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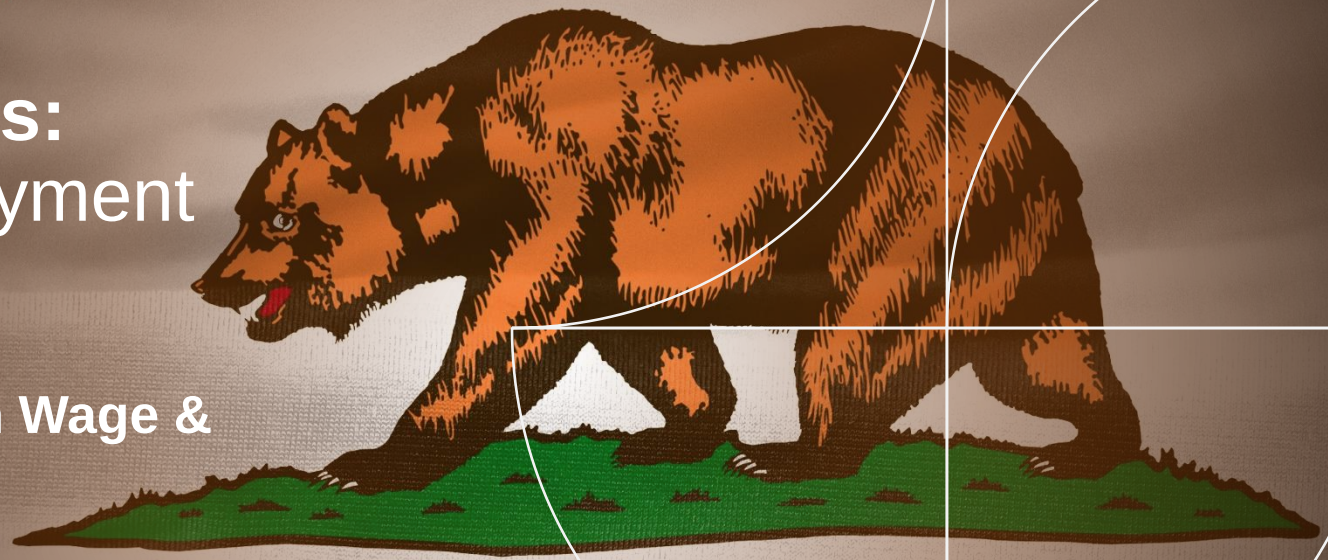
2023 Cal-Peculiarities: How California Employment Law is Different

Part 1: New Developments in Wage & Hour and Pay Equity & Pay Transparency

August 23, 2023



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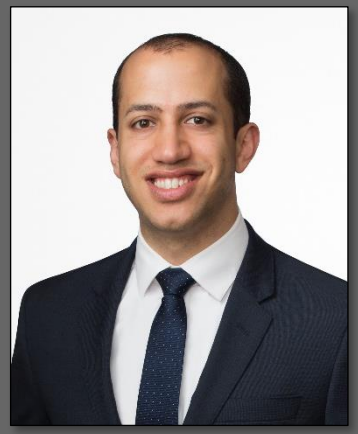

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Agenda

1 | Rounding

2 | Regular Rate of Pay

3 | Indemnification of Employee Expenses

4 | Service Charges and Gratuities, and the Impact on Employee Pay

5 | Changes to California Pay Data Reporting and New Pay Disclosure Requirements

6 | Additional Notable Wage/Hour Cases

Rounding

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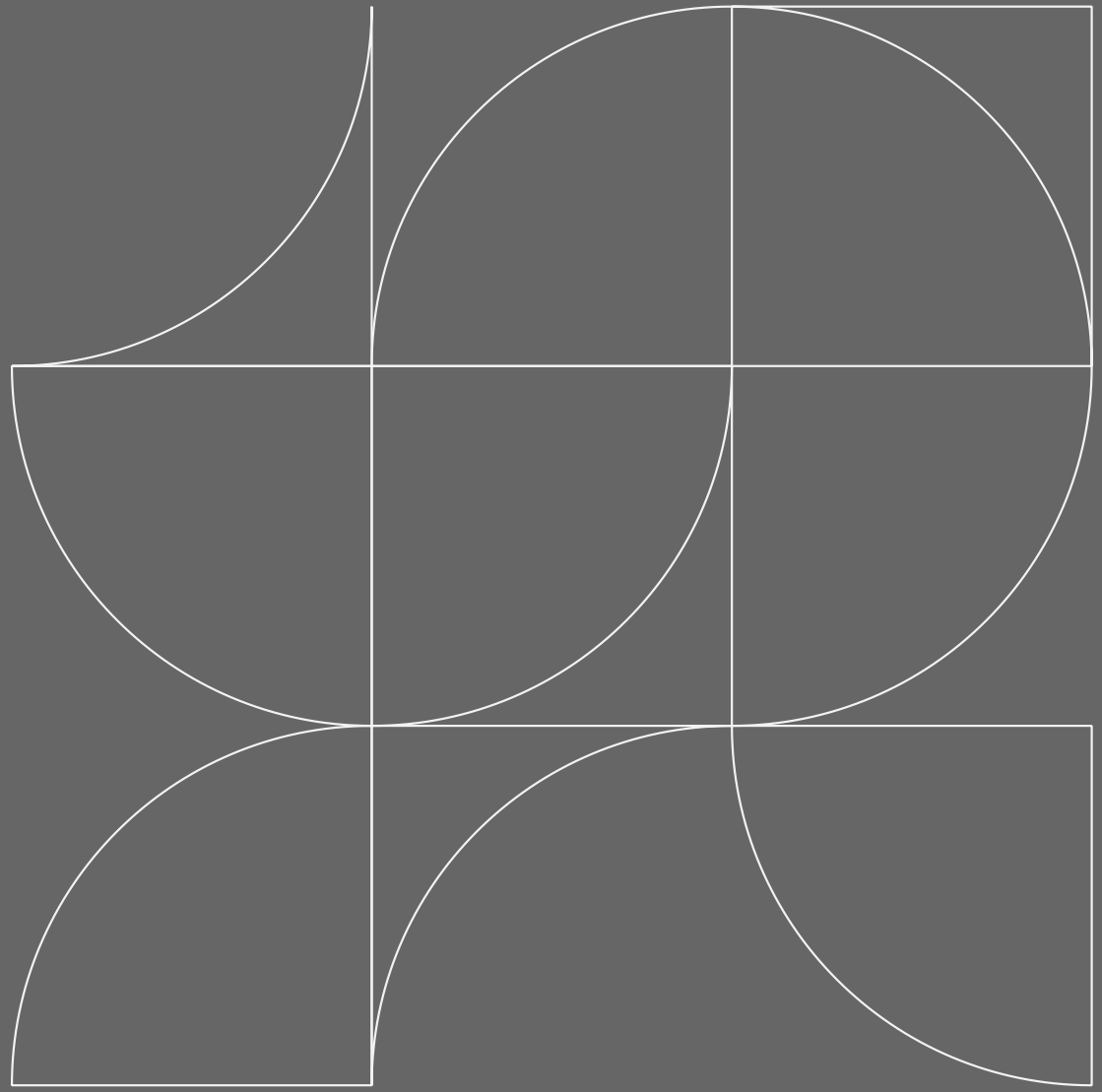

