39th Annual
LABOR & EMPLOYMENT LAW SYMPOSIUM
Program Materials
8:20–9:50 AM  **An Epic Year: A Review of Recent Employment and Labor Law Cases**

In this fast-paced discussion, our panelists will discuss notable cases and legislative developments in federal and California law with an emphasis on cases of most utility to the employment litigator.

**SPEAKERS:** Angel James Horacek, Law Offices of Angel J. Horacek
Anthony Zaller, Zaller Law Group, PC

10:00–11:00 AM

**BREAKOUT SESSION 1A**

**Understanding and Using FEHA Regulations in Your Practice**

California has a robust and active regulatory body interpreting the state's employment anti-discrimination laws. The DFEH's Director and two experienced employment attorneys will discuss how the process works, how to use FEHA regulations in your practice, and recent changes governing sexual harassment prevention training, national origin discrimination, use of criminal history in employment decisions, and gender identity and expression in the workplace.

**SPEAKERS:** María G. Díaz, Allred Moroko Goldberg
Ryan Derry, Paul Hastings LLP
Kevin Kish, California Department of Fair Employment and Housing

-OR-

**BREAKOUT SESSION 1B**

**Wage-Hour Class and PAGA Actions: The Trial Lawyer Perspective**

Increasing numbers of wage-hour class actions and PAGA cases are going to trial. This panel will address what every practitioner needs to know to take a case from intake, through discovery, and into trial. The seasoned trial lawyers will share tips, identify pitfalls to avoid, and weigh in on critical issues from the plaintiff’s and defense side.

**SPEAKERS:** Kevin T. Barnes, Law Offices of Kevin T. Barnes
Cornelia Dai, Hadsell Stormer & Renick, LLP
Tracey Kennedy, SheppardMullin

11:00–11:15 AM  **Break**

11:15 AM–12:15 PM  **Free Speech v. Hate Speech: The Politics and Practicalities of Regulating Employee Speech**

In our increasingly incendiary times, freedom of expression is often on a collision course with restrictions on offensive, hostile, and discriminatory behavior and speech. When does the law mandate such restrictions? When does it forbid such restrictions? Two nationally-recognized scholars will engage in a lively cross-town debate on this and other provocative First Amendment questions that impact the workplace.

**SPEAKERS:** Jody D. Armour, University of Southern California, Gould School of Law
Eugene Volokh, UCLA School of Law
12:15–1:30 PM  **Luncheon**

**Keynote Speaker:** Gustavo Arellano, Nationally-recognized author and syndicated columnist; Features Writer, Los Angeles Times; Frequent Contributor, KCRW

1:35–2:35 PM  **Recognizing and Preventing Unconscious Bias in Your Legal Practice**

Science teaches us that even the most well-intentioned individuals possess implicit or unconscious biases or stereotypes against certain social groups. Our panel of experts will help us learn how to recognize our unconscious attitudes and beliefs and find ways to counter these biases. This program qualifies for MCLE credit in the elimination of bias category for attendees under the California State Bar’s requirements.

**SPEAKERS:**
- Hon. Rupert A. Byrdsong, Los Angeles Superior Court
- Katherine M. Forster, Munger, Tolles & Olson LLP
- Dr. Sangeeta Gupta, Gupta Consulting Group

2:45–4:00 PM  **New Rules: Labor Law Under the Trump Board**

In this two-part discussion, join Chairman Ring of the NLRB as he discusses significant changes in labor law under the Trump administration, followed by the Los Angeles Regional Directors, union, and management-side panelists who will share their views on the implications of those changes. With issues ranging from joint employer status, administrative rulemaking, work rules, and the spillover of protests and strikes to non-union workforces, learn practical pointers that both labor and employment law practitioners need to know.

**SPEAKERS:**
- Nicole Buffalano, Morgan, Lewis & Bockius LLP
- William B. Cowen, National Labor Relations Board, Region 21
- Kirill Penteshin, UNITE HERE Local 11
- John F. Ring, National Labor Relations Board
- Mori Rubin, National Labor Relations Board, Region 31

4:00–4:15 PM  **Break**

4:15–5:15 PM  **How to Avoid Ethical Pitfalls in Your Employment Practice**

The new Rules of Professional Conduct became operative on November 1, 2018. Hear their impact on employment law from our panel of distinguished experts. This session qualifies for MCLE credit in the ethics category for attendees under the California State Bar’s requirements.

**SPEAKERS:**
- Diane L. Karpman, Karpman & Associates
- Hon. Michael D. Marcus (Ret.), ADR Services, Inc.
- David B. Parker, Parker Mills LLP

5:15–6:30 PM  **Cocktail Reception**

Sponsored by
**PROGRAM DETAILS**

**WHERE:**  
Millennium Biltmore Hotel, 506 South Grand Avenue, Los Angeles, CA

**HOTEL PARKING:**  
- Valet Parking $22  
- Self-parking at Pershing Square $10 early bird rate

**REGISTRATION FEE:**  
Includes admission to all panels; breakfast, lunch, coffee and refreshment service; and the cocktail reception.

**MATERIALS:**  
Materials will be provided electronically to those who pre-register, and on a flash-drive to walk-in registrants.

**PLEASE NOTE:**  
There will be a limited number of electrical outlets available in the general sessions for participants to use laptops or tablets during the presentations. Internet access will be available.

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An Epic Year: A Review of Recent Employment and Labor Law Cases
(Crystal Ballroom)

Speakers:
Angel James Horacek,
Law Offices of Angel J. Horacek
Anthony Zaller, Zaller Law Group, PC
Angel James Horacek practices employment and civil rights law on behalf of employees. In addition to representing workers in courts and arbitrations, she also counsels employees to resolve outstanding issues with the employer before a lawsuit is filed, which minimizes disruption to both the employee and the employer.

Prior to starting her own firm, Ms. Horacek was an associate attorney at an AmLaw 100 firm and an associate attorney at a boutique employee-side litigation firm. She was also an extern in the chambers of the Honorable Andrew J. Wistrich of the United States Federal Court for the Central District of California. She is admitted to practice in all state courts in California, in the United States District Court for the Central and Southern Districts of California, and in the Ninth Circuit Court of Appeals.

She is a member of the California Bar, and she is a member of the Los Angeles County Bar Association, the California Employment Lawyers Association, the John M. Langston Bar Association, Women Lawyers Association of Los Angeles, Black Women Lawyers Association of Los Angeles, and the Culver Marina Bar Association. She is an active member of Los Angeles County Bar Association's Labor and Employment Saturday Seminar Committee, which presents continuing legal educational programs for lawyers and law students several times through the year.

Thomson Reuters named Ms. Horacek to its 2016 Southern California Rising Star list, and to its 2017 and 2018 Southern California Super Lawyers list.

Ms. Horacek obtained both her Juris Doctor and Bachelors degrees from the University of California, Los Angeles. While at UCLA Law, she obtained a specialization in Business Law and Policy and a concentration in Critical Race Studies.

Ms. Horacek also sits on the alumni board for Harvard-Westlake School in North Hollywood, California.
Anthony Zaller is an employment litigation attorney and founding partner of the firm. Primarily focused on helping businesses and entrepreneurs navigate California’s complex employment and business laws, Anthony advises his clients through litigation, governmental agency investigations, and legal compliance issues. He has litigated wage and hour class actions for claims of unpaid wages, missed breaks, unpaid overtime, unreimbursed business expenses, and Private Attorney General Act ("PAGA") representative actions, among other issues. Anthony has also successfully litigated many single plaintiff employment cases including claims of wage and hour violations, breach of contract, wrongful termination, sexual and racial harassment, discrimination, unfair competition, and misappropriation of trade secrets and embezzlement.

Anthony has represented fortune 500 companies to start-up companies and individual executives in traversing California’s employment laws and successfully resolving litigation. Throughout his career, Anthony has represented and advised clients in various industries, including:

- Restaurants
- Technology and start-ups
- Manufacturing
- Entertainment
- Retail
- Oil and gas
- Trucking and logistics
- Aerospace and aviation

Anthony has been featured in various California and national news publications, including:

- Inc.
- Entrepreneur
- Silicon Valley Business Journal
- Nation’s Restaurant News
- KTLA 5
- CBS Los Angeles
- National Public Radio

Anthony also routinely speaks to California and nation-wide audiences, trade associations, and franchise groups.

Anthony is on the Board for the California Restaurant Association, Los Angeles Chapter.
Outline of Presentation
2018 Legislative Update

- Section 1: Sexual Harassment Laws
- Section 2: Corporate Board Diversity
- Section 3: Payroll Records
- Section 4: Hiring Laws
- Section 5: Employee Accommodations
- Section 6: Mediation disclosure
- Section 7: State Minimum Wage

Arbitration

**Epic Systems Corp. v. Lewis, 138 S.Ct. 1612 (2018)**

Employees sought to bring collective action against their employer in court, despite agreements to arbitrate employment disputes.

When an employee signs an arbitration agreement, he is bound not to file suit in court unless he first submits the dispute to arbitration.

The United States Supreme Court ruled that arbitration agreements under the Federal Arbitration Act (FAA) may supersede state laws requiring employers to provide their employees with an opportunity to litigate their claims in court.

The Court overturned the arbitrability rule for arbitration agreements under the FAA, thereby allowing employers to comply with the FAA policy favoring arbitration.

Impact: Atlas Tire Co. v. Tang, 155 F.3d 505 (9th Cir. 2008)
New Prime Inc. v. Oliveira, 139 S.Ct. 532 (2019)

A suit was filed against New Prime Inc., a long-haul trucking company, alleging that it violated the CONTROVERSIES clause in a collective bargaining agreement. The court held that the plaintiff could not bring the claim in state court because it was barred by the Federal Arbitration Act (FAA). The case was remanded to state court.

Schein v. Archer and White, 139 S.Ct. 524 (2019)

The Court held that when the parties’ contract delegates the question of the arbitrability of a particular dispute to an arbitrator, a court may not override the contract, even if it thinks that the arbitrator that the arbitration agreement applies to a dispute is unqualified. By rejecting the “wholly groundless” exception that courts had used to “spot-check” whether a claim of arbitrability was plausible before compelling arbitration, all lower federal courts must now compel arbitration in all cases unless the parties have agreed to delegate the issue of “who decides what is arbitrable” to an arbitrator.


Following arbitration of breach of contract claims involving funds held in escrow for movie actors, movie production company and its principal filed a petition to vacate the arbitration award in favor of the actors and the non-party debtor to compel the principal as a party. The trial court confirmed the award, but the Court of Appeal reversed and remanded, holding that the arbitrator lacked authority to determine that the principal, who was not a party to the arbitration agreement, could be compelled to arbitrate under the theory of alter ego liability, and that the trial court’s order was vacated.
Vazquez v. San Miguel Produce (Employer’s Produce), 2019 WL 3642628 (Jan. 30, 2019)

A staffing agency and the business to which two workers were assigned can enforce an arbitration agreement that is executed only between the staffing agency and the workers.


Employer’s arbitration agreement ran afoul because it ran afoul of public policy where provisions nullify employees’ right to bring action under PAGA without understanding the terms of the arbitration agreement.

The Court of Appeals found that, under Illinois v. CEG Tramps, Los Angeles, LLC, an employer’s right to use a PAGA action may not be waived. The Court explained that the differences between the English and Spanish versions of the handbook were not at issue, and the employer’s silent.


Plaintiff, an income partner of a Los Angles, hired a firm to assist her employer for gender discrimination, and violation of her pay

The appellate court held that the

Firm’s “predominantly and administratively unconscious”

agreement should have been subject to arbitration

attorneys were not at the trial level;

contractual agreements were not defective,

arbitration of the arbitration agreement

* A requirement for Plaintiff to pay the costs of

arbitration and file documents are very low,

* A limitation on refund available to her to that forum;

And;

* An appeal from confidentiality provision covering

all aspects of the arbitration process.
Saheli v. White Memorial Medical Center, 21 Cal.App.5th 308 (2018)

Plaintiff’s claims under California’s Ralph Act and Rane Act are preempted under the Federal Arbitration Act.


The Court of Appeal reversed the trial court’s order denying a petition to vacate an arbitration award where the arbitrator failed to satisfy disclosure obligations.

Because the arbitrator was aware of at least one of the grounds for disqualification but failed to disclose, the resulting arbitration award was subject to vacatur.

WAGE & HOUR CASES

Delivery drivers alleged they were misclassified as independent contractors in violation of state wage orders governing the transportation industry and various sections of the Labor Code. The California Supreme Court held:

The "ABC" test applied to determination of whether drivers were employees or independent contractors under suffer or permit work standard in wage orders.


The "ABC" test:

A. Whether the worker is free from the control and direction of the hire in connection with the performance of the work, both under the contract for the performance of the work and in fact; and

B. Whether the worker performs work that is outside the usual course of the hiring entity's business; and

C. Whether the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

In order to establish that a worker is an independent contractor under the ABC standard, the hiring entity is required to establish the existence of each of the three criteria.


Dynamex's ABC test must be satisfied to establish independent contractor status as defense to Wage Order claims; but Boccali multiplier test applies to non-wage order claims.

The Court of Appeals reversed summary judgment on plaintiff's claims brought under the auspices of Dynamex but affirmed on the non-wage order claims. The court properly relied on Boccali to grant summary judgment on the non-wage order claims.
**SuperShuttle DFW, Inc. v. NLRB**

Case No. 16-RC-010963 (2019)


Domestic Worker Bill of Rights requires application of the control test set forth in *Martinez v. Combs* as well as the common law test under *Boesel* in determining whether a worker is properly classified as an independent contractor.


- Filed a writ of certiorari and former service advisors for EncinoMotorcars, who sued, claiming their work entitled them to overtime under the Fair Labor Standards Act (FLSA).
- Defendant moved to dismiss, arguing that service advisors are exempt from the FLSA overtime pay requirement under 29 U.S.C. § 213(b)(7)(B), which applies to "any individual, corporation, or other enterprise primarily engaged in selling or servicing automobiles, trucks, or other implements."**
- Supreme Court held service advisors are "ineligible... intensely engaged in promoting automobiles," thus exempt from the FLSA's overtime pay requirement. 29 U.S.C section 213(b)(7)(B).

- Plaintiff were current and former service advisors for Encino Motocars who sued, alleging they were entitled to overtime pay under the Fair Labor Standards Act (FLSA).
- Defendant moved to dismiss, arguing that service advisors are exempt from the FLSA overtime pay requirements under 29 U.S.C. § 213(b)(3)(B), which provides that any supervisor or employee, or mechanic primarily engaged in doing or seeing that the repairs or alterations of any automobile or motor vehicle, are excluded from the FLSA overtime pay requirement.
- Supreme Court held because service advisors are "wholly engaged in doing or seeing to the repairs or alterations of any automobile or motor vehicle," they are exempt from the FLSA overtime pay requirement. 29 U.S.C. section 213(b)(3)(B).

Curtis v. Irwin Industries, Inc., No. 16-56515, (9th Cir. Jan. 25, 2019)

- California Labor Code section 514 provides that the Labor Code provisions regarding overtime requirements do not apply to an employee working under a qualifying collective bargaining agreement.
- Court did not address plaintiff's meal and rest break claims, and remanded to the district court for further review.
Alvarado v. Dart Container Corp. of Calif., 4 Cal.5th 542 (2018)

Plaintiff alleged that his employer had not properly incorporated the flat attendance bonus for non-worked time when calculating overtime pay.

Issue: Whether the distinct rule for purposes of calculating the per-hour overtime value of the bonus should be:

- The number of hours the employee actually worked during the pay period, including overtime hours;
- The number of non-overtime hours the employee worked during the pay period; or
- The number of non-overtime hours that exist in the pay period, regardless of the number of hours the employee actually worked.

Holding: Method 3 is correct, overtime rate is arrived at by dividing the amount of bonus by the total number of non-overtime hours actually worked during the relevant pay period.

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

In response to a certified question from the Ninth Circuit whether the FLSA de minimis rule applied to violations of minimum wage and overtime under the California Labor Code (Sections 510, 1194, and 1197), the California Supreme Court held that California's wage and hour statutes or regulations have not incorporated the de minimis doctrine found in the FLSA, and although the de minimis rule uses a background principle of state law, the rule was not applicable to employers.


Employer's timekeeping system that rounds time does not violate California wage law, so long as it does not systematically underor overstate employee time worked.

The Court of Appeals confirmed the rule that a rounding policy is lawful if it is facially neutral, consistently applied, and does not favor the employer to a significant degree.

Donohue v. AMN Services, LLC, 29 Cal.App.5th 1068 (Dec. 10, 2018)

An employer may round clock in and out times to the nearest 20-minute increments where the practice is neutral and fair, and does not result, over a period of time, in failure to compensate employees for all time actually worked.
Ward v. Tilly's, Inc. 2019
WL 421743 (2019)

Reporting time pay obligations under Wage Order 7 are triggered when an employee is required to leave their residence in order to report to work, and the record of reporting time is required.


Commuter time under a voluntary program where employees may drive a company vehicle from home to a customer's location is not compensable as hours worked under the "oncall" or the "suffer or permit to work" tests.

Rodriguez v. Taco Bell Corp., 896 F.3d 952 (9th Cir. 2018)

Employer's policy requiring employees to remain on premises during their meal breaks only if they chose to eat the discounted meal that employer offered did not violate Brinker, as the policy still relieved employees of all duties and relinquished control over their activities, and choosing the discounted meal was optional, not mandatory.

- Employees of staffing company sued employer for failure to pay minimum wage, overtime, and all wages owing at termination, failure to provide meal periods, and unfair competition, and sought civil penalties under PAGA.
- Court held that employee were entitled to compensation for the three to five minutes of every 30-minute meal period they were subject to employer's control.
- Employer's exertion of control over employees for three to five minutes of the 30-minute meal period did not entitle employees to minimum wage for all 30 minutes in addition to the premium pay for the meal period violation.


Temporary staffing agency met its obligation to provide meal breaks when contract with client required them to comply with all applicable laws, and staffing agency is not vicariously liable for subscribers' violation of the law.

**Goonewardene v. ADP, LLC, 2019 WL 470963 (2019)**

- California Supreme Court held that employee cannot assert two causes of action for breach of contract, negligence, and negligent misrepresentation against an employer's payroll company.
- The Supreme Court held that an employee cannot maintain a breach of contract claim under the third-party beneficiary doctrine because the primary benefit of the contract with the payroll company is the employer, not the employee.
- Also held that payroll company did not have a duty of care to the client's employees.

The Court of Appeal affirmed the judgment in favor of Wells Fargo on the ground that mailing the final wage statement is a "visible means to 'furnish'" it because the statute requires that the wage statement be furnished "seminmonthly or at the time of each payment of wages."


- Employee filed action for race, age, and disability discrimination and wage ordinances, both individually and in a representative capacity under PAGA for wages and hour violations, alleging failure to maintain accurate timecards.
- The Court of Appeal affirmed summary judgment in favor of the employer on the wage and hour claims, finding the wage statement deficiency could be corrected by simply asking whether and that such did not constitute an "injury" under the meaning of Sections 226(g).
- The appellate reversed summary judgment on the PAGA claim, reasoning that it did not equate proof of injury or showing and intentional violation of wage statement requirements.


An employer's failure to pay is sufficient when the employer explicitly states that the employee's wage has gone up but continue paying the old wage, after the employer's investigation by a consultant, and later makes an unreasonable argument that the wage laws is constitutionally vague.


The Court of Appeal reversed the sustaining of the petition but otherwise affirmed the judgment and awarded attorneys' fees to employees, affirming that the term "collect" in Section 226.6C(1) simply refers to when an employer intentionally fails or refuses to pay the wages in violation of the wage laws.

Employee brought a representative action under the Labor Code Private Attorneys General Act of 2004 (PAGA). The Court of Appeal affirmed the trial court's grant of motion for judgment in favor of the plaintiff as well as its grant of a new trial to the employee on the holding.

Employee could pursue penalties affecting other aggrieved employees even though the employee had not personally suffered the violations affecting other employees.

Holton assumed the status of claims as aggrieved employee could bring against an employer under PAGA. As a result, it is likely that any employee might bring PAGA actions alleging any suspected Labor Code violations.

See also: Correa v. MBK Partners, LLP, 19 Cal.App.5th 448 (2019) [in the tech industry, holding that employees may bring retaliatory claims even though "theosopher a violation that may differ from other employees..."


Employee brought a representative action under PAGA. The trial court granted defendants' motion to compel arbitration on all causes of action, except the PAGA claim.

Court of Appeal held it was bound by statutes, even after Epic.

 Held that Epic did not address the specific issues involved in arbitration, which involved a claim for civil penalties brought on behalf of the government and the enforceability of an agreement having a PAGA action in any forum.

Also held PAGA claims could not be arbitrated under arbitration agreements at issue because the claim is the representative action for violation of the Labor Code.

Labor code civil penalties under Labor Code sections 558(a) and 1157.1(e) may be recovered from individual officer or agents of the corporate employer.

**Lawson v. ZB, N.A., 18 Cal.App.5th 705 (2017) - California Supreme Court**

Granted Review on March 21, 2018

In Lawson, the Fourth District Court of Appeal disagreed with Fineman court by holding that unpaid wages under Labor Code section 558 are recoverable as civil penalties under PAGA, and therefore could not be converted to arbitration.


Amended PAGA notice failed to provide sufficient notice to employer and EWDA as precluded rule to a claim under PAGA and was time barred.


Employee filed a PAGA notice with Labor and Workforce Development Agency (LWDA) that referenced “my claim against my former employer” and “my final paycheck.” The notice did not refer to any other current or former employee.

Employee then amended his notice to include the PAGA claims as a representative action and dismissed his individual claim.

The Court of Appeal affirmed summary judgment on grounds that Employer failed to provide notice to Employer and the LWDA of fellow aggrieved employees.
Huerta v. Kava Holdings, Inc.
29 Cal.App.5th 74 (2018)

Code of Civil Procedure section 998 cost shifting does not apply to nonfrivolous FEHA actions.

Martinez v. Estelite One, Inc.,

Employee who prevailed at trial on discrimination claims but rejected 998 offer that was silent on fees and costs was not entitled to post-offer fees and costs.

WHISTLEBLOWER & QUI TAM

- Employee brought an action against his employer for violation of whistleblower anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).
- The U.S. Supreme Court held that a person must first provide information relating to a violation of the securities laws to the Securities Exchange Commission (SEC).

ANTI-DISCRIMINATION: FEHA & FEDERAL


- Employer - a dental assistant internship holder - alleged her employer falsely told her that no full-time dental position was available.
- The Court of Appeal reversed summary judgment, finding that Plaintiff's failure to apply for a full-time position did not preclude her failure to hire claim of discrimination, and that a triable issue of fact existed as to whether the employer acted with discriminatory animus.
EEOC v. BNSF Ry. Co., 902 F.3d 916 (9th Cir. 2018)

- Requiring job applicant to procure and provide MRI exam as condition of employment violates the ADA by discriminating on basis of perceived disability.
- The EEOC established all three elements of disability discrimination by showing that Plaintiff had a disability within the meaning of the ADA because:
  1) Defendant perceived him to have back impingement,
  2) Plaintiff was qualified for the job, and
  3) Defendant impermissibly conditioned Plaintiff's job offer on obtaining MRI.


- Employee, a state correctional officer, alleged disability harassment, failure to prevent the harassment, and related claims against Employer, citing of corrections and tenants. The Court of Appeal reversed the trial court's order for a new trial solely as to the issue of damages, finding that the trial court erred in granting Employer's motion for a new trial.
- The Court of Appeal affirmed the trial court's finding of disability, finding there was sufficient evidence that the harassment was severe and pervasive.


- Employee alleged she was terminated during probationary period (which overlapped with her pre-obligatory period) because her performance had not been reviewed.
- The Court of Appeal affirmed judgment in favor of Employee, finding that the District failed to reasonably accommodate her disability by extending the probationary period, and that the District failed to engage in the interactive process with its employee.
Nunes v. HFE Holdings, Inc.,
908 F.3d 428 (9th Cir. 2018)

*Under the 2008 ADA Amendments Act, an employee need only show that the employer regarded him as physically or mentally impaired.


The trial court erred in instructing the jury on a finding of an adverse action. The court should have instructed the jury on the relevant evidence


Age Discrimination in Employment Act applies to state and local governments regardless of their size.
Rizo v. Yovino, 887 F.3d 453 (9th Cir. 2018)

- The 9th Circuit held a female employee's prior salary could not be used to justify payment of lower wages for same public employee.

- The Justice at the School is the President of Schools, not a President of Students.

- The Court rendered a verdict with respect to the denial of a promotion for a prior principal with virtually no support for the decision because he is on the list to be ranked. The principal is supposed to be a certain authority and exceptional in every other aspect of the job. Former President of the School was not able to defend the decision.

- The Court overturned the decision of the School President by the 9th Circuit.

Traditional Labor


- Extraction of agency fees from nonconsenting public-sector employees violates the First Amendment.

- As a result, states and public-sector unions may no longer extract agency fees from nonconsenting employees.

- Neither an agency fee nor any other form of payment to a public-sector union may be deducted from an employee, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay.
Coffman v. Queen of the Valley Medical Center, 695 F.3d 717 (9th Cir. 2012)

Employee may challenge the certification of a union or negotiate with the union, but it may not do both, and the Director of the NLRB is entitled to injunctive relief to prevent employer's unfair labor practice.

CLASS ACTIONS/CAFA

Fritsch v. Swift Transp. Co. of Arizona, LLC, 689 F.3d 765 (9th Cir. 2012)

1. Class action alleging Employer denied employees proper overtime pay, meal periods, and wage statements in violation of the California Labor Code. Following removal pursuant to the Class Action Fairness Act (CAFA), the district court granted Employer's motion to remand. The Ninth Circuit held:
   - """"Employee's claims are not asserted under a contract or statute to impose attorney's fees, such fees are not included in the amount in controversy, and should not be included in the amount in controversy.
   - """"Ninth Circuit vacated the district court's order remanding the case to state court and instead remanded the case to the district court to allow Employer to prove if the amount in controversy, including future attorney's fees, exceeded CAFA's jurisdictional threshold of $5,000,000."""

Employee who successfully brings wrongful termination claim under the FLSA in state court is entitled to attorney fees and case costs.


After appeal of judgment from Labor Commissioner and Superior Court, employer ordered to pay nearly $100,000 in attorney fees and penalties for unpaid wage claim of $304.45.
Employees, a recruiter of temporary nursing workers, alleged
breach of contract and misappropriation of trade secrets
against former employees and a competitor.

Holding
The provision of the NDA that prevented employees from
directly or indirectly recruiting any employee of recruiter for a
specified period after termination of employment was
valid.

The identities and contact information of individuals who
worked for the employee was not to be used or disseminated
outside of the company and must not be used for any
subsequent employment or recruiting purposes.

Even if employees listed individuals as employees in their
recruiting materials, the use of this information was
permitted as it did not constitute a material breach of the
NDA.

Golden v.
Calif.
Emergency
Physicians
Med. Grp.,
896 F.3d
1018 (9th
Cir. 2018)

Employee successfully enforced settlement agreement
with former employer physician that included non-compete
provision barring the physician's employment by a consortium
that added a large number of medical facilities in California.

The Ninth Circuit overturned the district court's grant of the
motion, holding that the settlement agreement contained a
restrictive covenant that was not enforceable because it
unreasonably impaired the physician's ability to practice medicine.
Legislative Update — Bills Passed in 2018

Harassment Related Bills

- SB 826 — Sexual Harassment Training Expanded to Nonsexual Harassment
  - Bill requires a new training for all employees:
    - Training for nonsexual harassment
    - At least 2 hours of training every two years
    - In-person training

- Department of Fair Employment and Housing will regulate the requirements for the training

Harassment Related Bills

- SB 400 — Cal/OSHA Regulations on Workplace Violence
  - A workplace violence program shall be developed and implemented to prevent and to respond to any incident of workplace violence
  - The program shall include:
    - Identification of hazards and risks
    - Training of employees
    - Procedures for reporting and investigating incidents
  - All employees shall receive training on the program

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<th>Harassment Related Bills</th>
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<td>The bill also provides that a prevailing defendant is prohibited from being awarded fees and costs unless the court finds that the action was frivolous, vexatious, or brought in bad faith or that the plaintiff continued to litigation after it clearly appeared to be without merit.</td>
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<td>Provides for optional training by employer. An employer may also provide bystander intervention training that includes information and practical guidance on how to identify and report problematic behavior and to encourage bystanders to take action when they observe problematic behavior. The training and education may include measures to provide bystanders with the tools and confidence to intervene.</td>
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**Corporate Governance**

**SB 1310 - Corporations Board of Directors**

- Requires public companies who have principle executive offices in California to have a set number of women on the board of directors.
- By end of 2020: At least one female director.
- By end of 2021: Corporations with five directors must have at least two female members, and corporations with six or more directors must have at least three female members.

