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2019, A *Dynamex* Year of Change: *Lawson*, *OTO*, *Salazar*, and More

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I. WAGE & HOUR

1. *Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th 885 (Dec. 24, 2019)

Holding: Class certification was not suitable where the meal break policy complied with the applicable wage order but was silent as to certain requirements, nor was it suitable where the written rest break policy was facially unlawful yet not applied to employees.

Plaintiffs, retail employees, brought a class action for failure to provide meal and rest periods and for compelling off-the-clock work (unpaid wages, including overtime wages), as well as failure to reimburse, failure to pay vacation wages, and wage statement penalties and "waiting time" penalties claims. The trial court denied class certification for lack of commonality or typicality. The Court of Appeal held the trial court did not abuse its discretion because Plaintiffs failed to show they could prove liability for all claims by common proof at trial.

Plaintiffs' evidence included Defendant's policy manuals, time and pay records for a representative sample of 108 employees (of a putative class of more than 2,500 members) representing 31,085 work shifts, declarations from the named plaintiffs and another former employee, a declaration from a data analysis expert, and excerpts from deposition testimony of Plaintiffs as well as Defendant's district manager, controller, Vice President of Store Operations, and senior director of human resources. Plaintiffs also relied on employee handbooks issued both before (2007) and after (2013) the California Supreme Court decided *Brinker Rest. Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004, the seminal case on certification of wage and hour classes (the 2013 handbook was modified to reflect post-*Brinker* changes). Both plaintiffs testified as to their personal experiences with how Defendant implemented its meal and rest break policies.

In opposition, Defendant contended its policies complied with the applicable wage order, and an assistant store manager submitted a declaration regarding scheduling of lunch breaks and that in three years in management she had never received a complaint from an employee that his or her lunch break had been cut short or that the employee had been forced to work during lunch. The district manager testified as to Defendant's practice when stores were understaffed, and that Defendant paid premium wages for missed meal periods. The company's timekeeping system automatically calculated premiums for any lunches clocked out after the fifth hour, although it was unclear if that function had been in place the entire class period or only since September 2013, when Defendant changed its timekeeping practices. Defendant also assailed the expert's methodologies as overstating meal break violations. Similarly, Defendant submitted deposition testimony from Plaintiffs suggesting that whether they received rest breaks

depended on the manager, and that managers were likely to tell employees to take rest breaks as the employees would often forget to ask.

With respect to the off-the-clock claim, Plaintiffs testified that either there was not enough time to finish all the work or they were asked to continue working after they had clocked out. Defendant countered that its companywide policy, as disseminated in the employee handbook, strongly prohibited off-the-clock work, and that one named plaintiff had been written up several times for failing to clock in and out properly and that the other named plaintiff was not aware of anyone working off the clock and that he, as a manager, never asked employees to work off the clock.

The trial court found that common issues did not predominate, as the two named plaintiffs worked at two retail stores (out of 69 total stores) and had not offered any admissible witness testimony from the potential class of thousands of employees. The judge also found deficiencies with Plaintiffs' expert's report as to meal periods. The trial court found that Defendant's policy in the 2007 handbook as to rest breaks was deficient but that Plaintiffs had failed to present any evidence that Defendant, which had corrected the deficiency in the 2013 handbook, had a companywide practice of denying rest breaks. Similarly, the trial court found Plaintiffs failed to present sufficient evidence to overcome the presumption that Defendant's policy clearly prohibited off-the-clock work and enforced the policy with discipline.

The trial court further determined Plaintiffs had failed to establish their claims were typical of the subclasses they sought to represent.

Accordingly, the trial court denied class certification.

The Court of Appeal affirmed the trial court's decision. Consistent with *Brinker*, the Court focused on Plaintiffs' theory of liability rather than the merits or defenses of the action to determine whether common issues predominated. The Court recognized that if a plaintiff's theory is based on a common unlawful policy, evidence that some employees were treated differently does not defeat certification. However, where, as here, it is disputed whether a policy is uniformly unlawful, the trial court must weigh the evidence to determine whether substantial evidence supports predominance, or at least whether an employer's liability under the policy is susceptible to common proof. The appellate court held that Plaintiffs had failed to meet their burden, and that individual issues predominated in the meal period, rest period, and off-the-clock claims. As such, the trial court had not abused its discretion in finding Plaintiffs' experiences were atypical of other class members. Further, the trial court had correctly identified six separate bases for finding Plaintiffs' claims were not typical, including: (1) the anecdotal nature of the evidence; (2) the failure to produce more than a single non-plaintiff declaration (which was stricken after the declarant repeatedly failed to appear for deposition); (3) a failure to establish other class members were

affected by the policies and practices at issue; (4) most of the alleged misconduct occurred in only two stores; (5) one plaintiff complained of policies that the other (management) plaintiff was in charge of enforcing; and (6) the non-managerial plaintiff had been disciplined for failure to comply with company policies, including timekeeping.

2. *Cole v. CRST Van Expedited, Inc.*, 932 F.3d 871 (9th Cir. Aug. 1, 2019)

Holding: Ninth Circuit certifies two questions to the California Supreme Court: (1) Does the absence of a formal policy regarding meal and rest breaks violate California law; and (2) Does an employer's failure to keep records for meal and rest breaks taken by its employees create a rebuttable presumption that the meal and rest breaks were not provided?

Plaintiff, a commercial truck driver, filed a wage and hour class action for failure to provide meal and rest periods as required by California law. Plaintiff alleged that Defendant had no written policy for meal breaks and did not schedule meal breaks for him. Defendant's 30(b)(6) designee testified that truckers were instructed to take breaks when they either needed to or felt they needed to for any personal reason, such as to eat, use the restroom, do laundry, or make personal phone calls, and that drivers could stop whenever they chose to stop. Multiple other drivers testified at deposition or declared that they had opportunities to take breaks, although when they took breaks was up to them, and that the company reminded drivers of the importance of taking breaks.

The district judge granted summary judgment, finding the company had provided a reasonable opportunity to take meal and rest periods. The district court further decertified the meal and rest break classes on the grounds that there was evidence that drivers took breaks without the company interfering and that in any event individual questions predominated. On appeal, Plaintiff argued that just because Defendant did not prevent its employees from taking breaks does not mean it complied with California meal and rest period requirements.

After delving into *Brinker* analysis for an employer's requirements to provide meal and rest periods, the Court of Appeals for the Ninth Circuit noted that *Brinker* specifically avoided addressing the issue of whether an employer violates California law simply by not having a formal policy for meal and rest breaks. The Ninth Circuit then certified two questions to the California Supreme Court: (1) Does the absence of a formal policy regarding meal and rest breaks violate California law?; and (2) Does an employer's failure to keep records for meal and rest breaks taken by its employees create a rebuttable presumption that the meal and rest breaks were not provided?

Surprisingly, the Supreme Court denied review on October 16, 2019, which is unusual considering the high court nearly always responds to requests for

clarification from the Ninth Circuit. The questions now return to the Court of Appeals to resolve them on its own.

3. ***Dane-Elec Corp v. Bodokh*,**
35 Cal. App. 5th 761 (May 24, 2019)

Holding: Labor Code section 218.5 bars a prevailing employer in a wage claim from an award of attorney's fees where the wage claim is "inextricably intertwined" with a contract claim for a contract that contains a fee provision.

Plaintiff-employer sued Defendant, an owner and employee of Plaintiff, for breach of a promissory note. Defendant cross-complained for unpaid wages, waiting time penalties, and unfair competition. The company prevailed in a bench trial and sought attorney's fees. The trial court awarded attorney's fees on the breach of contract claim but disallowed fees incurred in defending the wage claims. The owner-employee, who was not a salaried employee of the company and was a citizen of and resided in France (and did not have a U.S. work visa), appealed both the wage claim denial and the fee award.

Labor Code section 218.5, subdivision (a), provides, in relevant part, "In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorneys' fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action. However, if the prevailing party in the court action is not an employee, attorney's fees and costs shall be awarded pursuant to this section only if the court finds the employee brought the court action in bad faith." After examining the legislative history of the statute and various case authorities, the Court of Appeal concluded that the time spent on the breach of contract claim was "inextricably intertwined" with the time spent defending the wage claims. However, the appellate court recognized that the company might be entitled to fees and costs specifically for the trial and the appeal, and accordingly remanded to the trial court to determine the appropriate amount of fees to award.

4. ***Dawson v. N.C.A.A.*,**
932 F.3d 905 (9th Cir. Aug. 12, 2019)

Holding: USC football player was not an "employee" of either the NCAA or the PAC-12 Conference under either the FLSA or the California Labor Code.

Plaintiff played football for the University of Southern California ("USC"), a member of the PAC-12 athletic conference of the National Collegiate Athletic Association ("NCAA"). NCAA member schools administer their athletic programs according to the academic eligibility requirements and limitations

imposed on recruitment, scholarships, and the conditions and scheduling of practices and games as provided for in the NCAA's constitution and bylaws, which also govern financial aid to student-athletes and prohibit compensating them. Plaintiff alleged that the NCAA and PAC-12 acted as his employers because they set "the terms and conditions under which student-athletes perform services."

The Ninth Circuit explored the definition of "employ" under the federal Fair Labor Standards Act of 1938 ("FLSA"), "to suffer or permit to work," and noted that while the FLSA definition is "exceedingly broad" it does have limitations, such as an individual who works for his or her own advantage on another's premises. (*Tony & Susan Alamo Found. v. Sec'y of Labor* (1985) 471 U.S. 290, 295.) The Court highlighted that the ultimate test of employment under the FLSA is the "economic reality" test. Under that analysis, the Ninth Circuit concluded that neither the NCAA nor the PAC-12 could have employed Plaintiff because neither compensated him with a scholarship or financial aid. Similarly, Plaintiff could not prove that either conference had the authority to hire or fire him. Though Plaintiff alleged the various ways that Defendants controlled his experience as a student-athlete, the Court found that showed the NCAA "functions as a regulator," not an employer, and that the member schools enforce its regulations. The Court of Appeals also rejected the argument that the fact student-athletes generate substantial revenue for Defendants in and of itself proved the existence of an employment relationship, noting that volunteers at a nonprofit religious organization had been found to be employees (*Alamo*) whereas cosmetology students who performed services for paying customers at salons run by the beauty schools they attended had not (*Benjamin v. B&H Educ., Inc.* (9th Cir. 2017) 877 F.3d 113, 1148.

Instead, the Court reviewed the four-factor test found in *Bonnette v. Calif. Health & Welfare Agency* (9th Cir. 1983) 704 F.2d 1465, 1470 (*abrogated on other grounds by Garcia v. San Antonio Metro. Transit. Auth.* (1985) 469 U.S. 528): "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." The Court did not find Plaintiff had met this test. The Court further distinguished the "primary beneficiary test" it had detailed in *Benjamin*, which referenced the Second Circuit "Black Swan" case regarding interns and added seven factors to the *Bonnette* test, noting that the cosmetology students in *Benjamin* earned academic credit towards their state licensing exam when they performed services whereas student-athletes "are participating in highly regulated extra-curricular activities."

The Court of Appeals similarly reviewed California law, particularly in the context of worker's compensation and the California Fair Employment and Housing Act ("FEHA") and concluded that while for a brief period California

courts acknowledged that student-athletes may be entitled to death benefits from their colleges under the Workman's Compensation Act (which was later amended to explicitly exclude student-athletes from its protections), generally California courts deemed student-athletes to not be employees of their schools. The Court saw no basis to support an inference that the NCAA and PAC-12 should be found to be "joint employers" if the schools themselves were not employers and therefore declined to extend liability to Defendants.

The Ninth Circuit further declined to consider whether Plaintiff had employment status as a football player or whether USC, and not the athletic conferences, was his employer, as these issues were not on appeal.

5. ***Esparza v Safeway, Inc.*,**
36 Cal. App. 5th 42 (June 10, 2019)

Holding: At summary judgment on a meal period class, employees may not rely on a market value approach to establish the value of UCL restitution.

Until June 2007, Defendant did not pay premium wages for meal periods it failed to provide. Plaintiffs brought a class action on the meal period claim, also alleging UCL and PAGA claims (PAGA as to the period during which the no-premium-wages policy was in place). The trial court granted class certification as to "All individuals who worked as an hourly paid store level employee in Safeway, Inc.'s NorCal or Vons division in California" during the relevant period. Defendant filed a petition for writ of mandate, which the Court of Appeal denied, finding – for purposes of writ review – that Defendant had forfeited its challenge to the UCL claim at the appellate level but leaving open the possibility that Defendant could challenge the theory in the court below.

On remand, the trial court granted Defendant's summary adjudication as to the UCL claim, finding that Plaintiffs improperly sought recovery of premium wages without first proving the meal period violations had occurred on a classwide basis, meaning there was insufficient evidence that members' interest in premium wages had vested. Specifically, Plaintiffs proposed measuring classwide restitution by identifying all short, missed, and late meal periods, regardless of the reasons behind the violations, and their expert did not address this theory in his declaration, which the trial court struck from the record as inadmissible. Accordingly, the trial court struck their UCL restitution claim, finding Plaintiffs "alleged no viable theory upon which [the class] could obtain restitution or injunctive relief." The lower court also granted Defendant's motion to strike the PAGA claim, finding it was time-barred. The Court of Appeal affirmed the trial court's decision on both counts.

The Court of Appeal acknowledged its own decision (denying the writ) that an employee's interest in a meal period premium wage vests when the meal period is denied, and such a practice (of missing, shortening, or delaying meal periods) can

violate the UCL, which can provide for either injunctive relief or restitution. UCL restitution requires identifying "measurable amounts," though, and therefore the existence of harm must be proven in order to establish a claim seeking restitution as a remedy. In the first appellate decision, Plaintiffs argued that the harm underlying their liability theory was not the unpaid premium wages but rather the "classwide practice of ignoring the statutory mandate" of Labor Code section 226.7 (which provides for the premium wage remedy). Plaintiffs proposed using a "market value" approach to measure the value of the classwide statutory protections lost due to Defendant's practices as the amount of harm by showing that Defendant's failure to pay premiums was sufficiently system-wide as to deny all class members their statutory guarantee of meal period premiums. In other words, Plaintiffs posited that the value of the harm was one hour of each class member's regular rate of pay for each possible meal period. The Court rejected this approach, holding instead that at summary adjudication Plaintiffs had failed to provide evidence of the value of the actual harm warranting restitution and therefore there was no triable issue of material fact.

6. ***Frlekin v. Apple, Inc.*,**
2020 WL 727813 (Feb. 13, 2020)

Holding: The term "hours worked" includes all time employees are subject to their employer's control, including bag checks whenever leaving the employer's premises.

Plaintiffs filed a class action in federal court seeking to represent all California nonexempt retail store employees who worked for Defendant and were subject to Defendant's bag-search policy, which called for employees to submit their bags to a manager or to security personnel before exiting the stores for any reason, including rest breaks, meal periods, and ends of work shifts. Employees estimated they spent between 5-20 minutes waiting for their bags to be searched depending on who performed the search, with some waiting up to 45 minutes on the busiest days. The district court certified a class but specified in its order granting certification that, in order to avoid individualized issues, the bag search issue would be adjudicated solely based on those employees who brought bags to work for personal convenience rather than because of special needs such as medications or as an accommodation for a disability.

Both sides filed competing motions for summary judgment, with Defendant prevailing and the district court denying Plaintiffs' motion. The trial court found the bag searches were not compensable time under the relevant wage order (No. 7) because the term "hours worked" required Plaintiffs to prove *both* (a) the employer had restrained employee movement during the bag search, *and* (b) the employees had not plausible way to avoid the bag searches. Plaintiffs appealed, and the Ninth Circuit certified the following question to the California Supreme Court: "Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages or bags 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?" (*Frlekin v. Apple, Inc.* (9th Cir. 2017) 870 F.3d 867, 869.)

The California high court began its analysis by asserting, "We construe wage orders, like wage and hour laws, so as to promote employee protection." Reinforcing its recent decisions such as *Dynamex Ops. West, Inc. v. Super. Ct.* (2018) 4 Cal.5th 903, 953, *Augustus v. ABM Sec. Servs., Inc.* (2016) 2 Cal.5th 2557, 262, and *Mendiola v. CPS Sec. Solutions, Inc.* (2015) 60 Cal.4th 833, 840, the *Frlekin* court reiterated that wage orders constitute the type of remedial legislation intended to benefit and protect California's workers. Further, the high court again (as it has in recent decisions) reached back to *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 582 to analyze the definition of the term "hours worked," which the wage order defines 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." The Court reminded the Ninth Circuit that the plain language of the wage order means that an employee can still be subject to her employer's control even if she is not actively working, and that conversely she is entitled to be compensated for time she is suffered or permitted to work even if she is not subject to her employer's control for that time, provided the employer knew or should have known the employee was performing work for the employer's benefit. (*See Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 853.)

The Supreme Court found Apple's employees were "clearly" subject to their employer's control when having to undergo bag searches (and therefore the time was compensable) because: (1) employees had to comply with the bag search policy under threat of discipline; (2) Defendant confined its employees to the premises for the searches; and (3) Defendant required both the employees whose bags were searched as well as the managerial and security employees performing the searches to perform specific and supervised tasks both before and during each search that were prescribed by Defendant. The Court rejected Defendant's argument that the time could only be compensable if the employees could prove the activity was both "required" and "unavoidable," holding that neither word appears in the control clause of the wage order term "hours worked," and that redefining the term would impermissibly narrow the scope of compensable activities and destroy the wage order's fundamental purpose of worker protection. The high court also held that such an interpretation was inconsistent with the legislative history of the term "hours worked."

Defendant also argued that because the holding in *Morillion* was limited to compulsory travel time that such logic should also apply here and that all employees should not be compensated for bag search time because the searches were avoidable in that Defendant did not *require* its employees to bring bags to work and the employees could have avoided the bag search by not bringing bags

with personal belongings to the stores. (*See, e.g., Overton v. Walt Disney Co.* (2006) 136 Cal.App.4th 263, 271 [because a shuttle bus from the employee parking area to the theme park entrance was option and other means of transportation were available, time spent waiting for and riding on the shuttle bus was not compensable.) However, the *Frlekin* court distinguished time spent commuting to work with time spent at the workplace, where, it found, Defendant had an inherently greater interest in controlling (in this case, to search bags in order to deter employee theft).

Another essential difference between this case and *Morillion* and its progeny is that the travel time cases focused on activities that benefitted employees, whereas here the activity in question (bag searches) benefitted the employer. And the high court found that what the employees in this case had in common with those in *Morillion* (as opposed to the *Overton* employees) is that in both cases the time deemed compensable was for activities that were enforceable by disciplinary action – in other words, the employees who opted to bring bags to work had no choice but to participate in the bag search, under threat of penalty. As the Court noted, Defendant's "personal convenience" argument – that employees could choose not to bring personal bags to work – "rings especially hollow" given the prevalence of smartphones and Defendant's own briefing before the United States Supreme Court in which it characterized its own iPhones as "practical necessities of modern life" and "fundamental tools for participating in many forms of modern-day activity," rather than just "another technological convenience." Given that many Apple employees could be assumed to own Apple smartphones, the California Supreme Court found such employees "have little true choice" in deciding whether to bring such phones to work, which would make searching their bags for theft vital and not optional.

The Court applied its ruling retroactively. It also declined to consider whether the bag searches were compensable under the "suffered or permitted" clause of "hours worked."

7. ***Hawkins v. City of Los Angeles*,**
40 Cal. App 5th 384 (Sept. 25, 2019)

Holding: Municipal employees who prevailed on civil rights, whistleblower claims enforced an important right affecting public interest, entitled to fees under CCP § 1021.5.

Plaintiffs, part-time hearing examiners for the parking adjudication division of the Los Angeles Department of Transportation, were fired for blowing the whistle on the City's practice of pressuring examiners to change their decisions. Plaintiffs also alleged race discrimination under various statutes, including the Bane Act, FEHA, and 42 U.S.C. § 1983. Plaintiffs prevailed at trial, and the jury awarded them damages of over $400,000 collectively. The court assessed $20,000 in civil penalties under PAGA, and awarded $1,054,286.88 in attorney's fees.

The Court of Appeal, reviewing the factual record, found Plaintiffs had established the elements of their prima facie case for retaliation and that there was evidence to support the jury's finding that the "legitimate" business reasons the City proffered for Plaintiffs' terminations were mere pretext.

Though the Court's findings on the merits of the PAGA and Bane Act claims were not published, the appellate court found that Plaintiffs had properly brought the PAGA claim and had prevailed and therefore were entitled to fees under that statute. The Court also held that fees were properly recoverable under Code of Civil Procedure section 1021.5 since Plaintiffs had vindicated an important right affecting the public interest, namely that the public was entitled to fair parking citation hearings yet this action revealed that for years the City had been pressuring examiners (sometimes successfully) to change hearing decisions, usually to the result that refunds were deemed to be unwarranted, to the detriment of the public.

8. ***Henderson v. Equilon Enterprises, LLC*,**
40 Cal. App. 5th 1111 (Oct. 8, 2019)

Holding: *Martinez v Combs*, not *Dynamex*, determines joint employer liability.

Plaintiff filed a wage and hour class action in 2010, then dismissed class allegations in 2016 in his second amended complaint, alleging he was employed as the station manager for several Shell gas stations owned and operated by defendant Danville Petroleum, Inc. ("Danville") and did not receive all overtime, meal period, and rest period premium wages to which he was entitled. Plaintiff also named Equilon Enterprises, LLC, dba Shell Oil Products US ("Shell"), Danville's franchisor, as his joint employer. Plaintiff settled his claims with Danville. Shell successfully moved for summary judgment that it was not liable as a joint employer.

Under the contract between Shell and Danville, Danville, like other franchisees, operated the convenience stores and/or car washes and paid Shell a royalty on convenience store sales and received a set fee for each gallon of gasoline it sold. In all other respect, Danville controlled the day-to-day operations on the premises of its gas stations, including recruiting, hiring, promoting, disciplining, and/or terminating its employees. Danville had its own employee handbook and set its own meal and rest break policies. While Shell retained the right to ask Danville to "remove" an employee "for good cause shown," only Danville could terminate its employees per contract.

Relying on the three-prong definition of "employment" from *Martinez v. Combs* (2010) 49 Cal.4th 35 and leaning heavily on the more recent decision of *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289 – which involved the same defendant (Shell) and the same franchisor-franchisee contract at issue in this case

(and the same plaintiff's counsel) – the Court of Appeal rejected Plaintiff's arguments that Shell's requirement that Danville "ensure" its employees perform specific tasks or that it set Plaintiff's hours by requiring Danville's stations be open 24/7/365 or that the amount it reimbursed Danville for gasoline determined the amount Danville could pay its employees as insufficient to show the requisite control over the terms and conditions of Plaintiff's employment as to find joint employment.

The appellate court also held that the "ABC" test from *Dynamex Ops. West, Inc. v Super. Ct.* (2018) 4 Cal.5th 903, which was decided while this case was on appeal, did not apply to the issue of joint employment. *Dynamex*, which addressed misclassification of employees as independent contractors, drew from *Martinez*'s "suffer or permit" prong, but the *Henderson* court held it did not fit analytically with the joint employer analysis. The Court noted that, at its heart, the *Dynamex* decision focused on businesses gaining unfair competitive advantages by saving money (owed to both employees and the government) by intentionally misclassifying employees as independent contractors and further depriving workers of their full protections under the law. Here, by contrast, the issue was not whether a worker was properly classified as an employee but rather who should be liable for potential wage and hour violations, i.e., as part of the remedial network of worker protection. Thus, analyzing whether Plaintiff's work was "outside [Shell's] usual course of business" (*Dynamex*'s "B" prong) or whether Plaintiff was "customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed" for Danville (*Dynamex*'s "C" prong) makes little sense in determining whether Shell controlled Plaintiff's employment. Thus, *Martinez*, not *Dynamex*, is the appropriate inquiry for the joint employment analysis.

9. *L'Chaim House, Inc. v. DLSE*,
38 Cal. App. 5th 141 (July 31, 2019)

Holding: Meal periods for 24-hour attendants must be at least 30 minutes long, even if on-duty.

Subdivision 11(A) of the Industrial Welfare Commission Wage Order No. 5-2001 mandates an employer provide its employees uninterrupted meal periods of not less than 30 minutes and states, "Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked. An 'on duty' meal period shall be permitted only when the nature of the work prevents an employee form being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to" that is revocable at any time. Subdivision 11(E) creates an exception to subdivision 11(A), providing that in residential care facilities for the elderly, blind or developmentally disabled, employees may be required to work an on-duty meal period "when necessary to meet regulatory or approved program standards" as long as either (1) the employee eats with the

residents during the residents' meals, and the employer provides free meals to the employee, or (2) the employee is solely in charge of the residents and the employer (on the day shift) provides free meals to the employee.

Defendant and its owner operated 24-hour residential care homes for seniors and failed to provide their employees meal periods of at least 30 minutes when they provided on-duty meal periods. Defendant argued subdivision 11(A) "contemplate[s] instances where an employee's meal period may be less than 30 minutes," and therefore it either does not extend to employees "until a full uninterrupted 30 minutes is realized" or it "require[s] a tolling of the 30-minute meal period while the employee carries out some of his or her duties." The Court of Appeal called this "a fundamental misreading of subdivision 11," reproaching Defendant for misunderstanding that "an on-duty meal period is not the functional equivalent of no meal period at all." Instead, the Court held, "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." The appellate court upheld the trial court's ruling that even if employees are not entitled to a meal period that is free of interruptions they still must be "afforded 30[] minutes of limited duty enabling them to eat their meal in peace."

Defendant, relying on *Palacio v. Jan & Gail's Care Homes, Inc.* (2015) 242 Cal.App.4th 1133 and an October 17, 2016 DLSE opinion letter, argued that an employer whose employees are covered by subdivision 11(E) need not comply with *any* portion of subdivision 11(A). The Court of Appeal rejected that argument, holding that *Palacio* stood only for the proposition that if a home-care facility met the subdivision 11(E) requirements it did not need to obtain a written agreement to impose on-duty meal periods.

The Court also considered Labor Code section 512 and last year's landmark decision of *Gerard v. Orange Cost Mem'l Med. Ctr.* (2018) 6 Cal.5th 443 for the requirement that employees may not work more than six hours without being provided a meal period of not less than 30 minutes unless they agree to waive their meal periods, an argument not contemplated in Defendant's briefing. The appellate court found the statute's plain language required that Defendant provide employees meal periods of at least 30 minutes when the employees worked at least five hours, regardless of whether the meal period was on duty or off duty.

10. ***Liday v. Sim*,**
40 Cal. App. 5th 359 (Sept. 25, 2019)

Holding: Personal Attendant Not Entitled to More than Minimum Wage While Exempt.

Plaintiff was a live-in personal attendant (as defined in Wage Order 15) for the two autistic sons of two doctors from December 2002 until she quit in April 2014. Plaintiff filed suit against Defendants in April 2014 for failure to pay overtime,

off-the-clock work (failure to pay at least minimum wage for all time worked), waiting time penalties, unfair competition, and PAGA civil penalties. Following a bench trial, the trial court issued a statement of decision entering judgment in Plaintiff's favor, including prejudgment interest. At issue in this appeal was whether the trial court had properly calculated Plaintiff's regular rate of pay in the award.

It was undisputed that Plaintiff worked a 45-hour workweek (five nine-hour days). The trial court found more credible Plaintiff's testimony that Defendants consistently paid her a monthly salary and the two parties never discussed an hourly rate than Defendant's testimony that the monthly payments were somehow calculated by multiplying the minimum wage rate by the scheduled number of hours Plaintiff worked.

Prior to 2014, live-in domestic workers were exempt from overtime but entitled to minimum wage. On January 1, 2014, the Domestic Workers Bill of Rights went into effect and extended overtime pay to workers like Plaintiff. The trial court found that from April 2010 through December 2013, Plaintiff had worked 138 hours per week for 179 weeks and 90 hours per week for 14 weeks, which meant she had not been paid for 93 hours per week for 179 weeks and 45 hours per week for 14 weeks. The trial court calculated Plaintiff's unpaid wages during that period by dividing her average weekly salary ($692.31) by 45 hours, for a regular rate of pay of $15.38 per hour and multiplying that figure by the total number of unpaid hours.

The Court of Appeal disagreed, holding that the trial court should have only calculated $8 per hour for each hour of Plaintiff's unpaid work. Plaintiff argued that Labor Code section 515(d) – requiring a salaried employee's regular rate of pay to be 1/40th of the employee's weekly salary – should apply in this instance, as reinforced by the DLSE Enforcement Manual and *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721. However, the appellate court emphasized that the above calculations applied to *nonexempt* employees for the purpose of calculating an overtime premium wage rate of pay (1.5 times the regular rate of pay), and since Plaintiff had been an exempt employee until January 1, 2014 and was not entitled to overtime compensation, that method of calculating her regular rate of pay should not apply. The Court also distinguished *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, which prohibits using the federal model of averaging monthly salaries over all hours worked, finding that unlike in *Armenta* the parties here had not agreed on a rate of pay that was higher than the minimum wage. Accordingly, since Plaintiff was only entitled to $8 per hour for all hours worked, the trial court overestimated Plaintiff's regular rate of pay for 2010-2013.

11. ***Mejia v. Merchants Bldg. Maintenance, LLC*,**
38 Cal. App. 5th 723 (Aug. 13, 2019)

Holding: Pre-*Lawson* decision finds Section 558 underpaid wages part of the PAGA penalty and that 558 penalties cannot be split between arbitrable and nonarbitrable claims.

This was another in a series of PAGA cases that was definitively settled with the California Supreme Court's decision in *ZB, N.A. v. Lawson* (Sept. 12, 2019) 8 Cal.5th 175 ("*Lawson*") (see below). At issue was whether the underpaid wages portion of Labor Code section 558, subdivision (a)(3) constitutes a claim for individual damages seeking "victim-specific relief" or is part of the PAGA civil penalty articulated in subdivisions (a)(1) and (2). If they were the former, such claims could be compelled to arbitration; if the latter, they could not. The Court in this case held such payments were part of the civil penalty and therefore an enforcement action taken on behalf of the State that could not be compelled to arbitration, which was consistent with the Court of Appeal's decision in *Lawson* (before it was taken up on review).

The Court in this case also agreed with *Zakaryan v. The Men's Wearhouse, Inc.* (March 28, 2019) 33 Cal.App.5th 659 (see below) that 558 penalties could not be "split" between that portion of Section 558 that provided for fixed penalty amounts ($50 or $100 per aggrieved employee per pay period) and the portion allocated to underpaid wages, and therefore the trial court properly denied Defendants' motion to compel arbitration in its entirety.

The Court here got it wrong.

12. ***Noori v. Countrywide Payroll & HR Solutions, Inc.*,**
43 Cal. App. 5th 957 (Dec. 26, 2019)

Holdings: (1) Plaintiff properly pled Labor Code § 226 claim where employer's name was only an acronym on the wage statement, (2) similarly satisfied PAGA notice requirements.

California Labor Code section 226, subdivision (a), lists nine distinct items that an employer must provide on each employee's wage statement, including "the name and address of the legal entity that is the employer." Defendant Countrywide Payroll & HR Solutions, Inc., issued wage statements to its employees listing the entity "CSSG," which stood for "Countrywide Staffing Solutions Group," as the employer. Plaintiff alleged that "Countrywide Staffing Solutions Group" was not registered to do business with the State of California but rather was a fictitious business name for Defendant "in at least some States." Plaintiff further alleged that Defendant operates under the fictitious name "Countrywide HR," or "CWHR," in California. Plaintiff also alleged that he worked for and reported to a business called Restoration Hardware, and that he and other employees were

unable to promptly and easily determine their employer's name from the wage statements. He also alleged Defendant failed to maintain accurate copies of the wage statements as required under Section 226, and he further alleged civil penalties under PAGA.

Defendant demurred to the complaint, arguing that (1) the use of the fictitious name on the wage statement was proper, and the full name was not necessary, (2) in any event, the complete name of the employer was on the checks attached to the allegedly deficient wage statements, and (3) Plaintiff could not allege damages, because a Section 226 claim requires a showing of injury, and since the use of the fictitious name supposedly was proper Plaintiff could not have suffered any injury.

The Court of Appeal noted that subdivision (a) does not require a complete or registered name of the employer, just a name, and minor truncations of the employer's name have been found to comply with Section 226 requirements. And while the Court also acknowledged that using an out-of-state fictitious business name would not necessarily violate the statute, it held that the use of an unregistered acronym of an out-of-state fictitious business name "is another matter." The *Noori* court reasoned that "CSSG" was not a minor truncation, and that using such an acronym would render the employer's name so confusing and unintelligible that violated Section 226(a). It further held that the fact that the complete fictitious name appeared on the check did not cure the violation, as subdivision (a) requires the wage statement to be "a detachable part of the check" and therefore is not modified by what is on the check itself. Thus, the Court reversed the demurrer as to this cause of action.

With respect to the failure to maintain accurate records claim, Plaintiff relied on the "deemed injury" provisions of Section 226 in arguing he did not have to have suffered actual injuries. *See* Lab. Code §226(e)(2)(B)(iii) ("An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly and easily determine from the wage statement alone one or more of the following…The name and address of the employer…") The Court found this provision supported a cause of action for failure to provide accurate wage statements but not for failure to maintain accurate records. Thus, the Court sustained the demurrer as to this cause of action.

Regarding the PAGA cause of action, the Act requires aggrieved employees to give notice of the of the Labor Code provisions the employer allegedly violated. Lab. Code §2699.3. Violations that cannot be cured by the employer (and whose Code sections are listed in Section 2699.5 of PAGA) must be noticed per the requirements of subdivision (a) of Section 2699.3; violations that can be cured must be noticed per the requirements of subdivision (c). Defendant argued Plaintiff had failed to comply with the statute's notice requirements when he

mistakenly wrote in his PAGA notice to the Labor and Workforce Development Agency ("LWDA") that the omission of the name of the legal entity that was the employer was not curable, and therefore subject to the notice requirements of subdivision (a) rather than subdivision (c). The Court of Appeal held that PAGA does not require that level of specificity in its notice requirement, nor does the statute have an express requirement to notify the employer that the alleged violation may be cured. Because Plaintiff stated the Labor Code sections that he alleged Defendant had violated, and because Plaintiff provided facts and theories in support, the appellate court held that Plaintiff had properly pled his PAGA notice to the LWDA.

13. *O'Grady v. Merchant Exchange Prods., Inc.*, 41 Cal. App. 5th 771 (Oct. 31, 2019)

Holding: Mandatory service charge in banquet hall could constitute a gratuity that needed to be paid to non-managerial employees.

Plaintiff, a server and bartender at a banquet facility, brought a class action regarding Defendant's practice of automatically imposing a 21% "service charge" on every food and beverage bill at the banquet and keeping a part of the monies collected from the service charge and sharing the rest with managers and other non-service employees but not with non-managerial service employees. Plaintiff alleged that the service charge was a form of gratuity and therefore sharing it with management and keeping part of it violated Labor Code section 351 ("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…Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for."). Plaintiff also alleged the practice was a form of unfair competition in violation of the UCL, that it intentionally interfered with the advantageous relationships between service employees and Defendant's customers, and that it breached Defendant's implied contract with its customers that Defendant's employees would receive the gratuities the patrons paid.

Defendant demurred that, as a matter of law, mandatory service charges are not gratuities. (*See Searle v. Wyndham Int'l., Inc.* (2002) 102 Cal.App.4th 1327 and *Garcia v. Four Points Sheraton LAX* (2010) 188 Cal.App.4th 364.) The trial court held, "I have no choice but to follow *Garcia* and *Searle*." The Court of Appeal reviewed de novo.

Labor Code section 350 defines "gratuity" as including "any tip, gratuity, money, or part thereof that has been paid or given to or left for an employee by a patron of a business over and above the actual amount due the business for services rendered or for goods, food, drink, or articles sold or served to the patron." But the Court struggled to define "service charge," examining its use in various industries before concluding, "In short, simply calling something a 'service charge' hardly ever explains what it is – or why it is being imposed."

The Court analyzed the *Searle* and *Garcia* decisions that the trial court had relied upon. The *Searle* court found that a hotel's mandatory 17% service charge was not a gratuity because the hotel's patrons had no interest in what the hotel did with the monies collected from the service charge (indeed, that court found patrons had no right to know how much the hotel was paying its servers) and the charge itself did not materially interfere with patrons' reasonable expectations regarding tipping hotel personnel. Thus, the *Searle* court held that the mandatory service charge there was not a gratuity because it was mandatory and because the hotel was free to do with the monies collected as it pleased. Similarly, *Garcia* also held that a gratuity is not a service charge because a service charge is part of the amount due to the hotel for services rendered, not something "over and above the amount due" to the hotel. However, *Garcia* analyzed the service charge in that case within the context of a city ordinance and essentially held that the servers had a property interest in the service charge monies.

The *O'Grady* court noted "that it all comes down to what label is used and who gets to do the labelling," and that *Searle* and *Garcia* were distinguishable in that in those cases the service charge was going exclusively to the non-managerial staff whereas in this case the service charge was being kept by the employer and only shared with managers and non-service employees. Yet *O'Grady* quoted *Searle* in noting that Section 351's purpose is "to ensure that employees, not employers, received the full benefit of gratuities that patrons intend for the sole benefit of those employees who serve them." (*Searle*, 102 Cal.App.4th at 1332.) [The *O'Grady* court engaged in a lengthy discussion about whether customer intent was relevant to the issue of gratuities before deciding that it could be.] The Court of Appeal seemingly found it unfair that Defendant would keep any monies intended for its employees under the guise of calling it a "service charge."

14. *Parker Drilling Mgmt. Servs., LTD v. Newton*,
139 S. Ct. 1881 (June 10, 2019)

Holding: California wage and hour laws should yield to federal law in federal enclave-type territory.

The Outer Continental Shelf Lands Act ("OCSLA") extends federal law offshore to subsoil and seabed of the Outer Continental Shelf ("OCS"). Plaintiff worked for Defendant on drilling platforms off the coast of California and brought a class action under California's wage and hour laws. Defendant removed, and the district court granted judgment on the pleadings under the OCSLA, which allows courts to apply state law only when there is a significant void or gap in the federal law. The district court found that the FLSA's wage and hour scheme was comprehensive and left no significant gap for California law to fill.

The Ninth Circuit vacated and remanded, finding that the OCSLA allowed for state laws to apply if they pertained to the subject matter at hand (which here they did) and that the only remaining question was whether California's wage and hour

laws were inconsistent with the FLSA under the OCSLA, meaning determining whether the two legal frameworks were "mutually incompatible, incongruous, [or] inharmonious." (Under the OCSLA, the federal government has complete jurisdiction over the OCS and state laws are adopted only "[t]o the extent that they are applicable and not inconsistent with" federal law. 43 U.S.C. §1333(a)(2)(A).) The Court of Appeals held there was no inconsistency between California's laws and the FLSA, particularly given that the FLSA explicitly allows for state laws to be more protective than the FLSA. (See 29 U.S.C. §218(a).) Because this created a circuit split with the Fifth Circuit, the Supreme Court granted certiorari.

Justice Thomas, writing for a unanimous court, called the issue "a close question of statutory interpretation" but ultimately found more persuasive the company's argument that (1) there was no gap in the federal law that needed to be filled, and (2) California's laws were inconsistent with the FLSA because that would create two different standards on the OCS. Further, Justice Thomas opined that such an interpretation was consistent with the federal enclave model, as invoked by the OCSLA, and with past precedents construing the OSCLA.

15. ***Ridgeway v. Wal-Mart Stores, Inc.*,**
946 F.3d 1066 (9th Cir. Jan. 6, 2020)

Holding: Wage status in California turns on whether the employer exercises control, not whether the employee actively works.

Plaintiffs, long-haul truckers with hubs in California, sued in Alameda County Superior Court for wage and hour violations, including a minimum wage violation for Defendant's failure to pay at least minimum wage for each hour "worked," i.e., time Plaintiffs and similarly situated truckers were subject to Defendant's control. After being removed to federal court, Plaintiffs successfully obtained class certification from the district court. Plaintiffs further prevailed on a partial summary judgment, obtaining a ruling that Defendant's pay policy – if applied as written – might not fully compensate drivers for ten-hour layover periods the drivers were subject to by law, as well as some tasks that did not appear to be accounted for by Defendant's pay system. Trial was set for a jury to determine whether Wal-Mart had implemented the offending policies. After a question regarding the court's jury instruction regarding the layover periods, the jury awarded $44.7 million in unpaid layover time, $3.9 million in unpaid rest breaks, $2.9 million for uncompensated pre-trip inspections, and another $2.9 million for post-trip inspections.

On appeal, Wal-Mart argued layover periods are not compensable as a matter of law because the company cannot control an employee when he is on a legally-mandated break (both California and federal law requires truckers to take uninterrupted layover breaks, during which time they may take "sleeper berth" or "off duty" time). It also argued that even if layover periods were compensable,

the company did not exercise control over layovers in this case. It further argued that the district court erred in instructing the jury, and that California's minimum wage law was preempted by the Federal Aviation Administration Authorization Act ("FAAAA").

During layovers, truckers are not actively "driving" or "on duty," and their break must be a continuous 10-hour period. If a layover is interrupted, the ten hours begin anew.

The Court of Appeals for the Ninth Circuit acknowledged the logic behind Wal-Mart's argument that the company should not have to compensate drivers for time they are legally required to not work. But the Ninth Circuit held that the company exercised control over truckers even when the truckers took legally required breaks, and that the time therefore was compensable under California law. As the Court explained, "whether an employee deserves pay in California turns on whether the employer exercised control over the employee, not whether the employee is actively working." While the Court of Appeals acknowledged that the mere fact that Wal-Mart required its employees to take layovers did not prove it exercised control during those breaks, other evidence supported such a finding, including that the company restricted the movement of its truckers during the layover breaks by preventing truckers from going home during the layover without prior approval from management and reserved the right to discipline employees who did not comply with this policy. Thus, even though there was an exception to the rule (a trucker who sought and received permission to go home could do so), the default policy was to not allow employees to use their free time as they desired, which meant they were subject to Defendant's control during that time, regardless of whether they were performing labor. The Ninth Circuit drew from California Supreme Court authorities, including *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 (time employees were required to ride employer's buses to work meant they were subject to the employer's control, even if they were not "working") and *Mendiola v. CPS Sec. Sols., Inc.* (2015) 60 Cal.4th 833 (company exercised and retained control over security guards when it restrained them from leaving the workplace during break time). Further, substantial evidence showed other indicia of control during layovers, such as testimony that truckers understood they were supposed to sleep in the truck and needed permission to sleep elsewhere, that they could not have guests in the tractor or pets in the cab, that they were prohibited from consuming alcohol, and that they were not allowed to carry a personal weapon.

Having found the time was compensable, and that Defendant's policies did not account for paying for that time, the Court of Appeals affirmed the district court's rulings.