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Best Practices
Re: Rounding

Brief Summary of California Law on Rounding

See's Candy Shops, Inc. v. Superior Court, 210 Cal. App. 4th 889, 901 (2012).

- California law "permits employers to use a rounding policy for recording and compensating employee time as long as the employer's rounding policy does not 'consistently result in a failure to pay employees for time worked.'"
- A rounding policy is lawful if it is "fair and neutral on its face and '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.'"
- Rounding policies have been found to violate this rule when they only round down and thereby "systematically undercompensate employees."
- Since *See's*, courts had routinely upheld rounding as a lawful practice.

Home Depot Decision on Rounding

Camp v. Home Depot, 84 Cal. App. 5th 638 (2022)

Key Holdings/Takeaways

- All time worked is compensable under Labor Code § 510, and Plaintiff's 7+ hours of uncompensated time worked was **not** *de minimis*
- Employers who "can capture and [have] captured the exact amount of time an employee has worked during a shift" must fully compensate employees for all the time worked, rather than rounded time, even if the rounding practice is neutral on its face and as applied
- There is "no provision in California law that privileges arithmetic simplicity over paying employees for all the time worked."

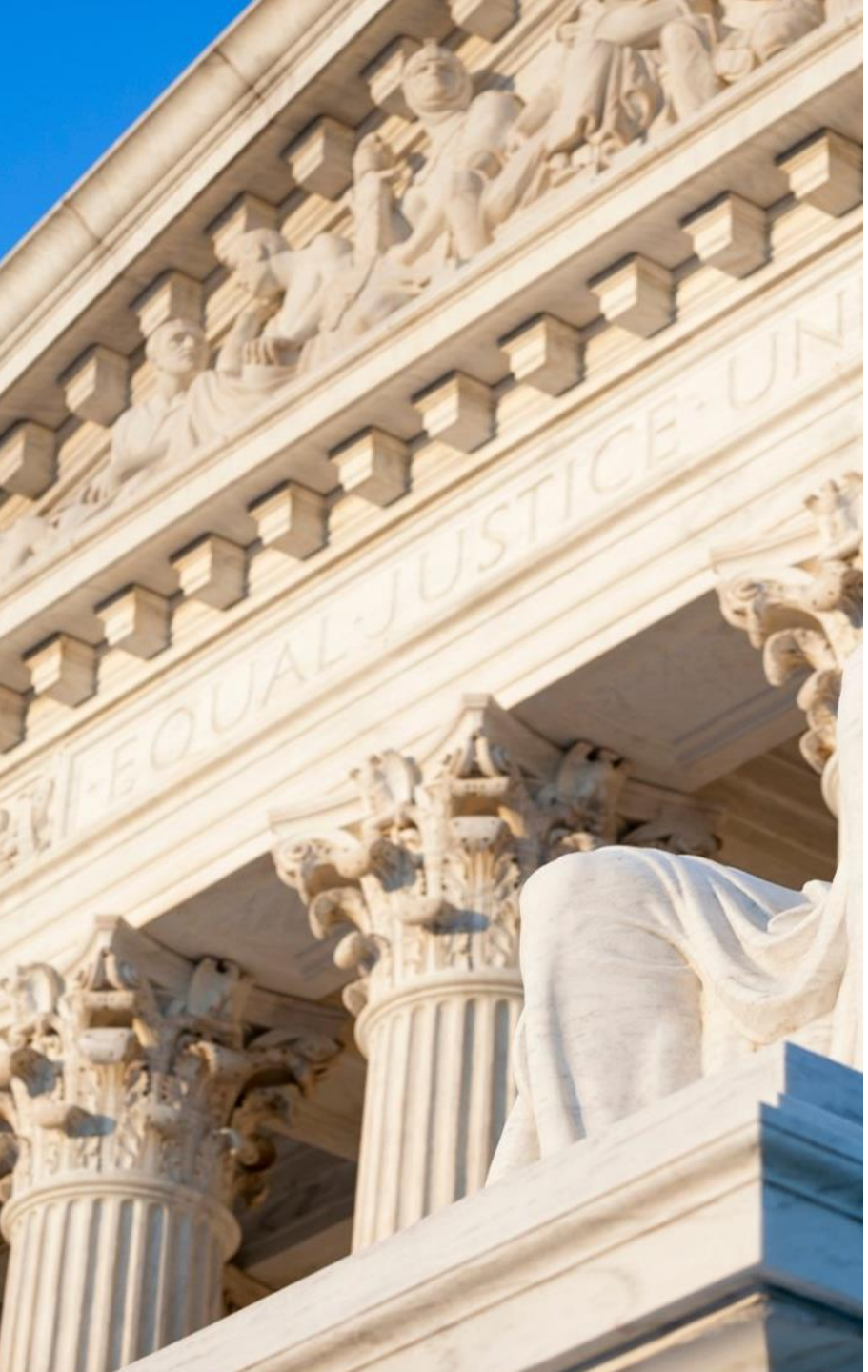
Home Depot Decision on Rounding

Key Holdings/Takeaways

- Court of Appeal invited California Supreme Court to address policies of neutral time rounding in light of current timekeeping technology

  – Troubling concurrence…

- Rounding is on its way out generally, and is already unavailable for meal periods per *Donohue*
- **The California Supreme Court has granted review of the *Camp* decision – what does that mean?**



Best Practices Re: Rounding

Is *Camp* a Precursor to the End of Rounding?