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**Payroll Records**

**SB 1232 - Payroll Records - Right to Receive Copy of Pay Records**

- Existing law grants current and former employees of employers who are required to keep records of hours worked and pay, and potential liability for failure to do so, the right to inspect or copy records regarding their employment. Upon written request, the employer must permit the employee to inspect and copy the records. The law now requires an employer to respond to these requests within a specified time. This bill provides that employers have the right to receive a copy of the employees' records described above and applies the associated time requirements and penalty provisions in this context.
Hiring
SB 1412 - Applicants for employment: Criminal History

- Bill permits employers to conduct background checks for employees under certain exceptions.
Accommodation

AB 1976 – Lactation accommodation
- Existing law requires every employer to provide a reasonable break time, and reasonable efforts to provide the employee with the use of a room or other location, other than a toilet stall, for the employee to express milk in private.
- The new law requires employers to make reasonable efforts to provide employee with use of a room or other location, other than a bathroom, for these purposes.
- Note: SB 597 which would require employers to provide a sink and refrigerator, among other items, did not pass.

Mediation

SB 564 – Mediation, Confidentiality Disclosure
- As of January 1, 2010, an attorney may provide the client with a printed disclosure containing the confidentiality restrictions set forth in Evidence Code section 715. Any such printed disclosure must be a single page that includes a statement that describes the confidentiality restrictions.
- Disclosure must be in at least 16-point text, in a typeface that is clearly legible.
- Disclosure must be in the language of the client’s native tongue, and must be provided in a language that the client can understand and comprehend.
- Disclosure must be signed by the client.
- Disclosure must be signed by the attorney.

California Minimum Wage

Effective January 1, 2019, the minimum wage is $12.50 per hour for employers with 26 or more employees, and $11.90 per hour for employers with 25 or fewer employees.

Exception: Certain employees who are not covered by the minimum wage.

Failure to comply with this requirement will result in the assessment of a monetary penalty not to exceed $1,000 per violation but can subject attorney to disciplinary action.
Los Angeles County Bar Association
Labor & Employment Law Symposium
March 5, 2019

An *Epic* Year:
A Review of Recent Employment and Labor Law Cases
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CASE LAW SYNOPSIS

ARBITRATION

ASARCO, LLC v. United Steel, Paper and Forestry, No. 16-16363 (9th Cir. Dec. 4, 2018)

Arbitrator did not exceed his authority in reforming CBA upon finding parties were mutually mistaken as to its terms when they agreed to it, even though the agreement contained a “no-add” provision.

ASARCO, a mining and smelting operation, had a collective bargaining agreement (“CBA”) with its employee union. The CBA provided that a Copper Price Bonus (“Bonus”) will be paid quarterly to employees who participate in ASARCO’s pension plan. An addendum to the CBA made employees hired on or after July 1, 2011 ineligible for ASARCO’s pension plan, and thus ineligible for the Bonus. ASARCO refused to pay the Bonus to employees hired after July 1, 2011 and the union filed a grievance.

At the beginning of the arbitration hearing the parties stipulated that the matter was properly before the arbitrator and that the arbitrator had jurisdiction to decide the grievance. The Union claimed there was a mutual mistake in the addendum and that the arbitrator should reform the CBA. ASARCO asserted that the arbitrator did not have the authority to reform the CBA due to a no-add provision in the CBA, which stated “The arbitrator shall not have jurisdiction or authority to add to, detract from or alter in any way the provisions of this Agreement.”

The arbitrator found that the parties were mutually mistaken as to the terms of the addendum and ordered that the CBA be reformed to provide that new hires, though ineligible for ASARCO’s pension plan, remain eligible for the Bonus. ASARCO filed a Petition to Vacate Arbitration Award in the United States District Court for the District of Arizona, arguing that the no-add provision deprived the arbitrator of authority to reform the CBA. The district court held that the arbitrator was authorized to reform the CBA to correct a defect, despite the no-add provision, based on a finding of mutual mistake.

The Ninth Circuit affirmed the district court’s order affirming the arbitration award. Applying ordinary principles of contract law, the arbitrator concluded that the proper remedy for the parties’ mutual mistake was to reform the CBA to make it reflect the terms the parties actually agreed upon. The Ninth Circuit held that the arbitration award drew its essence from the CBA, and the arbitrator did not exceed his authority in reforming the agreement. In addition, the arbitrator’s award did not violate public policy.

Gateway issue of whether a non-signatory to arbitration agreement can be bound to arbitrate must be decided by the court, not the arbitrator

Benaroya Pictures entered into a contract with Westside Corporation ("Westside") whereby Westside's president, the actor Bruce Willis ("Willis"), would perform in a movie produced by Benaroya Pictures. Willis signed the agreement as president of Westside, designated in the contract as "Lender." Michael Benaroya signed on behalf of Benaroya Pictures. The contract contained an arbitration clause, providing: "If there is any dispute between Producer and Lender with respect to the disposition of funds deposited in the Escrow Account, the parties agree that such dispute shall be resolved exclusively through arbitration ... pursuant to the rules and regulations of JAMS [Judicial Arbitration and Mediation Service] before a single arbitrator."

Westside and Willis filed a demand in arbitration pursuant to the arbitration clause, alleging that Benaroya breached the agreement by failing to pay Willis. Benaroya Pictures filed an answer and counterclaim. On September 10, 2015, Willis and Westside moved to amend the arbitration demand to name Michael Benaroya as an additional party, asserting that he is "the founder, principal, managing member, sole officer and Chief Executive Officer of Benaroya Pictures." Benaroya Pictures opposed, arguing that Michael Benaroya was not a party to the agreement and the issue of whether a non-signatory can be compelled to arbitrate is for the trial court.

The arbitrator issued a ruling granting the motion for leave to amend on the basis of alter ego. However, Benaroya Pictures and Michael Benaroya continued to dispute the arbitrator's ability to bind Michael Benaroya as the alter ego of Benaroya Pictures. The arbitrator determined that Michael Benaroya was the alter ego of Benaroya Pictures, and on the merits of the dispute, the arbitrator found in favor of Westside and Willis, awarding them $5,024,778.61 in damages, plus prejudgment interest, attorney fees, and costs, for which Michael Benaroya and Benaroya Pictures were liable. Michael Benaroya and Benaroya Pictures filed a petition to vacate the arbitration award, and Willis and Westside filed a petition to confirm the award. The trial court granted the petition to confirm the award and denied the petition to vacate the award.

On appeal, the Court of Appeal reversed and remanded, holding that the arbitrator lacked authority to determine that Michael Benaroya could be compelled to arbitrate as a non-signatory. Under Sandquist v. Lebo Automotive, Inc., (2016) 1 Cal.5th 233, an arbitration agreement cannot bind non-signatories, absent a judicial determination that the non-signatory falls within the limited class of third-parties who can be compelled to arbitrate. There are six theories by which a non-signatory may be bound to arbitrate: (a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing or alter ego; (e) estoppel; and (f) third-party beneficiary, but this decision cannot be delegated to the arbitrator. While the JAMS rule permits an arbitrator to determine whom among signatories to an arbitration agreement are proper parties for the dispute to be arbitrated, the rule cannot (and does not) permit the arbitrator to determine whether a non-signatory to the arbitration agreement can be compelled to arbitrate. The authority to decide that question resides, by law, solely with the trial court.

Under the FAA, employers may enforce class action waivers in arbitration agreements to compel individualized proceedings

Epic Systems was a consolidated action arising from three cases adjudicated in the Fifth, Seventh, and Ninth Circuits, respectively. The relevant facts adduced in the 5-4 decision by the United States Supreme Court were as follows: Ernst & Young ("E&Y") and Stephen Morris, a junior accountant, entered into an agreement to arbitrate any disputes that might arise between them. The agreement stated that the employee could choose the arbitration provider and that the arbitrator could "grant any relief that could be granted by ... a court" in the relevant jurisdiction. The arbitration agreement provided for individualized proceedings. Morris later sued E&Y in district court, alleging that E&Y had misclassified its junior accountants as professional employees and violated the federal Fair Labor Standards Act ("FLSA") and California law by paying salaries without overtime pay, and sought to litigate the federal claim on behalf of a nationwide class under the FLSA’s collective action provision. E&Y moved to compel arbitration. The district court granted the motion; the Ninth Circuit reversed, stating that the saving clause of the National Labor Relations Act ("NLRA") removes this obligation because an agreement requiring individualized arbitration proceedings violates the NLRA by barring employees from engaging in the concerted activity of pursuing claims as a class or collective action.

Under AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), courts may not allow a contract defense to reshape traditional individualized arbitration by mandating class-wide arbitration procedures without the parties’ consent. For the same reason, the Federal Arbitration Act ("FAA") does not bar arbitration agreements that require individualized proceedings be enforced, reasoning that neither the NLRA nor the FAA’s saving clause superseded the FAA policy favoring arbitration.

Section 7 of the NLRA, 29 U.S.C. § 157, guarantees workers “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” but is silent as to arbitration. Therefore, there is no conflict between the FAA and NLRA.

The Court did not give Chevron deference to the National Labor Relations Board’s 2012 opinion suggesting the NLRA displaces the FAA, because there is no conflict between FAA and NLRA.

The FAA’s Saving Clause provides that courts may refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract under 'generally applicable contract defenses, such as fraud, duress, or unconscionability,,'" but it will not allow "a contract defense to reshape traditional individualized arbitration by mandating class-wide arbitration procedures without the parties’ consent.” Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act’s saving clause nor the NLRA suggests otherwise.
Arbitrators must comply with disclosure requirements to ensure that arbitration “produces fair and just results from neutral decisionmakers”

Patrice Honeycutt (“Honeycutt”) filed a lawsuit against her former employer, JP Morgan Chase Bank (“Chase”). Chase filed a petition to compel arbitration which the Court granted. The American Arbitration Association (“AAA”) served as the arbitration provider and appointed a retired judge as arbitrator. The notice of appointment included a copy of AAA’s disclosure worksheet (“Worksheet”) which required the arbitrator to disclose any past or present relationship with the parties, their counsel, direct or indirect, whether financial, professional, and social or of any other kind. The notice of appointment also reminded the arbitrator that there existed a continuing obligation to disclose during the pendency of the matter. The Worksheet further advised the arbitrator that California Code of Civil Procedure §§1281.9 and 1281.95 require certain disclosures by a person appointed as an arbitrator and that the ultimate obligation for compliance rests with the arbitrator. The notice of appointment included a link to the Ethics Standards on the website of the California Judicial Branch.

The parties only received ten of the eleven pages of the Worksheet -- omitted was question 28, which asked whether the arbitrator, during the pendency of the arbitration, would “entertain offers of employment or new professional relationships in any capacity other than as a lawyer, expert witness, or consultant from a party or a lawyer for a party, including offers to serve as a dispute resolution neutral in another case,” to which the arbitrator answered yes.

The parties did receive an explanation for question 28, which stated “I will entertain offers to serve as a dispute resolution in other cases. I will evaluate any potential conflict at that time prior to accepting [the] offer.” The disclosure documents from the AAA also included a document signed by the arbitrator and titled “The Arbitrator’s Oath,” which repeated the AAA’s warning that the arbitrator, not the AAA, was responsible for complying with the disclosure requirements.

Following arbitration, the arbitrator issued an interim award in favor of Chase and against Honeycutt on all of her claims. Thereafter Honeycutt asked AAA to identify every other case the arbitrator had accepted involving Chase and its counsel of record, and informed AAA for the first time that she had not received all pages of the notice of appointment and that the copy she received was “missing a page, omitting questions 21 through 28 and their responses.” AAA sent Honeycutt the missing page of the Worksheet. The manager also sent Honeycutt 10 letters from the arbitrator’s case manager stating that, during the pendency of the arbitration between Honeycutt and Chase, the arbitrator had been appointed to serve as an arbitrator in eight other employment cases involving counsel for Chase and two other cases (one of which was an employment case) involving Chase. The parties had previously received only four of the eight letters concerning employment cases involving counsel for Chase. Counsel for Honeycutt objected to the arbitrator’s continuing to serve in this matter and requested the arbitrator’s “immediate disqualification,” arguing that, among other things, that she had not received the entire initial disclosure by the arbitrator (because of the missing page) and that the arbitrator failed to disclose at least four additional cases with Chase’s law firm since being appointed to this matter.” AAA denied Honeycutt’s request. The arbitrator issued a final award,
to which Honeycutt petitioned the court to vacate and Chase petitioned the court to confirm. The trial court confirmed the arbitration award.

The Court of Appeal reversed the trial court’s order denying a petition to vacate an arbitration award because the arbitrator failed to satisfy the required disclosure obligations. The Ethics Standards were adopted to address the bias, or appearance of bias, that may flow from one side in an arbitration being a source or potential source of additional employment. The arbitrator did not comply with Ethics Standard 12(b) because the arbitrator’s initial disclosure did not include the page containing the question asking whether the arbitrator would entertain such offers and the arbitrator’s “yes” answer. However, Honeycutt waived her right to vacate the award on this basis because she failed to object to the defective disclosures, demand the arbitrator make complete and compliant disclosures, or move to disqualify the arbitrator at the time the disclosure was omitted within the time period provided. The arbitrator also failed to comply with

The arbitrator also failed to comply with Ethics standard 12(d) because not only did she fail to disclose all of the cases involving Chase’s attorneys for which she accepted offers to serve as a neutral, she failed to disclose any offers of employment that she may have entertained but not accepted. The arbitrator also failed to comply with Ethics standard 7(d) by not disclosing four pending arbitrations with Chase’s attorneys.

Because the arbitrator was aware of at least one of the grounds for disqualification but failed to disclose, the resulting arbitration award was subject to vacatur. Honeycutt did not waive her right to vacate the award because she timely moved to disqualify the arbitrator after AAA disclosed the additional matters to her.

An employer’s arbitration agreement was unenforceable as against public policy where provisions waiving employee’s right to bring action under Private Attorneys General Act (“PAGA”) conflicted between the English and Spanish versions of the agreement.

The employer’s employee handbook was provided to all employees in English and Spanish. The handbook required arbitration of employment disputes and denied employees’ rights to bring a PAGA action. The English version contained a severability clause, in case a court found the PAGA clause to be unenforceable, but the Spanish version did not. Employee signed acknowledgement of receipt of both versions.

The Court of Appeal found that, under Iskanian v. CLS Transp. Los Angeles, LLC, 59 Cal.4th 348 (2014), an employee’s right to bring a PAGA action may not be waived and that the difference between the English and Spanish versions of the handbook was negligent at best, and deceptive at worst.
Local Joint Executive Board of Las Vegas v. Mirage Casino-Hotel, Inc., No. 16-16754 (9th Cir. Dec. 13, 2018)

An arbitrator does not have authority to decide the question of substantive arbitrability.

Finding that a district court echoed the legal errors in an arbitrator’s analysis of a grievance, a divided Ninth Circuit reversed the confirmation of an arbitration award in favor of an employer in a dispute over vacation time owed to employees of a third-party vendor. The appeals court found that the arbitrator’s essential error was his failure to discern a critical distinction between the arbitrability of a grievance and its merits. He compounded the error by neglecting the distinction between procedural arbitrability and substantive arbitrability. The arbitrator’s confusion led him to decide an arbitrability question that he was not empowered to adjudicate on the mistaken belief that it was procedural, and to base his conclusion of non-arbitrability on an analysis anchored in his view of the merits. Judge Owens filed a separate concurrence. Judge Friedland filed a dissenting opinion.
Morris v. Ernst & Young, LLP, 894 F.3d 1093 (9th Cir. 2018)

In one of the related Epic cases, the Ninth Circuit vacated and affirmed the district court’s granting of defendants-appellees’ motion to compel arbitration.

On July 9, 2018, the Ninth Circuit Court of Appeals issued its opinion, that stated, “[i]n light of the Supreme Court’s opinion dated May 21, 2018 (Epic Sys. Corp. v. Lewis, No. 16-285), the opinion of this Court dated August 22, 2016, 834 F.3d 975 is VACATED and judgment is entered AFFIRMING the district court’s grant of Defendant-Appellees’ motion to compel arbitration.

The Ninth Circuit’s reversal was preceded by the Supreme Court’s holding in the consolidated cases of Epic Systems Corp. v. Lewis, Ernst & Young LLP v. Morris, and National Labor Relations Board v. Murphy Oil USA, Inc., 138 S. Ct. 1612 (2018), that arbitration agreements in which an employee waives his right to bring a claim against an employer on a class or collective basis are enforceable under the Federal Arbitration Act and do not violate the National Labor Relations Act. The plaintiffs in the consolidated cases had previously agreed to individually arbitrate any disputes arising out of their employment and to waive any class or collective claims. Contrary to the agreements, plaintiffs brought class or collective actions in federal court asserting wage and hour violations for overtime pay under FLSA and applicable state laws. Therein, plaintiffs asserted that the class action waivers were unenforceable under the NLRA. On appeal, the Ninth Circuit in Ernst & Young and the Seventh Circuit in Epic Systems ruled that the class action waivers were unenforceable, and the Fifth Circuit in Murphy Oil held that the waivers were enforceable.

In a 5-4 decision written by Justice Gorsuch, the Court held that “Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act’s saving clause nor the NLRA suggests otherwise.” 138 S. Ct. at 1616, 1624–27. The Court rejected the employees’ argument that the FAA’s savings clause—which allows courts to refuse to enforce arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract”—precludes enforcement of their arbitration agreements. Because the employees’ argument was not applicable to “any” contract, and instead singled out “individualized arbitration proceedings” as invalid, the Court explained that the savings clause was not implicated, and there was no “generally applicable contract defense [ ]” to overcome the FAA’s presumption of enforceability. Id. at 1622–23.

The Supreme Court’s ruling of the Epic cases confirms that courts will continue to enforce agreements between employers and employees to arbitrate their disputes on an individual, as opposed to a class or collective basis, in furtherance of the of the FAA’s strong policy favoring arbitration.
Munro v. University of Southern California, et al., 896 F.3d 1088 (9th Cir. 2018)

Plaintiffs' claims under ERISA class action lawsuit were not arbitrable because their claims are similar to a qui tam action, and therefore outside of the scope of the arbitration clauses.

Plaintiffs who were participants in two ERISA-governed defined contribution plans sponsored by the University of Southern California ("USC") alleged breach of fiduciary duty stemming from the administration of those plans. The defendants moved to compel arbitration, as all of the potential class members had signed arbitration agreements to arbitrate all claims that the putative class members or USC had against one another.

The district court denied the motion, and the Ninth Circuit affirmed. The Ninth Circuit analogized the plaintiffs in this case to plaintiffs in a qui tam action brought on behalf of the U.S. Government under the False Claims Act. The Court stated that individual agreements to arbitrate do not extend to qui tam actions because those are brought on behalf of the government by the plaintiffs.

Issue of whether industry-specific exemption stated in Federal Arbitration Act applies to parties must be decided by a court, not an arbitrator.

Employee, a former truck driver, brought a putative class action against an interstate trucking company, alleging it violated the Fair Labor Standards Act ("FLSA") and Missouri and Maine labor laws by failing to pay its drivers minimum wage. The United States District Court for the District of Massachusetts denied employer's motion to compel arbitration under the Federal Arbitration Act ("FAA"), and it appealed. The United States Court of Appeals for the First Circuit, affirmed. Certiorari was granted.

The first issue was who decides if a claim falls within the transportation workers exception to FAA, a court or an arbitrator. The second issue was whether such exception (which refers to "contracts of employment") applies when, on the face of the independent contractor agreement, the plaintiff is not an employee.

The Supreme Court held that a court—rather than an arbitrator—must resolve a dispute over the applicability of the FAA’s Section 1 exemption for "contracts of employment of transportation workers."

The Supreme Court further held that the transportation workers exception found in Section 1 applied to the truck drivers even assuming for the purposes of this determination that the drivers were independent contractors. The term "contract of employment" encompasses contracts that require an independent contractor to perform work. Therefore, any workers, including independent contractors, meeting the transportation workers exemption could not be compelled to arbitration under the FAA.


Court applies Armendariz principles to partnership agreement between lawyer and law firm

Employee Constance Ramos was hired as an income partner at Winston & Strawn, LLP in May 2014 in the intellectual property practice group. In addition to her law degree, Ramos holds a doctorate in biophysics. She is a registered patent practitioner and has been admitted as a solicitor in the United Kingdom. She was the only partner in Winston’s Northern California offices with those advanced degrees. Ramos was hired along with two male attorneys from her prior firm.

She was employed pursuant to a “Partnership Agreement” which contained an arbitration clause requiring confidentiality, providing that each party was to bear its own legal fees and that the arbitrators would have no authority to substitute its judgment for, or otherwise override the determinations of the partnership.

Ramos was the highest billing income partner in the San Francisco office in 2016, but received no bonus for that year. She attempted to develop her practice but her efforts to do so were rebuffed by Winston. She was excluded from pitch meetings and left off cases in favor of less-qualified, less-experienced male attorneys.

After her male partners left, Winston’s Northern California office managing partner told Ramos that Winston wanted her to leave as well, and that she was to stop working on any billing matter, and that if she did not withdraw from employment, the firm would reduce her salary. When Ramos did not withdraw, Winston reduced her salary by 33 percent. Ramos then had low billings in 2017. Winston cut her salary again, resulting in a 56 percent reduction in pay.

Ramos resigned in July 2017, obtained a right to sue from the Department of Fair Housing and Employment, and filed a lawsuit. Winston moved to compel arbitration pursuant to the Partnership Agreement.

The trial court granted Winston’s motion on the basis that all Ramos’ claims fall within the scope of the arbitration clause and that Ramos and Winston had a partnership relationship. However, the Court found that the venue and cost sharing provisions were unconscionable and severed them from the arbitration agreement. Ramos filed a writ of mandate.

The appellate court found that the arbitration agreement was procedurally and substantively unconscionable and that the court should not have compelled arbitration. Although Ramos’ claims relate to the partnership and therefore the Partnership Agreement, the Partnership agreement fails to comply with Armendariz v. Foundation Health Psychcare Services, Inc., (2000) 24 Cal.4th 83, which remains good law following AT&T Mobility LLC v. Concepcion (2011) 563 U.S. 333 and Epic Systems Corp. v. Lewis (2018) 138 S.Ct. 1612, The Federal Arbitration Act does not preempt the invalidation of arbitration agreement by generally applicable contract defenses of fraud, duress, or unconscionability.

The Partnership Agreement was both procedurally and substantively unconscionable under Armendariz v. Foundation Health Servs., Inc. 24 Cal.4th 83 (2000) and the trial court should not have compelled arbitration, because:

There was a “marked” power imbalance between Ramos and Winston and the relationship was sufficiently similar to that of an employee-employer relationship to subject it to Armendariz;
The Partnership Agreement was a contract of adhesion Ramos was unable to negotiate or amend the agreement because it had been adopted by hundreds of capital partners prior to her joining the firm, and any modification would have required a two-thirds vote of the capital partners;

The Partnership Agreement failed to meet the five Armendariz factors of (1) neutral arbitrators (2) no limitation on remedies (3) sufficient discovery (4) written arbitration decision and judicial review and (5) employer pays costs unique to arbitration

There were four unconscionable terms in the Partnership Agreement which violated Armendariz:

(1) it limited remedies by precluding the arbitrators from providing remedies that would otherwise be available in a court of law;

(2) it impermissibly provides each party shall recover its own attorney fees;

(3) it forced the Partnership and Ramos to share equally the fees and other charges of the mediator, arbitrators, the CPR Institute for Dispute Resolution and the American Arbitration Association; and

(4) it contained a provision requiring all aspects of the arbitration be maintained in strict confidence which the court found to be substantively unconscionable because it may discourage potential plaintiffs and increased Ramos’ costs by requiring her to conduct depositions rather than witness interviews. It also advantaged the employer to the detriment of employees seeking to vindicate unwaivable statutory rights.

The court could not cure the unconscionability by severing the four unconscionable provisions and therefore found it void as a matter of law.
Saheli v. White Memorial Medical Center, 21 Cal.App.5th 308 (2018)

Plaintiff’s claims under California’s Ralph Act and Bane Act are preempted under the Federal Arbitration Act.

Plaintiff signed an arbitration agreement in connection with her medical residency program at White Memorial Medical Center. Less than a year later, Plaintiff filed a complaint that contained claims under the Ralph Act and Bane Act (harassment or discrimination claims in which the conduct is alleged as “hate crimes” (Civ. Code 51.7, 52.1)).

White Memorial Medical Center successfully compelled all claims to arbitration with the exception of the Ralph Act and Bane Act claims, which the trial court denied because the arbitration agreement did not comply with the 2014 amendments to the Ralph Act and Bane Act. White Memorial Medical Center appealed.

The Court of Appeal held the trial court erred in not compelling arbitration of plaintiff’s claims as restrictions on arbitrations agreements contained in the Ralph Act and Bane Act are preempted under the Federal Arbitration Act (“FAA”).

When the parties' contract delegates the arbitrability question to an arbitrator, it is for the arbitrator, not the courts to decide the threshold issue of whether an issue is arbitrable. The "wholly groundless" exception is rejected.

Archer and White is a business that distributes dental equipment. Archer and White entered into a contract with Pelton and Crane, a dental equipment manufacturer, to distribute Pelton and Crane’s equipment. The contract stated in relevant part "that any dispute arising under or relating to the agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of [Schein]), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association ("AAA")." AAA’s rules provide that arbitrators have the power to resolve arbitrability questions.

Archer and White sued Pelton and Crane’s successor-in-interest and Henry Schein, Inc. ("Schein") in the Eastern District of Texas for state and federal violations of antitrust law and sought money damages and injunctive relief. Schein filed a motion to compel arbitration under the Federal Arbitration Act, 9 U.S.C. §2 ("FAA") which the district court denied, and the Fifth Circuit affirmed. The United States Supreme Court granted certiorari.

The court held that arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. Parties may agree to have an arbitrator decide whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. The Fifth Circuit and other Courts of Appeal have employed a "wholly groundless" exception where the court rather than an arbitrator should decide the threshold arbitrability question if, under the contract, the argument for arbitration is wholly groundless. However, the "wholly groundless" exception is inconsistent with the FAA and is rejected. When the parties’ contract delegates the question of the arbitrability of a dispute to an arbitrator, a court may not override the contract, even if it thinks the argument that the arbitration agreement applies to a dispute is wholly groundless.

By rejecting the "wholly groundless" exception that courts had used to "spot-check" whether a claim of arbitrability was plausible before compelling arbitration, all lower federal courts have no discretion to decide arbitrability of an issue where the parties have agreed to delegate the issue of "who decides what is arbitrable" to an arbitrator.

A former employer (and nonparty to an arbitration agreement) has the right to appeal an adverse trial court order vacating arbitrator’s discovery order under the one final judgment rule.

Google initiated an arbitration proceeding against two former employees for breach of non-solicitation and non-competition agreements. After resigning from Google, the former employees formed Otto, a self-driving technology company which Google considered a competitor of its own self-driving car project. Otto then was acquired by Uber. Google filed a discovery motion in the arbitration proceeding seeking certain records from Uber (a nonparty to the arbitration). Over Uber’s objections, the arbitration panel determined the records were not privileged and ordered Uber to produce the records. Uber then initiated a special proceeding in Superior Court seeking to vacate the discovery order and prevailed.

In reversing the Superior Court’s order, the Court of Appeal concluded that Uber had a right of direct appeal based on the one final judgment rule. The Discovery Order disposed of all issues between Uber and Google in the special proceeding and was “the final determination of the rights of the parties[.]”
A staffing agency and the business to which two workers were assigned can enforce an arbitration agreement that is executed only between the staffing agency and the workers.

Packing workers brought suit against a produce company for wage and hour violations. The produce company filed a cross complaint against the staffing company which provided the workers. The produce company and the staffing company then filed a joint motion to compel arbitration based on provision in agreement between the workers and staffing company. The trial court granted the motion to compel arbitration.

The Court of Appeal affirmed, holding that co-employers have equal obligations to comply with laws governing wages, meals and rest breaks. A nonsignatory to an arbitration agreement can compel arbitration of a worker’s labor law claims if the worker has agreed to arbitrate “all disputes that may arise within the employment context” and the worker is asserting claims rooted in an employment relationship with a co-employer who was a signatory.
WAGE & HOUR


Employer’s factually-neutral rounding time-keeping system is valid even if individual employees are disadvantaged

Emilio Letona, a respiratory care technician, and Jacquelyn Abeyta, a registered nurse, were employed by AHMC Healthcare (“AHMC”). AHMC required their employees to swipe in and out, and rounded employees’ hours up or down to the nearest quarter hour prior to calculating wages and issuing paychecks. Letona and Abeyta filed suit on their behalf and on behalf of others.

Statistics showed that at Letona’s worksite, 49.3% of the workforce had time added, 1.2% of the workforce were unaffected, and 49.5% of the workforce lost time. Overall more minutes were added to employee time than were subtracted. At Abeyta’s worksite, 47.1% of employees had time added, 0.8% of employees were unaffected, and 52.1% of the employees lost time. Overall the rounding policy added 3,875 hours to the employees’ total compensable time.

The net effect on the two named plaintiffs over four years was determined to be undercounting of 3.7 hours for Letona and 1.6 hours for Abeyta. The trial court denied both parties’ motions for summary judgment, and the employees filed a petition for writ of mandate. The appellate court issued an alternative writ instructing the trial court to vacate the order or make a different order, showing why a writ should not issue, which the court failed to do.

