulation made sense back in 1975, when many employees lived on the growers' property and lacked the communications technology that have since evolved over the last half-century.

6 *ALRB v. Superior Ct. (Pandol & Sons)*, 16 Cal. 3d 392 (1976).

7 *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 536 (9th Cir. 2019).

8 *Cedar Point Nursery v. Hassid*, 956 F.3d 1162 (9th Cir. 2020) (Ikuta, J., dissenting from denial of rehearing *en banc*).

9 *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 141 S. Ct. 2063 (2021).

10 *Id.*, 141 S. Ct. at 2072.

[11] Civ. Proc. Code § 527.3(b).

[12] Lab. Code § 1138.1.

[13] *Ralphs Grocery Co. v. United Food & Com. Workers Union Local 8*, 186 Cal. App. 4th 1078 (2010), *review granted*, No. S185544 (Cal. Sept. 29, 2010).

[14] *Ralphs Grocery Co. v. United Food & Com. Workers Union Local 8*, 192 Cal. App. 4th 200 (2011), *review granted,* No. S191251 (Cal. April 13, 2011).

[15] *Ralphs Grocery Co. v. United Food & Com. Workers Union Local 8*, 55 Cal. 4th 1083 (2012).

[16] *Best Friends Animal Soc'y v. Macerich Westside Pavillion Prop. LLC*, 193 Cal. App. 4th 168 (2011).

[17] Lab. Code § 973.

[18] Gov't Code §§ 16645-16649.

[19] *Chamber of Com. of the U.S. v. Lockyer*, 463 F.3d 1076 (9th Cir. 2006) (en banc), *rev'd*, 128 S. Ct. 2408 (2008).

[20] *Chamber of Com. of the U.S. v. Brown*, 554 U.S. 60 (2008). *But see California Grocers Ass'n v. City of Los Angeles*, 52 Cal. 4th 177 (2011) (upholding ordinance requiring grocery stores to retain their former staff for 90 days after a change in ownership; ordinance was not preempted by the California Retail Food Code or the NLRA).

[21] *Fashion Valley Mall v. NLRB (Graphics Commc'ns Int'l Union, Local 432-M)*, 42 Cal. 4th 850 (2007).

[22] *Fashion Valley Mall, LLC v. NLRB*, 451 F.3d 241, 242 (D.C. Cir. 2006) (certifying question to the California Supreme Court).

[23] *Fashion Valley Mall*, 42 Cal. 4th at 869.

[24] *Id.* at 874-75 (Chin, J., dissenting).

[25] *WinCo Foods, LLC v. Thayer*, 2021 WL 343938, at *6-7 (Cal. Ct. App. Feb. 2, 2021) (unpublished) (finding that store owner could exclude petitioners from store front where property owner "open[ed] their ... stores to the public so the public can buy goods [and] do not offer their property for any other use"); *Ralphs Grocery v. Victory Consultants*, 17 Cal. App 5th 245 (2017) (non-labor petitioner was subject to trespass and did not have constitutional free speech right in anti-SLAPP context); *Van v. Target Corp.*, 155 Cal. App. 4th 1375, 1391 (2007) (given that stores, store apron, and perimeter areas are not designed as public meeting places, any societal interest in using stores for exercising expressive activities did not outweigh stores' interests in maintaining control over use of their property); *Albertson's, Inc. v. Young*, 107 Cal. App. 4th 106 (2003); *Costco Cos. v. Gallant*, 96 Cal. App. 4th 740, 745 (2002); *Trader Joe's Co. v. Progressive Campaigns, Inc.*, 73 Cal. App. 4th 425, 434 (1999).

[26] *Cnty. of Los Angeles v. Los Angeles Cnty. Employee Rels. Comm'n*, 56 Cal. 4th 905 (2013).

[27] AB 1654 (2018 Session), codified at Lab. Code § 2699.6.

[28] SB 646 (2020 Session), codified at Lab. Code § 2699.8.

19. Independent Contractors

California is generally hostile to businesses that characterize their workers as independent contractors instead of employees. This hostility undermines the interests of workers who prefer independent status to employee status for reasons related to their personal autonomy. Workers in many situations instead may prefer employee status, however, and classifying workers as employees instead of independent contractors serves the interests of labor unions, plaintiffs' lawyers, and governmental taxing authorities. As the power of these interests has grown, California has increasingly made it more difficult for businesses to retain workers as independent contractors.

The California Legislature superseded many judicial developments in this area by enacting, during 2019, Assembly Bill 5. AB 5, effective January 2020, codified and extended the ABC test the California Supreme Court adopted in its 2018 decision in *Dynamex Operations West, Inc. v. Superior Court*.[1] (See § 19.6).

19.1 The Plaintiff's Preference for Employee Status

19.1.1 The individual who wants wages, benefits, penalties

People who provide services as independent contractors enjoy many advantages over similarly situated employees. The advantages include lack of supervision, the freedom to schedule work, the ability to contract out the work, the avoidance of tax withholding, and the ability to make operational choices to maximize profit.

Once a dispute arises between a business and its independent contractors, however, individuals who once bargained for the advantages that an independent contractor enjoys may seek to recharacterize themselves as employees. Individuals can engage in this tactic because their signed agreements—describing them as independent contractors—are not conclusive of their status.

These individuals will be tempted to engage in this tactic because employees, unlike independent contractors, can:

- seek reimbursement of expenses they necessarily incurred in discharging their duties,
- challenge requirements to buy supplies from the principal,
- challenge, as unlawful payroll deductions, deductions made for expenses advanced,
- sue for payments an employer would owe for denying meal or rest breaks,
- seek penalties incurred for the absence of accurate wage-itemization statements,
- seek money payable under employee benefit plans,
- sue in tort for wrongful termination in violation of public policy,
- sue for violation of minimum-wage and overtime-pay laws,
- seek contractually owed payments as unpaid wages, while seeking attorney fees,

- sue for waiting-time penalties for failing to pay timely termination wages,[2]
- sue for violation of antidiscrimination and retaliation laws,
- seek workers' compensation benefits,
- seek unemployment compensation benefits, and
- have the DLSE act on their behalf to seek statutory and contractual remedies.

19.1.2 The government official who wants taxes and penalties

Taxing authorities prefer that workers be characterized as employees rather than independent contractors, because employers owe payroll taxes for employees and owe no similar taxes with respect to their independent contractors (see § 1.6.2 above).

19.1.3 The tort plaintiff who wants damages

Third parties injured by an organization's independent contractor will try to re-characterize the independent contractor as an employee, to argue that the third party's injuries were inflicted within the scope of the alleged employee's employment, thereby triggering the organization's liability as an employer.

19.2 Presumptions of Employment in Various Contexts

Ordinarily, individuals who sue to obtain the benefits of employee status bear the burden to prove that they are actually employees. In various California contexts, however, the standard of proof shifts in favor of the person claiming employment status and suing for benefits or wages.

19.2.1 Workers' compensation

For purposes of workers' compensation coverage, the Labor Code presumes that an individual retained to provide services for a fee is an employee, even if the individual has agreed in writing to be an independent contractor.[3]

19.2.2 Unemployment compensation

California courts have held that, in unemployment insurance cases, public policy prefers that the organization rather than the individual shoulder the cost of social insurance.[4] The law therefore requires "the party attacking the determination of employment" (which tends to be organizations) to prove independent contractor status instead of requiring individuals to prove employee status.[5]

19.2.3 Providing services under a license

California law presumes that a worker who provides services pursuant to a business license or for a person required to have such a license is an employee.[6]

19.2.4 The presumption that employment exists where services are provided

Historically the DLSE adopted a presumption of employment where an individual has provided services to an employer: DLSE starts with the presumption that the worker is an employee, where employment status is at issue, that is, employee or independent contractor.[7]

That presumption has been ratified, first by the California Supreme Court, in 2018, and then by the Legislature, effective 2020. (See § 19.6.)

19.2.5 Labor Code claims

The Ninth Circuit has concluded that California law presumes workers to be employees, not independent contractors—even where workers have agreed in writing that they are independent contractors—and has rejected defendants' attempts to rely on contractual choice-of-law provisions that call for applying the law of another state, such as Texas or Georgia.[8]

An illustration of how California employment law can differ from other law appears in the Ninth Circuit's 2014 decision in *Alexander v. FedEx Ground Package Systems, Inc*.[9] Although FedEx's elaborate operating agreement described FedEx delivery drivers as independent contractors, and although the D.C. Circuit had upheld that classification, the Ninth Circuit held that FedEx drivers in California were employees as a matter of law: "There is no indication that California has replaced its longstanding right-to-control test with the new entrepreneurial-opportunities test developed by the D.C. Circuit. Instead, California cases indicate that entrepreneurial opportunities do not undermine a finding of employee status."[10]

19.2.6 Wage Order Claims

A company's ability to defend its classification of workers as independent contractors is even weaker regarding claims that invoke the Wage Orders, which define employment more broadly than does the common law. (See § 19.6.)

19.2.7 Domestic Worker Bill of Rights

California's Domestic Worker Bill of Rights, enacted in 2013, provides: "A domestic work employee who is a personal attendant shall not be employed more than nine hours in any workday or more than 45 hours in any workweek unless the employee receives one and one-half times the employee's regular rate of pay for all hours worked over nine hours in any workday and for all hours worked more than 45 hours in the workweek."[11]

When a personal attendant invoked the DWBR to sue an employment agency for overtime wages, the trial court granted summary judgment against her because, under the common law, she was an independent contractor, not an employee. The Court of Appeal reversed, holding that the trial court should have applied not only the common law but also the legal standard set forth in the DWBR, which adopts a Wage Order definition of employer as someone who "exercises control over the wages, hours, or working conditions" of a worker.

The Court of Appeal concluded: "In light of the liberal construction we afford the DWBR, we conclude the burden should fall with the hiring entity to prove that a domestic worker is an independent contractor not entitled to the overtime protection of the DWBR."[12] Under these standards, the Court of Appeal reversed the summary judgment for the defendant because the parties' contract arguably gave the defendant agency control over the plaintiff's wages.[13]

19.3 Inversion of Common Law Standards in Standard Jury Instruction

Under the common law, as restated in the Restatement of Agency, the question of employee status versus independent contractor depends on various factors, the most important of which is whether the principal has the right to control the manner and means of performing the services that the individual was retained to provide.[14] The California Judicial Council has approved a standard instruction by which a jury is to consider the principal's right to control the manner and means of performance (even if it is not exercised) and is also to consider secondary factors, such as whether the principal supplied equipment, tools or the place of work, paid by the hour instead of the job, supervised the work, had a long-term relationship with the worker, etc.[15]

One basis for this jury instruction may be decisions applying the workers' compensation statute, which advances special social policies that are not present every time employee status is disputed.[16] But the Court of Appeal has advanced the pro-plaintiff proposition that even where control factors indicate the plaintiff is an independent contractor, the plaintiff can still present a triable issue of employee status by citing secondary factors.