- *Donohue* held that employers **cannot** engage in the practice of rounding time punches in the meal period context. But it did not address the use of rounding outside of the meal period context. ***However***, the California Supreme Court did go out of its way to say that it "has never decided the validity of the rounding standard articulated in *See's Candy I*."

- The Cal. Supreme Court also suggested that: "the practical advantages of rounding policies may diminish further" as "technology continues to evolve" and that "technological advances may help employers to track time more precisely."

- ***Practical Advice*: Discontinue rounding employee time punches, for both start/stop times and meal break times.**

Regular Rate of Pay

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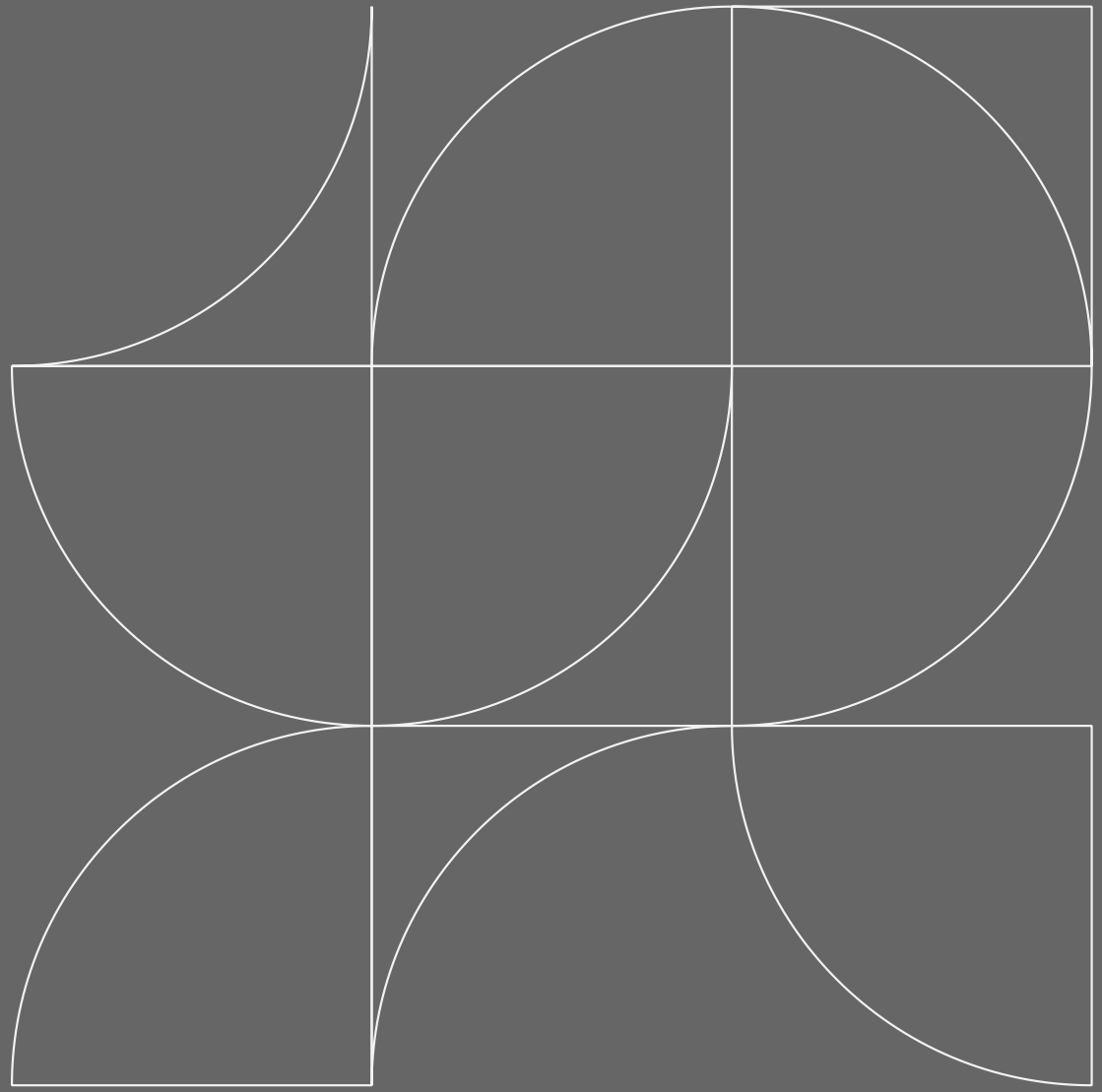

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Regular Rate of Pay

- An employee's regular rate of pay is calculated to include all compensation received during the workweek including:
  - base hourly wages;
  - commissions; and
  - nondiscretionary bonuses
- The regular rate generally does not include:
  - money paid as a gift or for special occasions (*e.g.*, a holiday bonuses);
  - expense reimbursement;
  - PTO; or
  - sick pay
- The regular rate of pay can fluctuate week by week

Regular Rate of Pay – Special Challenges

All includable compensation divided by all hours worked

Hours Worked

- Training/education time
- Controlled v. uncontrolled standby
- Unworked reporting time pay hours

Compensation

- Meal and rest penalties
- Standby pay
- Shift, unit and other differentials
- Bonuses

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Lemm Decision

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

Key Holdings/Takeaways

- The employer properly computed overtime pay in accordance for pay periods in which it paid plaintiff an hourly wage and a percentage bonus on sales. The employer used the method prescribed for FSLA overtime (29 CFR 778.210), applying instead the DLSE's Enforcement Manual method (section 49.2.4) would result in an improper overtime on overtime since the bonus already was computed as a percentage of the overtime calculated on the employee's regular hourly wages.
- Employers utilizing, or considering, "percentage of gross earnings" bonus paradigms should review their policies to ensure they conform with *EcoLab*.
- *EcoLab* sets forth a roadmap for an administratively simple way to comply with California overtime rules for employees with sales-based compensation.