**16. *Rodriguez v. Nike Retail Servs, Inc.*,
928 F.3d 810 (9th Cir. June 28, 2019)**

Holding: Upholding *Troester*, the Ninth Circuit finds the federal *de minimis* doctrine does not apply to off-the-clock exit inspections and therefore they are compensable.

Defendant required all retail employees to undergo exit inspections each time they left the store. The employees had already clocked out, and the time it took to pass through the inspections was not compensated. Plaintiff brought a class action for the uncompensated time under California wage laws. The district court granted summary judgment, holding Plaintiff's claims were barred by the federal *de minimis* doctrine. Subsequent to the district court's decision, the California Supreme Court decided that the *de minimis* doctrine did not apply to wage and hour claims brought under California law. (*Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829.) Accordingly, the Court of Appeals for the Ninth Circuit reversed and remanded for further proceedings consistent with *Troester*.

Further, the Court noted that a genuine dispute existed between the parties as to how much time the inspections actually took, which therefore did not support affirmance of the district court's ruling on summary judgment.

**17. *Safeway Wage and Hour Cases*,
43 Cal. App. 5th 665 (Dec. 18, 2019)**

Holding: Court of Appeal reinforces that an employment task is not inherently exempt simply because a manager undertakes it to try to make the store operate more smoothly.

This appeal arose from a trial that was one of a series of cases in which former managers sued Defendant for misclassifying them as exempt employees. This case went to trial and the jury found the store had properly classified the assistant manager plaintiff as exempt. Plaintiff appealed the verdict, arguing that the trial court, relying on *Batze v. Safeway, Inc.* (2017) 10 Cal.App.5th 440 and *Heyen v. Safeway Inc.* (2013) 216 Cal.App.4th 795 (both decided by this same Court of Appeal), had erred by instructing the jury (in two separate jury instructions) to classify any given task as exempt work whenever a manger engages in such activity "because it contributes to the smooth functioning of the store..." Plaintiff further claimed the trial court improperly excluded certain expert witness testimony.

The Court of Appeal clarified that a work task is not made exempt simply because the manager performs it in trying to contribute to the smooth functioning of the store. The Court noted that a jury instruction, where appropriate, must inform the jury of the relevant principles that limit the scope of the exemption, as set forth in the applicable regulations (state and federal) and reinforced in prior decisions. In

other words, while the trial court commendably sought to fashion jury instructions consistent with the holdings in *Heyen* and *Batze*, because those prior opinions went into great detail about the regulations and governing principles regarding exempt versus nonexempt work the instructions at issue could have been confusing to a jury without being presented within that context. Ultimately, however, the Court held that in this case the instructions did not affect the jury's verdict.

At trial, the main issue was whether Plaintiff had spent more than 50% of his time on nonexempt duties (such as stocking shelves and checking groceries) or exempt managerial tasks (training, supervising, assessing store conditions, filling out financial reports, or disciplining employees). Per the federal regulations – referenced in each applicable wage order – certain tasks are easily identifiable as exempt or nonexempt, whereas others require examining the manager's purpose in performing such a task. Tasks that are "directly and closely related" to the management and supervision of employees may include time spent performing both exempt and nonexempt work. *See* 29 C.F.R. § 541.108(a). A jury instruction (such as the ones at issue in this case) regarding a manager's purpose would be relevant only if the actual tasks the purported exempt employee performs were not disputed and the defense theory invoked the "work directly and closely related" category (exemption status is an affirmative defense, the burden of whose proof rests with the defendant). Yet if the "work directly and closely related" is asserted, it would be improper for a trial court to instruct the jury that *any* task is exempt simply because it "contributes to the smooth functioning of the store." (The appellate court noted several nonexempt duties that would aid the store's operations, such as mopping the floor or returning shopping carts, that would not on their own be exempt duties.) In that instance, the defendant would have to show that the work performed by the manager, while seemingly identical to tasks performed by nonexempt subordinates, served a different function for the manager that was directly and closely related to the management and supervision of the store. For example, if the reason a manager stocked shelves or rang up customers was for training or demonstration purposes, as opposed to merely making the store's operations more efficient, this would fall under the "work directly and closely related" exemption defense.

In this case, Plaintiff alleged he was little more than a glorified stocker. Thus, the factual dispute was limited to which activities he performed and how much time he spent on each of them rather than his reasons for doing so. Despite the contested jury instructions, the jury rendered its verdict in less than two hours and sent no questions regarding the instructions. The Court of Appeal concluded that although the instructions at issue were largely irrelevant to the disputed issues at trial, there was no reasonable probability that Plaintiff would have prevailed had the instructions been omitted.

18. ***Salazar v. McDonald's Corp.*,**
944 F.3d 1024 (9th Cir. Oct. 1, 2019, amended 12/11/19)

Holding: Franchisor not liable for franchisee's wage and hour violations.

Plaintiffs brought a wage and hour class action for unpaid overtime, meal period or rest period premium wages, as well as negligence and PAGA civil penalties, alleging that Defendant and the franchisee ("Haynes") jointly employed them and others in eight McDonald's franchises in Oakland and San Leandro. The Ninth Circuit found the district court properly granted summary judgment, holding McDonald's was not the joint employer of Haynes's employees. The Court of Appeals analyzed the nature of the relationship between franchisor and franchisee pursuant to the California Supreme Court's seminal decisions, *Martinez v. Combs* (2010) 49 Cal.4th 35 (joint employer liability in the wage and hour context) and *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474 (franchisor liability in the FEHA context – sexual harassment). *Martinez* set forth three bases for finding joint employment: (1) whether the putative employer exercises control over employees' wages, hours or working conditions (the definition under the wage order); (2) whether the putative employer "suffers or permits [employees] to work," again from the wage order but a term that historically has meant the employer knew employees were working and failed to prevent the work from happening; and (3) the common law definition of employment, to "engage," in which the principal test for employment, as articulated in the seminal decision, *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations* (1989) 48 Cal.3d 341, is the entity's "right to control the manner and means of accomplishing the result desired," regardless of whether the putative employer actually exercises that control. *Patterson* held that franchisors are liable for franchisee conduct only if they have "retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees."

Haynes selected, interviewed, hired, trained, and set wages and schedules for its employees, as well as monitored their time entries and supervised, disciplined, and fired employees. McDonald's was not directly involved in the day-to-day operations. However, the franchisor required Haynes to use the McDonald's Point of Sale ("POS") and In-Store Processor ("ISP") computer systems to open and close each store. Further, Haynes managers took various courses at the McDonald's Hamburger University, and at least one McDonald's trained manager was required to be on premises at each Haynes franchise during each shift worked.

Plaintiffs argued that McDonald's' ISP system inflexibly failed to account for overtime hours as calculated in California (any time worked over 8 hours in a workday), causing workers to miss out on payment for many overtime hours, and that the ISP system did not schedule any rest breaks or flag when they were missed, nor did the system require second meal periods after 10 hours of work,

also in violation of California's wage and hour laws. Plaintiffs also argued the fact that McDonald's required Haynes' employees to wear McDonald's uniforms and keep them "clean and neat," yet their working conditions (e.g., working near hot grease) caused excessive soiling that required special cleaning by the employees, in violation of the wage order.

Plaintiffs and Haynes reached a class action settlement for injunctive and monetary relief and McDonald's moved for summary judgment that it was not the employees' joint employer and owed them no duty of care. The district court granted summary judgment and later granted McDonald's' motion to strike Plaintiffs' PAGA claims as unmanageable. McDonald's then filed another summary judgment motion, which also was granted, with the district court holding that the wage order's definition of "employer" (the first "control" prong under *Martinez*) precluded franchisor liability for wage and hour violations under a theory of ostensible agency (California agency principles support a theory of both actual and ostensible agency), i.e., that in order to be a joint employer the putative employer had to actually exercise control over employees' wages, hours or working conditions.

The Ninth Circuit found McDonald's did not fit the *Martinez* definition of employment under the first and third prongs, as it did not exercise control over the day-to-day operations of Haynes' employees. It also affirmed the district court's ruling on ostensible agency and denied the negligence claim, holding that McDonald's could not have been negligent because (a) the wage and hour claims against it failed, as a matter of law, and (b) it owed Haynes' employees no duty of care. The Court of Appeals did not reach the merits on the PAGA issue. It further rejected analyzing this case under *Dynamex Ops. West, Inc. v. Super. Ct.* (2018) 4 Cal.5th 903, holding that *Dynamex* only applies to independent contractors, which was not at issue here.

As to the "suffer or permit" prong, the majority reasoned that Plaintiffs misplaced their focus on the ISP system's responsibility on the alleged violations, holding that the question was whether McDonald's employed Plaintiffs and other Haynes employees, not whether it had caused the true employer to commit wage and hour violations "by giving the employer bad tools or bad advice." As the defendants in *Martinez*, McDonald's could not be held liable under the "suffer or permit" prong because it did not have the power to prevent Plaintiffs from working. The majority derisively dismissed Plaintiffs' interpretation of "suffer or permit" definition as having the potential to yield "absurd" results, proposing hypothetically that if an IT specialist had designed the ISP system (and not McDonald's) then the specialist would be liable for Haynes' wage and hour violations.

Chief Judge Thomas dissented, arguing the "remedial nature" of California's wage and hour laws compelled a broader interpretation of the "suffer or permit" prong and on that basis triable issues of material fact as to whether McDonald's

was a joint employer because it required Haynes to use a timekeeping system which caused the California wage and hour violations: "Reasonable inferences can be drawn that McDonald's had the ability to prevent wage-and-hour violations caused by its ISP system settings yet failed to do so."

19. ***Savea v. YRC, Inc.*,**
34 Cal.App.5th 173 (April 10, 2019)

Holding: Employer did not violate Section 226 with recognized fictitious name and 5-digit zip code.

Defendant listed its dba name instead of the name of the corporate entity and failed to provide the optional last four digits in its zip code (representing the zip code as 66211 instead of 66211-1213, as it did in its "complete" address) in the employer address portion of its employee wage statements. Plaintiff brought a PAGA representative action for failure to comply with Labor Code section 226, subdivision (a)(8). The trial court concluded Defendant's practice did not violate Section 226's requirements and neither the fictitious business name nor the shorter zip code caused any confusion, and therefore sustained Defendant's demurrer without leave to amend. Because Plaintiff, in his opposition, had asserted that Defendant's dba was not valid during the operative period, the trial court also took judicial notice of Defendant's fictitious business statement renewal filed in Sacramento County showing the dba was valid during the pendency of this litigation.

On appeal, the *Savea* court affirmed, finding the omissions did not rise to the level of a Code violation, and held the trial court did not abuse its discretion in considering additional evidence before reaching its decision. The appellate court distinguished this case from the seminal case of *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, finding that, unlike here, the employer in that case failed to list a recognized name for the employer (merely placing a logo in the corner of the wage statement with the name "SUMMIT") or any address at all. In addition, the *Cicairos* wage statements were "fraught with 'anomalies and confusing elements,'" including how the company itemized employees' hours worked, that did not appear here.

20. ***Senne v. Kansas City Royals Baseball*,**
934 F.3d 918 (9th Cir Aug 16, 2019)

Holding: District court's denial of class certification for choice-of-law provisions reversed.

Plaintiffs, both current and former minor league baseball players, brought a collective action under the FLSA and Rule 23(b)(2) and Rule 23(b)(3) class claims under state wage and hour laws from eight different states against Major League Baseball ("MLB"), its Commissioner, and several big-league franchises

for failure to properly pay the players during spring training. The district court preliminarily certified the FLSA collective but denied certification on the Rule 23 class claims, holding that common questions of law or fact did not predominate over questions affecting individual class members because (a) players performed work in dozens of different states and the proposed classes' choice of law issues made uniformity unattainable, and (b) Plaintiffs included claims for winter off-season work, which, in the eyes of the trial court, necessarily required "an overwhelming number" of individualized inquiries. For similar reasons, the court then decertified the FLSA collective, despite that notice had gone out to approximately 15,000 players and more than 2,200 had opted in. The district court also refused to certify a Rule 23(b)(2) on the grounds that Plaintiffs, all former players, lacked standing to represent current players. And it granted Defendants' motion to exclude Plaintiffs' expert survey, finding the survey's methodology and results did not satisfy the requirements of either *Daubert v. Merrell Dow Pharm., Inc.* (1993) 509 U.S. 579 or Federal Rule of Evidence 702.

Plaintiffs moved for reconsideration, and submitted new evidence, including a new expert survey which the court admitted under *Daubert*, and the court recertified the FLSA collective and certified a class based on California state claims but denied the Arizona and Florida classes, finding that the choice-of-law issues raised by the proposed Arizona and Florida classes made meeting Rule 23(b)(3)'s requirements of predominance and adequacy insurmountable and similarly rendered inappropriate certification of a Rule 23(b)(2) class (i.e., that final injunctive or declaratory relief must apply to all class members) for those states, as well.

The Ninth Circuit analyzed each aspect of the district court's rulings on the Rule 23 classes. As to choice-of-law provisions, the Court of Appeals held that practical considerations strongly supported applying California wage laws to work that had been performed in California, and in any event Defendants had failed to prove that another state's laws should apply to the California work, and therefore the district court had correctly determined that California law should apply to the California class. However, with respect to whether choice-of-law provisions defeated predominance and adequacy for the Arizona and Florida Rule 23(b)(3) classes, the Court of Appeals reversed the district court's ruling and concluded that Arizona law should apply to work performed in Arizona and Florida law should apply to work performed in Florida. Relying on the California Supreme Court's decision in *Sullivan v Oracle Corp.* (2011) 51 Cal.4th 1191, 1202, the Court applied California's three-step governmental interest analysis and found that each state had "the predominant interest in regulating conduct that occurs within its borders" (*Mazza v. Amer. Honda Motor Co.* (9th Cir. 2012) 666 F.3d 581, 592): (1) are the relevant laws (such as defining the term "work" or offering certain defenses) of each state the same or different; (2) if there are material differences, does a true conflict of laws exist if each jurisdiction applies its own law; and (3) if there is a true conflict, the court should weigh each

jurisdiction's interest in applying its own law to determine which jurisdiction would be more impaired by the application of another's laws and then apply the law of the state whose interest would be most impaired by having to apply the laws of another state.

Given the above, the Ninth Circuit also held that because the district court erred in its choice-of-law analysis, it improperly refused to certify the Rule 23(b)(2) class on similarly faulty grounds and, accordingly, the appellate court reversed the trial court's denial there, too. The Court of Appeals further found that the district court had erred by imposing a "cohesiveness" condition on the Rule 23(b)(2) class, which, though not required, traditionally mirrored a Rule 23(b)(3) predominance analysis and therefore was similarly flawed in this instance.

The Ninth Circuit then concluded Plaintiffs met the predominance requirement for the California, Arizona and Florida Rule 23(b)(3) classes through a combination of Defendants' failure to maintain proper timekeeping records (see the burden-shifting analysis in *Anderson v. Mt. Clemens* (1946) 328 U.S. 680) as well as the "continuous workday" doctrine (i.e., that work time is continuous throughout the workday even if broken up by periods of inactivity where the employee is waiting to be engaged). As to the former, under *Tyson Foods v. Bouaphekeo* (2016) 136 S. Ct. 1036, 1047, 1049, plaintiffs may introduce representative evidence in the absence of adequate records from the employer to fill that void even if there are questions about the probative value of the evidence because such questions should be resolved by a jury, not at class certification, and in this case Plaintiffs' evidence was sufficient. As to the latter, the Court of Appeals relied on the California wage orders' expansive definitions of "employ" ("to engage, suffer, or permit to work") and "hours worked" ("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") and concluded that Plaintiffs showed that there were many hours that the players were permitted to work even if not required and therefore subject to Defendants' control.

Finally, the Court of Appeals held that although the district court erroneously used an ad hoc approach to certify the FLSA collective, such error was harmless.

21. ***Southern Cal. Pizza Co., LLC v. Certain Underwriters, etc.*,**
40 Cal. App. 5th 140 (Sept. 20, 2019)

Holding: Certain claims in a wage and hour class action are covered under the EPLI policy.

Plaintiff owns and operates over 250 Pizza Hut and Wing Street restaurants and obtained an employment practices liability insurance ("EPLI") policy from Defendant. Plaintiff's employees brought a wage and hour class action, and Plaintiff sought coverage under the policy. Defendant largely denied the coverage, arguing that the claims in the putative class action fell within an

exclusion to the policy that limited costs of defense coverage to $250,000. Plaintiff filed suit for breach of contract and breach of the implied covenant of good faith and fair dealing. Defendant demurred to the complaint, which the trial court sustained.

The Court of Appeal noted that an insurer owes a broad duty to defend its insured against claims that create a potential for indemnity, and that the duty to defend is broader than the duty to indemnify. In either case, the terms of the policy control and should be interpreted to give effect to the parties' mutual intentions, as with any contract. Here, the policy provided, in relevant part, the following exclusion: "This Policy does not cover any Loss resulting from any Claim based upon, arising out of, directly or indirectly connected or related to, or in any way alleging violation(s) of an foreign, federal, state, or local, wage and hour or overtime laws(s), including, without limitation, the Fair Labor Standards Act…The wage, hour and overtime coverage provided by this endorsement applies only to Claims which seek wages earned solely and exclusively after the retroactive date listed in the Schedule of this endorsement; but where the wage, hour or overtime Claim was first made against you during the Policy Period." Applying the ordinary meanings of the words "wage" and "hour," and bolstering with the Labor Code definition of "wages" as "all amounts for labor performed by employees of every description" (§200), the appellate court interpreted "wage and hour…law(s)" to "refer[] to laws concerning duration worked and/or remuneration received in exchange for work."

The underlying class action included the following causes of action: statutory penalties for inaccurate wage statements (Labor Code section 226); statutory "waiting time" penalties (Labor Code section 203); failure to indemnify for necessary business expenditures (Labor Code section 2802); civil penalties under PAGA; and unfair competition (UCL, or Business & Professions Code section 17200, *et seq.*).

The Court referred to Labor Code section 226 as a "quintessential wage law" and that the 203 waiting time penalties also were wage laws and therefore both should have fallen under the policy's exclusion. However, the Court found that the 2802 claim, though statutory, was in the nature of a tort (and it highlighted that the Legislature could enact statutory torts) in that it was designed to vindicate a public policy of not burdening employees with the costs of their employer's business expenses. For that reason, the appellate court held, the 2802 claim was not a wage claim and therefore should have qualified for a full cost of defense, not capped at $250,000. Similarly, because the PAGA and UCL claims were, in part, derivative of the 2802 claim they, too, should have qualified for full defense protection under the policy. Further, it was error to sustain the demurrer as to the insurance bad faith claim because Plaintiff's allegation that the insurer had falsely represented that the wage claims were properly denied potentially fell under the

broader duty under the policy to defend, even if the wage claims themselves did not.

22. ***Stoetzl, et al. v. Dept. of Human Resources*,**
7 Cal. 5th 718 (July 1, 2019)

Holding: Applying an FLSA standard, California Supreme Court finds "duty-integrated" walk time is compensable for state employees, "entry-exit" walk time is not.

Plaintiffs represented a certified class of state correctional employees claiming unpaid time for pre- and post-work activities, which the California Supreme Court labeled "walk time" (even though the activities encompassed more than mere walking). The high court differentiated between "entry-exit" walk time, which it described as the time an employee spent after arriving at the prison's outermost gate but before beginning her or his first work-related activity (and a similar time upon leaving the facility), and "duty-integrated" walk time, defined as the time the employee spends after beginning her or his first activity but before arriving at her or his assigned work post. (The definitions intentionally mirrored the federal Portal-to-Portal Act of the FLSA.) The Supreme Court found that duty-integrated time was contemplated by the state's Pay Scale Manual ("Manual") as adopted by California's Department of Human Resources ("CalHR") and by additional CalHR regulations, whereas entry-exit time was not defined as compensable time in the Manual (the Manual incorporates the FLSA's narrower concept of compensable time, as interpreted by several U.S. Supreme Court decisions) and therefore was excluded from coverage.

The majority opinion acknowledged Wage Order No. 4 governs the type of employees at issue, and that the 2001 amendment expressly applies the wage order's minimum wage provisions (but not overtime compensation) to rank-and-file employees of the state government. The majority further noted that *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 (finding compulsory travel time on a company's bus qualified as "hours worked" under the wage order) arguably applied to both types of walk time contemplated here. However, the high court chose the Manual over a wage order, a different regulatory scheme that has been given great deference and force of statutory law by the Supreme Court in *Brinker*, a reversal of the Court of Appeal's decision, which held that the FLSA standard controlled the state employees' entitlement to overtime compensation but the wage order governed the meaning of "hours worked" and therefore the class was entitled to minimum wage pay for all hours worked, including entry-exit time. As the majority reasoned, "It is true that the IWC's wage orders are entitled to extraordinary deference and that they must be harmonized, to the extent possible, with conflicting laws and regulations, but that harmonization does not mean that the wage orders must invariably prevail over the regulations of other agencies." Indeed, the high court found, "the provisions of the Pay Scale Manual at issue here are best characterized as quasi-legislative rules."

The Court reasoned that the IWC adopted "general background rules" for all employees, whereas CalHR was delegated the more specific authority of establishing salary ranges for state employees and adopting FLSA overtime criteria, and to the extent the CalHR standards conflict with the more generally applicable standards of the wage order the Manual should prevail. The Court also rejected the argument that because both the Manual and the wage order used the word "control" the Manual intended to incorporate the wage order's broader definition of compensable work time.

Justice Liu, joined by Justice Cuéllar, dissented, lamenting, "Today's opinion takes insufficient account of our long history of deference to IWC wage orders and unnecessarily suggests that the Legislature's delegation of authority to CalHR is enough to afford its manual the same dignity as IWC wage orders. There is no reason here to address whether an ordinary statutory delegation of authority [CalHR] is equivalent to a constitutionally authorized delegation of legislative, judicial, and executive authority [IWC], let alone a delegation of authority that has been affirmed repeatedly, over nearly a century, by 'formal expressions of legislative and voter intent' construed to insulate the IWC's work from judicial interference.'" (*Martinez v. Combs* (2010) 49 Cal.4th 35, 61.) Justice Liu referred to the Court's discussion on this issue as mere dictum, but it remains to be seen how far-reaching the effects of this decision will be on the IWC wage orders moving forward.

23. *Su v. Stephen S. Wise Temple*,
32 Cal. App. 5th 1159 (Mar. 8, 2019)

Holding: Ministerial exception does not apply to wage and hour claims, summary judgment is reversed.

Labor Commissioner Julie Su brought a claim on behalf of approximately 40 preschool teachers at Defendant Temple (a Reform Jewish synagogue whose mission it is to promote Judaism and strengthen and serve the Jewish community) for unpaid overtime, meal period and rest period premium wages. The trial court granted summary judgment on the theory that the ministerial exception – a Constitutional doctrine which provides a complete defense for religious institutions against civil rights employment claims brought by employees classified as ministerial employees – applied to the teachers' wage claims. The Court of Appeal found the teachers were not required to have any formal Jewish education or to be proficient in Hebrew, were not referred to by Defendant nor did they self-identify as "ministers," were not ordained as religious leaders, were not required to have any knowledge about Jewish belief or practice, and were not required to adhere to Defendant's religious philosophy or even to be Jewish (which some were not). Further, the preschool curriculum contained both secular and religious content, although it was primarily secular in nature, with an introduction to Jewish values and holidays through music, song, and dance and

certain prayers (such as the grace before meals). Accordingly, the appellate court reversed summary judgment and remanded for further proceedings.

In filing its motion for summary judgment, Defendant relied heavily on the seminal Supreme Court case, *Hosanna-Tabor Evangelical v. E.E.O.C.* (2012) 565 U.S. 171, to argue the preschool was a religious school and its teachers "ministerial employees." The trial court agreed, reasoning that the ministerial exception was not limited to religious leaders and noting that prior cases had found preschool teachers could serve ministerial functions. The trial court found that the preschool fulfilled a religious obligation of the Temple and that the preschool teachers advanced Defendant's mission by implementing the religious elements of the curriculum. It highlighted the few prayers taught to the students, noted that the majority of students continued their religious education with the Temple after finishing their preschool schooling, and stated as undisputed that early Jewish education impacts not only the students themselves but also the Jewish identity of their parents and families. The trial court also found that Judaism does not require teachers be Jewish in order to teach the religion. Given the above, the trial court held that no reasonable juror could find the preschool teachers did not serve a ministerial function.

Grounded in the Religion Clauses of the First Amendment, the ministerial exception exempts religious institutions against Title VII claims from its ministers on the theory "that no branch of secular government trespasses on the most spiritually intimate grounds of a religious community's existence." (*E.E.O.C. v. Roman Catholic Diocese of Raleigh, NC* (4th Cir. 2000) 213 F.3d 795, 800). In *Hosanna-Tabor*, the Supreme Court upheld a church's right to fire a disabled (narcoleptic) teacher who had completed eight courses of theological study over a six-year period, passed an oral examination by a faculty committee, and received the formal title of "Minister of Religion, Commissioned," holding, "Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." (*Hosanna-Tabor*, 565 U.S. at 188.) The Supreme Court held that the decision of who would minister to the faithful should rest solely with a church.

Nevertheless, the high court established four criteria to evaluate those who qualify for the exception. First, the church held out the teacher as a minister, issuing her a "diploma of vocation." Second, she had the title of minister, which reflected her significant religious training and ordainment as a religious leader. Third, she accepted "the formal call to religious service" and claimed a special allowance on her taxes only available to ministerial employees. Fourth, she taught religion three times per week, led students in prayer three times per day, took students to school-wide chapel services once per week, and led the chapel service

approximately twice per year by selecting the hymns, choosing the liturgy, and delivering a brief sermon.

By contrast, the preschool teachers in this case received no formal training, were not required to accept the call to Judaism, and were neither ordained as nor held out to be ministers. The only thing they had in common with the *Hosanna-Tabor* teacher was that they taught religion in the classroom, which, the Court of Appeal acknowledged, played "a role in transmitting Jewish religion and practice to the next generation." Ultimately, the Court found the ministerial exception did not apply, as the preschool teachers did not "personify" the religious institution's beliefs nor "minister" to the faithful (*Id.* at 188-189) and therefore did not play a central role in the synagogue's life. Rather, the state court likened the preschool teachers here to the plaintiff in the recent decision in *Biel v. St. James School* (9th Cir. 2018) 911 F.3d 603, where another disabled teacher who taught lessons in Catholicism four days per week and incorporated religious themes into her classroom was not precluded by the ministerial exception from bringing suit under the Americans With Disabilities Act given that she was neither educated nor trained in the religion, and that the school held her out as a "teacher" rather than a "minister." The Court of Appeal also found persuasive *Herx v. Diocese of Ft. Wayne-South Bend, Inc.* (N.D. Ind. 2014) 48 F.Supp.3d 1168, 1176-77, in which a Catholic school teacher had not been ordained by the Church, had not received (nor was she required) any religious instruction or training to teach at the school, merely "supervised" prayer and religious services, and never held herself out nor was held out as a priest or a minister.

In a concurring opinion, Presiding Judge Edmon opined that *Hosanna-Tabor* was not implicated at all as that decision was admittedly narrowly decided on the issue of whether a religious should have the autonomy to choose its own spiritual leaders, which was not at issue in this case.

24. *Tijerino v. Stetson Desert Project*,
934 F.3d 968 (9th Cir. Aug. 16, 2019)

Holding: Employee status is not a jurisdictional bar to bringing a FLSA collective action.

Plaintiffs, a group of exotic dancers, brought an action for violations of the Fair Labor Standards Act of 1938 ("FLSA") and Arizona state wage laws in federal court. The district court denied Plaintiff's motion to certify an opt-in class and dismissed the case for lack of subject-matter jurisdiction after finding the dancers were independent contractors and not employees, reasoning that only employees could be parties to an FLSA action pursuant to Section 216(b).

The United States Court of Appeals for the Ninth Circuit, relying on *Arbaught v. Y & H Corp.* (2006) 546 U.S. 500, held the district court erred because the dancers' employment status was a merits-based determination, not a jurisdictional

issue; the limitation on the scope of Section 216(b) could only be considered jurisdictional if Congress clearly had indicated an intent for it to be jurisdictional, which, in the case of the FLSA, it did not. The Ninth Circuit also noted that courts historically have not treated the employment status provisions of Sections 203(e) and 216(b) as jurisdictional. The appellate court further found that Plaintiffs' claims were not so lacking in merit as to justify dismissal for lack of subject-matter jurisdiction on that basis, either.

25. ***Townley v. BJ's Rest.*,**
37 Cal. App. 5th 179 (July 8, 2019)

Holding: Restaurant did not violate Labor Code Section 2802 by requiring employees to wear and pay for slip-resistant shoes.

Plaintiff, a server at one of Defendant's restaurants, brought a PAGA-only action alleging that Defendant's policy and practice of requiring all hourly restaurant workers to wear black, slip-resistant, close-toed shoes and for the employees to purchase the shoes and to not be reimbursed for their purchases violated Labor Code section 2802's mandate that employers indemnify employees for "all necessary expenditures…incurred by [employees] in direct consequence of the discharge of [their] duties…" The Court of Appeal noted that Defendant's policy did not require its employees to purchase a specific shoe brand, style or design, nor did Defendant prohibit employees from wearing their work shoes outside of work.

Relying on persuasive federal precedent, *Lemus v. Denny's, Inc.* (9th Cir. 2015) 617 F. App'x 701, the Court here found that the shoes were not part of any uniform but rather an accessory to the uniform and part of the "basic wardrobe items which are *usual and generally usable in the occupation*…" *Id.* at 703. Accordingly, the shoes did not qualify as necessary business expenditures within the meaning of Section 2802, and the trial court's grant of summary judgment was affirmed.

26. ***Voris v. Lampert*,**
7 Cal. 5th 1141 (Aug. 15, 2019)

Holding: Conversion tort is not a proper remedy for wage loss.

The California Supreme Court upheld the Court of Appeal's decision in concluding that the tort of conversion is not a cognizable claim for failure to pay wages. The reasoning behind a conversion theory of unpaid wages is that wages vest when earned, thereby becoming the employee's personal property, and in failing to timely pay wages the employer has dispossessed the employee of his or her wages, i.e., engaged in wage theft. In this case, the high court acknowledged that prompt and complete payment of wages has long been the public policy of this state. However, it also cited long-standing authority that "money cannot be

the subject of an action for conversion unless a specific sum capable of identification is involved." *Haigler v. Donnelly* (1941) 18 Cal.2d 674, 681. The Court enumerated certain examples of conversion involving misappropriation or commingling of funds, or misapplying specific funds intended for another, generally in the sales or real estate transactional context, or even where a client fails to pay his attorney from settlement proceeds despite the attorney's lien on the settlement. However, it distinguished those scenarios from unlawfully withholding wages, reasoning that unpaid wages are to be paid from funds owned by the employer (or cannot be paid because the funds do not exist at all) and therefore the employee has never had ownership over the unpaid monies.

At its essence, the *Voris* court simply was uncomfortable blurring the common law distinction between contract claims and tort claims. It reasoned that a conversion claim was inappropriate because it is a strict liability tort that merely requires intent to deprive a plaintiff of his or her rightful possession, as opposed to a showing of bad faith, knowledge, or negligence, a standard which the Court was uncomfortable imposing on wage claims.

The majority opinion also rejected Plaintiff's (and the dissent's) argument that longstanding law, *Cortez v. Purolator Air Filtration Prods. Co.* (2000) 23 Cal.4th 163, 178, justified a conversion theory when the Supreme Court previously held, "earned wages that are due and payable pursuant to section 200 et seq. of the Labor Code are…the property of the employee who has given his or her labor to the employer in exchange for that property." The majority explained that unlawfully withheld wages should be considered an employee's property only in the limited context of the Unfair Competition Law ("UCL," Business and Professions Code 17200, *et seq*.), not the law in general, and that the *Cortez* court merely recognized a theory of equitable conversion for the purposes of a UCL award of restitution. *Id.*

In a scathing dissent, Justice Cuéllar, joined by Justice Liu, attacked the majority opinion for being inconsistent and not well-reasoned. Focusing on the practical realities of wage theft, he noted a recent study showing minimum wage violations alone cost California workers nearly $2 billion per year, and the effects of such a loss are farther-reaching, as workers who are deprived their wages spend less, slowing local economies, and less income paid decreases state and local tax revenues. Underpaying or not timely paying employees also gives offending business owners an unfair competitive advantage over their counterparts who follow the law. He also noted that wages are not ordinary debts (once earned, unpaid wages are the employee's property and are due and payable) and therefore "diverge from garden-variety contractual promises to pay a debt."

Justice Cuéllar could not reconcile the majority's analysis of the applicability of *DIR v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084. In that case, the DLSE could have brought conversion action for unpaid wages on behalf of the affected employees; Justice Cuéllar questioned why a state agency was allowed to sue

under a conversion theory on workers' behalf but those same workers did not have the same remedy available to them to recover the wages they had already earned. Nor could he understand how the majority was willing to apply a conversion theory to Plaintiff's claims for unpaid stocks but not to his claims for unpaid wages, since the tort is an action that applies to "every species of personal property."

Justice Cuéllar also parted ways from the majority's finding that it was "notable" no prior California decision had recognized a conversion claim for withheld wages; rather, he found it persuasive that plaintiffs have routinely included conversion claims in wage cases for many years, citing numerous cases from 2007 to 2015 supporting such a theory, from trial courts to the California Supreme Court, and no party had yet presented any evidence of any ill effects of proceeding under such a remedy. In fact, he noted that the other remedies available at the time Plaintiff filed suit were inadequate. Thus, he could not agree with the majority's opinion that conversion was not "the right fit for the wrong" or "an appropriate remedy." Ultimately, he warned, "What happened to Voris, in effect, leads to a badly distorted and fundamentally unfair marketplace for both labor and consumers."

27. *Wojciechowski v Kohlbeg Ventures, LLC*,
923 F.3d 685 (9th Cir May 8, 2019)

Holding: Claim preclusion did not bar employee's WARN Act claims against non-signatory to a class action settlement; intent of settling parties determined preclusive effect.

Plaintiff brought a class action alleging violations of the federal Worker Adjustment and Retraining Notification ("WARN") Act against parties other than Defendant in this action, and six days after the filing those entities filed for bankruptcy. Plaintiff then brought an adversary class action in the bankruptcy court, and that action settled and was approved by the bankruptcy court, which closed the case soon after. Plaintiff then filed this class action against Defendant, alleging a "single employer" theory (that Defendant was affiliated with the other entities in some way and therefore should be held liable for WARN Act damages) and seeking the value of the WARN Act damages minus the amount that had already been recovered in the bankruptcy action. Defendant moved to dismiss this action arguing claim preclusion and the district court granted the motion, reasoning that Defendant could not be bound by the settlement from the bankruptcy action because it had not been a party to that action and had not consented to allow Plaintiff to split his claim.

The Court of Appeals rejected this reasoning, holding that in order to determine the preclusive effect of a dismissal with prejudice of an action based on a settlement agreement courts must look to the intent of the settling parties. In the bankruptcy action, the parties agreed to explicitly preserve claims against "any

third parties which may or may not be affiliated with [the entities declaring bankruptcy], including but not limited to [Defendant]." Because the language was clear and unambiguous, and specifically referred to Defendant, the class claims against Defendant should not have been precluded.

Defendant conceded that Plaintiff could pursue this class action but argued that it should not be bound by the terms of the bankruptcy settlement (which preserved claims against Defendant) because it was not a party to the proceedings nor did it agree to the settlement's terms. The Ninth Circuit disagreed, clarifying that the parameters of the preclusive effect of the contract set the scope of the preclusion in the instant class action as a matter of the law of preclusion, not as a matter of contract. As such, it was irrelevant that Defendant was a non-signatory to the bankruptcy settlement agreement because the Court was not going to impose any obligations on Defendant pursuant to the agreement. Rather, what controlled was that the settling parties intended for claims against Defendant to be available. Moreover, the Court held, if Defendant's argument carried the day it would mean that the Court would be giving the settlement agreement greater preclusive effect than the parties intended, and the Court lacked the power to do that.

28. ***Zakaryan v. The Men's Wearhouse, Inc.*,**
33 Cal. App. 5th 659 (March 28, 2019)

Holding: PAGA claims may not be split, wage component cannot be compelled to arbitration.

Plaintiff, a store manager for Defendant, filed a representative action under the Labor Code Private Attorneys General Act of 2004 ("PAGA") for misclassifying all store managers as exempt employees and failing to pay overtime, meal period, and rest period premium wages (as well as derivative claims for inaccurate wage statements and waiting time penalties). Defendant moved to compel Plaintiff's individual damages claims to arbitration. However, Plaintiff brought an action under Labor Code section 558, which, in addition to a $50/$100 penalty per aggrieved employee per pay period (with all recovered penalties split between the State and the aggrieved employees, 75% to the State and 25% to the employees), also provides for an amount sufficient to recover underpaid wages to be paid directly to the aggrieved employees. The issue before the Court of Appeal was whether Plaintiff's share of the wage component could be compelled to arbitration. The Court recognized a split of authority at the appellate court level, with *Esparza v. KS Indus., L.P.* (2017) 13 Cal.App.5th 1228 holding wage component claims could be severed and sent to arbitration, and *Lawson v. ZB, N.A.* (2017) 18 Cal.App.5th 705 holding they could not. (*Lawson* has since been decided and definitively has settled the issue; see below.)

First, *Zakaryan* noted that the weight of authority overwhelmingly favors the *Lawson* decision, that PAGA claims (which cannot be compelled to arbitration) may not be severed to send a portion of a PAGA claim to arbitration. Second,

after noting the legislative purpose of PAGA and a brief history of arbitrable claims – concluding, as did the California Supreme Court in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, that PAGA claims are not matters of private dispute and therefore not subject to arbitration under the FAA – *Zakaryan* held that splitting a PAGA claim was both legally impermissible under the primary rights doctrine and inconsistent with existing law regarding both wage and hour conflicts and arbitration.

Under the primary rights theory, a "primary right" is a plaintiff's right "to be free from the particular injury suffered." The same primary right can be at stake even when there are two separate actions involving the same parties, each seeking compensation for the same harm. Thus, splitting a PAGA claim violates this core principle, since the action is for a single "particular injury" suffered by the public, which state agencies (through private individuals, as deputized under PAGA) are charged with safeguarding. *Zakaryan* reinforced that the individual representative plaintiff's "personal claim" for underpaid wages is "not at stake" in a PAGA action, and indeed PAGA plaintiffs may bring an action for PAGA and their own individual claims; similarly, PAGA actions do not have preclusive effect on other aggrieved employees from bringing their own individual actions.

The appellate court further noted three reasons why splitting a PAGA claim would contravene California's wage and hour protections. First, the plain language of the statute suggests that it is a single civil penalty, albeit with two components. Second, a PAGA action, fundamentally, is a representative action, i.e., a PAGA plaintiff represents the state agency and all other aggrieved employees in enforcing penalties for violation of state labor laws. The portion of the penalties in a PAGA action awarded to the aggrieved employees (25%) are an incentive for more private citizens to step forward as private attorneys general and prosecute claims on behalf of California, *not* "victim-specific relief" for private grievances; trying to split the civil penalty on those grounds undermines the legislative purpose of the statute and existing case law. Third, an employee is welcome to file an action for her individual claims in lieu of a PAGA action, but if she chooses to file a representative action only, splitting the claim in two undermines what she originally elected to do and renders her decision meaningless.

The *Zakaryan* court added confusion to one issue in holding that the amount recovered to satisfy underpaid wages had to be split 75-25 between the State and all aggrieved employees, rather than with the individual employees directly.

29. ***ZB, N.A. v. Super. Ct. of San Diego County*,**
8 Cal. 5th 175 (Sept. 12, 2019)

Holding: Only fixed amounts, not wage component, comprise Section 558 PAGA penalty.

2019, A *Dynamex* Year of Change: *Lawson*, *OTO*, *Salazar*, and More

In a much-anticipated decision, the California Supreme Court definitively decided that the wage component of Labor Code section 558 ("an amount sufficient to recover underpaid wages") is not part of the civil penalty that a private citizen can recover through a representative action under the Labor Code Private Attorneys General Act of 2004 ("PAGA") but rather a compensatory remedy only available to the Labor Commissioner ("DLSE"), as Section 558 does not create a private right of action. Thus, even though "Wages recovered pursuant to [Section 558] shall be paid to the affected employee," the wages may only be collected through a DLSE claim. The decision overturns the holdings in *Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112 and its more recent progeny (such as *Atempa, et al. v. Pedrazzani* (2018) 27 Cal.App.5th 809, *Carrington v. Starbucks Corp* (2018) 30 Cal.App.5th 504, *Zakaryan v. The Men's Wearhouse, Inc*. (2019) 33 Cal.App.5th 659 (see above), and *Mejia v. Merchants Bldg. Maintenance, LLC*, 38 Cal.App.5th 723) (see above) that the wage component is part of the PAGA civil penalty, as opposed to a separate claim for damages. In so ruling, the high court also laid waste to the argument that such damages are the type of "victim-specific relief" that could be compelled to arbitration; after all, if employees cannot claim wage damages under Section 558, they cannot be compelled to arbitrate on that basis, either.

The Court began its analysis by drawing a distinction between restitution of unpaid wages – which employees could recover directly long before PAGA was enacted and which primarily seek to compensate employees for actual losses incurred – and civil penalties, which are "fundamentally a law enforcement action designed to protect the public and not to benefit private parties" (*Arias v. Super. Ct.* (2009) 46 Cal.4th 969, 986) and which are an additional remedy to actual loss. It then reviewed the legislative history of Section 558, which reflected that the statute authorized the Labor Commissioner "to issue citations, including an assessment of civil penalties, for overtime and other workday violations." It further analyzed the sentence construction of the clause in question (a fixed dollar amount "for each underpaid employee for each pay period for which the employee was underpaid <u>in addition to</u> an amount sufficient to recover underpaid wages"), finding that the better reading of the phrase "in addition to" was not that the penalty included the underpaid wages but rather that the compensation for the underpaid wages (actual losses incurred) was in addition to the civil penalty to be imposed. As the Court reasoned, payment of wages addresses the injury the employee has suffered, whereas penalties address the employer's bad conduct.

Finally, the Court looked to Labor Code section 1197.1, which it found analogous to Section 558 and "remarkably similar" in structure, language and purpose, for guidance on harmonizing the fixed penalty portions of Section 558(a) ($50/$100) and the wage component. The Court, reading both Code sections (which reference each other) in tandem, concluded that the citations the Labor Commissioner may issue for wage loss pursuant to Section 558 were compensatory in nature and not penalties. The finding also resolved the

inconsistency created by *Zakaryan, supra*, 33 Cal.App.5th at 673-674, which held that 75% of the wage portion had to go the state despite the statute's clear language directing such payments to go directly to the affected employee.

