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California Wage & Hour Class Action Litigation:

Recent Key Developments & Trends

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November 19, 2020

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02 Recent legal developments affecting PAGA representative actions

03 The current status of California law concerning classification of independent contractors

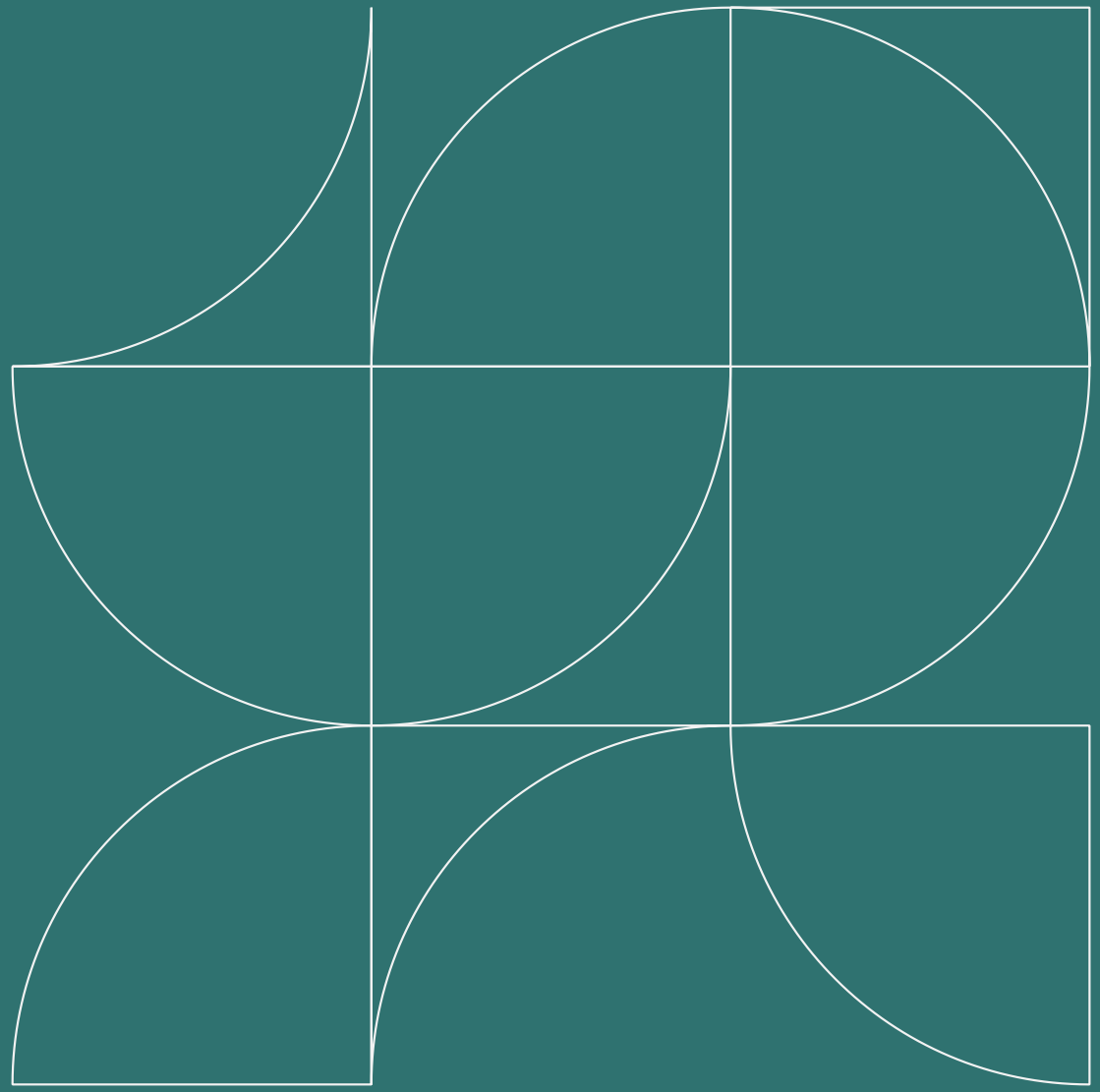
04 The latest state and federal decisions affecting class claims for off-the-clock work

05 AB 51: California's prohibition of mandatory employment arbitration agreements

06 Key wage & hour issues being considered by the California Supreme Court

07 Other recent wage & hour legal developments

Introduction to the 20th Edition of Seyfarth Shaw's *Litigating California Wage & Hour Class and PAGA Actions*



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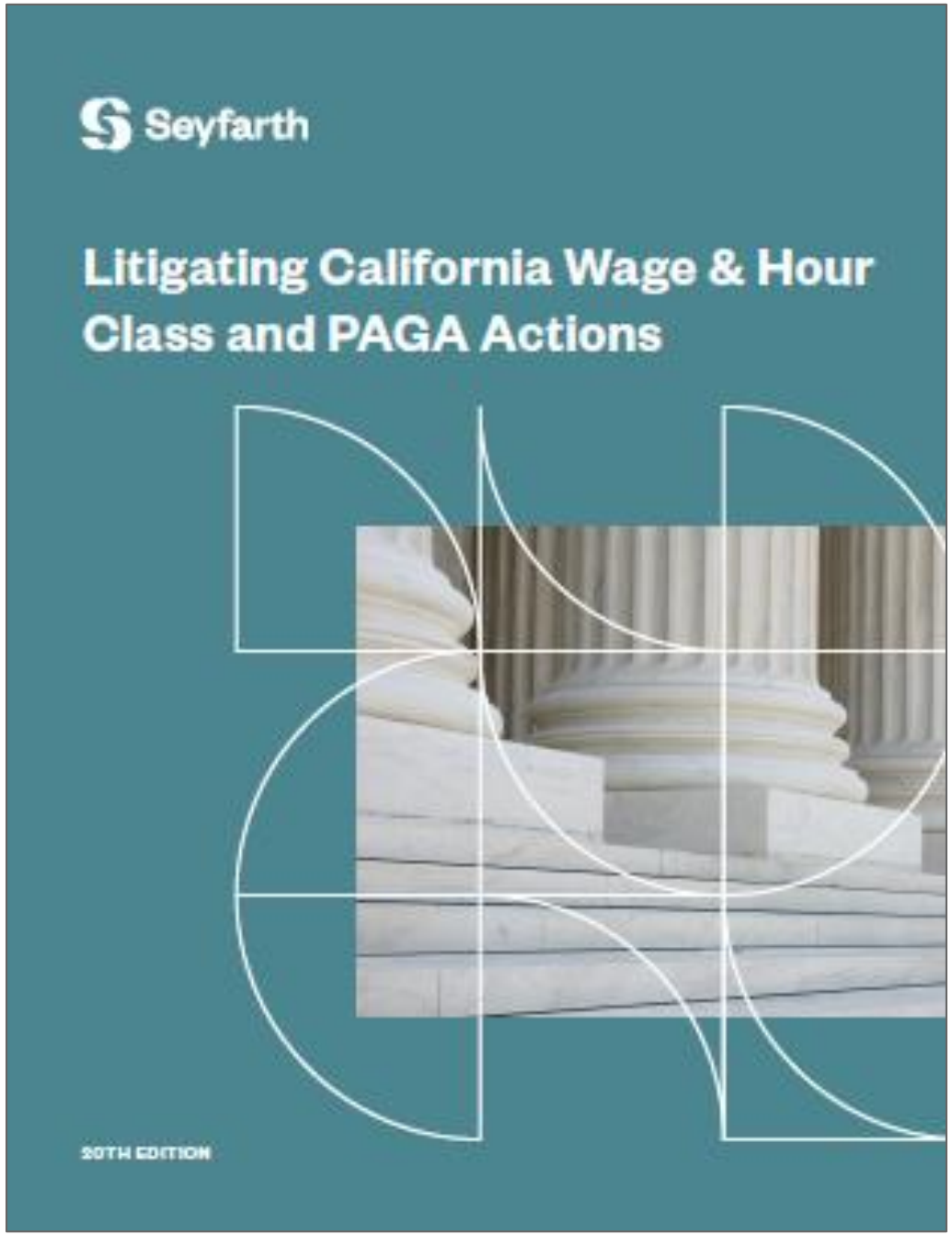

