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# WAGE AND HOUR DEVELOPMENTS

## *CALIFORNIA SUPREME COURT HOLDS REPRESENTATIVE PAGA CLAIMS MAY REMAIN IN COURT WHILE INDIVIDUAL CLAIMS, INCLUDING INDIVIDUAL PAGA CLAIMS, ARE ARBITRATED*

No one who pays attention to the federal and state court systems would be surprised to learn that the U.S. Supreme Court and the California Supreme Court view the world differently. As the familiar narrative goes, the U.S. Supreme Court is controlled by conservative justices while the California Supreme Court is packed with liberal judges who are widely regarded as judicial policy-makers who repeatedly exhibit an anti-business and anti-employer bias. One need only review the employment law decisions published by each court in recent years to see the obvious trends and leanings.

The contrast between the two courts was on display on July 17, 2023, when the California Supreme Court issued its long-awaited decision in Adolph v. Uber Technologies, Inc., _ Cal. 5th _ (2023), a case involving the collision between the rights created under a California law, the Private Attorneys General Act of 2004 ("PAGA"), and the rights of parties to arbitration agreements who have expressly agreed to refer all matters arising from employment disputes to arbitration on an individual-only basis. Such agreements often include provisions that specifically waive the ability to bring or participate in class, collective, or representative actions.

### 1. The Conflict Between The *Adolph* And *Viking River* Decisions

In June of 2022, the U.S. Supreme Court examined the enforceability of such arbitration agreements in its decision in Viking River Cruises, Inc. v. Moriana, 142 S.Ct. 1906 (2022). There, the U.S. Supreme Court determined that a 2014 California Supreme Court decision (Iskanian) was preempted by the Federal Arbitration Act ('FAA") where it concluded that a plaintiff could not split off an individual PAGA claim that could then be ordered to arbitration on an individual basis. It also construed California law to provide that an individual ordered to arbitrate an individual PAGA claim lacked standing to pursue a non-individual (representative) claim under PAGA in court. As a result, the Supreme Court observed that plaintiff-Moriana's non-individual claim should be dismissed so it could not remain in court.

In Adolph, the California Supreme Court had no choice but to defer to the U.S. Supreme Court's decision regarding preemption of Iskanian's anti-splitting rule under federal law, the FAA. However, it disagreed with Viking River's conclusion that a plaintiff loses standing to pursue non-individual (representative) PAGA claims in court once the plaintiff's individual claims are ordered to arbitration. Concluding that it had "the final word" on the meaning of California law, it found that a plaintiff's non-individual claim can be stayed and remain in court while the individual claims are resolved in arbitration.

### 2. The Issue Raised In *Adolph*

The holding in Adolph that an employee's PAGA claim can be stayed in court rather than dismissed will have a widespread impact on other PAGA cases. It will also influence the manner in which arbitration agreements and their severability provisions are written. While the decision includes a detailed review of PAGA's purpose and legislative history, the Supreme Court limited the holding to a review of the question of **PAGA standing** where an employee is subject to an arbitration agreement that provides for individual-only adjudication.

The question before the California Supreme Court was whether an "aggrieved employee" who has been compelled to arbitrate claims under PAGA that are premised on Labor Code violations actually sustained by the employee maintains statutory standing to pursue PAGA claims arising out of events involving other employees in court. The Supreme Court held that the answer is yes.

To have PAGA standing a plaintiff must be an **"aggrieved employee."** There are only two requirements. The plaintiff must (1) have been employed by the alleged violator, and (2) have suffered at least one of the alleged Labor Code violations. **Where a plaintiff has brought a PAGA action that includes individual and non-**

**individual claims, an order compelling arbitration of the individual claims does not strip the plaintiff of standing as an aggrieved employee to litigate PAGA claims in court on behalf of other employees.**

### 3. Background Facts

Erik Adolph worked as a driver for Uber Technologies, Inc., delivering food to customers through the company's Uber Eats platform. As a condition of his employment, Adolf was required to accept the technology services agreement. Because he did not timely opt out, he became bound by the arbitration provision in that agreement. The arbitration provision required Adolph to arbitrate, **on an individual basis only**, almost all work-related claims he might have against Uber.

#### a. The Arbitration Agreement

With regard to PAGA actions, the agreement stated: "To the extent permitted by law, you and Company **agree not to bring a representative action** on behalf of others under the [PAGA] in any court or in arbitration." This was referred to as *the "PAGA Waiver*."