The Court further noted that the "vast majority" of civil penalties in the Labor Code are fixed amounts; having a recoverable amount under Section 558 that could vary wildly would be inconsistent with this scheme.

Interestingly, the Court reinforced PAGA's mandate that an employee could "pursue or recover other remedies available under state or federal law…concurrently with an action taken under this part." (Cal. Lab. Code § 2699(g)(1).) The holding supports an argument that PAGA actions should not be stayed in court while arbitrations are pending but should proceed at the same time, since their objectives (recovery of fixed penalties for the state vs. recovery of varying compensatory damages) are separate and distinct.

II. REVIEW GRANTED

30. *Donohue v. AMN Servs., LLC*, (review granted by Cal. Supreme Ct., March 27, 2019)

Holding: Rounding policy case taken up on review by the California Supreme Court.

This case was reviewed in last year's materials, repeated here. Plaintiff filed a wage and hour class action contending it was unlawful for the employer to round punch in and out times to the nearest ten-minute increment. The trial court granted a motion for summary adjudication on the issue of whether the employer's policy of rounding punch in and out times to the nearest 10-minute increment complied with California law, finding that the rounding policy was facially fair and neutral and did not result, over a period of time, in the failure to compensate employees for all time actually worked. The Court of Appeal affirmed that time-rounding can be applied to the timekeeping of meal periods as well as to timekeeping of the beginning of an employee's shift.

On March 27, 2019 (shortly after last year's Annual Symposium), the California Supreme Court granted review of this case and depublished the Court of Appeals decision. The case is still pending at the high court.

31. ***Ferra v. Loews Hollywood Hotel*,**
40 Cal. App. 5th 1239 (Oct. 9, 2019)

Holding: Labor Code section 226.7's "regular rate of compensation" (meal and rest periods) is not the same as section 510(a)'s "regular rate of pay" (overtime).

Labor Code section 226.7, subdivision (c) provides a remedy of one hour at the employee's "regular rate of compensation" for each day an employer fails to provide a legally required meal or rest period. The question at issue in this case was how to calculate that regular rate of compensation: should it signify the employee's "straight time" rate of pay (i.e., the contracted base hourly wage), or should it be viewed as case law has developed around calculating regular rate for purposes of calculating overtime premium wages of 1.5 or 2.0 times the "regular rate of pay" (Section 510(a)), meaning including a prorated amount of all other forms of remuneration in the base rate of pay before multiplying by the premium factor? Importantly, the overtime regular rate of pay can vary from pay period to pay period, including such considerations as shift differentials, bonuses, and commissions. (*See Alvarado v. Dart Container Corp. of Calif.* (2018) 4 Cal.5th 542.) The Court of Appeal, relying on statutory construction and what it considered to be persuasive federal district court decisions, upheld the trial court's opinion that the phrases have different meanings and therefore calculations of meal and rest period premium wages should be limited to straight time pay, without additional compensation. The appellate court rejected Plaintiff's argument that both phrases' "regular rate" should be interpreted as used in the FLSA (including additional compensation) and that "pay" and "compensation" should be seen as interchangeable.

The Court of Appeal also found that Defendant's facially neutral rounding policy (grace periods of seven minutes before the scheduled shift start time and six minutes after the beginning of the shift) did not undercompensate its employees in a systematic manner. Plaintiff claimed the data showed the rounding policy was not neutral as applied, arguing that her records show she was underpaid 55.1% of the time and overpaid only 22.8% of the time, with the remaining shifts unaffected by the rounding policy. Similarly, a sample group revealed 54.6% of underpaid shifts, as opposed to 26.4% of overpaid shifts, and the rest unaffected. The appellate court did not find that data sufficient to show the undercompensation was "systematic" over a period of time. (*See See's Candy Shops, Inc. v. Super. Ct.* (2012) 210 Cal.App.4th 889, 901-902.)

Presiding Judge Edmon wrote a lengthy dissent, analyzing California wage law history and noting that the Labor Code uses the terms "pay" and "compensation" interchangeably.

The California Supreme Court has granted review but limited it to the compensation issue and did not depublish the appellate decision. (456 P.3d 415

(Jan. 22, 2020)). Perhaps the high court declined to consider the rounding issue in light of its pending decision in *Donohue v. AMN Servs., LLC*, 436 P.3d 899 (2019), to which the majority cited in its holding.

32. *Gonzales v. San Gabriel Transit*,
40 Cal. App. 5th 1131 (Oct. 8, 2019)

Holding: *Dynamex* ABC test applied retroactively and to Labor Code claims enforcing the wage order's protections, not just wage order claims.

Plaintiff filed a wage and hour case stemming from the misclassification of over 550 drivers as independent contractors who worked for a transit company that provided transportation services to passengers of public and private entities. Plaintiff moved for class certification, which the trial court denied for lack of commonality (claims were not subject to common proof) and that Plaintiff's claims were not typical of the members of the proposed classes. While this matter was pending, the California Supreme Court issued its seminal decision in *Dynamex Ops. West, Inc. v. Super. Ct.* (2018) 4 Cal.5th 903 regarding independent contractor analysis. The Court of Appeal found: (1) *Dynamex*'s "ABC" test applied retroactively to pending wage and hour litigation (Defendant did not address the issue on appeal, and this case did not involve a new standard or law that affected public policy); (2) The ABC test applied equally to Labor Code sections, not just the wage order under the "suffer or permit" standard (see *Martinez v. Combs* (2010) 49 Cal.4th 35), so long as the Labor Code provision sought to enforce the same fundamental protections afforded by the wage order; and (3) Labor Code claims not covered by the applicable wage order were appropriately analyzed under the common law "control" test, as set forth in *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations* (1989) 48 Cal.3d 341. The appellate court remanded the case to the trial court and instructed the trial court to re-analyze the case in light of *Dynamex* with the following parameters: apply the ABC test to those Labor Code claims that vindicated rights preserved in the wage order; apply *Borello* to those Labor Code claims that did not enforce the wage order; apply either the ABC test or *Borello*, as appropriate, to each underlying predicate claim for the derivate UCL (§17200) claim; and certify any claims the trial court felt would be superior to alternative adjudicative methods.

Importantly, the *Gonzales* court expanded on *Dynamex* – which limited to the ABC test for misclassification to claims brought under a wage order – finding that Labor Code claims either rooted in one or more wage orders or predicated on conduct that violated a wage order should be subject to the ABC test. If not, the Court held, then *Borello* analysis should govern. Though Defendant argued that such a ruling would create inconsistency and interfere with *Dynamex*'s stated aim of providing clarity, the Court of Appeal reasoned that because the wage orders establish basic requirements for wages, hours, and working conditions, applying the ABC test to Labor Code claims vindicating those same rights was consistent with the California Supreme Court's intent. In fact, the Court cited the high

court's rationale in *Dynamex*, which referenced the fact that different wage and hour standards exist under the FLSA in noting that California was following a federal model when it determined it could provide broader coverage of workers related to the "fundamental protections afforded by wage and hour laws and wage orders." *Dynamex*, 4 Cal.5th at 948.

Like *Vazquez v. Jan-Pro Franchising Int'l* (see below) before it, *Gonzales* has now been taken up by the California Supreme Court to determine whether *Dynamex* should be applied retroactively. (*See* 456 P.3d 1 (Jan. 15, 2020).) However, the high court denied requests to depublish the appellate court decision.

33. ***Naranjo v. Spectrum Security Servs., Inc.*,**
40 Cal. App. 5th 444 (Sept. 26, 2019)

Holdings: (1) Hourly employees entitled to meal period premium wages even when paid for on-duty meal periods; (2) meal period violations do not support derivative penalty claims; and (3) trial court erred by denying certification of a rest break class.

This class action was filed in June 2007 and still is active.

Plaintiff, representative of a certified class of guards for a federal contractor (the guards take temporary custody of federal prisoners and immigration detainees and transport them offsite for medical treatments or other appointments), filed class action for claims of meal period violations (unpaid premium wages), rest period violations (unpaid premium wages), derivative claims for Labor Code section 226 (wage statement) statutory penalties and Labor Code section 203 ("waiting time") statutory penalties based on the unpaid meal and rest period compensation, and attorney's fees.

Defendant had two different employee manuals during the relevant period, neither of which allowed for breaks "other than using the hallway bathrooms for a few minutes." Moreover, the handbooks did not include a separate on-duty meal period agreement, revocable in writing. Instead, four months after Plaintiff filed this lawsuit, Defendant issued a one-page policy document, "Memorandum 33," which provided, "Meal and rest periods must be taken" and reaffirmed the company's longstanding policy that both meal and rest periods were "on duty" and that employees agreed that on-duty meal periods were a condition of continued employment and that the document could be revocable at any time in writing. There was a signature line for employees on "Memorandum 33." Plaintiff had not signed the document because he had been terminated (for leaving his post for a meal period) before he filed suit.

The trial court heard Plaintiff's class certification motion before the California Supreme Court issued its seminal decision on meal and rest periods, *Brinker Rest. Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004. The trial court certified the meal

period and 226/203 penalties classes but denied certification of the rest break class, finding common questions did not predominate despite acknowledging that Defendant had a company-wide policy of not permitting required rest breaks. The court declined to revisit the motion after *Brinker* was issued, and the parties proceeded to trial in three phases: (1) bench trial on Defendant's affirmative defenses (Defendant lost); (2) jury trial on the meal break cause of action (the trial court granted a directed verdict on the pre- Memorandum 33 subclass and the parties stipulated to damages, then the jury returned a defense verdict on the Memorandum 33 subclass); and (3) bench trial on the derivative penalties (trial court found 226 and 203 liability for meal period violations on the pre-Memorandum 33 subclass). Both sides appealed: Defendant on whether 226 and 203 penalties should have been awarded for meal period violations, and Plaintiff for denial of the rest break class.

The Court of Appeal held as follows:

(1) At-will, on-call, hourly, nonexempt employees who are paid for on-duty meal periods worked also are entitled to meal period premium wages if the employer does not have written on-duty meal period agreements;

(2) Unpaid meal period premium wages are entitled to prejudgment interest at 7%;

(3) Unpaid meal period premium wages cannot serve as a predicate for derivative 226 or 203 penalties;

(4) If 226 penalties are unavailable, attorney's fees are not available pursuant to Section 226, subdivision (e); and

(5) The trial court erred by denying certification of a rest break class.

The California Supreme Court has since granted review but has denied requests to depublish the appellate court's decision. (455 P.3d 704 (Jan. 2, 2020)).

34. *Vazquez v. Jan-Pro Franchising Int'l*, 939 F.3d 1050 (9th Cir. Sept. 24, 2019)

Holding: Ninth Circuit holds *Dynamex* "ABC" Test applies retroactively, certifies that as a question to the California Supreme Court.

A three-member panel of the United States Court of Appeals for the Ninth Circuit held that the "ABC" test adopted by the California Supreme Court in *Dynamex Ops. West Inc. v. Super. Ct.* (2018) 4 Cal.5th 903 for determining whether employees were misclassified as independent contractors applied retroactively to a district court's pre-*Dynamex* grant of summary judgment and remanded the matter back to the trial court for further proceedings. The Court of Appeals

reasoned that the *Dynamex* decision did not change a settled rule upon which the parties had relied and therefore the general principle that judicial decisions apply retroactively held true for *Dynamex*.

In particular, the Ninth Circuit noted, "*Dynamex* did not fabricate the ABC test anew, but instead carefully explained how the test remains 'faithful to the fundamental purpose of [California's] wage orders,'" thereby clarifying rather than departing from existing law. The appellate court also found persuasive Plaintiff-Respondents' argument that post-*Dynamex* appellate courts in California have applied the test retroactively. The Court of Appeals further found that applying *Dynamex* retroactively was consistent with due process, per the rational basis test, because extending the protections of California's wage orders to its workers retroactively ensures the fundamental purposes of the wage orders would be respected, as articulated in *Dynamex*, and therefore such a holding would be neither arbitrary nor irrational.

On rehearing four months later, the Court of Appeals certified its finding as a question to the California Supreme Court, which is still pending as of this publication.

III. CLASS ACTION FAIRNESS ACT OF 2005 ("CAFA")

35. *Arias v. Residence Inn by Marriott*, 936 F.3d 920 (9th Cir. Sept. 3, 2019)

Holding: (a) District courts may not remand actions previously removed pursuant to the Class Action Fairness Act of 2005 ("CAFA") without affording the defendant the opportunity to show by a preponderance of the evidence that jurisdictional requirements were satisfied; (b) In assessing the amount in controversy, a removing defendant is permitted to rely on reasonable assumptions; (c) Attorneys' fees awardable under fee-shifting statutes or contracts are includable in the amount in controversy.

Arias filed a putative class action against Marriott in state court, alleging that Marriott failed to compensate its employees for wages and missed meal breaks and failed to issue accurate itemized wage statements. Marriott removed the action to federal court alleging diversity jurisdiction under the Class Action Fairness Act ("CAFA"). The district court *sua sponte* remanded the case back to state court. Marriott filed a petition for permission to appeal under 28 U.S.C. § 1453(c)(1), which the Ninth Circuit granted. The Ninth Circuit vacated the district court's *sua sponte* order, concluding it erred in three ways.

First, when a notice of removal plausibly alleges a basis for federal court jurisdiction, a district court may not remand the case back to state court without first giving the defendant an opportunity to show by a preponderance of the evidence that the jurisdictional requirements were satisfied. By remanding the

case to state court sua sponte, the district court deprived Marriott of a fair opportunity to submit proof.

Second, a defendant's showing on the amount in controversy element may rely on reasonable assumptions. Marriott's notice of removal included personnel and payroll data, and using that data, Marriott estimated the amount-in-controversy by making assumptions that were plausible and may prove to be reasonable in light of allegations in the complaint. Assumptions made part of the defendant's chain of reasoning need not be proven; they instead must only have "some reasonable ground underlying them." The district court erred by imposing a requirement that Marriott prove it actually violated the law at the assumed rate.

Third, the Ninth Circuit reiterated its position that when a statute or contract provides for the recovery of attorneys' fees, prospective attorneys' fees must be included in the assessment of the amount in controversy. The court refused to adopt an estimated 25% of potential recovery, as Marriott suggested, and instead remanded to the district court for determination.

36. ***Ehrman v. Cox Comm'ns, Inc.*,**
932 F.3d 1223 (9th Cir. Aug. 8, 2019)

Holding: A party who removes a case to federal court pursuant to CAFA need not provide any evidence of the parties' citizenships if the removing party's citizenship allegations are not met with a factual or as-applied challenge. In such cases, all a removing party must do is provide a short and plain statement of the grounds for removal.

David Ehrman ("Ehrman") filed a class action complaint against his internet service provider, Cox Communications ("Cox") in state court. Cox removed the case to federal court pursuant to the Class Action Fairness Act ("CAFA"). Cox alleged in its notice of removal that the suit met CAFA's removal requirements because it was a putative class action with more than 100 class members, there was minimal diversity between the parties, and the amount in controversy exceeded $5,000,000. Cox, a purported citizen of Delaware and Georgia, asserted based on information and belief that Ehrman and all class members are citizens of California. Ehrman then moved to remand the case to state court, arguing that Cox failed to adequately plead the existence of minimal diversity because Cox relied "purely on an allegation of residency and on 'information and belief.'" The district court granted Ehrman's motion to remand. The Ninth Circuit reversed.

The Ninth Circuit first reiterated that CAFA confers jurisdiction on federal district courts over class actions when, among other things, any member of a class of plaintiffs is a citizen of a state different from any defendant. The court noted that Congress enacted CAFA with the "intent to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications." Accordingly, a removing party in a CAFA action need only plead minimal

diversity. The removing party must file in the district court a notice of removal containing a short and plain statement of the grounds for removal. The allegation may be based on information and belief and need not contain evidentiary submissions.

Because Cox alleged on information and belief that Ehrman was a citizen of California, its jurisdictional allegations were sufficient. The court noted that "Cox did not have to explain why it believed Ehrman or the putative class members were citizens of California." In the absence of a factual or as-applied challenge, the allegation based on information and belief alone was sufficient.

The Ninth Circuit also found that the district court erred by placing on Cox a burden to prove its jurisdictional allegations in response to Ehrman's facial challenge to the legal adequacy of Cox's notice of removal. A facial challenged accepts the truth of the removing party's allegations but asserts that they are insufficient on their face to invoke federal jurisdiction. Accepting the truth of Cox's allegations, Ehrman is a citizen of California. Cox should not have been required to present evidence in support of its allegation of minimal diversity.

IV. CLASS ACTION ISSUES

37. *Grande v. Eisenhower Med. Ctr.*, 2020 WL 582961 (Feb. 06, 2020)

Holding: New class action allowed to proceed against client company after Plaintiff settled class action with staffing company because client was not in privity with the staffing agency.

Plaintiff, a nurse, was assigned to work at Defendant hospital by staffing agency FlexCare, LLC. Plaintiff brought a wage and hour class action against FlexCare and settled that class action as the named class representative. About a year later, she brought another class action based on the same wage claims, this time against Defendant. The staffing agency intervened in the second action, contending that Plaintiff could not assert claims against Defendant because she had released them pursuant to the prior settlement agreement. The trial court held a bench trial limited to this issue and found that Defendant was not a released party under the language of the settlement and therefore could not assert res judicata preclusion because it was neither a party to the prior action nor was it in privity with the staffing agency. The Court of Appeal affirmed the trial court's decision, agreeing with the lower court that Defendant was neither an affiliated company nor an agent of the staffing agency.

The Court of Appeal, relying on the California Supreme Court decision of *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, began its analysis with the concept that a plaintiff has the option of suing parties who are jointly and severally liable on an obligation either in the same action or in separate actions.

Id. at 818. It then favored the reasoning in *Serrano v. Aerotek, Ltd.* (2018) 21 Cal.App.5th 773 over that in *Castillo v. Glenair, Inc.* (2018) 23 Cal.App.5th 262, in part because the *Grande* court felt the *Castillo* court had failed to apply the test for privity articulated in *DKN*, namely, whether (1) the nonparty to the prior action shares an identity or community of interest with one of the parties to the prior action and (2) there was an adequate expression of that community of interest in the first action such that the nonparty should reasonably have expected to have been bound by the outcome of the first suit. Instead, *Castillo* focused on whether the subject matter of each lawsuit was the same and the party and nonparty shared the same relationship to the subject matter, not to each other. The *Grande* court felt that primarily focusing on the subject matter shortcut the analysis; the first step to determining whether claim preclusion applies is to analyze whether the two actions have the same causes of action and only then inquire about the relationship of the two entities to those causes of action. If the party seeking claim preclusion was not a party to the first action, then the inquiry follows the *DKN* analysis. By focusing almost exclusively on the parties' relationship to the subject matter of the two lawsuits, *Castillo* missed the mark. The *Grande* court also differed from *Castillo* in holding that the simple fact that both a staffing agency and its client are involved in paying employees their wages is insufficient to find that a staffing agency and its client are in privity with one another.

Here, the nurses' employment agreements gave the staffing agency "exclusive and total legal responsibility as the employer of" the nurses. Further, the settlement agreement in the first class action did not release Defendant or any other client of the staffing agency by name, nor did it release a category of the staffing agency's clients, and Defendant was not included in the definition of released parties, such as the staffing agency, its affiliates and officers, and other defined standardized language regarding present and former subsidiaries, parent companies, franchisors, etc. Moreover, when Plaintiff sued the Defendant hospital in the second lawsuit, she did so on behalf of workers placed by *any* staffing agency, not just the agency that had settled with her in the prior action. Thus, the appellate court held the trial court had properly found there was no privity between the defendants in the two lawsuits and Plaintiff was free to continue with her class action against Defendant.

38. ***Hance v. Super Store Indus.*,**
44 Cal. App. 5th 676 (Jan. 23, 2020)

Holding: Attorney fee division agreement unenforceable because of failure to disclose lack of professional liability insurance.

In January 2012, Attorney A referred Plaintiff to Attorney B. Attorney B recognized the potential for a class action but also acknowledged that he had limited experience with class actions, so he associated in Attorney C, whom he believed was qualified to handle a class action, and Plaintiff became the putative

class representative. Attorney C added a second representative and brought on Attorney D to help perform work on the case. (Attorney C also enlisted the help of a contract attorney, but she did not make a separate claim for her fees.) Attorney B remained as attorney of record and monitored the case's progress but performed no further work. Attorney A performed no work at all on the case. Attorney B and Attorney C negotiated a fee arrangement that Attorney C would pay Attorney B a 30% referral fee and would pay Attorney A's 15% referral fee.

In 2014, Attorney C added a third putative class representative. The new client's retainer agreement did not reference Attorneys A or B. Attorney C failed to tell the third representative that Attorney B was also an attorney of record on the case and failed to tell Attorney B that he had added a third representative.

By 2015, a dispute had arisen between Attorney B and Attorney C regarding the fee arrangement. Although Attorney B initially had obtained consent to the above fee split from each class representative, the third putative class representative subsequently retracted his consent.

In 2016, the parties reached a class action settlement. Attorney C moved for final approval of the settlement. Attorney B filed his own fee motion, seeking the 30% to which he believed the attorneys had agreed in 2012. On June 2, 2017, the trial court approved the settlement, including the following fee allocation: 15% to Attorney A, 30% to Attorney B, 5% to Attorney D, and the remaining 50% to Attorney C. Attorney C appealed, arguing (1) the attorneys never reached a final agreement to the terms of the fee arrangement, (2) written consent by all represented clients had not been obtained, (3) Attorney B purportedly had breached the fee agreement, and (4) Attorney B had failed to advise the clients that he did not carry professional liability insurance.

The Court of Appeal reversed, holding that the failure to disclose the lack of professional liability insurance – a disclosure that was required under the California Rules of Professional Conduct ("Rules") – voided any fee agreement that had been reached because precedent established that violations of the Rules at the time of contract formation can render a contract unenforceable. The Court found that upholding the fee agreement in the face of this violation would run contrary to the Rules' dual purposes of protecting the public and promoting respect and confidence in the legal profession and effectively would condone the violation. The appellate court rejected Attorney B's argument that Attorney C had colluded with Attorney B in failing to inform the class representatives of Attorney B's lack of professional liability insurance, as Attorney B had informed Attorney C (but not the clients) shortly after they reached a fee agreement that he lacked insurance and Attorney C discouraged Attorney B from informing the representatives for fear they would seek other counsel. Regardless of Attorney C's behavior, Attorney B was the one who had the obligation to inform the clients that he lacked coverage.

Nevertheless, the Court of Appeal did not agree with Attorney C that Attorney B should be limited in his recovery of fees, as a matter of law, solely to the work he had performed on the case (quantum meruit). The Court pointed to the fact that all parties and the trial court had approved a 15% award to Attorney A even though he performed *no* work at all on the case. Accordingly, the appellate court remanded for a redetermination of the fees Attorney B should recover, whether on a quantum meruit basis or on some other grounds.

39. ***Myers v. Raley's*,**
32 Cal. App. 5th 1239 (March 12, 2019)

Holding: Trial courts must justify denials of class certification.

Plaintiff technicians brought claims for travel time and meal period violations, as well as failure to reimburse necessary business expenditures (tools). The trial court denied class certification, conclusorily finding that Plaintiffs had failed to establish predominance without setting forth any analysis of how it had reached its decision. Given that the trial court issued its ruling before both *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522 and *Jones v. Farmers Ins. Exchange* (2013) 221 Cal.App.4th 986 were decided, the Court of Appeal remanded the matter in an abundance of caution for the trial court to fully consider the other appellate decisions and to provide a more robust explanation of its denial of certification.

The *Myers* court found the *Jones* case particularly instructive and cautioned that the same facts and arguments Defendant offered here had been set forth in *Jones* yet the appellate court there had overturned the denial of class certification, reasoning that liability rested on the existence of a uniform policy rather than how it was applied, which merely affected individual damages determinations. The *Jones* court found reversible error in the trial court's decision to elevate individual issues concerning the right recover damages over evaluating whether a theory of recovery was amenable to class treatment. Here, Defendant submitted declarations in opposing the motion for class certification that purported to negate the deposition testimony of its own Persons Most Qualified regarding the company's policies and practices by offering that some employees had not suffered the same damages that Plaintiffs alleged. The *Myers* court referenced *Ayala* as a reminder that the relevant inquiry is whether the company's control over its employees is sufficiently uniform such that classwide treatment is proper. In other words, the issue at certification is not the extent to which a company exercises control over its employees but whether its right to control the labor performed is common to all workers.

The Court of Appeal could not tell from the record which evidence or considerations the trial court had relied upon in its ruling, nor could it ascertain why the trial court found that common issues did not predominate. Because

Defendant's arguments mirrored those of the *Jones* defendant, the *Myers* court reversed and remanded for further analysis.

40. ***Roes v SFBSC Mgmt, LLC*,**
944 F.3d 1035 (Dec. 11, 2019)

Holding: Reversed approval of pre-certification of a class action settlement where there were numerous problems, including subtle signs of implicit collusion such as a disproportionate cash distribution to attorney's fees justified in part by potentially inflated non-monetary relief, large incentive awards to two plaintiffs, and reversionary clauses.

Exotic dancers ("Appellants") working at nightclubs allege that SFBSC misclassified them as independent contractors resulting in violations of both the FLSA and California labor laws. Appellants challenged the district court's approval of a class action settlement arguing both the notice and the amount were inadequate, partially because worthless coupons were given too much weight and indicia of collusion were not given enough weight.

The court disagreed with Appellants that notice was inadequate because it lacked information about parallel litigation but agreed with Appellants that notice was inadequate because it was sent only once and by mail. Failing to distribute the notice by email or provide a reminder, as is routine, prevented the notice given from being "reasonably calculated to apprise all class members of the settlement." This was especially true given that 12% of the mailed notices were undeliverable. Posters hung up at the nightclubs did not render notice adequate given that former employees who did not receive notice by mail would not be apprised by such posters.

The court noted a higher standard of fairness was required for the settlement at issue because it occurred prior to class certification. As a result, the district court erred in applying a presumption of fairness when reviewing the settlement. First, a "clear sailing" agreement on attorney's fees is a warning sign that the court must scrutinize before approving a settlement – the district court did not engage in such scrutiny even though more money was awarded to the attorneys than to the class members. Second, the district court failed to address Appellants concern that the coupons called "dance fee payments" cannot be accorded full face value given the expiration date. Third, the different mechanisms of payment, cash vs. coupon, rendered the district court's obligation to ensure adequate representation by the attorneys more difficult because they cannot do a direct comparison of the payments. Such careful consideration was not employed as to the likely inflated valuation of the injunctive relief either.

Similarly, the court did not apply any factors, such as actions taken to benefit the class or amount of time and effort expended, to justify the high incentive payments awarded from the common fund to the named plaintiffs. The amount

relative to the cash payments given to class members, and the presence of an advance guarantee that named plaintiffs would receive a certain sum, should have raised additional concerns regarding collusion.

Finally, the court found that reversionary funds create perverse incentives, so while such funds are not banned, their presence provides yet another sign that the court needs to investigate fairness. Again, the district court did not engage in such an investigation despite the presence of reversionary funds.

As a result, the court vacated the district court's approval and remanded the case so that the required scrutiny could be applied.

41. ***Williams v. Impax Laboratories, Inc.*,**
41 Cal. App. 5th 1060 (Nov. 8, 2019)

Holding: Plaintiff's appeal from a second order dismissing class allegations is denied under the death knell doctrine.

Plaintiff filed a class action and the trial court granted Defendant's motion to strike class allegations, holding Plaintiff was not an adequate class representative but granting leave to amend the complaint with a new representative. Instead, Plaintiff re-filed the class allegations. The court again struck down the class allegations. Plaintiff appealed the second order striking class allegations. The Court of Appeal denied the appeal under the death knell doctrine, holding it only had jurisdiction to review a first order extinguishing the class claims.

The doctrine, a "tightly defined and narrow" exception to the one-final-judgment rule, provides that an order is immediately appealable when it is tantamount to a dismissal of a class action for all members other than the plaintiff when the order effectively terminates the entire action. However, a plaintiff who fails to directly appeal such an order waives the right to later appeal and the order becomes final and binding. Orders that qualify for the death knell doctrine include a trial court's sustaining of a demurrer to class allegations without leave to amend, a denial of class certification, or a grant of a motion to decertify a class. *See Naranjo v. Spectrum Sec. Servs., Inc.* (2019) 40 Cal.App.5th 444, 478.

Plaintiff argued the first order was not subject to the death knell doctrine because the trial court granted her leave to amend her complaint and the class claims were not completely extinguished until the second order. The Court of Appeal held Plaintiff mischaracterized the effect of the first order, that by striking class allegations the trial court had already removed them from the case, which left Plaintiff as the sole plaintiff in an individual action. The appellate court distinguished this case from *Aleman v. AirTouch Cellular* (2012) 209 Cal.App.4th 556, upon which Plaintiff primarily relied, in which the plaintiffs were denied class certification without prejudice because they were inadequate representatives

yet the order was not subject to the death knell doctrine. Unlike the instant case, the order in *Aleman* neither struck nor dismissed class allegations.

Because Plaintiff failed to appeal the first order, and it was properly subject to the death knell doctrine, she waived her right to appeal the second order.

V. ARBITRATION

42. *Bakersfield College v. Calif. Cmty College Athletic Ass'n*, 41 Cal. App. 5th 753 (Oct. 31, 2019)

Holding: Athletic association's arbitration agreement held to be both procedurally (contract of adhesion) and substantively (lacking mutuality) unconscionable.

Plaintiff Bakersfield College (the "College"), joined by the head coach of the football team and the Kern County Community College District (collectively, "Plaintiffs") filed suit in civil court against Defendant California Community College Athletic Association (which administers intercollegiate athletics for the California community college system) following denial of Plaintiffs' internal appeal through Defendant's appellate process after Defendant sanctioned and penalized Plaintiff for supposed violations of Defendant's bylaws as they pertained to providing football players with meals and access to work and housing opportunities not available to other students. Rather than pursuing binding arbitration, as required by Defendant's constitution and bylaws, Plaintiffs filed a petition for writ of mandate and a complaint for breach of contract, violation of the fair procedure doctrine, and injunctive relief.

Defendants compelled arbitration, arguing Plaintiffs had failed to exhaust their administrative remedies. The trial court found four bases for why the arbitration provision was a contract of adhesion (Defendant had drafted the provision, the College had no ability to negotiate its terms, the College could not opt out of the provision, and the College had no meaningful choice but to accept the terms of the provision) and therefore contained "at least a minimal degree" of procedural unconscionability. However, the trial court also held that "the right to propose and vote on amendments to the constitution and bylaws lessens (if not eliminates) the adhesive nature of the arbitration provision," and therefore found in favor of Defendant.

The Court of Appeal disagreed, finding that whether the College had the right, as an Athletic Association member, to vote on amendments *after* it had joined the association and the contract had been formed was completely irrelevant to the unconscionability analysis, since unconscionability is determined at the time the contract was formed. The appellate court further disagreed that the fact that the College was a sophisticated party supported a finding of no procedural unconscionability (even large business entities may have relatively little

bargaining power), nor did it find persuasive Defendant's argument the contract contained a lack of surprise, reasoning that if a contract is found to be adhesive then the element of surprise is not at issue.

Having found procedural unconscionability, the Court of Appeal analyzed the provision for substantive unconscionability and found the provision lacked mutuality because under the provision the College and its students or employees could only bring certain claims against Defendant yet Defendant was not subject to the same limitations, nor did it have to submit to the same internal appeals process as did Plaintiffs. The Court found other examples of unilaterality, including a shortened limitations period, a one-way attorney's fee provision (in favor of Defendant), and Defendant's exclusive ability to secretly select the individuals on the master arbitration panel list. The one-sided nature of the provision, combined with the adhesive nature of the contract, was enough for the appellate court to decide the provision was permeated with unconscionability and therefore unenforceable.

43. ***Bravo v. RADC Enter., Inc.*,**
33 Cal. App. 5th 920 (March 29, 2019)

Holding: Choice-of-law provision in arbitration agreement does not favor California procedural law over the FAA.

Plaintiff, a store manager, brought individual and representative claims under The Labor Code Private Attorneys General Act of 2004 ("PAGA"). The trial court severed the PAGA claims, staying them in court, and compelled only some of the individual claims to arbitration, reasoning that although the Federal Arbitration Act ("FAA") applied, there also was a choice-of-law provision in the agreement which meant the parties intended for California law to apply. Specifically, the trial court found that Labor Code section 229 precluded Plaintiff's wage claims from being compelled to arbitration, and accordingly the trial court sent only three of Plaintiff's nine causes of action to arbitration. The Court of Appeal reversed the trial court's ruling, holding that the choice-of-law provision did not negate – nor was it inconsistent with – the parties' signed agreement that all claims or disputes arising out of Plaintiff's employment, "including any claims brought by the Employee related to wages" should be arbitrated. Relying in part on *Preston v. Ferrer* (2008) 552 U.S. 346, the appellate court reasoned that the choice-of-law provision meant that the parties intended for California substantive law to apply but not for any procedural law that would interfere with the parties' intent to arbitrate all claims arising out of Plaintiff's employment.

The *Bravo* court also found the trial court misapplied California Code of Civil Procedure section 1281.2(c) and corresponding case authority, holding that the statute applies where there is related litigation between a party to the arbitration agreement and a third party not bound by it, and in this case there were no third parties.

44. ***Clifford v. Quest Software, Inc.*,**
38 Cal. App. 5th 745 (July 23, 2019)

Holding: UCL claims for private injunctive relief or restitution can be arbitrated, claims for "public" injunctive relief cannot.

Plaintiff filed an individual wage and hour complaint (not asserting class claims) and included a claim for unfair business practices under Business and Professions Code section 17200 ("Unfair Competition Law," or "UCL"). Plaintiff's wage claims were predicated on his allegation that he was misclassified as an exempt employee. Defendant moved to compel arbitration and the trial court granted the motion as to all causes of action except the UCL claim, which it stayed pending the completion of the arbitration.

The Court of Appeal noted that the issue of whether UCL claims are arbitrable in any case turns on the type of relief the plaintiff seeks. Relying on the California Supreme Court case *Cruz v. PacifiCare Health Systems Inc.* (2003) 30 Cal.4th 303 (and the case referenced by the *Cruz* court, *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066), the *Clifford* court distinguished UCL claims for restitution (arbitrable) from public injunctive relief (inarbitrable) and highlighted what often is referred to as the *Broughton-Cruz* rule (barring from arbitration claims seeking public, but not private, injunctive relief). Where a plaintiff seeks relief that only redresses or prevents injury to a single plaintiff, that cannot be considered public injunctive relief. Thus, the *Clifford* court concluded that because the *Broughton-Cruz* rule does not apply to claims seeking private injunctive relief, the UCL claim in this case could be compelled to arbitration, assuming an otherwise valid and enforceable arbitration agreement. In so doing, the Court rejected Plaintiff's argument that his complaint alleged a claim that was public in nature by alleging that Defendant had benefited and profited unfairly and that Defendant should disgorge its ill-gotten gains; the Court of Appeal noted that Plaintiff's allegation was a claim for restitution, not injunctive relief, and even if it benefited Defendant's current employees it still would not be "public" injunctive relief as defined by *Broughton-Cruz*. Nor did the Court agree that the addition of a cause of action for PAGA penalties would have any impact on the private nature of the UCL claim.

The Court also declined to decide whether the FAA applies to or preempts the *Broughton-Cruz* rule.

45. *Davis v. TWC Dealer Group, LLC*,
41 Cal. App. 5th 662 (Oct. 30, 2019)

Holding: Arbitration petition properly denied, attorneys admonished.

This opinion was published more for the Court of Appeal's anger with the conduct of counsel for the defendants-appellants than for the merits of the appeal:

> This is an appeal from an order denying a petition to compel arbitration. We easily affirm the order. And we publish to also affirm – to remind the profession of – the importance of candor toward the court.

Briefing on the appeal concluded in July 2019. On August 29, 2019, the California Supreme Court issued the seminal arbitration decision of *OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111 (see below). The holding in the *Kho* decision was favorable for the plaintiff in this case. In advance of oral argument, the Court of Appeal instructed counsel for defendants-appellants to be prepared to discuss two issues: (1) to explain why Appellants had omitted 38 of the 49 lines of the arbitration provision when quoting it in their opening brief, and (2) why they had not advised the Court of the *Kho* case. The Court directed the parties to footnote 9 in *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, which specifically addresses the issue of presenting known case authorities directly on point with the issues on appeal to the Court, even when adverse to the party's position.

In its opinion, the Court noted that defense counsel sent to oral argument an associate whose name did not appear on the briefs and who admitted he had not even read the *Batt* footnote nor had he spoken with the attorney who wrote the brief – who no longer worked for the firm – and therefore the associate had no answer as to why so much of the arbitration provision had been omitted from the opening brief. As to the failure to advise the Court of the *Kho* case, counsel argued that it was "different," despite that the Court found *Kho* to be directly on point with the instant case given its unconscionability analysis, particularly procedural unconscionability. The Court then devoted the final six paragraphs of its opinion to a history of the California Rules of Professional Conduct, noting that the Rules were revised effective November 1, 2018, and specifically highlighted Rule 3.3, "Candor Toward the Tribunal," before concluding, "It is hard to imagine legal authority more 'directly adverse to the position of' TWC than *Kho* [and] hard to imagine a more obvious violation of Rule 3.3."

46. ***Diaz v. Sohnen Enterprises*,**
34 Cal. App. 5th 126 (Apr. 10, 2019)

Holding: Employee consented to arbitration where arbitration was a condition of her continued employment and where she presented no evidence of substantive unconscionability.

Plaintiff filed a complaint for workplace discrimination on December 22, 2016, while she was still employed by Defendant. Twenty days earlier, Defendant had provided notice at an in-person meeting that it was adopting a new dispute resolution policy which included a requirement to arbitrate all claims. Defendant's Chief Operating Officer submitted a declaration in support of Defendant's motion to compel arbitration that she had informed all employees at the meeting about the new dispute resolution agreement and that any employee who continued her employment signified her acceptance of the agreement, even if she refused to sign. Plaintiff refused to sign the agreement after meeting with company representatives, who separately advised her (in a private meeting) in both English and Spanish, that her continued employment would signify her acceptance of the agreement. Plaintiff clearly rejected the agreement and continued working for Defendant.

On December 23, 2016, Plaintiff's counsel served the complaint on Defendant. On January 17, 2017, Defendant sent plaintiff's counsel a demand for arbitration; counsel did not reply. In April 2017, Defendant filed its motion to compel arbitration, which the trial court denied solely on the basis of procedural unconscionability (it was a contract of adhesion, presented on a "take-it-or-leave-it" basis) without any substantive unconscionability analysis.

The Court of Appeal concluded Plaintiff had consented to arbitration because the record was clear that arbitration was a condition of her continued employment. (*See Pinnacle Museum Tower Ass'n v. Pinnacle Market Dev. (US), LLC* (2012) 55 Cal.4th 223, 236.) Moreover, because Plaintiff's employment was at-will, Defendant could unilaterally change the terms of her employment provided it gave her notice of the change (which it did) and such change did not violate a statute such as the Labor Code or breach an express or implied agreement of contract (which it did not). (*See Schacter v. Citigroup* (2009) 47 Cal.4th 610, 619-620.)

The Court further found that Plaintiff had not shown the arbitration agreement was unenforceable because it was not harsh or one-sided, despite its adhesive nature (on its own, not a sufficient basis to deny enforcement), nor did it contain any surprise or other sharp practices. Accordingly, it found she waived any argument that the agreement itself was unconscionable.

Judge Segal wrote a lengthy dissent, mostly arguing there were enough factual disputes in the record below that the Court of Appeal should have deferred to the

trial court's findings, and that in any event the appellate court had applied the wrong standard of review, that de novo review or even substantial evidence was too onerous a burden to place on Plaintiff and that the majority should have reviewed under an abuse of discretion standard; and further, that Defendant had not meet its burden on appeal of proving the parties had agreed to arbitrate. Moreover, Judge Segal lamented that the decision placed too much power in the employer's hands and removed review from the courts: "I believe that courts, not employers, should determine whether there is an implied agreement to arbitrate…the [majority's] decision gives employers the unilateral power to create an implied agreement simply by announcing that continued employment will constitute acceptance, no matter how strongly or clearly the employee manifests his or her rejection of the proposed agreement."

47. ***Franco v. Greystone Ridge Condominium*,**
39 Cal. App. 5th 221 (Aug. 27, 2019)

Holding: Arbitration agreement governing claims "Related to Any Aspect of Employee's Employment With Employer (pre-hire through post-termination)" applied to employee's claims despite that the employee had filed a civil complaint before signing the agreement.

Plaintiff filed a complaint for a number of FEHA claims (disparate treatment, hostile work environment, and failure to prevent discrimination, harassment, or retaliation) as well as a host of wage and hour claims. Earlier that same month, Defendant rolled out an arbitration agreement, which was presented to Plaintiff just days before he filed his complaint. Plaintiff informed Defendant's Vice President that he (Plaintiff) had a scheduled meeting with a lawyer, and the VP assumed Plaintiff would be discussing the arbitration agreement during that meeting. Plaintiff signed the arbitration agreement two days after he filed the civil complaint; Defendant was unaware at the time Plaintiff signed that he had filed a complaint. The trial court denied Defendant's motion to compel arbitration, holding that Defendant had not shown Plaintiff either agreed in advance of signing the agreement to arbitrate his claims or agreed that the agreement should be applied retroactively.

The Court of Appeal reversed, finding that the language of the arbitration agreement was all-inclusive of Plaintiff's claims because Plaintiff agreed to submit to final and binding arbitration "[a]ny and all claims…relating to any aspect of Employee's employment with Employer (pre-hire through post-termination)." The appellate court reasoned that the agreement did not contain any language limiting or restricting the age of the covered claims or any other qualifying language. Moreover, the Court relied on *Salgado v. Carrows Rests., Inc.* (2019) 33 Cal.App.5th 356, 361-362, for the proposition that arbitration agreements "'may be applied retroactively to transactions which occurred prior to execution of the arbitration agreement.'"

48. ***Heimlich v. Shivji*,**
7 Cal. 5th 350 (May 30, 2019)

Holding: A request for costs pursuant to an offer to compromise in arbitration can be before or after arbitral award; however, arbitrator's denial of costs not vacated.

Defendant hired Plaintiff to handle various intellectual property matters. Plaintiff had an arbitration provision in his retainer agreement. After Defendant paid some but not all of Plaintiff's contractual fees, Plaintiff sued Defendant in court. The disputed fee amount was approximately $125,000. After a year in civil litigation, Defendant successfully moved the claims to arbitration.