The appellate court held that under Section 785.48 of title 29 of the Code of Federal Regulations, employers may compute worktime by rounding “to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour,” provided that the rounding system adopted by the employer “is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time employees have actually worked. Under Corbin v. Time Warner Entm’t-Advance/Newhouse P’ship. (9th Cir. 2016) 821 F.3d 1069, employers may use rounding policies to calculate wages efficiently. Sometimes, in any given pay period, employees come out ahead and sometimes they come out behind, but the policy is meant to average out in the long-term. As long as the rounding policy is neutral and permits upward and downward rounding, it is facially neutral. Because the rounding system was neutral on its face, and employees as a whole were significantly overcompensated, AHMC’s rounding system did not systematically undercompensate employees over time. The fact that a bare majority at one hospital lost minor sums during a discrete period did not create an issue of fact as to the validity of the system. A system is fair and neutral and does not systematically undercompensate employees where it results in a net surplus of compensated hours and a net economic benefit to employees viewed as a whole.
Allied Concrete and Supply Co. v. Baker, 904 F3d 1053 (9th Cir. 2018)

Constitutional challenge to California’s prevailing wage law upheld as applied to ready-mix concrete delivery drivers

Plaintiffs initially filed the action seeking to challenge under the Equal Protection Clause of the U.S. Constitution the applicability of Labor Code Section 1720.9, which amended the prevailing wage laws to apply to ready-mix drivers to ensure payment of such wages on state and local public works projects. The Plaintiffs also asserted that the Federal Aviation Administration Authorization Act of 1994 (FAAAAA) preempted state law.

During the trial court, ready-mixed concrete suppliers filed a motion for preliminary injunction to prevent the California Labor Commissioner from enforcing the law, which was granted. Later, the ready-mixed concrete suppliers filed a motion for permanent injunction to permanently prevent the California Labor Commissioner from enforcing the law, which was also granted by the trial court, on the ground that AB 219 treated “ready-mixed concrete drivers differently than other materials drivers.” According to the trial court, the law did not pass scrutiny under the rational basis test under the Equal Protection Clause because AB 219 treated “ready-mixed concrete drivers differently than other material drivers,” and this was “arbitrary” rather than “rationally related” to a legitimate state interest. Based upon this ruling, the state appealed.

The Ninth Circuit reversed the district court’s grant of summary judgment for plaintiffs and held that the district court wrongly disregarded as irrelevant certain differences between ready-mix drivers and other drivers that the legislature could have relied on in extending the prevailing wage law. Further, it reversed the district court’s denial of the International Brotherhood of Teamsters (IBT) motion to intervene by holding that IBT had a significantly protectable interest. The Ninth Circuit affirmed the district court’s dismissal of the FAAAA claim and held that prevailing wage law was not related to prices, routes, and services within the meaning of the FAAAA’s preemption clause, and as such, did not preempt the state’s prevailing wage law.

The Ninth Circuit panel further explained that the California Supreme Court has stated that prevailing wage laws further goals such as: (1) generally protecting employees on public works projects; (2) benefiting the public through the superior efficiency of well-paid employees; and (3) permitting union contractors to compete with nonunion contractors. The Court also noted that under the rational basis test of the equal protection clause, a statute does not “run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate government purpose.” It held that the California legislature could have rationally concluded that extending the prevailing wage law to ready-mix drivers ahead of other drivers would further these respective goals because ready-mix drivers: (1) are more integrated into the construction process than other materials drivers and should be paid accordingly; (2) are more skilled than other drivers and provide a material that is more important to public works projects than other materials such that paying the prevailing wage will attract superior drivers and improve public works; and (3) are more likely to be unionized and, therefore, vulnerable to underbidding.
Alvarado v. Dart Container Corp. of Calif., 4 Cal.5th 542 (2018)

Employer must factor attendance bonus into an employee's regular rate of pay by treating it as if it were fully earned by only the nonovertime hours in the pay period

Hector Alvarado was employed by Dart Container Corporation of California ("Dart") as a warehouse associate. Dart manufactures food service products.

Alvarado was paid on an hourly basis and received an “attendance bonus” if he was scheduled to work on a Saturday or Sunday, and did so, completing the full work shift. The amount of the bonus was a flat sum of $15 per day of weekend work, regardless of whether he worked in excess of the normal work shift that day. Alvarado filed suit as a member of a class, alleging that Dart did not properly incorporate the flat attendance bonus for weekend work when calculating overtime pay.

There was no question that the attendance bonus must be factored into an employee’s regular rate of pay so that the employee’s overtime pay rate reflects all the forms of regular compensation that the employee earned. The issue was what formula must be used to correctly determine the overtime pay rate when factoring in the attendance bonus.

The court considered whether the divisor for purposes of calculating the per-hour value of the bonus should be (1) the number of hours the employee actually worked during the pay period, including overtime hours; (2) the number of nonovertime hours the employee worked during the pay period; or (3) the number of nonovertime hours that exist in the pay period, regardless of the number of hours the employee actually worked.

Although the Court determined that the Department of Labor Standards Enforcement regulation was not controlling and thus void as an underground regulation, it ultimately held that the divisor for purposes of calculating the per-hour value of the employer’s attendance bonus should be the number of non-overtime hours actually worked in the relevant period, not the number of non-overtime hours that exist in the pay period (option 2). In other words, Alvarado renders the rule that employers must divide the total compensation earned in a pay period by only the non-overtime hours worked by an employee.

Yet, the Court limited its decision to flat-sum bonuses. Production bonuses, piece rate bonuses, and other types of bonuses were not at issue in Alvarado, and the court recognized that “a different analysis may be warranted” for these other types of bonuses.
Labor code civil penalties may be recovered from individual officer or agents of the corporate employer.

The Court of Appeal held that under Labor Code Sections 558(a) and 1197.1(a), an individual officer of agent of a corporate employer may be personally liable to an employee for civil penalties authorized for minimum wage and overtime pay violations regardless of any allegations or finding of an alter ego relationship.

This case involved two restaurant employees who worked at a restaurant owned by Pedrazzani, who was also the president, secretary and director of Pama, which did business as Via Italia Trattoria, a restaurant located in Encinitas, California. The employees alleged wage and hour violations, including failure to pay minimum wage and overtime wages. The employees brought suit individually and pursuant to PAGA. The lower court ruled in favor of the employees, jointly and severally against Pedrazzani and his incorporated entity Pama for over $31,000 in penalties for minimum and overtime wage violations and Plaintiff’s attorney’s fees totaling over $300,000. Both defendants Pedrazzani and Pama timely appealed and during the pending appeal, Pama, the corporate entity filed for bankruptcy. Thereafter, the appeal ruling related solely as to Pedrazzani.

The Court of Appeal in the Fourth District held that under Labor Code Sections 558 and 1197.1, the California Legislature, “decided that both the employer and any “other person” who causes a violation of the overtime pay or minimum wage laws are subject to specified civil penalties.” (Id. at 474). The Court noted that neither of these statutes mentions the business structure of the employer, the protections under the corporate form, or any reasoning to disregard the same. Simply, the corporate form is irrelevant in cases where the evidence supports a finding that a party other than the employer “violates or causes to be violated” the overtime laws or “pays or causes to be paid any employee” less than the applicable minimum wage – that party is liable for civil penalties. As such, the party is liable regardless of the identity or business structure of the employer. The Court of Appeal concluded that the unambiguous language in both Labor Code Sections 558(a) and 1197.1(a) to include the individual, Pedrazzani, as a person other than the corporate employer to be subject to the civil penalties awarded by the lower trial court.

The Court of Appeal concluded by ruling that Pedrazzani was liable for the civil penalties and attorney’s fees under a different statute, Labor Code Section 2699 as part of PAGA, which entitled a prevailing employee an award of reasonable attorneys’ fees and costs to “an aggrieved employee.” To be noted, Pedrazzani did not challenge the applicability of PAGA or whether Plaintiffs were aggrieved employees.
Burkes v. Robertson, 26 Cal.App.5th 334 (9th Cir. 2018)

Indigent employer appealing labor commissioner award must seek waiver of appeal bond requirement under Labor Code section 98.2 before expiration of the time to file the appeal

Labor Commissioner found in favor of employee for unpaid overtime wages, penalties and interest. Employer timely filed a pro se notice of appeal in Superior Court but failed to post the required bond or cash deposit within the time required under Labor Code section 98.2, subdivision (b).

Employer sought a waiver of the undertaking requirement claiming indigency, but the trial court dismissed the case because the failure deprived it of jurisdiction. Employer argued that dismissal of the case for failing to file the waiver request within the time period for filing a notice of appeal violated his due process.

The Court of Appeal disagreed and held that an indigent employer only needs to seek a waiver for relief from the undertaking requirements which must be made prior to the expiration of time provided for appeal under section 98.2.
California Trucking Ass’n v. Su, 903 F.3d 953 (9th Cir. 2018)

The FAAAA does not preempt Borello standard to assess whether owner-operators were misclassified as independent contractors.

The California Trucking Association (Association) brought an action for declaratory and injunctive relief against the California Labor Commissioner to determine whether the Federal Aviation Administration Authorization Act (FAAAAA) preempted the Labor Commissioner’s use of the Borello standard to assess the claims of owner-operators (freight drivers for the carriers) to determine if they were misclassified as independent contractors and not employees by which they were denied certain benefits under the Labor Code. The Labor Commissioner’s motion to dismiss was granted and the Association’s motion for reconsideration was denied, therefore, the Association appealed.

The California Trucking Association licensed motor carriers and alleged that its “owner-operator” drivers were independent contractors, rather than employees. The Association alleged that the Labor Commissioner’s use of the Borello standard in fact disrupted its contracts between owner-operators and motor carriers, which resulted in inefficiencies into the transportation services market and was inconsistent with Congress’s deregulatory goals under the FAAAA.

Based upon the Borello test, classification of workers impact what benefits they may be entitled to under the State’s labor laws as employees and the obligations required of employers. California’s Borello standard, “calls for the application of a statutory purpose standard that considers the control of details and other potentially relevant factors identified in prior California and out-of-state cases in order to determine which classification...best effectuates the underlying legislative intent and objective of the statutory scheme at issue.” (Id. at 959). “The Commissioner, in turn, seeks the power (as with any other employer) to look behind the agreements and apply the Borello standard to ensure that owner-operators are, in fact, independent contractors.” (Id.)

The Ninth Circuit affirmed and held that the FAAAA not preempt the California Labor Commissioner’s use of a common law test, the Borello standard, to determine whether a motor carrier has properly classified its drivers as independent contractors. In its ruling, the Ninth Circuit held that the Borello standard, a generally applicable test used in a traditional area of state regulation, was not “related to” prices, routes, or services, and therefore was not preempted. As such, the panel affirmed the district court’s dismissal of the Association’s action seeking declaratory and injunctive relief of the use of the Borello test accordingly.
*Campbell v. City of Los Angeles*, 903 F.3d 1090 (9th Cir. 2018)

Collective actions were properly decertified due to Los Angeles police officers’ failure to satisfy “similarly situated” requirement of the Fair Labor Standards Act.

Under the Fair Labor Standards Act (FLSA), two related collective actions were brought against the City of Los Angeles by approximately 2,500 police officers who asserted that the city had a pervasive, unwritten policy which discouraged officers from reporting overtime, including pre-shift work and work through meal breaks. This was alleged despite the fact that the city had a written, FLSA-compliant policy prohibiting off-the-clock work.

Following extensive discovery, the city moved for decertification, which was granted and dismissed opt-in plaintiffs without prejudice to refile their FLSA claims on an individual basis, thereafter the original plaintiffs settled their claims and the court entered final judgment. The police officers filed this appeal challenging the decertification and dismissal of their claims. The opinion provides an exhaustive analysis of FLSA collective actions and decertification.

The Ninth Circuit ruled that collective actions were properly decertified because the officers had not shown they were similarly situated. The panel adopted a “similarly situated” standard requiring that plaintiffs show they “share a similar issue of law or fact material to the disposition of the FLSA claims.” In applying a summary judgment standard, following its post-discovery status, the Ninth Circuit found that the officers had not created a triable question of fact concerning a department-wide policy or practice. The key noted issue was that the officers’ evidence, specifically their declarations, referenced immediate supervisors’ certain worksites, with no evidence of a uniform practice from which one might infer direction from a higher level, but instead, varied practices not uniformly applied. There was no evidence of any directives, incentives, conversations, emails, or actions (like denials of promotions) by department leadership that could have communicated to local supervisors, implicitly or otherwise, a uniform policy against reporting small amounts of overtime. As such the Ninth Circuit concluded that the officers had failed, as a matter of law, to create a triable question of fact regarding the existence of a department-wide policy or practice, making the officers not “similarly situated” within the meaning of the FLSA.

Employer complied with California Labor Code §226(a) by furnishing wage statements to terminated employees by mail the day after discharge

Employees Fabio Canales and Andy Cortes were employees of Wells Fargo Bank, N.A. ("Wells Fargo"). Sometimes Wells Fargo would issue pay and a wage statement that contained incentive bonuses to employees who worked during the bonus period. For those who worked overtime during those bonus periods, the wage statement contained a line item called "OvertimePay-Override," which listed additional overtime paid for overtime hours worked during the bonus period. No hourly rates or hours worked were identified. Sometimes when final wages were issued to employees in store, the payroll department would mail it to the terminated employee the following day.

Employees sued individually and on behalf of a class who received "OvertimePay-Override" and who were paid final wages in store. Employees alleged that Wells Fargo violated California Labor Code §226 by failing to identity the hourly rates and hour worked for OvertimePay-Override, and by failing to provide terminated employees with wage statements concurrently with pay at termination.

The trial court granted Wells Fargo’s motion for summary judgment, finding that Cal. Labor Code §226(a)(9) did not apply to OvertimePay-Override because there was no applicable hourly rate for the pay period reflected in the wage statement, and because Wells Fargo complied with the "furnish" requirement under the statute by mailing the wage statement.

The Court of Appeal affirmed the judgment in favor of employer on the ground that mailing the final wage statement is a "viable means to ‘furnish’" it because California Labor Code §226(a) requires that the wage statement be furnished "semimonthly or at the time of each payment of wages." Although for purposes of the Labor Code, "at the time of each payment of wages" for discharged employees means "immediately," under the plain meaning of the statute, Wells Fargo also had the option of furnishing the wage statement semimonthly.

The Court rejected the interpretation of the Labor Commissioner at the Division of Labor Standards Enforcement Policies and Interpretations Manual, section 14.1.1, which provides, "[a] California employer must furnish a statement showing the following information to each employee at the time of payment of wages (or at least semimonthly, whichever occurs first)," and section 14.1.2, which provides, "section 226 ... sets out the employer's responsibilities in connection with the wage statement which must accompany the check or cash payment to the employee" because the phrases "whichever occurs first" and "must accompany" are not stated in California labor Code §226."

Temporary staffing agency and client-company were in privity for purposes of wage and hour actions, and settlement in prior action barred workers claims.

Plaintiffs were employed and paid by GCA, a temporary staffing company, to perform work on-site at Glenair Inc. Glenair reported Plaintiffs’ time records to GCA for payment of wages. Plaintiffs’ filed a putative wage hour class action against GCA and Glenair in which Plaintiff characterized GCA and Glenair as joint employers.

While Plaintiffs’ case was pending, a separate class action was brought against, among others, GCA that resulted in a final, court-approved settlement agreement that contained a broad release barring any members of the settlement class from asserting “additional” wage and hour claims. Plaintiffs were class members of the separate class action that settled. The claims in the settled action involved the same wage and hour claims, for the same work done, covering the same time period as the claims asserted in Plaintiffs’ class action.

Glenair moved for summary judgment as to Plaintiffs class action that was granted by the trial court. The Court of Appeal affirmed finding that Glenair is in privity with Plaintiffs’ employer, GCA, a defendant in the settled class action, and thus as an agent of GCA, the prior settlement barred Plaintiffs’ current claims against Glenair as a matter of law because employees who settled class action claims against their employer staffing company may not assert the same claims against the company where they had been placed to work.
Employer’s incentive compensation program complied with state minimum wage and rest break laws and regulations.

Automobile technician employees filed class actions alleging the employer’s compensation program violated minimum wage and rest period requirements. The compensation program guaranteed employees a specific hourly wage above the minimum wage for all hours worked during each pay period but also gave them the possibility of earning a higher hourly wage based on a formula that rewards the employees for work that is billed to the employer’s customer. After a bench trial judgment was awarded in favor of the employer. The Plaintiff appealed contending the employer was averaging the amount an employee receives during a pay period for non-paid and paid work hours, when in fact nothing was paid for non-billed time, including rest periods, in violation of Armenta v. Osmose, Inc., 135 Cal.App.4th 314 (2005). Plaintiffs also argued that because an employee could not increase the base hourly wage when working on activities that did not generate production dollars all those hours were uncompensated.

The Court of Appeal affirmed the judgment and found that the employees were paid on an hourly basis at an hourly rate above the minimum wage for all hours worked and were provided paid rest periods on the clock as required by law. The Court of Appeal rejected the notion that the employees were compensated on a piece-rate or commission basis.
Curtis v. Irwin Industries, Inc., No. 16-56515, (9th Cir. Jan. 25, 2019)

California overtime law does not apply to an employee working under a qualifying CBA.

Plaintiff filed a class action alleging denial of overtime pay, failures to provide meal and rest periods and failure to pay minimum wage for the 12 hours while working off duty. The District Court granted the employer’s motion to dismiss on the grounds that the claims were preempted by a section 301 of the Labor Management Relations Act (“LMRA”).

The Ninth Circuit affirmed, holding that the employees’ claims were preempted under the LMRA because California overtime law does not apply to an employee working under a qualifying collective bargaining agreement. California Labor Code section 514 states, provides that the “requirements of this section do not apply to the payment of overtime compensation to an employee working pursuant to . . . [a]n alternative workweek schedule adopted pursuant to a collective bargaining agreement pursuant to Section 514.”

The District Court did not address plaintiff’s meal and rest break claims, so the Ninth Circuit remanded to the district court to review these “complex issues of state law that have not been fully briefed by the parties.”

Employer’s ignorance of applicable minimum wage is no defense to willfully failing to pay wages where Employer suspects the law has changed but does not inquire


In 2007 the Los Angeles City Council passed an ordinance creating the Airport Hospitality Enhancement Zone (“Zone”), which required that employers within the Zone pay workers a “living wage” that was higher than the state minimum wage. The restaurant was within the Zone. The adjustments to worker pay were to be made on January 1 annually. In 2010, the City of Los Angeles amended the ordinance to require that the annual adjustments to the living wage be made on July 1 of each year, and that such adjustments be based on the annual increase in retirement benefits paid to members of the Los Angeles City Employees Retirement System (“LACERS”). However, until June 2014, Grill Concepts paid them the living wage as stated in the original ordinance, despite Grill Concepts human resources director being aware as early as June 2010 that the living wage within the Zone was higher than what Grill Concepts was paying and arranging outside counsel to contact the City Attorney’s office to inquire.

In April 2014, Sandra Diaz, Alfredo Mejia, and Madecadel Goytia sued Grill Concepts on behalf of a class of current and former employees for failing to pay the living wage, and for waiting time penalties. Within eight weeks, Grill Concepts calculated the underpayment and paid all former and current employees for the full amount of underpayment. The trial court certified the class, and the parties filed cross-motions for summary adjudication as to the issue for further liability. The court found that the ordinance was not constitutionally vague, that the amount was capable of being calculated and was therefore subject to prejudgment interest, that Grill Concepts did not deliberately violate the ordinance, and that Grill Concepts owed waiting time penalties because its failure to pay was willful. At trial, the parties stipulated that Grill Concepts owed prejudgment interest and waiting time penalties. The only issue to be tried was whether the court could waive the waiting time penalties for equitable reasons, but the court ruled that it did not have this discretion. Judgment was entered and Grill Concepts appealed.

The Court of Appeal affirmed the trial court’s finding of liability for waiting time penalties, finding that an employer’s failure to pay is willful when employer suspects the required wage has gone up but continues paying the old wage after halfheartedly investigating its suspicions, and later makes an unreasonable argument that the wage law is unconstitutionally vague. The Appellate court also clarified that trial courts lack discretion to waive statutory waiting time penalties for failure to pay wages of employees who are discharged or who quit, because California Labor Code §203 uses the word “shall,” which makes mandatory the imposition of the penalty, and enforcing such a penalty is essential to ensure that employees’ wages are paid on time.
Donohue v. AMN Services, LLC, 29 Cal.App.5th 1068 (Dec. 10, 2018)

An employer may round clock in and out times to the nearest 10-minute increments where the practice is neutral and fair, and does not result, over a period of time, in failure to compensate employees for all time actually worked.

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. The Court of Appeal also found that the methodology employed by the defense expert witness (who analyzed time records logged by 311 employees with more than 500,000 work-hours) was more credible than plaintiff’s expert who only analyzed uncompensated time as a result of short and delayed lunches.

Domestic Worker Bill of Rights requires application of the control test set forth in Martinez v. Combs as well as the common law test in determining whether a worker is properly classified as an independent contractor.

Plaintiff alleged, among other claims, that defendant failed to pay overtime wages under the Domestic Worker Bill of Rights ("DWBR"). The DWBR requires domestic workers to receive overtime wages for all hours worked more than nine hours per day or 45 hours per week. The trial court granted employer’s motion for summary judgment on the DWBR claim finding that the plaintiff was an independent contractor.

The Court of Appeal reversed the granting of summary adjudication in defendant’s favor, finding that the trial court erred in applying the common law test of independent contractor as set forth in S. G. Borello & Sons, Inc. v. Department of Industrial Relations, 48 Cal.3d 341 (1989). The court held that Dynamex Operations West, Inc. v. Superior Court, 4 Cal.5th 903 (2018), "recognized that different standards [in reviewing independent contractor classification] could apply to different statutory claims.” Therefore, after reviewing the DWBR, the court held that the statute does not include the “suffer or permit” definition set forth in Dynamex, but it does incorporate the “control of the wages, hours, or working conditions” test as set forth in Martinez v. Combs, 49 Cal.4th 35 (2010), as well as the common law test. In applying the control and common law tests, the court found that the employee presented enough evidence to establish a dispute of fact, and therefore reversed trial court’s granting of summary adjudication in favor of defendant.
Charles Lee filed a lawsuit on his behalf and on behalf of a class of similarly situated drivers against Dynamex Operations West ("Dynamex"), a package and document delivery company. The allegations were that Dynamex had misclassified its drivers as independent contractors, and as such, Industrial Welfare Commission Wage Order No. 9 had been violated. Prior to 2004, Dynamex had classified such drivers as employees but in 2004 adopted a new policy under which all drivers are considered independent contractors. The trial court denied class certification, which the Court of Appeal reversed.

The trial court ultimately certified a class relying on the three alternative definitions of “employ” and “employer” in Wage Order No. 9 and discussed in Martinez v. Combs (2010) 49 Cal. 4th 35, as (a) to exercise control over the wages, hours, or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship. The trial court rejected using the standard set forth in S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341. Dynamex moved to decertify the class and the trial court denied that motion. Dynamex filed a writ in the Court of Appeal, alleging that two of the alternative wage order definitions of “employ” relied upon by the trial court do not apply to the employee or independent contractor issue.

The Court of Appeal concluded that the wage order definitions discussed in Martinez are applicable to the employee or independent contractor question with respect to obligations arising out of the wage order. The Court of Appeal upheld the trial court’s class certification order with respect to all of plaintiffs’ claims, and also concluded that where no wage order governs, the Borello standard is applicable for determining whether a worker is an employee or independent contractor. Dynamex filed a petition for review.

The California Supreme Court held that the standard “ABC” test as used in other jurisdictions should be used to determine whether a worker is an employee or independent contractor under suffer or permit work definition in wage orders.

The three parts of the ABC test that an employer has to show to prove that a worker is an independent contractor and not an employee are that:

a) the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and
b) the worker performs work that is outside the usual course of the hiring entity’s business; and
c) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Here, there was sufficient commonality of interest as to whether drivers’ work was outside company’s usual course of business under the ABC test, and thus resolution on class wide basis was warranted; and sufficient commonality of interest existed as to whether drivers were engaged in independent business under the ABC test, and thus resolution on class-wide basis was warranted.

Car dealership service advisors are exempt from FLSA’s overtime pay requirements because they are primarily engaged in selling and servicing automobiles.

Plaintiffs were current and former service advisors for Encino Motorcars who sued, claiming they were entitled to overtime pay under the Fair Labor Standards Act (FLSA). Encino Motorcars moved to dismiss, arguing that service advisors are exempt from the FLSA’s overtime-pay requirement under 29 U.S.C. § 213(b)(10)(A), which applies to “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements.” The District Court agreed and dismissed the suit. Plaintiffs appealed and the Court of Appeals for the Ninth Circuit reversed.

The U.S. Supreme Court vacated the Ninth Circuit’s judgment and upon review, the Supreme Court held because service advisors are “salesman[en] ... primarily engaged in ... servicing automobiles,” they are exempt from the FLSA’s overtime-pay requirement. 29 USC section 213(b)(10)(A). The Court held that service advisors do not have to physically repair or service the actual vehicles in order to be deemed to be “providing service” to customers within the meaning of the FLSA exemption.

An employee’s “imprecise evidence” of overtime worked can provide a sufficient basis for damages when the employer fails to keep accurate records of the time he worked.

Plaintiff filed an action against his former employer for unpaid minimum and overtime wages, failure to provide meal and rest breaks and sought statutory penalties for inaccurate wage statements. Following a bench trial, the trial court found that the employer failed to keep accurate records of work hours but concluded that the employee was not entitled to any relief because his testimony was too uncertain to support a just and reasonable inference that he performed work for which he was not paid. The trial court also found that the employee was provided with uninterrupted meal and rest breaks as required by law.

The Court of Appeal affirmed the trial court’s ruling, in part, allowing the employee’s his meal period pay claim, but reversed the remainder of the overtime pay claim, remanding it back to the trial court. “We hold that it was error to completely deny Furry relief on his overtime claim, because imprecise evidence by an employee can provide a sufficient basis for damages when the employer fails to keep accurate records of the employee’s work hours[.]” The Court of Appeal held that the employee’s testimony was sufficient to “shift the onus to the employer to either provide a specific detail on the amount of overtime or to disprove by evidence what was not correct with the employee’s figures,” which it failed to do.

Dynamex’s ABC test applies to establish independent contractor status under wage orders, but definition of “employ” for non-wage order claims is still governed by Borello

Jesus Cuitlahuac Garcia drove a taxicab for Border Transportation Group, LLC (“BTG”). He purchased his own vehicle and operated it as a taxi-for-hire from January 2009 to August 2013. He leased a vehicle permit from BTG for $520 weekly and received radio dispatch services for $350 monthly. After Garcia’s car stopped working, he leased a vehicle from BTG for $65 per each 12-hour shift. Garcia stopped working for BTG in April 2014, after he was required to pay an additional $65 shift charge for a late return.

In 2015, Garcia sued for wage and hour violations alleging inter alia, that he was owed unpaid wages, overtime, meal and rest breaks, denied accurate wage statements. BTG moved for summary judgment, alleging that Garcia was an independent contractor under S.G. Borello & Sons, Inc., v. Dept. of Industrial Relations, 48 Cal.3d 341 (1989). The trial court agreed that Garcia an independent contractor and granted summary judgment.

The Court of Appeal held that Dynamex’s ABC test must be satisfied to establish independent contractor status as defense to Wage Order claims, which included causes of action for unpaid wages, failure to pay minimum wage, failure to provide meal and rest periods, failure to furnish itemized wage statements, and unfair competition law claims related thereto. BTG did not demonstrate that Garcia provided services for other entities or otherwise established a business independent of his relationship with BTG, the (C) part of the ABC test. The Court of Appeal therefore reversed summary judgment for Defendants on the wage order claims.

The Court of Appeal affirmed summary judgment on the non-wage order claims, holding the trial court properly relied on Borello, whose control test applies to non-wage-order claims. The non-wage order causes of action alleged were claims for overtime, wrongful termination, waiting time penalties and any unfair competition law claims related thereto.
Gerard v. Orange Coast Memorial Medical Center, 6 Cal.5th 443 (Dec. 10, 2018)

*Industrial Welfare Commission Wage Order No. 5 may exempt health care workers from Labor Code provision and allow waiver of a second meal period for shifts more than 12 hours.*

Health care employees sued their hospital employer for meal break violations under the Labor Code and the Private Attorneys General Act ("PAGA"). The Defendant had a policy allowing employees who worked 10 or more hour shifts to voluntarily waive one of their two meal periods, even if their shifts lasted more than twelve hours. Plaintiffs signed waivers to such effect. Plaintiffs contended that the second meal period waivers violated the Labor Code 516(a), which allows a waiver of second meal breaks only for shifts of 12 hours or less. Defendant claimed that the meal period waivers conformed to Industrial Welfare Commission ("IWC") Wage Order No. 5. The trial court granted a summary judgment finding no triable issues because the meal waivers complied with IWC Wage Order No. 5.

The Court of Appeal affirmed, holding that when an amendment to Labor Code section 516(a) was adopted, the IWC had already adopted a valid exemption to second meal periods for health care workers. The California Supreme Court affirmed, concluding that IWC Wage Order No. 5, section 11(D) is valid insofar as it says that health care workers can waive a second meal break during shifts longer than 12 hours. The section does not conflict with Labor Code section 512 which allows a waiver of second meal breaks only for shifts of 12 hours or less. The Legislature never withdrew authority from the IWC to issue this exemption from meal break regulations and it made its intent clear in later legislation specifically approving this portion of Wage Order No. 5 after the original Court of Appeal decision, in this case, had invalidated the wage order.
Goonewardene v. ADP, LLC, 2019 WL 470963 (2019)

California Supreme Court held that employee cannot assert tort causes of action for breach of contract, negligence, and negligent misrepresentation against an employer’s payroll company.