Thus, even where plaintiff truck drivers were owner-operators who controlled their own delivery operations, and thus seemed to be independent contractors under the primary factor of "right to control," the drivers could go to trial on their employee-status claim by citing such secondary factors as the W-2 forms they received, their tax withholding, their health plan benefits, their hourly rates for certain activities, the 24-hour termination provision in their contracts, and their function as a part of the defendant's regular business of providing transportation of property.[17]

19.4 Absence of Statutory Protection as to Newspaper Carriers

For well over a century, the newspaper industry regarded individuals contracting to provide home delivery of newspapers as independent contractors, not employees. Federal wage and hour law honors the spirit of this characterization; the FLSA expressly exempts from sections 206, 207, and 212 (addressing minimum wage, overtime pay, child labor) "any employee engaged in the delivery of newspapers to the consumer."[18] In California, it's different. California, unlike many other states, failed to adopt a statutory newspaper-carrier exemption.

In 2014, the California Supreme Court, in *Ayala v. Antelope Valley Newspapers,* clarified its view regarding the relevant test to determine whether a particular individual is an employee or an independent contractor. The case involved newspaper carriers who contracted to provide delivery to home subscribers. *Ayala* held that the existence of an employment relationship depends, in part, on "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." *Ayala* held that, for purposes of class certification, the relevant inquiry is not whether the hirer's degree of control exercised over hires was sufficiently uniform, but whether the hirer's legal right to control how the end result was achieved was sufficiently uniform. Because the newspaper carriers entered standard contracts with the defendant, *Ayala* found there could be sufficient uniform evidence of the right to control to support certification as to whether the carriers were in fact employees.[19]

Whether or not newspaper carriers are employees under other law, they thus far have been subject to temporary exemptions from the ABC test that have been codified in the California Labor Code.[20]

19.5 California's Judicial Revolution Against Independent Contracting

Until relatively recently, in California, as elsewhere, courts generally respected decisions to classify service providers as independent contractors. But in recent years federal and California courts applying California law have repeatedly issued decisions holding that classes of individuals classified as independent contractors—often delivery drivers—can contend they are employees (sometimes as a matter of law) who are entitled to the overtime pay, wage-itemization statements, timely termination wages, meal and rest breaks, reimbursement of business expenses, and other items of pay and benefits that generally are uniquely available to employees.

An example of the trend was the 2014 Court of Appeal decision in *Dynamex Operations West, Inc. v. Superior Court*,[21] which partially upheld certification of a class of package delivery service drivers, for purposes of claims brought under Wage Order 9 (governing transportation workers).

The Court of Appeal endorsed the trial court's use of a broader definition of "employee" to determine whether individuals are misclassified as an independent contractor under the IWC Wage Orders. Also in 2014, in *Ruiz v.*

Affinity Logistics Corp.,[22] the Ninth Circuit held as a matter of law that a class of delivery drivers had been improperly classified as independent contractors, even though the trial court had deemed them independent contractors. Also in 2014, in *Alexander v. FedEx Ground Package Systems*,[23] the Ninth Circuit considered the status of package delivery drivers who claimed to be employees misclassified as independent contractors. The trial court had granted summary judgment against the drivers on the ground that they were independent contractors, as a matter of law, but the Ninth Circuit, on the same facts, held that the drivers were employees, as a matter of law.

The Ninth Circuit emphasized that the drivers had to wear FedEx uniforms, drive FedEx-approved vehicles, and groom themselves according to FedEx appearance standards, and that FedEx told drivers what packages to deliver, on what days, and at what times. Although drivers could operate multiple delivery routes and hire helpers to get the work done, they could do so only with FedEx's consent. In 2015, in *Garcia v. Seacon Logix, Inc.*,[24] the Court of Appeal affirmed a bench trial ruling that truck drivers classified as independent contractors were really employees who were entitled to reimbursement of their expenses. And again in 2015, in *O'Connor v. Uber Technologies, Inc.*,[25] a federal district court held that on-call personal transportation drivers could proceed with a class action arguing that they were employees misclassified as independent contractors.[26]

This judicial revolution culminated in a 2018 California Supreme Court decision, which the Legislature then codified in statutory provisions effective in 2020 (see § 19.6).

19.6 California's "ABC Test"

The Dynamex decision. In 2018 the California Supreme Court, in *Dynamex Operations West, Inc. v. Superior Court*, introduced new law on whether companies can contract with workers as independent contractors instead of employees.[27] Truck drivers sued Dynamex on wage and hour claims, contending that they were employees misclassified as independent contractors. At issue was whether their status should be determined under the common law test the California Supreme Court applied in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*[28] (emphasizing the right to control manner and means of performance and some secondary factors) or under a broader test of employment found in the Wage Orders ("engage, suffer or permit to work").[29]

Dynamex took this opportunity to rewrite California law without the need for any new legislation. *Dynamex* held that "engage, suffer or permit to work" determines employee status for Wage Order claims, requiring a defendant disputing employee status to prove (A) the worker is free from control and direction of the hirer in connection with performing the work, both under contract and in fact, (B) the worker performs work outside the usual course of the hiring entity's business, and (C) the worker customarily engages in an independently established trade, occupation, or business of the same nature as the work performed for the hirer.

Particularly difficult for a business to satisfy is Part B—that the worker performs work beyond the usual course of the defendant's business. Contracted workers who provide services in a role comparable to that of the defendant's existing employee will likely be viewed as working in the usual course of the hiring entity's business. Further examples of services within the hiring entity's usual course of business would include (i) a clothing manufacturing company hiring work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that the company will then sell and (ii) a bakery retaining cake decorators to work on a regular basis on the bakery's custom-designed cakes.

Examples of services *not* part of the hiring entity's usual course of business would include (i) a retail store retaining an outside plumber to repair a bathroom leak on the retailer's premises and (ii) a retailer retaining an outside electrician to install a new electrical line.

An early—and especially disappointing—application of *Dynamex* came in *Garcia v. Border Transportation Group, LLC*.[30] *Garcia* reversed a summary judgment against Wage Order claims by a taxi driver who alleged that Border Transportation had misclassified him as an independent contractor. *Garcia* held that, for purposes of seeking summary judgment, Border had failed to satisfy part C of the ABC test. *Garcia* stated that *Dynamex* adopted a "stringent" version of part C, requiring "an existing, not potential, showing of independent business operation." The plaintiff taxi driver, in signing up with Border, had obtained a driver's permit that was limited to work for Border, and California's stringent part C "requires more than mere capability to engage in an independent business"; rather, part C requires evidence that the plaintiff "in fact provided services for other entities or otherwise established a business 'independent' of his relationship with [the defendant]."[31]

It gets still worse for California businesses: *Dynamex* applied retroactively. One might think that, as a matter of due process, *Dynamex* would apply prospectively only, as businesses lacked fair notice that the Supreme Court would radically rewrite the law of independent contracting. Although *Dynamex* itself applied its ruling retroactively, there was a serious question as to whether the *Dynamex* ABC rule would affect others on a retroactive basis.[32] Some early bad news for businesses came in a 2019 Court of Appeal decision holding that the ABC test applies to pending litigation and not only to claims brought under the Wage Orders, but also to Labor Code claims rooted in one or more Wage Orders or predicated on conduct alleged to have violated a Wage Order.[33] The California Supreme Court granted review of the decision, to consider the *Dynamex* retroactivity issue in connection with its acceptance of that issue from the Ninth Circuit in another pending case.[34]

In that referral from the Ninth Circuit, the Supreme Court, in *Vazquez v. Jan-Pro Franchising Int'l, Inc.*,[35] issued its unanimous decision on January 14, 2021. The result was a resounding disappointment for the business community. Reflecting the implicit anti-business bias that makes California peculiar, the Supreme Court dismissed the widespread employer concern that, before *Dynamex*, the question whether a worker was properly classified as an independent contractor are decided by applying the standards set forth in the Supreme Court's *Borello* decision. But no, said the Supreme Court. *Borello* arose under the Labor Code while *Dynamex* arose under a Wage Order, whose definition of employment includes the "suffer or permit to work" test. Here the Supreme Court relied on its own vague statements in two prior cases (*Martinez*[36] and *Ayala*[37]) to justify having employers bear the brunt of uncertainty now: "employers were clearly on notice well before the *Dynamex* decision that, for purposes of the obligations imposed by a wage order, a workers' status as an employee or independent contractor might well depend on the suffer or permit to work prong of an applicable wage order—and that the law was not settled in this area."[38] According to the Supreme Court, "the test we ultimately adopted in *Dynamex* drew on the factors articulated in *Borello* and was not beyond the bounds of what employers could reasonable have expected."[39] And the Supreme Court concluded that applying *Dynamex* "only prospectively would potentially deprive many workers of the intended protections of the wage orders to which they may have improperly been denied."[40]

19.7 The Codification and Extension of *Dynamex* in AB 5

During 2019 California enacted Assembly Bill 5, which codified the *Dynamex* decision's ABC test and extended it to contexts beyond the Wage Orders, including workers' compensation, unemployment insurance, disability insurance, and Labor Code claims such as for expense reimbursement under section 2802.[41] AB 5 itself did not impose retroactive liability for misclassification, but the California Supreme Court thereafter decided that, regardless of AB 5, the ABC test is retroactive. (See § 19.6.).

California government officials, in *People v. Uber*, sued ride-share companies for a preliminary injunction against their classifying California drivers as independent contractors. The trial court granted the requested relief because the People had shown a reasonable probability—indeed, "an overwhelming likelihood"—of prevailing on the merits of the claim that the ride-share companies were misclassifying drivers as independent contractors in violation of AB 5. In 2020 the Court of Appeal affirmed, holding that the trial court did not abuse its discretion in

granting the preliminary injunction. The trial court had focused on the companies' inability to meet Prong B: whether their drivers perform work outside the usual course of defendants' businesses. The trial court found that despite attempts to characterize the drivers as the ride-share companies' "customers," for whom the ride-share companies provide the service of matching drivers with passengers, the People's eventual success on the merits was almost "inevitable." The trial court acted within its discretion in concluding that rectifying the various forms of irreparable harm shown by the People would more strongly serve the public interest than protecting the ride-share companies, their shareholders, and all those who had come to rely on the advantages of on-line ride-sharing delivered by a business model that does not provide employment benefits to drivers.[42]

Prop 22. But then the actual people of California spoke. The voters in November 2020 overwhelmingly passed Proposition 22, the Protect App-Based Drivers and Services Act.[43] Proposition 22 classifies certain app-based ridesharing and delivery drivers as independent contractors, provided they (i) maintain control over their schedules, (ii) need not accept a particular "gig," and (iii) are not restricted from performing services for multiple companies (except during their engaged time). Proposition 22 also entitles app-based drivers to certain benefits, such as a minimum compensation, per-mile compensation, and a health care subsidy (for drivers who average 25 hours per week of engaged time in a calendar quarter). Proposition 22 was peppered with litigation but on July 25, 2024, the California Supreme Court unanimously upheld the Proposition, providing clarity for companies and workers alike.[44] Nevertheless, there remain a number of pending independent contractor misclassification cases where drivers' employee status will still be litigated under the ABC test for the time period pre-dating the enactment of Proposition 22. While gig companies have argued that Proposition 22 abates AB 5 for the period prior to its passage, the Ninth Circuit recently rejected that argument in *Lawson v. GrubHub*, and on February 1, 2024, the District Court further held that app-based workers can seek minimum wage and other related violations for violations prior to December 16, 2020.[45]

Prop 22 remains vulnerable to further judicial challenge. In 2021, an Alameda Superior Court in *Castellanos v. State of California* held that Proposition 22 was unconstitutional because it limits the ability of a future legislature to define gig workers' employment status. The decision was appealed, and on March 13, 2023, a California Court of Appeal disagreed with the lower court's decision that Proposition 22 was unconstitutional on the whole. It struck down part of Proposition 22, finding that "the initiative's definition of what constitutes an amendment violates separation of powers principles." However, because "the unconstitutional provisions can be severed from the rest of the initiative, we affirm the judgment insofar as it declares those provisions invalid and to the extent the trial court retained jurisdiction to consider an award of attorney fees, and otherwise reverse."[46]

Further appeals are expected, but for now Proposition 22 provides a powerful carveout for certain app-based workers who are defined by statute as independent contractors.