The agreement also included a severability clause that stated if the PAGA Waiver was found unenforceable or unlawful for any reason, (1) *the unenforceable provision would be severed* from the arbitration provision; (2) severance of the unenforceable provision would have no impact whatsoever on the arbitration provision or the parties' attempts to arbitrate any remaining claims on an individual basis pursuant to the arbitration provision; and (3) any representative actions brought under PAGA must be litigated in a civil court of competent jurisdiction.

#### b. The Litigation

In October 2019, Adolf sued Uber in superior court, alleging individual and class claims under Labor Code Section 2802 and California's Unfair Competition Law. Adolph claimed that Uber misclassified him and other delivery drivers as independent contractors rather than as employees and, as a result, wrongfully failed to reimburse them for necessary business expenses. In February 2020, Adolph amended his complaint to add a claim under PAGA.

In July 2020, the trial court granted a motion by Uber to compel arbitration of Adolph's individual Labor Code claims and dismissed Adolph's class action claims. Adolph later amended his complaint to eliminate his individual Labor Code and class claims and retain only his PAGA claim for civil penalties.

### 4. The California Supreme Court's Analysis

The Supreme Court devoted a significant part of its analysis to a review of the history of PAGA, its one year statute of limitations, the effect of a PAGA settlement, and the inability to waive the right to bring a PAGA action.

#### a. PAGA Waivers

It stated that its decision in Iskanian v. CLS Transportation Los Angeles, 59 Cal. 4th 348 (2014), held that a pre-dispute **categorical waiver** of the right to bring a PAGA action is unenforceable. Iskanian also held unenforceable an agreement that, while providing for arbitration of alleged Labor Code violations sustained by the plaintiff employee (what Viking River called "individual claims"), compels **waiver of claims on behalf of other employees** (i.e., "non-individual claims"). Whether or not an individual claim is permissible under PAGA, a prohibition of representative (non-individual) claims frustrates PAGA's objectives.

#### b. The *Viking River* Decision

Adolph disagreed with Viking River's determination that Moriana's non-individual PAGA claims should be dismissed. The California Supreme Court cited California decisions finding that Viking River did not disturb Iskanian's rule that an arbitration agreement purporting to waive an employee's non-individual claims is unenforceable as a matter of state law. It deferred to Viking River's holding that the FAA preempted the rule of Iskanian insofar as it foreclosed the division of PAGA actions into individual and non-individual claims pursuant to an agreement to arbitrate. Viking River explained that such an anti-splitting rule is impermissible. Thus, it conceded that "*Viking River* requires enforcement of agreements to arbitrate a PAGA

plaintiff's individual claims if the agreement is covered by the FAA." However, as noted below, it did not defer to Viking River's finding that the non-individual PAGA claims should be dismissed rather than stayed.

**c. The Court Focused On The Plaintiff's Statutory Standing**

After reviewing judicial precedents and the legislative history of PAGA, the Supreme Court addressed the narrow issue before it: whether an aggrieved employee who has been compelled to arbitrate individual claims premised on Labor Code violations actually sustained by the plaintiff maintains statutory standing to pursue non-individual PAGA claims arising out of events involving other employees in court. Viking River concluded that a PAGA plaintiff loses standing in this situation. Thus, it found that plaintiff-Moriana lacked standing to continue to maintain her non-individual claims in court and the correct course was to dismiss her remaining claims.

**d. California Courts Have The "Final Word"**

After framing the key issue in the case, the California Supreme Court chose to deviate from Viking River's conclusion. It stated that the highest court of each state remains the final arbiter of what is state law. In other words, **California courts will have the last word**. Having given itself permission to resolve the issue it framed, the California Supreme Court declared that it was its obligation to ascertain the intent of the California Legislature so it could then effectuate the purpose of the enactment. It interpreted that intent in a manner that conflicted with the U.S. Supreme Court's views in Viking River regarding PAGA standing.

**5. Conclusion**

The Supreme Court unanimously held that a plaintiff who files a PAGA action with individual and non-individual claims does not lose standing to litigate the non-individual claims in court simply because the individual claims have been ordered to arbitration. The Supreme Court reversed the judgment of the court of appeal and returned the case for further proceedings consistent with its opinion. It expressly limited its review to the question of PAGA standing and expressed no view on the parties' other arguments regarding the proper interpretation of the arbitration agreement.