Indemnification of Employee Expenses

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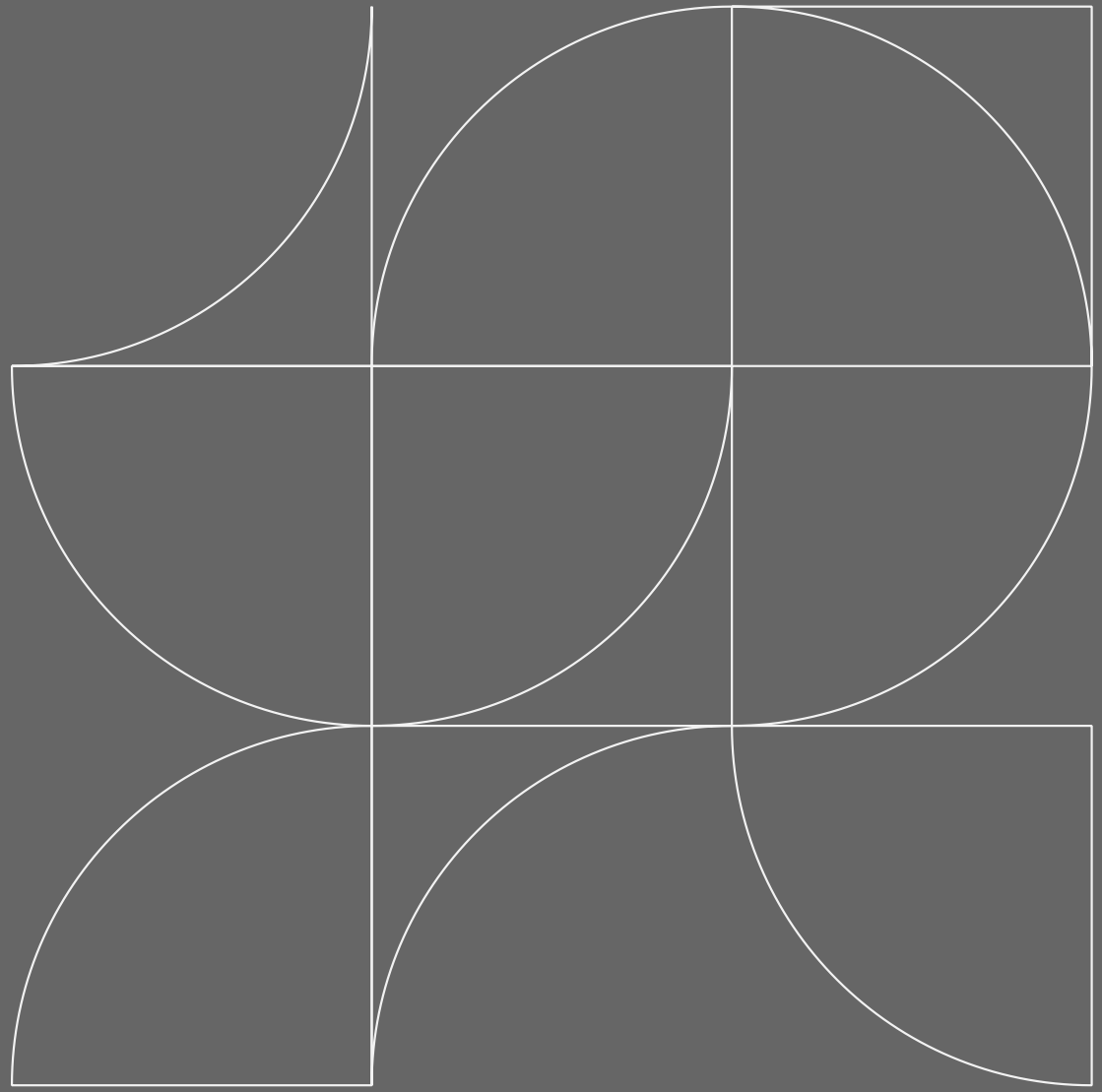

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Labor Code §2802

Indemnification for Routine Business 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.

- 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."

- **Latest: 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.

Remote Working Expenses

Thai v. International Business Machines Corp., 93 Cal. App. 5th 364 (2023)

Key Holdings/Takeaways

- The California Court of Appeal held that even if government-mandated stay-at-home orders during the COVID-19 pandemic were an intervening cause of employees working from home and incurring necessary business expenses, the employer is still liable under California Labor Code Section 2802 to reimburse the employees for those expenses.

- The decision eliminates a defense we may have used – that any WFH expenses were as a result of government stay-at-home orders, rather than employer mandate, and thus not reimbursable.

- The decision does not address the larger question that we all still grapple with: *what expenditures might be reasonable or necessary when working from home?*