Exemptions from the ABC test. The enactment of AB 5 was a business bonanza for legislative lobbyists. The law granted many exemptions from the ABC test—both as to AB 5 and as to the holding in *Dynamex*—for specified industries and occupations.[47] This Sacramento lobbying gravy train continued well into 2020, culminating in the passage of AB 2257, which repealed and replaced AB 5 while adding exemptions from the ABC test. Where an exemption applies, a business can continue to defend its classification of a contractor by attempting to rely on the common law test for employment set forth in the California Supreme Court's 1989 *Borello* decision.[48]

One broad, vaguely worded statutory exemption is a "business to business" exemption that applies to "business service providers" contracting to provide services to another business, provided that certain criteria are met.[49] Other exemptions address "service providers" in certain fields, including graphic design, photography, tutoring, event planning, moving, home cleaning, pool and yard cleanup, animal services, web design, and dog grooming and walking, provided certain criteria are met.

AB 5 also exempts “professional services” contracts, covering occupations such as marketing, human resources administration, travel agents, graphic designers, grant writers, fine artists, agents licensed to practice before the IRS, payment processing agents, photographers and photojournalists, freelance writers, editors or cartoonists, and professionals providing cosmetic services (e.g., licensed barbers and manicurists), again, provided certain criteria are met.

Also exempted from AB 2257 are certain

- licensed insurance agents and brokers,
- licensed physicians, surgeons, dentists, podiatrists, psychologists, or veterinarians,
- licensed attorneys, architects, engineers, private investigators and accountants,
- registered securities broker-dealers or investment advisers or their agents and representatives,
- freelance writers,
- underwriters, real estate appraisers and home inspectors,
- data aggregators,
- occupations linked to the music industry,
- specialized performers teaching master classes,
- direct salespersons, and
- licensed commercial fishermen (through 2025 unless extended by law).

Newspaper exemption. In 2020 newspaper companies obtained another temporary reprieve from the ABC test, receiving an exemption for newspaper distributors working under contract with a newspaper publisher, and newspaper carriers working under contract with either a newspaper publisher or distributor. This exemption was set to expire on January 1, 2022, but was extended for three years to January 1, 2025.[50]

Early applications of AB 5 and AB 2257. California law enforcement officials have painted a target on the back of the drive-for-hire industry. The San Diego City Attorney obtained a preliminary injunction against Instacart (a firm offering same-day grocery delivery via smartphone software technology) with respect to classifying its “Shoppers” as independent contractors instead of employees. The trial court, acknowledging uncertainty in the law, vaguely enjoined Instacart from “failing to comply with California employment law with regard to its Full-Serve Shopper employees within the City of San Diego.” The court explained: “ [I]t is more likely than not that the People will establish at trial that the ‘Shoppers’ performed core functions of defendant’s business, that they are not free from defendant’s control; and that they are not engaged in an independently established trade, occupation or business. Establishing any one of these would be enough, and … the burden of establishing proper classification is on the defendant.”[51] On appeal, however, the Court of Appeal overturned the injunction and remanded to the trial court for further proceedings in light of Proposition 22. The injunction was “impermissibly vague” because, in “a decidedly undeveloped area of law,” the trial court “failed to provide adequate notice of the conduct proscribed by the injunction.”[52]

Challenges to AB 5 and AB 2257. Legislative adoption of the ABC test sparked organized resistance. Gig companies invoked the California initiative process to change the law, culminating in the passage of Proposition

22 in November 2020. Meanwhile, Uber and Postmates drivers unsuccessfully argued that the myriad exemptions created by AB 5 are irrational and violate equal protection.[53] A challenge by freelancers was likewise initially unsuccessful. Journalists and photographers sought injunctive relief against state enforcement of AB 5 on the ground that it infringed on their ability to work, in violation of First Amendment freedoms. The infringement stemmed from AB 5's rule (since modified by AB 2257) that anyone writing more than 35 articles for publication in a given year is an employee instead of an independent contractor.[54] A federal district court denied temporary emergency relief because the plaintiffs failed to demonstrate a likelihood of success on the merits or serious questions going to the merits on their Equal Protection and First Amendment claims.[55] Further, a group of registered financial advisors challenged an exemption to AB 5 that makes them subject to *Borello*, rather than the ABC test. According to the financial advisors, the exemption violated equal protection, and retroactive application of the exemption violated due process. In a case defended by Seyfarth Shaw, the California Court of Appeal deemed the exemption, and its retroactive application, constitutional under California law.[56]

Trucking companies initially succeeded in judicial challenges to AB 5. Both state and federal courts enjoined California from enforcing AB 5 as to motor carriers. An association of motor carriers obtained a preliminary injunction against enforcement on the ground that AB 5 is preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA), which overrides state laws "related to a price, route, or service of any motor carrier … with respect to the transportation of property."

The motor carriers successfully argued that Prong B of the ABC test—whether the worker serves in the defendant's usual course of business—would automatically make every truck driver an employee instead of an independent contractor of the hiring motor carrier. Accordingly, motor carriers could not contract with owner-operators to provide trucking services without treating drivers as employees. The ABC test would thus affect motor carriers' prices, routes, or services, contrary to the FAAAA.[57]

The State and the labor union appealed and the Ninth Circuit reversed, holding that the state statute had only a tenuous, remote, or peripheral connection to rates, routes, or services and thus was not preempted by FAAAA as applied to motor carriers.[58] In 2020, the Court of Appeal reversed a trial court order that had applied FAAAA preemption to the ABC test on the ground that prong B of the ABC test prohibited motor carriers from using independent contractors to provide transportation services, thereby impermissibly affecting motor carrier prices, routes, and services. The Court of Appeal, in something of an *ipse dixit*, stated that the ABC test does not prohibit motor carriers from using independent contractors, but rather simply requires that the motor carriers classify drivers appropriately and comply with generally applicable labor and employment laws. According to the Court of Appeal, the ABC test is a law of general application that does not mandate any hiring entity to use employees. The ABC test is merely a worker-classification test that states a general and rebuttable presumption that a worker is an employee unless the hiring entity demonstrates certain conditions. That independent owner-operator truck drivers may be incorrectly classified does not mean that the ABC test prohibits motor carriers from using independent contractors. The ABC test is thus, according to the Court of Appeal, not the type of law that Congress intended the FAAAA to preempt.[59]

19.8 Professional Cheerleaders Must Be Employees

California-based professional major and minor league teams (in baseball, basketball, football, ice hockey, and soccer) must treat the cheerleaders who perform during the teams' exhibitions, events, and games as employees—not independent contractors.[60]

19.9 Special Reporting Requirements

Businesses that retain individual independent contractors who perform work in California and receive payments exceeding $600 (or contract for such a payment) must report them to the EDD (see § 16.2).

19.10 Administrative Enforcement

The EDD administers California's employment tax laws, and provides guidance in determining whether a worker is an employee or independent contractor.[61] The California Code of Regulations lists the rules generally applicable to common law determinations of employment versus an independent contractor relationship.[62]

19.11 Special Penalties for Willful Misclassification

Labor Code section 226.8 provides that California employers must not willfully misclassify any individual as an independent contractor[63] or assess against such an individual a deduction or fee that an employer could not lawfully assess against an employee.[64] Penalties range from $5,000 to $25,000 per violation.[65]

Violators are also subject to an electronic Scarlet Letter: any entity found to have willfully misclassified one or more individuals must "display prominently on its Internet Web site" a notice confessing it "committed a serious violation of the law by engaging in the willful misclassification of employees"[66] and declaring that it has changed its business practices to avoid committing further violations.[67] Moreover, liability attaches to any "person who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for that individual" if the individual is found not to be an independent contractor.[68]

There is no private right of action under section 226.8.[69]

19.12 Dealing with Certain Labor Contractors

A California business must not enter into an agreement for labor or services with certain contractors if the business knows or should know that the agreement fails to provide enough funds to allow the contractor to satisfy the applicable local, state, or federal labor laws or regulations. Contractors affected include construction, farm labor, garment, janitorial, security guard, and warehouse contractors.[70] Any person or entity that breaches this obligation can be liable for the greater of actual damages or statutory penalties to workers who suffer injury from any labor law violations.[71] The business must, upon request, give the Labor Commissioner a copy of the contractor agreement and other related documentation.[72]

A claim brought under this statute (against airlines that had contracted with a security company) failed because the plaintiff had failed to allege that the airlines had knowingly underfunded the contracts.[73]

Employers that use labor contractors are jointly liable with the labor contractor for paying wages to all workers whom the labor contractor supplies, and for the contractor's failure to obtain valid workers' compensation coverage.[74]

---

1 Lab. Code § 2750.3

2 *See*, *e.g., Bain v. Tax Reducers, Inc.*, 219 Cal. App. 4th 110 (2013) (employee misclassified as independent contractor entitled to minimum wages, reimbursement of business expenses, and waiting-time penalties for failure to pay timely termination wages), *review denied and ordered not to be officially published*, No. S213850 (Cal. Dec 11, 2013).

3 Lab. Code § 3357 ("Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.") *See also* Lab. Code § 5705(a) (employer has burden to prove "affirmative defense" that "injured

person claiming to be an employee was an independent contractor"); *S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels.*, 48 Cal. 3d 341, 349 (1989) ("One seeking to avoid [workers' compensation] liability has the burden of proving that persons whose services he has retained are independent contractors rather than employees."); *Antelope Valley Press v. Poizner*, 162 Cal. App. 4th 839, 855 (2008) (for purposes of workers' compensation insurance, persons who delivered newspapers to daily subscribers were employees of the publisher, not independent contractors, where publisher maintained significant supervision over the carriers, controlled the price paid by subscribers, based payment for carriers on the number of papers delivered per day, supplied materials and facilities the carriers used, did not hire the carriers to achieve a specific result attainable within a finite period, and was better suited than the carriers were to distribute the cost of on-the-job injuries as a business expense).