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Seyfarth Shaw LLP | www.seyfarth.com Litigating CA Wage & Hour Class and PAGA Actions (20th Edition) | II

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Statutes of Limitations for Selected California Wage and Hour Claims

Statutory Section	Claim	Statute of Limitations
Labor Code § 203	Waiting Time Penalties	3 years
Labor Code § 226	Wage Statement Penalties	1 year
Labor Code § 226.7	Meal and Rest Premium Pay	3 years (unclear whether UCL extends SOL to 4 years)
Labor Code § 558	Penalties for Violation of Wage Order and Certain Labor Code sections	1 year
Labor Code § 1198.5	Penalty for Failure to Provide Timely Records and Inspection	1 year
Labor Code § 2699	PAGA Penalties	1 year
Labor Code § 2802	Reimbursement of Employee Business Expenses	3 years (Under UCL: 4 years)
Code Civ. Procedure § 338	Unpaid Wages	3 years (under UCL: 4 years)
Code Civ. Procedure § 338	Unpaid Overtime	3 years (under UCL: 4 years)
Bus. & Prof. Code § 17200, *et seq.*	Unfair Competition	4 years. A UCL claim effectively expands the statute of limitations on a Labor Code wage claim from 3 years to 4 years.

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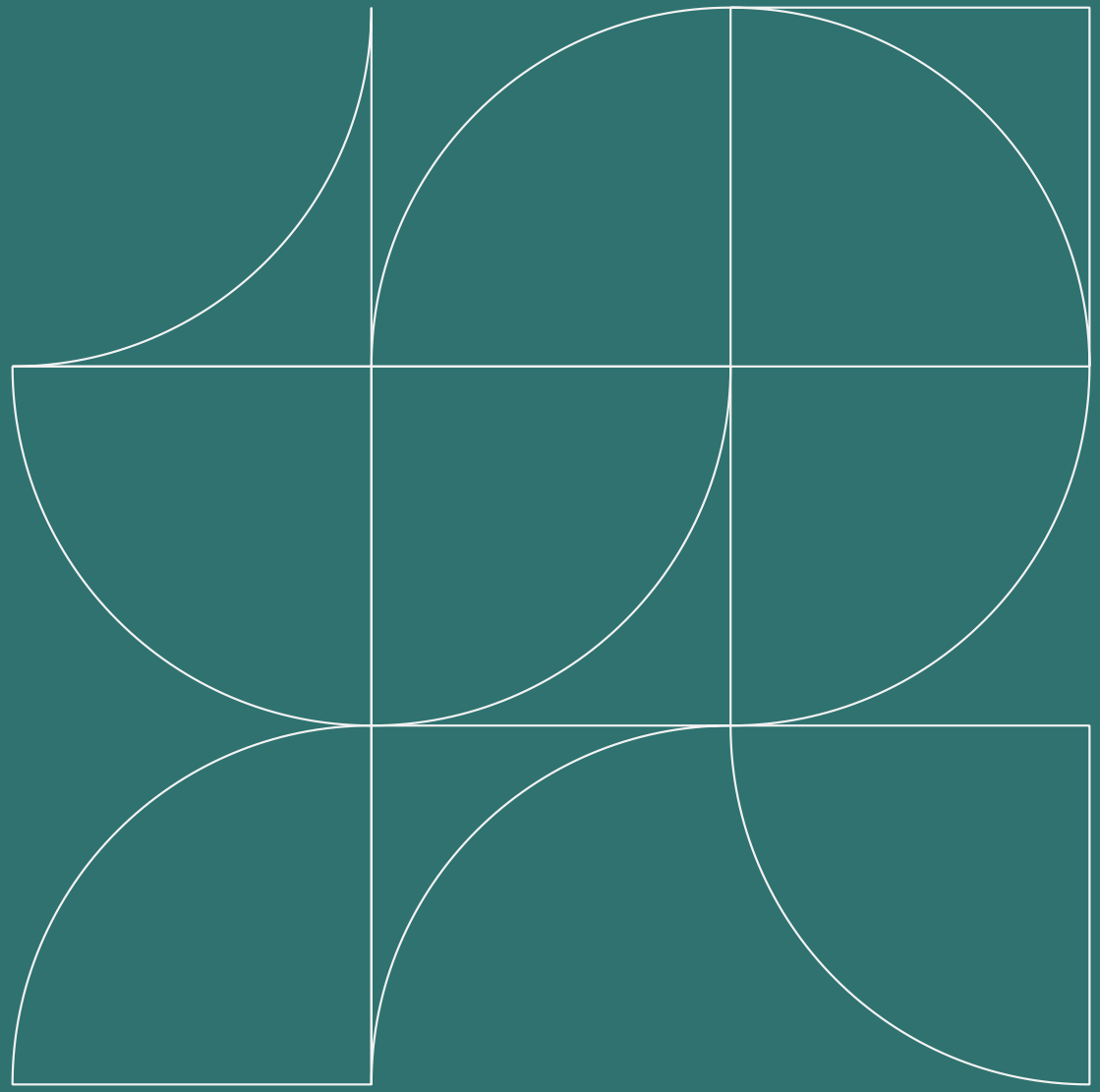
Recent Trends and Developments Affecting Representative Actions Under the Private Attorneys General Act (PAGA)



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Recent PAGA Developments

PAGA Standing Difficult to Rein In

***Kim v. Reins International California,* 9 Cal. 5th 73 (2020)**

- An employee does not lose the ability to pursue representative PAGA claims as an "aggrieved employee" by virtue of settling and dismissing their individual wage & hour claims against the employer.

- "The Legislature defined PAGA standing in terms of violations, not injury. [Plaintiff] became an aggrieved employee, and had PAGA standing, when one or more Labor Code violations were committed against him. Settlement did not nullify these violations. The remedy for a Labor Code violation, through settlement or other means, is distinct from the fact of the violation itself."