The California Supreme Court was presented with the issue of whether an employee may bring a civil action against an independent payroll company hired by an employer to perform payroll tasks that would otherwise be performed by the employer, in addition to the employer. The Court of Appeal held that while the payroll company could not be held liable for Labor Code violations, the employee could maintain causes of action against the payroll company for: (1) breach of the payroll company’s contract with the employer under the third-party beneficiary doctrine, (2) negligence, and (3) negligent misrepresentation. The California Supreme Court reversed.

The Supreme Court held that an employee cannot maintain a breach of contract claim under the third-party beneficiary doctrine because the primary benefit of the contract with the payroll company is the employer, not the employee. In addition, by allowing employees to name payroll companies as defendants in wage and hour litigation would increase the costs for the payroll companies, which would increase the costs for employers. This result would not be consistent with the objectives of the contract or the reasonable expectations of the employer or payroll company.

The Supreme Court also held that the Court of Appeal erred in permitted an employee to assert tort causes of action for negligence and negligent misrepresentation against a payroll company, as “it is neither necessary nor appropriate to impose upon a payroll company a tort duty of care with regard to the obligations owed to an employee under the applicable labor statutes and wage orders...."

*Commuter time under a voluntary program where employee may drive a company vehicle from home to a customer's location is not compensable as hours worked under the "control" or the "suffer or permit to work" tests.*

Plaintiffs brought class action against employer alleging they were entitled to pay for time spent traveling in an employer-provided vehicle from their homes to the customer's residence. The trial court heard cross-motions for summary judgment and ruled in favor of the employer. The Court of Appeal affirmed the trial court's ruling and held that plaintiffs were not entitled to compensation for the time spent traveling in a company provided vehicle that contained equipment and tools from their home to a customer's residence under an optional and voluntary home dispatch program.

Under the voluntary dispatch program, employees drive the company vehicles, containing tools and equipment, to and from home each day. Employees are required to be at the first worksite by 8:00 a.m. and they are not paid for any time before 8:00 spent driving from their homes to the first worksite. The employees are likewise not paid for the time spent driving home with the equipment and tools after their last appointment. Employees must make one visit a week to the employer's garage to load equipment for the week, and they are paid for this time. The court held that because the employees were not required to use the company provided vehicle to commute to or from work, they were not under the control of the employer, nor did the employer "suffer or permit" the employee to work. In addition, while the employees were transporting equipment and tools, this does not make the time compensable because no extra effort or extra time is required to do this. As the court noted, "if carrying equipment necessary for the job were always compensable, every employee who carries a briefcase of work documents or an electronic device to access work emails to and from work would need to be compensated for commute time."
Interpipe Contracting, Inc. v. Becerra, 898 F.3d 879 (9th Cir. 2018)

Machinists preemption doctrine under the NLRA does not apply to California state law regulating wage credits under prevailing wage laws.

Employer challenged an amendment to the labor code that imposed limitations on wage-credits the employer was entitled to receive under prevailing wage requirements. The amendment to the law only allowed employers to take wage credits for certain benefit payments to “industry advancement funds” if the employees consented to the credit through a collective bargaining agreement negotiated by a union. Employer argued that the amended discriminates against pro-open shop advocacy.

The Ninth Circuit held that the state law was not preempted under the NLRA preemption articulated in Machinists v. Wis. Emp’t Relations Comm’n (1976) 427 U.S. 132 because the state law does not regulate labor related speech.


Employer was entitled to rely on statutory safe harbor for curing unpaid wage violations

Jose Roberto Lainez filed a complaint on May 14, 2015, against his former employer, Jackpot Harvesting Company, Inc. ("Jackpot"), alleging that he had worked for Jackpot as an agricultural worker and was compensated on a piece-rate basis. He alleged, inter alia, a claim for unpaid minimum wages for rest/non-productive time, as well as interest, liquidated damages, and statutory penalties. Jackpot eventually paid the back wages.

On January 1, 2016, approximately six months after Lainez filed the class action complaint, California Labor Code §226.2 went into effect. Jackpot pled an affirmative defense of compliance with the safe harbor provision contained therein. The trial court denied summary adjudication for the employer.

The Court of Appeal reversed trial court’s denial of summary adjudication in favor of Jackpot. The Court of Appeal reasoned that the unambiguous language of §226.2(b) of Cal. Labor Code provides employer a safe harbor for all employee claims for unpaid rest or nonproductive time accruing on or prior to December 31, 2015, where the employer has complied with all the requirements of the statute, including timely paying employees for such claims that had accrued between July 1, 2012 and December 31, 2015.

Employer owed minimum wages for time worked during improperly shortened meal periods.

Barrett Business Services, Inc. ("Barrett") provided staffing and management services for two publicly owned and operated recycling facilities under contract with Los Angeles County. Employees filed suit for failure to pay minimum wage, overtime, and all wages owing at termination, failure to provide meal periods, and unfair competition, and sought civil penalties under PAGA. The class members are all former belt sorters, who stood at sorting stations along a conveyor belt, removing recyclable materials from the conveyor belt and placing them in receptacles at their sorting stations.

Employees alleged that Barrett failed to provide at least 30 minutes of duty-free time during meal periods because Barrett required them to return to the conveyor belt (which was turned off for just 30 minutes during meal periods) three to five minutes before it restarted. Since Barrett had shortened their meal periods by three to five minutes, they alleged that they were entitled to be paid for the entire 30-minute meal period and one hour of premium pay. Barrett argued that employees were only entitled to one hour of premium pay for those shortened meal periods.

The court held that employees were entitled to compensation for the three to five minutes of every 30-minute meal period they were subjected to employer’s control. When a meal period is considered an “on duty” meal period, an employee is entitled to payment for time worked and to premium pay if the requirements for a permissible on-duty meal period are not met. However, employer’s exertion of control over employees for three to five minutes of 30-minute meal period did not entitle employees to minimum wage for all 30 minutes.
Marsh v. J. Alexander’s, LLC, 905 F.3d 610 (9th Cir. 2018) (en banc)

Department of Labor’s regulation and interpretation of a dual-job tip credit provision is entitled to deference.

The Ninth Circuit agreed with plaintiffs who sued their employers for underpaying them the reduced tip credit and treating them as tipped employees for non-tipped related tasks or non-incidental tasks. As such, the Ninth Circuit Court of Appeals ruled that courts should defer to the tip credit guidance under the U.S. Department of Labor (DOL).

Four employees who received tips brought separate actions against their former employers and alleged that the employers failed to pay the required minimum wage in violation of the Fair Labor Standards Act (FLSA) by improperly claiming tip credit for time employees spent on related duties not directly associated with receiving tips. The complaints were dismissed for failure to state a claim with summary judgment and judgment on the pleadings entered on behalf of the employers. The employees appealed, which were consolidated. The Court of Appeals affirmed in part, vacated in part and remanded with rehearing en banc granted.

The en banc court reversed the district courts’ dismissals of actions concerning tip credits toward servers’ and bartenders’ wages under the Fair Labor Standards Act (FLSA). Plaintiffs alleged that their employers abused the tip credit provision by paying them a reduced tip credit wage and treating them as tipped employees when they were engaged in either (1) non-tipped tasks unrelated to serving and bartending; or (2) non-incidental tasks related to serving or bartending. The en banc court held that the DOL foreclosed an employer’s ability to engage in this practice by promulgating a dual jobs regulation, 29 C.F.R. § 531.56(e), and subsequently interpreting that regulation in its 1988 Field Operations Handbook, known as the “Guidance.” The DOL’s interpretation of the dual jobs’ regulation was not plainly erroneous or inconsistent with regulation, which strongly favors Auer deference to that interpretation, since the interpretation was consistent with nearly four decades of interpretive guidance and with the statute and regulation itself.

State entity whose employees are exempt employees under state law, do not lose their exempt status when a non-state employer jointly employs them.

Plaintiff sued their employer alleging nonpayment of overtime, as required by state law and federal law under the FLSA. Plaintiffs’ employer is a California agency that owns and manages the Del Mar Fairgrounds. Plaintiffs were seasonal employees who assist with amusement and seasonal operations and are not entitled to overtime compensation if certain criteria are met. (29 U.S.C. § 213(a)(3).)

The Court of Appeal held that a state entity whose employees are exempt from state law requiring the payment of overtime compensation is not required to pay overtime compensation to such employees when the state entity jointly employs the employees with a non-state employer.

Labor Code section 226.2 dealing with piece rate compensation is not unconstitutionally vague.

An association of employers brought a declaratory judgment action against the LWDA and agency officials, challenging the constitutional validity of Labor Code section 226.2, which sets forth wage requirements applicable where an employer uses a piece-rate compensation method.

Plaintiff argued that the phrase “other nonproductive time” rendered the statute unconstitutionally vague and violated their constitutional due process rights because the statute failed to define precisely what activities constituted such time. The trial court sustained a demurrer without leave to amend.

The Court of Appeal rejected Plaintiff’s argument, noting that to be unconstitutionally void for vagueness, the statute must “either forbid [] or require [] the doing of an act in terms so vague that persons of common intelligence must necessarily guess as to its meaning and differ as to what is required.” Recognizing that demonstrating unconstitutional vagueness is an “exacting” standard, the Court of Appeal added that a statute will not be considered void solely because it contains some level of ambiguity. The Court of Appeal held that the definition set forth in the statute did not meet that exacting standard of vagueness, but instead “provides an adequately discernable standard that possesses a reasonable degree of specificity.”

The Court of Appeal discussed at length the two groundbreaking cases in 2013 — Gonzalez v. Downtown LA Motors, LP, 215 Cal.App.4th 36, 40 (2013) and Bluford v. Safeway, Inc., 216 Cal.App.4th 864, 872 (2013) — which were subsequently codified in 2016 by Labor Code section 226.2. California law does not allow “nonproductive” work time to be lumped together with productive time when determining whether a piece-rate employee has been paid at least minimum wage. When a piece-rate employee is engaged in nonproductive work, that time must be separately compensated at a rate at least equal to minimum wage for all hours worked.

Employer was liable for willful nonpayment of wages when it failed to timely correct its error where employee’s final paycheck where numbers did not match words

Taryn Nishiki, a law firm office manager and paralegal, resigned by sending an email at 6:38 p.m. on Friday, November 14, 2014. The email requested unpaid vacation time within 72 hours. The employer mailed her a handwritten check on Tuesday, November 18, which stated $2,880.31 as the amount, but stated in words “Two thousand eight hundred and 31/100,” $80 less than she was owed. On Wednesday, November 26, Nishiki sent an email to Meredith telling her she had been unable to deposit the check because of the inconsistency between the numerical and written amounts, and asserting she was therefore entitled to waiting time penalties. Employer eventually mailed a corrected check for $2,880.31 to Nishiki on Friday, December 5, 2014.

Nishiki filed a complaint with the Labor Commissioner, seeking (1) unpaid vacation wages of $366.88; (2) rest period premiums of $23,718.75; and (3) waiting time penalties for the delay in receiving the $2,880.31 check, in the amount of $7,500, calculated as 30 days at the rate of $250 per day. The Labor Commissioner denied the first two claims but awarded her waiting time penalties for the time between November 18, 2014 and December 5, 2014, in the amount of $4,250, ($250 average daily wage multiplied by 17 days).

Employer appealed Labor Commissioner’s award to the trial court, which on a trial de novo, found that Nishiki was entitled to 17 days of waiting time penalties, or $4,250, and awarded her statutory attorney fees under California Labor Code § 98.2(c) of $86,160 in fees. Employer appealed.

The Court of Appeal reduced the waiting time penalties, finding that the 72 hours period following employee voluntary quit did not begin to run when Nishiki sent her email, and that as such the November 18, 2014 check was timely. However, the Court of Appeal otherwise affirmed the judgment and awarded attorneys’ fees to employee, affirming that the term “willful” in Section 203 simply refers to when an employer intentionally fails or refuses to do an act which is required to be done and does not require a showing of malice, and noting that inadvertent clerical error might not be willful, but Employer’s delay until Friday, December 5 to issue a new check, back-dated to November 18 violated its statutory obligation to pay wages promptly.

Employee's overtime rate was readily ascertainable by "simple math" and therefore employee suffered no injury under California Labor Code §226(e)

Employee Terri Raines sued her former employer Coastal Pacific Food Distributors, Inc. ("Coastal Pacific") for race, age, and disability discrimination and sought recovery, both individually under the Labor Code and in a representative capacity under PAGA, for failure to maintain accurate itemized wage statements.

The parties stipulated that the wage statements issued by Coastal Pacific did not include the overtime hourly rate of pay.

The Court of Appeal affirmed summary judgment for the employer on employee’s individual wage statement claim, finding the deficiency of not listing the overtime hourly rate of could be corrected by simple arithmetic by dividing the total overtime pay by the number of overtime hours worked and thus did not constitute an “injury” under the meaning of Section 226(e).

However, the Court reversed summary judgment on the representative PAGA claim, finding PAGA does not require proof of injury or proof of a knowing and intentional violation.
Class action settlement of state law claims bars employee's FLSA collective action under res judicata.

Employee appealed district court ruling dismissing her proposed class action under the Fair Labor Standards Act ("FLSA") for labor code violations. The district court held that a prior class action settlement for state law claims barred employee's FLSA claims under res judicata.

The Ninth Circuit affirmed the district court's ruling by holding that even though FLSA collective actions require employees to opt-in, as opposed to state law class actions that are opt-out classes, the release obtained in the state law case meets the elements of res judicata and bars the FLSA action. California's "primary rights" approach to res judicata bars the FLSA claim.
Rodriguez v. Taco Bell Corp., 896 F. 3d 952 (9th Cir. 2018)

An employer may require an employee to remain on premises during their meal break if they choose to purchase a discounted meal.

Bernadina Rodriguez was an employee of Taco Bell Corp. (“Taco Bell”) from August 2005 to December 2012. Taco Bell offered meal breaks but also offered that employees could purchase a discounted meal from the restaurant, provided that they ate the meal at the restaurant. Employees were not required to purchase the discounted meal.

Plaintiff filed suit in state court and Taco Bell removed to federal court. Plaintiff alleged that that Taco Bell’s on-premises discount policy subjected the employees to sufficient employer control to render the time employees spent consuming the meals as working time under California law, and therefore Taco Bell failed to provide uninterrupted, duty-free meal periods and rest periods, or provide premium wages in lieu.

The district court granted summary judgment to Taco Bell because under the discounted meal policy, employees were free to use the break time as they wished, and that they were only required to remain on the premises if the employee chose to purchase a discounted meal.

The Ninth Circuit held that the employer’s policy requiring employees to remain on premises during their meal breaks only if they chose to eat the discounted meal that the employer offered did not violate Brinker v. Superior Court, 53 Cal.4th 1004 (2012), as the policy still relieved employees of all duties and relinquished control over their activities, and choosing the discounted meal was optional, not mandatory.

Temporary staffing agency met its obligation to provide meal breaks when contract with clients required them to comply with all applicable laws, and staffing agency is not vicariously liable for violations committed by client.

Plaintiff brought a putative class action against her employer, Aerotek, a temporary staffing service that placed her as a temporary employee with its client, Bay Bread. Plaintiff alleged various causes of actions, among other things, for alleged failure to provide required meal periods.

The trial court granted summary judgment in favor of Aerotek based upon the undisputed facts that the temporary services contract required Bay Bread to comply with all applicable laws; Aerotek provided its meal period policy to temporary employees including Plaintiff.

The Court of Appeal affirmed dismissal of the claims after concluding that Plaintiff had failed to establish "anything more was required of staffing agencies when they provide temporary employees to other companies." The Court further held that Aerotek was not vicariously liable for any meal period violations committed by Bay Bread.
*Troester v. Starbucks Corp.*, 5 Cal.5th 829 (2018), as modified on denial of reh’g (Aug. 29, 2018)

*California Supreme Court held that California’s wage and hour statutes or regulations have not incorporated the de minimis doctrine found in the FLSA*

Employee Douglas Troester filed a complaint in an action in Los Angeles County Superior Court on behalf of himself and a putative class of all nonmanagerial California employees of defendant Starbucks Corporation (“Starbucks”) who performed store closing tasks from mid-2009 to October 2010.

Starbucks removed to federal court and the district court granted Starbucks’ motion for summary judgment. The undisputed evidence was that closing tasks performed by Troester required him to work four to ten additional minutes each day, such that the during the 17-month period of his employment, Troester’s unpaid time totaled approximately 12 hours and 50 minutes, adding up to $102.67. The court concluded that the *de minimis* doctrine applied.

On appeal, the Ninth Circuit recognized that although the *de minimis* doctrine has long been a part of the Fair Labor Standards Act (“FLSA”), the California Supreme Court has never addressed whether the doctrine applies to wage claims brought under California law, and certified the question to the California Supreme Court.

In response to the certified question from the Ninth Circuit whether the FLSA *de minimis* rule applies to violations of minimum wage and overtime under the California Labor Code (Sections 510, 1194, and 1197), the California Supreme Court held that California’s wage and hour statutes or regulations have not incorporated the *de minimis* doctrine found in the FLSA. Although the *de minimis* rule is a background principle of state law, the Court held the rule was not applicable to the employer under state wage and hour law.

Reporting time pay obligations under Wage Order 7 are triggered when employer requires employees to call in prior to a shift to see if they will be needed, and no physical reporting to work is required.

Plaintiff filed a putative class action alleging that defendant’s on-call policy violated Wage Order 7’s requirement that non-exempt employees must be paid reporting time pay. Wage Order 7 requires employers to pay employees “reporting time pay” for each workday “an employee is required to report for work and does report but is not put to work or is furnished less than half said employee’s usual or scheduled day’s work.” Wage Order No. 7-2001 (codified at California Code of Regulations, title 8, section 11070).

The employer’s policy assigns employees on-call shifts, and the employees are required to call the employer two hours prior to the shift to see if they are needed for work. If they are needed, the employees were paid for their work, but if they are told they are not needed for the on-call shift they do not receive any compensation. Employee alleged that being required to call her employer two hours before a potential shift to see if she was required to work that day should be considered reporting to work, which triggers the employer’s obligation to pay reporting time pay.

The employer filed a demurrer to the complaint on the grounds that the reporting time cause of action failed as a matter of law because requiring employees to “call [] in to ask whether to report for work” did not constitute “reporting for work.” The employer argued that “reporting for work” requires the employee’s physical presence at the workplace in order to trigger reporting time pay obligations under Wage Order 7. The court sustained the demurrer and dismissed the action.

The Court of Appeal reversed, holding that “the on-call scheduling in this case triggers Wage Order 7’s reporting time pay requirements.” The court explained that the burdens placed on employees under the on-call policy at issue were the types that “reporting time pay was designed to discourage.” The court held that if “the employer directs employees to present themselves for work by telephoning the store two hours prior to the start of a shift, then the reporting time requirement is triggered by the telephonic contact.”
LABOR CODE PRIVATE ATTORNEYS GENERAL ACT OF 2004 ("PAGA") ACTIONS


Amended PAGA notice failed to provide sufficient notice to employer and LWDA as prerequisite to a claim under PAGA and was time-barred.

Plaintiff brought representative action against employer under the Labor Code Private Attorneys General Act of 2004 ("PAGA") alleging wage and hour violations. During the litigation plaintiff submitted an amended PAGA notice to the Labor and Workforce Development Agency ("LWDA") and her employer. Thereafter, plaintiff filed an amended complaint alleging new violations of different Labor Code provisions not specified in the original PAGA Notice. Defendants filed a demurrer to the amended complaint, which the trial court sustained the demurrer without leave to amend.

The Court of Appeal affirmed as to some of the wage and hour claims on the grounds that the original PAGA Notice was deficient because it did not allege "facts and theories" to support the alleged violations and did not include violations of the Labor Code provisions plaintiff had added to later complaints, such as missed rest and meal breaks and the failure to pay wages at discharge. The Court of Appeal further concluded that the claims based on the subsequent PAGA Notice were barred by PAGA’s one-year statute of limitations, and found that the deficient claims and later-added claims were not saved by equitable tolling, the relation back doctrine, judicial estoppel, or waiver, except to the extent the later-added claims may relate back to adequately and timely noticed claims in the original PAGA Notice.

Confirms Huff v. Securitas in that PAGA representative may seek penalties other than those she personally suffered.

A barista who worked at Starbucks for less than five months alleged that she had not received duty free meal periods before working more than five hours on at least two occasions. Claiming that she did not receive premium payments for the late meal periods, and that her pay stubs were inaccurate, the plaintiff brought a representative action under the Labor Code Private Attorneys General Act of 2004 (“PAGA”) and sought nearly $70 million in total penalties.

In a bifurcated bench trial on plaintiff’s action, the trial court determined Starbucks was liable for these violations and imposed penalties of $150,000, with 75 percent thereof payable to the Labor and Workforce Development Agency (“LWDA”) and 25 percent payable to plaintiff and the employees she represented in the action. The trial court entered judgment in plaintiff’s favor. Starbucks appealed, arguing plaintiff failed to prove she was an aggrieved employee and failed to prove a representative claim. After review, the Court of Appeal found no legal error and that substantial evidence supported the judgment.

PAGA claims may not be compelled to arbitration without state consent. Iskanian v. CLS Transportation Los Angeles, LLC remains good law following Epic Systems Corp. v. Lewis

In 2014 and 2015, Mark Correia and Richard Stow began working for NB Baker Electric, Inc. ("Baker"), an installer of electrical systems. They each signed an identical arbitration agreement ("Agreement"). The Agreement stated that "[n]o claims covered by this Agreement shall be permitted by the arbitrator or a court to proceed or be maintained as a class action or representative action... YOU ARE GIVING UP YOUR RIGHT TO MAINTAIN ANY CLASS ACTION OR REPRESENTATIVE ACTION IN ARBITRATION OR ANY COURT..."

In December 2016, Correia and Stow sued Baker, alleging wage and hour violations and seeking civil penalties under the Private Attorney General Act ("PAGA"), California Labor Code, §2699 et seq. Baker petitioned to compel arbitration. The trial court granted the arbitration petition on all causes of action except for the PAGA claim, on the basis that Iskanian v. CLS Transportation Los Angeles, LLC, 59 Cal.4th 348 (2014) ("Iskanian"), holds that an arbitration agreement may not waive the right to bring a PAGA representative action in any forum, and on the basis that the under Tanguilig v. Bloomingdale's, Inc., 5 Cal.App.5th 665 (2016), a PAGA claim cannot be compelled to arbitration without the state’s consent. The trial court stayed the PAGA claim pending the conclusion of the arbitration. Baker appealed.

The Court of Appeal held that Iskanian still controls. While the United States Supreme Court decision in Epic Systems Corp. v. Lewis 138 S.Ct. 1612 (2018) ("Epic") reaffirmed the broad preemptive scope of the FAA, Epic did not address the specific issues before the Iskanian court involving a claim for civil penalties brought on behalf of the government and the enforceability of an agreement barring a PAGA representative action in any forum.

The Iskanian court held that a complete ban on PAGA actions is unenforceable because a PAGA claim functions as a law enforcement mechanism to implement state labor laws, deputizing an employee to bring a qui tam claim on behalf of the state. The FAA was intended to govern the resolution of private disputes, whereas a PAGA action is a dispute between an employer and the state. Several California Courts of Appeal have held that a PAGA arbitration requirement in a pre-dispute arbitration agreement is unenforceable as the state is the real party in interest in a PAGA claim. These courts reasoned that the state must have consent to an agreement to effectively waive the right to bring the PAGA claim into court. Federal courts finding otherwise did not fully consider the qui tam nature of a PAGA claim on the enforceability of an employer-employee arbitration agreement.

The Court of Appeal rejected the argument that Epic’s interpretation of the FAA preemption clause undermines Iskanian and requires that California courts enforce PAGA representative-action waivers. The cause of action in Epic differs from a PAGA claim. Epic held that an employee who agrees to individualized arbitration cannot avoid it by asserting claims on behalf of other employees under the FLSA or federal class action procedures. The Iskanian court distinguished this type of factual scenario from the PAGA context. Because Epic did not rule on the precise issue before Iskanian, courts remain bound by Iskanian’s holding.
Employee can maintain PAGA claim for Labor Code violations employer committed on other employees

Employee Forrest Huff was employed as a security guard for Securitas Security Services USA, Inc. ("Securitas") for about one year. After Securitas remove Huff from his assignment at the request of a client, Huff resigned his employment. He then filed suit seeking penalties under the Labor Code Private Attorneys General Act of 2004, California Labor Code §2699 ("PAGA"), for violations of "numerous Labor Code provisions," including California Labor Code §§201, 201.3(b), 202, and 204.

For the first phase of trial, the parties agreed to sample 20 Securitas employees and determine certain disputed issues to those employees, including whether the employees had been paid on a weekly basis as required under California Labor Code §201.3(b)(1), and whether they were exempt from the weekly pay requirement under California Labor Code §201.3(b)(6). Following Huff’s presentation to the trial court, Securitas moved for judgment under California Code of Civil Procedure §631.8, finding that the evidence established that Huff was not a temporary employee and therefore could show a violation under §201.3(b)(1), nor did he have standing to pursue penalties under PAGA for others.

Huff moved for a new trial under California Code of Civil Procedure §657, which the court granted. The court found that it had erred and concluded that as long as Huff could prove at least one labor Code violation for himself, he could pursue penalties on behalf of other aggrieved employees for additional violations. Securitas appealed the rant of new trial.

The Court of Appeal affirmed the trial court’s grant of motion for judgment in favor of employer as well as its grant of motion for new trial in employee’s favor, holding that

- the purpose of PAGA was to solve the problem of inadequate state enforcement recourses by deputizing private citizens to pursue violators,
- An employee can pursue penalties affecting other aggrieved employees even though the employee has not personally suffered the same violations affecting other employees;
- Employee’s claim that employer failed to pay wages on termination supported a PAGA cause of action and the Court did not reach that issue at the trial; and
Employee’s PAGA action failed because his notice to Labor and Workforce Development Agency only discussed his individual claims and not that of other employees

Employee Hamid Khan worked at Employer Dunn-Edwards from 1994 to 2011. During his employment, all his wage statements included the pay period start date, except his final paycheck dated September 13, 2011, which did not include the start date for the pay period. Khan sued Dunn Edwards in January 2012 for receiving his pay check 11 days after termination in violation of Cal Labor Code §§201 to 203.

On February 28, 2012 Khan provided correspondence to counsel for Dunn-Edwards and the California Labor and Workforce Development Agency ("LWDA") that referred to "written notice under Labor Code §2699.3 of my claims against my former employer," “my earned wages” and “my final paycheck” (“LWDA Notice”). The LWDA notice did not refer to any other current or former employee. After Khan received notice that the LWDA did not intend to investigate his claims, he filed a first amended complaint including a cause of action under the Labor Code Private Attorneys General Act of 2004 ("PAGA"). After the court determined that Khan was compelled to arbitrate his individual claim, he dismissed it.

Dunn-Edwards moved for summary judgment because, inter alia, the LWDA Notice was insufficient.

The appellate court affirmed summary judgment for the employer. As a condition of suit, an aggrieved employee acting on behalf of the state and other current or former employees must provide notice to the employer and the responsible state agency of the specific provisions of the Labor Code alleged to have been violated, including the facts and theories to support the alleged violation. The purpose of the notice requirement is to afford the LWDA the opportunity to decide whether to investigate and to allow the employer to submit a response to the agency again thereby promoting an informed agency decision as to whether to allocate resources toward an investigation. Because the employee failed to give fair notice of the individuals involved, he failed to comply with the administrative requirement served by the LWDA Notice.
Lawson v. ZB, N.A., 18 Cal.App.5th 705 (2017) – California Supreme Court Granted Review on March 21, 2018

Fourth District Court of Appeal disagrees with Esparza court by holding that unpaid wages under Labor Code section 558 are recoverable as civil penalties under PAGA.

An employee brought a Private Attorneys General Act (PAGA) representative claim for civil penalties to recover for violations of Labor Code Section 558, which sets statutory penalties for underpaid wages owing to individual employees. The employer moved to compel arbitration of the portion of the PAGA claim seeking individualized relief for violations of Labor Code section 558.

Labor Code Section 558(a) provides for recovery of civil penalties for violations of overtime requirements and other provisions:

(a) Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows:

(1) For any initial violation, fifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.

(2) For each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.

(3) Wages recovered pursuant to this section shall be paid to the affected employee. (emphasis added).

The Court of Appeal held: (a) PAGA claims for violations of section 558 cannot be arbitrated because state labor law enforcement agencies are the real parties in interest under such claims, and arbitration of PAGA claims cannot proceed without their consent; and (b) under Iskianian v. CLS Transportation Los Angeles LLC (2014) 59 Cal.4th 348, this result is not preempted by the Federal Arbitration Act (“FAA”). The Court of Appeal disagreed with Esparza v. KS Industries, LP (2017) 13 Cal.App.5th 122, which held that an employee’s PAGA claim seeking relief under section 558 was a private dispute over underpaid wages that fell outside Iskianian’s rule and that an employee could therefore be compelled to arbitrate this dispute on an individual basis pursuant to the FAA.