[4] *See e.g., Grant v. Woods,* 71 Cal. App. 3d 647, 652, 654 (1977) (focusing on whether individual was employee "for purposes of the Unemployment Insurance Act" and demanding "[c]lear evidence … to defeat the beneficent purposes of the legislature established in the [Unemployment Insurance] code").

[5] *See Santa Cruz Transp., Inc. v. Unemployment Ins. Appeals Bd.*, 235 Cal. App. 3d 1363, 1367 (1991) ("The burden of establishing an independent contractor relationship is upon the party attacking the determination of employment.").

[6] Lab. Code § 2750.5 provides in part: "There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor." *See also Blackwell v. Vasilas*, 244 Cal. App. 4th 160, 162, 172-73 (2016) (reversing summary judgment for property owner/hirer upon, holding that to establish independent contractor status of stucco contractor, in addition to presenting evidence of the requisite factors to determine said status under Labor Code section 2750.5(a), (b) and (c), property owner/hirer also was required to present evidence that stucco contractor was licensed, or alternatively, that the services performed by the stucco contractor did not require a license).

[7] www.dir.ca.gov/dlse/FAQ_independentcontractor.htm (last visited Mar. 20, 2023) ("Both the *Borello* test and the ABC test assume that the worker is an employee and the hiring entity must prove that the worker is an independent contractor."). *See also Lujan v. Minagar*, 124 Cal. App. 4th 1040, 1048 (2004) ("[t]here is a rebuttable presumption that one who furnishes services for an employer is an employee.").

[8] In *Narayan v. EGL, Inc.*, 616 F.3d 895, 898-99, 904 (9th Cir. 2010), where delivery drivers classified as independent contractors sued for Labor Code benefits, the Ninth Circuit reversed a summary judgment that the trial court had granted to the defendant. The Ninth Circuit stated that California law rather than Texas law applied, and that, under California law, "once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee." *Id.* at 900. Reprising that theme, the Ninth Circuit, in *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1325 (9th Cir. 2012), vacated a judgment for a Georgia-based delivery company whose California drivers, subject to written "independent contractor" agreements, were suing for unpaid wages. The trial court had applied Georgia law, which creates a rebuttable presumption that the contracting parties' designation of an independent-contractor relationship is true. *Id.* at 1321. The Ninth Circuit held that California law should apply instead, because even though Georgia had a substantial relationship to the parties, California "fundamental policy" was at stake and California had a materially greater interest than Georgia in resolving an employment dispute arising in California. *Id.* at 1324. And under California law, the Ninth Circuit stated, "the presumption is that the drivers are employees and the burden is on Affinity to demonstrate that the drivers are independent contractors." *Id.* at 1323. The Ninth Circuit then remanded the case for a bench trial, in which the trial court once again ruled for the company. *Ruiz v. Affinity Logistics Corp.,* 754 F.3d 1093, 1095-96 (9th Cir. 2014). In the drivers' appeal, the Ninth Circuit once again reversed, holding now that the drivers, as a matter of California law, were employees rather than independent contractors: "[t]he undisputed facts indicate that Affinity had the right to control the details of the drivers' work, and the application of the secondary factors weigh in favor of a finding that the drivers were employees. We therefore reverse the district court's decision that the drivers were independent contractors and hold that they were Affinity's employees under California law." *Id.* at 1101, 1105.

[9] *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 988 (9th Cir. 2014) (awarding summary judgment to class of delivery drivers on the basis that they, as a matter of California law, were employees who had been misclassified as independent contractors).

[10] *Id.* at 993.

[11] Lab. Code § 1454.

[12] *Duffey v. Tender Heart Home Care Agency, LLC*, 31 Cal. App. 5th 232, 250 (2019).

[13] *Id.* at 242, 245, 250, 253 (reversing summary judgment for employer).

[14] The Restatement Second of Agency § 220 (1958) identifies these factors, with the right of control being the most important: (a) the extent of control that, by the agreement, the hiring entity may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating an independent contractor relationship; and (j) whether the principal is or is not in business.

[15] The California Civil Jury Instructions, CACI 3704, provides:

In deciding whether [name of agent] was [name of defendant]'s employee, the most important factor is whether [name of defendant] had the right to control how [name of agent] performed the work, rather than just the right to specify the result. One indication of the right to control is that the hirer can discharge the worker [without cause]. It does not matter whether [name of defendant] exercised the right to control.

In deciding whether [name of defendant] was [name of agent]'s employer, in addition to the right of control, you must consider the full nature of their relationship. You should take into account the following additional factors, which, if true, may show that [name of defendant] was the employer of [name of agent]. No one factor is necessarily decisive. Do not simply count the number of applicable factors and use the larger number to make your decision. It is for you to determine the weight and importance to give to each of these additional factors

based on all of the evidence.

(a) [Name of defendant] supplied the equipment, tools, and place of work;

(b) [Name of agent] was paid by the hour rather than by the job;

(c) [Name of defendant] was in business;

(d) The work being done by [name of agent] was part of the regular business of [name of defendant];

(e) [Name of agent] was not engaged in a distinct occupation or business;

(f) The kind of work performed by [name of agent] is usually done under the direction of a supervisor rather than by a specialist working without supervision;

(g) The kind of work performed by [name of agent] does not require specialized or professional skill;

(h) The services performed by [name of agent] were to be performed over a long period of time; [and]

(i) [Name of defendant] and [name of agent] believed that they had an employer-employee relationship [and]

(j) [Specify other factor].

[16] *See Yellow Cab Cooperative, Inc. v. Workers' Comp. Appeals Bd.*, 226 Cal. App. 3d 1288, 1301 (1991) ("The Supreme Court pointed out in *Borello* that the Workers' Compensation Act serves public as well as private interests and that a waiver of its protections is not to be lightly inferred. 'Among other things, the statute represents society's recognition that if the financial risk of job injuries is not placed upon the businesses which produce them, it may fall upon the public treasury.'") (quoting *Borello*, 48 Cal. 3d at 358).

[17] *Arzate v. Bridge Terminal Transp., Inc.*, 192 Cal. App. 4th 419, 426 (2011) (reversing summary judgment for the defendant; secondary factors could sustain finding that plaintiffs were employees even if control factor indicated that plaintiffs were independent contractors).

[18] The FLSA exemption appears in 29 U.S.C. § 213(d). Many states, but not California, adopt the substance of this exemption for purposes of state wage and hour law.

[19] *Ayala v. Antelope Valley Newspapers, Inc.,* 59 Cal. 4th 522, 528, 533 (2014) ("Whether a common law employer-employee relationship exists turns foremost on the degree of a hirer's right to control how the end result is achieved. [Internal citations omitted.] In turn, whether the hirer's right to control can be shown on a classwide basis will depend on the extent to which individual variations in the hirer's rights vis-à-vis each putative class member exist, and whether such variations, if any, are manageable." "Significantly, what matters under the common law is not how much control a hirer *exercises*, but how much control the hirer retains the *right* to exercise.") (emphasis in original). The Supreme Court concluded that the trial court had erred in denying certification based on an analysis of the actual control the newspaper asserted over the carriers. The Supreme Court also noted, however, that class certification might be denied if there were significant variations among the class members as to various secondary factors of employment (which are to be considered in addition to the primary "right to control" factor). The Supreme Court left undisturbed another appellate decision, *Sotelo v. Medianewsgroup,* 207 Cal. App. 4th 639 (2012), *disapproved on other grounds by Noel v. Thrifty Payless, Inc.*, 7 Cal. 5th 955 (2019), which affirmed the denial of class certification to another group of newspaper carriers, given the variations among carriers that existed regarding factors that one considers in deciding whether an individual is an employee or an independent contractor: "Even though the court found variability among the class in only a few of the factors, the court observed that the multifactor test 'requires that the factors be examined together.' Thus, even if other factors were able to be determined on a classwide basis, those factors would still need to be weighed individually, along with the factors for which individual testimony are required. We find no failure to use proper criteria or improper legal assumptions in this determination." *Id.* at 660. More recently, in a case defended by Seyfarth Shaw, a California federal court denied class certification to a group of newspaper carriers, despite allegations of their uniform contracts, given that the secondary factors were "riddled" with individualized inquiries. *Aronson v. Gannett Publ'g Servs., LLC*, 2020 WL 2891940 (C.D. Cal. May 29, 2020). Seyfarth Shaw also defeated class certification based on similar allegations involving newspaper dealers—businesses that contracted with the defendant newspaper publisher for home delivery services, and then the dealers sub-contracted the delivery work to newspaper carriers. *Sanchez v. Hearst Commc'ns, Inc.*, 2022 WL 1400853 (N.D. Cal. May 4, 2022).

[20] Lab. Code § 2783(h)(1), (4) (extending to Jan. 1, 2025 the exemption from the ABC test, thereby making *Borello* the governing legal test for newspaper carriers and dealers).

[21] *Dynamex Operations West, Inc. v. Superior Ct.*, 230 Cal. App. 4th 718 (2014), *review granted*, No. S222732, 341 P.3d 438 (Cal. 2015). The California Supreme Court ruled in 2018. *Dynamex Operations West, Inc. v. Superior Ct.,* 4 Cal. 5th 903 (2018).

[22] *Ruiz v. Affinity Logistics Corp.,* 754 F.3d 1093, 1103-05 (9th Cir. 2014).

[23] *Alexander*, 765 F.3d at 997.

[24] *Garcia v. Seacon Logix, Inc.*, 238 Cal. App. 4th 1476, 1478-79, 1488 (2015).

[25] *O'Connor v. Uber Techs., Inc.*, 311 F.R.D. 547, 568 (N.D. Cal. 2015), *rev'd and remanded*, 904 F.3d 1087 (9th Cir. 2018).

[26] An order of class certification in that case was reversed because certain arbitration agreements were enforceable. *O'Connor v. Uber Techs., Inc.*, 904 F.3d 1087, 1094-95 (9th Cir. 2018) ("The class as certified includes drivers who entered into agreements to arbitrate their claims and to waive their right to participate in a class action with regard to those claims. … [T]he question of whether those agreements were enforceable was not properly for the district court to answer. The question of arbitrability was designated to the arbitrator.").

[27] *Dynamex*, 4 Cal. 5th at 903 (2018).

[28] *Borello*, 48 Cal. 3d at 342-43.

[29] *See* 8 Cal. Code Regs. § 11130, Section 2(D).

[30] *Garcia v. Border Transp. Grp., LLC*, 28 Cal. App. 5th 558, 575-76 (2018).