Service Charges and Gratuities, and the Impact on Employee Pay

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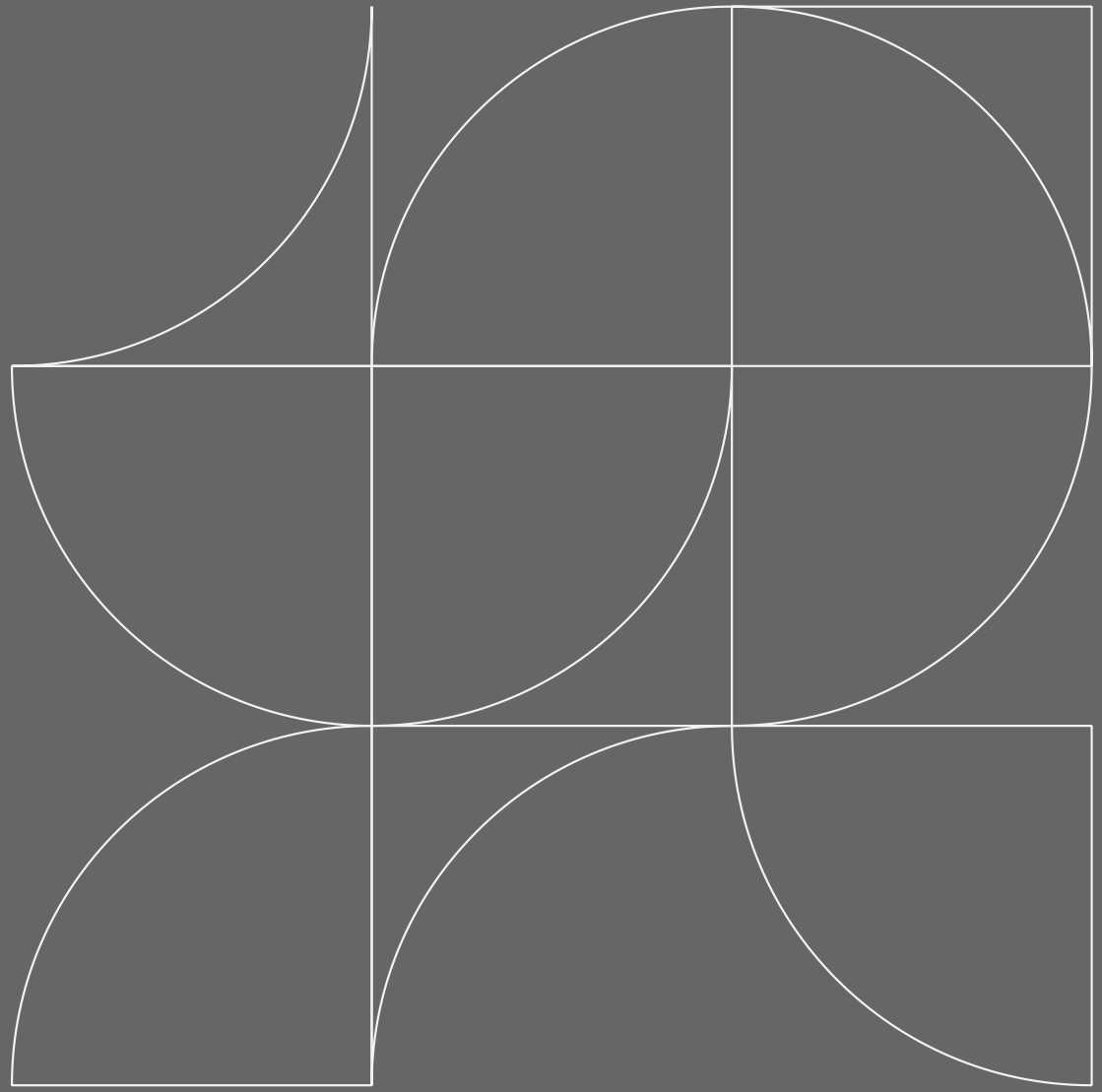

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Gratuities or “Tips”

Brief Summary of Tips in California

- You’ve probably seen this language all the time and never thought twice about: tip, gratuity, service charge – is it all the same?
- Why does it matter? What are some of the differences between how California treats a service charge vs. a tip?
- Of particular note: California Labor Code 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. Lab. Code § 351

“Service Charges”

O’Grady v. Merchant Exchange Prods., Inc.,
41 Cal. App. 5th 771 (2019)

Key Holdings

- 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 Court of Appeal, finding “service charge” a vague term, rejected the employer’s argument that a “service charge” can **never** be a gratuity.
  - 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.

“Service Charges”

Ordono et al. v. Marriott International Inc.,
No. CGC-16-550454 (Cal. Sup. Ct.)

Key Holdings/Takeaways

- On April 7, 2023, after a multi-day bench trial, a California Superior Court judge issued a tentative ruling awarding approximately $9 million in damages for unpaid service charges to class of banquet servers who worked at the Marriott Marquis hotel in San Francisco from 2012-2017, holding that Marriott had violated the California Labor Code’s prohibition on employers keeping any portion of gratuities left for employees.
- A “service charge” is a gratuity that should be remitted to banquet service staff – unless it specifies how the charge is allocated between the employees and the employer.
- See also: *Gonzalez v. San Francisco Hilton, Inc.*, 2023 WL 5059536, at *6 (N.D. Cal. Aug. 8, 2023) (denying Defendant’s motion for summary judgment; “the Court DENIES the motion for summary and finds that a jury will have to decide what an objectively reasonable customer would have understood the mandatory service charge to be after viewing all of the evidence.”)
- Uptick in service charge cases in California…

Changes to California Pay Data Reporting and New Pay Disclosure Requirements

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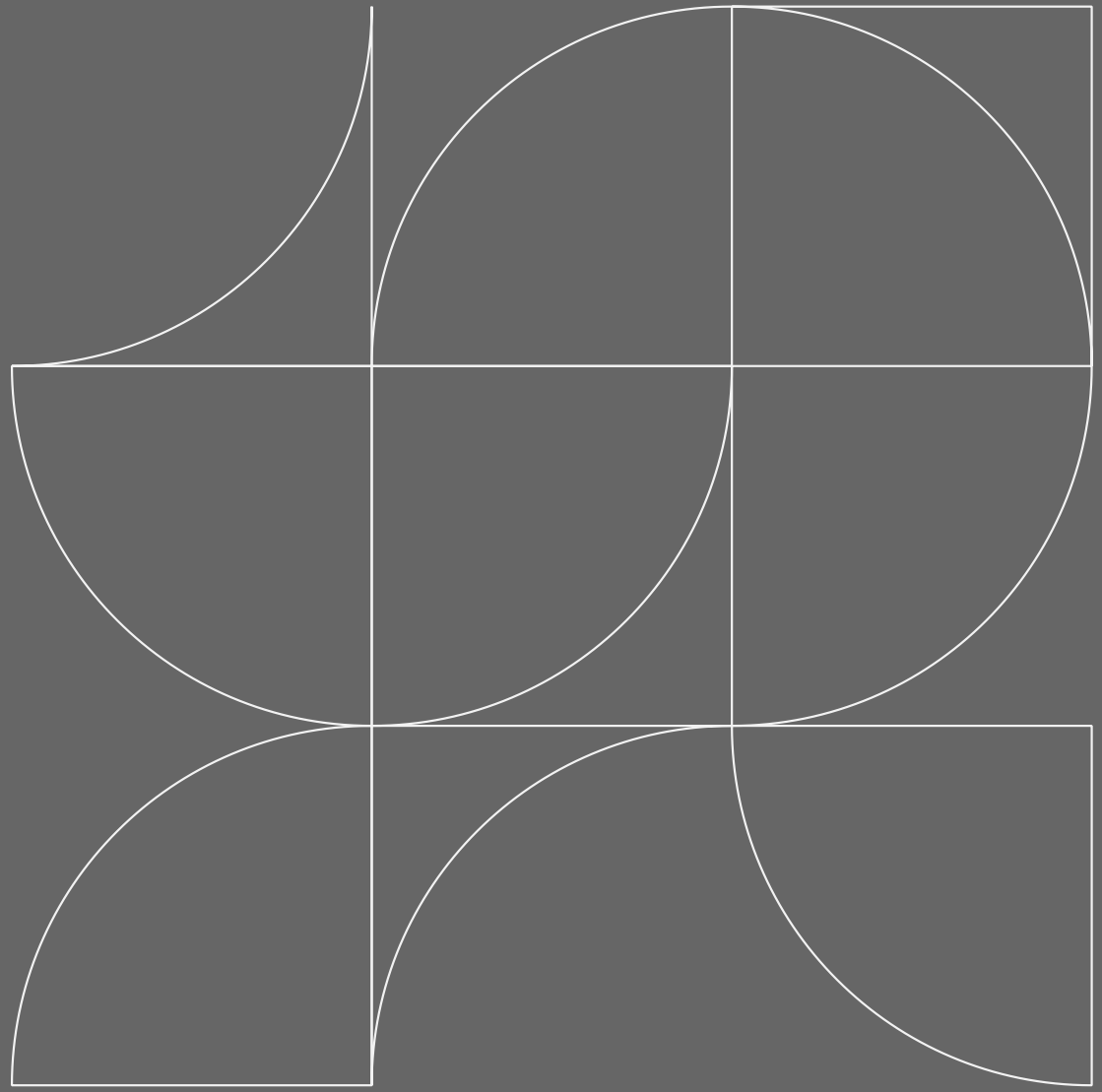