The Lawson case is the latest in a series of cases in which the U.S. Supreme Court and California appellate courts have ruled by differing approaches concerning the scope of FAA preemption of state laws that challenge the enforcement of contractual arbitration provisions.
998 OFFERS


Trial court abused its discretion in failing to award prevailing plaintiffs post 998-offer attorney’s fees.

Automobile buyers brought lemon law action against vehicle manufacturer under the Song-Beverly Consumer Warranty Act. Following two statutory offers to compromise under Code of Civil Procedure section 998, the parties reached a negotiated settlement agreement, and plaintiffs filed a motion for attorney’s fees and in costs.

The trial court substantially reduced plaintiffs requested fees and denied all fees from the date of the first rejected 998 offer as not “reasonably incurred.” Plaintiffs argued that their ultimate recovery was double the estimated value of the first section 998 offer, which was invalid, and plaintiffs had no duty to counter or accept. The Court of Appeal agreed and reversed the order and remanded to the trial court to award plaintiffs reasonable post-offer fees.
Employee who prevailed at trial on discrimination claims but rejected 998 offer that was silent on fees and costs was not entitled to post-offer fees and costs.

Plaintiff sued her former employer for employment discrimination in violation of public policy, gender and pregnancy discrimination, failure to provide reasonable accommodations in the workplace, violation of the California Constitution and negligent supervision and retention. A jury found in favor of plaintiff on all claims and awarded her $11,490 in damages. Before trial, the defendant made a statutory offer to compromise under Code of Civil Procedure section 998 in the amount of $12,001. The 998 offer did not mention attorney’s fees or costs, and plaintiff never responded so the 998 offer expired by operation of law 30 days later.

After trial, both sides filed competing memoranda of costs and motions to strike or tax the other side’s costs and plaintiff filed a motion for attorney’s fees. The trial court granted plaintiff’s motion to strike defendant’s costs and denied defendant’s motion to strike or tax plaintiff’s costs. The trial court granted the plaintiff’s motion for attorney’s fees, reasoning that defendant’s 998 offer was silent on costs and attorney’s fees and so it was appropriate to add plaintiff’s pre-offer costs and fees to the jury’s verdict, to determine whether plaintiff’s “judgment” exceeded defendant’s 998 offer.

The Court of Appeal reversed the portions of the post judgment orders awarding post-offer costs and fees to plaintiff and denying post-offer costs to defendant. The Court of Appeal held that the trial court should have simply compared the jury’s award with the 998 offer because, for comparison purposes, plaintiff’s pre-offer costs and fees are added to both the jury award and the (silent on costs) 998 offer. The Court concluded by noting, “Having reached this disposition, we nonetheless believe the bench and bar would be well served if the Legislature amended section 998 to clarify how costs and fees should be addressed in a 998 offer.”

The Legislature then enacted SB 1300 to amend California Government Code §12965(b) to state “In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney’s fees and costs, including expert witness fees, except that, notwithstanding Section 998 of the Code of Civil Procedure, a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.”
WHISTLEBLOWER AND QUI TAM


A whistleblower under Dodd-Frank by definition has to blow the whistle to the SEC

Paul Somers was a vice president of Digital Realty Trust, Inc. ("Digital Realty") from 2010 to 2014. Somers reported suspected securities-law violations by Digital Realty to senior management. He was then terminated. He did not alert the Securities and Exchange Commission ("SEC") of his suspicions, either prior to his termination nor did he file an administrative complaint within 180 days of his termination. Somers brought an action against Digital Realty for violation of the whistleblower anti-retaliation provision of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u–6 ("Dodd-Frank"). Digital Realty sought to dismiss on the basis that Somers did not qualify as a whistleblower because he did not make a report to the SEC.

The district court denied the motion, stating that whistleblower status based on the SEC’s Rule 21F–2, did not require reporting to the SEC to gain whistleblower status under Dodd-Frank. The court noted that the statutory scheme was ambiguous and accorded deference to the SEC under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)

On an interlocutory appeal, the Ninth Circuit affirmed the district court. The Ninth Circuit acknowledged that Dodd–Frank’s definitional provision describes a “whistleblower” as an individual who provides information to the SEC itself, but concluded that the statute should be read to protect employees who make disclosures to an internal supervisor if the reports are independently safeguarded from retaliation under Sarbanes–Oxley, whether or not those employees also provide information to the SEC.

The U.S. Supreme Court held that in order to sue under the anti-retaliation provision of Dodd-Frank, a person must first provide information relating to a violation of the securities laws to the Securities Exchange Commission (SEC), and therefore reversed the district court’s denial of Defendant-Employer’s motion to dismiss. The Sarbanes–Oxley anti-retaliation provision covers employees who report fraud not only to the SEC, but also to any other federal agency, Congress, or an internal supervisor. However, under Dodd-Frank, the term “whistleblower” is defined as “providing information to the Commission,” and Somers did not provide any information to the SEC prior to his termination, and he is therefore ineligible to seek relief under Dodd-Frank.
Chair of tribe’s governing body held to be an employee of the tribe for purposes of the whistleblower protections of the American Recovery and Reinvestment Act.

Ken St. Marks was a member of the Chippewa Cree Tribe ("CCT") who informed the Department of the Interior that he believed members of the tribe’s governing body were misusing federal stimulus funds awarded pursuant to the American Recovery and Reinvestment Act, ("ARRA"), Pub. L. No. 111-5, § 3, 123 Stat. 115, 115–16 (2009). Members of CCT subsequently elected St. Marks Chairman of the governing body 3 months later. Five months after his election however, he was removed from the governing body. That same week, St. Marks then filed a complaint with the Department of the Interior ("DOI").

After an investigation by the Inspector General, the DOI concluded that the CCT had engaged in whistleblower retaliation. DOI then gave St. Marks and the CCT an opportunity to submit additional documentation. The tribe filed a series of exhibits to attempt to rebut DOI’s conclusion and show that the governing body removed St. Marks for fraud and misconduct. After analyzing the evidence, including the CCT’s newly submitted exhibits, DOI issued a final order confirming its earlier decision and ordered CCT to provide St. Marks relief of approximately $650,000, including back pay, front pay, travel costs, and legal fees. CCT petitioned for review.

The Ninth Circuit denied the petition, reasoning that as the governing body chair, St. Marks performed services on behalf of the tribe and was an employee of CCT, as defined by ARRA, and that although CCT is sovereign, it agreed to federal oversight and processes by accepting funds under ARRA. CCT’s argument that the gap in time between St. Marks’ report and his dismissal was not dispositive, as six months was a reasonable time frame between the alleged complaint and retaliation to find a nexus, DOI’s finding that Tribe’s removal of Chair was retaliatory was not arbitrary or capricious, and CCT could not challenge the monetary award to St. Marks for the first time on appeal.
Taswell v. The Regents of the University of California, 23 Cal. App. 5th 343 (2018)

Doctor not required to exhaust judicial remedies by seeking writ of mandamus to challenge University's rejection of his formal grievance before filing suit against the University for whistleblower retaliation.

Carl Taswell is a licensed medical doctor who is board certified in nuclear medicine. Taswell was hired by the University of California ("UC") in December 2011 as an authorized user at the UC’s brain imaging center. As an authorized user, he had significant radiation safety responsibilities mandated by state and federal law.

In early February 2012, Taswell learned from a radiochemist at the brain imaging center that there were potential safety and compliance problems at the brain imaging center. On February 17, 2012, Taswell called the chair of the radiology department, Scott Goodwin, and informed him of his concerns. On February 19, Taswell reported the same issues to the UC whistleblower hotline and on February 22, Taswell met with the UC’s designated official responsible for receiving whistleblower complaints. The official told Taswell that investigations would begin and that Taswell should keep the allegations confidential and not investigate them himself. But Taswell did not listen. Disregarding that instruction, on March 15, 2012, Taswell spoke at the University’s radiation safety committee’s regular monthly meeting about the allegations, allegedly becoming “visibly agitated.” On March 16, 2012, Taswell reported his concerns over the “serious violations” at the brain imaging center to the California Department of Public Health. On March 19, Taswell reported his concerns to the U.S. Food and Drug Administration, Department of Health and Human Services. Taswell informed Goodwin that he had informed state and federal authorities about the problems, but Goodwin did not appear upset. Goodwin’s attitude soon changed when Taswell, on March 22, entered a radiochemistry lab that was not a part of the brain imaging center to take pictures of what he thought were safety violations. On April 2, Goodwin and another official informed Taswell that he was being placed on a paid leave of absence for entering the separate lab without authorization, pending investigation. Additionally, Goodwin informed Taswell that his contract as an authorized user would not be renewed nor would he get a clinical professorship.

An independent investigation commissioned by the University found that Taswell was authorized to enter the lab, but Goodwin testified that Taswell’s contract would not have been renewed anyway due to Taswell’s alleged refusal to do his job, interpersonal issues, and behavior at the March 15 meeting with the radiation safety committee meeting. Taswell challenged this assertion and filed an internal complaint for whistleblower retaliation based on the investigatory leave and decision to not renew his contract. The grievance procedure culminated in a formal grievance hearing, at which a hearing officer concluded that the University did not retaliate against Taswell for whistleblowing activities. The University’s vice-provost for academic personnel approved the decision denying Taswell’s grievance. Taswell did not file a petition seeking a writ of mandamus to challenge the administrative decision but filed a lawsuit against the Regents of the University of California instead.

Taswell’s operative complaint included claims for violation of the California Whistleblower Protection Act, California Government Code, § 8547 et seq., whistleblower retaliation in violation of Health and Safety Code §1278.5, violation of California Labor Code §1102.5, and retaliation in
violation of the California False Claims Act, California Government Code §12653. The trial court granted the UC’s motion for summary judgment as well as summary adjudication of issues, on the grounds that no triable issue existed and Taswell’s retaliation claims were barred because Taswell failed to exhaust judicial remedies.

The Court of Appeal reversed both grants of summary judgment, finding that a genuine issue of material fact existed as to whether the University’s decision to place Taswell on an investigatory leave and failure to renew his contract had a causal connection to Taswell’s whistleblowing activities, and Taswell was not required to exhaust his judicial remedies by seeking a writ of mandamus to challenge the University’s rejection of his whistleblower retaliation claims.
CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT (“FEHA”)


FEHA failure to hire claim not precluded where employer dissuaded pregnant employee from applying for job.

Ada Abed was hired as a dental assistant student extern at Western Dental Services, Inc. in Napa, California. Abed was pregnant at the time she was hired. Externs who wanted to be considered for full time employment as dental assistants could apply. Abed did not inform Western Dental of her pregnancy, but her supervisor at the Napa office, Sabrina Strickling, saw a bottle of prenatal vitamins in Abed’s purse. Abed asked Strickling whether there were openings for dental assistant in the Napa office. A few days later, Strickling told Abed that there were no open positions for dental assistant in the Napa office. Abed did not apply for a position in Napa. After Abed’s externship ended, Western Dental hired another extern, and thereafter extended that extern an offer for dental assistant in Napa, which she accepted.

Abed sued for pregnancy discrimination. The trial court granted Western Dental’s motion for summary judgment because Abed never applied for a dental assistant position and failed to show that applying would have been futile.

The Court of Appeal reversed summary judgment, finding employee’s failure to apply for a full-time position did not preclude her claim of discriminatory failure to hire, because Western Dental caused her not to apply by falsely telling her for discriminatory reasons that no position was available. A triable issue of fact existed as to whether employer acted with discriminatory animus. “Employers who lie about the existence of open positions are not immune from liability under the FEHA simply because they are effective in keeping protected persons from applying.”
Disability harassment verdict upheld where evidence could support a finding of severe or harassing behavior

Augustine Caldera was a correctional officer at a California state prison ("CDCR"). Caldera has a stutter when he speaks. Sergeant James Grove, a supervisor, mocked Caldera’s stutter frequently. CDCR employees, including Grove, mocked or mimicked Caldera’s stutter at least a dozen times over a period of two years. In one instance, Sergeant Grove mimicked Caldera’s stutter over the prison’s radio system. After Caldera filed an EEO complaint against Grove, Caldera learned that Grove was to be reassigned to the same work area as Caldera. After Grove’s reassignment, Grove continued to mock and mimic Caldera’s stutter.

Caldera filed a complaint in the superior court alleging various causes of action against CDCR and Grove including disability harassment, failure to prevent harassment, and retaliation. The superior court granted CDCR’s motion for summary judgment, which was reversed by the Court of Appeal. Upon remand, the jury returned a verdict in favor of Caldera on his claims of disability harassment and failure to prevent harassment, awarding him $500,000 in non-economic damages. CDCR subsequently moved for a new trial and the superior court granted the motion solely on the grounds of excessive damages, without filing a statement of reasons. Both CDCR and Caldera appealed.

The Court of Appeal held that substantial evidence was presented that the harassment was severe or pervasive. The evidence showed that the behavior Caldera was subjected to could be found to be severe because it was demeaning, embarrassing, harmful, and hurtful behavior, which purposely occurred in front of others, that the harassing conduct was at times done in a mean spirited and harmful manner, and that the harassment caused Caldera to experience psychological disorders. The evidence also showed that the behavior to which Caldera was subjected could be found to be pervasive, because the conduct occurred approximately twelve times, over a two-year time frame, and it was considered as a part of the culture at the prison., to the point where Grove felt that he could openly mock Caldera in front of peers with no consequence.

The jury instructions given correctly stated the law and their issuance did not constitute prejudicial error. The trial court was correct to rejected Defendant’s special jury instruction that the “law does not exhibit ‘zero tolerance’ for offensive words or conduct. Rather, the law requires the Plaintiff to meet a threshold standard of severity or pervasiveness” as and duplicative. Finally, the trial court’s order of new trial on grounds of excessive damages was defective because trial court did not file statement of reasons within 10 days and was therefore reversed.

Additional release language in Worker’s Compensation C&R of “any other claims for reimbursement, benefits, damages, or relief of whatever nature” did not apply to employee’s FEHA claims.

Employee Adrian Camacho began working as a cashier at Employer Target Corporation (“Target”) in August 2012. Camacho is gay, and alleged that he suffered verbal harassment from coworkers. He complained to his supervisor and to human resources, and also called Target’s “Anonymous Hotline,” regarding repeated harassment. He alleged that Target retaliated against him by denying him a promotion and allowing the hostile work conditions to remain.

In August 2014, Camacho filed a claim for workers’ compensation based on injuries related to head and neck pain, as well as digestive and psychological problems that he alleged resulted from the harassment he endured. Camacho felt that he was forced to resign and did so on September 30, 2014. In March 2015, Camacho settled his workers compensation case with Target and executed the mandatory preprinted Compromise and Release (“C&R”) form, and an addendum that included additional language releasing “any other claims for reimbursement, benefits, damages, or relief of whatever nature.” (“Addendum”). The Workers’ Compensation Appeals Board (“WCAB”) approved the settlement. In April 2015 Camacho received a right-to-sue notice from the Department of Fair Employment and Housing and filed suit on his claims under the Fair Employment and Housing Act in August 2015.

Target moved for summary judgment, and the trial court granted its motion, concluding that the C&R and Addendum constituted a general release of all potential civil claims Camacho might have had as a result of the harassment he suffered at Target. Camacho filed a motion for new trial, which the trial court denied.

The appellate court held that the trial court erred in granting summary judgment because the C&R stated that execution of this form has no effect on claims that are not within the scope of the workers’ compensation law or claims that are not subject to the exclusivity provisions of the workers’ compensation law, unless otherwise expressly stated, and because under Claxton v. Waters (2004) 34 Cal.4th 367, the parties failed to indicate a desire to settle claims that fall outside the workers’ compensation system by referring generally to causes of action outside the workers’ compensation law in clear and non-technical language.

Firefighters Procedural Bill of Rights Act outlining restrictions on taking certain employment actions against a fire chief; only applied to lead fire chief of jurisdiction

Plaintiff had been a Division Chief with the San Bernardino County Fire Protection District ("District") for six years when a new Fire Chief was appointed. The new Chief felt that Plaintiff’s management style was incompatible with his own and terminated Plaintiff’s employment with the District. Plaintiff filed a lawsuit against the District alleging age discrimination under the Fair Employment and Housing Act, California Government Code §12940(a).

A jury found for Plaintiff awarding him monetary damages in the six figures. The District appealed, claiming, among other things, that the trial court erred in denying its request to instruct the jury regarding a provision in the Firefighters Procedural Bill of Rights Act ("FBOR"). The Appellate Court of Appeal found that the trial court did not err in refusing to instruct the jury regarding the following provision:

"A fire chief shall not be removed by a public agency or appointing authority without providing that person with written notice, the reason or reasons for removal, and an opportunity for administrative appeal."

The Court of Appeal held the provision only refers to "‘a fire chief’ and does not refer to ‘deputy chiefs,’ ‘assistant chiefs,’ ‘division chiefs’ or the like.” The appellate court found that by providing no definition of the word “fire chief,” the legislature meant for it to only apply to the “job of the fire chief.”
*Harris v. County of Orange, 902 F.3d 1061 (9th Cir. 2018)*

Restructuring of benefits plan which eliminated a retiree premium subsidy on health benefits and reduced grant benefit intended to offset healthcare costs did not constitute age discrimination in violation of FEHA

The County of Orange ("County") restructured its health benefits program in a way that altered two benefits the County provided to its retirees: the Retiree Premium Subsidy and the Grant Benefit. The Retiree Premium Subsidy refers to the County's former policy of pooling together active and retired employees for the purpose of calculating health insurance premiums. Pooling the active and retired employees together had the effect of subsidizing the cost of retirees' premiums. The Grant Benefit refers to a monthly grant given to retirees in order to defray the costs of health care premiums. The monthly grant for retirees was calculated by multiplying an employee's years of service at retirement by a fixed-dollar amount. The initial grant multiplier was $10, but it increased every year by a maximum of 5% to reflect inflation.

In 2006, after negotiation with the labor union representing the County's employees, the County decided to split the pools of retired and active employees to calculate premiums, effectively ending the Retiree Premium Subsidy. The County also altered its Grant Benefit by reducing the grant multiplier maximum from 5% to 3%. Additionally, once a retiree became eligible for Medicare (at age 65), the Grant Benefit would be reduced by 50%.

Retired county employees filed a putative class action suit, alleging that the County's restructuring of its health benefits program deprived them of vested employment benefits, in violation of County's contractual obligations, and constituted age discrimination in violation of the Fair Employment and Housing Act, California Government Code §12940(a).

In a separate action, the Retired Employees Association of Orange County, Inc. ("REAOC") filed suit and that litigation resulted in the California Supreme Court holding (upon certified question from the Ninth Circuit) that under California law, a vested right to health benefits for retired county employees can be implied under certain circumstances from a county ordinance or resolution.

This class action was filed in district court while the REAOC case was pending. The class action alleged a breach of contract from the elimination of the Retiree Premium Subsidy and reduced Grant Benefit. It also alleged that the elimination of the Retiree Premium Subsidy constituted age discrimination in violation of FEHA. The district court granted summary judgment on all three claims.

The Ninth Circuit reversed summary judgment on the breach of contract claim over the Grant benefit, finding that retirees sufficiently stated an implied contract by setting forth sufficient allegations regarding the continuation of the Grant Benefit during Retirees' lifetimes. The court affirmed summary judgment on the other claims, however, holding that retirees had no contractual right to continue receiving the Retiree Premium Subsidy and that the County did not violate FEHA by treating retirees as a separate group when making cost calculations over benefits plans, because California law does not require equal health care benefits for active employees and retirees. Retirees' argument that retirement status was a proxy for age was unavailing because the County did not treat similarly situated retirees different based on their ages.

Employer who terminated probationary employee while on approved medical leave because it could not evaluate her performance failed to reasonably accommodate or engage in good faith.

Employee Marisa Hernandez worked for employer Rancho Santiago Community College District ("RSCCD") on and off throughout the years. She had worked for RSCCD in 2012 and injured her hand on the job. In 2013 she was hired as an administrative assistant and was given a one-year probationary period. During this period RSCCD was to evaluate her performance at 3, 7, and 11 months. RSCCD did not evaluate Hernandez’s job performance at three months or at seven months.

Hernandez’s physician recommended surgery on her hand. She sought an opinion from RSCCD’s risk manager and related that she was worried about her job. He told her not worry because she could not be fired on a workers’ comp case. RSCCD agreed to the three to four months off for the surgery. She underwent surgery nearly eight months after she started working as an administrative assistant. RSCCD’s human resource department employee Judyanne Chitlik then sent Hernandez a letter which terminated her employment. Hernandez tried to contact Chitlik but was told that she was not available. When Chitlik returned the call, she said “You should [have] known better than to take a personal leave while you’re on probation.” Hernandez tried to explain that it was an approved workers’ compensation leave, but Chitlik said it was a personal leave.

Hernandez sued RSCCD for violation the Fair Employment and Housing Act, alleging failure to reasonably accommodate and failure to engage in the interactive process. The trial court found for Hernandez, ruling that RSCCD could have accommodated her by extending her probationary period and that it would not have been an undue hardship to accommodate Hernandez by extending her probationary period. RSCCD could have also deducted from Hernandez’s probationary period the extended period of time she was away from work due to her work-related injury.

The appellate court affirmed, finding the District failed to reasonably accommodate her disability by extending the probationary period and failed to engage in the interactive process. A finite leave is not a reasonable accommodation when the leave leads directly to termination of employment because the employee’s performance could not be evaluated while she was on the leave, and an “accommodation” that leads directly to termination of employment is not an effective accommodation and is not reasonable under the FEHA.

Code of Civil Procedure section 998 cost shifting does not apply to nonfrivolous FEHA actions.

Employer terminated employee for being in an altercation at work. Employee filed suit, of which most of the grounds were dismissed before or during trial. The trial court granted defendant’s motion for nonsuit as to employee’s retaliation claim under FEHA and allowed the jury to decide the remaining FEHA claims for harassment based on hostile work environment, discrimination, and failure to prevent harassment and/or discrimination.

The jury found in favor of the employer. Employer sought costs, expert fees, and attorneys fees pursuant to California Government Code section 12965(b) as the prevailing party and under Code of Civil Procedure section 998, seeking over $111,000 in costs, and $1.3 million in attorney’s fees. The trial court found employee’s action was not frivolous and denied employer’s motion for fees and costs under Government Code section 12965(b) but awarded employer $50,000 in costs and expert witness fees under Code of Civil Procedure section 998.

The Court of Appeal held that Code of Civil Procedure section 998 does not apply in nonfrivolous FEHA actions, and reversed award of costs and expert witness fees to employer.

Trial court erred in excluding "me too" evidence and testimony about sexual text messages, warranting a new trial

Natasha Meeks was a store manager at Autozone who alleged that on numerous occasions she faced sexual harassment from Juan Fajardo, who managed a different Autozone store. She encountered him during store inventories and when they would visit one another’s store to pick up parts. Meeks alleged that prior to her promotion to store manager and after, Fajardo would comment on her body and clothes, ask her to go out with him, or more directly suggest they have sex. He would allegedly send her text messages with sexual content, including images and video. On three occasions, he also forcibly attempted to kiss her.

Meeks first reported Fajardo’s conduct to her district manager in October 2009, but the district manager advised Meeks to “just squash it” and instructed Meeks to tell an investigator from the human resources department that “everything had been taken care of.” The district manager thereafter allegedly threatened to fire Meeks and Meeks’ husband (another employee) if Meeks took her complaints “higher.” Fajardo was ultimately terminated in September 2010 for violating company policy by sending sexually explicit texts to another Autozone employee. Meeks alleged that Fajardo’s termination was a belated reaction to his conduct toward Meeks.

Meeks brought suit against Autozone and Fajardo in September 2010. Her first amended complaint was filed in September 2013 alleging claims under the Fair Employment and Housing Act, California Government Code §12940 et seq., including sexual harassment-hostile work environment, failure to prevent sexual harassment and retaliation, and retaliation. The trial court granted summary judgment for Autozone on the retaliation claim and following a trial, the jury returned a verdict in favor of Autozone on the remaining claims. Meeks appealed.

The Court of Appeal affirmed summary judgment on the retaliation claim because Meeks could not demonstrate an adverse employment action but reversed the judgment on all other claims and remanded for a new trial due to several erroneous evidentiary rulings by the trial court.

The Court of Appeal found that it was error to exclude Meeks’ testimony about electronic messages she received from Fajardo because she no longer had her telephone, and that her detailed testimony was admissible secondary evidence to prove the content of unavailable messages, pursuant to California Evidence Code §1521. The trial court acted within its discretion in excluding evidence of sexual harassment allegations and lawsuit by another female employee regarding different alleged harasser under California Evidence Code §352. The trial court erred in its analysis of “me too” evidence of sexual harassment of other non-party employees by Fajardo by excluding this evidence under California Evidence Code §352. The trial court erred in allowing Autozone to publish a photograph of Meeks’ tattoo and should have instead excluded it from evidence pursuant to California Evidence Code §1106(a), but the trial court acted within its discretion in allowing Meeks’ discussions of personal and intimate matters with Fajardo. These errors were not harmless, so the Court of Appeal reversed the judgment and remanded for new trial.

Objective standard for constructive discharge in age discrimination case against LA Times did not require the trial court to assess evidence from viewpoint of a well-known columnist

T.J. Simers was a well-known sports columnist for the Los Angeles Times until September 2013. On March 16, 2013, Simers, then 62 years old, suffered a neurological event with symptoms similar to a “mini-stroke.” Two and a half months later, the Times reduced Simers’ columns from three to two per week to “give [him] more time to write on [his] columns.” Simers’ editors expressed the dissatisfaction of upper management with several recent columns and stated “they had been having problems with [his] writing for the past 18 months. Two weeks thereafter, when the Times learned about a possible ethical breach involving the development of a show based on Simers’ life, the Times put Simers’ columns “on holiday” for 10 days, and then, on June 24, 2013, suspended the column pending an investigation.

After completion of the investigation and several meetings with Simers, the Times issued a “final written warning” that removed Simers from his position as a columnist and made him a senior reporter with no reduction in salary. On August 12, 2013, Simers’ attorney notified the Times that Simers could not work in that environment and that Simers considered himself to have been constructively terminated. When the Times asked Simers to return to his position as a columnist on September 4, 2013, it would not answer Simers’ questions regarding how many columns he would write and whether he had to change his interviewing approach. Simers, therefore met with editors at the Orange County Register the next day and subsequently accepted a position as a columnist there on September 9, 2013.

In October 2013, Simers sued the Times alleging age and disability discrimination as well as wrongful termination under a constructive termination theory. The jury found in favor of Simers on all three claims and the Times moved for judgment notwithstanding the verdict (JNOV) on all three claims. The trial court denied JNOV on the age and disability discrimination claims but granted JNOV on Simers’ constructive termination claim. Both Simers and the Time appealed.

The Court of Appeal affirmed the trial court, holding that Simers was not constructively discharged as a matter of law, because the evidence did not support intolerable working conditions forcing plaintiff’s resignation. The court rejected Simers’ argument that the court should have assessed the objective standard from the viewpoint of a reasonable well-known columnist under the circumstances that preceded Simers’ resignation, and held that the evidence showed only plaintiff’s personal, subjective reactions to defendant’s use of standard disciplinary procedures, not that of a reasonable person, as is required. The trial court was also correct to order a new trial related to the damage apportionment on the discrimination claims and the constructive discharge claims, upon which the trial court granted JNOV.
Ministerial exception only bars contract claims where 1) the employer is a religious group, 2) the employee making the claim is a minister, and 3) the contract claim is one that turns on an ecclesiastical inquiry or “excessively entangles” the court in religious matters.

Sarah Sumner was the dean of the A.W. Tozer Theological Seminary at Simpson University (“Simpson”) in Redding, California from January 11, 2010 until July 27, 2012. As dean, Sumner’s written employment contract provided that she was part of the administrative faculty and that she was entitled to a continuous contract by virtue of her status as a full professor. Sumner also taught several religious courses at Simpson. Though Sumner was terminated for insubordination on June 22, 2011 for her advocacy that the seminary become an independent cost center (structurally distancing itself from Simpson), she was reinstated when an ad hoc grievance committee heard her formal grievance and voted to reinstate Sumner. Sumner alleged, however, that the chairman of the board of trustees of Simpson University falsely reported to the board of trustees, to the Simpson University community, and to Sumner that the grievance committee voted to uphold the termination. Furthermore, she alleged, the president of the university publicly stated that the ad hoc committee had voted to uphold the termination.

Upon her reinstatement to her former position, Sumner began communicating with various Simpson University personnel, and urging them to “tell the truth” about her termination. In response, the provost sent Sumner a letter on July 18, 2012 stating that Sumner had violated protocols given to her when she was reinstated prohibiting Sumner from sending out group emails critical of the university leadership. Sumner alleged she had never been given a list of protocols and did not respond to the letter. She was thus terminated on July 27, 2012.

Sumner filed suit in state court against Simpson alleging causes of action for breach of contract, defamation, invasion of privacy, and IIED. Simpson University asserted an affirmative defense that each of these claims was barred by the First Amendment of the United States Constitution’s “ministerial exception” as discussed in Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C., 565 U.S. 171 (2012). The trial court agreed and granted Simpson University’s motion for summary judgment on the basis of the ministerial exception. Simpson appealed.