In arbitration, Defendant made two offers to compromise pursuant to CCP § 998, one for $30,001 and another for $65,001, neither of which Plaintiff accepted. At the arbitral hearing, Defendant sought a refund for the $176,000 he had already paid Plaintiff and Plaintiff sought his unpaid fees of $125,000. After the hearing, the arbitrator awarded each side $0, with each side to bear its own fees and costs. Post-award, Defendant introduced the 998 offer and sought costs, since Plaintiff had failed to achieve a more favorable result at arbitration. The arbitrator rejected the costs demand, reasoning that once he issued his final award, he lost jurisdiction to take any further action. Defendant filed a motion in court to confirm the award and attached a memorandum of costs seeking over $76,000. The trial court confirmed the award but denied the costs requests.

The Court of Appeal reversed, holding that the post-award costs application to the arbitrator was timely, reasoning that a "section 998 determination necessarily must postdate an arbitration award" and that a 998 offer to compromise "cannot be given in evidence upon the trial or arbitration."

The California Supreme Court overruled, deciding that evidence of a 998 offer could be presented either before or after an arbitrator issues a final award, and that litigants need not choose one over the other. The high court reasoned that the allocation of costs was an issue the arbitrator, not a court, should have determined, and that Defendant's introduction of the evidence a mere six days after the arbitrator issued the final award was timely. Under CCP §§ 1284, 1286.6, and 1288.4 (part of the California Arbitration Act, "CAA") vest continuing jurisdiction in the arbitrator for at least 10 and as many as 30 days after filing and serving the final award. The CAA also provides implicit authority for an arbitrator's continued jurisdiction. (CCP §1283.4.) And, given that Section 998 was amended in 1997 to place parties in arbitration on equal footing with those in civil actions yet Section 998 does not specify a timeline for seeking costs, the Supreme Court held that California Rules of Court Rule 3.1700 should govern the timeliness of submitting a costs application in arbitration following a 998 offer.

Accordingly, the high court provided the following clarity: within 15 days after the issuance of a final award, a party in arbitration may submit a cost request asserting the rejection of a prior 998 offer, and the arbitrator has implicit power under Section 998 to consider the request and amend the final award.

However, in this case the arbitrator's final award could not be vacated because Defendant had not presented any evidence of fraud, corruption, misconduct or any other acceptable basis for correcting the arbitrator's evidence. Indeed, "ordinary errors in ruling on costs are not subject to correction, nor do they serve as a basis for vacating an award."

49. ***Lacayo v. Catalina Restaurant Grp, Inc.*,**
38 Cal. App. 5th 244 (Aug. 1, 2019)

Holding: UCL claim for injunctive relief cannot be compelled to arbitration.

Plaintiff filed a wage and hour class action, also alleging injunctive relief under the UCL, seeking to represent a class of restaurant assistant managers or salaried employees who earned less than twice minimum wage (in other words, a misclassification/exemption action). Defendant successfully moved to compel Plaintiff's individual claims to arbitration; the arbitration agreement had a class action waiver and a provision that the arbitrator had exclusive authority to interpret or enforce the agreement, but it also specifically carved out claims for "immediate injunctive and/or equitable relief for unfair competition" to be petitioned in court. It also specified that it would be governed by the Federal Arbitration Act, not its California corollary.

The trial court denied Defendant's motion to dismiss the class and injunctive claims, however, staying them instead pending the resolution of the arbitration. Procedurally, Defendant argued that the recent U.S. Supreme Court case, *Lamps Plus, Inc. v. Varela* (2019) 139 S. Ct. 1407 (see below), stood for the proposition that the partial denial of their motion to compel was appealable. The Court of Appeal rejected this argument, distinguishing *Lamps Plus* because in that case the district court ordered a class arbitration (which the Ninth Circuit approved) as the agreement there was vague as to whether the parties had agreed to classwide arbitration. Here, by contrast, the trial court did not order classwide arbitration but rather left that decision to the arbitrator. The Court of Appeal similarly rejected Defendant's argument that *Truly Nolen of Amer. v. Super. Ct.* (2012) 208 Cal.App.4th 487 supported the notion that the Court of Appeal should construe Defendant's appeal in this case as a petition for writ of mandate; the Court ruled that Defendant had filed an appeal, not a writ. This left only the UCL claim for review.

As to the merits of the trial court's denial of sending the UCL claim to arbitration, the Court of Appeal affirmed the ruling, finding that the clear language of the agreement both precluded sending UCL claims to arbitration and provided that

the FAA, not the CAA, would govern, which meant the agreement should not be interpreted through the lens of the CAA.

50. ***Lambert v. Tesla*,**
923 F.3d 1246 (9th Cir. May 17, 2019)

Holding: Section 1981 race claims may be compelled to arbitration.

Plaintiff filed a claim of race harassment, discrimination and retaliation under 42 U.S.C § 1981. Defendant moved to compel arbitration and Plaintiff opposed, arguing that § 1981 claims were not subject to compulsory arbitration. The Court of Appeals for the Ninth Circuit disagreed, holding that § 1981 claims are arbitrable.

The Court reviewed the history of § 1981 claims and other civil rights claims that had been held to be arbitrable, such as age discrimination, but noted that precedent cautioned that while "all statutory claims may not be appropriate for arbitration," "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." (*Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 23 (quoting *Mosses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24).) The Court also noted that Congress enacted the Civil Rights Act of 1991 to reflect the *Gilmore* decision and in § 118 of the statute codified that "alternative means of dispute resolution, including…arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title."

In reaching its decision, the Ninth Circuit relied on its en banc decision in *E.E.O.C v. Luce, Forward, Hamilton & Scripps* (9th Cir. 2003) 345 F.3d 742. The Court of Appeals agreed with the district court's logic that if *Luce, Forward* mandated that Title VII claims could be subjected to arbitration then so could § 1981 claims. After all, *Gilmer* instructed that whether claims brought under a particular statute could be arbitrated depended on the statute's text or legislative history, or whether arbitration presented an "inherent conflict" with the statute's underlying purpose, and § 118 specifically encouraged arbitration "[w]here appropriate and to the extent authorized by law." The *Luce, Forward* court concluded that nothing in Title VII directly *precluded* compulsory arbitration agreements. Similarly, the Court here found no conflict between forced arbitration and § 1981 claims.

Chief Circuit Judge Thomas concurred that the right result was reached, given the precedent to which the Court of Appeals was bound, but lamented (somewhat after the fact) that *Luce, Forward* was wrongly decided, arguing the decision ignored the legislative history of § 118 which specifically shows that Congress "plainly thought that the [1991] Act did not allow employers to force their workers to sign compulsory arbitration clauses forfeiting their right to trial by jury

in Title VII cases." (*Luce, Forward*, 345 F.3d at 766 (Reinhardt, J., dissenting).) In this light, compelling arbitration *would* conflict with congressional intent.

51. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (Apr. 24, 2019)

Holding: Class arbitration is unavailable unless specified in the arbitration agreement.

The United States Supreme Court extended its interpretation of "silence" in an arbitration agreement as to classwide arbitration, as first contemplated in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Cor.* (2010) 559 U.S. 662, i.e., that parties may only be compelled to submit to class arbitration if they agreed to such a term. In the wake of *Epic Systems Corp. v. Lewis* (2018) 138 S. Ct. 1612 and its concept of "traditional individualized arbitration," the high court held that parties to agreements that are "ambiguous" as to class arbitration may not be compelled to arbitrate on a classwide basis because such agreements do not provide the necessary "contractual basis" for class arbitration. *Stolt-Nielsen*, 559 U.S. at 684.

Plaintiff sued Defendant after a fraudulent tax return was filed in his name following a data breach into the company's personnel data. Plaintiff brought state and federal claims on behalf of a putative class of employees whose tax information had been compromised. The district court granted Defendant's motion to compel arbitration but compelled class arbitration. The Ninth Circuit upheld the ruling, reasoning that *Stolt-Nielsen* did not control because, unlike that case in which the parties had expressly stipulated that their agreement was silent as to classwide arbitration, no such stipulation existed here. Instead, the Court of Appeals found that the arbitration agreement was ambiguous as to class arbitration, as certain clauses suggested the language of the agreement was broad enough to have contemplating class arbitration, and, according to California law, construed the ambiguous language against the drafter of the document. *See Sandquist v. Lebo Auto., Inc.* (2016) 1 Cal.5th 233, 248.

The *Lamps Plus* court acknowledged that courts may ordinarily interpret arbitration agreements according to state contract principles but found that arbitration, and all its terms, must reflect the explicit consent of the parties and therefore courts could not infer consent to arbitrate on a classwide basis absent such language. The Court held the FAA requires "more than ambiguity" to compel class arbitration, as class arbitration "undermines the most important benefits" of "traditional individualized arbitration," such as lower costs, greater efficiency and speed, and the ability of parties to choose their adjudicators. The high court also derisively chastised the Ninth Circuit for relying on the doctrine of *contra proferentem*, or rule of "last resort," of using ambiguity to try to discern the parties' intent.

Chief Justice Roberts delivered the opinion of the Court and was joined by the other four conservative justices; Justice Thomas wrote a concurrence and each liberal justice penned a dissenting opinion. Justice Ginsberg focused on the imbalance of power and inequity to consumers and employees of essentially forced arbitration, a forum that was designed to enable merchants of roughly equal bargaining power to arbitrate commercial disputes; Justice Breyer argued at length that the Ninth Circuit lacked jurisdiction to hear the case, since the FAA prohibits appeals of interlocutory orders (such as the district court's compelling the parties to arbitration) and therefore so did the Supreme Court; and Justice Sotomayor argued that the language of the agreement was ambiguous and the Court of Appeals was correct to turn to state law to resolve the ambiguity. Justice Kagan delivered the harshest rebuke, arguing that the majority was seeking to "federalize basic [state] contract law" and that the majority opinion "has more than a little in common with this Court's efforts to pare back class litigation." Moreover, she argued that California's rule construing ambiguities in contracts against their drafters (which, Justice Kagan observed, is not unique to California) should have held unless preempted, which it was not because it did not apply only to arbitration agreements. Further, Defendant could have inserted express language barring class arbitration but chose not to, thus leaving open the interpretation that the phrase "any and all disputes, claims or controversies" was broad enough to contemplate class arbitration.

52. ***Muller v Roy Miller Freight Lines, LLC*,**
34 Cal. App. 5th 1056 (May 1, 2019)

Holding; Truck driver wage claims exempt from FAA when transporting interstate goods.

Plaintiff brought a wage and hour class action for unpaid wages, missed meal and rest periods, incomplete wage statements, waiting time penalties, and unfair competition. Defendant successfully compelled arbitration of all claims on an individual basis except for the unpaid wages claim, which the trial court stayed pending the outcome of the arbitration.

The Court of Appeal affirmed the trial court's ruling, finding that Section 1 of the FAA applies to truck drivers who transport goods, the vast majority of which originate outside California despite transporting cargo solely within California. The *Muller* court found persuasive the reasoning in *Nieto v Fresno Bev Co., Inc.* (2019) 33 Cal.App.5th 274 (decided two months prior to *Muller*), as well as that of the authorities to which *Nieto* cited, that intrastate deliveries were essentially the last phase of a continuous journey of interstate commerce. The *Muller* court factually distinguished certain contrary federal district court decisions in the area, drawing a distinction between truck drivers and delivery drivers.

The *Muller* court also held that Labor Code section 229 applied to Plaintiff's claims since the FAA did not apply, and that Section 229 rendered the arbitration

agreement ineffective as to the cause of action for unpaid wages (as violative of Sections 226.2, 1194, and 1194.2). Accordingly, the Court stayed the prosecution of the unpaid wages claim pending the resolution of the other claims in arbitration.

Defendant also appealed the trial court's decision that the arbitrator should determine the issue of classwide arbitration, asking the Court of Appeal instead to find that the arbitration agreement prohibited arbitration on a classwide basis and that other appellate courts had reached the same decision. The *Muller* court declined to rule on this issue, relying on *Sandquist v. Lebo Auto., Inc.* (2016) 1 Cal.5th 233 for the proposition that the parties' agreement as interpreted under state contract law dictated who makes that decision, and in this case the agreement expressly provided that the arbitrator would resolve "all disputes," which the Court of Appeal interpreted to include questions of the arbitrability of claims on a classwide basis.

53. ***Nieto v Fresno Bev Co., Inc.*,**
33 Cal. App. 5th 274 (March 22, 2019)

Holding: Arbitration properly denied, statutory exemption to FAA applies.

Plaintiff, a delivery driver for Defendant beverage company, filed a wage and hour class action. Defendant sought to compel arbitration of Plaintiff's individual claims, pursuant to a signed agreement. Plaintiff opposed, arguing that as a transportation employee engaged in interstate commerce he was exempt from the requirements of the FAA, and both the trial court and appellate court agreed, as Plaintiff and other drivers transported beer, wine and other beverages manufactured in other states and housed in Defendant's warehouse before being transported to Defendant's clients. The trial court held that although Plaintiff's route did not cross state lines, the fact that he transported goods in the stream of interstate commerce which had been stored for a short period in Defendant's warehouse qualified him under Section 1's exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The Court of Appeal affirmed, noting the term "any other class of workers engaged in…interstate commerce" also applies to transportation workers "actually engaged in the movement of goods in interstate commerce." *Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 112.

Defendant argued the trial court had applied the wrong standard, and that Plaintiff was not a transportation worker under the meaning of the FAA exemption. The appellate court rejected both arguments. As to the first argument, although the trial court had presented both standards of review, contracts "involving commerce" and the much narrower workers "actually engaged in the movement of goods in interstate commerce," the trial court properly analyzed Plaintiff's work as that of one who is "actually engaged in the movement of goods in

interstate commerce." As to the second, the Court of Appeal held that Defendant had not provided any clear or persuasive authority that required workers "actually engaged in the movement of goods in interstate commerce" to be defined as those drivers who actually cross state lines. Rather, the *Nieto* court held that the weight of authority from federal district court cases established that transportation workers were "actually engaged in the movement of goods in interstate commerce" for FAA exemption purposes even when performing intrastate deliveries so long as the deliveries were "merely a continuation" of an interstate journey for the goods being transported.

The Court of Appeal refused to consider an argument raised by Defendant for the first time in its appellate reply brief, that the trial court erred in finding California Labor Code section 229 further exempted Plaintiff's claims from the FAA because it had found Plaintiff was a transportation worker engaged in interstate commerce.

54. ***Nunez v. Nevell Group, Inc.*,**
35 Cal. App. 5th 838 (May 28, 2019)

Holding: Employer who delayed motion to compel arbitration waived the right to do so.

Defendant, a commercial construction contractor, employed Plaintiff as a stocker-scrapper. Plaintiff was a member of the United Brotherhood of Carpenters, and the union and company were signatories to a collective bargaining agreement ("CBA") that provided for arbitration of claims of wage order violations. Plaintiff filed a civil class action lawsuit for various wage and hour claims under the Labor Code. Counsel for Defendant demanded arbitration pursuant to the CBA; Plaintiff's counsel refused. Defendant failed to file a motion to compel arbitration by the court-imposed deadline. The trial court lifted the stay on discovery. Plaintiff served written discovery.

In advance of the second status conference, Defendant represented to the trial court in writing, "Defendant is electing at this juncture to move forward on its motion to compel arbitration and will file the petition to compel arbitration prior to the status conference." Plaintiff argued the motion was timely as the trial court's deadline had passed, but also indicated his desire to file an amended complaint. The trial court continued the status conference with explicit instructions for both parties to file their respective documents; Plaintiff did, Defendant stated, "Defendant has elected not to proceed with the petition to compel arbitration." At a fourth status conference, Defendant made no mention of any intent to file a motion to compel arbitration.

Several motions to compel discovery responses and a failed mediation followed over the next two years. The trial court also set a date for Plaintiff to file his motion for class certification.

On October 1, 2017, the Court of Appeal finalized its published opinion in *Cortez v. Doty Bros. Equipment Co.* (2017) 15 Cal.App.5th 1, in which the parties also were bound by a CBA. The *Cortez* court found that the "clear and unmistakable" language of the arbitration clause in the CBA covered the claims at issue in that case.

On April 26, 2018, the day before the hearing on Plaintiff's motion for sanctions for Defendant's repeated failure to produce documents and after three years of litigation, Defendant filed its motion to compel arbitration. The trial court denied the motion to compel, finding that Defendant had acted inconsistently with its previous representations and that Plaintiff would be prejudiced after having propounded substantial discovery.

On appeal, Defendant argued it could not have moved to compel before *Cortez* was published. The Court in this case rejected that argument, holding that *Cortez* did not reflect a change in the law. As such, Defendant's written election to not proceed with a petition to compel arbitration "was an explicit waiver of its right to arbitrate [Plaintiff's] claims."

55. *OTO, LLC v. Kho*,
8 Cal. 5th 111 (Aug. 29, 2019)

Holding: California high court readdresses unconscionability analysis for wage disputes.

The California Supreme Court re-addressed the unconscionability of arbitration agreements that waive statutory rights to "Berman hearings," expedited wage dispute hearings held at the DLSE with no discovery process and to which technical rules of evidence do not apply (all relevant evidence is admitted). In *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659 (*Sonic I*), California concluded such agreements were categorically unconscionable, as requiring employees to waive their Berman rights as a condition of employment violated public policy and was substantively unconscionable (i.e., decidedly unfair) as a matter of law, but it did not completely invalidate such agreements, holding that a party that was not satisfied with the outcome of the Berman hearing could then compel arbitration. The United States Supreme Court invalidated that decision and remanded in the wake of *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333. Thus, in *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 (*Sonic II*), the California high court held that *Sonic I*'s categorical rule was preempted by the Federal Arbitration Act ("FAA") and that arbitration agreements of wage disputes were enforceable if they made arbitration affordable, but that waiver of Berman hearings, though not dispositive, remained a significant factor in the unconscionability analysis. The Court granted review in this case to decide whether an arbitration agreement with terms akin to civil litigation was properly affordable and made arbitration no more complex than the Berman hearing process. Along the way, however, a nearly unanimous Court found such a high

degree of procedural unconscionability that it declared the agreement unenforceable and punted on the original issue.

The majority opinion agreed with the Court of Appeal that the facts of this case showed an extraordinarily high degree of procedural unconscionability – particularly oppression, although the high court noted the agreement also was "a paragon of prolixity" and "visually impenetrable" and therefore justified a finding of surprise – but disagreed with the appellate court that the arbitration agreement was not sufficiently substantively unconscionable. Rather, the Court held that, given the high level of procedural unconscionability, "even a relatively low degree of substantive unconscionability" could render the agreement unenforceable. The Court agreed with Plaintiff that the arbitral process at issue was so inaccessible and unaffordable that it did not offer an effective alternative to the Berman hearings it purported to waive. And while the Court acknowledged that arbitral schemes based on civil litigation are not per se unfair, it noted that such a process can be "costly, complex, and time-consuming," which, the Court suggested, might be better suited for resolving wrongful termination actions rather than wage and hour disputes. The Court ultimately concluded that because of the coercive nature in which Defendant obtained Plaintiff's signature (rushing him through the process, not explaining the dense legal terminology, not affording him the opportunity to consult with an attorney, and not presenting him the contract in his native language), it was not clear that Plaintiff understood what he was giving up or getting in return and therefore the agreement was sufficiently one-sided as to render it unconscionable.

Justice Chin wrote a lengthy dissent, splitting with the majority on three main points. First, he challenged the majority's interpretation of the sliding scale of unconscionability, asking what "a relatively low degree of substantive unconscionability" necessary to invalidate an arbitration agreement meant – "low" relative to what, and how "low" is enough? Second, Justice Chin disagreed that the procedural unconscionability was as high as the majority found but acknowledged it was enough to proceed with the unconscionability analysis. Third, he attacked the substantive unconscionability analysis as difficult to follow, shifting in its approach, and insufficiently faithful to *Sonic II*. Ultimately, he felt the majority's analysis was inconsistent with, and preempted by, the FAA.

56. *Subcontracting Concepts (CT), LLC v. De Melo*,
34 Cal. App. 5th 201 (Apr. 10, 2019)

Holding: Arbitration agreement so permeated with unconscionability it is unenforceable.

Plaintiff filed a Labor Commissioner complaint with the appropriate state agency, the Division of Labor Standards Enforcement ("DLSE"). Two months later, Defendants filed a petition in court to compel arbitration and stay the DLSE proceedings. The trial court denied the petition, finding the arbitration clause at

issue was both procedurally and substantively unconscionable and so permeated with unconscionability that it was not possible to sever the offending provisions.

On appeal, Defendants devoted much of their brief to the argument that *Armendariz v. Found'n Health Psychare Servs., Inc.* (2000) 24 Cal.4th 83 should not apply because Defendants contended that Plaintiff was an independent contractor, not an employee, and *Armendariz* should only apply in the employment context. Instead, Defendants argued, *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, which addressed unconscionability in the consumer context, should apply. The Court of Appeal was not persuaded.

The Court found it unnecessary to determine whether Plaintiff was an employee or independent contractor for unconscionability analysis purposes, noting "there plainly was a power imbalance between the parties." The Court noted the record from the court below on procedural unconscionability, including that the contract was one of adhesion and was presented on a take-it-or-leave-it basis, that Plaintiff, who spoke only limited English, was pressured to sign it "on the spot," and that no rules were attached to the agreement nor did it clearly state which rules would govern arbitration. Even Defendants conceded the trial court had not erred when it found a moderate level of procedural unconscionability.

The appellate court also agreed with the trial court's finding of substantive unconscionability because the agreement required the parties to share the cost of arbitration and barred Plaintiff from filing wage claims with the Labor Commissioner and seeking a (Berman) hearing. Further, the agreement impermissibly prohibited representative and private attorney general (PAGA) claims, as well as punitive damages, statutory penalties, equitable relief, and attorney's fees, which meant Plaintiff would not be able to fully vindicate statutory rights.

VI. PROCEDURAL ISSUES

57. *Ass'n for L.A. Deputy Sheriffs v County of L.A.*, 42 Cal. App. 5th 918 (Dec. 02, 2019)

Holding: The inadequacy of available administrative procedures is a well-established exception to the rule that a party must exhaust administrative remedies before seeking judicial relief.

The Association for Los Angeles Deputy Sheriffs (ALADS) appealed from a judgment following the trial court's ruling sustaining a demurrer to ALADS's complaint without leave to amend. ALADS had sued the County of Los Angeles (County) concerning the County's alleged breach of a labor agreement. The trial court sustained the County's demurrer on the sole ground that ALADS failed to exhaust the administrative remedies available under the labor agreement before filing suit. The court of appeal reversed in part.

ALADS had filed a complaint alleging that the County failed to comply with provisions in a memorandum of understanding (MOU) requiring the County to match compensation increases given to other County safety employee unions. Thus, the issues that ALADS raised in its action applied to all its members. On the other hand, the grievance procedures under the MOU were only available to individual employees and were not binding on any other parties. Because those procedures would require each of the thousands of individual ALADS members to pursue a grievance through arbitration to obtain the relief that ALADS sought in the lawsuit, they were not adequate. The appellate court held that the inadequacy of available administrative procedures is a well-established exception to the rule that a party must exhaust administrative remedies before seeking judicial relief.

To the extent ALADS's complaint alleged violations of the Meyers-Milias-Brown Act (Gov. Code, § 3500 *et seq*.), however, ALADS should have first pursued the claims in proceedings before the Los Angeles County Employee Relations Commission (ERCOM). ERCOM has exclusive initial jurisdiction over such claims, and ALADS's argument that ERCOM could not provide binding relief was insufficient to excuse its obligation to first pursue those claims administratively. Accordingly, the court struck those claims without prejudice pending ALADS's exhaustion of administrative remedies concerning those claims with ERCOM.

The appellate court also concluded that ALADS properly had stated causes of action for breach of contract and breach of the covenant of good faith and fair dealing.

58. ***Bennett v. Rancho Calif. Water Dist.*,**
35 Cal. App. 5th 908 (May 29, 2019)

Holding: In a section 1102.5 whistleblower retaliation case, trial court improperly excluded evidence showing Plaintiff's relationship with Defendant was anything other than an employment relationship. The collateral estoppel doctrine (based on a prior finding by administrative law judge) did not apply, because the burden of proof was different at the trial than it had been in the administrative proceeding.

Plaintiff Shawn Bennett sued defendant Rancho California Water District (the District) for whistleblower retaliation in violation of Labor Code section 1102.5, subdivision (b). At the jury trial, the trial court excluded evidence that would have shown that Bennett's relationship with the District might have been something other than an employment relationship. Citing an administrative law judge's prior finding that Bennett had been the District's employee for purposes of retirement benefits, the trial court concluded the doctrine of collateral estoppel applied and established Bennett had been the District's employee.

The court of appeal reversed and remanded to the trial court, with directions to conduct a new trial. The court held that a party is not collaterally estopped from litigating an issue when, in a prior proceeding, a dispositive finding had been made, but only by imposing a lesser burden of proof on the party invoking collateral estoppel than that which would have been applied in the subsequent proceeding. To prevail on a section 1102.5(b) claim, the court explained, the plaintiff must *prove* employment status. But in the prior proceeding, the administrative law judge expressly had assigned *to the District* the burden of proving that plaintiff had been an independent contractor. Thus, the administrative law judge did not impose the same burden of proof on plaintiff that he bore in the subsequent trial. The trial court therefore erred by finding the doctrine of collateral estoppel applicable and precluding litigation of Bennett's employment status.

At the retrial, the court held that the common law definition of employee would apply to Bennett's section 1102.5(b) claim, not a statutory definition, because neither section 1102.5, nor Labor Code section 1106, which defines "employee" to include government employees, gives the term "employee" a special meaning.

59. ***Berroteran v. Super. Ct.*,**
41 Cal. App. 5th 518 (Oct. 29, 2019)

Holding: There is no categorical bar to admitting deposition testimony under Evidence Code § 1291 based on the unexamined premise that a party's motive to examine its witnesses at deposition always differs from its motive to do so at trial.

In this non-employment case, plaintiff sued Ford Motor Company for multiple counts of fraud, negligent misrepresentation, and violation of consumer protection statutes. He alleged that his new vehicle had a defective engine, that he experienced numerous breakdowns, and that Ford's repair efforts did not fix the problems. At trial, Ford sought to exclude, under Evidence Code section 1291, the videotaped deposition testimony of several of its employees who had been deposed in prior litigation involving similar allegations but were unavailable for trial. Ford argued that it did not have a similar interest and motive to examine its employees at those depositions as it would have at trial in this case. Ford relied on *Wahlgren v. Coleco Industries, Inc.*, 151 Cal.App.3d 543, 198 Cal. Rptr. 715 (1984), which concluded that a party has a different motive in examining a witness at a deposition than at trial. The trial court excluded the depositions.

Plaintiff filed a writ, and the court of appeal reversed, concluding that court abused its discretion in excluding former deposition testimony of Ford's witnesses taken in federal and state litigation regarding the same engine underlying plaintiff's lawsuit. The court disagreed with *Wahlgren*'s premise that a party's motive to examine its witnesses at deposition always differs from its motive to do so at trial. The court analyzed Federal Rule of Evidence 804, which contains a

hearsay exception similar to that in California Evidence Code section 1291. Under rule 804, former deposition testimony is not categorically excluded based on an assumption that a motive to examine a witness differs during deposition and at trial. The court noted that pretrial depositions are not only intended as a means of discovery, but also serve to preserve relevant testimony that might otherwise be unavailable for trial. The relevant issue is not whether the party had a tactical or strategic incentive to question its witnesses, but whether the party had an opportunity and similar motive to develop the testimony. A strategic choice not to question one's own witness at deposition does not preclude admission of the deposition in a later proceeding.

Applying this rationale, the court found that Ford failed to demonstrate that it lacked a similar motive to examine its witnesses in the former litigation. Each deponent was represented by Ford's counsel, and Ford had the same interest to disprove allegations related to the engine that was the subject of both the current and prior proceedings. The hearsay exception in section 1291, the court concluded, requires only a similar, not an identical, motive. Accordingly, the court concluded that the trial court abused its discretion in granting the motion to exclude the depositions.

60. ***Doe v. Super. Ct.*,**
36 Cal. App. 5th 199 (June 13, 2019)

Holding: Trial court erred by disqualifying an attorney for having interviewed third-party witness; witness was not a "represented person" but rather a percipient witness of the harassment (and a student-employee).

Plaintiff and petitioner Jane Doe, a student-employee in the campus police department at Southwestern College, brought claims relating to sexual harassment and sexual assault against defendants. Her complaint also alleged sexual harassment of two other female employees who were not plaintiffs. Before the deposition of one of those employees, one of Doe's lawyers contacted her. When defendants became aware of the contact, they moved to disqualify the lawyer for violating rule 4.2 of the California State Bar Rules of Professional Conduct (Rule 4.2), which generally prohibits a lawyer from communicating with "a person … the lawyer knows … to be represented by another lawyer in the matter." The trial court granted the motion.

The court of appeal reversed. Although defendants had offered to provide counsel for the employee for her deposition, there is no evidence that at the time of the contact she had accepted the offer or otherwise retained counsel. The court noted that Rule 4.2, in the case of a represented governmental organization, prohibits communications with a current employee of the organization, "if the subject of the communication is any act or omission of such person … in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability."

Here, the lawyer contacted the witness to discuss evidence of other alleged acts of sexual harassment by one of the defendants. The witness was a percipient witness. Plaintiff was not seeking to hold defendants liable for what the witness did or said. The purpose of Rule 4.2, the court reasoned, is to prevent ex parte contact with employees who engaged in acts or conduct for which the employer might be liable. It is not designed to prevent a plaintiff's lawyer from talking to employees of an organizational defendant who might provide relevant evidence of actionable misconduct by another employee for which the employer may be liable. Accordingly, the court issued a writ directing the superior court to vacate its order disqualifying the lawyer as plaintiff's counsel.

61. ***Global Protein Products, Inc. v. Le*,**
42 Cal. App. 5th 352 (Nov. 20, 2019)

Holding: (a) Trial court denied Appellants' renewed motion under CCP section 1008, which had sought dissolution of a stipulated permanent injunction regarding trade secrets on the grounds that recently discovered evidence demonstrated that Respondent did not have a valid trade secret; (b) An order denying a renewed motion under section 1008, subdivision (b) is not appealable, but the court exercised its discretion to treat appellants' appeal as a petition for writ of mandate. Court denied the constructive petition on the grounds that there was sufficient evidence to support the trial court's implied finding that the trade secret remained valid.

Global Protein Products ("Respondent") sued Appellants Kevin K. Le and West Coast AG, LLC ("Appellants") claiming, in part, that Appellants misappropriated Respondent's trade secret—a proprietary formula and process for treating iceberg lettuce to prolong its shelf life. The court entered a temporary and then preliminary injunction against Appellants, which prohibited them from acquiring, disclosing, or using Respondent's trade secret. The parties then entered into a settlement by which Appellants agreed to a stipulated permanent injunction which also prohibited them from acquiring, disclosing, or using Respondent's trade secret. Appellants later learned that the previously undisclosed ingredient used in Respondent's product was not a trade secret since it had been disclosed in an earlier patent, and thus, the underlying basis for the stipulated permanent injunction was invalid. Appellants filed a motion to dissolve the stipulated permanent injunction under section 533. The trial court denied the motion. Appellants filed a renewed motion to dissolve the stipulated permanent injunction filed pursuant to section 1008(b). The trial court denied the renewed motion. Appellants appealed the trial court's order denying their renewed motion pursuant to section 1008(b).

The Court of Appeal held that the trial court's denial of the renewed motion to dissolve the stipulated permanent injunction was not directly appealable, but it nonetheless decided to treat the "appeal" as a petition for a writ of mandate. The

Court of Appeal concluded that the trial court did not abuse its discretion when it denied the renewed motion to dissolve the stipulated permanent injunction.

The Court of Appeal reiterated the general principle that publication of a trade secret destroys the trade secret but disagreed that trade secret status was forfeited in this case. The Court of Appeal reasoned that Respondent's trade secret information was "a proprietary formula and the *process* for treating lettuce,"—in other words, the trade secret was not merely limited to the identity of the components used but also included the proprietary formula and the process for treating lettuce. Thus, the Court of Appeal found sufficient evidence to support the trial court's implied finding that the trade secret remained valid.

62. *Hollingsworth v. Superior Court (Heavy Transport)*, 37 Cal. App. 5th 927 (2019)

Holding: When a civil action and a workers' compensation proceeding are concurrently pending, the tribunal first assuming jurisdiction should determine exclusive jurisdiction.

Under California law, when a civil action and a workers' compensation proceeding are concurrently pending, the tribunal first assuming jurisdiction should determine whether the civil court or the Workers Compensation Appeals Board ("WCAB") has exclusive jurisdiction to hear the case. In this case, the trial court exercised jurisdiction first, so it had jurisdiction to decide which tribunal has exclusive jurisdiction.

The court of appeal held that the trial court erred by staying the civil case to allow the WCAB to decide the issue of exclusive jurisdiction, and the WCAB erred by proceeding without deference to the civil court. The appropriate tribunal to determine the question of exclusive jurisdiction was the trial court because it exercised jurisdiction first.

63. *Kisor v. Wilkie*, 139 S. Ct. 2400 (June 26, 2019)

Holdings: (1) The plaintiff failed to present any persuasive/sufficient reason to overturn the Auer Deference Doctrine and (2) the lower courts improperly applied the doctrine in this case.

Plaintiff was a Vietnam War veteran seeking disability benefits from the Department of Veterans Affairs ("VA"). He first applied in 1982, alleging that he had developed PTSD as a result of his participation in a military operation. The report of the agency's evaluating psychiatrist noted Kisor's involvement in that battle but found that he did not have PTSD. The VA thus denied Kisor benefits. In 2006, Kisor moved to reopen his claim. Based on a new psychiatric report, the VA this time agreed that Kisor suffered from PTSD. But it granted him benefits

only from the date of his motion to reopen, rather than (as he requested) from the date of his first application.

The Board of Veterans' Appeals affirmed the timing decision, based on its interpretation of an agency rule. The Court of Appeals for Veterans Claims, an independent Article I court that initially reviews the Board's decisions, affirmed for the same reason. The Court of Appeals for the Federal Circuit also affirmed, but it did so based on deference to the Board's interpretation of the VA rule. Plaintiff argued that the Auer doctrine should either be deemed unconstitutional or was improperly used in this case.

The Supreme Court held in favor of the Agency. The court explained that the Auer deference does not violate the judicial review provisions or the rulemaking requirements of the Administrative Procedure Act. First the Court explained that Kisor's argument ignores how the Auer doctrine works and the extent to which a court must evaluate the agency's decision. Second, the court also explained that Kisor's argument ignored the exception to the notice and comment procedures requirements for issuing legislative rules. Finally, the Court ruled that Kisor failed to show any special reason to overturn prior precedent given the doctrine of stare decisis.

Applying the Auer doctrine to Kisor's case, the Court reversed and remanded for further review. The Court determined that (1) the lower court did not engage in the proper analysis to determine whether the regulation is ambiguous and (2) the court did not properly determine whether the Auer doctrine actually applied.

64. ***Monster Energy Co. v. Schechter*,**
7 Cal. 5th 781 (July 11, 2019)

Holdings: (1) An attorney's signature on a document with a notation that it is approved as to form and content does not, as a matter of law, preclude a factual finding that the attorney intended to be bound by the document's terms and (2) The intent question requires an examination of the agreement as a whole, including substantive provisions referring to counsel.

The parents of a deceased child sued Monster Energy after she died from consuming their energy drink. The parties settled the case and negotiated a settlement agreement. The related attorneys were not explicitly parties to the agreement. The agreement was made "on the behalf of the settling Parties, individually, as well as on the behalf of their … attorneys." Among other relevant provisions, the agreement also provided that "Plaintiffs and their counsel agree that they will keep completely confidential all of the terms and contents of this Settlement Agreement." Finally, the relevant attorneys also signed the agreement under the pre-printed language "approved as to form and content."

Shortly after the settlement was finalized, the attorney representing the parents was quoted as disclosing some of the confidential aspects of the settlement agreement. Upon learning about the purported breach of the agreement, Monster Energy sued the lawyer for breach of contract and other related claims. The lawyer's principal defense was that he was not a party to the agreement, and thus could not be sued for breach of the agreement. Moreover, in response, the lawyer also filed an anti-SLAPP motion.

The district court denied the lawyer's motion holding that the agreement contemplated that the lawyers were also bound by the contract's terms. The Court of Appeal, however, reversed holding that a lawyer des not objectively manifest their intent to be bound by the agreement by signing over the language "approved as to form and content." The Court of Appeal so held in line with a previous case that held that "reasonable meaning to be given to a recital that counsel approves the agreement as to form and content, is that the attorney … asserts that he or she is the attorney for his or her particular party, and that the document is in the proper form and embodies the deal that was made between the parties."

The Supreme Court reversed the Court of Appeal and distinguished the case from previous cases. While the Court agreed with previous cases over the meaning of "approved as to form and content," it held that the inquiry does not end there. More specifically, the court held that an attorney approving an agreement as to form and content does not preclude, as a matter of law, a finding that he also intended to be bound by the agreement. It is possible for an attorney to sign an agreement containing substantive provisions that imposes duties on counsel. In this case, the Court found that a fact finder could reasonably find that the lawyer agreed to be bound by the agreement because the confidentiality provisions specifically referred to the attorneys. Moreover, many of the other relevant provisions of the agreement also specifically referred to and imposed duties on counsel. Consequently, the Court held that Monster Energy had showed the possibility of prevailing.

65. ***Natarajan v. Dignity Health*,**
42 Cal. App. 5th 383 (Oct. 22, 2019)

Holding: Court rejects arguments that (i) hearing officer's relationship with defendant gave rise to an unacceptable risk of bias from a pecuniary interest in future employment with defendant, and (ii) an internal decision revoking plaintiff's staff membership and privileges failed to apply objective standards.

Dignity Health owns many hospitals, including St. Joseph's – Natarajan's ex-employer. St. Josephs (a self-governing entity) conducted an investigation of Natarajan's performance as a hospitalist and found that he had been failing to procure medical records in a timely manner. As a result, the investigators recommended that the executive committee revoke Natarajan's staff membership

and privileges. The committee complied with that recommendation. In connection with Natarajan's appeal to the peer committee, a hearing officer who had experience with Dignity Health hospitals, but not St. Josephs, was appointed to oversee the process, participate in deliberations and make evidentiary rulings. The officer denied Natarajan's motion to recuse the officer on the grounds of bias by pointing to his contract barring St. Josephs, although not Dignity Health, from appointing him again within the next three years.

The committee concluded Natarajan failed to provide efficient and high-quality medical care as all hospitalists at St. Josephs are required to provide. As a result, his staff membership and privilege were not reinstated. Natarajan then appealed to the community board, but again was unsuccessful. Finally, Natarajan initiated mandamus proceedings.

First, the court disagreed with Natarajan and found that the constitutional threshold for public entities is not the same threshold private entities must meet in order to provide an impartial adjudicator and an otherwise fair procedure. Whereas the mere possibility of bias can constitute unconstitutional due process in the context of a public entity, an "unacceptable risk of bias as the result of a tangible interest" is the applicable standard for fair procedure in the context of a private entity. A personal stake in the proceeding or a present pecuniary interest satisfies the standard applicable to private entities. However, the possibility of future employment as a hearing officer is not a present pecuniary interest and thus fails to meet the standard.

Second, Natarajan argued untimely provision of medical record does not warrant a revocation of membership and privileges absent a showing it negatively impacted a patient. However, nothing indicates a hospitalist must harm a patient in order for his/her membership and privileges to be properly revoked. Past efforts had been made encourage Natarajan to remedy his medical record issues, but because he did not, the committee's decision to revoke his membership and privilege in furtherance of high-quality medical care is defensible.

66. ***Ryze Claim Sols. LLC v. Super. Ct.*,**
33 Cal. App. 5th 1066 (Apr. 3, 2019)

Holdings: (1) Because choice-of-forum provision was entered into before Labor Code § 925 went into effect, California employee was compelled to litigate his claims in Indiana; (2) FEHA's public policy favoring a "wide choice of venues" refers to choice of counties within California, not choice of states.

Plaintiff Jerome Nedd was employed by Ryze Claim Solutions in El Cerrito, California for almost three years before his employment was terminated. Plaintiff filed claims against Ryze for wrongful termination and violation of the Fair Employment and Housing Act ("FEHA") in Contra Costa County Superior Court.

When Plaintiff was first employed, he executed an employment agreement with Ryze (an Indiana-based company), which contained a forum selection clause compelling Plaintiff to prosecute any claims he might have against Ryze in either Marion County or Hamilton County, Indiana or in federal court in the Southern District of Indiana. In response to Plaintiff's complaint, Ryze filed a motion to stay or dismiss the action based on the Indiana forum selection clause in the agreement. The trial court denied Ryze's motion, but the Court of Appeal issued a peremptory writ of mandate directing the trial court to grant Ryze's motion.

The Court of Appeal rejected Plaintiff's argument that the public policy underlying FEHA favors a "wide choice of venues" on the ground that the relevant issue here involved forum (i.e., which state) rather than venue (i.e., which county within the state) selection. The Court emphasized that "since a venue clause is not the same thing as a forum selection clause, whatever policies may be drawn from FEHA's venue provisions do not bear on the forum selection clause in the Employment Agreement." Because Plaintiff did not present any evidence or argument that Indiana would not be an adequate forum for his claims, and the trial court did not find as such, the Court concluded that requiring him to litigate his claims in Indiana would be neither unfair nor unreasonable.

The Court also rejected Plaintiff's reliance upon Labor Code § 925 (restricting non-California forum selection clauses) on the ground that the contract at issue in this case was entered into prior to the January 1, 2017 effective date of that statute. The express language of Labor Code § 925 limits its policy only to agreements "entered into, modified, or extended on or after January 1, 2017," and there was no evidence that the Employment Agreement between Plaintiff and Ryze was never extended in January 1, 2017.

67. ***Silbaugh v. Chao*,**
942 F.3d 911 (Nov. 14, 2019)

Holdings: (1) Plaintiff's amended complaint to name the proper defendant was entitled to relation back under Fed. R. Civ. P. 15(c)(2), since both the United States Attorney and the Attorney General were sufficiently notified of plaintiff's action within the 90-day period prescribed by Fed. R. Civ. P. 4(m); (2) The notice-giving function of "process" under Rule 15(c)(2) was accomplished whether or not the summons accompanying the complaint was signed by the clerk of court.

Plaintiff Alisha Silbaugh, a former employee of the Federal Aviation Administration, timely filed a discrimination lawsuit under Title VII of the Civil Rights Act of 1964, naming the FAA and her former supervisor as defendants, but not the head of the executive agency to which the FAA belongs, as Title VII requires. She did not discover the mistake until after the statute of limitations had expired. After the limitations period ran, the FAA moved to dismiss the action on grounds the case had to be filed against the head of the executive agency to which

the FAA belongs. Plaintiff responded by filing an amended complaint that named the Secretary of Transportation ("Secretary Chao") as the defendant. The district court denied FAA's motion to dismiss as moot. Secretary Chao then filed a motion to dismiss on grounds the amended complaint was not timely because it did not "relate back" to the original complaint. The district court agreed.