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California Pay Scale Disclosure Requirements

- “Pay scale:” salary or hourly wage range that the employer reasonably expects to pay for the position
- An employer with 15 or more employees must include the pay scale for a position in any job posting
  - At least one employee must be located in California
- For employees, pay scale provided upon request (only for current position)
- Employers *cannot* link to the salary range in an electronic posting or include a QR code in a paper posting. The pay scale must be included on the posting itself.

What is considered a “job posting”?

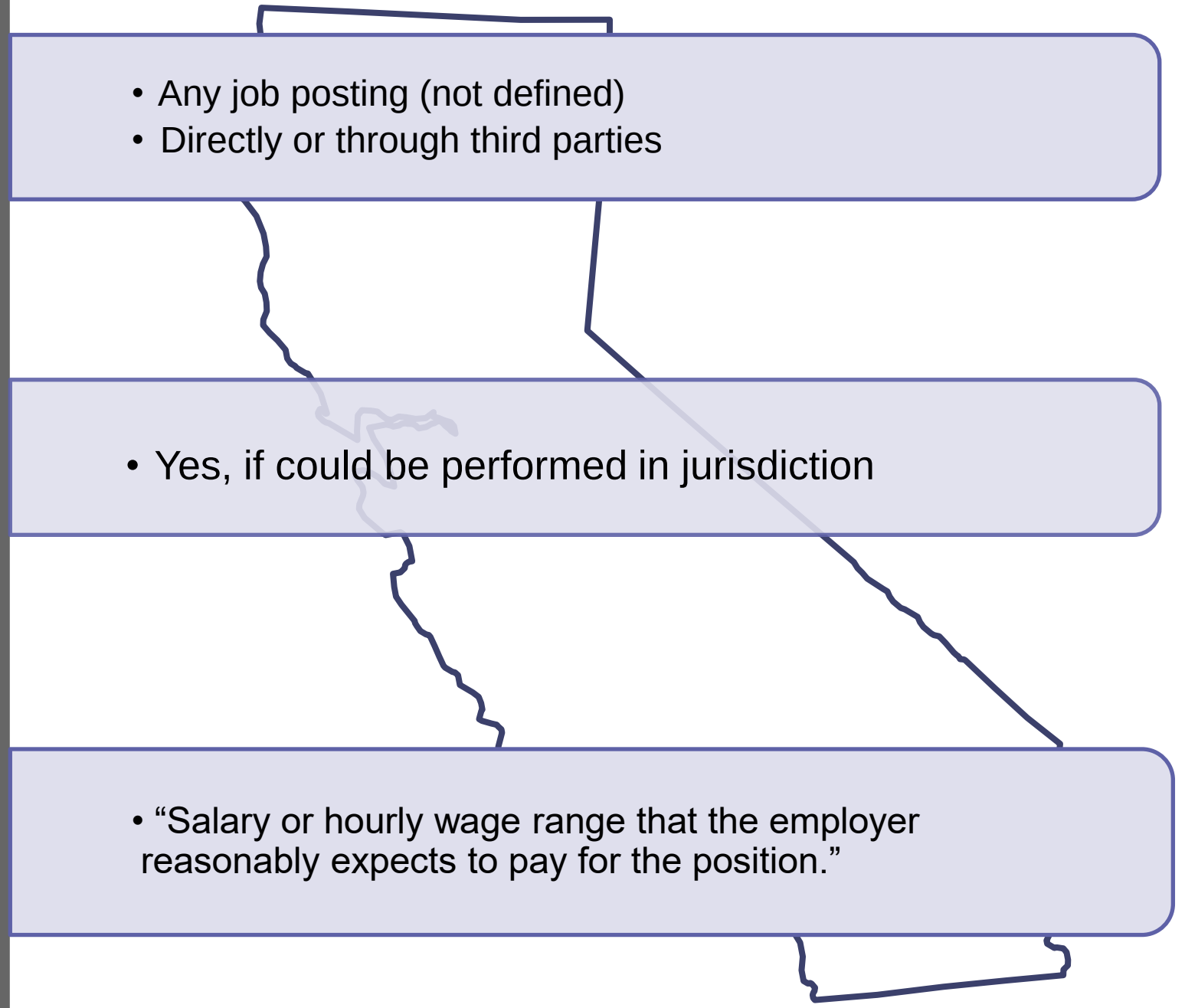
- Any job posting (not defined)
- Directly or through third parties

Do the job posting requirements apply to remote positions?