The Court of Appeal reversed summary judgment as to the breach of contract cause of action, holding that the ministerial exception applies to contract claims where a minister employee makes a claim against a religious employer that requires the excessive entanglement of the court in religious matters, and Sumner’s claim did not require excessive entanglement since the contract dispute was limited to whether she was insubordinate as the term was used in her employment contract’s grounds for termination. The Court of Appeal affirmed summary judgment, however, on the three intentional tort claims, holding they were also covered by the ministerial exception, as the “First Amendment protects the act of a decision rather than a motivation behind it.”
FEDERAL ANTI-DISCRIMINATION EMPLOYMENT LAW

Biel v. St. James Sch., 911 F.3d 603, 605 (9th Cir. 2018)

Ministerial exemption does not apply to cancer-stricken Catholic school teacher

Kristin Biel was hired as a fifth-grade teacher at St. James Catholic School (“St. James”) in March 2013. Prior to working at St. James, Biel had worked at two tutoring companies and as a substitute teacher at several public and private schools. Biel is Catholic yet being Catholic was not required for teaching positions. Biel had no training in Catholic pedagogy when she came to St. James; while at St. James she attended a half-day conference, a part of which discussed incorporating religious themes into lessons.

Biel taught all academic subjects, including a standard religion curriculum for thirty minutes daily, four days per week. Biel’s contract with St. James made several references to promoting behavior that conformed to Catholic doctrine and faith. Biel also received a positive teaching evaluation in November 2013. Less than six months after her evaluation, Biel informed St. James that she had breast cancer and requested time off for surgery. St. James told Biel a few weeks later that it would not renew her teaching contract. Biel sued in district court alleging violation of the Americans with Disabilities Act (“ADA”), 42 U.S.C. §12112(a). The district court granted summary judgment to St. James, holding that Biel’s ADA claim were barred by the First Amendment’s “ministerial exception” as discussed in Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C., 565 U.S. 171 (2012).

The Ninth Circuit reversed. Under Hosanna-Tabor, the Supreme Court expressly considered all the circumstances of an employee’s employment, framing four major considerations to determine if the ministerial exception applied:

1. whether the employer held the employee out as a minister,
2. whether the employee’s title reflected ministerial substance and training,
3. whether the employee held herself out as a minister, and
4. whether the employee’s job duties included “important religious functions.

Although the First Amendment’s Establishment and Free Exercise Clauses of the United States Constitution “bar the government from interfering with the decision of a religious group to fire one of its ministers,” the ministerial exception did not foreclose Biel’s claim. Biel did not have religious credentials, training, or ministerial background. There was no religious component to her degree or teaching credential. St. James had no religious requirements for her position. Her training at St. James consisted of only a half-day conference with limited religious substance. Biel also took on teaching work wherever she could find it. Under the totality of the circumstances, the Ninth Circuit concluded that Biel did not qualify as a minister for purposes of the ministerial exception.

The Ninth Circuit further held that First Amendment does not provide “carte blanche” to employers to disregard antidiscrimination laws when it comes to non-ministerial employees who do not serve a leadership role in the faith.
Campbell v. Hawaii Dept. of Educ., 892 F.3d 1005 (9th Cir. 2018)

School district was not liable for hostile work environment created by students' derogation of teacher on basis of her race and gender.

Patricia Campbell was a teacher employed by the Hawaii Department of Education ("DOE") at a high school in Maui from 2000 until she resigned in July 2009. Campbell alleged that students frequently degraded her on the basis of her race (white) and sex (female) by calling her offensive names such as "fucking weirdo," "cunt," "bitch," and "fucking haole." Campbell routinely reported the students' misconduct to Hawaii DOE administration and a variety of disciplinary measures were imposed against students found to have misbehaved. At the same time, however, Campbell was the subject of numerous complaints which led to an investigation. The investigation found that Campbell had intimidated and discriminated against students, physically grabbed and verbally abused students, and failed to maintain a safe classroom environment. Nevertheless, the Hawaii DOE took no action against Campbell and she was allowed to keep her position at the school.

At some point before the 2007-2008 school year, Campbell requested a transfer to teach kindergarten or become a band director elsewhere in Maui, but her requests were not granted. Campbell subsequently requested and was granted a 12-month leave of absence without pay due to work-related stress. Before the next school year, she requested and was granted an additional year of unpaid leave. Before the following school year, Campbell learned that she had been assigned to teach three remedial math classes because there were not enough students to support a full slate of music classes, and music was Campbell's primary teaching subject. Campbell told her principal that she would not teach remedial math and never reported back to work after her leave expired. When the principal told Campbell that she would be fired if she did not return to work, Campbell resigned.

Campbell filed suit in the District Court against the Hawaii DOE and various administrators alleging (among other things) disparate treatment in violation of Title VII, 42 U.S.C. §2000e et seq., a hostile work environment because of her race and her sex, retaliation under Title VII, and retaliation under Title IX, 20 U.S.C. §1681(a). The court granted judgment on the pleadings as to some claims and summary judgment for the Hawaii DOE on her Title VII disparate treatment claims.

The Ninth Circuit affirmed the trial court. Campbell did not, as a matter of law, suffer an adverse employment action, as she was able to continue working during the investigation (which was prompted by student, parent, and coworker complaints) and therefore did not alter the terms and conditions of her employment. Additionally, Campbell failed to request a transfer through the appropriate procedures. Further, Campbell was not able to identify similarly situated employees outside of her race and sex who were treated more favorably. Therefore, her discrimination and retaliation causes of action under Title VII and discrimination claim under Title IX were properly dismissed. Hawaii DOE took corrective action once Campbell informed it of the students' harassing conduct, actions that were reasonably calculated to end the harassment, but also kept in mind that the harassers were adolescents, and for that reason the harassment claims under Title VII and Title IX were properly adjudged.
E.E.O.C. v. BNSF Railway Co., 902 F.3d 916 (9th Cir. 2018)

Employer engaged in an unlawful employment practice when it required applicant to pay for post job-offer medical exam

Russell Holt received an offer to work as a senior patrol officer from BNSF Railway Company ("BNSF") contingent upon him passing a post-offer medical review. During the medical exam, Holt disclosed that he had injured his back four years before but had no limitations and no need for follow-up testing. BNSF's medical contractor examined Holt and found no issues; but BNSF further reviewed the medical file and requested that Holt obtain an MRI at his own cost. Holt's medical insurance declined the cost of the MRI as it was not medically necessary, and Holt failed to procure the MRI after learning that it would cost $2,500 out of pocket. Without the MRI, BNSF designated Holt as having declined the job offer.

Holt filed a charge with the Equal Employment Opportunity Commission ("EEOC"), which sued BNSF for violating the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 et seq. The district court granted the EEOC's motion for partial summary judgment on ADA liability finding that; (1) BNSF had "regarded" Holt as having a disability due to his 2007 back injury; (2) Holt was qualified for the job; and (3) BNSF discriminated against Holt by requiring an MRI because BNSF regarded Holt as having a disability. The district court also issued a nationwide injunction, mandating that "BNSF must bear the cost of procuring any additional information it deems necessary to complete a medical qualification evaluation." It also required that "[i]f BNSF chooses not to procure additional information, it must complete the medical examination process, i.e., it must use the medical information it does have to make a determination about whether the applicant is medically qualified for the job for which the applicant received the conditional offer." BNSF appealed.

The Ninth Circuit held that making an employee-applicant bear the cost of an employer-required medical exam will effectively preclude many applicants from applying, which is at odds with the ADA’s aim to increase opportunities for persons with disabilities and affirmed the district court’s findings. However, the Ninth Circuit remanded the scope and form of injunction to the district court.
Common-law agency principles apply to analyze issue of joint employer under Title VII, not the economic reality test.

Green Acre Farms and Valley Fruit Orchards ("Growers") were experiencing labor shortages and contracted with Global Horizons to obtain temporary workers for workers in their orchards. Global Horizons recruited workers from Thailand and brought them to work under H-2A guest worker program. Two of the Thai workers filed charges of discrimination with the EEOC, which brought the action against the Growers and Global Horizons as joint employers alleging claims for race or national origin discrimination, hostile work environment and constructive discharge, retaliation, and pattern-or practice claims under Title VII of the Civil Rights Act of 1964.

The Ninth Circuit Court of Appeals reversed the district court’s order granting in part the Growers’ motions to dismiss on the grounds that the Growers were not joint employers with Global Horizons. The court held that when presented with “completely circular” definitions like the definitions of “employer” under Title VII, courts should use common-law agency principles to analyze the existence of an employer-employee relationship. Under the common-law test, “the principal guidepost” is the element of control, which is “the extent of control that one may exercise of the details of the work of the other.” The court refused to apply the economic-reality test to analyzing employment relationships under Title VII, as the economic-reality test was developed under the FLSA and Migrant and Seasonal Agricultural Worker Protection Act, “two statute that differ from Title VII in material respects.”

In applying the economic-reality test, the court reversed the district court’s dismissal of the claims that the Growers were not joint employers of the Thai workers.

Age Discrimination in Employment Act applies to state and local governments regardless of their size.

Two firefighters filed suit against Mount Lemmon Fire District, a political subdivision in Arizona, after being terminated alleging violation of the Age Discrimination in Employment Act of 1967 ("ADEA"). Employer alleged that it was too small to qualify as an "employer" under the ADEA, which only applies to "a person engaged in an industry affecting commerce who has twenty or more employees...The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State...." 29 U.S.C. § 630(b).

The U.S. Supreme Court held that the ADEA’s definition of employer set forth that it applies to "state or political subdivisions with no attendant numerosity limitation" and "leave[s] scant room for doubt that state and local governments are ‘employer[s]’ covered by the ADEA regardless of their size."
Nunies v. HIE Holdings, Inc., 908 F.3d 428 (9th Cir. 2018)

Under the 2008 ADA Amendments Act, employee need only show that the employer regarded him as physically or mentally impaired.

This case presents the Ninth Circuit’s first impression of the term “regarded as” under the Americans with Disabilities Act (“ADA”) since it was amended in 2008.

Employee filed suit against employer under the ADA alleging that he was terminated from his position as delivery driver after informing the employer that he had injured his shoulder.

In 2008, Congress enacted the ADA Amendments Act (“ADAAA”), which broadened the definition of a disability under the ADA. Under the ADAAA, a plaintiff meets the definition of “being regarded as having such an impairment” if he or she was subject to an action prohibited under the regulations “because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” 42 U.S.C. § 12102(3)(A). Prior to the ADAAA, the plaintiff “had to ‘provide evidence that the employer subjectively believe[d] that the plaintiff [was] substantially limited in a major life activity.’”

Therefore, the Ninth Circuit reversed the district court and held that employee established a genuine issue of material fact as to whether employer regarded employee has having a disability, and that “a reasonable jury could conclude that [employer] effectively terminated [employee] ‘because of’ its knowledge of” the employee’s injury.
Under the Equal Pay Act, an employer cannot justify a wage differential between male and female employees by relying on prior salary, otherwise employers could capitalize on the persistence of the wage gap.

Aileen Rizo was hired as a math consultant by the Fresno County Office of Education (“Fresno COE”) in October 2009. In 2012, Rizo learned that her male colleagues had been subsequently hired as math consultants at higher salary steps. Rizo sued Fresno COE in February 2014, via its superintendent, Jim Yovino, claiming a violation of the Equal Pay Act (“EPA”) (29 U.S.C. §206(d)); Violation of Title VII (42 U.S.C. 200e et seq.); Violations of Fair Employment and Housing Act, Cal. Gov’t Code §12940(a) and (k). Fresno COE moved for summary judgment on the basis that the prior salary was an affirmative defense as it fell within the catch all clause of exceptions to the Equal Pay Act as a “differential based on any other factor other than sex.” 29 U.S.C. § 206(d)(1).

The district court denied summary judgment and certified the question for interlocutory appeal because Fresno COE’s pay structure based exclusively on prior wages is certain to perpetuate discriminatory wage disparity between men and women.

A three-judge panel of the Ninth Circuit vacated the denial of summary judgment and remanded, stating that prior salary alone may constitute a factor other than sex, and that the district court was to consider other factors including ability, education, and experience under Kouba v. Allstate Insurance Co., 691 F.2d 873 (9th Cir. 1982).

Upon rehearing en banc, in the past opinion authored by the late Justice Stephen Reinhardt, the Ninth Circuit held that prior salary cannot not be used to justify payment of lower wage and introduced a new rule. With respect to the catchall exception in the EPA:

(1) a factor other than sex must be one that is job-related, such as experience, ability, and performance, rather than one that effectuates some business policy;

(2) it is impermissible to rely on prior salary to set initial wages because it is not job-related and it perpetuates gender-based assumptions about the value of work that the EPA was designed to end; and,

(3) prior salary cannot be used as the sole factor or one of several factors considered in establishing wages because that is a distinction without a difference.

Kouba v. Allstate Insurance Co., 691 F.2d 873 (9th Cir. 1982) is overruled.

The Equal Pay Act does not require any proof of discriminatory intent on the part of the employer.

On February 25, 2019, the Supreme Court of the United States vacated this decision and remanded to the Ninth Circuit, because at the time the en banc decision in this case was filed, Judge Reinhardt had passed away and by statute he was without power to participate in the en banc court’s decision, rendering it unclear whether there was a quorum for decision.
90-day period to file a Title VII action starts when the employee is given a right-to-sue notice by the EEOC, and acts occurring after charge is filed may be included if part of a single unlawful employment practice.

Employee Taylor Scott was a barber working at Camp Pendleton for Gino Morena Enterprises LLC ("GME"). Scott alleged that two of her managers, Judy Lifiesy and Katie Shepler, sexually harassed and retaliated against her after Scott turned down Lifiesy’s sexual advances. On November 13, 2013, Scott filed a charge with the California Department of Fair Employment and Housing ("DFEH"). Six days later, DFEH transferred the duty to investigate to the Equal Employment Opportunity Commission ("EEOC") pursuant to a work-sharing agreement between the agencies. DFEH issued Scott a right-to-sue notice on November 25, 2013. On December 22, 2013, GME issued Scott a warning. Scott then quit DME. Scott filed a second charge with the DFEH on November 17, 2014, recounting the allegations in her first DFEH charge and stating that she was issued a warning after receiving her first right to sue notice. DFEH issued a second right-to-sue notice.

On November 20, 2014, Scott filed a complaint in state court for claims under the Fair Employment and Housing Act ("FEHA"). GME removed to federal court under the federal enclave doctrine. The district court denied Scott’s motion for remand. On May 22, 2015, GME filed a motion for judgment on the pleadings, seeking dismissal of the FEHA claims as preempted by federal enclave doctrine. Scott then requested and obtained a right-to-sue notice dated June 3, 2015 from the EEOC for her first DFEH charge. The EEOC right-to-sue stated that a lawsuit under Title VII must be filed within 90 days of receipt. The parties agreed to allow Scott to file a first amended complaint to include only federal claims. GME then moved to dismiss the first amended complaint as time-barred. The district court ruled that Scott might be entitled to equitable tolling. Following discovery, GME then filed a motion for summary judgment which the court granted, ruling that Scott’s claims were time-barred and that equitable tolling did not apply. Scott appealed.

The Ninth Circuit considered whether the 90-day period to file a civil action begins when the plaintiff receives a right-to-sue notice from the EEOC or 180 days after the charge is filed with the EEOC, regardless of when the EEOC issues a right-to-sue notice. Stiefel v. Bechtel Corp., 624 F.3d 1240 (9th Cir. 2010) was not controlling as it only concerned whether the plaintiff satisfied the statute’s administrative exhaustion requirement and was not binding on the question of when the 90-day limitations period begins.

The court held that the 90-day period for filing a Title VII action begins when the aggrieved person is given a right-to-sue notice by the EEOC. The court further held that under the continuing violations doctrine, Plaintiff could base her claims occurring after she filed her first DFEH charge on GME’s alleged acts occurring after 300-day time period for filing administrative charge had expired, only to the extent such acts were part of a single unlawful employment practice.
Danny Snapp worked for Burlington Northern Santa Fe Railway Company ("BNSF") from 1971 through 1999. Due to sleep apnea, Snapp went on short-term disability leave. He then applied for long-term disability benefits through CIGNA, the third-party administrator for BNSF's disability plan. CIGNA approved Snapp's claim for disability benefits and BNSF's medical director told Snapp that should CIGNA later find him ineligible, Snapp should contact BNSF's medical director to plan a return to work. CIGNA later did deem Snapp ineligible in November 2005 when Snapp refused to pay for a requested sleep study to verify his continuing disability. At that time, Snapp did not request an accommodation or apply to return to work. Instead he appealed CIGNA's denial and copied BNSF in his letter. In November 2007 CIGNA notified BNSF that it had denied Snapp's appeal and Snapp was no longer eligible for long-term disability.

At the same time, Snapp wrote to BNSF demanding reinstatement of his disability payments. A BNSF representative responded to his letter on January 2, 2008 notifying Snapp that, in accordance with the BNSF Long-Term Disability Plan, Snapp had 60 days to secure a position with BNSF or he would be dismissed. Snapp responded on January 6, 2008 that he would welcome an offer to return to work so long as it was "without discrimination of [his] situation..." He attached a doctor's note describing his work limitations. Snapp also asked for, alternatively, a continued and on-going Long-Term Disability leave of absence until the issue with CIGNA was presented in a court of law for "malicious administration and breach of the BNSF... Welfare Plan." BNSF replied on January 10, 2008 that CIGNA was solely responsible for plan administration and Snapp should deal with CIGNA directly, but BNSF was standing by the 60-day window for Snapp to secure employment. The 60-day window eventually expired after Snapp unsuccessfully attempted to invoke seniority rights to a position.

Snapp sued BNSF in district court August 2010 under the Americans with Disability Act, 42 U.S.C. §12101 et seq. alleging a failure to provide a reasonable accommodation. The trial court granted summary judgment, but the Ninth Circuit reversed, finding a triable issue as to whether Snapp requested an accommodation so as to trigger BNSF's duty to engage in the interactive process. On remand, Snapp sought a jury instruction that would have relieved him entirely of showing the availability of a reasonable accommodation: The district court did not issue that instruction and instead gave instructions based on the Ninth Circuit Model Instructions, placing the burden of proof on Snapp as to all issues other than the statutory defense of "undue hardship." Snapp moved at the end of trial for judgment as a matter of law, but the court denied the motion and the jury returned a verdict for BNSF. Snapp appealed.

The Ninth Circuit affirmed, holding that while an employer's failure to engage in good faith in the interactive process is sufficient to shift the burden of proving the unavailability of a reasonable accommodation at summary judgment, this burden shifting does not apply at trial to relieve the employee of the burden to demonstrate to a jury that reasonable accommodations would have been possible.
TRADITIONAL LABOR

American Federation of Musicians of the U.S. and Canada v. Paramount Pictures Corp., 903 F.3d 968 (9th Cir. 2018)

Ninth Circuit’s Reversal of Interpretation of CBA and Rejection of Violation of “Hot Cargo” Provision of NLRA

The American Federation of Musicians filed an action alleging a breach of Article 3 of the collective bargaining agreement, Basic Theatrical Motion Picture Agreement (CBA) as to the motion picture entitled, Same Kind of Different As Me, which its score was produced by non-AFM represented musicians in Slovakia. AFM asserted that Paramount had breached a provision of the applicable CBA, which required the scores to be produced in the U.S. or Canada when a signatory producer produced a film in the U.S. or Canada. The district court granted summary judgment for Paramount Pictures Corp. (Paramount) under the National Labor Relations Act (NLRA).

On appeal, the Ninth Circuit disagreed with the district court’s interpretation of the CBA by holding that producers were required to score films in the U.S. or Canada when a signatory studio produced a motion picture and had authority over the hiring and employment of scoring musicians. Unlike the district court, the Ninth Circuit held that the employment of the cast and crew was irrelevant. Specifically, the panel held that the district court misinterpreted Article 3 to apply only if a signatory producer employs the cast and crew shooting the picture. Article 3 applies when a signatory studio produces a motion picture and has authority over the hiring and employment of the musicians. Ultimately, the Ninth Circuit held that there was a disputed question of fact concerning whether Paramount had sufficient authority over the hiring of the musicians for application of Article 3 of the Basic Theatrical Motion Picture Agreement.

In addition, the Ninth Circuit rejected Paramount’s affirmative defense that Article 3 violated the NLRA’s “hot cargo” provision. The panel held that the “hot cargo” provision does not apply to valid work preservation agreements. The “hot cargo” provision prohibits an employer from entering into an agreement to cease or refrain from dealing in the products of another employer or to cease doing business with any other person. The panel held that the CBA provision could be found to be a valid work-preservation provision in light of disputed evidence of Paramount’s authority to hire and control the employment of musicians on the film. Ultimately, the Ninth Circuit concluded that there was a genuine dispute of material fact whether Paramount had authority over the hiring and employment of the musicians scoring the motion picture, which prevented summary judgment on the “hot cargo” affirmative defense. Based thereon, the panel reversed two of the district court’s evidentiary rulings and held that the district court abused its discretion that excluded an expert report and internal Paramount email and remanded the matter for further proceedings.
Boling v. Public Employment Relations Board, 5 Cal.5th 898 (2018)

California Supreme Court held that mayor was obligated to meet and confer under the Mayers-Milianis-Brown Act with union for city employees before drafting and sponsoring a citizen initiative related to pension reform.

Unions filed claims of unfair practices after San Diego’s mayor drafted and sponsored a citizen’s initiative to eliminate pensions for new municipal employees and refused to meet and confer with unions over the measure.

The California Supreme Court held that the Public Employment Relations Board (“PERB”) and the Myers-Milianis-Brown Act (“MMBA”) require governing bodies “or other representatives as may be properly designated” to engage with unions on matters within the scope of representation “prior to arriving at a determination of policy or course of action.” The mayor’s official pursuit of pension reform is therefore covered by this meet and confer obligation under the MMBA.
Casino Pauma v. NLRB, No. 16-70397 (9th Cir. 2018)

NLRA applies to the relationship between non-tribal employees working in commercial gaming establishments on tribal lands and tribal government that owns and manages establishments; casino violated NLRA by trying to stop union literature distribution.

Casino Pauma is located on tribal land in California and operates a gambling casino and restaurants. The Pauma Band of Mission Indians owns Casino Pauma. Each day, approximately 2,900 customers visit Casino Pauma. Casino Pauma employs over four hundred employees. The vast majority of the employees are not members of the Native American Tribe (only five are members). In 2013, a union named Unite Here began an organizing drive at Casino Pauma. In December 2013, throughout the day nine Casino Pauma employees distributed union leaflets to customers at the casino’s front entrance. After being told to stop, each group of employees located at various sites on the casino ceased their distribution efforts. The following month, an employee handed out union flyers to several employees waiting to clock out of their shifts. Thereafter, Casino Pauma issued the leafletting employee a disciplinary warning. Thereafter, the General Counsel of the NLRB filed several complaints concerning the literature distribution incidents.

The Ninth Circuit granted the Board’s petition for enforcement of its Order and denial of Casino Pauma’s petition for review. Following a three-day trial before an Administrative Law Judge, Casino Pauma was held in violation of the National Labor Relations Act (NLRA), in several ways, but in particular, that it committed unfair labor practices by trying to stop union literature distribution at guest areas at the casino’s front entrance an in non-working areas near its employees’ time clock. A three-member panel affirmed the ALJ’s rulings and findings yet adopted a slightly modified version of the ALJ’s order.

The Court of Appeals upheld the Board’s ruling that it may apply the NLRA to the relationship between employees working in commercial gaming establishments on tribal lands and the tribal governments that own and manage the establishments. Based upon this ruling, the panel confirmed that Casino Pauma committed unfair labor practices in violation of the NLRA by trying to stop union literature distribution. The panel held that there was no conflict between the NLRA and the Indian Gaming Regulatory Act and concluded that Casino Pauma’s compact with California did not displace the application of the NLRA to its activities.

Also, the Ninth Circuit held that the Board properly applied the rule regarding employee solicitation established in Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945), to customer-directed union literature distribution. As such, the panel upheld the Board’s conclusion that Casino Pauma violated its employees’ NLRA rights to distribute union literature, which was adequately supported by both the applicable legal principles and the record. The panel concluded that the Board properly interpreted Republic Aviation’s holding concerning NLRA section 7 to reach employees’ customer-directed union literature distribution on non-work time in non-work areas of the employer’s property. The panel further held that the Board reasonably applied to Casino Pauma its literature distribution rules concerning casinos.
Clark v. City of Seattle, 899 F.3d 802 (9th Cir. 2018)

Drivers’ challenge to Seattle ordinance establishing collective-bargaining process for ride-sharing companies is unripe as the drivers could not show any injury-in-fact under the National Labor Relations Act or that their First Amendment rights have been violated.

The Seattle City Council passed the Ordinance Relating to Taxicab, Transportation Network Company, and For-Hire Vehicle Drivers (“Ordinance”). The Ordinance establishes a multistep collective-bargaining process between “driver coordinators,” such as Uber and Lyft, and for-hire drivers who contract with these companies.

Drivers filed suit challenging the Ordinance arguing that it is preempted by the National Labor Relations Act (“NLRA”) and that it violates their First Amendment rights.

The Ninth Circuit held that the drivers’ claims were not ripe. The drivers’ objection that disclosure of their contact information to the union had not occurred yet, and the type of contact information required to obtain a business license. Moreover, the drivers could not establish that a contract or agreement between the driver coordinators and the City was imminent, and therefore had no injury-in-fact. In addition, driver did not show that they were subject to “threaten[ing], coerc[ive], or restrain[ing]” conduct to show a violation of NLRA section 8(b)(4). Finally, the drivers’ First Amendment claim is unripe because their “actual injuries hinge on a prospective chain of events that have not yet occurred and may never occur.”
Employer may challenge the certification of a union or negotiate with the union, but it may not do both, and the Director of the NLRB is entitled to injunction to prevent employer’s unfair labor practices.

Employees formed a union. The employer met with the union after the election, and discussed employee schedules and arrangements of a union representative at an employee’s investigatory meeting. Thereafter, the employer challenged the certification of the union.

The Ninth Circuit held that to preserve a challenge to the certification of a union, “the employer must refuse to bargain immediately after the union’s certification.” “If the employer does not immediately refuse to bargain, it waives its right to challenge the union’s certification” and the delay in challenging the union harms the union and the collective bargaining process.

The Ninth Circuit held that the Director has shown a likelihood of success in establishing that the employer began unconditional bargaining, and then later withdrew recognition of the union. Therefore, the Director was entitled to preliminary injunction, and the employer may no longer challenge the union’s certification.
Dent v. National Football League, 902 F.3d 1109 (9th Cir. 2018)

The LMRA does not preempt state law claims where rights are conferred by state law and are independent of collective bargaining agreements.

Retired professional football players filed a putative class action that alleged that the National Football League distributed controlled substances and prescription drugs to its players in violation of both state and federal laws, and that in the manner the drugs were administered resulted in the players suffering from permanent injuries and chronic medical conditions. The players’ complaint was dismissed by the district court and they appealed.

The Ninth Circuit Court of Appeals reversed and remanded, holding: (1) Labor Management Relations Act (“LMRA”) did not preempt players’ negligence per se claim; (2) LMRA did not preempt players’ negligent hiring and retention claim; (3) LMRA did not preempt players’ negligent misrepresentation claim; and (4) LMRA did not preempt players’ fraud and fraudulent concealment claims. Under Section 301, the LMRA preempts state law claims founded directly on rights created by the collective bargaining agreements, and also claims substantially dependent on analysis of collective bargaining agreements. The Ninth Circuit held that as pled, the players’ claims neither arise from collective bargaining agreements nor require their interpretation. As such, the district court’s decisions were reversed and remanded for further proceedings.

State and public-sector unions may no longer extract agency fees nor attempt to collect payments from nonconsenting employees; such payments must be affirmatively approved by the employee.

Mark Janus was an Illinois state employee whose unit was represented by a public sector union. He refused to join the union because he disagreed with many of its political activities, but the union charged him agency fees, which are fees paid to a union by a non-union employee to cover the union’s expenditures attributable to the activities germane to the union’s collective bargaining activities, but not political activities.

The Governor of Illinois filed suit challenging the constitutionality of the state law providing for agency fees, and Janus intervened. The district court dismissed the Governor for lack of standing but allowed Janus to file his own complaint. The district court then granted the union’s motion to dismiss on the ground that the claim was foreclosed by Abood v. Detroit Board of Education, 431 U.S. 209 (1977). The Seventh Circuit affirmed the district court.

The U.S. Supreme Court held that extraction of agency fees from nonconsenting public-sector employees violates the First Amendment, as it forces individuals to endorse ideas that they find objectionable. Promoting “labor peace” may be achieved through less restrictive means than assessing agency fees. Avoidance of “free-riders” is not a compelling state interest that justifies burdening an individual’s first amendment rights.

Abood v. Detroit Board of Education is overruled.
McCray v. Marriott Hotel Servs., 902 F.3d 1005 (9th Cir. 2018)

Labor Management Relations Act does not preempt employee’s claims arising under city’s wage ordinance.

Employee brought class action for wage violations under state law alleging that his employer failed to pay the applicable minimum wage required under the City of San Jose’s ordinance. Employer contended that it was not subject to the city’s ordinance as it negotiated and agreed with employee’s union to waive the ordinance’s minimum-wage requirement.

Employer removed the case to federal court on the grounds that employee’s claims are preempted by section 301 of the Labor Management Relations Act ("LMRA"). Ninth Circuit held that employee’s “claims arise independently under state law and are not subject to § 301 preemption on that basis.”
A job posting was not ripe for resolution where there was no union applicant who met the minimum requirement.