[31] *Id.* at 575.

[32] *Lawson v. Grubhub, Inc.*, No. 15-cv-05128-JSC, 2018 WL 6190316, at *7 (N.D. Cal. Nov. 28, 2018) (declining to rule on retroactivity while noting defendant's argument that retroactive application would raise issues of due process); *Lawson v. Grubhub, Inc.*, No. 18-15386, 2019 WL 5876923, at *1 (9th Cir. Sept. 26, 2019) (proceedings stayed pending the California Supreme Court's decision on whether its *Dynamex* ruling applies retroactively).

[33] *Gonzales v. San Gabriel Transit, Inc.*, 40 Cal. App. 5th 1131, 1156 (2019) (citing "usual rule of retroactive application" and wrongly asserting that "*Dynamex* did not establish a new standard."), *review granted*, 456 P.3d 1 (Cal. 2020), *review dismissed, remanded by* 481 P.3d 1144, (Cal. 2021).

[34] In *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 10 Cal. 5th 944 (2021), the California Supreme Court—accepting a request by the Ninth Circuit, 939 F.3d 1045 (9th Cir. 2019)—agreed to decide: "Does the decision in *Dynamex Operations West Inc. v. Superior Ct.* (2018) 4 Cal. 5th 903, apply retroactively?"

[35] *Id. (*accepting a request by the Ninth Circuit to decide the question, "Does the decision in *Dynamex Operations West Inc. v. Superior Ct.* (2018) 4 Cal. 5th 903, apply retroactively?").

[36] *Martinez v. Combs*, 49 Cal. 4th 35, 57-58 (2010).

[37] *Ayala*, 59 Cal. 4th at 431.

[38] *Vazquez*, 10 Cal. 5th at 955.

[39] *Id*. at 956-57.

[40] *Id.* at 957.

[41] AB 5, 2019 bill amending Lab. Code § 3351, adding Lab. Code § 2750.3, and amending Unemp. Ins. Code §§ 606.5, 621.

[42] *People v. Uber Techs., Inc.*, 56 Cal. App. 5th 266 (2020).

[43] Bus. & Prof. Code §§ 7448 et seq.

[44] See *Castellanos v. California*, Cal., No. S279622, July 25, 2024. Note that the California Supreme Court explicitly left open the question of whether state lawmakers can extend the workers' compensation system to include app-based workers.

[45] *Lawson v. Grubhub, Inc.*, No. 15-cv-05128-JSC, (N.D. Cal. July 23, 2024).

[46] *Castellanos v. State of Cal.*, 89 Cal. App. 5th 131, 143, *as modified* (Apr. 12, 2023).

[47] The AB 5 exemptions appeared in Lab. Code § 2750.3(b)-(h) (which has since been repealed), while the AB 2257 exemptions appear in Lab. Code §§ 2776-2784.

[48] *S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels.*, 48 Cal. 3d 341, 342-43 (1989).

[49] Lab. Code § 2776.

[50] AB 170, 2019 bill adding Lab. Code § 2750.3(b)(7), was thus followed by AB 323, a 2020 bill. In September 2021, Governor Newsom signed into law AB 1506, which amended Lab. Code § 2783 by extending the exemption to January 1, 2026.

[51] *People v. Maple Bear*, No. 2019-48731, slip op. at 3, 4, 5 (San Diego Superior Ct. Feb. 18, 2020).

[52] *State of Cal. v. Maplebear, Inc.*, No. D077380 (Cal. Ct. App. Feb. 17, 2021), slip op. at 8 (unpublished).

[53] *Olson v. State of Cal.,* 2020 WL 905572, at *14 (C.D. Cal. Feb. 10, 2020) (rejecting argument that it violates equal protection to apply the ABC test to companies providing internet applications for drivers and travelers while exempting ABC coverage for such favored classes as doctors, lawyers, accountants, investment advisers, commercial fisherman, travel agents, and so on). *See Olson v. Cal.*, No. CV 19-10956 DMG (RAOx), 2020 WL 6439166, at *12 (C.D. Cal. Sept. 18, 2020) (granting motion to dismiss Uber and Postmates plaintiffs' complaint).

[54] Lab. Code § 2750.3(c)(B)(ix), (x) (repealed). AB 2257 removed the 35 "submission" cap as a requirement of contractor status. *See* Lab. Code § 2778(b)(2)(J).

[55] *Am. Soc'y of Journalists & Authors, Inc. v. Becerra*, No. CV 19-10645 PSG (KSx), 2020 WL 1444909, at *10 (C.D. Cal. Mar. 20, 2020), *appeal dismissed,* No. 20-55408, 2020 WL 6075667 (9th Cir. Aug. 20, 2020).

[56] *See Quinn v. LPL Fin. LLC*, 91 Cal. App. 5th 370 (May 10, 2023).

[57] *Cal. Trucking Ass'n v. Becerra*,433 F. Supp. 3d 1154 (S.D. Cal. 2020), *rev'd sub nom. Cal. Trucking Ass'n v. Bonta,* 996 F.3d 644 (9th Cir. 2021). *Becerra* relies on a state judicial decision, *Cal. v. Cal Cartage Transp. Express, LLC*, No. BC689320 (Los Angeles Superior Ct. Jan. 8, 2020), which ruled that the ABC test effectively prohibits motor carriers from using independent contractors to provide transportation services and thus has a significant, impermissible effect on motor carriers' "prices, routes, and services" that runs afoul of the FAAAA. The State and the labor union appealed and the Ninth Circuit reversed, holding that the state statute had only a tenuous, remote, or peripheral connection to rates, routes, or services and thus was not preempted by FAAAA as applied to motor carriers. *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644 (9th Cir. 2021).

[58] *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644 (9th Cir. 2021).

[59] *People v. Superior Ct. (Cal Cartage Transp. Express, LLC)*, 57 Cal. App. 5th 619 (2020).

[60] Lab. Code § 2754.

[61] See § 1.5. For the standard that the EDD applies in determining whether a worker is an employee or independent contractor, see the Employment Determination Guide, https://www.edd.ca.gov/pdf_pub_ctr/de38.pdf (visited Mar. 18, 2024)(listing multiple elements to consider: instructions/supervision, training, continuing relationship, reports, payments, expenses, tools and materials, investment, profit or loss, services offered to general public, right to fire, right to quit, level of skill required, beliefs of the parties, and business decisions).

[62] 22 Cal. Code Regs. § 4304-1.

[63] Lab. Code § 226.8(a)(1).

[64] Lab. Code § 226.8(a)(2).

[65] Lab. Code § 226.8(b), (c).

[66] Lab. Code § 226.8(e)(1).

[67] Lab. Code § 226.8(e)(2).

[68] Lab. Code § 2753(a). Liability under this section does not extend to persons who are advising their employer or to licensed attorneys who are providing legal advice to their clients. Lab. Code § 2753(b).

[69] *Noe v. Superior Ct. (Levy Premium Foodserv. Ltd. P'ship)*, 237 Cal. App. 4th 316, 334-41 (2015). There may, however, be a UCL claim for conduct made unlawful by section 226.8. *See id.* at 326 ("the UCL … might provide plaintiffs some form of remedy for a violation of section 226.8").

[70] Lab. Code § 2810(a).

[71] Lab. Code § 2810(g).

[72] Lab. Code § 2810(f).

[73] *Hawkins v. TACA Int'l Airlines, S.A.*, 223 Cal. App. 4th 466, 471, 480 (2014).

[74] Lab. Code § 2810.3(b).

Seyfarth

20. Miscellaneous Statutory Provisions

20.1 Agreement to Illegal Terms of Employment

California makes voidable, as contrary to public policy, various provisions in employment-related agreements, including

- any settlement agreement provision that prevents the disclosure of "factual information related to a claim" filed in court or in an administrative action and regarding sexual harassment or retaliation for reporting harassment or discrimination,[1]
- any contractual provision that waives a party's right to testify in a legal proceeding (if required or requested by court order, subpoena or written administrative or legislative request) regarding criminal conduct or sexual harassment on the part of the other contracting party, or the other party's agents or employees,[2]
- any mandatory term of employment that has the employee release any FEHA claim,[3]
- various covenants not to compete (as of January 1, 2024, it is unlawful to include a noncomplete clause in an employment contract, or to require an employee to enter a noncompete agreement, that does not satisfy specified exceptions (*see supra* § 12)),[4]
- any agreement to have a dispute decided in a non-California forum under non-California law,[5]
- releases of wage claims as to wages indisputably due but not yet paid,[6] and
- any waiver—imposed as a condition of employment, continued employment, or receipt of an employment benefit—of any right, forum, or procedure for a violation of any provision of FEHA or the Labor Code.[7]

California employers must not require employees or applicants to agree in writing to any condition the employer knows to be unlawful.[8]

20.2 Choice of Non-California Law or Non-California Forum in Employment Contracts

Employers cannot impose on employees who reside and work in California any contractual provision that would either (1) "[r]equire [them] to adjudicate outside of California a claim arising in California" or (2) "[d]eprive [them] of the substantive protection of California law with respect to a controversy arising in California."[9] This law effectively forbids employers from contractually requiring California employees to adjudicate claims outside of California or to submit to the laws of another state, and makes any such provisions voidable by the employees.[10] (See § 5.3.)

The only exception is where an employee was individually represented by a lawyer in negotiating an employment contract.[11] The law provides that any contract that violates these provisions is voidable by the employee. A court may award an employee reasonable attorney fees, among other remedies, for enforcing rights under the act. [12]

Section 925 does not affect employment agreements already in effect before January 1, 2017.[13]

20.3 Forced Patronage

Some companies require their employees to patronize company products or services. Thus, for example, employees of the Brand X department store might be expected to wear Brand X clothes. Not so in California, which forbids employers to require employees to purchase "anything of value" (e.g., safety training, auto insurance, banking services) from the employer or any particular vendor.[14]

California also forbids employers to require an employee to buy or sell stock in order to secure a job. The relevant provision states: "Investments and the sale of stock or an interest in a business in connection with the securing of a position are illegal as against the public policy of the State and shall not be advertised or held out in any way as a part of the consideration for any employment."[15] For rules on company-required uniforms, see § 7.12.2.

20.4 Restrictions on Employer Rights to Employee Inventions

An employer may provide in its employment contracts for confidential disclosure of all of an employee's inventions made individually or jointly with others during the term of employment.[16] But California employers must not require an employee to assign rights to an invention that the employee has developed on his or her own time without using the employer's equipment, supplies, facilities, or trade secret information, unless the invention results from work for the employer or relates to the employer's business when the invention was developed.[17] Further, any agreement requiring a California employee to assign invention rights must notify the employee of these limitations.[18]

20.5 Child Labor

California's numerous and complicated child labor laws are generally beyond the scope of this discussion. For a summary, see https://www.dir.ca.gov/dlse/ChildLaborLawPamphlet.pdf.