- Yes, if could be performed in jurisdiction

How do I define the pay scale?

- “Salary or hourly wage range that the employer reasonably expects to pay for the position.”



Refresher On California Pay Data Report Requirements

- California Pay Data requirements were implemented in 2020
- SB 1162 introduced February 17, 2022; Signed into law September 27, 2022
    - Amended pay data reporting requirements in Government Code section 12999
- Employers with 100 or more employees nationwide with at least one employee in California **and** private employers with 100 or more workers hired through labor contractors in the prior calendar year
- Reporting and grouping employees by job category, pay band, and race/ethnicity/sex

Key Changes to Pay Data Reporting Under CA SB 1162

New Timing

- Second Wednesday in May
- In 2023, the deadline was May 10th

New Scope

- Requires reporting even if employer does not have an EEO-1 filing requirement
- Covers employees & “labor contractor” workers

New Pay Data

- Median hourly rate
- Mean hourly rate

New Report

- In addition to changes to the Payroll Employee Report, there is a new “Labor Contractor” report

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California Now Requires Two Pay Data Reports

- *Payroll Employee Report*
  - *covers the W-2 workers employed during the selected Snapshot Period*
- *Labor Contractor Report*
  - *covers the W-2 "labor contractor" workers that performed work for a "client employer" within the client employer's "usual course of business" during the selected Snapshot Period*

Enforcement of Pay Data Reporting Requirements

- CRD may bring claim for non-compliance
- CRD may seek an order requiring the employer to comply with these requirements and seek costs
- A court may impose civil penalties
  - $100 per employee for failure to file
  - $200 per employee for subsequent failures to file
- Labor contractor “shall supply” all necessary pay data to the Client Employer
  - Pay data: “all the data that must be reported to CRD in a pay data report, including but not limited to pay rates and demographic information about employees
  - Penalties can be assessed against Labor Contractor who fails to provide pay data to Client Employer resulting in the inability to submit a “complete and accurate report”

Practical Takeaways

- Team of internal stakeholders to identify scope, labor contractors, and data collection requirements
- Coordinate with relevant labor contractors regarding:
  - Snapshot period
  - Labor Contractor Employees to be reported and the Client Employer establishments to which they are assigned
    - What data is currently shared that may provide information to the level of detail required
  - Timelines for data production or report generation
- Consider data transfer process between employers and labor contractors to ensure data protections are in place
- Evaluate how labor contractor data will be compiled, distilled, and formatted for submission
- Review processes and identify any modifications needed moving forward, including best way to obtain data from labor contractor employers

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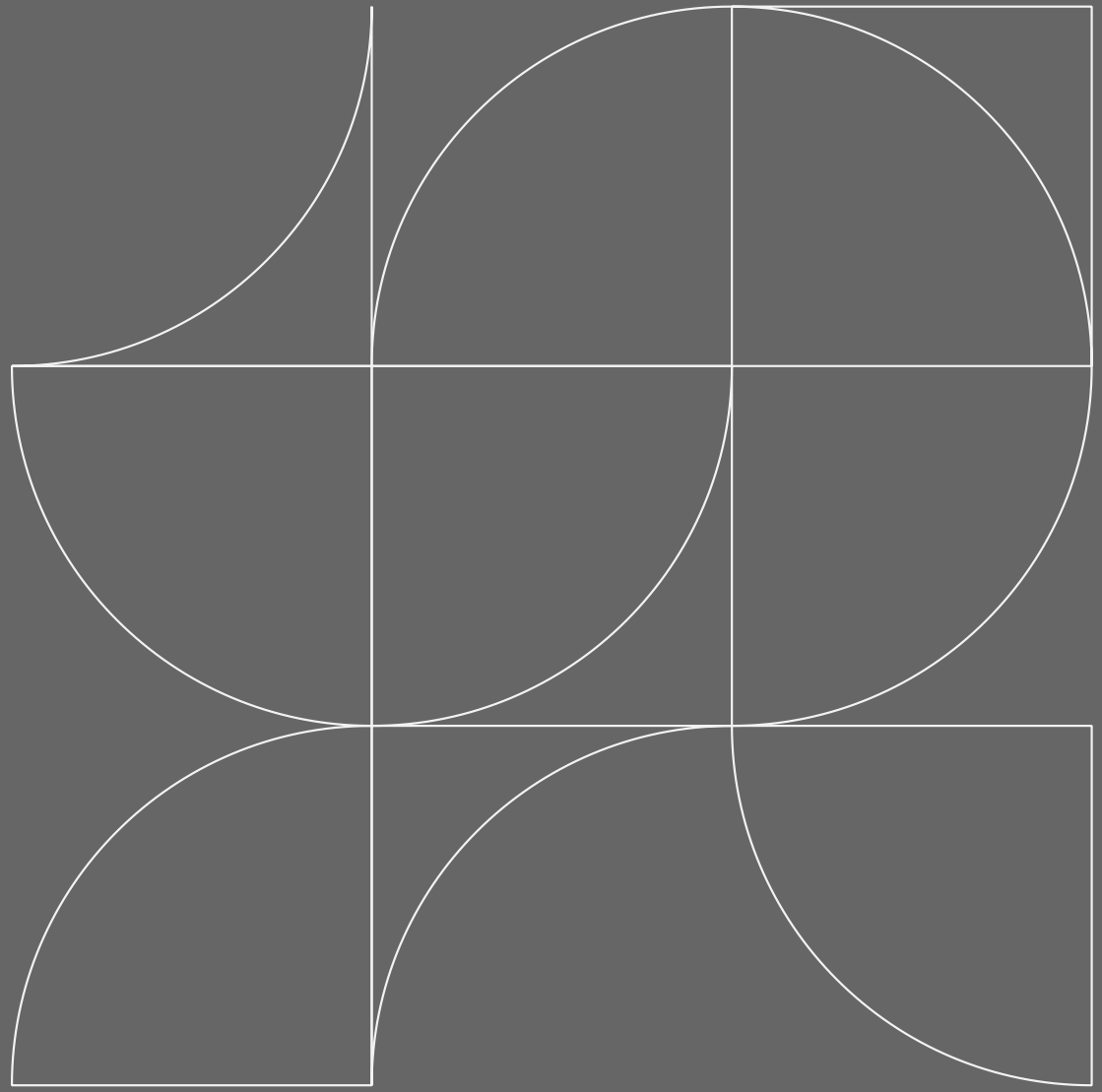