The American Federation of State, County, & Municipal Employees, Local 1092, AFL/CIO (AFSCME) appealed from a trial court decision which granted a writ of administrative mandamus filed by the Metropolitan Water District of Southern California (District). The District had filed a petition pursuant to CCP 1094.5 to challenge the decision of a hearing officer of an AFSCME grievance. The trial court set aside the administrative hearing officer’s decision on the grounds that the decision was granted on an issue that was not ripe and that exceeded the scope before the hearing officer. The appellate court affirmed the trial court’s decision.

The District challenged the decision of a hearing officer on a union grievance concerning the District’s use of a “comparative analysis” procedure in job postings. The trial court set aside the hearing officer’s decision on the grounds that it granted relief on an issue that was not ripe and exceeded the scope of the issue before him, which was affirmed on appeal. The specific issue before the hearing officer was as to the question of whether the District violated the collective bargaining agreement for a particular job posting. However, the only union applicant for that posting did not meet the minimum requirements. As such, there was no actual controversy.

Alternatively, the hearing officer was asked to speculate on the resolution of the hypothetical situation where a union applicant, meeting minimum requirements for the position, is subject to the comparative analysis procedure. In ordering the District to “cease and desist from the use of posting language or a recruitment procedure that provides ... for a comparative analysis” it was held to have gone beyond the role of the hearing officer. The hearing officer’s role is “limited” to hearing “the written grievance as originally filed.” The issue before the hearing officer was limited to the District’s use of language that did not meet the minimum requirements for the job posting at issue.
Section 301 of the LMRA grants jurisdiction only for suits that claim violation of collective bargaining agreement, not to obtain declaratory judgment.

The Ninth Circuit Court of Appeals affirmed the district court’s dismissal for lack of subject matter jurisdiction of an action brought pursuant to the Labor Management Relations Act (“LMRA”). The case involved an employer that alleged a union had engaged in intentional and negligent misrepresentation in order to induce it to enter into a collective bargaining agreement. The employer sought a declaratory judgment against the union to assert that part of the collective bargaining agreement was invalid.

The panel held that section 301(a) of the LMRA grants jurisdiction only for suits that claim a violation of a collective bargaining agreement (CBA), which the employer in this case failed. The Ninth Circuit rejected Nu Image’s argument that the LMRA grants a district court jurisdiction to hear any case in which a party, or third party, has alleged a violation of a collective bargaining agreement. The panel concluded that the holding in Rozay’s Transfer v. Local Freight Drivers, Local 208, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 850 F.2d 1321 (9th Cir. 1988), that an employer can sue under section 301(a) for declaratory relief to void a provision of a CBA without alleging a contract violation, could not stand following Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto., Aerospace, & Agric. Implement Workers of Am., 523 U.S. 653 (1998).

Employees’ statutory anti-discrimination claims did not infringe on arbitration grievance process set out in CRA and were not preempted by LMRA.

Three former employees sued the employee for various state law statutory employment claims, to include claims under the Fair Employment and Housing Act (“FEHA”) and Labor Code section 1102.5 for retaliation. The employer successfully filed a motion to sever the claims, and then filed motions to compel arbitration as to each plaintiff, which were denied.

On appeal the decision was affirmed on the grounds that plaintiffs’ claims did not require an interpretation of the CBA, and that their claims fell outside the scope of the collective bargaining agreement (“CBA”): “Save Mart explains that disputes about the employee termination and production norm provisions of the CBA are intended to be resolved through grievances. As an abstract proposition we do not disagree. But ...plaintiffs retain an independent (nonnegotiable) state law right to be free of discipline caused by protected activity, such as whistleblowing (Hagins) or exercising his FEHA rights (all plaintiffs).”
Weighing in on the *Dynamex* versus *Borello* debate, the National Labor Relations Board ("Board") held franchisee cab drivers were not employees under the National Labor Relations Act ("NLRA" or "Act") and therefore not covered by the Act.

The Board reversed its prior holding in *FedEx Home Delivery*, 361 NLRB 610 (2014), and returned to the "traditional common-law test that the Board applied prior to *FedEx*..." which applies the ten factors enumerated in the Restatement (Second) of Agency section 220 (1958). The *Borello* court relied on the Restatement factors, too.

In applying the common law test, the Board found the drivers' ownership (or lease) and control of their vans, the principal instrumentality of their work, the nearly complete control over their daily work schedules and working conditions, and the method of payment, where drivers paid a monthly fee and kept all fares they collected, showed they were independent contractors.
City ordinance regulating ride sharing services was not preempted under the National Labor Relations Act, nor was the ordinance entitled to state-action immunity from federal antitrust laws.

On December 14, 2015, the Seattle City Council enacted an Ordinance Relating to Taxicab, Transportation Network Company, and For-Hire Vehicle Drivers (Ordinance). The Ordinance permitted independent-contractor drivers, represented by an entity denominated an “exclusive driver representative,” and driver coordinators to agree on the “nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers.”

The Chamber of Commerce, together with a subsidiary of Uber, challenged the Ordinance in district court on federal antitrust and labor law grounds, specifically that the Ordinance is preempted by the National Labor Relations Act (“NLRA”), 29 U.S.C. §§ 151–169, because drivers are “employees” under the NLRB. The Court held that drivers were not “employees” under the NLRB’s exemptions, but struck down the Ordinance on other grounds.

The Ninth Circuit affirmed the district court’s dismissal of the Chamber’s NLRA preemption claims, because the Chamber did not make any showing or set forth any evidence showing that the for-hire drivers covered by the Ordinance are arguably employees subject to the NLRA.
PROCEDURAL AND DISCOVERY ISSUES


A tolling period means that clock is paused, and resumes after the tolling period ends

Stephanie Artis filed a suit in district court against her employer, the District of Columbia ("DC"), alleging a claim under Title VII (42 U.S.C. §2000e) and three claims under DC law. At the time that she filed, nearly two years remained on the applicable statute of limitations for the DC law violations.

After the district court granted summary judgment for DC on the Title VII claim, it declined to exercise supplemental jurisdiction over her DC law claims. Fifty-nine days later, Artis filed a claim in the D.C. Superior Court on the DC law claims. DC argued that the claims were time-barred; the Superior Court dismissed, and the D.C. Court of Appeals affirmed.

The U.S. Supreme Court held that the tolling provision of 28 U.S.C. § 1367 suspends or "stops the clock" on the limitations period for supplemental state law claims while the underlying case is pending in federal court and for 30 days thereafter, rather than merely providing a 30-day grace period after dismissal for a plaintiff to refile in state court. When Artis first asserted her state-law claims in district court, nearly two years remained on the applicable three-year statute of limitations. Thus, the statute of limitations had not run out when she filed her DC law court claim 59 days after dismissal in federal court.

Three-year statute of limitations on claim for recovery of personal property does not begin to run until possession and control of the property took place.

The plaintiffs licensed their rights to produce replicas of Eleanor, the car that played a starring role in Gone in 60 Seconds, to the defendants. In return for the license, the defendants gave the plaintiffs among other things, the first licensed replica they built. But the defendants then terminated the agreement—having delivered the car, but never the title—to the clients. Five years later, the defendants falsely informed the Los Angeles Police Department that plaintiff had stolen the car, and had it seized from its display at a high-end dealership that had since become the plaintiff’s licensee. Plaintiffs’ sued the defendants, prevailing on both contract and tort theories (i.e., conversion).

On appeal, the defendants argued that the plaintiff never had the Eleanor rights to license in the first place, suggesting that the clients therefore never provided sufficient consideration for the first licensed replica and they were barred by the statute of limitations.

The Court of Appeal rejected these arguments entirely, holding that substantial evidence supported the plaintiffs’ ownership of the “Eleanor” trademark, and that the plaintiffs’ other intellectual property rights in the star car character were completely undisputed. Having provided sufficient consideration for the car, the plaintiffs were entitled to continue to possess it—and to take the title that the defendants had wrongfully withheld. Further, the court held the three-year statute of limitations on claim for recovery of personal property did not begin to run until the possession and control of sample replica movie car was wrongfully taken.
Sali v. Corona Regional Medical Center, 909 F.3d 996 (9th Cir. 2018)

Federal Rules of Civil Procedure Rule 37 authorizes a court to order a party to produce its nonparty expert witness at deposition.

The Ninth Circuit ruled that the district court did not abuse its discretion in assessing contempt sanctions (in the amount of the deposing party’s costs associated with the failed deposition) against a party for its expert witness’ failure to appear at a deposition.

As directed in the district court’s FRCP Rule 37 order, the party failed to show good faith efforts to assure expert’s appearance for deposition. Generally, a party may compel the opposing party’s expert to attend a deposition by serving a subpoena on the expert. Also, the party may move for an order under FRCP Rule 37 to compel the opposing party to attend the deposition. If subpoenaed, the expert is subject to contempt sanctions if he/she fails to appear for the deposition. In contrast, a FRCP Rule 37 order is only against the party. Therefore, if the expert fails to appear for the ordered deposition, the hiring party can only prevent sanctions from being awarded against him by a showing that it made good faith efforts to have the expert appear but failed in that effort.
Wassmann v. South Orange County Community College District, 24 Cal App. 5th 825 (2018)

Res judicata and exhaustion of judicial remedies barred community college employee’s claim because she did exhaust her administrative remedies with the DFEH within one year, and her claim for intentional infliction of emotional distress was barred by a two-year statute of limitations.

The South Orange County Community College District dismissed Plaintiff from employment as a tenured librarian. Several years later, Plaintiff obtained a right to sue notice from the California Department of Fair Employment and Housing (DFEH) and brought a lawsuit against the District, and several individuals, alleging causes of action for racial discrimination, age discrimination, and harassment in violation of the California Fair Employment and Housing Act (FEHA), California Government Code, § 12900 et seq., intentional infliction of emotional distress and two other causes of action.

The trial court granted two motions for summary judgment, one brought by the District Defendants and the other brought by two of the individuals on the ground the FEHA claims were barred by res judicata, collateral estoppel, or failure to exhaust administrative remedies, and the intentional infliction of emotional distress cause of action was barred by res judicata, collateral estoppel, or the statute of limitations.

The Court of appeal affirmed. After Plaintiff was dismissed from her employment and before filing her lawsuit, a five-day-long administrative hearing was conducted. After hearing testimony, receiving documentary evidence, and reviewing written arguments, the administrative law judge issued a 20-page decision upholding the District’s decision and determining there was cause for dismissing Plaintiff. The trial court upheld the administrative law judge’s decision by denying Plaintiff’s petition for writ of mandate.

Plaintiff’s FEHA causes of action arising out of dismissal from employment are therefore barred by the principals of res judicata and exhaustion of judicial remedies. Any other claims Plaintiff seeks under the FEHA are barred because Plaintiff did not file a complaint with the DFEH within one year of the date on which the alleged unlawful acts were undertaken. Finally, Plaintiff’s cause of action for intentional infliction of emotional distress was barred by the two-year statute of limitations.
CLASS ACTIONS

Fritsch v. Swift Transp. Co. of Arizona, LLC, 899 F.3d 785 (9th Cir. 2018)

Under CAFA, anticipated attorneys’ fees may be used to determine whether jurisdictional threshold is met

Employee brought a putative class action in state court against employer, alleging employer denied employees proper overtime pay, meal periods, and wage statements in violation of the California Labor Code. Following removal pursuant to the Class Action Fairness Act ("CAFA"), the district court granted employee’s motion to remand. Employer appealed.

The Ninth Circuit held:

- If a plaintiff would be entitled under a contract or statute to future attorneys’ fees, such fees are at stake in the underlying litigation and should be included in the amount in controversy.
- Defendant retains the burden of proving the total amount of future attorneys’ fees by a preponderance of the evidence.
- Ninth Circuit vacated district court’s order remanding to state court and instead remanded the case to district court to allow employer to prove that the amount in controversy, including future attorneys’ fees exceeded the CAFA jurisdictional threshold of $5,000,000.
- Prior to this decision, district courts in the Ninth Circuit were split on whether a court could include future attorneys’ fees in the amount in controversy.
Moen v. Regents of the University of California, 236 Cal.Rptr.3d 400 (2018)

Individual issues did not predominate in claim for impairment of an implied contract and individual damages are not a basis to decertify a class.

Group of retired employees of the University of California filed a lawsuit alleging the University promised to provide sponsored group health insurance during retirement. The employees brought a putative class action asserting, among other claims, of impairment of an implied contract, which was certified as a class. However, the trial court granted University’s motion to decertify the class.

The Court of Appeal reversed the order granting the motion to decertify in finding that the trial court erred by concluding individual issues exist when there is a written policy setting forth terms offered to employee, the employee’s understanding of the offer can be inferred without individualized proof. Moreover, individualized proof of damages does not defeat class certification “if defendant’s liability can be determined by facts common to all members of the class.” Finally, the Court held that actual economic damages are not required to show impairment of contract claims.
ATTORNEY’S FEES


J. Brent Arave was the managing director of the Desert Inland Empire Complex of Merrill Lynch, Pierce, Fenner & Smith, Inc.’s (“Merrill Lynch”). Merrill Lynch and Bank of American (“BOA”) conducted an anonymous employee satisfaction survey in 2010, and the results of the survey contained negative comments about Arave’s leadership and alleged that Arave showed favoritism toward members of the LDS church, of which he was a member. Arave’s regional manager, Joseph Holsinger emailed everyone in the region about the results in 2011. Arave replied to Holsinger to state that he had not yet reviewed the survey, but that he was interested in being promoted to director of a larger complex in Orange County. Thereafter, Holsinger informed Arave that he would not be considered for the promotion, partially based on the survey comments. Arave told Holsinger and a BOA human resources manager Katherine Anderson that he viewed the survey comments as harassing.

On March 29, 2011, Arave resigned and in May 2011 filed suit against BOA, Merrill Lynch, Holsinger, and Anderson. On June 11, 2012, Defendants made Arave an offer to compromise pursuant to California Civil Code of Procedure §998 for his seventh cause of action for failure to pay wages, which he rejected. After a trial in August 2013, the jury found for the defendants. The trial court denied Arave’s post-trial motions and awarded defendants $54,545.18 in costs and $29,097.50 in expert witness fees, as well as $97,500 for attorney fees incurred while defending Arave’s wage claim.

The Court of Appeal found that

- The trial court erred by awarding $97,500 in attorney’s fees on the wage claim without determining whether that claim was frivolous pursuant to California labor Code §218.5. The court of appeal and reversed and remanded to determine whether attorney fees are appropriate under this standard.
- the trial court did not abuse its discretion in concluding that an award of attorney fees to Defendants under California Government Code §12965 was not justified,
- Under Williams v. Chino Valley Independent Fire Dist. (2015) 61 Cal.4th 97, the trial court erred by awarding $54,545.18 in costs and $29,097.50 in expert witness fees though it found employee’s FEHA claims were nonfrivolous. The standard applicable to attorney fees and ordinary costs also applies to expert witness fees for a prevailing FEHA defendant. The conflict between §998 and §12965 is resolved in favor of FEHA.
- This decision parts ways with Svirdov v. City of San Diego (2017) and Holman v. Altana Pharma US, Inc. (2010) 186 Cal.App.4th 262

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Employee who successfully brings wrongful termination claim under the FLSA in state court is entitled to attorney fees and case costs.

A case of first impression, the California Court of Appeal held that federal law applies to the determination of what types of costs are recoverable by a prevailing party in a Fair Labor Standards Act ("FLSA") action filed in state court.

Employee filed a wrongful termination claim in violation of the FLSA, 29 U.S.C. § 203. In addition to the damages she recovered at trial, the court awarded employee $689,310.04 in attorney fees and $50,591.69 for costs. The Court of Appeal affirmed the award of fees and costs in holding that section 216(b) provides that any employer who wrongfully terminates an employee in retaliation for filing an FLSA claim shall be liable for reasonable attorney fees and costs. In addition, the court held that "federal law must apply in determining the recoverability of certain type of costs in an FLSA action" and this provides for reimbursement of photocopying, postage, and mediation expenses to parties who prevail on FLSA claims.

Employee was entitled to voluntarily dismiss his action against employer prior to it being submitted to the court for decision

Achikam Shapira sued his former employer, Lifitech Resources, LLC for breach of contract. The case proceeded to a bench trial, and after the parties rested, the parties agreed that they would submit closing argument briefing and Court stated that the matter would stand submitted upon receipt of the reply brief. Before submitting his closing brief, Plaintiff filed an ex parte application requesting that the matter be dismissed with prejudice pursuant to Cal. Code of Civil Procedure § 581(e).

The trial court denied the request to dismiss, ruled in favor of employer, and awarded employer $137,000 in costs and prevailing party attorneys’ fees under the agreement.

The Court of Appeal reversed the judgment and held that employee had the right to dismiss the action before completion of the trial, which here included written closing arguments, and therefore employer was not the “prevailing party” nor was it entitled to recover attorneys’ fees.

After appeal of judgment from Labor Commissioner and Superior Court, employer ordered to pay nearly $100,000 in attorney fees and penalties for unpaid wage claim of $304.45

Employer Thomas Beck had an employee of two months, Anthony Stratton, who quit and claimed he was owed wages of $1,075.00. Beck’s payroll services paid him $771.45. Stratton then filed a claim with the Division of Labor Standards Enforcement for the approximate difference of $304.45. After a hearing, the Labor Commissioner awarded Stratton the wage difference plus $5,757.46 in penalties, damages and interest.

Beck sought de novo review and appealed the award to the Superior Court under Labor Code section 98.2(a). The superior court awarded Plaintiff $6,778 in wages and penalties and $31,365 in attorney’s fees.

Beck again appealed, this time to the appellate court on the basis that the motion for attorney fees was untimely because the civil case was limited, as well as the fact that the fee was unreasonable. The appellate court affirmed the superior court but directed the parties to bear their own costs of appeal.

Stratton’s counsel then sought appellate fees in the superior court under Cal. Labor Code §98.2(c)(2) and was awarded in the amount of $57,420. Beck filed a motion for reconsideration, which the court denied.

Beck again appealed to the appellate court on the basis that the appellate court had ordered the parties to bear their own costs. The appellate court affirmed the trial court’s decision to award fees because the attorney fees under California labor Code §98.2(c) are not costs, and the trial court did not abuse its discretion in granting a fee award.
MISCELLANEOUS CASES


Forfeiture provision of CCERA applied to public employee who had submitted his application but had not been approved as a retired member of the CERL.

Plaintiff Jon Wilmot commenced employment with the Contra Costa County Fire District in 1985, thereafter rising to the rank of captain by 2012. During his employment, Wilmot was a member of the retirement program, administered by the Contra Costa County Employees’ Retirement Association (“CCERA”). At the end of 2012, Wilmot decided to retire with his final day on December 12, 2012. The following day, Wilmot submitted his “application for a service retirement.” On January 1, 2013, the Public Employees’ Pension Reform Act took effect, which mandated the complete or partial forfeiture of pension benefits/payments if a public employee is convicted of “any felony under state or federal law for conduct arising out of or in the performance of his or her official duties.” Gov. Code 7522.72(b)(1). On March 19, 2013, CCERA received Wilmot’s “Choice of Retirement Allowance” and the following month sent Wilmot his first monthly pension check for $8,758.46.

In April 2013, CCERA formally approved Wilmot’s retirement application with a fixed retirement date as of December 13, 2012. In February 2013, Wilmot was indicted for four felony charges and in December 2015, Wilmot entered a plea of not contest to a single charge. CCERA then advised Wilmot that due to his conviction, his monthly check would be reduced per the forfeiture provision that took effect in January 2013.

The Court of Appeal held that the forfeiture provision applies to Wilmot and declined to address whether it would amount to an unconstitutional impairment of his employment contract or an ex post facto law for someone in a different situation. It further ruled that finishing the last day of work does not automatically make a public employee a “retired” former employee. As such, the court of appeal stated that it found that a public employee who has submitted application for retirement, and who is no longer actually working, is in a state of limbo until the application is approved by the retirement board. It is only with that approval that the employee can be considered “a retired member” for purposes of CERL. On January 1, 2013, when the Pension Reform Act and section 7522.72 took effect, Wilmot’s application had been submitted but not yet approved by CCERA. Because Wilmot did not become officially retired until April 2013, he was subject to the new forfeiture provision.
PRIVACY RIGHTS

Connor v. First Student, Inc., 5 Cal. 5th 1026 (2018)

Employer’s failure to obtain written authorization prior to conducting background check of employee violated investigative consumer reporting statute

Eileen Connor was a bus driver for Laidlaw Education Services, which First Student, Inc. (“First”) acquired in 2007. First hired a consumer reporting agency to conduct background checks on its employees in 2007, 2009 and 2010. Before conducting these checks, First sent Connor a notice that First’s vendor planned to prepare a report, and that she could view the file maintained on her, receive a summary by phone, or obtain a copy. The notice also explained that Connor could request an investigative consumer report and included a check box that described her rights under the Investigative Consumer Reporting Agencies Act (“ICRAA”), California Civil Code §1786; if she checked the box, she could obtain a copy. Notably, it also said that checking the box would release First from all claims and damages arising from its background investigation.

Connor sued alleging that the notice did not satisfy the ICRAA’s requirements and that First failed to obtain her written authorization to conduct the background check in the first instance. First moved for summary judgment on the basis that the ICRAA is unconstitutionally vague because it overlaps with Consumer Credit Report Agencies Act (“CCRAA”), California Civil Code §1785.1 et seq., and that the proper notice was provided. The trial court granted the motion.

The appellate court reversed the trial court, finding that although ICRAA and CCRAA overlap, agencies that provide the reports could comply with each without violating the other.

The California Supreme Court agreed. Although the ICRAA overlaps with the Consumer Credit Report Agencies Act (“CCRAA”), the overlap does not render the ICRAA unconstitutionally vague where the statutes are otherwise unambiguous. If an employer seeks a consumer’s credit records exclusively, then the employer need only comply with CCRAA. An employer seeking other information that is obtained by any means must comply with ICRAA. In the event that any other information revealed in an ICRAA background check contains a subject’s credit information and the two statutes thus overlap, a regulated party is expected to know and follow the requirements of both statutes.
Extraneous documents and language inapplicable to employee that were not part of the mandated disclosures under FCRA and ICRAA violated the standalone document requirement

Employee brought a putative class action for disclosures made by employer during the application process that Employee alleged violated both the federal Fair Credit Reporting Act (FCRA) and California’s Investigative Consumer Reporting Agencies Act (ICRAA).

The Ninth Circuit confirmed that Syed v. M-I, LLC, 853 F.3d 492 (9th Cir. 2017) applied to any “extraneous” information in employment background check disclosures required by the two statutes. In Syed, the Court held that an employer acted “willfully” in violation of the FCRA when it included a liability waiver in its FCRA disclosure.

Here, the Court held that extraneous documents and language applying to rights under state laws inapplicable to the plaintiff that were not part of the mandated disclosures under FCRA and ICRAA violated the standalone document requirement under these statutes as the “extraneous information is as likely to confuse as it is to inform [and therefore] does not further FCRA’s purpose.”
UNFAIR COMPETITION


Employer non-solicitation agreement that barred former employee from soliciting or recruiting any worker listed in employer’s database for one year was void

AMN Healthcare, Inc. (“AMN”) sued its former employees and a competitor, Aya Healthcare (“Aya”), for breach of contract and misappropriation of trade secrets. AMN recruited and hired temporary nurses, as did Aya. The basis of the suit was that when the former employees left AMN and joined Aya, they violated the AMN’s signed confidentiality and non-disclosure agreement (“CNDA”) that was a condition of employment with AMN. The CNDA barred a former AMN recruiter from soliciting or recruiting any travel nurse listed in AMN’s database for one year. Aya and the former employees cross-complained for declaratory relief and unfair business competition. Aya moved for summary judgment on both their cross-complaint and on AMN’s complaint, which the court granted. The court enjoined AMN from enforcing the non-solicitation provision in the CNDA and awarded attorney fees under California Code of Civil Procedure §1021.5. AMN appealed.

The Court of Appeal reasoned that under California Business and Professions Code §16600, the provision of the CNDA that prevented employees from directly or indirectly soliciting any employee of recruiter for a specified period after termination of employment was void. AMN also failed to allege that any of its trade secrets were used to solicit its travel nurses. Finally, under trade secret analysis, protected information includes that which is unknown and is intended to remain unknown to others. However, Aya was in possession of the contact information for a number of travel nurses at issue prior to AMN’s former employees joining Aya. Additionally, these travel nurses belong to a public social media group with 30,000 members and can be messaged via that application. Therefore, the placement, names, and contact information of travel nurses was not a trade secret.

The Court of Appeal also affirmed the order on attorney’s fees because the action also conferred a significant benefit on a large class of persons, namely, all current and former AMN California employees who had signed a CNDA containing a similar non-solicitation of employee provision.

Agreements which limit former employee’s ability to seek or maintain employment with third parties violates California’s Unfair Competition law

Dr. Donald Golden sued his former employer California Emergency Physician’s Medical Group ("CEP") for race discrimination in state court. CEP moved to federal court and the magistrate judge conducted a settlement conference, where the parties orally agreed to settle the case. However, Dr. Golden refused to sign the written settlement agreement because one of its provisions required that he not work at any CEP facility or any CEP contracted facility, and that if CEP acquires rights in a facility that Dr. Golden works at in the future, it may remove him from employment.

Dr. Golden’s attorney withdrew, intervened, and moved for enforcement of the settlement agreement. The district court granted the motion, finding that California Business and Professions Code §16600 did not apply because the agreement would not prevent Dr. Golden from competing with CEP, and it was not a restraint on his medical practice. Dr. Golden appealed, and the Ninth Circuit remanded to the district court to determine whether the agreement constituted a restraint of “substantial character.” On remand the district court concluded that the agreement was not a restraint of substantial character and ordered Dr. Golden to resign, who again refused, and denied Dr. Golden a jury trial. Dr. Golden appealed again.

The Ninth Circuit held that the agreement did impose a restraint of substantial character because it significantly impeded the physician’s lawful practice of medicine. A contractual provision imposes a restraint of a substantial character if it significantly or materially impedes a person’s lawful profession, trade, or business. Interference with an employee’s ability to seek or maintain employment with third parties. Because CEP’s agreement proposed to limit Dr. Golden’s future employment with third parties, it was impermissible violative of California Business and Professions Code §16600.

Employee cannot maintain action for employer’s “theft” of labor by false pretenses under stolen property statute

In 2010, Richard Morrison and Jud Gardner formed a company called Comprehend Systems (collectively, “Comprehend”). In June 2012 Comprehend hired David Lacagnina as director of business development. His employment contract called for a salary, plus twenty percent commission on his customer sales. It also provided that Comprehend would recommend that Lacagnina be granted stock options. The contract stated that it was at will employment.

Lacagnina continued to work at Comprehend, obtaining sales contract, and negotiated new terms for employment; however, in June 2013, Comprehend offered an amended employment agreement, which did not contain the terms that had been discussed in negotiation. Although he told Morrison that he wanted to have the agreement reviewed by an attorney, Lacagnina signed the new agreement. In August 2013, Comprehend hired a new Vice President of Sales, who started work in September 2013. In October 2013, Lacagnina was told to transition his accounts to the new Vice President of Sales, and in November 2013, Lacagnina was terminated from employment.

Lacagnina filed suit against Comprehend, Morrison, and Gardner for, inter alia, fraud, breach of contract, violation of California Penal Code §496, breach of the covenant of good faith and fair dealing, alleging that his labor was taken by “fraudulent representation” or “false ... pretense” as a result of his employer’s fraudulent representation, and that he “never received full compensation, or the opportunity to obtain full compensation, for his work. The trial court denied Comprehend’s motion for summary judgment, and after a ten-day jury trial, the jury found for Lacagnina. Comprehend moved for judgment notwithstanding the verdict, and the trial court granted the motion as to the fraud claim. Lacagnina appealed.

The appellate court held that California Penal Code §496 refers to receiving stolen property, and that the statute statutory definition makes no reference to labor or other services under the definition of property. Additionally, Lacagnina received a contractually agreed-upon salary, and had a dispute with his employer about the commissions and other compensation.
STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION ("SLAPP")

Bel Air Internet, LLC v. Morales, 20 Cal. App. 5th 924 (2018)

Employer’s lawsuit against employee for encouraging other employees to sue employer was subject to strike under anti-SLAPP

Albert Morales and Flavio Delabra worked as installers for Bel Air Internet, LLC ("Bel Air"), a DirecTV service provider. In June 2015, a Bel Air manager, met with Bel Air employees to provide them with new hourly payment procedures, including overtime, and meal and rest breaks. He also provided a general release which released the claim of misclassification of an employee as exempt rather than nonexempt ("Release"). Morales and Delabra declined to sign the Release. Morales and Delabra alleged that their manager told them Bel Air would end their employment if they did not sign the Release. Thereafter, Bel-Air’s owner told Morales that he would “need to find ... another job” and wished Delabra “good luck in the future.” Bel Air offered a settlement agreement and general release and proposed a settlement payment of $1,500.00. Morales and Delabra believed that they had been terminated from employment.