Note, though, that even here, California goes to peculiar lengths. It forbids employment of an infant under the age of one month on a motion picture set or location unless a board-certified pediatric physician and surgeon certifies that the infant is at least 15 days old, was carried to full term, was of normal birth weight, and has the lungs, eyes, heart, and immune system that one needs to handle the stress and potential risks of filmmaking. Violation of this provision is a misdemeanor punishable by a fine of $2,500 to $5,000, 60-day jail term, or both.[19] The medical certification must be provided in advance to the Labor Commissioner, who will consent to the minor's employment through issuance of a permit.[20] (Some have cited this provision in trying to explain why viewers were shown a doll appearing to be a baby, instead of a real baby, during a scene in the 2014 movie *American Sniper*.)

Aggrieved individuals can seek treble damages claims for child-labor violations, and their claims are tolled during the time that they remain a minor. Moreover, certain violations involving a minor 12 years of age or younger are now subject to civil penalties of $25,000 to $50,000 per violation.[21] Just when you thought California could not get more peculiar in this area: agricultural packing plants in Lake County get a unique exemption from child labor laws until January 1, 2023. This exemption allows minors ages 16 and 17 to work during the peak agricultural season, so long as school is not in session.[22]

Not only is infant labor in the entertainment industry affected by recent laws, but the labor of older minors is as well. As of 2020, minors between the ages of 14-17 must complete training in sexual harassment prevention, retaliation, and reporting resources before they can obtain a work permit.[23]

20.6 Human Trafficking

A non-traditional employment law is the California Transparency in Supply Chains Act of 2010, which requires retail sellers and manufacturers doing business in California and having at least $100 million in annual worldwide gross receipts to disclose, on their website, their efforts to eradicate slavery and human trafficking from their direct supply chains for tangible goods offered for sale.[24] The California Attorney General has issued a detailed 50-page resource guide.[25] The remedy for a violation would be an injunction secured by the California Attorney General.[26] Further, certain businesses (e.g., truck stops, bus stations) must post notices providing hotline numbers to use to report incidents of human trafficking.[27]

The FEHA requires hotel and motel employers to provide 20 minutes of human trafficking awareness training to employees likely to come into contact with victims of human trafficking (including those who work in a reception area, perform housekeeping duties, help customers in moving possessions, or drive customers). At the time of its implementation, employers were required to train employees by January 2020 and every two years thereafter. For new employees hired after July 1, 2019, training must be completed within six months after hire. The training must prepare employees to recognize the signs of human trafficking, to distinguish between labor and sex trafficking, and to report suspected trafficking to the appropriate law enforcement agencies.[28]

Operators of mass transit intercity passenger rail systems, light rail systems, and bus stations must provide 20 minutes of training to employees who may interact with victims of human trafficking or who are likely to receive reports about suspected human trafficking.[29] The training must include (1) the definition of human trafficking, including sex trafficking and labor trafficking, (2) myths and misconceptions about human trafficking, (3) physical and mental signs that may indicate that human trafficking is occurring, (4) guidance on how to identify individuals who are most at risk for human trafficking, (5) guidance on how to report human trafficking, including, but not limited to, national hotlines and contact information for local law enforcement agencies, and (6) protocols for reporting human trafficking when on the job.[30]

While the failure to report human trafficking does not itself cause liability for the above businesses,[31] an establishment or business that fails to comply after notice of non-compliance is liable for a $500 civil penalty for a first offense and a $1,000 civil penalty for each further offense.[32]

20.7 Garnishments

California employers must not discharge an employee for being subject to garnishment for the payment of one judgment.[33] Under Family Code provisions, California employers must not rely on a wage-assignment support order to deny hire, to discharge, to discipline, to deny a promotion, or to take any other adverse employment action. Violations of this prohibition subject employers to civil penalties of up to $500.[34]

Historically, the amount of California wages protected from garnishment reflected the federal minimum wage, but now the amount of California wages exempt from garnishment must reflect either the state minimum wage or the local minimum wage, whichever is higher. The amount of weekly wages subject to levy under an earnings withholding order cannot exceed either 25% of the debtor's disposable earnings or one-half of the debtor's weekly disposable earnings exceeding 40 times the applicable minimum wage.[35] Starting on September 1, 2023, SB 1147 will limit garnishments to the lesser of 20% of the employee debtor's disposable earnings for that week or 40% of the amount by which the debtor's disposable earnings for the week exceeds 48 times the state minimum hourly wage.

20.8 Diverse Representation on Corporate Boards of Directors

Pursuant to legislation effective beginning in 2019, every publicly held corporation[36] with a principal executive office in California—whether incorporated in California or elsewhere—must have women on its board of directors.[37] Previously, such corporations must have had at least one female director and now must have a minimum number of board seats filled by women, based on the total size of the board of directors.[38]

Under similar 2020 legislation, such corporations must also, by the end of 2021, have had at least one director from "an underrepresented community"—someone who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.[39] And by the end of 2022, a corporation with more than four but fewer than nine directors must have had at least two directors from underrepresented communities, and such a corporation with nine or more directors must have at least three directors from underrepresented communities.

In 2022, the Secretary of State published an annual report of how many publicly held corporations have principal executive offices in California and which corporations (1) complied with requirements, (2) moved their headquarters in or out of California, and (3) are no longer publicly traded.[40]

For each director's seat not held by a female or individual of an underrepresented community, when by law it should have been, the corporation was subject to a $100,000 fine for the first violation and a $300,000 fine for further violations. Corporations that failed to timely file relevant information with the Secretary of State also were subject to a $100,000 fine.[41]

If you thought that race- and gender-based mandates on corporate board representation raised constitutional issues, then you would not be alone. In April 2022, a Los Angeles Superior Court judge ruled that the board diversity statute concerning underrepresented communities was unconstitutional and enjoined implementation and enforcement of the statute.[42] In May 2022 another Los Angeles Superior Court judge similarly ruled that the gender diversity board mandate was unconstitutional.[43] The ruling reasoned that the gender-based quota was subject to strict constitutional scrutiny and lacked a compelling government interest to justify it. The judge rejected the State's argument that remedying discrimination in director selection was a compelling government interest, because the State did not specify any intentional, unlawful discrimination to remedy. The judge also denied that there was a compelling interest in benefiting the public and state economy, as the law instead aimed to achieve gender equity or parity. Moreover, there were no conclusive connections between women on corporate boards and improved corporate performance and governance. The judge cited expert testimony that attributed the differences in the numbers of men and women on corporate boards to reasons other than actual discrimination, such the lack of open board seats, women's networking issues, board members' propensity to select persons they already, know, and board preferences for choosing CEOs to fill board positions. Finally, the judge held that the law was not narrowly tailored to California's stated interest, because the Legislature failed to consider amending existing discrimination laws or to adopt more finely tuned legislation to root out alleged discrimination in the board selection process. Accordingly, the judge enjoined implementation and enforcement of the gender diversity board statute.

The State of California appealed both board diversity statute decisions to the Court of Appeal, where they are currently pending.[44] Implementation and enforcement of both statutes is enjoined pending the appeals.[45]

On May 16, 2023, a California federal district court weighed in on the California board diversity statute requiring directors from underrepresented groups. The federal court found that the statute's board diversity requirement constitutes a facially invalid racial and ethnic quota and violates the federal Constitution's Equal Protection Clause and federal civil rights statute 42 U.S.C. § 1981.[46]

The decision was appealed, and in December 2023, the Court of Appeals for the Ninth Circuit continued the stay of briefing pending the decision of the California Supreme Court in a case that will determine whether the State of California recognizes taxpayer standing to bring actions against state officials.[47]

20.9 Pay For College Athletes

The Fair Pay to Play Act, which became effective on September 1, 2021,[48] authorizes California student athletes enrolled in California public and private four-year colleges and universities and California community colleges to earn money from endorsements, sponsorship deals, and any other activities related to their athletic skills, without losing their status as student athletes. The Act also forbids California colleges, universities, and community colleges from denying their student athletes the chance to hire agents and earn money for use of their names, images, and likenesses.[49]

In January 2024, the California legislature introduced a bill[50] that, if passed, would require any entity that provides compensation or any item of value or service to a student athlete, or to the student athlete's immediate family, to disclose the amount of compensation, the student athlete's gender, and the team as specified, to the student athlete's school. This legislation seeks to raise awareness about gender equity in name, image, and likeness (NIL) deals in California.

---

1 Civ. Proc. Code § 1001. The section does not prohibit confidentiality as to the amount paid in settlement or the identity of the claimant—if the claimant so requests and if no party is a government agency or official.

2 AB 3109, 2018 bill adding Civil Code § 1670.11.

3 SB 1300, 2018 bill adding Gov't Code § 12964.5(a). This prohibition does not apply to any negotiated agreement to settle a FEHA claim filed in a legal proceeding or through the employer's internal complaint process.

4 Bus. & Prof. Code § 16600. The new law requires employers to notify current and former employees (who were employed after January 1, 2022, whose contracts include a noncompete clause, or who were required to enter a noncompete agreement, that does not satisfy an exception to this chapter) in writing by February 14, 2024, that the noncompete clause or agreement is void. The law makes a violation of these provisions an act of unfair competition pursuant to California's unfair competition law. See § 12.1 for more detailed discussion.

5 Lab. Code § 925. This prohibition does not apply to agreements the employer negotiates with individuals represented by legal counsel.

6 Lab. Code § 206.5. Parties can, however, enter into enforceable agreements to settle wage claims that the employer disputes in good faith.

7 Lab. Code § 432.6(a). Exempted are "postdispute settlement agreements" and "negotiated severance agreements." Lab. Code § 432.6(g).

8 Lab. Code § 432.5.

9 Lab. Code § 925(a), (d).

10 Lab. Code § 925(a), (b).

11 Lab. Code § 925(e).

12 Lab. Code § 925(c).

13 Lab. Code § 925(f).

14 Lab. Code § 450. Although employees may lack a private right of action under section 450, *Sanchez v. Aerogroup Retail Holdings, Inc.*, 2013 WL 1942166, at *4-5 (N.D. Cal. May 8, 2013) (section 450 does not create private right of action); *Harris v. Vector Mktg. Corp.*, 2010 WL 2077015, at *2 (N.D. Cal. May 20, 2010) (same), employees might still seek civil penalties under PAGA. See § 5.15. In some cases, federal law may preempt the forced patronage statute. *McDaniel v. Wells Fargo Invs., LLC*, 717 F.3d 668, 671 (9th Cir. 2013) ("[F]ederal securities law preempts the enforcement of California's forced-patronage statute against brokerage houses that forbid their employees from opening outside trading accounts.").

15 Lab. Code § 407. Corporation Code section 408 provides an exception to Labor Code section 407 with respect to (a) a stock purchase plan or stock option plan or (b) securing the employment of someone to be an officer of the corporation or any parent or subsidiary thereof.