Recent PAGA Developments

PAGA Standing Difficult to Rein In

***Kim v. Reins International California,* 9 Cal. 5th 73 (2020)**

- **Unresolved Issues:** California Supreme Court declined to address the validity of *Villacres v. ABM Industries, Inc.,* 189 Cal. App. 4th 562 (2010) (holding that a class action settlement where PAGA claims were never pled nor included in release but all underlying Labor Code claims were released in a court-approved settlement created a *res judicata* bar to settlement class members pursuing a subsequent PAGA action for the same wage & hour violations).

Recent PAGA Developments

PAGA Standing Difficult to Rein In

***Kim v. Reins International California,* 9 Cal. 5th 73 (2020)**

- **Unresolved Issues:** Whether an individual settlement that *expressly included* PAGA claims would have barred a subsequent PAGA action?
  - Could an individual PAGA settlement have been submitted to the Superior Court for approval, thus barring a future representative PAGA action by the same plaintiff?
  - *Khan v. Dunn-Edwards Corp.*, 19 Cal. App. 5th 804 (2018) ("[A] PAGA action is only a representative action" and not an individual one).

Recent PAGA Developments

PAGA Standing Difficult to Rein In

***Kim v. Reins International California,* 9 Cal. 5th 73 (2020)**

- **Unresolved Issues:** What about *pre-litigation* individual settlements of PAGA claims? Such as via a severance agreement?
  - Cal. Lab. Code § 2699(I)(2) ("The superior court shall review and approve any settlement of **any civil action** filed pursuant to this part.") (emphasis added).
  - *Julian v. Glenair, Inc.,* 17 Cal. App. 5th 85 (2017) (Employee cannot enter into an agreement affecting a PAGA claim prior to being authorized by the LWDA to pursue it).

Recent PAGA Developments

PAGA Standing Difficult to Rein In

***Kim v. Reins International California,* 9 Cal. 5th 73 (2020)**

- **Unresolved Issues:** What about *pre-litigation* individual settlements of PAGA claims? Such as via a severance agreement?

- Potential strategies:
  - Covenant not to sue
  - California Civil Code section 1542 waiver

Recent PAGA Developments

Zamora v. Walgreens Co.

747 Fed. Appx. 619 (9th Cir 2019)

Employee who participated in wage & hour settlement that released all PAGA claims was not barred from bringing a new wage & hour PAGA claim based on different underlying facts.

- Plaintiff had participated in a prior settlement of wage & hour claims based on unpaid overtime and failure to provide breaks, including signing a claim form containing a broad release of all Labor Code and PAGA claims, plus a covenant not to sue.
- Plaintiff then filed a separate PAGA action alleging failure to provide suitable seating.
- The Ninth Circuit held that the release was not enforceable because the two actions were founded on different facts. And *res judicata* did not apply since the second suit was based on different claims.

Recent PAGA Developments

ZB., N.A. v. Superior Court, (8 Cal. 5th 175, 2019)

The wages remedy mentioned in Labor Code Section 558 is not a civil penalty but rather is more akin to a damages remedy for withheld overtime premium wages and, therefore, is not recoverable through a PAGA action.

- PAGA plaintiffs had often included a claim under Labor Code § 558, asserting that it permitted them to recover unpaid wages that would not have to be shared with the State of California, in addition to penalties.

- The California Supreme Court held that unpaid wages do not constitute a "civil penalty" that can be recovered via a PAGA representative action.

Recent PAGA Developments

Recent Trend

Filing Separate Class and PAGA Actions

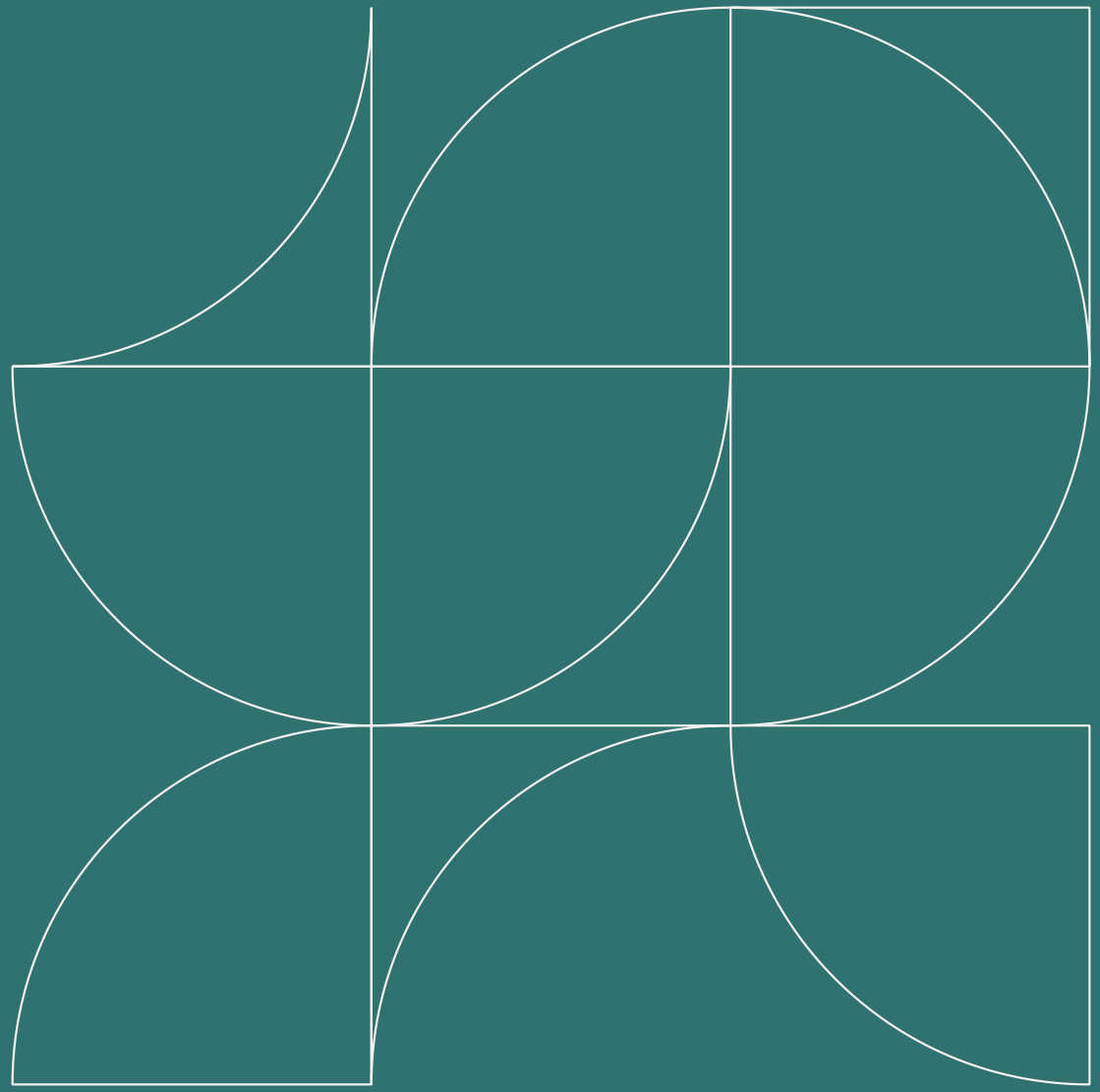
- Plaintiffs' counsel have taken to filing two separate actions on behalf of the same plaintiff, one alleging class claims and one alleging PAGA claims, in order to preclude removal of the PAGA claims.