Bel Air filed suit against Morales and Delabra, alleging that they interfered with its contractual relationship with other Bel Air employees by encouraging them to leave their jobs and sue Bel Air. Morales and Delabra filed a motion to strike under California Civil Code of Procedure §425.16, as a strategic lawsuit against public participation (“anti-SLAPP”). Morales and Delabra alleged that Bel Air until June 2015 had paid them as exempt, not paying them for hours worked above eight hours per day or 40 hours per week, and they were not informed of their right to meal and rest breaks or compensated for missed breaks. The trial court found that Morales and Delabra were not in good faith considering suing Bel Air in their prelitigation activities, but that Bel Air failed to meet its burden to show a probability that it would prevail on its claims.

A special motion to strike arises under anti-SLAPP when a plaintiff’s claims arise from certain acts constituting the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on its claims. Ruling on an anti-SLAPP motion involves a two-step procedure: (1) the moving defendant must identify all allegations of protected activity and show that the challenged claim arises from that activity, and if the defendant makes such a showing, (2) the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated.

The Court of Appeal held the trial court erred in denying employees’ motion to strike. The employees were entitled to rely on the pleadings alone which alleged protected conduct. A moving party has no duty to submit declarations confirming the factual basis for the plaintiff’s claims. Therefore, employees had no duty to support their motion to strike with declarations confirming their conduct fell within a category of protected conduct. Because communications that are preparatory to or in anticipation of the bringing of an action or other official proceeding, including counseling or encouraging others to sue, are within the scope of protected conduct, Bel Air’s allegations that Morales and Delabra encouraged other Bel Air employees to sue was protected prelitigation conduct.
**MMM Holdings, Inc. v. Reich, 21 Cal.App.5th 167 (2018)**

*Attorney for employee whistleblower who provided proprietary documents to other attorneys pursuing legal action against same company was not subject to suit by company for wrongful possession or distribution of company documents*

Jose “Josh” Valdez, former president of MMM Holdings, Inc.’s subsidiary MSO of Puerto Rico (collectively “MMM”) filed a qui tam action under seal pursuant to the False Claims Act, 31 U.S.C. 3729, in district court. MMM operated Medicare Advantage plans in Puerto Rico, and Valdez alleged that MMM overcharged Medicare by more than one billion dollars between 2007 and 2010. The gist of the qui tam action was that MMM knowingly submitted inaccurate, incomplete, and misleading data to the government in order to increase payments made to the plans and that MMM retaliated against Valdez for his speaking out about MMM’s overbilling practices.

When Valdez’s employment ended with MMM in December 2010, he kept the company laptops and electronic information. MMM demanded the return of the laptops and information following the separation from employment, but Valdez did not return them. In January 2014, the United States declined to intervene, and the complaint was unsealed and served. MMM then became aware of the qui tam action, at which point, it inquired in August 2014 whether Valdez had company documents. Valdez’s attorney Marc Reich sent MMM’s attorneys over 25,000 emails and other electronic documents. MMM learned that Valdez’s attorney had provided certain of this information to different attorneys in other matters. MMM argued that these documents were confidential and proprietary, but Valdez’s counsel contended that he provided documents to other attorneys to help prove the common issue of MMM’s failure to pay or underpaying non-plan providers.

In November 2015 MMM filed suit against Reich based on allegations that Reich wrongfully took possession of documents, wrongfully disclosed the documents to third parties, and wrongfully refused to return them. Reich moved to strike the complaint under California Civil Code of Procedure §425.16 on the grounds the case is as a strategic lawsuit against public participation (“SLAPP”). The trial court granted the motion and found the claims asserted by MMM against Reich involve Reich’s petitioning activity protected by the anti-SLAPP statute, because the gravamen of each of MMM’s causes of action is that Reich, while acting as Valdez’s attorney, received purportedly stolen, confidential and/or privileged documents from his client who was or was about to be and still is embroiled in litigation with plaintiffs and that he refuses to return them to plaintiffs despite their demand. The court also found that MMM could not show that they would prevail as their claims were directed at activity protected by litigation privilege. MMM appealed.

The Court of Appeal considered the two-step procedure for anti-SLAPP motions: (1) the moving defendant must identify all allegations of protected activity and show that the challenged claim arises from that activity, and if the defendant makes such a showing, (2) the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated.

On the first prong, the Court of Appeal found that Reich’s use of documents received from Valdez in connection with the qui tam action constituted protected activity. Whether Reich’s transmittal of documents to non-qui tam action attorneys was protected is difficult to disentangle, the
distribution of documents was done in furtherance of the exercise of the constitutional right of petition and of free speech and was done to further litigation efforts. The integrity of the health care system is a matter of widespread public concern.

On the second prong, MMM could not show that they could prevail on their claim, because Reich owed them no contractual duty, and all the conduct alleged agains: Reich was protected by the litigation privilege.
Signing settlement agreement “Approved as to form and content” did not subject plaintiff’s counsel to liability for its breach of the confidentiality provision

A family filed a lawsuit against Monster Energy Company (“Monster”). The parties entered into a settlement agreement, which had a confidentiality provision, as well as signature blocks for the attorneys stating, “approved as to form and content.”

Plaintiff’s counsel gave an interview to www.lawyersandsettlements.com and described a recent case where a child consumed “two Monster energy drinks, went into cardiac failure, and died,” the resolution was “substantial dollars for the family,” and “Monster wanted the amount to be sealed.” Lawyersandsettlements.com published the statements, which generated leads for the attorneys, and one employee of lawyersandsettlements.com was also a non-lawyer employee of one of employees’ law firms. Monster filed an action for breach of contract, *inter alia*, against plaintiff’s counsel. Plaintiff’s counsel filed an anti-SLAPP motion and argued that because counsel was not a party to the agreement, Monster could not show a probability of prevailing. The trial court denied the motion with respect to the breach of contract cause of action but granted it to the remainder, explaining that the settlement contemplates counsel being subject to the agreement.

The Court of Appeal found that Monster did not show that plaintiff’s counsel’s speech served a commercial purpose and therefore did not fall clearly within the commercial speech exemption in the anti-SLAPP statute. Plaintiff’s counsel also was not defined as a party in the agreement. Plaintiff’s counsel cannot be not liable to employer for breach of confidentiality provision where the settlement agreement provided “plaintiffs and their counsel agree” to keep the terms of the agreement confidential, and where employees’ counsel signs the agreement under the words, “Approved as to form and content.”

An attorney’s signature under words such as “approved as to form and content” means only that the document has the attorney’s professional thumbs-up. It follows that it does not objectively manifest the attorney’s intent to be bound; however, Monster may have a cause of action against the family for their attorney’s breach or could state a cause of action against plaintiff’s counsel as a third-party beneficiary of the attorney-client contract between the employees and their counsel.
In July 2012, Ernesto Ruiz filed a putative class action in San Bernardino County Superior Court against Moss Bros. Auto Group, Inc. ("MBAG") for violations of the California Labor Code. MBAG petitioned to compel arbitration of the individual claims pursuant to an electronically signed arbitration agreement, which the court denied. The appellate court affirmed the denial because MBAG did not show that Ruiz had electronically signed the arbitration agreement. After remittitur, in March 2015 MBAG filed a second petition to compel arbitration, arguing that Moss Bros. Toy, Inc. had been Ruiz's employer, and that it, not MBAG, had entered into arbitration agreements with Ruiz. In April 2015, MBT then applied to intervene, which the trial court denied as untimely. The court also denied the second petition to compel arbitration as a "another bite at the apple." The appellate court affirmed the order denying MBT's intervention as MBT showed no reason for its unreasonable delay.

In September 2015, after the trial court denied MBT's application to intervene, MBT filed an action in Riverside County Superior Court against Ruiz for breach of written contract for arbitration and for breach of the covenant of good faith and fair dealing, alleging that Ruiz breached the arbitration agreements by filing a complaint against MBAG. MBT filed a notice of related case and the case was transferred to San Bernardino County Superior Court to the same trial judge on the San Bernardino action. MBT then petitioned to compel arbitration of Ruiz's individual reemployment claims, with the trial court denied.

Ruiz demurred to MBT's complaint and MBT filed a first amended complaint, again alleging causes of action all based on Ruiz's refusal to submit his claims to arbitration and for filing his putative class action in court.

Ruiz moved to strike under California Civil Code of Procedure §425.16, as a strategic lawsuit against public participation ("anti-SLAPP"). The trial court granted the anti-SLAPP motion ruling that Ruiz showed that the acts alleged were in furtherance of his right of petition, and that MBT had failed to demonstrate a probability of prevailing on its claims. MBT appealed.

The Court of Appeal affirmed the grant of employee's motion, finding that MBT's entire complaint was based on Ruiz's exercise of protected right of petition based on his refusal to submit his individual employment related claims to arbitration and his act, instead, of filing a putative class action complaint for those claims against MBAG. But for Ruiz filing a complaint against MBAG, MBT would not have filed its lawsuit alleging breach of the arbitration agreement.
Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism, 4 Cal.5th 637 (2018)

Anti-SLAPP motion to strike an amended complaint may seek dismissal of causes of action that were not included in the earlier complaints, however an anti-SLAPP motion is untimely as to claims included in prior complaints.

California’s anti-SLAPP statute, Code of Civil Procedure § 425.16, permits a defendant to file an anti-SLAPP motion “within 60 days of the service of the complaint or, in the court’s discretion, at any later time upon terms it deems proper.” (§ 425.16, subd. (f).) Defendants filed their anti-SLAPP motion within 60 days of the third amended complaint, but not within 60 days of any earlier complaint. The third amended complaint contained some of the same causes of action as earlier complaints.

The Court of Appeal held that an anti-SLAPP motion to strike an amended complaint may seek dismissal of causes of action that were not included in the earlier complaints, however an anti-SLAPP motion is untimely as to claims included in prior complaints. Subject to the trial court’s discretion under section 425.16, subdivision (f), to permit late filing, a defendant must move to strike a cause of action within 60 days of service of the earliest complaint that contains that a cause of action subject to the anti-SLAPP statute.

Taxpayer privilege cannot shield employer from whistleblowing claim regarding underpayment of tax

Says Siri was employed as an accountant at Sutter Home Winery ("Sutter") and her duties included filing sales and use tax returns. She had reasonable cause to believe that Sutter was not in compliance with state law relating to use tax payments and disclosed to her direct supervisor and to the State Board of Equalization her concerns about Sutter’s responsibility to report and pay use taxes. Sutter declined to allow Siri to make payment of unpaid use tax owed, but still contended that Siri was wrong, and Sutter compliant, even though the Board of Equalization had confirmed that Siri was correct.

Siri alleged that Sutter retaliated against her and ultimately terminated her employment. She filed suit under California Labor Code §1102.5. Sutter moved for summary judgment on the basis that to prove her causes of action, Siri must rely on Sutter’s tax returns, which would invade Sutter’s privilege. The trial court granted summary judgment.

The Court of Appeal reversed, holding though the tax returns would strengthen her case, Siri may rely on her own testimony and the testimony of other witnesses to prove that she was impossibly discharged for the reason she asserts. Prosecution of plaintiff’s claim does not require the forced production of defendant’s returns or of the content of its returns. Her right to recover turns only on whether she was discharged for communicating her reasonable belief that defendant was not properly reporting its use tax obligation. Finally, the trial courts can and should apply an array of ad hoc measures designed to permit the plaintiff to attempt to make the necessary proof while protecting from of privileged information.

A party’s use of surreptitiously recorded conversations with a business associate during an arbitration proceeding is not a protected activity for purposes of the anti-SLAPP statute.

Plaintiff filed a superior court action against the defendant for invasion of privacy and eavesdropping on or recording confidential communications in violation of Penal Code sections 632 and 637.2. The defendant had secretly recorded conversations with plaintiff, and then, then introduced the recordings as evidence in an arbitration. The arbitrators ultimately decided in favor of the defendant. In the civil action the defendant’s special motion to strike under section Code of Civil Procedure section 425.16 (the anti-SLAPP statute) was denied.

The Court of Appeal affirmed and held that recording secret business conversations and using the recordings in an arbitration were not in connection with a judicial or official proceeding authorized by law, and therefore they were not protected activities under the anti-SLAPP statute.
IMMIGRATION AND EMPLOYMENT


California cannot restrict employers from complying with federal immigration law but can require that employers inform their employees of anticipated immigration activity.

The United States of America (“USA”) brought action against the State of California (“State”) in district court alleging preemption of a number of California statutes relating to enforcement of federal immigration law, including, *inter alia*, statutes imposing requirements on private employers regarding immigration worksite enforcement actions; statute restricting reverification of employment eligibility; and statutes restricting information-sharing with federal immigration enforcement authorities. The United States sought a preliminary injunction, arguing that under the Supremacy Clause of the United States Constitution, federal immigration law including Immigration and Nationality Act (“INA”), 8 U.S.C. §1101 et seq. preempts the challenged State statutes.

The preliminary injunction standard requires that a party show that (1) it is likely to succeed on the merits of its claim, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of the equities tips in its favor, and (4) an injunction is in the public interest.

AB 103 added Section 12532 to the California Government Code and directs the Attorney General to review and report on county, local, and private locked detention facilities in which noncitizens are housed or detained for purposes of civil immigration proceedings in California. The district court found that USA was not likely to succeed on the merits of a conflict preemption challenge to AB 103 requiring review and report concerning detention facilities, because the report would not be publicly disclosed, and there was no indication in the INA that Congress intended for States to have no oversight over detention facilities operating within their borders.

AB 450 placed new duties on employers: (1) it prohibited employers from providing voluntary consent to an immigration enforcement agent to enter nonpublic areas of a place of labor or to access, review, or obtain the employer’s employee records. Cal. Gov’t Code §§ 7285.1, 7285.2; (2) it required employers to provide notice to their employees of any impending I–9 (or other employment record) inspection within 72 hours of receiving notice of that inspection. Cal. Lab. Code §90.2; (3) it prohibited employers from reverifying the employment eligibility of current employees when not required by federal law. Cal. Lab. Code § 1019.2.

USA challenged AB 450 as to private employers under Immigration Reform and Control Act (“IRCA”), 8 U.S.C. § 1324a. IRCA imposes criminal sanctions on employers who knowingly hire, recruit, refer, or continue to employ unauthorized workers, but does not impose criminal sanctions on employees. Although laws governing labor relations and the workplace generally fall within the States’ police powers, the district court found that USA was likely to succeed on the merits of a conflict preemption challenge to AB 450 under the Supremacy Clause as to Cal. Gov’t Code §§ 7285.1, 7285.2. because as the imposition of civil fines on an employer turns on whether an employer chooses to work with federal immigration enforcement. USA was also likely to succeed on the merits of a conflict preemption challenge to AB 450 as to California Labor Code 1019.2 because employers
have a continuing obligation to avoid knowingly employing an unauthorized worker, and this statute prevents employers from reverifying the employment eligibility of current employees.

However, the district court found that USA was not likely to succeed on the merits of a conflict preemption challenge to AB 450 as to California Labor Code §90.2 requiring private employers to provide notice to employees of any impending record inspection, because this mirrors the same notice that employers themselves receive from USA under IRCA;

Finally, SB 54 added subsections to the California Government Code regarding law enforcement. USA challenged three provisions, two of which prohibited state law enforcement agencies from sharing certain information for immigration enforcement purposes, and one of which prohibited law enforcement’s transfer of an individual to immigration authorities unless authorized by a judicial warrant or judicial probable cause determination. The district court found that USA was not likely to succeed on the merits of a conflict preemption challenge because under the police power of the State, its directive to its law enforcement agencies is not preempted, and USA cannot compel the State’s involvement in immigration activity.
2019 LEGISLATIVE UPDATE – BILLS PASSED IN 2018

SEXUAL HARASSMENT

AB 1619 – Sexual Assault – Statutes of Limitations on Civil Actions

- Extends statute of limitations to file civil action for assaults that occurred on or after the plaintiff’s 18th birthday to the later of 10 years from the date of the last act, attempted act, or assault with the intent to commit an act of sexual assault or within three years from the date the plaintiff discovers or reasonably should have discovered an injury or illness resulting from an act, attempted act, or assault with the intent to commit an act of sexual assault.

- Prior law provided that civil actions must be commenced by the later of 3 years from the date of the last act of violence or within 3 years from the date plaintiff discovered or reasonably should have discovered the injury or illness.

AB 2338 – Talent Agencies – Education and Training

- Requires talent agency to provide educational materials about sexual harassment prevention, retaliation, and reporting to its artists. At a minimum, the materials shall include the information listed in the Department of Fair Employment and Housing’s Form 185. Materials may be provided electronically, such as a website or other means.

- Requires talent agency to make available educational materials regarding nutrition and eating disorders available to adult artists within 90 days of agreeing to representation.

- Talent agencies must keep records for three years confirming it has made the required information available.

- Prior to receiving a minor work permit, representatives of, and minors between ages of 14 to 17, must receive training about sexual harassment prevention, retaliation, and reporting resources.

- Requires talent agency to request and retain a copy of a minor’s entertainment work permit prior to representing or sending minor to an audition, meeting, or interview.

AB 3109 – Contracts and Settlement Agreements – Waiver of Right to Testify

- New law makes unenforceable any provision in a contract or settlement agreement entered into on or after January 1, 2019, that waives a party’s right to testify in a proceeding concerning alleged criminal conduct or alleged sexual harassment on the part of the other party when the party has been required or requested to attend proceeding.
- Can apply to severance agreements and other contracts provided to employees, not just settlement agreements.

**SB 224 – Personal rights – Civil liability and Enforcement**
- Civil Code section 51 prohibits sexual harassment in certain business, service or professional relationships. This bill adds “investor, elected official, lobbyist, director, and producer among those listed persons who may be liable to a plaintiff for sexual harassment” under Civil Code section 51.9 of who may be personally liable for sexual harassment.

**SB 820 – Settlement Agreements – Confidentiality Clauses**
- Prohibits provision in settlement agreement that prevents the disclosure of factual information relating to certain claims of sexual assault, harassment, or discrimination.
- Can still make amount paid in settlement agreement confidential.

**SB 970 – Employment – Human Trafficking Awareness**
- Requires hotel and motel operators to provide at least 20 minutes of “interactive training and education” regarding human trafficking awareness to employees who are likely to interact or come into contact with victims of human trafficking.
- Require training must take place by January 1, 2020 and must be provided to employees within six months of employment in such a covered position. Training is required once every two years thereafter.
- Training is required, but is not limited to, the following positions: “an employee who has reoccurring interactions with the public, including, but not limited to, an employee who works in a reception area, performs housekeeping duties, helps customers in moving their possessions, or drives customers.”

**SB 1300 – Sexual Harassment – Changes to Fair Employment & Housing Act**
- Removes the existing requirement that plaintiff must prove that the relationship could not easily be terminated.
- Expands employer liability to cover nonemployee harassment based on other forms of harassment other than sexual harassment (such as harassment based on age, race, etc.) if the employer knew or should have known of the conduct and did not take remedial steps.
- Prohibits an employer, in exchange for a raise or bonus, or as a condition of employment of continued employment, from requiring the execution of a release of a claim or right under FEHA or from requiring an employee to sign a non-disparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment.
  - May include a release of claims if the agreement is a “negotiated” settlement agreement
- Makes obtaining summary judgment for employers more difficult.

- Makes a single incident of harassing conduct sufficient to create a triable issue of hostile work environment if the conduct has unreasonably interfered with the plaintiff’s work performance or created an intimidating, hostile, or offensive working environment.

- Rejects the “stray remarks doctrine” and allows evidence of stray remarks even if not made directly in the context of an employment decision or made by a non-decisionmaker.

- Adopts standard set forth by Ruth Bader Ginsburg in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) that “the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find...that the harassment so altered working conditions as to make it more difficult to do the job.”

- The bill also provides that a prevailing defendant is prohibited from being awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so.

- Provides for optional training by employer: An employer may also provide bystander intervention training that includes information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors. The training and education may include exercises to provide bystanders with the skills and confidence to intervene as appropriate and to provide bystanders with resources they can call upon that support their intervention.

**SB 1343 – Sexual Harassment Training Expanded to Nonsupervisory Employees**

- Bill requires employers with 5 or more employees, including temporary or seasonal employees, to provide:
  - at least 2 hours of sexual harassment training to all supervisors and
  - at least one hour of sexual harassment training to all nonsupervisory employees by January 1, 2020, and once every 2 years thereafter.

- Initial training must be completed within 6 months of hire.

- Department of Fair Employment and Housing is required by the law to develop an online training that complies with the law.

**CORPORATE GOVERNANCE**

**SB 826 – Corporations – Board of Directors**

- Requires public companies who have principle executive offices in California to have a set number of women on the board of directors.
• By end of 2019: At least one female director
• By end of 2021: Corporations with five directors must have at least two female members, and corporations with six or more directors must have at least three female members.

WAGE AND HOUR

- Exempts employers in the construction industry from PAGA penalties as long as a valid collective bargaining agreement (“CBA”) covers the work performed and provides for the following:
  • Expressly provides for the wages, hours of work, and working conditions of employees,
  • Premium wage rates for all overtime hours worked,
  • Employees to receive a regular hourly pay rate of not less than 30 percent more than the state minimum wage
  • Prohibits all violations of the Labor Code redressable under PAGA
  • Expressly waives the requirements of PAGA in clear and unambiguous terms
  • Authorizes an arbitrator to award all remedies available under PAGA, except for the award of penalties that would be payable to the Labor and Workforce Development Agency
- Effective January 1, 2019.

SB 1252 – Payroll Records – Right to Receive Copy of Pay Records
- Existing law grants current and former employees of employers who are required to keep this information the right to inspect or copy records pertaining to their employment, upon reasonable request. Existing law requires an employer to respond to these requests within a specified time. This bill provides that employees have the right to receive a copy of the employment records described above and apply the associated time requirements and penalty provisions in this context.

HIRING

AB 2282 – Salary history information – Fair Pay Act Clarifications
- Clarifies California’s Fair Pay Act, which prohibits employers from relying on salary history information of an applicant for employment as a factor in determining whether to offer a position and the level of salary.
  • “Pay scale” means “a salary or hourly wage range.”
- “Reasonable request” means a “request made after an applicant has completed an initial interview with the employer.”

- Clarifies that nothing prohibits employers from asking an applicant about his or her salary expectation for the position.

- Clarifies that “applicant” or “applicant for employment” means an individual who is seeking employment with the employer and is not currently employment in any capacity or position.

**AB 2770 – Privileged Communications – Protection from Defamation Claims**

- Protects employers against libel or slander claims for communicating complaints of sexual harassment by an employee, without malice, to an employer based on credible evidence and communications between the employers and interested parties regarding a complaint of sexual harassment.

- Authorizes employers to answer, without malice, whether the employer would rehire the employee and whether a decision to not rehire is based on the employer’s determination that the former employee engaged in sexual harassment.

**SB 1412 – Applicants for employment – Criminal History**

- Bill permits employers to conduct background checks for employees under certain exceptions as set forth below.

- This bill specifies that an employer, including a public agency or private individual or corporation, is not prohibited from asking an applicant about, or seeking from any source information regarding, a particular conviction of the applicant if, pursuant to federal law, federal regulation, or state law, (1) the employer is required to obtain information regarding the particular conviction of the applicant, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation, (2) the applicant would be required to possess or use a firearm in the course of his or her employment, (3) an individual with that particular conviction is prohibited by law from holding the position sought, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation, or (4) the employer is prohibited by law from hiring an applicant who has that particular conviction, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.

**EMPLOYEE LEAVES**

**SB 1123 – Disability Compensation – Paid Family Leave**

- Existing law provides, through the state disability insurance program, the paid family leave program that provides up to six weeks of wage replacement benefits to workers who take time off to care for a seriously ill family member or to bond with a minor child within one year of birth or placement.

- This bill expands the coverage of the family temporary disability insurance program to include time off to participate in a qualifying exigency related to the covered active duty or call to “covered active duty” of the individual’s spouse, domestic partner,
child, or parent in the Armed Forces of the United States. “Covered active duty” is defined as deployment to a foreign country.

- Effective January 1, 2021.

EMPLOYEE ACCOMMODATIONS

AB 1976 – Lactation accommodation
- Existing law requires every employer to provide a reasonable break time, and reasonable efforts to provide the employee with the use of a room or other location, other than a toilet stall, for the employee to express milk in private.
- The new law requires employers to make reasonable efforts to provide employee with use of a room or other location, other than a bathroom, for these purposes.
- Note: SB 937 which would require employers to provide a sink and refrigerator, among other items, did not pass.

NATIONAL ORIGIN DISCRIMINATION

Fair Employment & Housing Council – Regulations Regarding National Origin Discrimination
- Fair Employment and Housing Council (“FEHC”) issued regulations focused on preventing national origin discrimination that took effect on July 1, 2018.
- The regulations defined various terms:
  - Defined “national origin” to include, but is not limited to, the individual’s or ancestors’ actual or perceived:
    o physical, cultural, or linguistic characteristics associated with a national origin group;
    o marriage to or association with persons of a national origin group;
    o tribal affiliation;
    o membership in or association with an organization identified with or seeking to promote the interests of a national origin group;
    o attendance or participation in schools, churches, temples, mosques, or other religious institutions generally used by persons of a national origin group; and
    o name that is associated with a national origin group.
  - Defined “national origin groups” to include, but are not limited to, ethnic groups, geographic places of origin, and countries that are not presently in existence.
- Defined “undocumented applicant or employee” as an applicant or employee who lacks legal authorization under federal law to be present and/or to work in the United States.

- The regulations made it an unlawful employment practice for an employer to adopt or enforce a policy that prohibits the use of any language in the workplace, such as an English-only rule, unless:

  (A) The language restriction is justified by business necessity;

  (B) The language restriction is narrowly tailored; and

  (C) The employer has effectively notified its employees of the circumstances and time when the language restriction is required to be observed and of the consequence for violating the language restriction.

- The FEHC explained that employer’s requirement that certain positions in a company must meet certain height and weight requirements may have the effect of creating a disparate impact on members of certain national origins. The regulations explain that if an adverse impact is established, such requirements are unlawful, unless the employer can demonstrate that they are job related and justified by business necessity.

- Under the regulations, employers may only require an applicant or employee to “hold or present” a license issued under the Vehicle Code only if (1) the possession of a driver’s license is required by state or federal law, or (2) if the possession of a driver’s license is “otherwise permitted by law.”
MEDIATION DISCLOSURE
SB-954 – Mediation - Confidentiality Disclosure
- As of January 1, 2019, an attorney must provide the client with a printed disclosure containing the confidentiality restrictions set forth in Evidence Code section 1119 and obtain a printed acknowledgment signed by the client that he or she understands the confidentiality restrictions.

- Does not apply to class or representative actions
- Disclosure must be in at least 12-point font, in preferred language of client, since page not attached to any other document provided to client, provides the name of the attorney and client and signed by both
- Sample disclosure set forth in Evidence Code section 1129(d).
- Failure to comply with this requirement will not set assign any agreement in the course of or pursuant to a mediation but can subject attorney to disciplinary action.
Mediation Disclosure Notification and Acknowledgment (Cal. Evid. Code §1129(d))

To promote communication in mediation, California law generally makes mediation a confidential process. California’s mediation confidentiality laws are laid out in Sections 703.5 and 1115 to 1129, inclusive, of the Evidence Code. Those laws establish the confidentiality of mediation and limit the disclosure, admissibility, and a court’s consideration of communications, writings, and conduct in connection with a mediation. In general, those laws mean the following:

• All communications, negotiations, or settlement offers in the course of a mediation must remain confidential.
• Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings.
• A mediator’s report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body.
• A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring at, or in connection with, a mediation.

This means that all communications between you and your attorney made in preparation for a mediation, or during a mediation, are confidential and cannot be disclosed or used (except in extremely limited circumstances), even if you later decide to sue your attorney for malpractice because of something that happens during the mediation.

I, ____________________________ [Name of Client], understand that, unless all participants agree otherwise, no oral or written communication made during a mediation, or in preparation for a mediation, including communications between me and my attorney, can be used as evidence in any subsequent noncriminal legal action including an action against my attorney for malpractice or an ethical violation.

NOTE: This disclosure and signed acknowledgment does not limit your attorney’s potential liability to you for professional malpractice or prevent you from (1) reporting any professional misconduct by your attorney to the State Bar of California or (2) cooperating with any disciplinary investigation or criminal prosecution of your attorney.

[Name of Client]

[Date signed]

[Name of Attorney]

[Date signed]
MINIMUM WAGE INCREASES

California Minimum Wage
- Beginning January 1, 2019, for employers with 25 or fewer employees the minimum wage is $11.00/hour and for employers with 26 or more employees the minimum wage is $12.00/hour.

Los Angeles County Minimum Wage
- On July 1, 2018, Los Angeles County’s minimum wage increased to $13.25 per hour for employers with 26 or more employees, and $12.00 per hour for employers with 25 or fewer employees, or non-profit corporations with 26 or more employees with approval to pay a deferred rate.

Exempt Employee Salary Requirement Increases Based on Minimum Wage Increase
- To qualify for the “white collar exemptions,” beginning January 1, 2019, small employers will need to pay $45,760 per year and large employers will need to pay $49,920 per year to meet the salary basis test for exempt employees. Salary basis is set according to the equivalent of two times the state minimum wage for full-time employment.
- Beginning January 1, 2019, employers must pay at least $45.41 per hour, which is $7,883.62 per month or $94,603.25 as an annual salary, to meet the computer professional exemption.