16 Lab. Code § 2871.

17 Lab. Code § 2870.

18 Lab. Code § 2872.

19 AB 267, 2019 bill amending Lab. Code §§ 1286, 1308.8.

20 Lab. Code § 1308.10.

21 Lab. Code § 1311.5.

[22] Lab. Code § 1393.5(f).

[23] AB 3175, 2020 bill amending Lab. Code § 1700.52.

[24] Civ. Code § 1714.43(a), (c).

[25] The California Transparency in Supply Chains Act: A Resource Guide 2015, https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf (last visited Mar. 28, 2024).

[26] Civ. Code § 1714.43(d).

[27] Civ. Code § 52.6.

[28] Gov't Code § 12950.3(b)(3). See SB 970, 2018 bill adding Gov't Code § 12950.3. The requirement does not apply to bed and breakfast inns as defined in Business and Professions Code section 24045.12.

[29] AB 2034, a 2018 bill amending Civ. Code § 52.6 to add subdivision 52.6(e).

[30] Civ. Code § 52.6(f)(1)-(6).

[31] Civ. Code § 52.6(g)(2).

[32] Civ. Code § 52.6(h).

[33] Lab. Code § 2929.

[34] Fam. Code § 5290.

[35] Civ. Proc. Code §§ 706.011, 706.050.

[36] Publicly held corporations constitute a subset of publicly traded corporations, and have shares listed on the New York Stock Exchange, the NASDAQ or the NYSE American (formerly known as the American Stock Exchange or AMEX). See California Secretary of State, Women on Boards, Frequently Asked Questions, https://www.sos.ca.gov/business-programs/women-boards/frequent (last visited Mar. 28, 2024).

[37] Corp. Code §§ 301.3, 2115.5.

[38] Corp. Code § 301(b)(1)-(3). If the number of directors is four or fewer, the corporation must have at least one female director. If the number of directors is five, the corporation must have at least two female directors. If the corporation has six or more directors, the corporation must have at least three female directors.

[39] SB 979, 2020 bill amending Corp. Code § 301.3 and adding Corp. Code § 301.4.

[40] https://bpd.cdn.sos.ca.gov/div-on-boards/dob-report-2022.pdf (last visited Mar. 28, 2024).

[41] SB 826, 2018 bill adding Corp. Code §§ 301.3, 2115.5.

[42] *Crest v. Padilla*, No. 20 STCV 37513 (Los Angeles Sup. Ct. April 1, 2022) (Judge Terry A. Green) (granting an injunction against the corporate board diversity law with respect to its quotas for "underrepresented communities").

[43] *Crest v. Padilla*, No. 19 STCV 27561 (May 13, 2022) (Judge Maureen Duffy-Lewis) (Corp. Code § 301.3, requiring publicly listed California corporations to have women on their boards, violates the Equal Protection Clause of the California Constitution). The two *Crest v. Padilla* decisions have the same name because they both were brought by the same plaintiff against the same defendant (then-California Attorney General Alex Padilla), with a 2019 filing challenging the gender quota and a 2020 filing challenging the "underrepresented communities" quota).

[44] *Crest v. Padilla*, No. B322276 (Cal. Ct. App. Dec. 1, 2022); *Crest v. Padilla*, No. B321726 (Cal. Ct. App. Dec. 1, 2022).

[45] *Id.*

[46] *Alliance for Fair Bd. Recruitment v. Weber,* No. 2:21-CV-01951-JAM-AC, 2023 WL 3481146, at *2-3 (E.D. Cal. May 16, 2023) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978)).

[47] *Alliance for Fair Recruitment v. Weber,* No. 23-15091, Doc. 24 (9th Cir. Dec. 20, 2023).

[48] The Act originally was set to become effective on January 1, 2023. However, on August 31, 2021, Governor Newsom signed SB 26, which made the Act effective the following day, September 1, 2021.

[49] SB 206, 2019 bill adding Educ. Code § 67456; AB 1518, 2019 bill amending Bus. & Prof. Code §§ 18895.2, 18897.6, 18897.73 and adding Bus. & Prof. Code § 18897.74; SB 26, 2021 bill amending Educ. Code § 67456.

[50] SB 906, 2024 bill to amend Educ. Code § 67456.

21. Some Provisions Favoring California Employers

To keep our overall presentation fair and balanced, this section lists a few provisions of California law that can benefit employers (even if that was not their primary intent).

21.1 Claims for Unlawful Tape Recording

Because California is a two-party consent state to audio recording, corporate employers as well as individuals can sue for civil penalties when an employee surreptitiously tape-records confidential communications.[1] Thus, wrongful termination plaintiffs who have secretly tape-recorded disciplinary meetings with their supervisors have found themselves facing an employer's cross-complaint.[2]

In 2021, the California Supreme Court held that recording cell phone calls without consent is unlawful and may subject an employer to class action exposure.[3] Therefore, it is now unlawful for anyone, party or nonparty, to record a cellular telephone conversation without the consent of all parties to the call. Because of this, employers should take steps to ensure that their representatives or automated systems clearly communicate to the other party that the call is being recorded and to ensure that such notification is non-bypassable.

21.2 Workplace Harassment Orders

Employers can act on behalf of their employees to obtain injunctive relief against unlawful violence or a credible threat of violence that reasonably implicates the workplace.[4] One California appellate court has ruled that an employer's unsuccessful petition for an injunction would not support a malicious prosecution suit by the employee who had been the target of the petition.[5]

Restraining orders against gun violence can be sought by the subject individual's employer or by co-workers who have had substantial and regular interactions with the subject individual and who have approval of their employer. The order would prohibit the subject individual from controlling, owning, purchasing, possessing, receiving, or attempting to purchase or receive, a firearm or ammunition upon a showing that there is a substantial likelihood that these activities would pose a significant danger of self-harm or harm to another in the near future and that the order is necessary to prevent personal injury to the subject or another.[6]

21.3 Anti-SLAPP Motions

California's "anti-SLAPP" statute permits defendants to move to strike meritless claims that are based upon the defendant's exercise of constitutional rights.[7] While this statute aims to protect public interest groups sued for defamation by corporate developers and other organizations, corporate employers have used this statute when sued for statements made to the government, such as the employers' position statements to the EDD or the EEOC or the tax forms that the employers have filed with the IRS.

During 2019 a series of judicial decisions recognized employers' ability to use anti-SLAPP motions to strike employment suits brought against employer actions taken in furtherance of free speech rights. The California Supreme Court rejected a plaintiff's extreme view that anti-SLAPP motions are unavailable to a defendant accused of discriminatory or retaliatory motive. The Supreme Court held that a media company, Cable News Network (CNN), could file an anti-SLAPP motion against a wrongful-termination plaintiff whom CNN had fired as a

news reporter for alleged plagiarism. The Supreme Court reasoned that an adverse employment action may be an action entitled to anti-SLAPP protection if that action was taken in furtherance of speech or petitioning rights, as CNN's was.[8]

Two Court of Appeal decisions likewise held that employers could move to dismiss employee lawsuits arising from employer actions that were in furtherance of free speech rights.

These decisions endorsed anti-SLAPP motions by a singer who fired a drummer, by a newspaper that fired a blogger, and by a university that investigated a professor.

The first decision upheld an anti-SLAPP motion by a singer/songwriter who fired his band's drummer. When the drummer brought FEHA claims for age, disability, and medical condition discrimination, the singer/songwriter filed an anti-SLAPP motion to dismiss because the claims arose in connection with an issue of public interest given the media's and the public's interest in the music involved. The Court of Appeal reasoned that "a singer's selection of the musicians that play with him both advances and assists the performance of the music, and therefore is an act in furtherance of his exercise of the right to free speech."[9]

The second decision held that a defendant university's anti-SLAPP motion should have been granted to dismiss the defamation claim of a professor arising from several internal investigations into the professor's alleged discriminatory conduct.

The Court of Appeal reasoned that the university's actions were constitutionally protected statements that occurred in an official proceeding.[10]

On the other hand, the Court of Appeal held in 2021 that the alleged wrongful suspension and termination of a public school teacher did not constitute protected activity under the anti-SLAPP statute because the plaintiff's claims were based on reassignment and termination of employment decisions, rather than on communications made regarding the employer's investigation of the teacher's alleged misconduct, or the investigation as a whole.[11]

21.4 Special Proof Required to Impose Punitive Damages

California law provides corporate defendants with special protections against the imposition of punitive damages. The plaintiff must prove by "clear and convincing" evidence (not merely "the preponderance of the evidence") that she suffered from the fraudulent, malicious, or oppressive conduct of a corporate officer, director, or "managing agent," or that an officer, director, or managing agent knowingly ratified the relevant wrongful conduct or had advance knowledge of the wrongdoing employee's unfitness for employment.[12]

The "clear and convincing" standard of proof applies not only to whether the conduct was fraudulent, malicious, or oppressive but also to whether the employee perpetrating or ratifying the wrongdoing was a managing agent.[13] Another pro-defendant aspect of California law in this regard is that no award of punitive damages is valid absent proof of the defendant's net worth,[14] and discovery into that net worth is forbidden unless the plaintiff first shows a likelihood that punitive damages will be awarded on the facts of the case.[15]

And more good news for corporate employers on this front: punitive damages are not available for Labor Code violations.[16]

Nonetheless, courts have broadly construed the term "managing agent" to include individuals who are not corporate policy-makers. In 2020, the Court of Appeal affirmed a jury award of punitive damages for a retail store manager who had been mistreated and then fired. The alleged wrongdoer, the plaintiffs' regional supervisor, was

permissibly found to be a managing agent because he oversaw nine retail stores and 100 employees, had independent and final authority to hire or fire employees within his district, and enjoyed substantial discretionary authority over daily store operations, leading to the ad hoc formulation of policy. The fact that he was not a corporate policymaker did not preclude a finding that he was a managing agent.[17]

21.5 Relatively Short Limitations Period

California once had an unusually short statute of limitations for personal injury claims—just one year. This statute applied to most employment-related torts, including wrongful termination in violation of public policy. The statute of limitations for those claims now is two years.[18]

21.6 Contractually Authorized Judicial Review of Arbitration Awards

The California Supreme Court has held that California employers invoking the California arbitration statute (but not the Federal Arbitration Act) can enforce agreements by which arbitral awards can be reviewed for errors of law. (See § 5.2.5.)