- Employers may wish to pursue a stay of the PAGA action pending the resolution of the class lawsuit.

  – C.C.P § 587 "prescribes entry of an interlocutory judgment suspending [the second] proceedings 'until the final determination of th[e] other action." *Cty. of Santa Clara v. Escobar*, 244 Cal. App. 4th 555, 565 (2016).

  – Trial courts have the "inherent power to control litigation before them." *Cottle v. Sup. Court*, 3 Cal. App. 4th 1367, 1377 (1992). A trial court may exercise its inherent power to stay a pending action. *Jordache Enters. v. Brobeck, Phleger & Harrison*, 18 Cal. 4th 739, 758 (1998) ("The case management tools available to trial courts, including the inherent authority to stay an action when appropriate…can overcome problems of simultaneous litigation if they do occur").

State of ABC Test and Independent Contractors



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Dynamex Operations West, Inc. v. Superior Court

- In *Dynamex*, the California Supreme Court rejected the traditional multi-factor "control" test (the *Borello* test) and adopted the "ABC" test.

- In order to qualify as an independent contractor under the ABC test, the worker must meet all three of the requirements below:

  A. The worker is "free from control and direction of the hiring entity in connection with the performance of the work," both in contract and in fact;

  B. The work is outside the usual course of the hiring entity's business; and

  C. The worker is customarily engaged in an independently-established trade, occupation, or business.

Post-*Dynamex* Developments

Application to Joint Employment

***Curry v. Equilon Enterprises*, LLC, 23 Cal App. 5th 289 (2018)**

- Employee of a gas station operator alleged that he was jointly employed by Shell Oil Products, which had leased the gas station to the operator.
- Court declined to apply *Dynamex* test to determine joint employment status.
- Court held that "policy reasons for selecting the "ABC" test are "uniquely relevant" to the issue of allegedly misclassified independent contractors" and did not apply where individual was an entity's employee.

Retroactivity

Vazquez v. Jan-Pro Franchising International, Inc.

- Ninth Circuit held that *Dynamex* applies retroactively
- Opinion withdrawn and question certified to California Supreme Court
- We still await resolution of this question

AB 5

Codification and Expansion of ABC Test

AB 5 Codifies *Dynamex* for a variety of employment purposes and includes certain exceptions

- Result of significant lobbying from many interests - employers, unions and industry groups.
- Established a number of exemptions
  - Professional services exemptions
  - "Business to business" exemption
  - Referral agency exemptions
  - Exemptions for specific occupations and industries
- Prompted massive lobbying efforts by industries not provided an exemption

What Does AB 2257 Do?

Replaces AB 5

- Effective September 4, 2020
- Maintains the ABC Test
- Maintains all of AB 5's exemptions
- Still applies to work performed on or after January 1, 2020

Updates Exemptions

- Expands professional services exemptions
- Revises the business-to-business and referral agency exemptions

Enhances Enforcement Powers

- District attorneys may now bring enforcement actions, in addition to the Attorney General and some city attorneys

AB 2257

Significant Modifications

Expansion of Professional Services Exemption

- AB 5 created numerous exemptions for specified professionals
- After AB 2257, exemption now applies to many more professionals
- Professionals must still meet requirements showing that they operate independently
- Submission cap removed for freelance writers, editors, photographers and newspaper cartoonists

AB 2257

Significant Modifications

Clarification of Business-to-Business Exemption

What is the same:

- The test still provides an exemption for “bona fide business-to-business contracting relationships”

What has changed:

- Service provider may provide services to the contracting business’s customers under specified circumstances
- Contract must specify the payment amount, rate of pay and due date
- No longer required that service provider actually contract with other businesses