On appeal, the Ninth Circuit reviewed Federal Rule of Civil Procedure 15(c), which provides that an amendment relates back to the original complaint when a United States officer or agency is added as a defendant if the original complaint and summons was served on the United States attorney, the Attorney General, or the officer or agency within a 90-day period. Plaintiff did mail a copy of the summons and complaint to the United States Attorney and the Attorney General, but failed to have it signed by the clerk of court. Defendants argued that because Plaintiff's mailing of the summons and complaint was missing a signature of the clerk of court, it was not valid "process." The Ninth Circuit ruled that because the summons contained the other information required by Rule 4(a)(1) of the Federal Rules of Civil Procedure, process was sufficient to ensure that "the government was put on notice of the claim within the stated period."

Because Plaintiff timely served the United States attorney and Attorney General her amendment to re-name the defendant related back. Accordingly, the Ninth Circuit reversed the dismissal.

68. ***Synergy Project Mgmt, Inc. v. City and County of S.F.*,**
33 Cal. App. 5th 21 (Mar. 14, 2019)

Holdings: (1) A public works project prime contractor had standing under Code Civ. Proc. § 1086 to seek a writ of administrative mandate challenging a hearing officer's jurisdiction to determine the existence of statutory grounds for substitution, because the ruling directly and negatively affected the prime contractor's interest in exerting control in the substitution process; (2) Trial court erred by granting writ relief – the hearing officer had jurisdiction because Public Contract Code § 4107(a) did not strictly require the prime contractor to make the request, and the city substantially complied when it instructed the prime contractor to remove the subcontractor for cause.

For public works projects, a prime contractor must obtain the consent of the awarding authority before replacing an originally listed subcontractor. The Public Contract Code § 4107 limits the awarding authority's ability to consent to specified circumstances, and the awarding authority must hold a hearing on the prime contractor's substitution request if the original subcontractor objects to being replaced. In this case, the City and County of San Francisco entered a contract with prime contractor Ghilotti Bros., Inc. which listed Synergy Project Management as a subcontractor. After Synergy caused property damage and engaged in unsafe behavior, the City invoked a portion of its contract and directed

Ghilotti to substitute Synergy with a new subcontractor. Synergy objected to its replacement, and at the § 4107(a) hearing, the hearing officer determined that Synergy's poor performance established a statutory ground for substitution.

Ghilotti and Synergy both filed petitions for writ of administrative mandate, contending the hearing officer lacked jurisdiction because the prime contractor had not made a "request" for substitution, as the City had ordered Ghilotti to substitute. The trial court granted the petitions, but the Court of Appeals reversed. The procedure followed "complied in substance with every reasonable objective of the statute," which include preventing bid shopping and bid peddling and protecting an awarding authority's control over the selection of subcontractors, so the hearing officer had jurisdiction.

69. *Walden v. State of Nevada*,
[D.C. No. CV 14-0320 MMD] (9th Cir. Dec. 23, 2019)

Holding: A State that removes a case to federal court waives its immunity from suit on all federal law claims in the case, including FLSA claims that Congress failed to apply to the states through unequivocal and valid abrogation of their Eleventh Amendment immunity.

Plaintiffs, a group of correctional officers, filed suit against the State of Nevada in Nevada state court alleging violations of the Fair Labor Standards Act ("FLSA") by Nevada. Plaintiffs alleged wage and overtime claims under the FLSA, Nevada's Constitution, Nevada statutes, and common law breach of contract. Nevada then removed the case to federal court, moving for judgment on the pleadings, pleading the affirmative defense that "Defendant is immune from liability as a matter of law," but didn't explicitly mention state sovereign immunity or the Eleventh Amendment. Conditional FLSA collective action notice was certified.

Four years into the litigation, the district court *sua sponte* requested briefing on whether the doctrine of state sovereign immunity applied to the FLSA claims against Nevada as brought in federal court, an issue which neither party had addressed aside from Nevada's affirmative defense. Extending the holding of *Embury v. King*, 361 F.3d 562 (9th Cir. 2004), the panel held that a State that removes a case to federal court waives its immunity from suit on all federal-law claims in the case, including those federal-law claims that Congress failed to apply to the states through unequivocal and valid abrogation of their Eleventh Amendment immunity.

VII. CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT ("FEHA")

70. *Brome v. Calif. Hwy Patrol*, 2020 WL 429035 (Jan. 28, 2020)

Holdings: Under the doctrines of equitable tolling and continuing violations, Plaintiff's claims for sexual orientation harassment and discrimination/constructive discharge were not time-barred; summary judgment was reversed.

Brome sued the California Highway Patrol ("CHP") asserting that, during his career as a law enforcement officer, he suffered harassment and discrimination because of his sexual orientation in violation of the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.). The trial court granted summary judgment to the CHP, holding that Brome's claims were filed after the statute of limitations expired and a reasonable jury could not have concluded they were timely based on an exception to the deadline. The court also rejected Brome's claim that he was constructively discharged. Brome appealed the grant of summary judgment.

Brome began his employment at the CHP in 1996. During his nearly 20-year career, other officers subjected Brome, who was openly gay, to derogatory, homophobic comments; singled him out for pranks; repeatedly defaced his mailbox; and refused to provide him with backup assistance during enforcement stops in the field. He transferred to a different office in 2008 in search of a better working environment but encountered similar acts of discrimination. By early 2015, he had become suicidal, and in January 2015, he began a medical leave of absence and filed a worker's compensation claim. He took industrial disability retirement in February 2016, ending his employment with the CHP. In September 2016, he filed an administrative complaint with the Department of Fair Employment and Housing, and he filed a lawsuit the next day.

The court of appeal concluded that the filing of the workers' compensation claim could equitably toll the one-year deadline for filing a discrimination claim. The time for filing a claim can be tolled where the plaintiff can establish three elements: timely notice, lack of prejudice to the defendant, and reasonable and good faith conduct on the part of the plaintiff. The court found that because the workers' compensation claim was based on the same facts that would support a discrimination claim, it provided timely notice to the defendant and supported a finding that equitable tolling would not prejudice the defendant. Moreover, although plaintiff waited 11 months after his workers' compensation claim to file his claim, the court could not conclude he was unable to meet the good faith requirement, given the years of harassment and bias that led him to become suicidal.

The court also concluded that the continuing violation doctrine potentially could allow plaintiff to rely on conduct occurring more than a year prior to the tolled statute of limitations. The court reasoned that the conduct complained of was similar in character throughout plaintiff's employment, and it occurred with a reasonable frequency. Moreover, because he sought a fresh start in a new office, and because his superiors continued to state that they would look into his claims, a jury could find that the problems had not yet gained permanence.

Finally, the court concluded that the allegations of bias and harassment could be found by a jury to amount to a constructive discharge. Accordingly, the court reversed summary judgment. The court recognized the potential tension between plaintiff's theories: *i.e.,* the conditions were so intolerable that a reasonable employee would feel forced to resign (for purposes of establishing constructive discharge), and yet the same employee could reasonably believe the situation was salvageable (for purposes of establishing a continuing violation). But at this stage of the litigation, the court saw its task as simply determining whether facts in the record could support either proposition. It would be the jury's job, the court stated, to reconcile the evidence at trial, and a court may well conclude that plaintiff had proven only one or the other.

71. *Carroll v. City and County of San Francisco*, 41 Cal. App. 5th 805 (Oct. 31, 2019)

Holdings: (1) A potentially unlawful employment practice occurred each time a retired worker received an allegedly discriminatory disability retirement check, such that a new limitations period applied to each allegedly discriminatory check. (2) A worker's putative class claims are timely if she alleges unlawful acts occurring during the limitations period even if those acts arise from a systematic policy of discrimination that came into existence prior to the limitations period.

Plaintiff retired in 2000 and applied for (and subsequently received) monthly disability retirement benefits. In 2017, Plaintiff learned that the formula used for calculating the disability retirement benefits resulted in a lower amount paid to employees, including her, who were hired over the age of 40. She filed a complaint with the DFEH in 2017, and ultimately filed a class action asserting disparate treatment and disparate impact claims. Defendants demurred, arguing that the statute of limitations barred her claims, because she failed to timely file an administrative charge with the DFEH. The court sustained the demurrer. The court of appeal reversed.

With regard to plaintiff's individual disparate treatment claim, the court found that, assuming the allegations of the complaint were true, an unlawful event occurred each time plaintiff received a discriminatory payment, such that a new limitations period applies to each allegedly discriminatory check. The court reasoned that prior cases recognized that an employer's discriminatory decision to

take an unlawful employment act is not actionable only when made but instead when statutorily prohibited acts or practices occur pursuant to that decision. The court also found that plaintiff's putative class action disparate treatment claim was timely under the "continuing violation" theory that pertains to claims alleging a systemic policy of discrimination, distinguishing that theory from one involving discrete acts toward an individual. Under Plaintiff's theory, the class could recover only for injuries during the limitations period, but not for conduct predating the limitations period. The putative class claims were timely because Plaintiff alleged unlawful acts occurring during the limitations period, even if those acts arise from a systematic policy of discrimination that came into existence before the limitations period.

Regarding the disparate impact claim, the court noted the absence of California authority to guide the analysis and relied on *Lewis v. Chicago*, 560 U.S. 205 (2010). Under that case, a plaintiff establishes a prima facie disparate-impact claim by showing that the employer *uses* a particular employment practice that causes a disparate impact on one of the prohibited bases. Here, Plaintiff claims that Defendants *used* an employment policy to pay retirement disability benefits each month and that use of that policy caused a disparate impact on employees who began their employment when they were over 40, in that such employees receive lower monthly benefits than similarly situated employees who began employment before age 40. The court concluded that, under *Lewis*, Plaintiff may sue for the payments that occurred within the year prior to the November 17, 2017 filing of her DFEH complaint.

72. ***Doe v. Dept. of Corrections & Rehab.*,**
43 Cal. App. 5th 721 (Dec. 19, 2019)

Holdings: (1) Minor or relatively trivial adverse actions are not actionable under FEHA; (2) Personnel decisions do not constitute harassment; and (3) Where a disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, the employee bears the burden to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations.

Plaintiff submitted an employment application with the Department of Corrections & Rehabilitation, which he signed under penalty of perjury, and did not check a box indicating that he had a disability. He thereafter submitted requests for accommodation, seeking quieter workspaces, citing a "learning disorder not otherwise specified." When asked for medical documentation to support his request, Plaintiff submitted a doctor's note saying that Plaintiff was easily distracted and, under stress, could become disorganized. Although the employer took certain steps in an effort to address Plaintiff's concerns, he did not receive the accommodation he requested. Plaintiff also claimed he experienced discrimination, retaliation, and harassment because his work was criticized during an "interrogation-like" meeting, and because his employer ordered a wellness

check on him when he was out sick, incorrectly suspected him of bringing a cell phone into work (which was against policy), and assigned him the rotating role of "primary crisis person" on the same day he was scheduled to attend an off-site union meeting. The trial court granted summary judgment to the employer. The court of appeal affirmed.

The court concluded there was no triable issue of material fact regarding discrimination or retaliation, because Plaintiff presented no evidence that he was subjected to an adverse action. An "adverse employment action," the court held, is one that materially affects the terms, conditions, or privileges of employment. Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable. The court found that the conduct complained of by Plaintiff fell squarely into the category of relatively minor conduct that, while potentially angering or upsetting to Plaintiff, did not threaten to materially affect the terms, conditions, or privileges of his job. None of the employer's actions resulted in any sort of formal or informal discipline or demotion in job responsibilities.

With regard to the harassment claim, the court explained that harassment claims are based on a type of conduct that is avoidable and unnecessary to job performance, whereas discrimination claims result from bias in the exercise of official actions on behalf of the employer. The conduct Plaintiff complained of did not constitute harassment because each act involved a personnel decision by his supervisor that was within the scope of that supervisor's duties. The court also found that although Plaintiff may have understandably found the incidents frustrating or upsetting, they were not so severe as to alter the conditions of his employment or create an abusive working environment. The court noted that workplaces can be stressful and that relationships between supervisors and their subordinates can often be contentious, but FEHA was not designed to make workplaces more collegial. Rather, its purpose is to eliminate more insidious behavior like discrimination and harassment based on protected characteristics.

Finally, the court found that the information Plaintiff included in his accommodation request and the notes from his doctor were not sufficient to place the employer on notice that he suffered from a disability covered by FEHA or to inform the employer of the extent of the limitations his disability caused. Information about the nature and extent of Plaintiff's claimed disabilities was crucial to the employer's ability to determine whether it was able to reasonably accommodate those disabilities. The lack of any evidence indicating that Plaintiff provided such information to the employer was fatal to his interactive process and accommodation claims.

73. ***Galvan v. Dameron Hosp. Ass'n*,**
37 Cal. App. 5th 549 (June 20, 2019)

Holding: Where an employee takes medical leave because of workplace discrimination or harassment engaged in by the employer or supervisory employees, the employee's inability to return from leave can support a claim for constructive termination.

Shirley Galvan ("Galvan"), a 54-year old Filipino nurse, worked for Dameron Hospital Association ("Dameron") for 25 years. In 2011, Doreen Alvarez ("Alvarez") became Galvan's supervisor and allegedly began harassing Galvan and other Filipino employees. Among other things, Alvarez criticized Galvan and other Filipino employees' accents, called them "stupid", subjected them to tests without warning, and informed them that she was hired to "clean house." As a result, Galvan claims she was forced to take medical leave and ultimately quit.

Galvan brought suit against Dameron and Alvarez, alleging that she had been discriminated against and harassed on the basis of her age and national origin, and constructively terminated in violation of FEHA. Defendants moved for summary judgment, and the trial court granted the motion. In relevant part, the trial court dismissed Galvan's claims because Galvan couldn't show that she was subjected to an employer-initiated adverse employment action. The Court of Appeal reversed, finding that Galvan establish a triable issue of fact as to whether she was constructively discharged and whether Dameron acted with discriminatory motive.

To prove constructive discharge, Galvan had to prove by a preponderance of evidence that Dameron either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of her resignation, that a reasonable employer would realize that a reasonable person in Galvan's position would be compelled to resign. Dameron argues that it was unaware of Alvarez's conduct prior to Galvan going on medical leave, and thus it did not permit or condone Alvarez's behavior. The Court of Appeal rejected this argument, finding that Galvan was not required to show that Dameron knew of Alvarez's conduct prior to Galvan going on medical leave since a reasonable trier of fact could find that Alvarez, a supervisory employee, intentionally created the working conditions at issue and a reasonable person faced with those conditions would have felt compelled to leave.

Further, the appellate court found that Galvan presented sufficient evidence to demonstrate that Alvarez acted with a discriminatory motive and that there was a nexus between Alvarez's conduct and Galvan's protected status. Discrimination based on an employee's foreign accent is sufficient to show national origin discrimination. As a supervisor, Alvarez's statements, such as Filipinos are "stupid" and criticism of their accents, could make both defendants liable for discrimination.

74. ***Glynn v. Super. Ct.*,**
42 Cal. App. 5th 47 (Nov. 13, 2019)

Holding: (a) Even a legitimate company policy, if mistakenly applied, may engender FEHA disability discrimination liability; (b) Lack of animus does not preclude liability for a disability discrimination claim; (c) Appellate court reverses the portion of the trial court's order granting the corporation's motion for summary adjudication of the employee's disability discrimination, retaliation, failure to prevent discrimination, and wrongful termination causes of action.

Petitioner John Glynn ("Petitioner") worked for Allergan, Inc. and Allergan USA, Inc. (collectively, "Allergan") as a pharmaceutical sales representative. His primary duties involved driving to doctors' offices to promote Allergan's products. Petitioner took a medical leave of absence for an eye condition that prevented him from being able to drive. Allergan's reasonable accommodation policy lists "reassignment to a vacant position" as potential accommodation. While on leave, Petitioner asked and applied for new jobs within the company that did not require driving, but he was never reassigned. After several months, Petitioner became eligible for long term disability ("LTD"). A temporary Allergan employee terminated Petitioner because she mistakenly believed that under the company's policy, termination was required once an employee's "transition date" from short term disability ("STD") to LTD benefits had passed. In actuality, the company's policy was that termination was required once the employee had applied, and been approved for, LTD benefits. However, Petitioner never applied for LTD, and he could have returned to work with accommodation. Petitioner tried to correct the mistake, but he was not reinstated.

Petitioner filed suit against Allergan alleging various disability discrimination and related claims under FEHA. Allergan moved for summary judgment and the trial court dismissed a number of Petitioner's claims, including his disability discrimination claim. The Court of Appeal held that the trial court erred in dismissing these claims.

The Court began by reiterating the process for evaluating disability discrimination claims, which ordinarily entails a burden-shifting framework, unless there is direct evidence that the motive for an employer's conduct was related to the employee's condition. The Court found that Petitioner provided direct evidence of disability discrimination, since Allergan terminated Petitioner because of its mistaken belief that he was totally disabled and unable to work. The Court reasoned that even if the employer's mistake was reasonable and made in good faith, a lack of discriminatory intent does not preclude liability for a disability discrimination claim. California law does not require an employee with an actual or perceived disability to prove that the employer's adverse employment action was motivated by animosity or ill will against the employee. Instead, California's

statutory scheme protects employees from an employer's erroneous or mistaken beliefs about the employee's physical condition.

75. *Gupta v. Trustees of the Cal. State Univ.*, 40 Cal. App. 5th 510 (Sept. 26, 2019)

Holding: In a FEHA retaliation trial, Plaintiff was not required to show that her qualifications were "clearly superior" to a comparator's qualifications in order to present evidence relating to comparator.

Dr. Rashmi Gupta ("Gupta") is an American woman of Indian national origin and ancestry. In 2006, Gupta was hired by the Trustees of the California State University for San Francisco State University ("SFSU") as a "tenure track assistant professor" in the School of Social Work, College of Health and Social Sciences. In her third year, Gupta received positive reviews from peer faculty and students. Then, in 2009, Gupta complained to high ranking SFSU faculty, including Dean of the College of Health and Social Sciences, Dr. Don Taylor ("Taylor"), about discrimination against people of color. Less than two months later, Gupta received a critical performance review. Gupta emailed colleagues complaining of a discriminatory and hostile work environment created by Taylor. Taylor confronted Gupta about the emails, telling her there would be "consequences." The next year, Gupta requested early tenure and received widespread support, but her request was denied.

Gupta filed a complaint with the EEOC, and filed a federal lawsuit alleging SFSU denied her early tenure as a result of discrimination and retaliation. The matter went to arbitration, and an arbitrator ordered SFSU to review Gupta for tenure the follow year. The year after, Gupta again received widespread support and exceeded the number of required publications. The school's interim director supported Gupta's tenure, but Taylor recommended against it. The next year, SFSU granted tenure to Dr. J.H., a professor in the School of Social Work who had not filed a complaint against SFSU. Gupta's student evaluation scores were better than J.H.'s, and Gupta had more than double the minimum requirements for publication, while J.H. had not met the minimum publication requirements. SFSU reevaluated Gupta for tenure, but agreed with Taylor's recommendation and denied her tenure and terminated her employment.

Gupta sued SFSU alleging discrimination and retaliation. The matter went to trial and a jury found against Gupta on her discrimination claim, but in favor of Gupta on her retaliation claim. Before trial, SFSU filed a motion *in limine* to exclude evidence of comparator professors on the grounds that Gupta's qualifications were not "clearly superior" to the qualifications of those professors. The trial court granted SFSU's motion as to one comparator who was in a different department than Gupta, but denied SFU's motion as to J.H., stating J.H. was similarly situated to Gupta in all material respects and evidence relating to J.H was thus relevant. On appeal, SFSU argued that the trial court erred in allowing

Gupta to present evidence of J.H. without requiring her to show her qualifications were "clearly superior" to J.H.'s.

The Court of Appeal rejected this argument. The Court stated that it is "well-settled that for comparator evidence to be probative, and therefore admissible at trial, all that is required is for the comparator, who was treated more favorably, to be 'similarly situated' to the plaintiff 'in all relevant respects.'" Additionally, Gupta presented ample evidence, other than comparator evidence, from which the jury could infer retaliation.

76. ***Jimenez v. U.S. Cont'l Mktg., Inc.*,**
41 Cal. App. 5th 189 (Oct. 17, 2019)

Holding: To evaluate whether an entity is an employer for purposes of FEHA, courts consider the totality of circumstances through the lens of a temporary staffing dynamic or other contractual framework. Thus, where a FEHA claimant presents substantial evidence of an employment relationship that is rebutted only by direction and control evidence outside the bounds of the contractual context (such as in temporary-staffing situation where hiring, payment, benefits, and time-tracking are handled by a temporary-staffing agency), the claimant has demonstrated an employment relationship for FEHA purposes.

Elvia Velasco Jimenez ("Jimenez") asserted claims under FEHA against her contracting employer U.S. Continental Marketing Inc. ("USCM"), a manufacturing company that negotiated with Jimenez's direct employer Ameritemps, Inc. ("Ameritemps"), a temporary-staffing agency, for her employment. The line between temporary and direct employees at USCM often blurred, for example: temporary employees often became direct employees, direct and temporary employees worked alongside each other using USCM's equipment; temporary and direct employees use the same USCM clinic for on-the-job injuries; temporary and direct employees supervise and train both temporary and direct employees; and USCM's polices apply to both temporary and direct employees. Jimenez worked for USCM as either a direct or temporary employee for five years before she was terminated. Jimenez was made ware of USCM's decision through a USCM employee. Shortly thereafter, Ameritemps also terminated Jimenez.

Jimenez sued USCM alleging, in part, five causes of action under FEHA. Jimenez's claims required a threshold showing that USCM was her employer. At trial, USCM framed the inquiry as a contest of relative influence between direct and contracting employers, asking the jury whether USCM had control over Jimenez *more than* the temp agency. The jury found that USCM was not Jimenez's employer because, in part, USCM did not hire Jimenez, Jimenez's paychecks came from Ameritemps, USCM did not exercise control over the decision to terminate Jimenez, Jimenez's termination letter came from

Ameritemps, and Jimenez used a time clock monitored by Ameritemps. Jimenez filed a motion for a new trial, and the trial court denied the motion. Jimenez appealed.

The Court of Appeal held that in evaluating whether an entity is an employer for FEHA purposes, courts consider the totality of circumstances and analyze several factors, principal among them the extent of direction and control possessed and/or exercised by the employer over the employee. In the case of temporary staffing, factors under the contractual control of the temporary staffing agency (i.e. hiring, payment, benefits, and timesheets being handled by temporary staffing agency) are not given any weight in determining the employment relationship with respect to the contracting employer. The inquiry with respect to the contracting employer is considered individually, not in relation to that of the direct employer—in other words, there is no contest of relative influence as was framed by USCM in its closing argument.

Here, USCM did not hire, pay, provide benefits to, or track Jimenez's time. But these factors are outside the scope of the terms and conditions of Jimenez's employment with USCM, so they do not bear on the issue. "The key is that liability is predicated on the allegations of harassment or discrimination involving the terms, conditions, or privileges of employment *under the control of the employer*, and that the employment relationship exists for FEHA purposes within the context of the control retained." The evidence reveals that USCM exercised considerable direction and control over Jimenez under the terms, conditions, and privileges of her employment. "[A]lthough the parties contest the characterization of Jimenez's termination, the appropriate inquiry in the temporary-staffing context is whether the contracting employer terminated the employee's services for the contracting employer (which USCM did), not whether the contracting employer terminated her employment with her direct employer (which USCM did not do)."

77. ***Ortiz v. Dameron Hosp. Ass'n*,**
37 Cal. App. 5th 568 (June 20, 2019)

Holding: Plaintiff, a nurse of Filipino origin, alleged FEHA discrimination and harassment; summary judgment reversed for numerous bases.

Ortiz sued her former employer, Dameron, and former supervisor, Alvarez, alleging she was discriminated against and subjected to harassment based on her national origin (Filipino) and age (over 40) in violation of the FEHA. The trial court granted defendants' motion for summary judgment because Ortiz could not show that she suffered an adverse employment action or causation.

Alvarez often demeaned Ortiz and other employees, many of whom were Filipino, by criticizing their English, grammar, and comprehension. She then transferred Ortiz to another unit without providing any training and levied false

accusations that Ortiz fell asleep while on duty. In addition to the aforementioned criticisms, Alvarez also griped about attending meetings with so many Filipinos over the age of 40 because they were "stupid" and she could not understand them. Finally, Alvarez stated that the Filipino unit coordinators were "too old and had been there too long."

First, the court of appeal held the trial court erred in ruling Ortiz must show Dameron knew of Alvarez's conduct prior to resignation because supervisory employees, such as Alvarez, effectively represent Dameron. As a result, Alvarez's intentional conduct alone was sufficient and created a triable issue on Ortiz's constructive discharge claim.

Similarly, the court explained FEHA's definition of employer encompasses agents of the employer, and where a constructive discharge is alleged to stem from a supervisor's conduct, her discriminatory motive is what is at issue. This conduct also permits a reasonable fact finder to conclude a hostile work environment as required to prove harassment. Thus, the trial court erred in granting summary judgment on both Ortiz's discrimination claim and harassment.

The court of appeal also held the trial court erred in sustaining the following objections. Ortiz stated her original position did not provide her with the training to perform her duties at the unit to which she was transferred. This statement was relevant in proving a hostile work environment because it tends to show Alvarez set Ortiz up for failure by making the transfer. Ortiz stated she suffered stress and anxiety. This did not constitute improper lay opinion because Ortiz is a registered nurse. Another employee's account of Alvarez saying she cannot understand Filipino employees was is not hearsay because it was offered to show discriminatory motive, not for its truth. Finally, an employee's testimony that Alvarez requested he say he saw Ortiz sleeping so Alvarez could fire her is relevant in proving both constructive termination (i.e., that Ortiz was coerced into resigning) and hostile work environment.

The court reversed the judgment and remanded to the trial court with instructions to reassign this matter to a different judge.

78. ***Schmidt v. Super. Ct.*,**
44 Cal. App. 5th 570 (Jan. 22, 2020)

Holding: Substantial evidence showed that Plaintiffs could not prevail on their sexual harassment claim, nor was trial court biased against them.

Two court employees alleged a security guard sexually harassed them with his metal detecting wand during the courthouse entry screening process. All security screening was in public and on video, and none of the video supported the allegations. After a lengthy bench trial, the trial court ruled the plaintiffs had not proved their allegations. The employees appealed, primarily targeting the trial

court's decision not to credit testimony favorable to them. The employees also asserted that the judge was biased against them.

The appellate court noted that the evidence was conflicting and hotly contested. The appellate court began its analysis with an explanation of the applicable standard of review. It explained that it reviewed the trial court's factfinding for substantial evidence, which was highly deferential. Under that standard of review, if substantial evidence supported the trial court's factual findings, those findings would not be disturbed on appeal. Inferences favorable to appellants may create conflicts in the evidence, but that is of no consequence. When a civil appeal challenges findings of fact, the appellate court's power begins and ends with a determination of whether there is any substantial evidence — contradicted or uncontradicted —to support the trial court findings. The court must view the evidence in the light most favorable to the prevailing party (here, the court), giving it the benefit of every reasonable inference and resolving all conflicts in its favor. The court explained that the trial judge may believe or disbelieve uncontradicted witnesses if there is any rational ground for doing so. The fact finder's determination of the veracity of a witness is final. Credibility determinations thus are subject to extremely deferential review. Given this deferential review, and the video evidence that contradicted much of plaintiffs' testimony, the court of appeal had no basis for reversing the trial court's findings.

The appellate court also rejected plaintiff's attempts to show legal error or bias in the judge's decision. For example, it was not legal error or bias to not include every case Plaintiffs cited, nor was it improper for the court to use cases and language from defendant's brief. Finally, the court rejected each of plaintiffs' contentions that the trial judge exhibited gender bias, noting that plaintiffs made such an assertion only after receiving the trial judge's decision.

79. *Williams v. Sacramento River Cats Baseball Club, LLC*, 40 Cal. App. 5th 280 (Sept. 24, 2019)

Holding: Job applicants, as distinguished from employees, have no Tameny common law tort claim for failure to hire; the only remedy is a statutory claim under FEHA.

Plaintiff Wilfert Williams sued the Sacramento River Cats Baseball Club for allegedly failing to hire him as an assistant visitor clubhouse manager because of his race. Plaintiff brought claims under a *Tameny* common law tort action for failure to hire because of his race, and discrimination under the Unruh and Ralph Civil Rights Acts, and unfair business practices under Business and Professions Code Section 17200. The trial court sustained the employer's demurrer to the complaint on the ground that California law does not recognize a common law cause of action for failure to hire in violation of public policy.

The Court of Appeal affirmed dismissal of the claim on the ground that only an employee (as distinguished from an applicant) may bring a common law claim for discrimination against an employer. Because the defendant did not owe plaintiff any duty, as it was not his employer, there was no viable common law tort action. The Court noted, however, that "plaintiff is not without recourse" because Plaintiff could have sued under the California Fair Employment and Housing Act ("FEHA").

VIII. FEDERAL ANTI-DISCRIMINATION EMPLOYMENT LAW

80. *Ft. Bend County, Texas v. Davis*, 139 S. Ct. 1843 (June 3, 2019)

Holding: Title VII's charge-filing requirement is not jurisdictional. Instead, it is a procedural prescription mandatory if timely raised, but subject to forfeiture if tardily asserted.

Former county employee, Lois Davis ("Davis") filed a charge against her employer, Fort Bend County ("County") alleging sexual harassment and retaliation for reporting the harassment. While her EEOC charge was pending, the County fired Davis because she failed to show up for work on a Sunday and went to a church event instead. Davis then attempted to supplement her EEOC charge by handwriting "religion" on the intake questionnaire, but she did not amend the formal charge document. Upon receiving a right-to-sue letter, Davis commenced suit in the federal district court, alleging religious discrimination and retaliation for reporting sexual harassment. After years of litigation, only the religious discrimination claim remained in the case. For the first time, the County asserted that the district court lacked jurisdiction to adjudicate Davis' case because her EEOC charge did not state a religion-based discrimination claim. The district court agreed and granted the County's motion to dismiss the suit. The Fifth Circuit reversed. The Supreme Court affirmed the Fifth Circuit.

The Court stressed the distinction between jurisdictional prescriptions and non-jurisdictional claim-processing rules. The word "jurisdictional" is generally reserved for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction). A claim-processing rule requiring parties to take certain procedural steps in, or prior to, litigation, may be mandatory in the sense that a court must enforce the rule if timely raised. But a mandatory rule of that sort, unlike a prescription limiting the kinds of cases a court may adjudicate, is ordinarily forfeited if not timely asserted.

Title VII's charge-filing requirement is a non-jurisdictional claim-processing rule. The requirement is stated in provisions of Title VII discrete from the statutory provisions empowering federal courts to exercise jurisdiction over Title VII actions. The charge-filing instruction is akin to prescriptions the Court has ranked

as non-jurisdiction, such as directions to raise objections in an agency rulemaking before asserting them in court, or to follow procedures governing copyright registration before suing for infringement.

81. ***Garcia v. Salvation Army*,**
918 F.3d 997 (9th Cir. March 18, 2019)

Holding: Title VII's religious organization exemption is non-jurisdictional and subject to procedural forfeiture. However, absent prejudice resulting from the failure to timely raise the defense, it can still be relied on to dismiss Title VII claims at summary judgment.

Plaintiff worked as a social services coordinator for Defendant, the Salvation Army, but left the church and stopped attending religious services. A few years later, a client filed a complaint against Plaintiff. Plaintiff demanded to see the complaint, but the Pastor refused, claiming that the complaint was confidential. Three days later, Plaintiff filed an internal grievance against the Pastor, claiming she felt discriminated against and excluded at work ever since leaving the church. Following a lengthy period of medical leave, Defendant fired Plaintiff after she failed to report to work despite being cleared by her doctor. Plaintiff sued for religious discrimination under Title VII and disability discrimination in violation of the ADA. The district court granted summary judgment in favor of Defendant, holding that Title VII's religious organization exemption protected Defendant from suit, even if Defendant failed to timely assert the defense in answer to the complaint, because the exemption is jurisdictional. The Ninth Circuit affirmed the grant of summary judgment but disagreed that the exemption is jurisdictional.

First, the Ninth Circuit confirmed that the religious organization exemption applies to the Salvation Army because its purpose and character are primarily religious. The fact that it makes a percentage of its total income from the exchange of goods or services does not preclude the application of the defense because it is a nonprofit organization that gives many of its services away or charges a nominal fee.

Second, the Ninth Circuit rejected Plaintiff's argument that the exemption did not reach her claims because it only applies to hiring and firing decisions. Congress "painted with a broader brush, exempting religious organizations from the *entire* subchapter of Title VII with respect to the *employment* of persons of a particular religion" and "the entire subchapter of Title VII includes protections against retaliation and discriminatory harassment amounting to a hostile work environment." Thus, the exemption applies to claims of retaliation and hostile work environment.

Third, the religious organization defense is not jurisdictional and can be forfeited because it limits entitlement to relief in a narrow class of cases, not the authority of federal courts to adjudicate claims under Title VII. However, in the absence of

a showing of prejudice, an affirmative defense may be raised for the first time at summary judgment. Plaintiff's only asserted prejudice was that she could not take discovery of Defendant's religious focus and mission, but the Ninth Circuit rejected this argument because Plaintiff was intimately familiar with the Salvation Army.

82. ***Karnoski v. Trump*,**
926 F.3d 1180 (9th Cir. June 14, 2019)

Holding: (1) The trial court improperly concluded that transgender people belong to a suspect class (they are only entitled to intermediate scrutiny) and (2) Military decision making is subject to an intermediate scrutiny standard of review.

In July 2017, President Trump announced that the United Stated military would no longer allow transgender people to openly serve. The President formalized the ban by issuing the 2017 memorandum prohibiting transgender people from serving in the military. After these directives were carried out, Ryan Karnoski (an open transgender man who wanted to serve in the military) sued claiming that the ban violates various constitutional protections. The district court shortly thereafter issued a preliminary injunction against enforcement of the ban. The court held so because the new policies had not been implemented after proper reasoning and deliberation. A study was then conducted on the issue, and the Secretary of Defense then requested the injunction be lifted to implement a new policy (2018 Memorandum) based on the study conducted. The district court denied the order and based its holding on two main premises. First, the court concluded that transgender people were a suspect class and that the Government would need to satisfy strict scrutiny principles. Second, the court concluded that the court was not due any deference in its decision because it was not made after proper reasoning or deliberation. An appeal followed.

The court began its analysis by explaining the standard for dissolution of a preliminary injunction. First, the court must consider whether the party seeking the dissolution has established a significant change in facts or law. Once this showing has been made, the court must then address whether this change warrants dissolution of the injunction. In applying the first prong of the analysis, the court concluded that the Government had established a significant change in facts or laws. First, the court noted that the 2018 memorandum had been implemented after extended research and consultation with various experts. Second, the court also noted that the substance of the policy had changed and included various safeguards that did not exist in the 2017 version of the policy.

With regard to the second part of the analysis, the court clarified some of the relevant factors for the district court for review on remand. First, the court held that transgender people do not constitute a suspect class. The court came to this conclusion based on its review of the case law regarding discrimination on the

basis of sex. Ultimately, it concluded that the standard of review applied by the district court should be somewhere between rational basis and strict scrutiny. Next, the court clarified how much deference the policy should be given as military decision making. The court noted that the proper standard of review for military decision making has already been settled by previous case law. The court reaffirmed that military decision making is properly decided under an intermediate scrutiny. In conclusion, the court remanded to the district court for analysis under these clarified principles.

83. ***Murray v. Mayo Clinic*,**
(9th Cir. Aug. 20, 2019)

Holding: District court properly instructed the jury that a plaintiff bringing an ADA disability discrimination claim must show that the adverse employment action would not have occurred but for the disability.

Dr. Murray filed suit against Mayo Clinic alleging that he was discharged because of his disability in violation of the Americans with Disabilities Act ("ADA"). The parties disagreed on the proper causation standard, and each party submitted a proposed jury instruction reflecting its position. Dr. Murray's position was that he only had to prove that the alleged disability was a motivating factor in his discharge - citing *Head v. Glacier Northwest, Inc*., 413 F. 3d 1053 (9th Cir. 2005) as supporting authority. In contrast, Mayo Clinic argued a "but-for" standard was proper. The district court agreed with Mayo Clinic and instructed the jury that Dr. Murray must prove that he was discharged because of his disability.

The district court reasoned the Supreme Court had abrogated the Ninth Circuit's reasoning in *Head* and denied Dr. Murray's motion for reconsideration.

On appeal, the court acknowledged they were deciding for the first time if *Head* is irreconcilable with the Supreme Court decisions in *Gross v. FBL Financial Services, Inc*., 557 U.S. 167 (2009) and *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). In *Head*, the Ninth Circuit based its decision on the premise that the "motivating factor" causation standard was consistent with the ADA's "plain language and purpose." In Gross, the Supreme Court explained Title VII decisions do not govern the ADEA because Title VII contains explicit "motivating factor" language' whereas the ADEA's language is more easily interpreted as requiring but-for causation. The ADA contains the very same language as ADEA – "on the basis of" - and none of the same "motivating factor" language as Title VII.

Second, the *Nassar* court reasoned the Title VII provision containing "motivating factor" language listed the discriminatory actions it applies to, and since retaliation is not on the list, the section does not apply to retaliation claims. Similarly, the ADA incorporated section 2000e-5, which provides relief for violations of section 2000e-2(m). The following are listed as illegal

considerations in employment decisions under section 2000e-2(m): race, color, religion, sex, and national origin. Since disability is not on the list, the incorporation of that section does not apply a motivating factor standard of causation to disability discrimination claims.

As a result, the court overruled its earlier decision in *Head*.

84. ***Rizo v. Yovino*,**
2020 WL 946053 (9th Cir. Feb. 27, 2020)

Holding: The Ninth Circuit, en banc, upon remand from the U.S. Supreme Court, affirmed the district court's order denying Defendant's summary judgment on Plaintiff's Equal Pay Act claims; prior pay does not qualify as a job-related factor (a "factor other than sex") that can defeat a prima facie Equal Pay Act claim.

This is a well-traveled case.

In 2014, Plaintiff sued Defendant in state court for violations of the Equal Pay Act ("EPA") and sex discrimination under Title VII and under the California Fair Employment and Housing Act ("FEHA"), as well as FEHA failure to prevent discrimination. Defendant removed the matter to federal court and moved for summary judgment. The motion did not contest that Plaintiff was paid less than her male counterparts but that her pay rate had been determined by Defendant's pay policy, which was based solely on employees' historical pay rates. Defendant argued that the policy itself was a "factor other than sex" (one of the exceptions to the EPA, 29 U.S.C. § 206(d)(1)) and should defeat Plaintiff's federal EPA claim.

The district court denied the motion, finding that the pay disparity resulted exclusively from Plaintiff's prior pay history, not her prior rates of pay when combined with other factors, and that "a pay structure based exclusively on prior wages is so inherently fraught with the risk – indeed, here, the virtual certainty – that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if motivated by a legitimate non-discriminatory business purpose." Defendant had relied on the rule in *Kouba v. Allstate Ins. Co.* (9th Cir. 1982) 691 F.2d 873, which held that prior pay, when combined with other factors, could justify a pay disparity between male and female workers. The district court rejected that argument and certified its order for interlocutory appeal.

In 2018, Circuit Judge Stephen Reinhardt, writing on behalf of a three-judge panel, began his opinion with the following paragraph:

> The Equal Pay Act stands for a principle as simple as it is just: men and women should receive equal pay for equal work regardless of sex. The question before us is also simple: can an employer justify a wage differential between male and female employees by relying on prior

> salary? Based on the text, history, and purpose of the Equal Pay Act, the answer is clear: No. Congress recognized in 1963 that the Equal Pay Act was long overdue: "Justice and fairplay speak so eloquently [on] behalf of the equal pay for women bill that it seems unnecessary to belabor the point. We can only marvel that it has taken us so long to recognize the fact that equity and economic soundness support this legislation."[1] Salaries speak louder than words, however. Although the Act has prohibited sex-based wage discrimination for more than fifty years, the financial exploitation of working women embodied by the gender pay gap continues to be an embarrassing reality of our economy.

Rizo v. Yovino (9th Cir. 2018) 887 F.3d 453. It was the final opinion Judge Reinhardt would write before he died, and the opinion was published posthumously after his death. But that was not the end of this case. The Supreme Court vacated the opinion, holding it was error to have issued the opinion after Judge Reinhardt's death, and remanded the matter for reconsideration. *Yovino v. Rizo* (2019) 139 S. Ct. 706. Another judge was randomly selected to replace Judge Reinhardt. On February 27, 2020, a three-judge panel again held that the *Kouba* rule was insufficient.

In the second go-around, Defendant conceded that it had no other defense to the EPA claim apart from the *Kouba* rule. Plaintiff argued that Congressional intent behind the EPA was to eliminate "deep rooted" pay differentials between men and women performing the same work, and that using employees' pay history perpetuated indefinitely the pay gap between male and female workers. In analyzing the scope of the "any other factor other than sex" exception to the EPA, the Ninth Circuit held that, based on the other three EPA exceptions, the statute's history and purpose, and decisions from other circuits, pay classifications must be based on legitimate differences in responsibilities or qualifications needed for specific jobs, not prior pay. The en banc panel aligned itself with the Second, Fourth, and Tenth Circuits, finding the Seventh Circuit's decision to be "an outlier." The panel also rejected the Eighth Circuit's approach of analyzing each case on a case-by-case basis and shunning a bright-line rule.

The panel then considered whether prior pay qualified as a job-related factor that could defeat a prima facie claim under the EPA. The Court held that prior pay, which represented pay received for performing work at other jobs, did not necessarily relate to the qualifications and responsibilities of job that would be the object of an EPA claim. Moreover, the Court found that allowing prior pay to serve as an affirmative defense would frustrate the purpose of the EPA because it would perpetuate wage disparities based on sex.

85. ***Valtierra v. Medtronic*,**
934 F.3d 1089 (9th Cir. Aug. 19, 2019)

Holding: The Ninth Circuit failed to reach the issue of whether morbid obesity itself is an "impairment" under the ADA absent identification of an underlying physiological condition, but held Plaintiff could not show a causal relationship between his impairments and his termination.

Plaintiff Jose Valtierra claimed he was terminated by his employer Medtronic on account of his morbid obesity (370 lbs.) in violation of the Americans with Disabilities Act (ADA). Medtronic terminated Plaintiff for falsifying records, which indicated he had finished more assignments than he had in fact completed before going on vacation. The district court granted summary judgment to Medtronic on the ground that obesity, no matter how great, cannot constitute a disability under the applicable EEOC regulations unless the obesity is caused by an underlying physiological condition. The Ninth Circuit affirmed summary judgment in favor of Medtronic on different grounds, holding that "we need not take a definitive stand on the question of whether morbid obesity itself is an 'impairment' under the ADA" because in this case Plaintiff had failed to show some causal relationship between his alleged impairments and his termination. The Court held there is "no basis for concluding that he was terminated for any reason other than Medtronic's stated ground that he falsified records to show he had completed work assignments" and there was no evidence that Medtronic "ever knew of similar misconduct on the part of others" who were not subjected to termination.