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Additional Notable Wage/Hour Cases

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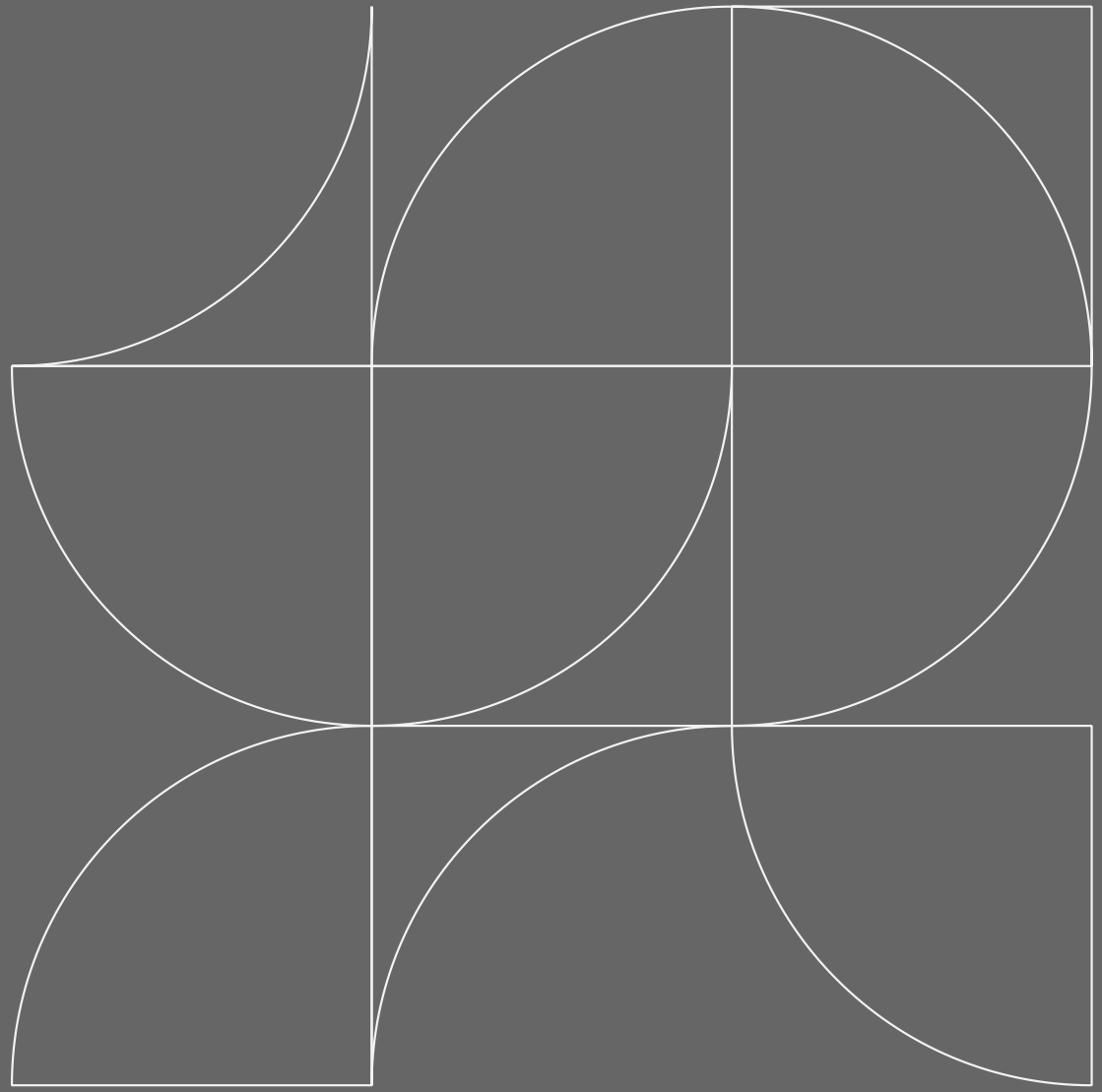

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Sick Pay Claims Under Labor Code § 245(e)

Wood v. Kaiser Foundation Hospitals,
88 Cal. App. 5th 742 (2023)

Key Holdings/Takeaways

- The Court held that section 248.5, subdivision (e) does not preclude an aggrieved employee from bringing a PAGA action for violations of the Act. Reasonably construed according to its text, history, and context, the phrase, “on behalf of the public as provided for under applicable state law” refers to a UCL claim and not a PAGA action.

- Employers need to ensure that they are actively calculating, accruing, and paying sick pay correctly, and properly reporting it on their wage statements (or some other written notice that complies with Labor Code 246(i)).

Rate of Pay for Vacation Payouts upon Termination

Mills v. Target Corporation,
2023 WL 2363959 (9th Cir. Mar. 6, 2023)

Key Holdings/Takeaways

- **The Ninth Circuit affirmed the lower court's ruling in full, holding that "final rate" means the employee's "final wage rate," as opposed to the final base hourly rate.** The Ninth Circuit held that "giving 'a plain and commonsense meaning' to the text here counsels interpreting 'final rate' to mean the 'final rate of wage pay,' which in this case includes Mills' base pay and the pay differentials she received when she was terminated."

- Employers need to ensure they are aware of the correct rate of pay for the payout of vacation wages at termination, to take advantage of the good-faith defense and minimize past liability for penalties.

Good Faith Defense for Wage/Hour Premiums

Naranjo v. Spectrum Security Services, Inc.,
88 Cal. App. 5th 937 (2023)

Key Holdings/Takeaways

- A good faith defense exists for derivative claims under Labor Code 203 based on a failure to pay premium pay for missed breaks.
- “We conclude substantial evidence supports the trial court's finding that Spectrum's defenses were presented in good faith, and were not unreasonable or unsupported by the evidence. The trial court, therefore, properly denied waiting time penalties under section 203 based on its finding that Spectrum did not ‘willfully’ fail to pay timely wages.”
- BUT: review granted on May 31, 2023.

Questions?

thank you

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