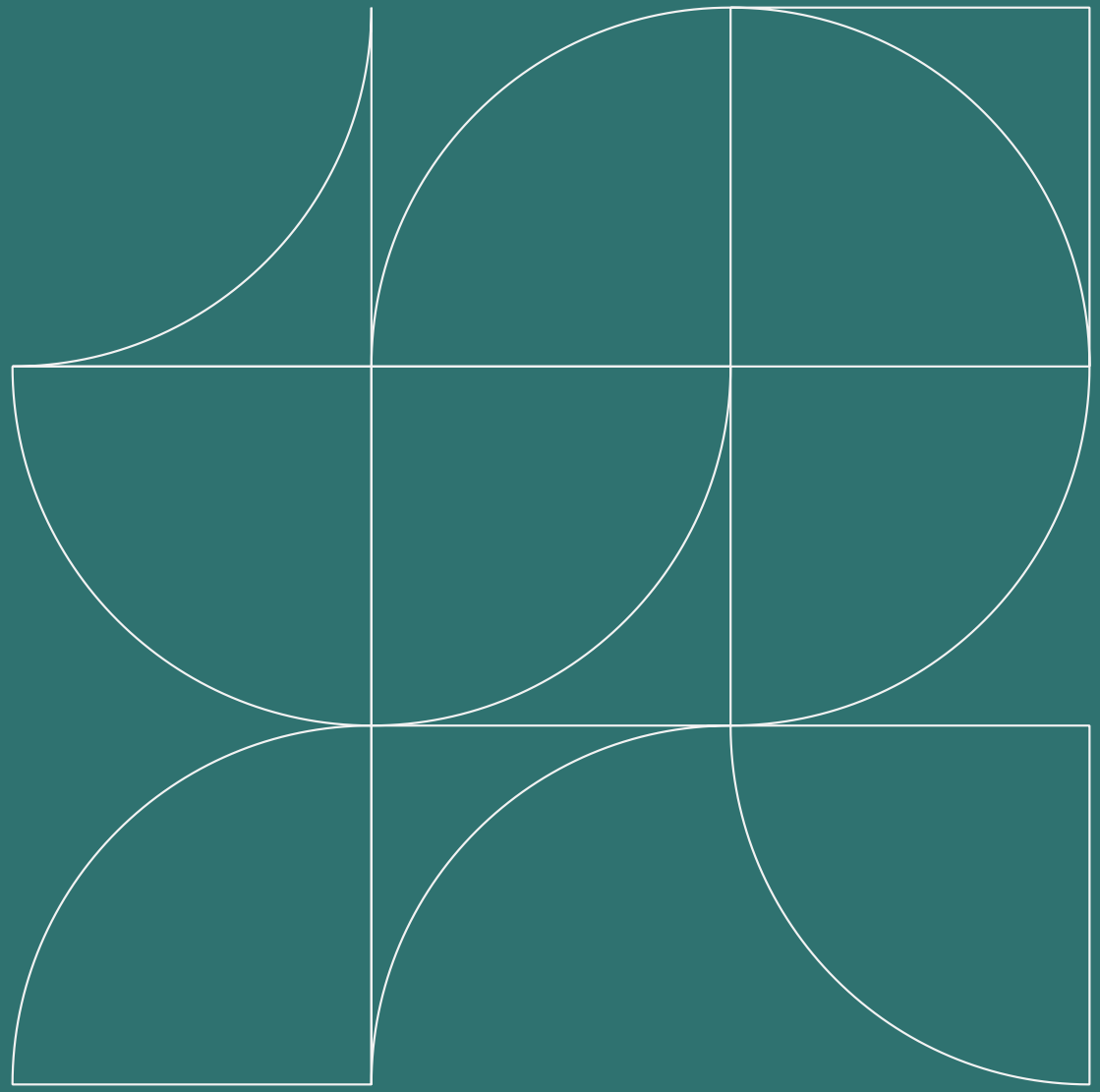
AB 2257

Significant Modifications

Clarification of Referral Agency Exemption

- Expansion of exemption – very limited set of workers under AB 5, but now the list is non-exhaustive, with more examples
- Service provider must certify compliance with business license and tax registration requirements
- More flexibility on requirement that service provider be customarily engaged in independent business
- Service provider must be able to set the hours and terms of work, or to negotiate them with client
- Service provider may negotiate rates through the referral agency with the client

The Latest State and Federal Decisions Affecting Class Claims for Off-the-Clock Work



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Class Claims For Off-The-Clock Work

California Supreme Court Guts Major Defense

Troester v. Starbucks Corp., 5 Cal. 5th 829 (2018)

- California Supreme Court considered the issue of whether the federal *de minimis* defense, under which daily periods of up to 10 minutes off the clock were non-compensable, applied to claims under the California Labor Code.
- **The answer? No.**
- "We hold that the relevant California statutes and wage order have not incorporated the [federal] de minimis doctrine … The relevant statutes and wage order do not allow employers to require employees to routinely work for minutes off the clock without compensation. We leave open whether there are wage claims involving employee activities that are **so irregular or brief in duration** that employers may not be reasonably required to compensate employees for the time spent on them."

Class Claims For Off-The-Clock Work

The Ninth Circuit Adopts *Troester*

***Rodriguez v. Nike Retail Services, Inc.*, 928 F.3d 810 (9th Cir. 2019)**

- The Court held that the federal *de minimis* doctrine does not apply to wage and hour claims brought under the California Labor Code.
- "We 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. … [W]here employees are required to work for more than trifling amounts of time 'on a regular basis or as a regular feature of the job,' *Troester* precludes an employer from raising a de minimis defense under California law."
- But the time may not need to be compensated if "minute," "brief," or "trifling."

Class Claims For Off-The-Clock Work

Even Voluntary Activities May Be Compensable

Frlekin v. Apple, Inc., 8 Cal. 5th 1038 (2020)

- Employees brought putative wage-and-hour class action against employer, seeking compensation under California law for time spent waiting for and undergoing exit searches pursuant to employer's package and bag search policy.

- Does an employee engage in compensable "hours worked" while waiting for the employer to inspect a bag the employee voluntarily chose to bring to work? **Yes.**

- The time employees spent on employer's premises waiting for, and undergoing, mandatory exit search was an "employer-controlled activity," and therefore it was compensable as "hours worked" within meaning of the California Wage Order.

- What about *de minimis*?

Class Claims For Off-The-Clock Work

What About The "Good Faith Dispute" Defense?

***Chavez v. Converse, Inc.*, 2020 WL 1233919 (N.D. Cal. Mar. 13, 2020)**

- Converse sought partial summary judgment to dismiss wage statement penalties and waiting time penalties, on the grounds that it had a "good faith belief" that the time spent in exit inspections was not compensable

- The Court held that California courts regularly applied prior federal *de minimis* defense, so Converse "acted reasonably in asserting the *de minimis* defense given the legal landscape at the time."

- More importantly, the Court held that, "[e]ven after *Troester,* the precise contours of the *de minimis* doctrine remain uncertain … This uncertainty alone presents a good faith dispute."

Off-The-Clock Claims In The COVID-19 World

Working From Home

- A big issue (fear?) currently facing employers is how to deal with employees working off the clock, because they are working from home and not subject to the normal "clock in and clock out" procedures at work.
- **Continuous workday** concept says that, other than a meal period, all time from the first activity of the day to the last activity of the day is compensable, including breaks. But what about other non-work distractions?
- Work from home creates numerous opportunities for employees to work without the employer's knowledge.
  - Does the company have knowledge?
  - Can knowledge be imputed? How?

Off-The-Clock Claims In The COVID-19 World

Working From Home

- **Recommendations:**

  1) Employers should be sure to reiterate their existing policies that no work is permitted off-the-clock.

  2) Update policies to reflect work from home scenarios that might result in off the clock work.

  3) Send reminders to employees to submit all time worked. Implement attestations?

  4) Discipline employees quickly and with documentation

- How do these recommendations help employers avoid class actions for off-the-clock work?

Off-The-Clock Claims In The COVID-19 World

Activities Triggering "Compensable Time"

- As employers begin to re-open their workplaces, several state and local requirements may trigger issues of off the clock time and how to compensate employees for pre-shift and post-shift activities.
- Employees may be required to undergo pre-shift or post-shift activities, such as:
  - A "temperature check";
  - Donning or doffing "personal protective equipment";
  - Completing certifications that they have complied with self-check safety procedures;
  - Using hand sanitizers or washing hands; or
  - Waiting for other employees to complete procedures before entering or exiting (*e.g.*, restrictions on how many employees are allowed on an elevator, or social distancing while waiting to punch a time clock).