86. ***Weil v. Citizens Telecom Servs. Co., LLC*,**
922 F.3d 993 (9th Cir. Apr. 29, 2019)

Holding: (1) Under Fed. R. Evid. 801(d)(2)(D), hearsay does not include statements offered against a party, made by that party's employee on a matter within the scope of that employee's employment, so long as the statement was made while the employee was still employed by that employer; (2) Summary judgment on employee's termination claim was affirmed because the employee did not present evidence that he was performing satisfactorily.

David Weil sued Citizens Telecom Services for wrongful termination and discriminatory failure to promote under Title VII and related statutes. In support of his failure-to-promote claim, Plaintiff testified in his deposition that his former supervisor (identified in the opinion as "L.H.") told him that he did not receive the promotion because "You have three things going against you: You're a former Verizon employee, okay. You're not white. And you're not female." At the time L.H. made this statement to Weil, she was still working for the company though she was no longer Weil's supervisor. The district court excluded L.H.'s statement on the ground that it was inadmissible hearsay, and in the absence of other

evidence of discrimination, the district court granted Citizens' summary judgment motion. The Ninth Circuit reversed, holding that L.H.'s statement was not inadmissible hearsay pursuant to Fed. R. Evid. 801(d)(2)(D) because L.H. was still employed by the company (albeit in a different capacity) at the time she made the statement. Based upon L.H.'s statement, the Ninth Circuit reversed the summary judgment that had been entered with respect to Weil's failure-to-promote claim. However, the Ninth Circuit affirmed summary judgment with respect to Weil's wrongful termination claim on the ground that Weil failed to produce evidence that he was performing satisfactorily or that the employer treated a similarly situated employee who was not a member of Weil's protected class differently.

IX. WHISTLEBLOWER

87. *Bahra v. County of San Bernardino*, 945 F.3d 1231 (9th Cir. Dec. 30, 2019)

Holding: Administrative agency's decision had preclusive effect barring a § 1983 whistleblower claim but did not preclude a state retaliation claim under Labor Code Section 1102.5.

Plaintiff was terminated from the San Bernardino County Department of Children and Family Services. He challenged his termination through an appeal to the County's Civil Service Commission but was unsuccessful. Plaintiff subsequently filed an action in federal court, alleging retaliation under state and federal law. The district court granted summary judgment for defendants, holding in part, that plaintiff's claims for retaliation under California Labor Code section 1102.5 and 42 U.S.C. § 1983 were barred by claim preclusion and issue preclusion, given the findings by the Civil Service Commission. Plaintiff appealed to the Ninth Circuit.

The Ninth Circuit first held that the Commission's order sustaining plaintiff's dismissal did not preclude plaintiff's section 1102.5 claim for retaliation. The court noted that although decisions by administrative agencies typically have preclusive effect in California, a recent California appellate court applied a legislative-intent exception and held that administrative findings by a state agency do not preclude claims for retaliation brought under section 1102.5. (*See Taswell v. Regents of Univ. of Cal.*, 23 Cal. App. 5th 343, 232 Cal. Rptr. 3d 628, 643 (2018). Accordingly, the court reversed the district court's ruling to the contrary.

The court's conclusion regarding legislative intent, however, did not extend to plaintiff's claim under § 1983. The court noted that the plaintiff had not argued that giving an administrative proceeding preclusive effect in a later § 1983 action was contrary to legislative intent, and it declined to conduct such an analysis *sua sponte*. The court reasoned that plaintiff had a full opportunity to litigate the propriety of his termination before the administrative agency, as evidenced by a comprehensive evidentiary record and the availability of judicial review. The

court therefore concluded that plaintiff's § 1983 claim was precluded by the Commission's order and affirmed the district court's ruling on this claim.

88. ***Mathews v. Happy Valley Conf. Ctr., Inc.*,**
43 Cal. App. 5th 236 (Dec. 12, 2019)

Holdings: (1) Sufficient evidence supported a finding that defendants were a single employer under the integrated enterprise test; (2) Plaintiff's emails to the EEOC and the employer brought him within the protection of the whistleblower statute, under which punitive damages were available; and (3) A religious employer did not waive its religious entity exemption, despite the use of an employee handbook that "prohibited unlawful discrimination" and was "committed to compliance with all applicable laws."

Plaintiff Jeremiah Mathews was an employee of a religious employer, Happy Valley Conference Center, which was a subordinate affiliate of co-defendant Community of Christ church. Plaintiff reported wrongful conduct to the Conference Center's board of directors and the church's general counsel, after a younger male employee confided in him that a female executive director had sexually harassed him. Plaintiff was terminated a month later. He asserted retaliation claims under Title VII and FEHA and whistleblower claims under Labor Code section 1102.5, among other claims. Following a jury trial, judgment was entered in his favor awarding damages, penalties, and attorneys' fees.

On appeal, the appellate court rejected the church's argument that it was a separate entity, finding sufficient evidence to support findings that the church exercised financial control over the conference center, had common ownership with it, and did not maintain any legal distinction. The appellate court also found sufficient support for plaintiff's whistleblower claim, because plaintiff, while still employed with the conference center (i) emailed the EEOC stating that he believed he had been retaliated against in relation to another employee's sexual harassment complaint, and (ii) emailed the church's general counsel that he was pursuing state and federal complaints. The appellate court rejected defendants' argument that punitive damages were unavailable under section 1102.5.

The appellate court did agree, however, that defendants could not be liable under FEHA, because they fell within the religious entity exemption. Plaintiff argued that the employer had waived its religious exemption argument because its policies and handbook provided that company "prohibits unlawful discrimination" and was "committed to compliance with all applicable laws providing equal employment opportunities." The appellate court rejected that argument, concluding that the employer never explicitly referenced the FEHA in its handbook, and made no promises that it would be bound by the requirements of FEHA. The appellate court therefore modified the judgment to delete any reference to liability under FEHA, but otherwise affirmed the judgment and the separate order awarding attorneys' fees.

89. ***Nejadian v. County of Los Angeles*,**
40 Cal. App. 5th 703 (Oct. 1, 2019)

Holding: To prevail on a claim for a violation of Labor Code § 1102.5(c), the plaintiff must identify both the specific activity and the specific statute, rule, or regulation at issue. The court improperly instructed the jury on FEHA and the jury improperly awarded the plaintiff damages.

Nejadian alleged retaliation in violation of both section 1102.5(c) of the labor code and the California Fair Employment and Housing Act ("FEHA"). Nejadian alleges he was retaliated against because he refused to rebuild homes with existing septic system because he believed doing so would constitute a violation of the California Plumbing Code and/or the fire-rebuild guidelines. The jury awarded Nejadian damages and the County appealed. On appeal, the court found that the trial court made three errors.

First, under section 1102.5(c), Nejadian must show that the activity actually would violate the law. That is question of law for the court to decide. To do this, Nejadian must identify both the activity and the law with specificity. Nejadian only identified two activities with specificity – that he refused to give approval for two rebuild projects. However, Nejadian failed to identify any statute, rule or regulation that would be violated by such a rebuild, and no evidence was presented showing a violation of the California Plumbing Code. While Nejadian did identify a violation of the fire-rebuild guidelines, those guidelines were not rules for the purposes of section 1102.5(c). Even if they were, the evidence did not show they would be violated by the project. Thus, the court should have dismissed the section 1102.5 claim.

Second, the jury was instructed that Nejadian needed to establish the following to succeed on his FEHA claim: "his refusal to participate in activities that would violate state, federal, or local statutes, rules or regulations" was a substantial motivating factor in the adverse employment action. The court found the quoted portion to be improper because he would not have violated any statutes, rules, or regulations if he had participated in the activity. Thus, the instruction improperly allowed the jury to find Nejadian was subjected to an adverse employment action even if no violation of FEHA was committed.

Third, Nejadian failed to present sufficient evidence that he was unlawfully retaliated against. Nejadian's informal statement to a coworker that he felt he was discriminated against because of his age did not constitute protected activity, but the EEOC and DFEH filings did. Nejadian alleged three adverse employment actions, but only presented evidence of two - the downgrading of his rating in his performance evaluation and the denial of assignment to an acting position. However, the County offered undisputed evidence that these decisions were made for legitimate, nondiscriminatory reasons. Namely, the position was filled based upon performance evaluation ratings and his evaluation rating was lowered based

on an instruction that supervisors should reconsider ratings that could not be substantiated with documentary support.

The court reversed the judgment and entered judgment for the County.

90. ***Ross v. County of Riverside*,**
36 Cal. App. 5th 580 (June 20, 2019)

Holding: Summary judgment reversed in disability discrimination case where triable issues of material fact existed as to whether Plaintiff had a physical disability within the meaning of FEHA and whether he engaged in protected activity under Labor Code section 1102.5.

Ross alleged violations of Labor Code section 1102.5 and the California Fair Employment and Housing Act ("FEHA") during his employment as a deputy district attorney for the County. Ross inherited a case that he recommended the County dismiss in light of exculpatory evidence. Around this same time, Ross informed his supervisor that he may have a serious illness and as a result must undergo extensive testing. His supervisor denied his request to transfer units and to receive no new cases during the testing. Because the testing required Ross to miss work and to alleviate any stress, he arranged to continue the court dates for all of his existing cases. His supervisor then offered to transfer Ross to the filing unit and did so despite Ross's contention the quotas would cause him to endure more stress. Finally, the assistant district attorney asked for a doctor's note from plaintiff's out-of-state doctor and offered a leave of absence under the Family and Medical Leave Act ("FMLA"). Ross did not return to work and initiated a civil action. The trial court granted the County summary judgment on both claims.

Under Labor Code section 1102.5, a disclosure to one with authority is protected if the employee had a reasonably based suspicion of illegal conduct. The employee need not expressly state that he believed a violation of a state or federal law is occurring. Ross disclosed to his supervisors that he thought the confession of a defendant in a murder case was coerced and that the district attorney's office lacked probable cause in light of exculpatory evidence. Continuing to prosecute such a case contravenes a prosecutor's ethical obligations under state law. Ross's supervisors, as prosecutors, are subject to the same obligations. As a result, a reasonable trier of fact could find this disclosure to be protected activity and the trial court erred in awarding the defendant summary judgment.

A physical impairment, or a perceived physical impairment, can constitute a physical disability under the FEHA even if it is short term, as long as it affects a major life activity – such as work. Ross missed work to undergo months of testing for a neurological disease or autoimmune disorder. The County failed to comply with Ross's request for no new cases, but instead transferred him to a unit Ross deemed more stressful, requested a note from the out-of-state doctor conducting the testing, and placed him on a leave of absence pending a fitness-

for-duty examination. In light of both Ross's and the County's treatment of Ross's physical impairment, a reasonable trier of fact could find Ross had a physical disability under FEHA and the trial court erred in awarding the defendant summary judgment.

91. ***St. Myers v. Dignity Health*,**
44 Cal. App. 5th 301 (filed Dec. 12, 2019, part. pub. ord. Jan. 13, 2020)

Holdings: Plaintiff's claims of retaliation and constructive discharge were properly disposed of through summary judgment when she failed to establish one defendant (Optum360) was a joint employer, and she failed to raise a triable issue of fact as to any adverse employment action against the other defendant (Dignity Health).

Plaintiff worked as a nurse practitioner at a rural clinic that was part of a medical center owned and operated by defendant Dignity Health. During the three years she worked there, she submitted over 50 complaints about working conditions and was also the subject of several investigations based on anonymous complaints. All the investigations concluded the complaints against St. Myers were unsubstantiated and no action was taken against her. After she found a better paying job, she resigned. Claiming her resignation was a constructive termination due to intolerable working conditions, St. Myers sued Dignity Health and Optum360 Services, Inc. Optum 360 was a third-party provider that provided revenue cycling services to Dignity Health, such as scheduling, patient registration, health information management such as coding and transcription, billing, and collections. The trial court granted summary judgment to both defendants, and the appellate court affirmed.

As to Optum 360, the court referenced the various tests courts have adopted to determine joint employer status. It concluded that the common and prevailing principle espoused in all of the tests directs courts to consider the "totality of circumstances" that reflect upon the nature of the work relationship of the parties, with emphasis upon the extent to which the defendant controls the plaintiff's performance of employment duties. The court enumerated multiple factors that can be considered and concluded that nearly all the factors pointed to the conclusion that Optum360 was not a joint employer of St. Myers. Even though Optum360 may have had a small degree of control over St. Myers's pay (because one of its employees could make small changes to St. Myers's schedule), the conclusion was the same.

As to Dignity Health, the court noted that all of her causes of action required her to demonstrate an adverse action. Plaintiff contended she was constructively discharged, because she was subjected to intolerable working conditions, a campaign of harassment in the form of baseless investigations, false complaints whose sources were not investigated, a refusal to remedy safety issues, schedule manipulation that affected her pay and bonus compensation, and being forced to

practice in unsafe conditions and below the standard of care. The court concluded none of these arguments supported an inference of constructive discharge. The court focused on the undisputed evidence showing that plaintiff had never been disciplined, suspended, or demoted. All of the investigations regarding her found the accusations against her to be baseless, and no action was taken against her because of them. She received a raise, and her performance evaluation praised her outstanding work. She authored an e-mail thanking others for helping to improve the clinic. She was offered the opportunity to assume management duties. At the time of her resignation, she did not believe she was in danger of being fired and thought she could have stayed at her job. She quit only after she had a better job offer. When she resigned, she gave two weeks' notice. In sum, the court concluded that her litany of complaints failed to raise a triable issue of fact that Dignity Health "either intentionally created or knowingly permitted" an intolerable workplace that coerced her to resign.

X. ANTI-SLAPP (STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION)

92. *Greisen v. Hanken*, 925 F.3d 1097 (9th Cir. May 31, 2019)

Holding: former city manager retaliated against former chief of police in violation of chief's first amendment rights.

1. Police chief presented sufficient evidence to show his speech involved a matter of public concern;
2. Police chief spoke as a private citizen rather than a public employee;
3. Police chief's retaliation claim could be based in part on former city manager's own speech acts, in the form of defamatory communications to the media;
4. Former city manager waived his argument that his actions were supported by an adequate justification;
5. Sufficient evidence supports the conclusion that former city manager's retaliatory actions proximately caused police chief's termination, and any error in instructing the jury on proximate cause was harmless.

Former chief of police Doug Greisen ("Greisen") did not support former city manager Jon Hanken's ("Hanken") budget, resulting in tensions between Greisen and Hanken. Greisen grew suspicious about Hanken's accounting practices and voiced his concerns with several city administrators. Shortly thereafter, Hanken arranged for an outside agency to conduct three investigations of Greisen. The report from the first investigation found that Greisen committed several policy violations, so Hanken suspended Greisen for two weeks without pay. Greisen appealed to the city's Personnel Review Committee, which absolved him of wrongdoing and found the report was biased to arrive at a predetermined result. Hanken placed Greisen on paid administrative leave pending the results of the

latter two investigations. Hanken admonished Greisen not to speak about the investigations to anyone, even though Hanken released defamatory information about Greisen to the media. Hanken resigned from his position, and his replacement used a "no-cause" clause in Greisen's contract to terminate him, after the replacement reviewed the investigative reports and spoke with people whose views were highly polarized.

Greisen filed a lawsuit against Hanken alleging that Hanken violated the First Amendment by subjecting Greisen to adverse employment actions in retaliation for his protected speech. Hanken moved for summary judgment on qualified immunity, and the district court denied the motion. The claim was tried to a jury, which found in favor of Greisen, awarding him over $4 million. Hanken filed post-trial motions seeking a new trial and seeking judgment as a matter of law on other grounds. The district court denied the motions, and Hanken appealed. The Ninth Circuit affirmed the trial court ruling denying a new trial.

A First Amendment retaliation claim turns on five questions: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.

Greisen's speech, which concerned mismanagement of city funds, involved matters of public concern. Hanken argued that the speech involved private grievances and a power struggle between him and Greisen, but the Court rejected this argument. The Court analyzed the content, context, and form of the speech, and concluded that Greisen provided the trial court enough information about his discussions with city employees (i.e. a general timeline, the roles of those with whom he spoke, and a description of his motivations for his discussions) to show his speech substantially involved matters of public concern.

Greisen spoke as a private citizen, as opposed to a public employee, because: (1) Greisen did not confine his statements to individuals within his chain of command; (2) Greisen's statements concerning corruption in management of city finances were not part of his official duties as chief of police; and (3) Greisen spoke in contravention of his supervisors, as Hanken did not want him discussing or looking into the overall city budget or accounting practices.

Greisen identified a number of potentially adverse employment actions, including Hanken's communications with the media. Hanken argued that his communication with the press was an exercise of his own free speech. The Ninth Circuit rejected this argument, concluding that his speech was part of a concerted effort to deter Greisen from, and punish him for, engaging in constitutionally

protected speech. Hanken engaged in a campaign of harassment against Greisen that included not only defamatory communications with the press, but also a suspension, indefinite leave, a one-sided gag order and the instigation of three spurious investigations.

Next, Hanken was required to use a balancing test to prove he had adequate justification for treating Greisen different from other members of the public. Hanken did not raise the defense that he had an adequate justification to treat Greisen differently until after trial, and thus the Ninth Circuit refused to consider the defense.

Lastly, the Ninth Circuit found that a reasonable juror could have concluded that Hanken's actions were the proximate cause of Greisen's termination. The evidence showed that the replacement city manager's decision to terminate Greisen was not unrelated to Hanken's conduct. Hanken's actions, which amounted to a campaign of public humiliation through false and misleading representations, almost certainly played a direct and substantial role in creating these conditions, and a reasonable juror could have found that Hanken's actions were a causal factor in the decision to determine Greisen.

93. ***Long Beach Unified Sch. Dist. v. Margaret Williams*,**
43 Cal. App. 5th 87 (Dec. 9, 2019)

Holdings: Trial court properly struck school district's cross-complaint under the anti-SLAPP statute because, (1) the cross-complaint arose out of protected litigation activity, and (2) the school district did not establish a probability of success on its claims, because the indemnity provision of the contract at issue in the cross-complaint was limited as unconscionable, since it would have unfairly required Plaintiff to fund Defendant's defense as well as reimburse it for whatever award it obtained.

In 2006, Appellant Long Beach Unified School District ("the District") entered into a contract with Respondent Margaret Williams, LLC, which had been formed by Margaret Williams that year for the purpose of working for the District. According to Williams, the District required her to form a business entity to enter the contract, which was a standardized form agreement with terms she could not negotiate. Williams worked for the District, through her LLC, for nearly a decade on construction management and environmental compliance. After a dispute arose between Williams and the District about alleged violations of a cleanup agreement, Williams was diagnosed with arsenic poisoning, and the District terminated Williams LLC's then-current contract, which included an indemnity provision.

Williams and her LLC filed a lawsuit against the District alleging retaliation and that the District unlawfully caused Williams' arsenic poisoning. The District invoked the indemnity provision to demand that Williams LLC defend and

indemnify the District in the action. After Williams LLC refused to defend the District against its own claims, the District filed a cross-complaint alleging that the refusal to indemnify breached the contract. Williams LLC filed an anti-SLAPP motion to strike the cross-complaint. The trial court granted the motion and struck the District's cross-complaint. The Court of Appeal affirmed.

First, the Court of Appeal found that the District's cross-claim arose from protected activity. Specifically, the court reasoned that if the indemnity provision was enforced as the District requests, it would require Williams LLC to fund the District's defense against the very litigation the LLC and Williams brought against the District. The District's cross-complaint therefore arose from the litigation or the LLC's refusal to sabotage it – each of which is protected by the anti-SLAPP statute.

Second, the Court of Appeal found that the District failed to meet its burden to show a probability of prevailing on the merits of its cross-claims. Williams LLC raised an affirmative defense in its anti-SLAPP motion, arguing that the District could not prevail on its claims because the indemnity provision is both substantively and procedurally unconscionable. The court agreed. The indemnity provision drafted by the District sought to require the LLC not only to fund the District's defense, but also to reimburse the District for any award secured by Williams or the LLC falling within the provision's broad scope. This bar to recovery is substantively unconscionable. Further, Williams LLC produced evidence of adhesion, oppression, and surprise, which also establishes that the indemnity provision is procedurally unconscionable. The court therefore decided to limit the provision to avoid an unconscionable result, rendering it inapplicable to the claim brought by Williams LLC and Williams. In light of this limitation, the District failed to show error in the dismissal of the District's cross-claims.

94. ***Rall v. Tribune 365, LLC*,**
43 Cal. App. 5th 638 (Dec. 18, 2019)

Holding: The L.A. Times' decisions to cease publishing the plaintiff and to report on the inaccuracy of the plaintiff's blog was protected by the First Amendment, and the author's termination was not illegal.

The L.A. Times ("The Times") published a blog post describing an incident with the Los Angeles Police Department ("LAPD"), written by the plaintiff. Upon learning the post was not accurate, The Times published a "note to readers" remedying the inaccuracies and asserting plaintiff's work would no longer be featured in the newspaper. The Times also published a more detailed article on the subject relaying information from records of the incident that The Times obtained from the LAPD. Plaintiff sued alleging defamation, wrongful termination, and related claims. The Times brought an anti-SLAPP motion which required the court to first evaluate whether The Times made a threshold showing

of protected activity, and then whether plaintiff as shown a "probability of prevailing" on his claims.

First, the court considered the plaintiff's defamation claims and held The Times Articles were protected activity because they were written statements in a public forum (i.e. a newspaper) and pertained to a matter of public interest (i.e. a police investigation). With respect to the second prong on an Anti-SLAPP motion, the court found the plaintiff failed to meet his burden on his defamation cause of action because The Times articles were absolutely privileged as a fair and true report of what was said in the course of a public official proceeding. A police investigation is considered a public official proceeding and the investigation was central to the articles. The fact The Times conducted its own investigation and recounted its findings as well does not change that. The confidentiality exception to this privilege does not apply because the LAPD provided the investigation files to The Times thereby waiving its confidentiality. Finally, the court held the issue was not one for the jury because both the articles and the investigation were part of the record and the undisputed facts weighed in favor of The Times.

The court then considered the plaintiff's employment claims and held that the First Amendment grants a newspaper the right to control its content, so The Times' decision to omit the plaintiff's content in the future constituted protected activity. The court then held the plaintiff failed to meet his burden of showing a probability of success on his employment claims because the only wrongful conduct alleged is The Times' decision not to publish his work. While The Times cannot terminate an employee for an illegal reason, it can terminate an employee for any other reason. The parties disagreed whether plaintiff was an employee or an independent contractor, but in the end, the court noted it did not matter because plaintiff had not pointed to any authority rendering the decision illegal. Plaintiff claimed The Times retaliated against him for "offending the police chief" and that was the true reason for his termination. However, the court noted even if that were true, there is no authority supporting that as a basis for a public policy violation.

95. ***Wilson v. Cable News Network, Inc.*,**
7 Cal. 5th 871 (July 22, 2019)

Holding: (1) Anti-SLAPP statute can apply to employment discrimination and retaliation claims; (2) News organization's termination of employee's employment may qualify as protected activity under the anti-SLAPP statute where the termination is connected to the news organization's right to maintain journalistic ethics and/or to protect editorial integrity and credibility.

Wilson, a reporter who had been employed by CNN for 17 years, was terminated following an investigation by CNN into allegations of plagiarism. He sued, alleging that CNN discriminated against and ultimately terminated him based on

race, age, his taking parental leave, and for complaining about unlawful discrimination.

CNN filed a special motion to strike Wilson's complaint under the anti-SLAPP law, arguing that Wilson's employment claims arose from CNN's decision to fire Wilson, which CNN argued was an act in furtherance of its right to determine who should speak for it on matters of public importance. The trial court granted the motion to strike and dismissed Wilson's claims. A divided Court of Appeal reversed, agreeing with the courts above and holding that claims arising from alleged discrimination or retaliation in employment can never be based on an act "in furtherance" of a defendant's speech or petitioning rights. The Supreme Court disagreed with this conclusion as a categorical rule and reversed the Court of Appeal's judgment in part.

The Supreme Court first observed that claims arising from discrimination or retaliation in employment require both an unlawful motive and an action by the defendant. The Supreme Court concluded that an adverse employment action may be within the ambit of the anti-SLAPP statute, if that action was itself taken in furtherance of speech or petitioning rights. The Supreme Court noted that the fact there is some relationship between a particular action and an employer's speech does not necessarily mean the relationship is sufficiently substantial to cloak the action in constitutional protection.

The Supreme Court stated that a producer's decision as to who would speak for the organization may implicate free speech concerns. Similarly, the decision to hire or fire an employee with ultimate editorial control over the news organization's message (and lawsuits intended to influence those decisions) "could chill participation in the discussion of public issues, as surely as suits targeting the act of speaking itself." However, the Supreme Court found no evidence that Wilson's role at CNN was such that he spoke for CNN or exercised ultimate authority over CNN's message. Thus, the court found that the CNN's disciplinary action against Wilson, without more, did not bear a substantial enough relationship to its ability to speak on matters of public concern to trigger anti-SLAPP protection.

However, CNN's allegations of plagiarism against Wilson were sufficient to bring its termination under anti-SLAPP protection. News organizations have a recognized right to maintain and enforce codes of journalistic ethics in order to protect their editorial integrity and credibility, which "lies at the core of publishing control." Because CNN's evidence established a connection between Wilson's termination for alleged plagiarism and its right to maintain and enforce ethical standards, the termination qualified as an act "in furtherance of" CNN's speech on public matters.

XI. NON-COMPETE AGREEMENTS

96. *Techno Lite v. EMCOD, LLC*, 44 Cal. App. 5th 462 (Jan. 21, 2020, certified for partial publication)

Holding: Plaintiffs' promise not to compete with their current employer was not void under B&P Code § 16600, and thus could form the basis for a fraud claim.

Defendants Drucker and Nirenberg worked for plaintiff Techno Lite. At the same time, they started and ran their own company, Emcod. Techno Lite consented to Drucker's and Nirenberg's operating Emcod while working for Techno Lite, based on their promise that they would run Emcod on their own time, and that Emcod would not compete with Techno Lite. While Drucker and Nirenberg were still employed with Techno Lite, Emcod started selling to Techno Lite customers the same products Techno Lite was selling. Drucker did not tell Techno Lite's owners that Emcod was selling to their customers, and Emcod kept the profits from these sales. In addition, several e-mails were sent to Techno Lite's customers asking them to replace Techno Lite with Emcod. Drucker offered to purchase Techno Lite, but no purchase was consummated. Drucker and Nirenberg then resigned from Techno Lite.

Techno Lite sued Drucker and Nirenberg, alleging causes of action for breach of fiduciary duty, misappropriation of trade secrets, interference with contractual relationships, intentional and negligent interference with economic advantage, conversion, injunctive relief, and constructive trust. The gist of Techno Lite's complaint was that while Drucker and Nirenberg were employed by Techno Lite, they were siphoning off accounts of Techno Lite's and diverting the business of their employer to their own company, Emcod. At the subsequent trial, among other things, Drucker and Nirenberg were found liable for fraud.

On appeal, Drucker and Nirenberg argued that the trial court erred in holding them liable for fraud, because the false promise on which the fraud was based was void as a matter of law. Specifically, they argued that any promise Drucker and Nirenberg made not to compete with Techno Lite was void because, "the covenant not to compete with Techno-Lite was contrary to public policy and in violation of the express provisions of Business & Professions [Code] section 16600." Because "[a] promise ... to violate a statute or to violate an expressly stated legislative public policy is ab initio invalid, [it] cannot form the basis of a promisee's justifiable reliance; and justifiable reliance is a critical element of a promissory fraud action."

The appellate court disagreed, concluding that section 16600 has consistently been interpreted as invalidating any employment agreement that unreasonably interferes with an employee's ability to compete with an employer *after* his or her employment ends. But the statute does not affect limitations on an employee's

conduct or duties *while employed*. California law, the court found, does not authorize an employee to transfer his loyalty to a competitor. During the term of employment, an employer is entitled to its employees' undivided loyalty. Section 16600, the court stated, "is not an invitation to employees to bite the hand that feeds them."

In short, Drucker and Nirenberg's promise that Emcod would not compete with Techno Lite was not void *ab initio*, and Techno Lite was entitled to rely on it. Accordingly, the trial court did not err in finding appellants liable for fraud based on that false promise.

XII. PUBLIC

97. *Amezcua v. L.A. County Civil Serv. Com.*, 44 Cal. App. 5th 391 (filed Dec. 18, 2019, cert. for pub. Jan. 17, 2020)

Holding: Petition for writ of mandate denied to deputy sheriff who was terminated approximately 18 months after his date of hire and who alleged his 12-month probationary period was improperly extended and that he became a permanent employee after 12 months had passed and therefore was entitled to a hearing before he was fired.

The Los Angeles County Sheriff's Department (the Department) hired plaintiff as a deputy sheriff on January 25, 2015 and placed him on a 12-month period of probation. During the probationary period, the Department placed plaintiff on "relieved of duty" status and extended his period of probation pursuant to rule 12.02(B) of the Los Angeles County Civil Service Rules (Civil Service Rules). The Department then terminated plaintiff approximately 18 months after his date of hire. Plaintiff filed a petition for writ of mandate, contending that: the Department improperly extended his probation; he became a permanent employee 12 months after his hire date; and as a permanent employee, he was entitled to a hearing before discharge. The trial court denied his petition.

The court of appeal affirmed the denial of his petition. Six month into his probationary period, plaintiff became the subject of an administrative investigation when a female inmate at the detention center where plaintiff was assigned complained that plaintiff had asked her inappropriate personal questions and expressed a desire to have a relationship with her after her release. As a result, the Department placed plaintiff on relieved of duty status. Soon thereafter, the Department sent plaintiff a letter notifying him that his probationary period was being extended pursuant to rule 12.02. On July 18, 2016, the Department terminated plaintiff. Although the administrative investigation was deemed unresolved, the Department concluded that plaintiff had a "propensity to engage in inappropriate communication with inmates, lack of attention to safety, unethical conduct, and poor judgment." Because plaintiff was absent from duty during this time, the Department was authorized to extend his probationary

period. The fact that he was paid while on relieved of duty status did not change the result. Because he was still on probation at the time of his termination, he was not entitled to a hearing.

98. ***Barber v. State Personnel Bd.*,**
35 Cal. App. 5th 500 (May 17, 2019)

Holding: A reinstated state employee who was awarded back pay and benefits was not entitled to recover an additional amount as compensation for increased tax liability, because back pay awards were limited to salary and benefits, and increased tax liability was not salary.

Barber was awarded a lump-sum backpay award by the State Personnel Board (SPB), which resulted in Barber incurring increased income tax liability. SPB denied Barber's motion for recovery for increased tax liability. The trial court upheld SPB's decision and denied Barber's petition for writ of mandamus. Barber appeals the denial of his writ petition and motion for increased tax liability recovery.

Barber asserted that he was entitled to recover damages for incurring increased tax liability because his increased tax liability was caused by the real party in interest and respondent, Department of Corrections and Rehabilitation (CDCR), improperly terminating his employment. Barber argued that awarding him such relief would be consistent with the remedial statutory purpose of Government Code section 19584, of making an improperly terminated employee whole by restoring the employee to the financial position he or she would otherwise have occupied had employment not been wrongfully interrupted.

The court of appeal disagreed. Barber was not entitled to increased tax liability recovery under section 19584 or as equitable relief, because such relief is not statutorily authorized. The court therefore affirm the judgment denying such an award.

99. ***Boling v. Pub. Employment Relations Bd.*,**
5 Cal. 5th 898 (Aug. 2, 2019)

Holding: San Diego mayor had duty to meet and confer before placing city pension reform initiative on the ballot.

The California Public Employment Relations Board ("PERB") found that a city had committed an unfair labor practice by failing to meet and confer with employee organizations under California Government Code section 3505 regarding a citizens' initiative that made changes to public pensions. The Court of Appeal, Fourth District, Div. One, Nos. D069626 and D069630, annulled the finding. The Supreme Court reversed the Court of Appeal and remanded.

Two San Diego city officials, including the mayor, proposed public employee pension reforms. The mayor declared that he would develop a citizens' initiative to eliminate traditional pensions for new hires, except in the police and fire departments, and replace them with a 401(k)-style plan. Under San Diego's charter, the mayor acts as the city's chief executive officer, and his or her duties include conducting collective bargaining with city employee unions. The San Diego Municipal Employees Association (the "Union") wrote to the mayor, claiming the city had an obligation under the MMBA to meet and confer over the intended initiative. The city responded that it had no duty to meet and confer, because there was no action taken by the city council.

City unions filed unfair practice claims with the PERB, which agreed with the unions. The city challenged PERB's decision by writ, and the court of appeal held that the city was not required to meet and confer, because the meet and confer requirements apply only to proposals by the governing body of a public agency. Because citizen-sponsored initiatives are not from an agency's governing body, they are not subject to bargaining requirements.

The California Supreme Court reversed, holding that the mayor's promotion of a ballot initiative affecting terms and conditions of employment triggers the meet and confer duty. The facts before the court showed that the mayor conceived the idea of a citizens' initiative pension reform measure, developed its terms, and negotiated with other interested parties before any citizen proponents stepped forward. He relied on his position of authority and employed his staff throughout the process. He continued using his powers of office to promote the Initiative after the proponents emerged. On these facts, the court found, substantial evidence supported PERB's conclusion, which was entitled to deference, that the mayor's promotion of pension reform by way of a citizens' initiative created an obligation to meet and confer.

100. *County of Los Angeles v. Civil Service Commission (Montez)*, 40 Cal. App. 5th 871 (2019)

Holding: The Civil Service Commission abused its discretion when it reduced Montez's discipline to a suspension after he failed to report two incidents of abuse of an inmate and lied during the subsequent investigation.

An inmate in Los Angeles County Central Jail stole items from the commissary. After the commissary employee reported it to authorities, Deputy Lopez strip searched and assaulted the inmate. Deputy Montez was present during the incident, but did not participate nor know ahead of time that Lopez was going to use unnecessary force. After this first incident, Lopez assaulted the inmate again, after hearing that he had confronted the commissary employee. Montez was not present during the second incident, but soon thereafter became aware that it happened. Montez failed to report either incident.

The Sheriff's Internal Affairs Bureau investigated both incidents. When interviewed, Montez lied about having witnessed either incident or having knowledge of either occurrence. The department later notified Montez that he would be discharged for failure to conform to work standards by (1) failing to report his observation of a use of force by another deputy and (2) making false statements during the department's investigation. Montez appeal his discharge, and the commission found that the department failed to meet its burden of proving discharge was appropriate. The finding was based on the fact that a more junior employee also had failed to report the incident and lied during the investigation but was only suspended. As such, the commission reduced the penalty to a 30-day suspension. The county appealed (via a writ of mandate), and challenged the commission's decision to reduce the penalty. The superior court set aside the commission's decision and asked the commission to reconsider. Montez appealed the decision.

The only question on appeal was whether the Commission's decision to reduce Montez's discharge to a 30-day suspension was an abuse of discretion. The court held that "[i]n considering whether an abuse of discretion occurred in the discipline of a public employee, the overriding consideration is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, harm to the public service." The court further held that Montez's failure to report two incidents of abuse of an inmate constituted an inexcusable neglect of his duty to safeguard the jail population. Consequently, the court concluded that the commission abused its discretion when it reduced Montez's discipline to a suspension. There was no evidence in the record that offered any hope that Montez would act differently in the future. According to the court, his actions brought discredit upon himself and the department and the resulting termination was proper.

101. ***County of Ventura v. Public Employment Relations Bd.*,**
42 Cal. App. 5th 443 (Nov. 21, 2019)

Holding: County exercised sufficient control over employees of privately owned corporations that contracted with County to provide medical services, such that County was properly found to be a joint employer of the corporations' employees.

The Service Employees International Union ("SEIU") sought to represent nonphysician employees of medical clinics owned by private corporations but under contract with the Ventura County Medical Center ("VCMC") to provide medical services. SEIU filed a petition for recognition with the County, but the County refused to process it on the grounds that it was not the "employer, joint or otherwise, of the persons SEIU purports to represent." SEIU subsequently filed an unfair practice charge with Public Employment Relations Board ("PERB"). Following a hearing, an Administrative Law Judge found that PERB lacked jurisdiction over the matter because the County was neither a single employer nor

a joint employer. A PERB panel reversed the ALJ's decision. The majority found that SEIU "met its burden under the single employer doctrine and, alternatively, under the joint employer doctrine." The County filed a petition for a writ of extraordinary relief from PERB's decision. The court of appeal affirmed the finding that the County was a joint employer.

The court began its analysis by stating the applicable joint-employer doctrine: "A joint-employer relationship exists when two or more employers exert significant control over the same employees—where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment." 42 Cal. App. 5th at 450 (citations and internal quotation marks omitted). The court then discussed the substantial evidence that led it to conclude that a joint-employer relationship existed.

For example, the County exercised control over compensation and staffing decisions at the clinics, because the County has ultimate control over the Clinics' financial resources that pay for compensation and staffing, and it required the clinics to share staff to meet demand. The court noted that the County also had a right to control patient care and personnel policies, training, and other conditions of employment at the clinics. Clinic employees were required to attend County trainings, and County policies, rules, and training requirements governed the manner and method in which employees performed day-to-day patient care procedures and administrative tasks. Other County rules relating to employee conduct, workplace harassment, and dress codes affected the conditions of employment of clinic employees, who could be disciplined if they did not follow the policies or rules. Clinic employees were required to wear a badge that identified them as affiliated with the County; use County mail, e-mail, and IT systems; and perform various administrative tasks on behalf of the County. Finally, sworn statements on various federal and state application forms showed the County retained a right to control Clinic operations.

As a result, the court found that substantial evidence supported the conclusion that the County retained the right to control the manner and method in which Clinic employees' work is performed, and PERB did not err when it found the County was a joint employer. Because the court concluded that PERB properly had found the County was an employer under the joint-employer doctrine, it did not decide whether the single-employer doctrine applied.

102. ***Gonzalez v. City of Los Angeles*,**
42 Cal. App. 5th 1034 (2019)

Holding: A hearing before a Board of Rights fulfills the Police Officers Bill of Rights Act Government Code §3304(b) requirement of an opportunity for an administrative appeal before imposing punitive action.

This case involves two separate police officers with identical issues – whether or not a Board of Rights hearing fulfilled the administrative appeal before punishment requirement under Government Code § 3304(b). Plaintiff Cesar Gonzalez was a Los Angeles Police Department ("LAPD") sergeant living in San Bernardino County. He was criminally investigated for allegations that he supplied alcohol to and raped a minor. LAPD investigated the allegations, and initially suspended Gonzalez for 10 days; after further investigation substantiated several additional allegations, Gonzalez' proposed penalty was changed to a "Board of Rights for Removal." Gonzalez was sent by LAPD to a Board of Rights hearing with a proposed penalty of removal. The Board reported a unanimous guilty verdict for three counts of providing alcohol to a minor, sexual intercourse with a minor, and providing misleading information on the complaint form. Gonzalez was removed the next month.

Plaintiff Kosal Uch was an LAPD sergeant who was investigated for a complaint alleging invasion of a minor's privacy, recording a minor in a state of undress, and deletion of digital media from his department camera and cell phone. Uch's commanding officer sustained all but one of the 14 allegations, and LAPD directed Uch to attend a Board hearing and be removed if found guilty. The Board unanimously found Uch guilty and he was removed the next month.

Both plaintiffs filed a petition for writ of mandate, alleging the city failed to provide a fair administrative appeal in violation of Government Code § 3304(b). The Public Safety Officers Procedural Bill of Rights Act ("POBRA"; Government Code section 3300 et seq.) provides in Section 3304(b): "No punitive action … shall be undertaken by any public agency against any public safety officer … without providing the public safety officer with an opportunity for administrative appeal." Gonzalez and Uch argued that the City had not made a "final decision" to remove them until after the Board hearing, and so the City must create another procedure to satisfy the statute's requirement of an administrative appeal from a "final" punitive action.

The Court held that because removal was the selected sanction at all levels of the disciplinary process, the officers were not sent to their hearings before the City had made a decision as to which punishment to impose. Thus, the Court held that the City's provision of a hearing before the Board was the administrative appeal required by Government Code section 3304(b). Further, because the City of Los Angeles Charter ("Charter") requires the Chief of Police to order a Board hearing to review the charges and reach a decision, it "bakes into the standard procedure

what POBRA requires: an administrative appeal for the officer to establish a formal record of the circumstances surrounding his removal, and to attempt to convince LAPD to change the sanction."

103. ***Heimrich v. U.S. Dept. of the Army*,**
947 F.3d 574 (Jan. 16, 2020)

Holding: Unionized federal employees seeking to bring discrimination claims may go through either the union's negotiated procedure or the agency's EEO office, but not both.

Plaintiff was removed from his position as a power-plant mechanic for the United States Army Corps of Engineers in 2016. He initially challenged his removal by filing a grievance through his union's negotiated procedure. He then filed a separate complaint with the Army Corps's EEO office. The Army Corps contended that the EEO complaint raises the same matters as previously covered in Heimrich's union grievance, which is prohibited by section 7121(d) of the Civil Service Reform Act of 1978. Plaintiff, in response, argued that his EEO complaint contains allegations of a hostile work environment, a separate matter not explicitly raised in his union grievance. The district court agreed with the Army Corps, granting its motion to dismiss plaintiff's complaint. The Ninth Circuit affirmed.

The Ninth Circuit began its analysis by noting that section 7121(d) of the Civil Service Reform Act of 1978 provides federal employees claiming discrimination with two alternative means by which to raise the "matter." At issue, however, was whether plaintiff's CBA grievance and his EEO complaint raised the same "matter" under § 7121(d). Plaintiff contended that his EEO complaint contained allegations of a hostile work environment that were not presented in his CBA grievance, so that the grievance and the complaint did not raise the same "matter." The Army Corps, however, argued that plaintiff's EEO complaint covered the same matters previously raised in his CBA grievance. After analyzing the language of the statute and decisions from other circuits, the Ninth Circuit held that the term "matter" in 5 U.S.C. § 7121(d) refers to the "underlying action" in the CBA grievance or the EEO complaint. "Matter" is broader than "legal theory": it refers to the factual basis of the employee's adverse action.

Plaintiff asserted that his CBA grievance addressed only his termination, but his EEO complaint also included allegations of a hostile work environment. The court rejected that contention, however, noting that his EEO complaint contained no mention of a hostile-work-environment claim. To the extent he asserted additional harassing acts, they were not a separate claim, but supporting evidence for what he believed was a wrongful termination.