21.7 Use of E-Verify

Some states and municipalities, concerned about unlawful immigration, required employers to use the otherwise optional E-Verify electronic employment verification system (administered by the U.S. Department of Homeland Security) when considering job applications. Arizona enacted such a law, and the City of Lancaster, California enacted a similar ordinance. When the U.S. Chamber of Commerce challenged the Arizona statute, arguing that it was preempted by federal immigration law, the U.S. Supreme Court upheld the statute.[19]

California, however, differs from Arizona. Its Employment Acceleration Act of 2011—legislation sponsored by both business groups and the ACLU—forbids state and local governments from requiring employers to use electronic employment verification systems, except as required by federal law or as a condition of receiving federal funds.[20]

California took its aversion to E-Verify a step further in 2015, forbidding employers and other persons—except as required by federal law or as a condition of receiving federal funds—to use E-Verify to check the employment authorization status of an employee or a job applicant who has not been offered employment.[21]

The law imposes a $10,000 civil penalty for each violation. In addition, as of 2017, California employers must not request documents not required by federal law and must honor documents that on their face reasonably appear to be genuine. A similarly draconian penalty applies.[22]

21.8 Non-Signatories Can Enforce Arbitration Agreements

Some companies contract with staffing agencies or other independent contractors to provide services to the company. While the company might have arbitration agreements with its own employees, the company typically would not have an arbitration agreement with the workers retained by the contractor. Under certain circumstances, however, the company can respond to a worker's lawsuit by invoking an arbitration agreement that the worker entered into with the contractor. While the general rule is that only the parties to an arbitration agreement can seek to enforce it, several exceptions apply.

One exception is equitable estoppel, which applies when the claims against a nonsignatory defendant arise from the same facts and are inherently inseparable from arbitrable claims against a signatory defendant. Another exception applies when the nonsignatory defendant is being sued for its acts as an agent of the signatory

defendant. And a third exception applies when the arbitration agreement identifies the nonsignatory defendant as a third-party beneficiary of the agreement.

The Court of Appeal, in *Garcia v. Pexco, LLC*, addressed a case involving the first two exceptions. Narciso Garcia, who worked for Real Time Staffing Services, sued Real Time for Labor Code violations and also sued Pexco, the firm where Real Time had assigned Garcia to work. Although Garcia and Real Time had an arbitration agreement, which waived class claims, there was no arbitration agreement between Garcia and Pexco. Pexco nonetheless successfully compelled individual arbitration of Garcia's Labor Code claims against Pexco.

The Court of Appeal reasoned that "Garcia's claims against Pexco are rooted in his employment relationship with Real Time, and the governing arbitration agreement expressly includes statutory wage and hour claims."[23] The Court of Appeal concluded: "Garcia agreed to arbitrate his wage and hour claims against his employer, and Garcia alleges Pexco and Real Time were his joint employers. Because the arbitration agreement controls Garcia's employment, he is equitably estopped from refusing to arbitrate his claims with Pexco."[24]

The Court of Appeal independently relied on the "agency" exception to the rule that only signatory parties can invoke an arbitration agreement. Pexco could invoke that exception because Garcia had alleged that each defendant was the agent of the other and because Garcia had alleged that "the two defendants were joint employers fulfilling the same role."[25]

In 2019, the Court of Appeal addressed another Labor Code lawsuit by an employee who had an arbitration agreement with his staffing agency employer. The employee chose to sue only the worksite employer where he had worked. The worksite employer cross-complained against the staffing agency, and both companies moved to compel arbitration. The employee distinguished *Garcia v. Pexco, LLC* by arguing that his staffing agency could not compel arbitration because he had not sued the staffing agency, and that the worksite employer could not compel arbitration because the worksite employer had not signed the arbitration agreement. The Court of Appeal disagreed: the plaintiff's decision not to sue the staffing agency presented "a distinction without a difference," because the staffing agency (being a cross-defendant) was a party to the litigation, and because "this entire dispute arose" from the employee's employment with the staffing agency.[26]

In 2021, the Court of Appeal again addressed an arbitration agreement between an employee and his staffing agency employer, and held that California law allows a non-signatory to invoke arbitration under the doctrine of equitable estoppel even when the signatory attempts to avoid arbitration by suing non-signatory defendants. This case is instructive for staffing agencies and similar entities who should review their contracts with employees to ensure that their clients are encompassed within arbitration agreements the staffing agencies enter into with their employees.[27]

21.9 Employers Doing Business Within Federal Enclaves

Not all land inside California's borders is actually within the legal jurisdiction of California. Rather, some areas are federal enclaves—territory California has ceded to the federal government, with the result that federal law largely applies. Some California employers operating within these enclaves are free of many peculiar California employment laws, and need only follow federal employment law.[28]

As an example, both Yosemite National Park (in 1920) and San Francisco's Presidio (in 1987) became federal enclaves well before California created most of its peculiar employment law. Employers that operate within enclaves such as these may be shielded from many of the laws that afflict the common run of California employers.

21.10 Sometimes a Quit Is Just a Quit

An employee phoned in her resignation and a few days later confirmed her resignation in an email to her supervisor. When she asked her employer to allow her to rescind her resignation, the employer refused to do. She then sued for discriminatory discharge. The Court of Appeal affirmed summary judgment for the employer, reasoning that refusing to allow an employee to rescind a resignation is not an adverse employment action.[29]

21.11 Half Hour Deductions for Tardiness?

In what can only be called an odd quirk, even for peculiar California, a 1937 Labor Code provision still on the books provides: "No deduction from the wages of an employee on account of his coming late to work shall be made in excess of the proportionate wage which would have been earned during the time actually lost, *but for a loss of time less than thirty minutes, a half hour's wage may be deducted.*"[30]

We are unaware of any employer that has defeated liability by relying on this provision.

Conclusion

Whether or not you consider California a leader in "progressive" labor and employment laws likely will depend on whether you are a plaintiffs' attorney or an employer.

Something that any objective observer must acknowledge, however, is that California employment law often is peculiar.

---

[1] *See* Pen. Code §§ 631, 637.2.

[2] Pen. Code § 631(d); *but see* Pen. Code §§ 633.5, 633.6(a) (permitting use of recordings of confidential communications in criminal proceedings as evidence of various crimes including extortion, bribery, and any felony involving violence against the person making the recording); *People v. Guzman*, 11 Cal. App. 5th 184, 186 (2017) (holding Pen. Code § 632(d)'s exclusionary language nullified by Article I, Section 28 of the California Constitution in criminal proceedings); *People v. Ratekin*, 212 Cal. App. 3d 1165, 1169 (1989) (holding Pen. Code § 631(c)'s exclusionary language nullified by Article I, Section 28 of the California Constitution in criminal proceedings). The tapes generally are inadmissible in evidence.

[3] *Smith v. Loanme, Inc.,* 11 Cal. 5th 183 (2021).

[4] Civ. Proc. Code § 527.8. *See USS-Posco Indus. v. Edwards*, 111 Cal. App. 4th 436 (2003) (affirming three-year injunction against former employee who made generalized threats of workplace violence while still employed; employer may obtain injunction on behalf of employee who is logical target of threats, even if not specifically identified by the harasser).

[5] *Robinzine v. Vicory*, 143 Cal. App. 4th 1416 (2006) (employer's petition under the Workplace Violence Safety Act, Code of Civil Procedure § 527.8, cannot, as a matter of law, support a claim for malicious prosecution; thus employee's malicious prosecution suit must fail and employee is vulnerable to an anti-SLAPP motion).

[6] Pen. Code §§ 18150, 18170, 18190.

[7] Civ. Proc. Code § 425.16.

[8] *Wilson v. Cable News Network, Inc.*, 7 Cal. 5th 871 (2019).

[9] *Symmonds v. Mahoney*, 31 Cal. App. 5th 1096, 1106 (2019).

[10] *Laker v. Bd. of Trustees*, 32 Cal. App. 5th 745 (2019).

[11] *Verceles v. Los Angeles Unified Sch. Dist.,* 63 Cal. App. 5th 776 (2021).

[12] Civ. Proc. Code § 3294.

[13] *Barton v. Alexander Hamilton Life Ins. Co. of Am.*, 110 Cal. App. 4th 1640 (2003).

[14] *Kelly v. Haag*, 145 Cal. App. 4th 910 (2006) (substantial evidence did not support $75,000 punitive damages award against defendants in fraud action where plaintiff did not present evidence of defendant's net worth or ability to pay; plaintiff on remand is not entitled to a retrial on punitive damages, because plaintiff had full and fair opportunity to establish defendant's financial condition but failed to do so).

[15] *See* Civ. Proc. Code § 3295.

[16] *Brewer v. Premier Golf Props.*, 168 Cal. App. 4th 1243 (2008) (plaintiff may not recover punitive damages for Labor Code violations regarding meal and rest breaks, pay stubs, or minimum wage, because (1) the express statutory remedies are exclusive absent evidence that they are inadequate and (2) the statutory provisions on these subjects arise from a contractual employment relationship, thereby precluding punitive recoveries).

[17] *Colucci v. T-Mobile USA, Inc*., 48 Cal. App. 5th 442 (2020).

[18] Civ. Proc. Code § 335.1.

[19] *Chamber of Com. v. Whiting*, 563 U.S. 582 (2011) (federal immigration law did not preempt the Legal Arizona Workers Act, which required that all Arizona employers use E-Verify to confirm that the workers they employ are legally authorized workers).

[20] Lab. Code § 2812 ("Except as required by federal law, or as a condition of receiving federal funds, neither the state nor a city, county, city and county, or special district shall require an employer to use an electronic employment verification system, including under the following circumstances: (a) As a condition of receiving a government contract. (b) As a condition of applying for or maintaining a business license. (c) As a penalty for violating licensing or other similar laws.").

[21] Lab. Code § 2814.

[22] Lab. Code § 1019.1.

[23] *Garcia v. Pexco, LLC*, 11 Cal. App. 5th 782, 787 (2017).

[24] *Id.* at 788.

[25] *Id.* For an example of a third-party beneficiary successfully invoking an arbitration agreement, see *Selby v. Deutsche Bank Trust Co. Ams.,* No. 12-01562, 2013 WL 1315841 (S.D. Cal. Mar. 28, 2013). The arbitration clause at issue—a credit card agreement—permitted "any involved third party" to elect "binding arbitration." Accordingly, successor servicers to the signatory bank could compel arbitration of plaintiff's claim, even though they did not sign the arbitration agreement.

[26] *Vasquez v. San Miguel Produce, Inc.*, 31 Cal. App. 5th 810 (2019).

[27] *Franklin v. Cmty. Reg'l Med. Ctr.,* 998 F.3d 867 (9th Cir. 2021)

[28] U.S. Const., art. 1, § 8, cl. 17.

[29] *Featherstone v. S. Cal. Permanente Med. Grp.*, 10 Cal. App. 5th 1150, 1163 (2017) (absent a constructive discharge or a contractual obligation, refusing to accept rescission of a resignation is not an adverse employment action, because "the employment relationship has ended").

[30] Lab. Code § 2928 (emphasis added).

Seyfarth

Index of Terms

Index of Statutory and Wage Order Provisions

Business and Professions Code

Civil Code

Code of Civil Procedure

Education Code

Family Code

Government Code

Health & Safety Code

Insurance Code

Labor Code

Military & Veterans Code

Penal Code

Public Utility Code

Revenue and Taxation Code

Unemployment Compensation Insurance Code

Vehicle Code

IWC Wage Orders

www.seyfarth.com