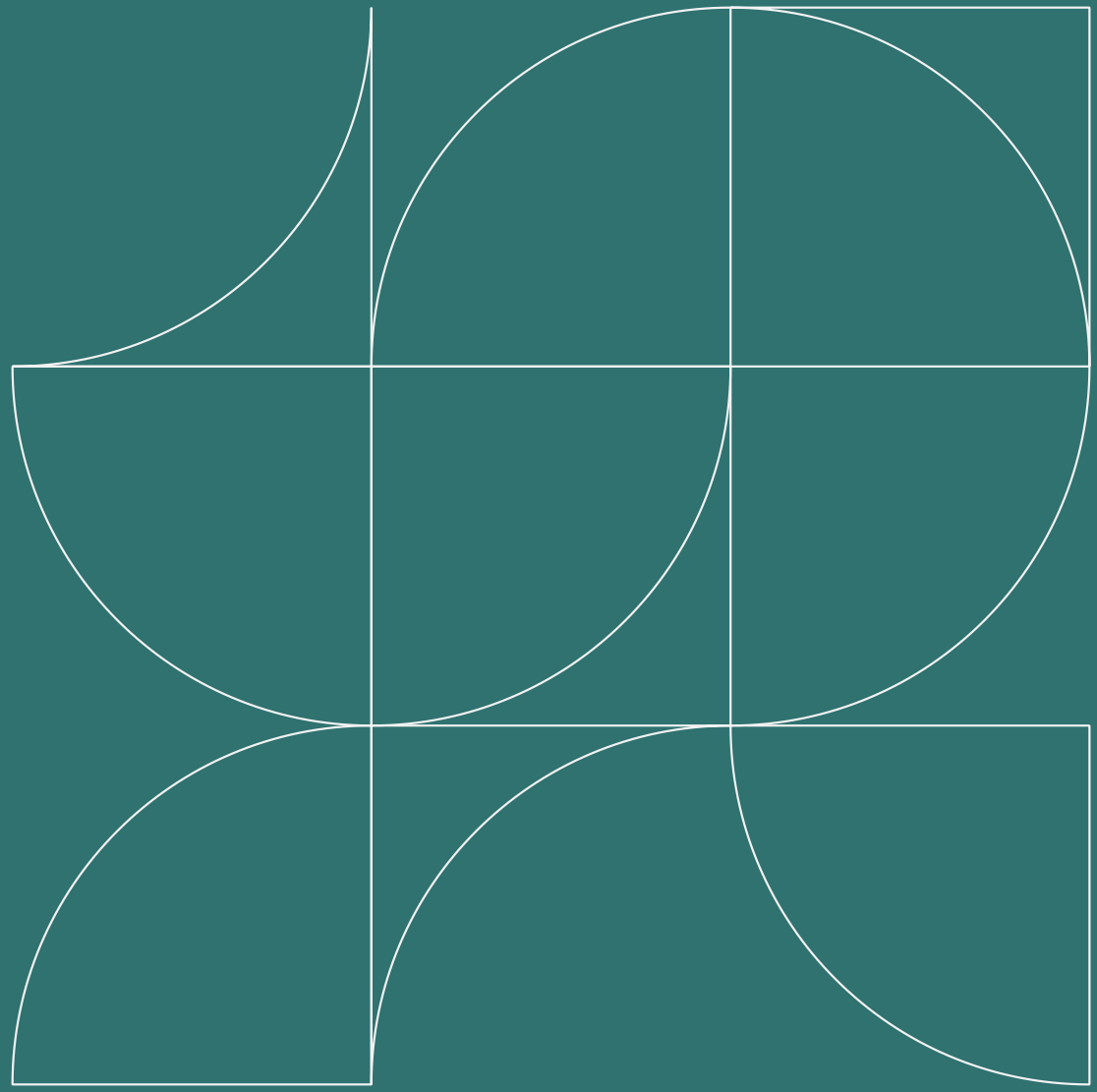
Off-The-Clock Claims In The COVID-19 World

Activities Triggering "Compensable Time"

- Under California law, these pre-shift and post-shift activities would be considered compensable time because employees are "subject to the control of the employer."
- **Best practice?** Automatically pay employees a set number of minutes per day (e.g., 10 minutes), and have a written policy to this effect.
- How does this impact class actions?

CLE CODE

AB 51: California's Prohibition of Mandatory Employment Arbitration Agreements



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AB 51

What Does it Do?

Scope of AB 51

- Makes it unlawful for employers to impose arbitration agreements on employees as a condition of employment, even if employees are permitted to opt out
- Prohibits threatened or actual retaliation against an individual who refuses to consent to an arbitration agreement
- Authorizes injunctive relief and attorney's fees to any plaintiff who proves a violation
- Does not apply to post-dispute settlement agreements or negotiated severance agreements

AB 51

What Should Employers Do Now?

Current Status

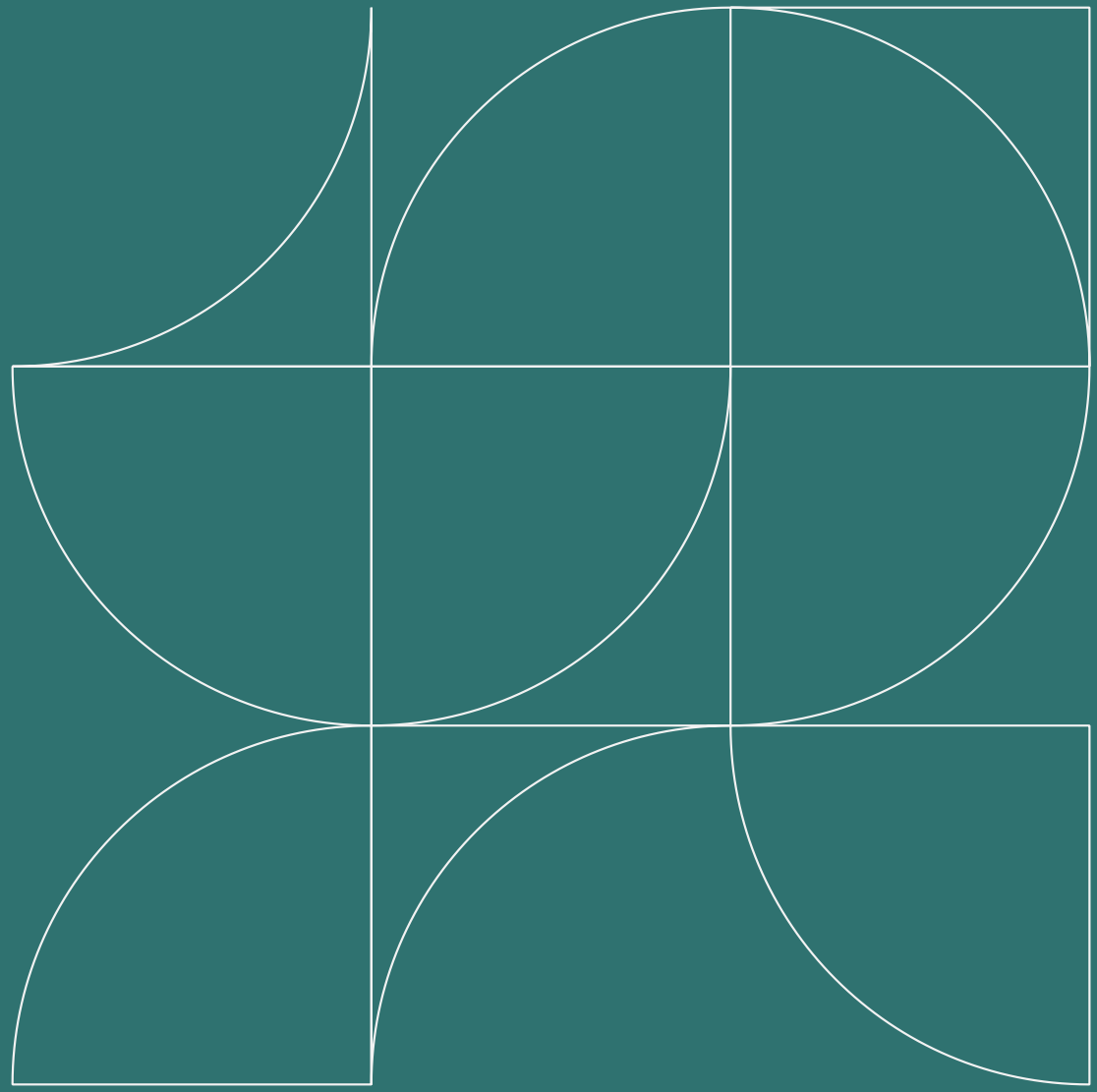
Federal Arbitration Act preemption challenge

- Court has enjoined state law enforcement as to arbitration agreements governed by the FAA
- Injunction does not apply to private actions – only to state enforcement

Employer Considerations

- AB 51 applies to contracts entered into on or after January 1, 2020.
- Optional arbitration agreements?
- Is arbitration the best option?
  - Class action waivers
  - PAGA
  - Multiple/mass arbitrations

Key Wage & Hour Issues Being Considered by the California Supreme Court



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California Supreme Court Cases to Watch

Naranjo v. Spectrum Security Services 40 Cal. App. 5th 444 (2019)

- The Court of Appeals ruled that, when a plaintiff recovers unpaid meal period premiums, the premiums do *not* constitute unpaid wages that trigger the obligation to pay derivative wage statement penalties (Lab. C. § 226) or waiting time penalties (Lab. C. § 203).