104. ***Koenig v. Warner Unified Sch. Dist.*,**
41 Cal. App. 5th 43 (filed 9/19/19, publ'n ordered 10/11/19)

Holdings: (1) The healthcare provisions of the termination contract were void because they violated Government Code Section 53261 and (2) these provisions of the contract were severable because the contract contained other lawful promised consideration.

Defendant school district hired plaintiff, Ron Koenig, to work as the principal of a few of the district's schools. The district later promoted the plaintiff to serve as the superintendent of the entire district. As a part of the promotion, the parties negotiated an employment agreement. Under the terms of the employment agreement, the district agreed to pay the plaintiff an annual salary and provide the plaintiff (and his spouse) a range of health care benefits, both for a period of 4 years.

Three years into the contract term, the parties elected to terminate the contract. In the process of terminating this contract, the parties negotiated and came to terms on a new agreement. As a part of this agreement, the district agreed to pay the plaintiff a lump sum of money and to provide the same health care benefits (including his spouse) until the plaintiff turned 65 years old in exchange for the plaintiff waiving any claims. Two years later, the district informed the plaintiff that it would no longer provide health care benefits because the contract clause violated Government Code Section 53261's prohibition on providing noncash benefits beyond the termination of a local agency administrator's employment contract.

The district court ruled in favor of the district and held that the entire termination agreement was void because the healthcare contract terms were unlawful. These provisions, according to the trial court, could not be severed and made the entire agreement unenforceable. The trial court ultimately concluded that the plaintiff was due everything he was entitled to under the original employment contract.

The Court of Appeal disagreed and reversed the trial court's decision. The court began its analysis by looking at Government Code Section 53261. The court concluded that, given the language of § 53261, the healthcare provisions of the termination agreement were unlawful and therefore void. The court next shifted their analysis to determine whether those provisions of the agreement were severable. The court recognized that a contract is severable and valid (despite an unlawful provision) when there are several distinct parts and at least one is lawful. The court also recognized that a contract can survive the severing of a major promise of consideration if it was only part of the promised consideration (and part of it is lawful). Moreover, the court held that a contract should be severed if it would serve the interests of justice. Given these principles, the court determined that the healthcare provisions of the agreement were severable because it was only part of the termination contract. Under the terms of the

contract, the plaintiff was also promised a lump sum of over $130,000. This was, according to the court, sufficient consideration to maintain the contract. The interests of justice were served because it allowed the plaintiff to retain the lawful benefits of the termination contact while preventing an unlawful windfall.

105. ***Le Mere v. Los Angeles Unified Sch. Dist.*,**
35 Cal. App. 5th 237 (Apr. 30, 2019)

Holding: Trial court properly sustained school district's demurrer to Plaintiff's cause of action for FEHA retaliation.

In 2002, plaintiff began working as a teacher for LAUSD. Between July 2006 and February 2014, appellant filed several claims and complaints arising from her employment. She filed two worker's compensation actions for injuries sustained when students attacked her. She filed at least two administrative complaints alleging LAUSD violated provisions of the Education Code. In 2007 she filed a civil action against LAUSD and two individuals for discrimination, retaliation and civil rights violations. In 2014, plaintiff filed a complaint with the California Department of Fair Employment and Housing ("DFEH"), subsequently receiving a "right to sue letter." After a couple of sustained demurrers, plaintiff filed a second amended complaint. LAUSD again filed another demurrer and the district court dismissed plaintiff's claims.

On appeal, the plaintiff argued that the district court improperly dismissed her claim for retaliation. The court disagreed. The court held that the plaintiff failed to allege that any of the named defendants held any retaliatory animus toward plaintiff or that they otherwise knew about her 2007 lawsuit. Moreover, the court noted that even if they had alleged some animus, no causal connection between the animus, the protected activity, and the retaliatory conduct had been alleged. In addition to the lack of any direct evidence of any animus, the case also lacked any indirect evidence of animus. A good portion of the "retaliatory behavior" alleged occurred before she filed her previous lawsuit. Another good portion of the "retaliatory behavior" she alleged occurred two years after the filing of the lawsuit. According to the court, a two-year period of time was insufficient to infer causation. Consequently, the appellate court affirmed the district court's dismissal of the claims.

106. ***Martinez v. Pub. Employees' Retirement System*,**
33 Cal. App. 5th 1156 (Apr. 4, 2019)

Holding: Statutory amendment did not supersede case law providing that termination for cause precluded disability retirement for public employees.

Linda Martinez, a former state employee, settled the termination for cause action against her, and agreed to resign and not re-apply for employment with the agency she was leaving. Her application for disability retirement was denied by the

CalPERS Board of Administration. Joined by her union, the Service Employees International Union, Local 1000 ("SEIU"), Martinez challenged the soundness and continued validity of case law holding that public employees are not eligible for disability if they were terminated for cause. Her challenge failed during her administrative appeal and was rejected by the trial court that denied her petition for mandate relief. The trial court further concluded that the agency was entitled to "substantial weight" due to "the agency's area of expertise." Ultimately, the court agreed with these two conclusions and affirmed the lower court's holding.

In *Haywood v. American River Protection*, an employee was progressively disciplined for workplace incidents and ultimately terminated. The employee was diagnosed with major depression as a result of the disciplinary actions taken against him. The employee sought disability retirement because returning to work would create a substantial risk of future depression. The court held that the employee was not entitled to disability retirement because there was a difference between an employee who was unable to return to work and one who is unwilling to do so. It is permissible to terminate an employee who is unwilling to return to work. Finally, because the disability retirement system contemplates the potential for reinstatement of an employee, the termination of an employee unwilling to return to work does not present any potential for reinstatement. As a result, an employee fired for cause is ineligible for disability retirement. In *Smith v. City of Napa*, the court reaffirmed this holding, but added that *Haywood* does not apply if the disability claim matured before the termination.

On appeal, the plaintiff argued that recent amendments to the Public Employees' Retirement System, had overturned case law precluding disability benefits to public employees terminated for cause. More specifically, the plaintiff argued that the relevant statute had been amended to add: " In determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process." This, according to the plaintiff, an employee's eligibility for disability benefits should be determined by review of someone's medical necessities, and not by review of their disciplinary history. Ultimately, the court agreed. The court found that the purpose of the amendments was to codify the belief that disability should be determined by medical evidence and not the desire to get rid of an employee without going through the process of disciplining the employee. According to the court, none of the legislative history made any reference and did not attempt to overturn previous case law with regard to public employees terminated for cause. Consequently, the court upheld the lower court's ruling.

107. *McCormick v. Calif. Pub. Employees' Ret. System*, 41 Cal. App. 5th 428 (Oct. 25, 2019)

Holding: Employees are eligible for a disability retirement under the California Public Employees' Retirement System pursuant to Government Code § 21156 when, due to a disability, they can no longer perform their usual duties at the only location where their employer will allow them to work, even if they might be able to perform those duties at a theoretical different location.

Plaintiff Cari McCormick worked as an appraiser for Lake County. She developed certain medical symptoms, including pain, fatigue, and dizziness, that seemed to be caused by her office environment. She initially requested to be move to different locations within the office, but nothing helped. She also requested that she be allowed to work from home, or from some other location, but those requests were denied. She applied for workers' compensation, but the request was also denied. Finally, she submitted an application for disability retirement under the California Public Employees' Retirement System. As a part of this application, the plaintiff stated that she could work in another building (as long as she remained asymptomatic), but that her employer did not allow her to. CalPERS ultimately denied her application. The plaintiff's lower court appeals were unsuccessful. Notably, the trial court determined that the plaintiff could perform her job duties in other buildings. Underlying all of the denials was the fact that the plaintiff could perform her duties in other locations other than her current environment.

On appeal, the plaintiff argued that she could be disabled under the California Public Employees' Retirement System even if she could perform her duties elsewhere. Ultimately, the court agreed. The court held that CalPERS cannot deny disability retirement, when due to a medical condition, applicants can no longer perform their duties at the only location where their employer will allow them to work. What matters for this analysis, is whether the employee can perform her duties in her "current environment." Whether the plaintiff can perform her usual duties elsewhere (or for another employer) is irrelevant to the eligibility for disability retirement. The court further held, that it is immaterial whether the plaintiff could have asked for a reasonable accommodation under FEHA. There was no basis, according to the court, for CalPERS to require the plaintiff to request an accommodation.

108. ***Perez v. City of Roseville*,**
926 F.3d 511 (9th Cir May 21, 2019)

Holding: Panel affirmed district court's summary judgment in favor of defendants in plaintiff's section 1983 claim, holding it was not clearly established that the police department could not terminate a probationary officer based on her extra-marital relationship with another officer and without a hearing.

Perez, a former probationary police officer, was hired for a one-year probationary term. She separated from her husband and began dating another officer, Begley, who worked the same shift as her. Begley's wife, after their separation, made a citizens complaint that Perez and Begley were engaging in sexual relations and texting while on duty. This prompted an internal affairs investigation, which concluded there was no evidence of sexual relations while on-duty, but there was evidence of phone calls and texts. Because this constituted unsatisfactory work performance and "conduct unbecoming" – as articulated in the police department's handbook – both officers were issued written reprimands. Subsequently, Perez was terminated for failing to complete her probation successfully.

Qualified immunity provides that a court may not award damages against a government official in his/her personal capacity unless (1) the officer violated "a statutory or constitutional right, (2) and that right was clearly established at the time of the challenged conduct." Both of Perez's arguments failed the second prong.

First, the court affirmed summary judgment in favor of the City in regard to Perez's section 1983 claim that she was terminated based on her extramarital relationship in violation of her constitutional right to privacy. The court reasoned even if the decision was based partially on her extramarital affair, the second prong of the qualified immunity standard justified summary judgment. There is no rule precluding consideration of relationships affecting job performance and/or community reputation. In fact, existing case law permits the consideration of an officer's sexual relations while on-duty, and even while off-duty in some circumstances.

The court also affirmed summary judgment in regards to Perez's claim that her constitutional right to due process was violated because she was never given an opportunity to address the stigmatizing statements levied against her. The court noted that Perez must establish the statements were made in connection with her termination, and to do so she must establish a temporal nexus between the two. Perez argued the letter the City sent to Begley's wife articulating the two policies she and Begley violated constituted a public charge. However, even if she proved this, 19 days passed between the letter and her termination. Thus, it was not clearly established that Perez was constitutionally entitled to a hearing.

The court held that the defendants were entitled to qualified immunity.

109. ***Ray v. County of Los Angeles*,**
935 F.3d 703 (9th Cir. Aug. 22, 2019)

Holding: The County of Los Angeles was not entitled to assert Eleventh Amendment immunity from a FLSA action because the County was not acting as an arm of the state when it administered the state's In-Home Supportive Services program and its original effective date was reinstated.

Plaintiffs brought a putative collective action under the Fair Labor Standards Act (FLSA) seeking overtime payments from the County pursuant to the United States Department of Labor's (DOL) rule excluding homecare workers from the "companionship exemption" to FLSA. A constitutional challenge was levied against the rule in *Home Care Ass'n of Am. v. Weil*, 799 F.3d 1084 (D.D.C. 2015), but the rule's constitutionality was upheld.

As a result of the challenge, the DOL announced the rule would be enforced no earlier than November 12, 2015, even though the rule articulated January 1, 2015 as its effective date. The plaintiffs sought unpaid overtime wages from the time period of January 1, 2015 through February 1, 2016. The district court held both the *Weil* court and the DOL intended the regulation would not become effective at least until November 12, 2015, and beginning the period on that date was consistent "with the general rule that a private right of action should ordinarily not exist when the applicable rule could not be enforced by the relevant enforcement agency." 935 F.3d at 708.

On appeal, the Court found the County was not entitled to Eleventh Amendment immunity by relying on the five-factor test from *Mitchell v. Los Angeles Cmty. Coll. Dist*., 861 F.2d 198 (9th Cir. 1988). Four out of the five factors weigh in the plaintiffs favor: (1) the judgment would not be paid directly from state funds; (2) the County can sue and be sued; (3) the County can take property in its name; (4) and the County has independent corporate status. The only factor in the County's favor is that the County performs centralized government functions.

The court then held that the plaintiffs were entitled to all of their sought-after unpaid wages because when the rule was deemed constitutional, its effective date was reinstated. In addition, the date that the DOL or the *Weil* court intended the rule become effective is irrelevant because the rule already had an effective date, and nothing suggests the DOL's decision not to enforce the rule was meant to obviate private rights of action.

110. ***Teamsters Local 2010 v. Regents of the University of Calif.*,**
40 Cal. App. 5th 659 (Sept. 30, 2019)

Holding: (a) Union showed reasonable probability of prevailing on claim that public employer violated state statute prohibiting use of public funds to influence employees' decision on issue of unionization, warranting denial of employer's anti-SLAPP motion; (b) union was entitled to rely on employer's declarations as evidence in opposing the anti-SLAPP motion; (c) the claim did not allege an unfair labor practice and was not subject to the exclusive jurisdiction of the Public Employment Relations Board (PERB).

The Teamsters represents skilled crafts employees at two University of California campuses, and sought to organize employees at UC Davis. During the campaign, the Teamsters distributed a flyer making a number of statements about the impact unionizing had upon the skilled crafts employees at the other two campuses. The Regents distributed a flyer titled "HR Bulletin" to the skilled crafts employees at UC Davis that cited several facts, including that the negotiations at the other UC campuses had resulted in salary freezes and that the UC Davis campus had a means of resolving grievances, and noting that UC Davis was committed to paying competitive market salaries, among other things. The Teamsters sued under Government Code section 16645.6, which prohibits public employers who receive state funds from using those funds to "assist, promote, or deter union organizing," defined in the statute as any attempt to influence the decision of employees whether to support or oppose a labor organization or to become a member of a union.

The Regents filed an Anti-SLAPP motion, which the trial court denied, and the Regents appealed. The parties agreed the conduct complained of arose from "protected activity" under the anti-SLAPP statute, such that only the union's probability of prevailing on the merits was at issue. The court of appeal held the union had established a probability of prevailing on the merits. While the bulletin was not coercive, professed the Regents' neutrality on the issue of unionization, couched its terms as facts, and did not threaten employees with reprisals if they unionized, the bulletin did contain a number of statements that a reasonable trier of fact could find to be attempts to "influence" the employees' decision within the meaning of Gov. Code § 16645.6. The court considered the sworn declaration of the university's executive director of labor relations, stating the employer had "decided to provide employees with additional facts so they could make a more informed decision about unionization" as evidence the university intended to influence employees. The court rejected the argument that the Teamsters failed to make the required evidentiary showing because the union relied on the university's declaration. The court compared the analysis of an anti-SLAPP motion to a summary judgment motion, in which "gaps" in the evidence can be filled by an opposing party's evidence.

The court also considered and rejected the Regents' argument that the Teamsters had no probability of prevailing because the case fell within the exclusive jurisdiction of the Public Employment Relations Board ("PERB"). The Higher Education Employer-Employee Relations Act ("HEERA") gives PERB exclusive jurisdiction to rule on unfair labor practices, which the HEERA defines not to include mere "influence" of an employee's decision on unionization, but threats, reprisals, and other coercive conduct. Therefore, conduct could violate section 16645.6 without amounting to an unfair labor practice. For the same reason, the court also rejected the Regents' argument that *Garmon*-type preemption should apply because the prohibited conduct was arguably protected or prohibited by HEERA. The conduct alleged to violate Government Code section 16645.6 did not come within the definition of an unfair labor practice, and no unfair labor practice was alleged.

The Teamsters filed their lawsuit in December 2017. On January 1, 2018, SB 285 became effective, which prohibits a public employer from "deterring" or "discouraging" public employees from becoming or remaining members of a union and gives PERB exclusive jurisdiction over claims of violations of the statute. The court declined to decide whether a claim filed after January 1, 2018 would be subject to PERB's exclusive jurisdiction.

111. *United Educators of San Francisco v. Calif. Unemployment Ins. Appeals Bd.*, 8 Cal. 5th 805 (Jan. 16, 2020)

Holding: Unemployment Insurance Code § 1253.3 does not bar substitute teachers and other public school employees from collecting unemployment benefits during the summer months if the summer session constitutes an academic term; a summer session is an academic term within the meaning of the statute if the session, on the whole, resembles the institution's other academic terms based on objective criteria such as enrollment, staffing, budget, and the instructional program offered.

Under section 1253.3 of the Unemployment Insurance Code ("section 1253.3"), public school employees are not eligible to collect unemployment benefits during "the period between two successive academic years or terms" if the employees worked during "the first of the academic years or terms" and received "reasonable assurance" of work during "the second of the academic years or terms." The teachers' union and the school district in this case agreed that the last date that the schools operated during the 'regular' session of the 2010–2011 school year was May 27, 2011, and that the first day of instruction for the 2011–2012 school year was August 15, 2011. The parties also agreed that the District operated a session of summer school from June 9, 2011 to July 7, 2011 for elementary school students, and from June 9, 2011 to July 14, 2011 for middle and high school students.

The teachers in this case did not receive regular compensation during the period from May 27, 2011 to August 15, 2011 unless they worked for the District during that period. Each claimant filed for unemployment benefits for the entire period between May 27, 2011 and August 15, 2011. The Employment Development Department ("EDD") denied their claims. The California Unemployment Insurance Appeals Board ("CUIAB" or "Board") concluded that section 1253.3 did not bar such claimants from collecting benefits for the portion of the period between May 27, 2011 and August 15, 2011 during which they expected to work but did not. Separately, the Board issued a precedent-setting decision in which it concluded that where a claimant was qualified and eligible for work during the summer school session, the denial provisions do not apply for the weeks of the summer school session. Following a petition for review of administrative mandate, the superior court rejected the Board's conclusions in the current case and invalidated the precedent-setting decision of the CUIAB. The Court of Appeal affirmed, concluding that summer sessions were not academic terms, but instead fall between academic years or terms, rendering claimants ineligible for benefits during that time.

After analyzing the potential meanings of "academic term" and "academic year," the court concluded that if a school district offers a summer session that resembles the fall and spring semesters in terms of enrollment, staffing, budget, and the instructional program offered, then the summer session would qualify as a "regular" term. Such a term would not fall within the period of unemployment benefits ineligibility mandated by section 1253.3. The court noted that the record contained little evidence, one way or the other, on the objective characteristics of the summer sessions at issue, and the parties could introduce such evidence on remand.

112. ***Visalia Unified Sch. Dist. v. Super. Ct.*,**
43 Cal. App. 5th 563 (Dec. 17, 2019)

Holding: Government Code § 818 prohibits the imposition of punitive damages against school districts sued under the whistleblowing statute, Reporting by School Employees of Improper Governmental Activities Act (Ed. Code §§ 44110-44114).

A school district employee, Natalie Harlan, sued her former employer Visalia Unified School District ("VUSD") and two individuals for retaliation in violation of the Reporting by School Employees of Improper Governmental Activities Act ("Act"). Plaintiff sought compensatory and punitive damages from all three defendants. VUSD moved to strike the punitive damages allegations against it on the ground that it is a public entity, immune from punitive damages under Government Code § 818. The trial court held that the Act superseded Government Code § 818. The Court of Appeals disagreed and ordered the trial court to strike the punitive damage allegations as to VUSD from the complaint.

The plaintiff was a special education program manager for VUSD, who claimed she lost her job after refusing instructions from a program co-director to backdate certain documents. After reporting the issue to another co-director, she was told she would not be reelected to her position for the following school year. She filed a complaint against VUSD and both co-directors for retaliation and other causes of action.

The Act provides a person shall be liable for punitive damages for malicious acts; the Act defines "person" as including "any state or local government, or any agency or instrumentality of any of the foregoing." Government Code § 818 bars the imposition of punitive damages against public entities and applies "notwithstanding any other provision of law." The Court of Appeals found no implied repeal of § 818 by the Act, because the phrase "notwithstanding any other provision of law" was very broad, and the Act contained no language creating an exception to § 818.

XIII. ERISA

113. *Acosta v. City National Corporation*, 922 F.3d 880 (9th Cir. 2019)

Holding: (a) ERISA's "reasonable compensation" exemption does not apply to fiduciary's self-dealing by setting, approving, and paying its own fees from plan assets as the plan's recordkeeper; (b) In awarding pre-judgment interest, the district court abused its discretion by including unopposed offsets in the total base amount used to calculate interest.

City National Corporation maintained a defined-contribution 401(k) employee profit-sharing plan, and one of its subsidiaries, City National Bank (CNB), acted as the plan's trustee and recordkeeper as well as one of its fiduciaries. For performing services as recordkeeper, CNB was compensated through a largely automated process of "revenue sharing" pursuant to which CNB received a portion of fees charged to the plan by mutual funds. While CNB was the recordkeeper for approximately 200 other plans during the same period, CNB did not maintain a system for tracking how much time its employees spent servicing the plan.

The Department of Labor (DOL) filed a complaint against CNB alleging CNB engaged in prohibited self-dealing under ERISA § 406(b), 29 U.S.C. § 1106(b), by setting and approving its own recordkeeping fees and regularly accepting those fees as compensation for its services. The DOL moved for summary judgment on liability, and the district court granted the motion. The district court then ordered an independent accounting of CNB's plan-related revenue, which determined the plan's total losses. The district court granted the DOL's second motion for summary judgment on damages, awarding $8,815,596.13 less certain unopposed offsets.

The Ninth Circuit affirmed summary judgment on liability, rejecting CNB's argument that the "reasonable compensation" exemption should apply only to circumstances where the fiduciary received kickbacks and transfers of plan assets to personal accounts or otherwise received compensation for illegitimate services. It cited the "broad sweep" of prior Ninth Circuit cases and concluded the exemption does not apply even where a self-dealing fiduciary seeks "reasonable compensation" for actual and legitimate services rendered. On the issue of damages, the court held that CNB had provided insufficient evidence to establish it was entitled to claimed offsets above certain unopposed offsets, but that the district court had abused its discretion in awarding prejudgment interest on CNB's liability for the gross amount of its recordkeeping compensation rather than on net compensation after the deduction for unopposed offsets.

114. ***Dorman v. The Charles Schwab Corp.*,**
934 F.3d 1107 (9th Cir. 2019)

Holding: ERISA claims can be subject to mandatory arbitration, overruling *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984).

Plaintiff, a former employee of Charles Schwab & Co., Inc. ("Schwab") who participated in Schwab's defined contribution 401(k) retirement plan ("Plan") filed a putative class action claiming Defendants violated ERISA and breached their fiduciary duties by including Schwab-affiliated investment funds in the Plan, despite the funds' poor performance, to generate fees for Schwab. While Plaintiff was employed, Schwab amended the Plan to add an arbitration provision that required arbitration of all disputes and that arbitration be conducted on an individual basis only, and not on a class, collective, or representative basis. Defendants moved to compel arbitration pursuant to the Plan arbitration agreement, and the district court denied the motion. Defendants filed an interlocutory appeal.

The Ninth Circuit considered the threshold issue of whether ERISA claims can be subject to mandatory arbitration. (In a separate, unpublished opinion, the court addressed Defendants' challenges to the district court's denial of their motions to compel individual arbitration and for leave to move for reconsideration and reversed those orders.) The court considered the 35-year-old case of *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984), in which the Ninth Circuit had held ERISA's "mandated 'minimum standards for assuring the equitable character of [ERISA] plans'" could not be satisfied by arbitral proceedings, on the basis that arbitrators lacked the competence of courts to interpret and apply statutes as Congress intended. The court noted that since *Amaro*, the Supreme Court had ruled in *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013) that federal statutory claims are generally arbitrable and that arbitrators are competent to interpret and apply federal statutes, and that this precedent was irreconcilable with *Amaro*. The panel held *Amaro* was no longer binding precedent under the rule that where an intervening Supreme Court

decision undermines an existing precedent of the Ninth Circuit and both cases are closely on point, a three-judge panel may overrule the prior circuit authority.

115. ***Intel Corp. Inv. v. Sulyma*,**
909 F. 3d 1069 (9th Cir. 2018), *cert. granted*,
139 S. Ct. 2692 (Dec. 4, 2019)

(Note: the case was argued on 12/04/19, but SCOTUS has not yet issued an opinion.)

Issue: Whether the three-year limitations period in Section 413(2) of ERISA, which runs from "the earliest date on which the plaintiff had *actual knowledge* of the breach of violation," bars suit when all the relevant information was disclosed to the plaintiff by the defendants more than three years before the plaintiff filed the complaint, but plaintiff chose not to read or could not recall having read the information.

Christopher Sulyma ("Sulyma") worked at Intel from 2010-2012, where he participated in retirement accounts an Intel investment committee managed. The Funds invested in "alternative investments" and did not perform as well as comparable portfolios. Intel disclosed the investment decisions and Fund performance in documents hosted on two websites. Sulyma said he accessed some of this information but was not aware that his accounts were involved. In 2015, Sulyma sued Intel, claiming the committee mismanaged his accounts and violated ERISA. Intel moved to dismiss the complaint as untimely under 29 U.S.C. § 1113(2), which provides that an action under § 1104 has a three-year statute of limitations beginning on "the earliest date on which the plaintiff had actual knowledge of the breach or violation." The district court converted the motion into a motion for summary judgment, and then granted summary judgment in favor of Intel. The Ninth Circuit reversed and remanded the case. The Ninth Circuit ruled that the three-year bar did not apply because Sulyma had not read the disclosures that apprised him of the investments that he claimed violated ERISA, and thus he could not have had "actual knowledge" of a breach.

Insights from 12/04/19 argument:

The Court grappled with the issue of whether receiving pension investment disclosures constitutes "actual knowledge" of a fiduciary breach even when many people don't read the detailed disclosures required by federal law.

Intel argued that the Ninth Circuit wrongly interpreted "actual knowledge" to mean subjective awareness of the facts of a beach or violation. Instead, plan participants have "actual knowledge" that is imputed to them when they receive plan disclosure documents. The phrase "actual knowledge" must be interpreted in the context of ERISA's text and emphasis on "robust disclosure by plan fiduciaries and private policing of plans by plan participants". Intel argued that

by interpreting "actual knowledge" to mean subjective awareness, is to effectively double from three to six years (six years being the default limitations period for ERISA) the period in which plaintiffs can exploit hindsight bias to second-guess investments.

Sulyma argued that by requiring "actual knowledge", Congress meant what we all understand the phrase to mean - the plaintiff must have real awareness. Sulyman claimed that this interpretation makes sense since most people don't read complicated disclosures full of jargon. Instead, most people trust that their fiduciaries are acting in their best interest. Given the real-world understanding, it was sensible that Congress chose not to start the three-year clock as soon as a plan participant receives the disclosure.

116. *Lehman v. Nelson*,
943 F.3d 891 (9th Cir. 2019)

Holding: Trustees of labor union pension plan abused their discretion and violated ERISA by interpreting plan amendment to apply to "pass-through" payments to be transferred to out-of-state plans.

Trustees of the IBEW Pacific Coast Pension Fund ("Fund") learned that the Fund would soon enter "critical status" under the Pension Protection Act of 2006 and, accordingly, amended the Fund's Pension Plan ("Plan"). The effect of the amendments was to withhold at least $1.00 per hour from all employer contributions in order to improve the funding status of the Fund. The Plaintiff, an electrician and member of the Puget Sound Electrical Workers Pension Trust, and putative class members were "travelers." As such, they frequently traveled outside of the jurisdiction of their home funds. Pursuant to a "Reciprocal Agreement" that was incorporated into the Plan, when travelers were employed temporarily outside their home fund, their employers contributed to the local funds in the places where they performed work. The Reciprocal Agreement further provided that a separate account of contributions was required to be kept for each traveler, and a transfer equal to the amount of all contributions received was to be transferred to the traveler's home fund within thirty days of receipt.

When the Fund amended the Plan, they designated the $1.00 per hour withholdings as "non-benefit contributions," and those contributions were not passed through to the travelers' home funds. Plaintiff filed a putative class action against the Fund Trustees claiming they violated ERISA and breached their fiduciary duties by withholding $1.00 per hour from traveler's employer contributions without providing any accrued benefit to them. The Ninth Circuit affirmed the district court's summary judgment in favor of the class, rejecting the Trustees' argument that the Plan amendments created "non-benefit contributions" that were excluded from the "contributions" for which monies would need to be passed through to a traveler's home fund. Because the Plan incorporated the Reciprocal Agreement, and pass-through contributions were not assets of the

Fund, the Trustees' did not have the discretion to withhold those contributions by designating them "non-benefit" contributions.

117. *O'Rourke v. Northern Cal. Electrical Workers Pension Plan*, 934 F.3d 993 (9th Cir. 2019)

Holding: (a) Alleged procedural irregularities in board of multi-employer pension plan's denial of early retirement benefits weighed at most only slightly and weakly in favor of concluding the board abused its discretion; (b) Board's interpretation of "prohibited employment" precluding early retirement benefits was reasonable.

Defendant multi-employer pension plan for electrical workers (Plan) provided early retirement and an early pension at age 55 for those accumulating ten or more years of covered employment, with a restriction that no benefits would be paid "for any month in which the Participant worked in Prohibited Employment." The Plan also provided that its six-member board, comprised of three labor and three management representatives, would determine any dispute as to eligibility of benefits, and that the board had "exclusive power and discretion to interpret the provisions of the Plan."

Plaintiff, a plan participant who worked as an electrician for 20 years and then was elected business manager of his local union and subsequently served in administrative positions for the IBEW, applied for and was denied early pension benefits. He sued, alleging he was entitled to an early pension and claimed benefits under 29 U.S.C. § 1132(a)(1)(B). The parties cross-moved for summary judgment, and the district court granted the Plan's motion, concluding that the board had not abused its discretion in denying benefits.

The Ninth Circuit affirmed. The court first considered alleged procedural irregularities and the weight to be given them in determining whether the board abused its discretion. These irregularities included alleged emails and meeting minutes reflecting "political hostility" and personal animus toward Plaintiff; shifting rationales for the denial; the rejection of the opinion of Plan counsel in 2014; and the board's reversal of its prior position based on a 2010 resolution.

The court found a lack of evidence in the record supporting the first two alleged procedural irregularities and that, with regard to the alleged ignoring of Plan counsel's opinion, the record reflected the Plan was ambiguous and there was a good faith disagreement about interpretations of the Plan. The board's change in position from 2010 to 2014 reflected a change in opinion, rather than a procedural irregularity. Based on the totality of the facts, the court held that Plaintiff's irregularity argument demonstrated at best only that the board held a different interpretation of the plan from Plaintiff and past boards, and that it was unwilling to change its interpretation based on Plaintiff's arguments or Plan counsel's

advice. These were not, according to the court, "serious procedural irregularities that would weigh heavily against" the board.

The court then reviewed the board's interpretation of "Prohibited Employment" and found the interpretation reasonable and affirmed the district court's order awarding summary judgment.

118. *Ret. Plans Comm. of IBM v. Jander01*, 2020 WL 201024 (*per curiam* Jan. 14, 2020)

Holding: Briefing by the parties did not address the question presented, which concerned what it takes to plausibly allege an alternative action "that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it" in a case alleging ERISA-governed employee stock options plan fiduciaries breached the duty of prudence. The Supreme Court vacated and remanded to the Second Circuit to allow it to consider whether to address the issues raised by the parties.

Plaintiffs, IBM employees who participated in IBM's employee stock option plan ("ESOP"), claimed the plan's fiduciaries knew that a division of the company was overvalued but failed to disclose that fact, which artificially inflated the ESOP's stock price and harmed the ESOP's members. They sued the plan's fiduciaries, who included IBM's Chief Accounting Officer, Chief Financial Officer, and General Counsel, under 29 U.S.C. § 1104(a)(1)(B), alleging the defendants failed to manage the plan's assets prudently. They alleged that once the defendants learned IBM's stock price was artificially inflated, they should have taken one of three alternative actions – disclose the truth about the overvaluation, issue new investment guidelines to temporarily freeze further investments in IBM stock, or purchase hedging products to mitigate potential declines in the value of IBM common stock. The district court granted defendants' motion to dismiss on the basis that Plaintiffs had failed to plausibly plead the alternative actions would not have done the plan more harm than good.

The Second Circuit reversed. The court noted that the United States Supreme Court's decision in *Fifth Third Bancorp v. Dudenhoffer*, 134 S. Ct. 2459 (2014) held that a duty-of-prudence claim may lie against ESOP fiduciaries only where it is alleged that fiduciaries behaved imprudently by failing to act on the basis of nonpublic information that was available to them because they were corporate insiders, and that to plausibly plead such a claim, plaintiffs must plausibly allege an alternative action the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it. The Second Circuit noted the tension within the text of the *Dudenhoffer* decision regarding whether the standard would be measured against what the average fiduciary would have concluded, versus the question whether *any* prudent fiduciary *could* have considered the alternative action to be more harmful than

helpful. The court declined to decide which of the two standards was the proper standard, because it held plaintiffs' complaint stated a claim even under the more restrictive test.

IBM appealed to the Supreme Court, which vacated the judgment and remanded the case to the Second Circuit without deciding the legal issues. The Supreme Court noted that the parties had focused their arguments primarily on matters outside the question on certiorari. The parties' briefs had instead focused on two issues: (1) whether ERISA imposes no duty on ESOP fiduciaries to act on inside information, and (2) whether an ERISA-based duty to disclose inside information that is not otherwise required to be disclosed by the securities laws would conflict with the insider trading and corporate disclosure requirements of the federal securities laws. The Supreme Court remanded to the Second Circuit to decide whether to entertain these arguments.

119. ***Rudel v. Hawai'i Mgmt. Alliance Assn.*,**
937 F.3d 1262 (9th Cir. 2019)

Holding: (a) District court properly exercised federal jurisdiction and denied motion to remand of injured motorcyclist seeking determination of validity of insurer's lien on third-party settlement proceeds, because his state law claims could have been brought as ERISA claims; (b) The Hawai'i statutes at issue were saved from preemption pursuant to ERISA's savings clause, were not subject to conflict preemption, and provided the relevant rule of decision in the removed action.

Plaintiff was injured while riding his motorcycle home from work. Hawai'i Medical Alliance Association ("HMAA") paid for his medical expenses pursuant to an employee benefit plan (Plan) governed by ERISA and then asserted a lien on a portion of a $1.5 million tort settlement the Plaintiff entered into with the third-party driver who caused the injuries. Two Hawai'i statutes which, read together, prohibited insurance providers from seeking reimbursement for general damages from third-party settlements, posed obstacles to HMAA's lien. Plaintiff filed an action in state court for determination of the validity of HMAA's lien. HMAA removed the case to federal court, and Plaintiff moved for remand, arguing he sought only to "keep" benefits already provided by HMAA rather than to "recover" benefits under the terms of the Plan.

The district court denied Plaintiff's motion on the basis that the action was "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits" under ERISA § 502(a)(1)(B). Plaintiff then moved for determination of the validity of HMAA's lien pursuant to the Hawai'i statutes, and HMAA filed a motion for summary judgment arguing Plaintiff's action was preempted by ERISA so that the Plan provisions governed, and the lien was valid. The district court held the Hawai'i

statutes were saved from preemption under ERISA's savings clause at § 514 and provided the relevant rule of decision. Both parties appealed.

The Ninth Circuit first held the district court properly exercised federal court jurisdiction, because challenges to a plan's right to reimbursement are properly characterized as § 502(a) claims, so the Plaintiff's claim was one to clarify his right to benefits pursuant to the Plan, and there was no additional legal duty implicated by the Defendant's action aside from the duty to provide benefits. The court then considered preemption under ERISA § 514, noting that section's savings clause saves from preemption "any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A). Because the Hawai'i statutes at issue were directed at insurance and impacted risk pooling, they "regulated insurance" and were saved from ERISA preemption. Finally, the court held that the state statutes could appropriately supply the rule of decision, based on the rule that a state statute may provide a relevant rule of decision under ERISA if it is saved from preemption under § 514 and it does not impermissibly expand the scope of liability outlined in § 502(a). The court held that the Hawai'i statutes did not create additional remedies, because they impacted only the insurer's subrogation rights against a third-party tort settlement fund, which presented no conflict with ERISA.

XIV. TRADITIONAL LABOR

120. *Beckington v. American Airlines, Inc.*, 926 F.3d 595 (9th Cir. 2019)

Holding: Employees aggrieved by a union's alleged breach of the duty of fair representation do not have a cause of action against the employer for collusion with the union under the Railway Labor Act.

A long-standing dispute arose among two competing factions of airline pilots in the Air Line Pilots Association ("ALPA"), the "East Pilots" and the "West Pilots," that emerged after US Airlines and America West Airlines merged in 2005. At the core of the dispute was a disagreement over how to integrate the seniority lists of the two airlines. The factions submitted the issue to an arbitration panel, which issued an award (the "Nicolau Award") that composed an integrated seniority list viewed as more favorable to the West Pilots. The East Pilots then created a new union, the US Airline Pilots Association ("USAPA") and pushed for a different integrated seniority list. When US Airways began the process of merging with American Airlines in 2012, the two airlines, USAPA, and the union representing American Airlines' pilots negotiated a multi-party agreement (the "MOU"), which included provisions effectively ignoring the Nicolau Award. Several lawsuits and additional arbitration proceedings followed.

The Plaintiffs, former West Pilots, then sued the post-merger American Airlines ("American") seeking damages under the Railway Labor Act ("RLA") for US

Airways's "collusion" in USAPA's breach of its duty of fair representation. The district court granted American's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). On *de novo* review, the Ninth Circuit affirmed the order of dismissal on the grounds that an employer may not be held liable for breach of the duty of fair representation under the RLA. The court noted that the claim sought to create liability for acts that were not actually prohibited by the text of the RLA, and that the Plaintiff's theory of liability lacked support in the RLA's collective bargaining framework. The RLA assumes that the parties proceed from contrary viewpoints and concepts of self-interest, and that employers are expected to represent their own interests, not those of the employees represented by the union. The court noted that imposing liability on an employer in these circumstances would "frustrate the basic purpose underlying the duty of fair representation" by allowing the union to escape liability. The court rejected the Plaintiffs' argument that "hybrid" cases brought against both unions and employers alleging "collusion" under the Labor Management Relations Act for an employer's breach of a collective bargaining unit and a union's breach of the duty of fair representation were analogous.

121. ***Melendez v. S.F. Baseball Assoc., LLC*,**
7 Cal. 5th 1 (Apr. 25, 2019)

Holdings: Employees' claim is not preempted by the LMRA because (1) the claim arouse out of independent state law (not the CBA) and (2) resolution of the action does not require interpretation of the CBA (merely reference to the CBA).

Plaintiffs were security guards who work for the San Francisco Giants. According to the plaintiffs, they were terminated intermittently throughout the season and did not receive their final wages in a timely manner (pursuant to Labor Code section 201). More specifically, the guards allege that they were terminated at the end of each home stand, season, and other events at the park. Consequently, they allege that the Giants failed to pay them their final wages immediately upon termination. The Giants do not dispute whether terminated employees are entitled to wages immediately. Instead, the Giants disputed whether and when the security guards are terminated (thereby triggering their right to immediate compensation). The Giants argued that determining whether and when the guards are terminated requires an analysis of the CBA between the two parties.

In response to these allegations, the Giants moved to compel arbitration, arguing that the action is preempted by the Labor Management Relations Act ("LMRA"). According to the Giants, as noted above, resolution of this claim required an interpretation of the CBA between the parties. The trial court disagreed and held that resolution of the claim only required determining whether employees were terminated within the meaning of Labor Code section 201. The Court of Appeal reversed, holding that the duration of employment is derived from the meaning of

the CBA itself. As such, resolution of the action required an interpretation of a CBA.

Ultimately, the Supreme Court reversed the Court of Appeal's decision to grant the motion to compel. In so holding, the Court relied on its holding in *Sciborski v. Pacific Bell Director*. In *Sciborski*, the Court outlined a two-part test for determining whether a claim is preempted. First, the court must determine if the claim rises from independent state law or from the CBA. If the claim arises from the CBA, then it is preempted. Next, the court must determine if resolution of the claim requires interpreting a CBA, or if it merely requires reference to a CBA. If the action requires interpretation, then the claim is preempted. The Court also noted that in order for there to be an "interpretation," there must be an active dispute over "the meaning of contract terms."

In this case, the Court concluded that the claim arises from independent state law (it arose from the Labor Code). As to the second part of the analysis, the Court concluded that resolution of the claim did not require interpretation of the CBA because whether someone was discharged is a question of Labor Code section 201, not a disagreement over the provisions of the CBA. Consequently, the Court concluded that the claim was not preempted under the LMRA.

122. ***National Labor Relations Board v. Int'l. Assn. of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local 229*, 941 F.3d 902 (9th Cir. 2019)**

Holding: (a) NLRA's provision protecting the expression of views from being used as evidence of an unfair labor practice did not immunize union's promotion of a secondary boycott under the NLRA; (b) Union did not demonstrate that prohibiting its inducement of secondary boycott substantially burdened its exercise of religion; (c) NLRA's prohibition on secondary boycotts does not violation Thirteenth Amendment's prohibition on involuntary servitude.

The International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers Local 229 ("Local 229") conceded it had engaged in conduct that violated Section 8(b)(4)(i)(B) of the National Labor Relations Act ("NLRA") by inducing or encouraging employees of a neutral subcontractor to strike or stop work for the secondary purpose of increasing Local 229's leverage in its labor dispute with another subcontractor engaged on the same construction project. Under the NLRA, such conduct is considered an unlawful "secondary boycott." The National Labor Relations Board ("NLRB") ordered Local 229 to cease and desist from engaging in the conduct and petitioned the Ninth Circuit for enforcement of its order.

In opposing the NLRB's petition, Local 229 contended that the NLRB's application of the statute to Local 229's specific conduct punished expressive

activity protected by the First Amendment and violated the Religious Freedom Restoration Act ("RFRA") and the Thirteenth Amendment's prohibition on involuntary servitude.

With respect to the First Amendment, Local 229 argued the Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 218 (2015), should be extended to the secondary boycott context and that strict scrutiny should apply to the analysis of Section 8(b)(4)(i)(B). The Ninth Circuit rejected that argument and distinguished *Reed*, which involved content-based restrictions in a municipal ordinance regulating signs directed toward the general public. The court cited *International Brotherhood of Electrical Workers v. NLRB (IBEW)*, 341 U.S. 694 (1951), which predated *Reed*, as precedent. In *IBEW*, the Supreme Court had held that even peaceful picketing violates the NLRB's prohibition on secondary boycotts and that the prohibition imposes no unconstitutional abridgement of free speech. The Supreme Court also noted that the words "induce or encourage" in Section 8(b)(4)(i)(B) "are broad enough to include in them every form of influence and persuasion." The two circuit courts to address First Amendment implications of Section 8(b)(4)(i)(B) in the context of pure speech had also held the First amendment does not protect handbilling or conversations. Therefore, there was no precedent to support the argument for applying strict scrutiny or finding an abridgment of First Amendment rights.

The court also rejected the argument that Section 8(c) of the NLRA protected Local 229's communications, on the ground that Section 8(c) has been held not to immunize activities that violate Section 8(b)(4), and the remedial purpose of Section 8(c) is to protect noncoercive speech by employers and unions.

Finally, the court also rejected Local 229's argument that enforcing the NLRB's order would infringe its rights under the RFRA, finding that Local 229's "bald assertion" failed to demonstrate how prohibiting the union's inducement of neutral employees to engage in a secondary boycott burdened its exercise of religion, and that Local 229's Thirteenth Amendment argument was "patently groundless."

The court granted the NLRB's petition to enforce the order.

XV. WORKERS COMPENSATION]

123. *Cal. Ins. Guar. Ass'n v. San Diego County Sch. Risk Mgmt. Joint Powers Auth.*, 41 Cal. App. 5th 640 (2019)

Holding: A superior court has jurisdiction to characterize a worker's injury differently than was reflected in a stipulation before the Workers' Compensation Appeals Board.

School bus driver Colleen Knowles sought workers' compensation from her employer, Mountain Empire Unified School District ("the District"). The District is self-insured, and its workers' compensation claims are administered through the San Diego County Schools Risk Management Joint Powers Authority ("JPA"). JPA purchased excess workers' compensation insurance. The District is an additional insured under those policies. The parties' dispute arose out of Knowles' claim for benefits. The District and Knowles stipulated before the Workers' Compensation Appeal Board ("WCAB") that Knowles suffered a specific injury on May 6, 2000. The distinction between a "cumulative" and "specific" injury matters for determining which excess insurance policy was triggered. As JPA's excess insurer during the injury date, Kemper Insurance Company ("Kemper") indemnified JPA until it went insolvent. JPA then approached California Insurance Guarantee Association ("CIGA"), a statutorily created insolvency insurer of last resort, to make up what Kemper had failed to pay. CIGA sued the District and JPA (collectively, "Defendants") seeking declaratory relief that it was not required to reimburse the District because Knowles suffered a cumulative injury for which other insurance is available. Defendants filed motions for summary judgment, arguing that the court lacked jurisdiction to determine if Knowles suffered a cumulative injury, as this fact had already been settled before the WCAB. The trial court agreed.

The Court of Appeal reversed. The Court began by reiterating that the WCAB has no powers beyond those conferred on it, and the Workers' Compensation Act gives the WCAB exclusive jurisdiction over proceedings "for the recovery of [workers'] compensation, or concerning any right or liability arising out of or incidental thereto." Cal. Lab. Code § 5300(a). First, the Court found that there was no dispute that the characterization of Knowles's injury is collateral to or derivative of injuries compensable under WCA, and thus the cause of action may be barred under workers' compensation exclusivity.

Next, the Court evaluated whether the alleged acts that establish the elements of the cause of action fall outside the risks encompassed within the compensation bargain. Although prompted by Knowles's workplace injuries, the Court found that CIGA's coverage dispute falls outside the risks encompassed within the compensation bargain. The question of whether a workers' compensation claim against a self-insured employer is covered by the employer's *excess* insurance

policy is not a normal part of the workers' compensation claims process. CIGA's action can have no legal effect on Knowles's ability to recover workers' compensation. As a self-insured employer, the onus is on the District to provide compensation to Knowles. As the excess insurer, Kemper was not obligated to provide compensation to Knowles; it merely had a contractual obligation to indemnify JPA for certain claims. CIGA's action only determines who – between the District/JPA, CIGA, and another excess insurer – bears the ultimate cost of the District's compensation obligation. Thus, it does not fall within the WCAB's exclusive jurisdiction.

124. ***Skelton v. Workers Compensation Appeals Board*, 39 Cal. App. 5th 1098 (2019)**

Holding: An injured worker is not entitled to receive temporary disability indemnity for time lost from work to attend appointments for medical treatment following her return to work.

A Department of Motor Vehicles employee, Renee Skelton, filed Workers Compensation claims for two separate injuries incurred while working. She was placed on modified work and continued working after each injury. Her work hours were not flexible, and she could not visit her doctors on weekends. She initially used her sick and vacation leave, but eventually her paycheck was reduced for missed time at work.

The employee sought reimbursement for her wage loss to attend medical treatment and medical-legal evaluations. The Workers Compensation Appeals Board ("WCAB") concluded that the employee was entitled to one day of temporary disability indemnity ("TDI") for each day of wage loss in submitting to a medical-legal evaluation, but not for a medical treatment appointment. This decision was upheld by the appellate court. Agreeing with the WCAB's decision, the Court held that employees are not entitled to "TDI for work missed to attend medical appointments for an employee who has returned to work full time, regardless of whether the employee's injury is permanent and stationary. The WCAB has reasoned that an employee, by returning to work full time, no longer suffers from a wage loss coupled with an incapacity to work. Rather, the employee has restored his or her earning capacity, which eliminates the income replacement rationale underlying TDI." Because The Court found that "neither Skelton's time off from work nor her wage loss was due to an incapacity to work. Rather, these circumstances were due to scheduling issues and her employer's leave policy. Because Skelton's injuries did not render her incapable of working during the time she took off from work and suffered wage loss, Skelton was not entitled to TDI for that time off or wage loss."

2019, A *Dynamex* Year of Change: *Lawson*, *OTO*, *Salazar*, and More

LEGISLATION

I. ARBITRATION

1. AB 51

Arbitration; prohibits compelled arbitration of rights under FEHA or the Labor Code or retaliation against an applicant or employee who refuses to consent to a waiver.

This bill adds Section 432.6 to the Labor Code (and Section 12953 to FEHA, referring to § 432.6) which prohibits imposing as a condition of employment, continued employment, or the receipt of any employment-related benefit at any time after January 1, 2020 that workers waive their rights to pursue a civil action or agency complaint to vindicate their rights under FEHA or the Labor Code. The bill also prohibits employers from threatening, retaliating or discriminating against, or terminating any employee who opposes consenting to such a waiver. Section 432.6 clarifies that an agreement requiring an employee to take any affirmative action to preserve that worker's rights is, for purposes of this section, deemed to be a condition of employment.

The bill specifies, however, that nothing in the bill is intended to invalidate a written arbitration agreement that otherwise is enforceable under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*.

On December 30, 2019, two days before the bill was to take effect, the U.S. Chamber of Commerce, the California Chamber of Commerce, and various business associations sought – and District Judge Kimberly J. Mueller of the Eastern District of California issued – a temporary restraining order barring state officials (including the Attorney General's office, the Labor Commissioner/DLSE, the LWDA, and the Department of Fair Employment and Housing) from enforcing AB 51. District Judge Mueller heard oral argument on January 10, 2020, accepted supplemental briefing on January 17, 2020 by the State and January 24, 2020 by the Chamber, and then granted the Chamber's motion on January 31, 2020, finding the business groups had shown they likely would be able to show that the FAA preempts the State's action and that the bill places arbitration agreements on unequal footing with other contracts by singling out the requirement of entering into arbitration agreements as opposed to other types of contracts.

The district court rejected the State's argument that Section 432.6 does not regulate agreements but rather regulates attempts by employers to coerce agreements that waive employment rights.

2. SB 707

If an employer withholds payment of arbitration fees for 30 days it is a material breach and the employer is in default and subject to sanctions; also requires arbitration companies to report on diversity/demographic information (Jay Z effect).

In arbitration agreements with consumers and employees, this bill amends the California Arbitration Act in three main ways. First, if a drafting party fails to pay the initial arbitration fees and costs within 30 days after the due date, this constitutes a material breach and the drafting party is in default and waives its right to compel arbitration, which means the employee or consumer can either withdraw the claim from arbitration and proceed in a court of appropriate jurisdiction or compel an arbitration in which the drafting party must pay reasonable fees and costs related to the arbitration. This bill adds Section 1281.97 to the CCP to codify this change.

Second, and similarly, if a drafting party fails to pay fees and costs that are due once the arbitration has commenced within 30 days after the due date, this also constitutes a material breach and the drafting party is in default and waives its right to compel arbitration, which means the employee or consumer can either withdraw the claim from arbitration and proceed in a court of appropriate jurisdiction or compel an arbitration in which the drafting party must pay reasonable fees and costs related to the arbitration. The bill adds Section 1281.98 to the CCP to codify this change.

In so doing, this bill codifies Ninth Circuit precedent, *Brown v. Dillard's, Inc.* (2005) 430 F.3d 1004 (employer's refusal to participate in arbitration pursuant to mandatory arbitration provision constituted a breach of the arbitration agreement) and *Sink v. Aden Enter., Inc.* (2003) 352 1197 (employer's failure to pay arbitration fees required under the contract constituted a material breach of the arbitration agreement and resulted in a default in the arbitration).

Further, the bill amends Section 1280 to add the following terms and their definitions in support of the above changes: (1) "consumer," (2) "drafting party" (defined as the company or business that included a pre-dispute arbitration provision in a contract with a consumer or employee and includes non-signatories who intend to rely upon or who otherwise are subject to the arbitration provision); and (3) "employee," which includes employees, applicants for employment, and individuals misclassified as independent contractors or otherwise improperly categorized as something other than an employee.

Finally, the bill also addresses the issue of diversity in private arbitration companies and amends Section 1281.96(a) (which mandates publishing at least quarterly information regarding each consumer arbitration in the preceding five years), adding a twelfth reporting requirement: "Demographic data, reported in

the aggregate, relative to ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation of all arbitrators as self-reported by the arbitrators. Demographic data disclosed or released pursuant to this paragraph shall also indicate the percentage of respondents who declined to respond."

II. WAGE & HOUR

3. AB 5

Codifying *Dynamex* (note carveouts and *Borello* test); retroactive for wage orders and Labor Code violation that relate to wage orders, otherwise is prospective.

Dynamex Ops. West, Inc. v. Super. Ct. (2018) 4 Cal.5th 903, the California Supreme Court's seminal decision on independent contractor misclassification, creates a presumption that a worker who performs services for the hiring entity is an employee for purposes of wage and benefits claims. *Dynamex* adopted the "ABC" test from other jurisdictions: (A) the worker is free from the hiring entity's control, (B) the worker performs work 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 of the same nature as the work performed. With this bill, the Legislature recognized that the misclassification of workers as independent contractors "has been a significant factor in the erosion of the middle class and the rise in income inequality."

This bill adds Section 2750.3 to the Labor Code to codify the *Dynamex* decision for purposes of the Labor Code and IWC wage orders (and the Unemployment Insurance Code) and establishes that a person providing labor or services for remuneration is presumptively an employee unless the hiring entity can show each prong of the ABC test. The bill allows for courts to follow the common law "control test" from *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations* (1989) 48 Cal.3d 341 if a court rules that the ABC test should not apply.

The bill exempts the following professions from the ABC test: licensed insurance agents; licensed physician/surgeons, dentists, podiatrists, psychologists, or veterinarians; licensed professionals such as lawyers, architects, engineers, private investigators, and accountants; registered securities broker-dealers or investment advisers; direct sales salespersons as described in UI Code § 650; and commercial fishermen.

For contracts for "professional services" (which can include marketing, human resources administration (with caveats), travel agents, graphic designers, grant writers, fine artists, payment processing agents, still photographers or photojournalists, freelance writers/editors/newspaper cartoonists, workers providing cosmetology or barbering services (with caveats), real estate licensees, and workers at repossession agencies), the bill provides that the *Borello* test, not

the *Dynamex* test, should control if the hiring entity proves each of the following six factors: (A) the individual maintains a business location apart from the hiring entity (can be the individual's residence); (B) the individual has a business license (this provision becomes effective July 1, 2020); (C) the individual has the ability to set or negotiate their own rates for services performed; (D) the individual has the ability to set their own hours outside of project completion dates and reasonable business hours; (E) the individual is customarily engaged with another hiring entity (or holds themselves out to other potential customers as available) in the same type of work for which they contracted with the hiring entity; and (F) the individual regularly and customarily exercises discretion and independent judgment in the performance of the services. Other industries that could be exempted include contracts between two business entities or pursuant to a subcontract in the construction industry.

The bill also requires the Employment Development Department to issue an annual report to the Legislature on the use of unemployment insurance in the commercial fishing industry, beginning March 1, 2021. The bill further amends Section 3351 of the Labor Code and Sections 606.5 and 621 of the UI Code to redefine the definition of the term "employee" for unemployment insurance purposes.

4. AB 170

Exempts newspaper carriers from AB 5.

In addition to the carveouts for various industries enumerated in AB 5, this bill delays the application of the *Dynamex* ABC test to newspaper deliverers until January 1, 2021.

5. AB 673

Redefines penalties available under Labor Code section 210 for late payment of wages, allows for recovery by the DLSE as well as through PAGA (LC 204).

Labor Code § 210 provided for a civil penalty of $100 for the initial violation of an employer's failure to timely pay wages (including Section 204), and a $200 civil penalty for each subsequent violation, or any willful or intentional violation, plus 25 percent of the amount unlawfully withheld. The penalty was recoverable by the Labor Commissioner pursuant to a Berman hearing, with 12.5% of the recovered penalty to be paid to a fund in the Labor and Workforce Development Agency ("LWDA") dedicated to educating employers about state labor laws and the remaining 87.5% payable to the General Fund of the State Treasury.

This bill amends Section 210 to provide that the penalty may be recovered either (a) by the affected employee as a statutory penalty under Labor Code § 98, or (b)

by the Labor Commissioner as civil penalty under Labor Code § 98.3. If recovered by the employee, the employee must elect whether to recover the penalty as a statutory penalty as provided in this section or to enforce a civil penalty pursuant to PAGA. The bill also adds to the list of statutes for which this penalty may be recovered the wages paid to an employee who is licensed under the Barbering and Cosmetology Act, Business and Professions Code § 7301, *et seq*.

6. AB 1554

Employers must notify (in a prescribed manner) employees who participate in a flexible spending account of any deadline to withdraw funds before year's end.

Labor Code § 2810.5 requires employers to provide employees, at the time of hire, the following information in writing: the position's rate of pay and the basis thereof (e.g., per hour, per shift, per week, etc.), any claimed minimum wage credits (including for meals or lodging), the regular payday, the name of the employer (including any dba used), the physical address of the employer's main office or principal place of business and any different mailing address, the employer's telephone number, the name/address/phone number of the employer's worker's compensation carrier, a listing of the employee's sick leave rights, and any other information the Labor Commissioner deems material and necessary. This bill adds Labor Code § 2810.7, which requires an employer to notify an employee who participates in a flexible spending account any deadline to withdraw funds before the end of the plan year. The employer must notify the employee in two of the following ways, by: email, phone, text message, postal mail, or in person.

7. AB 1768

The term "public works" in the prevailing wage context expanded to include work conducted during site assessment or feasibility studies; preconstruction work is deemed to be part of a public work regarding of whether future construction is conducted.

Labor Code § 1720 defines the term "public works" for the purpose of paying prevailing wages, regulating hours, and securing workers' compensation for public works projects. Specifically, the definition of the term "construction," which delineated which phases of the public works project were compensable by prevailing wage and which included "work performed during the design and preconstruction phases of construction, including, but not limited to, inspection and land surveying work" is now amended to include "work performed during the design, site assessment, feasibility study, and other preconstruction phases of construction, including, but not limited to, inspection and land surveying work." This bill also provides that the prevailing wage act does not require any

reimbursement to local agencies or school districts, despite that the California Constitution requires the state to reimburse local agencies or school districts for certain costs mandated by the state, because the only costs that a local agency or school district could now incur under this Act would be incurred because the Act creates a new crime or infraction, changes the penalty for a crime or infraction, or changes the definition of a crime.

8. SB 286

Entitles "events employees" at any professional baseball venue (not just major leagues) to be paid by next regular payday, except as specified.

Labor Code § 201 provides that if an employer discharges an employee, the unpaid earned wages are due and payable immediately. Other Code sections in this series regulate the final pay of specific industries, such as temporary services employees (§ 201.3), employees engaged in the production or broadcasting of motion pictures (§ 201.5), and print-shoot employees (§ 201.6, newly added this year – see SB 671). This bill adds Labor Code § 201.8 to add another carve-out for specified employees, this time "events employees" who work for a professional baseball team or at a professional baseball venue, unless the employees are hired for a specified, limited period of time and have no expectation of an ongoing employment relationship. Such events employees must be paid final wages by their next regular payday, defined as the day designated by the employer as a payday pursuant to Labor Code § 204. Section 201.8 further clarifies that events employees are deemed to be employed continuously and without interruption until their employment is terminated either by the employer or the employee but that the conclusion of an event or series of events such as a single game or concert, or a series of games in a homestand, or the end of the baseball season, does not in and of themselves constitute the termination of an events employee's employment.

The bill also amends Labor Code §§ 203, 203.1 and 220 to include Sections 201.6 and 201.8.

9. SB 671

Employers may pay print shoot employees (models) on next regular payday, rather than immediately.

This bill is related to SB 286 and adds Labor Code § 201.6 as the Photoshoot Pay Easement Act, clarifying that print shoot employees – individuals hired for a period of limited duration to render services relating to or supporting a still image shoot, including film or digital photography, for use in print, digital, or internet media – are entitled to be paid by their next regular payday, defined as the day designated by the employer pursuant to Labor Code § 204.

This bill was enacted on September 5, 2019. Because it was enacted before SB 286 (October 9, 2019), it acted to incorporate the changes to Labor Code §§ 203, 203.1 and 220 to include both Sections 201.6 and 201.8.

III. CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT ("FEHA")

10. AB 9

Extending filing deadline for DFEH charge from 1 year to 3 years.

Prior to January 1, 2020, the California Fair Employment and Housing Act required that persons claiming to have been aggrieved by an unlawful practice must first file a verified complaint with the DFEH before they may file a claim in court. The Act required the employees to file this DFEH complaint within one year from the date of the unlawful practice.

AB 9 allows employees to wait up to three years before filing a complaint with the DFEH. Lawmakers noted that lengthening the statute of limitations serves the goal of protecting people from workplace civil rights violations. However, employers argue that AB 9 will significantly impair an employer's ability to gather accurate evidence about a complaint if the filing party waits several years after the allegedly unlawful practice occurred. It also reduces the effectiveness of the commonly asserted affirmative defense that the alleged unlawful acts fall outside of the complaint period. Former employees who have a claim may wait to file a complaint until they have found a new job. AB 9 specifies that it shall not be interpreted to revive claims that lapsed prior to January 1, 2020.

AB 9 amends sections 12960 and 12965 of the California Government Code.

11. AB 241

Implicit bias training for doctors and surgeons.

Under the Medical Practice Act, physicians and surgeons are required to demonstrate satisfaction of continuing education requirements, including cultural and linguistic competency in the practice of medicine. AB 241would require, by January 1, 2022, all continuing education courses for a physician and surgeon to contain a curriculum that includes specified instruction in the understanding of implicit bias in medical treatment. The bill, by January 1, 2022, would require associations that accredit these continuing education courses to develop standards to comply with these provisions.

The Nursing Practice Act regulates the practice of nursing by the Board of Registered Nursing. The act requires persons licensed by the board to complete specified courses of instruction, including instruction regarding alcoholism and substance dependency and spousal abuse. AB 241 would require the Board of

Registered Nursing, by January 1, 2022, to adopt regulations requiring all continuing education courses for its licensees to contain curriculum that includes specified instruction in the understanding of implicit bias in treatment. Beginning January 1, 2023, the bill would require continuing education providers to comply with these provisions and would require the board to audit education providers for compliance with these provisions, as specified.

The Physician Assistant Practice Act authorizes the Physician Assistant Board to require a licensee to complete not more than 50 hours of continuing education every two years as a condition of license renewal. AB 241 would require the Physician Assistant Board, by January 1, 2022, to adopt regulations requiring all continuing education courses for its licensees to contain curriculum that includes specified instruction in the understanding of implicit bias in treatment. Beginning January 1, 2023, the bill would require continuing education providers to comply with these provisions and would require the board to audit continuing education providers for compliance with these provisions.

12. AB 242

Implicit bias training (CLEs) for attorneys; Judicial Council may develop similar training for judges and judicial staff.

Prior to the passage of AB 242, the Judicial Council was authorized to provide, by rule of court, for racial, ethnic, gender bias, and sexual harassment training, and training for any other bias based on sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation for judges, commissioners, and referees.

AB 242 authorizes the Judicial Council to develop training on implicit bias with respect to these characteristics. The bill would require all court staff who interact with the public to complete 2 hours of any training developed by the Judicial Council pursuant to this authorization every 2 years. The bill would authorize the Judicial Council to adopt a rule of court, effective January 1, 2021, to implement these requirements.

Prior law also required the State Bar to request the California Supreme Court to adopt a rule of court authorizing the State Bar to establish and administer a mandatory continuing legal education (MCLE) program.

AB 242 requires the State Bar to adopt regulations to require the mandatory continuing legal education curriculum to include training on implicit bias and the promotion of bias-reducing strategies. The bill would require a licensee of the State Bar to meet the requirements for each MCLE compliance period ending after January 31, 2023.

13. AB 406

Requires EDD to distribute materials related to SDI program for family temporary disability insurance benefits in all non-English languages spoken by a substantial number of non-English-speaking applicants, in addition to English materials; does not take effect until 1/1/25.

The Dymally-Alatorre Bilingual Services Act requires a state agency that finds specific factors exist to distribute certain written materials in the appropriate non-English language through its statewide and local offices or facilities to non-English-speaking persons, or, as an alternative, to furnish translation aids, translation guides, or provide assistance, through use of a qualified bilingual person, at its statewide and local offices or facilities in completing English forms or questionnaires and in understanding English forms, letters, or notices.

Existing law establishes, within the state disability insurance program administered by the Employment Development Department, a family temporary disability insurance program, also known as the paid family leave program, for the provision of wage replacement benefits to workers who take time off work to care for a seriously ill family member or to bond with a minor child within one year of birth or placement, as specified.

This bill, beginning January 1, 2025, would require the department to distribute the application for family temporary disability insurance benefits, in addition to the application in English, in all non-English languages spoken by a substantial number of non-English-speaking applicants.

14. AB 547

Sexual violence and harassment prevention training for janitors.

AB 547 calls for "peer to peer" sexual violence and harassment prevention training for janitorial workers. Specifically, AB 547 mandates that all employers with at least one employee and one or more janitorial services worker provide biennial, in-person sexual violence and harassment prevention training to non-supervisory workers and supervisors of non-supervisory workers. The training must be given by a peer trainer, who is part of a qualified organization. The content used in the training must be the content developed by the Labor Occupational Health Program.

The bill prescribes certain minimum qualifications for qualified organizations and peer trainers that are permitted to conduct the trainings. The Director of the Department of Industrial Relations, along with a training advisory committee that is to be convened by the Director, will develop a list of qualified organizations and qualified peer trainers. Employers must use trainers from the developed list.

Employers must document and certify compliance with the training and payment of the qualified organization, as specified, on a form prescribed by, and available to, the Division of Labor Standards Enforcement. Employers must submit a specified report of training completion to the Director of the Department of Industrial Relations.

15. AB 800

Victims of sexual assault (and other violations) may file a lawsuit using a pseudonym and may exclude or redact other identifying characteristics.

AB 800 permits a person who is a participant in the address confidentiality program (i.e. persons attempting to escape from domestic violence, sexual assault, stalking, human trafficking, or elder or dependent abuse) and a party to a civil action to proceed using a pseudonym (John Doe, Jane Doe, or Doe) and to exclude or redact other identifying characteristics of the person from all pleadings and documents filed in the action, as specified.

Identifying characteristics that must be excluded or redacted include the person's name, address, age, marital status, relationship to other parties, race or ethnic background, contact information, online identifiers, images of the person, or any other information from which the protected person's identity could be discerned.

Parties to the action are required to use the pseudonym at proceedings open to the public and to exclude and redact other identifying characteristics of the plaintiff from documents filed with the court. This includes using the pseudonym in all pleadings, discovery requests or discovery motion documents, and other documents filed or served in the action that may be viewable by the public.

The protected person who proceeds in this manner, and a party excluding or redacting identifying characteristics, shall file with the court and serve upon all other parties to the proceeding a confidential information form that includes the protected person's name and other identifying characteristics being excluded or redacted. The court shall keep the confidential information form confidential.

16. AB 1223

Adds an additional 30-business day period during a one-year period to take unpaid leave (after first exhausting available sick leave) for purpose of organ donation.

Currently, state law mandates private employers with 15 or more employees to provide employees 30 days of paid leave in a one-year period when an employee participates in an organ donation. Employers also are required to provide bone marrow donors five days of paid leave. Under the amended law, private

employers must now provide a minimum of an additional 30 business days of unpaid leave.

Employees are still required to provide their employers with written verification of their participation in either organ donation or bone marrow donation. The verification also must include that the procedure is medically necessary.

17. AB 1510

Sexual assault: not necessary that a criminal prosecution or other proceeding have been brought, or conviction or adjudication resulted, from the sexual assault before a victim can bring a civil action.

This bill clarifies that it is not necessary that a criminal prosecution or other proceeding have been brought as a result of the sexual assault or, if a criminal prosecution or other proceeding was brought, that the prosecution or proceeding resulted in a conviction or adjudication in order for a person to bring a civil action.

This bill also extends the applicable statute of limitations for claims that would otherwise be barred. In order to qualify for this extension, the action must seek to recover more than two hundred fifty thousand dollars ($250,000) in damages and must arise out of a sexual assault or other inappropriate contact, communication, or activity of a sexual nature by a physician occurring at a student health center between January 1, 1988, and January 1, 2017.

18. AB 1748

CFRA amended to define 1,250-hour requirement for airline flight deck or cabin crew employees consistent with the FMLA, DFEH may adopt regulations thereto.

The CFRA is amended to apply the 1,250-hour requirement to airline flight deck or cabin crew employees consistent with the Family and Medical Leave Act ("FMLA"). An airline flight deck or cabin crew employee is eligible for 12 workweeks of protected leave in any 12-month period if he/she has: 12 months or more of service with the employer; has worked or been paid for not less than 60% of the applicable total monthly guarantee or equivalent annualized over the preceding 12-month period; and has worked or been paid for not less than 504 hours during the 12 month period.

It is an unlawful employment practice to refuse a proper request. The Department of Fair Employment and Housing ("DFEH") may calculate leave available to such employees.

19. AB 1820

DFEH is now authorized to bring civil actions for violations of specified federal civil rights and antidiscrimination laws, not just FEHA.

The Department of Fair Employment and Housing ("DFEH") may bring civil actions for certain federal civil rights and antidiscrimination laws in addition to those under the Fair Employment and Housing Act ("FEHA"). This includes claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, and the Fair Housing Act. The DFEH can bring such actions before state and federal trial courts.

20. SB 41

Reduction in Damages Based on Protected Status: calculations of past, present or future damages for lost earnings/diminished earning capacity resulting from personal injury or wrongful death shall not be reduced based on race, ethnicity or gender

Calculations of past, present or future damages for lost earnings/diminished earning capacity resulting from personal injury or wrongful death shall not be reduced based on race, ethnicity or gender. When calculating earning potential, economists often consider race and gender because women and minority groups, on average, have a lower earning potential. Relying on statistics reflecting such pay gabs is problematic because the statistics might reflect discrimination or fail to account for progress or individual achievement. As a result, a reduction in damages using statistics based on membership in a protected class now contravenes public policy.

21. SB 142

Lactation accommodations.

Employers must provide reasonable amount of break time to an employee desiring to express breast milk each time the employee has need to express milk. Employers must develop and implement a lactation accommodation policy as part of the employee handbook or set of policies.

The policy must include the following: a statement about an employee's right to request lactation accommodation; the process by which the employee makes the request; an employer's obligation to respond to the request; a statement about an employee's right to file a complaint with the Labor Commissioner for any violation of a right under the law.

The lactation space cannot be a bathroom. It must be in close proximity to the employees' workstation, shielded from view, and free from intrusion while the

employee is lactating. It must be safe, clean and free of hazardous materials. It must contain a place to sit and a surface to place a breast pump and personal items. The space must have access to electricity, including extension cords or charging stations, and running water and a refrigerator/cooler suitable for storing milk.

If a multipurpose room is used for lactation among other uses, the use of the room for lactation shall take precedence over the other uses.

22. SB 188

Includes in definition of "race" under FEHA characteristics historically associated with race, such as hairstyles.

This statute, also known as the "CROWN Act" (Create a Respectful and Open Workplace for Natural Hair), amends California's Education Code and Government Code to define "race or ethnicity" as "inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles." The new law expressly defines "protective hairstyles" as including but not limited to "braids, locks, and twists."

23. SB 530

Sexual harassment prevention training requirements in the construction industry.

This statute extends the date by when seasonal, temporary, or other employees that are hired to work for less than six months must begin receiving mandatory sexual harassment training to January 1, 2021, and incorporates special training provisions for construction industry employers that employ workers pursuant to a multiemployer collective bargaining agreement.

24. SB 778

FEHA sexual harassment training must be provided every two years; employers who have provided the training in 2019 is not required to provide it again until 2021.

This statute extends the deadline for an employer with 5 or more employees to provide two hours of sexual harassment training to all supervisory employees, and one hour to all nonsupervisory employees, from January 1, 2020, to January 1, 2021.

IV. IMMIGRATION

25. AB 595

Immigration status, apprenticeship training programs, in collaboration with the DIR's Division of Apprenticeship Standards; trainees without social security numbers may use an individual tax ID number for purposes of any required background check.

Under Education Code § 79146, the Board of Governors of the California Community Colleges, as one of the segments of public postsecondary education in the state, are authorized to establish internship training programs and actively support apprenticeship and pre-apprenticeship training programs that comply with Department of Industrial Relations standards. This bill, which adds Education Code § 79149.25, allows students who lack social security numbers and who are enrolled in a community college class pursuant to an apprenticeship training program or internship training program to use an individual tax identification number for the purposes of any background check required by the class or the program.

26. AB 668

Immigration status: no person shall be subject to civil arrest in a courthouse while attending a court proceeding or having legal business in the courthouse.

Under existing law, judicial officers have the power to preserve and enforce order in judicial proceedings, and certain conduct inside public buildings the state owns and occupies, or leases and occupies, is prohibited. With this bill, the Legislature finds and declares, "The threat that persons may be subject to civil arrest while in California while in California's courthouses or attending judicial proceedings is a threat to the proper functioning of California's government and to the rights enjoyed by all Californians." Noting that access to civil and criminal courts has historically been open to the public (as codified in Code of Civil Procedure § 124), that public scrutiny of judicial proceedings allows the public to determine whether justice is being meted out fairly, and that public access to judicial proceedings safeguards their integrity by enhancing their truth-finding function, this bill adds Section 43.54 to the Civil Code and prohibits subjecting a person to civil arrest in a courthouse while attending a court proceeding or having legal business in the courthouse without lessening or narrowing any existing common law privilege. However, § 43.54 does not apply to arrest made pursuant to a valid judicial warrant.

The bill also amends CCP § 177, which provides for certain judicial powers, to add subdivision (e), the power "To prohibit activities that threaten access to state courthouses and court proceedings, and to prohibit interruption of judicial

administration, including protecting the privilege from civil arrest at courthouses and court proceedings."

V. PROCEDURE

27. AB 749

Prohibits "no rehire" provisions in employment settlement agreements, does not prohibit agreement to end a current employment relationship.

AB 749 prohibits and invalidates all provisions in settlement agreements that prevent workers from obtaining future employment with the settling employer or its affiliated companies. Through the newly created Code of Civil Procedure section 1002.5, it makes such provisions in agreements entered into on or after January 1, 2020 void as a matter of law and against public policy.

This section does not preclude the employer and employee from agreeing to end a current employment relationship (that is, to enter into a separation or severance agreement). Additionally, employers may enter into "no rehire" agreements with employees who the employer has made a good-faith determination has engaged in sexual harassment or sexual assault.

Further, an employer remains free to terminate an employee or to not rehire the employee if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person.

28. AB 1349

For written discovery, parties must provide requesting party with the document propounding or responding to discovery in the electronic format requested within 3 court days of the request (interrogatories and requests for admission).

With regard to interrogatories, this law adds subdivision (d) to section 2030.210 of the Code of Civil Procedure. This subdivision authorizes the responding party to ask the propounding party to provide interrogatories in electronic format (with 3 days to respond), if they were created in electronic format. If the responding party asks for the interrogatories in electronic format, the responding party shall include the text of the interrogatory immediately preceding the response. With regard to requests for admissions, A.B. 1349 amends section 2033.210 to add subdivision (e), which is substantially similar to subdivision (d) of section 2031.210.

29. SB 17

Civil Discovery Act: upon court order following stipulation by all parties, a party has 45 days to provide initial disclosures.

Upon a court order following a stipulation by all parties, a party has 45 days to provide an initial disclosure.

The following information should be included in the initial disclosure: contact information of all persons likely to have discoverable information; a copy or description of all documents, ESI, and tangible things the party may use to support its claims or defenses; and any agreement under which an insurance company or another person may be liable to satisfy a judgment.

The court is required to impose a $250 sanction upon findings that any party failed to respond in good faith to a document request or produced documents within 7 days of a motion to compel resulting from the party's failure to respond. The same is true for any party who fails to meet and confer regarding any document request dispute. The court need not impose the sanction if they find a substantial justification for the action or other circumstances that render the sanction unjust.

30. SB 370

Civil Discovery Act: documents can no longer be produced as they are kept in the usual course of business, must be identified with the specific request number to which the documents respond when produced.

In response to discovery requests, documents can no longer be produced as they are kept in the usual course of business. Instead, they must be identified with the specific request number to which the documents respond. The amendment now reads, "[a]ny documents or category of documents . . . shall be identified with the specific request number to which the documents respond." This will affect all active cases subject to the Civil Discovery Act, regardless of when filed. The amended CCP Section 2031.280 applies to electronically stored information, or ESI, as well as physical documents. The bill, however, does not specify how ESI is to be identified with a specific request.

31. SB 616

Enforcement of judgement: exemptions.

This statute amends California Code of Civil Procedure to ultimately limit how much judgment creditors can garnish from an individual's bank account when attempting to collect on judgments. Beginning September 1, 2020, debtors will have 15 days to file a notice of claim of exemption if the debtor was personally

served with the notice of levy and 20 days if the debtor was served with the notice of levy by mail. Creditors now have 15 days to oppose the exemptions claimed by debtors. SB 616 automatically designates any funds in a debtor's deposit account that are "equal to or less than the minimum basic standard of adequate care for a family of four" in California as exempt from garnishment, without the need for a debtor to file a claim of exemption. However, this exemption does not apply to money garnished to satisfy certain obligations such as wages owed, child support, or spousal support. It also does not apply to the collection of a liability by the State, or any of its departments or agencies.

VI. PUBLIC

32. AB 333

County patients' rights mental health advocates afforded whistleblowing protection.

Welfare and Institutions Code § 5520 authorizes a mental health director to appoint, or contract for the services of, one or more county patients' rights advocates. Labor Code § 1102.5(b) prohibits retaliation by an employer against whistleblower employees. This bill adds Section 5525 to the Welfare and Institutions Code and establishes similar whistleblower protections specifically for county patients' rights advocates, prohibiting retaliation by an employer to a local contracting agency. The bill also creates a private right of action for county patients' rights advocates by amending WIC § 5550.

33. AB 644

Revises definition of earnable compensation under the State Teachers' Retirement System.

Education Code § 22000, *et seq*., the E. Richard Barnes Act or Teachers' Retirement Law, establishes the California State Teachers' Retirement System ("STRS"), which is governed by the Teachers' Retirement Board ("Board"), and creates the Defined Benefit Program of the State Teachers' Retirement Plan ("Plan"). This bill revises the definition of earnable compensation for STRS purposes and makes various changes to conform with the revised definition. Specifically, "compensation earnable," which previously meant "the creditable compensation a person could earn in a school year for creditable service performed on a full-time basis," is now expanded to mean the sum of the annualized pay rate (defined as the salary or wages a person could earn during a school term for an assignment if creditable service were performed for that assignment on a full-time basis) plus remuneration paid in addition to salary or wages, excluding creditable compensation for which contributions are credited to the Defined Benefit Supplemental Program.

Creditable compensation is now defined as remuneration such as salary or wages, additional remuneration (such as sick leave, vacation leave, or an employer-approved compensated leave of absence), paid in cash to all persons in the same class of employees.

Further, existing law requires an employer to certify that a member's employment has been terminated unless that termination occurred 12 consecutive months or more prior to the date the system receives an application for termination of benefits. This bill requires the employer certification to be in a format the system prescribes and that the application for termination of benefits must be received at the office of the system's headquarters.

34. AB 672

Public employees who retired for disability may not be reemployed by any employer without reinstatement from retirement if the position includes duties or activities that the disabled employee was restricted from performing at the time of retirement.

The Public Employees' Retirement Law ("PERL"), Government Code § 20000, *et seq.*, creates the Public Employees' Retirement System ("System"), which provides pension and other benefits to members of the System and prescribes conditions for service after retirement. PERL and the California Public Employees' Pension Reform Act of 2013 (Educ. Code § 7522, *et seq*.) establish certain limitations on retirement benefits and limits on service after retirement.

PERL authorizes a person retired for disability to be employed by any employer without reinstatement in the System if certain conditions are met, including, *inter alia*, that the retiree is below the mandatory retirement age for persons in that job, the Board finds that person is not disabled for that employment, and the position is not the position from which that person retired or a position from the same member classification from which the person retired.

This bill adds Government Code § 21233 to prohibit a person retired for disability to be employed by any employer without reinstatement in the System if the position is either (1) the position from which the person retired, or (2) a position that includes duties or activities the retiree was previously restricted from performing at the time the person retired. If a person who has retired for disability is employed without reinstatement, the employer must provide the Board the nature of the employment and duties and activities the person will perform.

35. AB 1116

Establishes the California Firefighter Peer Support and Crisis Referral Services Act, authorizes a program to aid fellow employees on emotional or professional issues.

Government Code § 8550, *et seq*., the California Emergency Services Act, authorizes the Governor to proclaim a state of emergency, and similarly authorizes city or county governments or officials to proclaim a local emergency. Existing law provides that a person has a privilege to refuse to disclose, and prevent another from disclosing, confidential communications with specified individuals.

This bill enacts the California Firefighter Peer Support and Crisis Referral Services Act ("Act"), Government Code § 8669.05, *et seq*. Recognizing that firefighters frequently respond to traumatic incidents and dangerous circumstances, are exposed to harmful substances, and witness grave injuries, death, and grief, the Legislature acknowledged that many firefighters may experience the trauma of their jobs when off duty and that certain trauma-related injuries could become overwhelming, manifesting in post-traumatic stress. Accordingly, the Act enables "critically needed, confidential peer support and crisis referral services" for California firefighters. The Peer Support and Crisis Referral Program may provide support for such matters as substance use and abuse, critical incident stress, family issues, grief support, legal issues, line of duty deaths, serious injury or illness, suicide, crime victims, and other workplace issues. The Act also establishes such communications as privileged, and exempts peer support personnel from personal liability for damages (including personal injury, wrongful death, property damage, or other loss) relating to an act, error, or omission in performing peer support services, unless such act, error, or omission constitutes gross negligence or intentional misconduct.

36. SB 698

Employees of the Regents of the University of California must be paid on a regular payday.

Labor Code § 204 requires employers to pay employees their wages either weekly, biweekly, or twice monthly, although exempt employees could be paid once per month on or before the 26th day of the month in which the labor was performed provided that the entire month's salary was paid at that time. This bill amends Section 204 to add subdivision (e) which provides that employees of the Regents of the University of California paid on a monthly basis must now be paid no later than five days after the close of the monthly payroll period. It further clarifies that UC employees may elect to have their salaries distributed throughout the year rather than just during the pay periods in which they worked. Further, just like the prevailing wage bill (AB 1768), no reimbursement to local agencies

or school districts is required, despite that the California Constitution requires the state to reimburse local agencies or school districts for certain costs mandated by the state, because the only costs that a local agency or school district could now incur under Labor Code § 204 would be incurred because Section 204 creates a new crime or infraction, changes the penalty for a crime or infraction, or changes the definition of a crime.

VII. EMPLOYMENT STATUS

37. AB 267

Infant employment in the "entertainment industry," not just motion pictures.

Existing law requires specified certification from a physician and surgeon for an infant younger than one month to be employed on any motion picture set or location. This bill expands the definition of the term "entertainment industry" to now include "motion pictures of any type, including, but not limited to, film or videotape, using any format, including, but not limited to, theatrical film, commercial, documentary, or television program, by any medium, including, but not limited to, theater, television, or videocassette; photography; recording; modeling; theatrical productions; publicity; rodeos; circuses; musical performances; advertising; and any other performances where a minor performs to entertain the public." A licensed physician and surgeon who is board-certified in pediatrics must provide written certification that the infant is at least 15 days old and, in their medical opinion, the baby was carried to term and physically capable of withstanding the stress of working in the entertainment industry. A violation of the certification process by a parent, guardian, or employer of the infant constitutes a misdemeanor.

38. AB 1518

Student athletes may contract with agents without losing their student status.

The Miller-Ayala Athlete Agents Act ("Act"), Business and Professions Code § 18895, *et seq.*, regulates various activities that an agent of student-athletes may perform, including contact with the students, contract negotiations, and required disclosures to the Secretary of State. Existing law removes the status of student-athlete from an individual who enters into a valid agent contract, endorsement contract, or professional sports services contract, and prohibits an agent or the agent's representative from offering anything of benefit or value to any student-athlete.

This bill amends the Act to allow student-athletes to enter into contracts with a sports agent and not lose their status as student-athletes as long as the contract (a) complies with the policies of the school and the bylaws of the National Collegiate Athletic Association ("NCAA"), and (b) contains a provision that the contract will

terminate if the student opts to return to school instead of seek employment with a professional sports team. The amendments further allow an agent or the agent's representative to offer or provide money or any other thing of benefit to a student-athlete provided (a) the offer or beneficial item is authorized by the school's policies and the NCAA's bylaws, and (b) the agent files an itemized report of the payments with the school's athletic director, as specified.

39. SB 206

College athletes may use their name, image, or likeness for a commercial purpose when they are not engaged in official team activities.

The Student Athlete Bill of Rights ("SABR"), Education Code § 67450, *et seq.*, regulates intercollegiate athletic programs at four-year private universities or University of California or California State University campuses that receive an average of $10 million (or more) in annual revenue from media rights for intercollegiate athletics. This bill adds Section 67456 to the SABR and prohibits such postsecondary schools from providing prospective student-athletes with compensation for their names, images, or likenesses. However, the bill allows current student-athletes to be compensated for their names, images, or likenesses (providing such compensation does not conflict with the school's contract) and allows them to obtain professional representation provided the representative is licensed by the state and complies with applicable federal law. The bill further prohibits schools from revoking the scholarship of a student who obtains professional representation, or from contracting away students' right to use their names, images, or likenesses for commercial purposes when the student-athlete is not engaged in official team activities, as specified.

This bill does not go into effect until January 1, 2023.