- The California Supreme Court granted certiorari on January 2, 2020.

California Supreme Court Cases to Watch

Naranjo v. Spectrum Security Services 40 Cal. App. 5th 444 (2019)

Clues as to how the Cal Supremes may rule:

- *Murphy v. Kenneth Cole Productions, Inc.,* 40 Cal. 4th 1094, 1102 (2007): Held that claims seeking unpaid meal and rest premium payments are subject to the three-year limitations period applicable to claims for wages.

- *Kirby v. Immoos Fire Protection, Inc.,* 53 Cal. 4th 1244, 1248, 1255-57 (2012): Held that a plaintiff who prevailed on a claim to recover rest period premium pay could not recover attorneys' fees pursuant to Labor Code sections 218.5 and 1194 because the premium pay did not constitute "unpaid wages."

California Supreme Court Cases to Watch

Naranjo v. Spectrum Security Services 40 Cal. App. 5th 444 (2019)

Clues as to how the Cal Supremes may rule:

- *Ling v. P.F. Chang's China Bistro, Inc.*, 245 Cal. App. 4th 1242, 1261 (2016): Held that unpaid meal and rest premiums do not support a claim for waiting time penalties:
  - "A section 226.7 action is brought for the nonprovision of meal and rest periods, not for the 'nonpayment of wages'."
  - "We reject plaintiff's argument that a section 203 waiting time claim based on section 226.7 premium pay is an 'action. . .brought for the non-payment of wages' under section 218.5. 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."

California Supreme Court Cases to Watch

Naranjo v. Spectrum Security Services 40 Cal. App. 5th 444 (2019)

Clues as to how the Cal Supremes may rule:

- *Ling v. P.F. Chang's China Bistro, Inc.*, 245 Cal. App. 4th 1242, 1261 (2016): Held that claims for meal and rest premiums do not support a waiting time claim.
- California Supreme Court denied certiorari as to *Ling.*
  - However, several district court decisions have held that the expansive language in *Ling v. P.F. Chang's* was merely *dicta,* and have declined to dismiss claims seeking Labor Code section 203 penalties based on unpaid meal and rest premiums. *See, e.g. Valdez v. Harte-Hanks Direct Marketing/Fullerton, Inc.,* 2017 WL 10592135 (C.D. Cal. December 21, 2017); *Castillo v. Bank of America, N.A.,* 2018 WL 1409314 (C.D. Cal., February 1, 2018).

California Supreme Court Cases to Watch

Ferra v. Loews Hollywood Hotel 40 Cal. App. 5th 1239 (2019)

- **Holdings:**

  1) Meal period premiums may be paid at the base hourly rate of pay instead of at the "regular rate of pay."

  2) Rounding of recorded work time can be "fair and neutral" even where a majority of workers have net time rounded away and thereby lose compensation.

- The California Supreme Court granted certiorari on January 22, 2020.

California Supreme Court Cases to Watch

Ferra v. Loews Hollywood Hotel 40 Cal. App. 5th 1239 (2019)

How *should* the Cal Supremes rule?

- Meal period premiums *should* be paid at the base hourly rate of pay instead of at the "regular rate of pay."
- Labor Code Section 226.7(c) provides that premium pay is to be provided at the employee's "regular rate of *compensation*," not at the "regular rate of *pay.*"
- Labor Code Section 510 uses the language "regular rate of pay," so by choosing to not use that term in Section 226.7, the Legislature made a deliberate choice. Ruling otherwise would negate the Legislature's intent.

California Supreme Court Cases to Watch

Ferra v. Loews Hollywood Hotel 40 Cal. App. 5th 1239 (2019)

How *should* the Cal Supremes rule?

- Yes, rounding of recorded work time *can* be "fair and neutral" even where a majority of workers have net time rounded away and thereby lose compensation.

- *See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889, 907 (2012): Rounding is permissible under California law if it is "fair and neutral" on its face and 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."

California Supreme Court Cases to Watch

Ferra v. Loews Hollywood Hotel 40 Cal. App. 5th 1239 (2019)

How *should* the Cal Supremes rule?

- Yes, rounding of recorded work time *can* be "fair and neutral" even where a majority of workers have net time rounded away and thereby lose compensation.

- *AHMC Healthcare, Inc. v. Superior Court,* 24 Cal. App. 5th 1014 (2018) ("the regulation does not require that every employee gain or break even over every pay period or set of pay periods analyzed; fluctuations from pay period to pay period are to be expected under a neutral system," and finding that employer's rounding policy was lawful even where certain employees were undercompensated because the evidence established that the rounding system "did not systematically undercompensate employees over time").

Other Legal Developments Affecting Wage & Hour Class Actions

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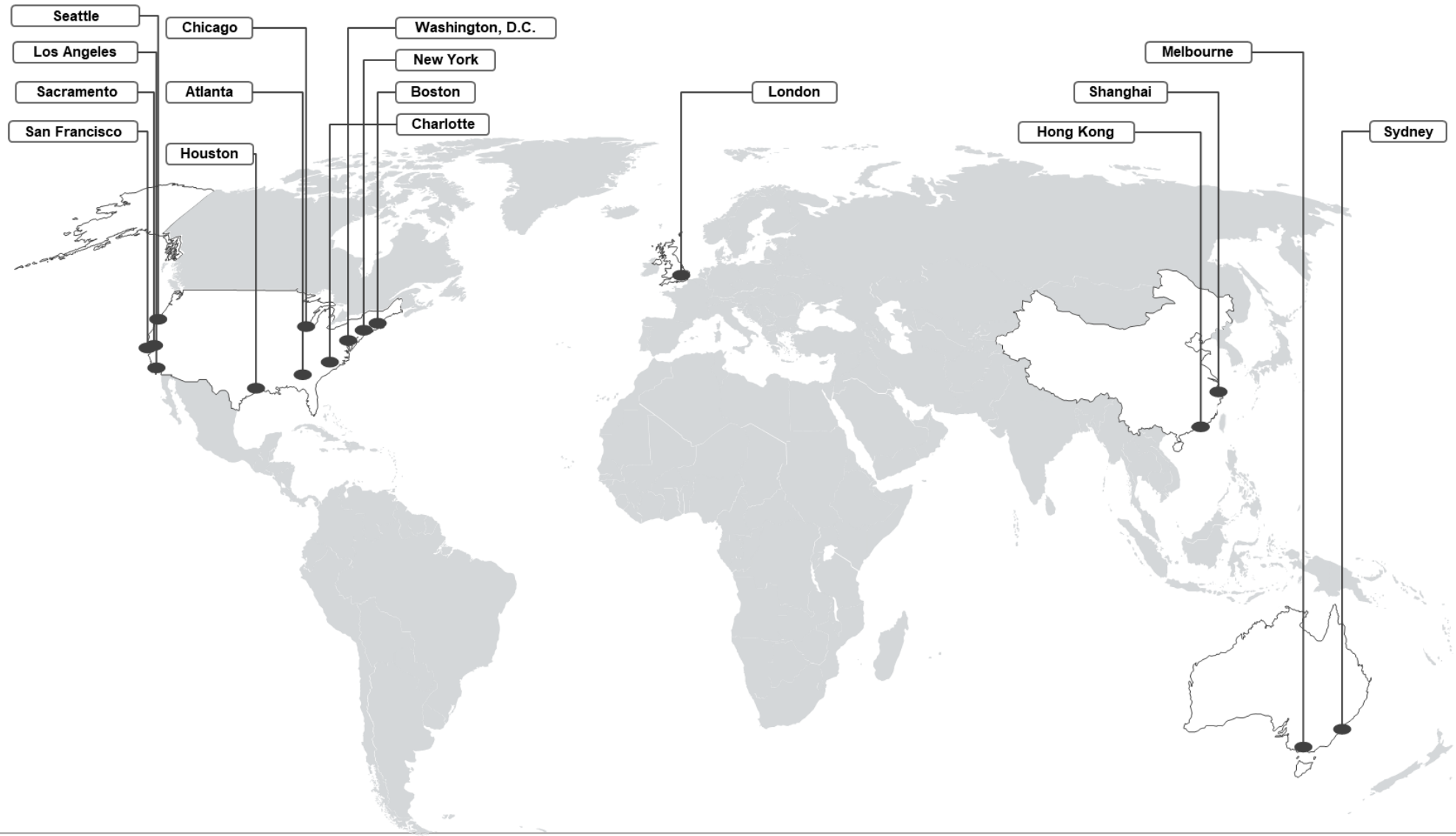
Other Legal Developments Affecting Wage & Hour Class Actions

Other Key Cases From 2020

- *David v. Queen of the Valley Medical Center,* 51 Cal. App. 5th 653 (2020), review denied (Oct. 21, 2020)
  - Rounding practice was lawful even though 53 percent of rounded time favored the defendant, and plaintiff lost, on average, 1.56 minutes of time per shift
- *McPherson v. EF Intercultural Foundation*, 47 Cal. App. 5th 243 (2020) (addressing the perils of "unlimited" vacation policies)
- *Barriga v. 99 Cents Only*, 51 Cal. App. 5th 299 (2020) (defense declarations obtained from current employees to support opposition to class certification were "inherently coercive" and must be scrutinized)

Questions?

Global Reach



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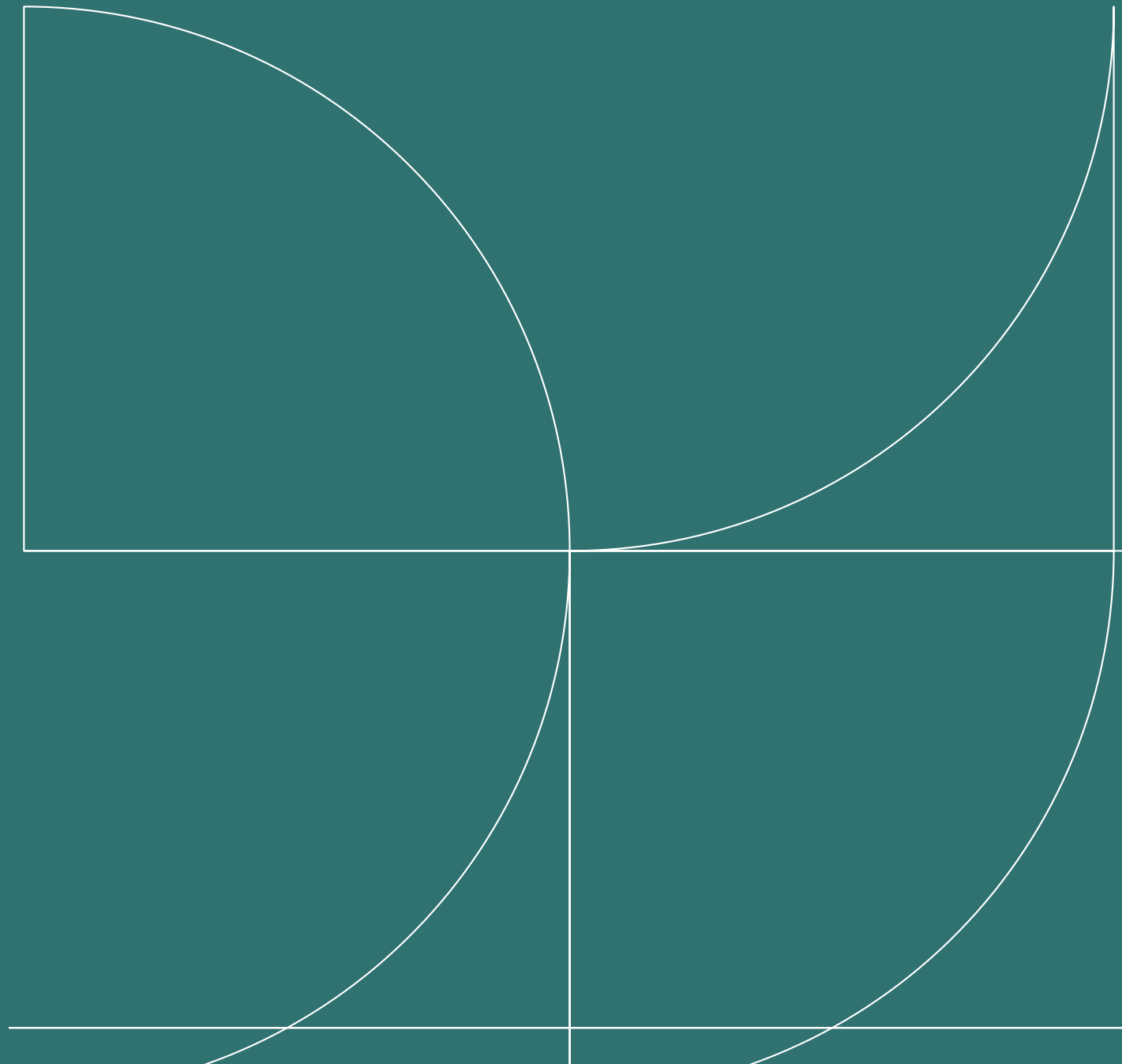

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