**a. Class Claims, But Not PAGA Claims, Can Be Dismissed**

Notably, the decision did not disagree with Viking River's holding that employees can be compelled to arbitrate their individual claims, including their individual PAGA claims, when their arbitration agreement is subject to the FAA and provides for adjudication of claims on an individual-only basis. Nor did it disagree that the plaintiff's class claims should be dismissed based on such an agreement. However, the Adolph decision preserves the ability of a PAGA plaintiff to pursue non-individual (representative) PAGA claims on behalf of other aggrieved employees in court. In short, the class claims can be dismissed while the PAGA claims can be pursued if the plaintiff is found to be an aggrieved employee.

**b. The Significance Of The Arbitrator's Decision**

As a practical matter, this underscores the significance of the arbitrator's determination of whether the plaintiff is or is not an aggrieved employee on the representative claims that are stayed in court. After the arbitrator issues a decision, any party may petition the court to confirm or vacate the arbitration award under Section 1285 of the Code of Civil Procedure.

Employers may therefore find it prudent to assess the potential outcome before deciding to compel arbitration. If the arbitrator finds the plaintiff is an aggrieved employee, i.e., the employee was employed by the employer and suffered at least one of the alleged Labor Code violations, that finding (if confirmed and reduced to a final judgment) would be binding on the court. Thus, the plaintiff would continue to have standing to litigate the non-individual (representative) claims in court. Conversely, if the arbitrator finds the plaintiff is not an aggrieved employee and the court confirms that determination and reduces it to a final judgment, the court would give effect to that finding. In that case, the plaintiff could no longer prosecute the non-individual claims due to lack of standing.

### c. Moving Onwards

Employers are advised to consult with knowledgeable employment counsel regarding the combined impact of the Adolph and Viking River decisions. The decisions will have a widespread impact on pending and new PAGA cases and how they will be adjudicated in arbitration and in court. They will also influence the way arbitration agreements are drafted and enforced. Particular attention will be focused on provisions that contain class, collective and representative action waivers and severability clauses. One thing appears certain. It can be expected that arbitrators will be extremely busy. (For a detailed understanding of PAGA, readers are encouraged to review the publication, **California's Private Attorneys General Act (PAGA) Litigation And Compliance Manual** by Attorneys Richard J. Simmons, Ryan Krueger, and Tyler Johnson of Sheppard Mullin. The book is available from Castle Publications, LLC.)

## *TELEWORKERS MUST BE REIMBURSED FOR EXPENSES INCURRED AT HOME DURING PANDEMIC*

Labor Code Section 2802 requires employers to reimburse employees "for all necessary expenditures" incurred in direct consequence of the discharge of their duties. The application of the statutory obligation to reimburse expenses incurred by teleworkers during the pandemic has been raised in numerous lawsuits. The first California appellate court to examine the question examined the issues on July 11, 2023 in Thai v. International Business Machines, Corp., 2023 WL 4443934 (Cal. Ct. App. 2023). The court ruled in favor of the employees who initiated the claim under the Private Attorneys General Act ("PAGA"). (The topic of reimbursing business expenses is discussed in Section 12.19 of the **Wage and Hour Manual For California Employers**, 26th Edition, by Attorney Richard J. Simmons of Sheppard Mullin. The book is available through Castle Publications, LLC.)

### 1. Background

On March 19, 2020, in response to the COVID-19 pandemic, Governor Gavin Newsom issued an order requiring residents to stay at home, except as needed to maintain operations in critical sectors. At the time, Paul Thai was employed by IBM, which directed its employees to continue working at home.

Thai filed an action under PAGA for alleged violations of Labor Code Section 2802. Thai asserted that IBM failed to reimburse him and other employees for the expenses necessarily incurred to perform their work duties from home. The trial court sustained IBM's demurrer, concluding the Governor's order was an "intervening cause" of the work-from-home expenses that absolved IBM of liability under Section 2802. Because it found the trial court's conclusion inconsistent with the statutory language, the court of appeal reversed.

### a. The Employees' Internet And Other Costs

Thai was a direct employee of IBM. To accomplish his duties, he required, among other things, internet access, telephone service, a telephone headset, and a computer and accessories. The court inferred from the complaint that IBM provided those items to its employees who worked in its offices.

### b. The Governor's Executive Order

On March 19, 2020, Governor Newsom signed Executive Order N-33-20. The order instructed all California residents to heed a Department of Public Health order that directed all individuals living in California to stay home or at their place of residence, except as needed to maintain continuity of operations of the federal critical infrastructure sectors and any other additional sectors later designated as critical.

After the order went into effect, IBM directed Thai and several thousand of his coworkers to continue performing their regular job duties from home. Thai and his coworkers personally paid for the services and equipment necessary to do their jobs while working from home. IBM never reimbursed employees for these expenses, despite knowing that its employees incurred them. In fact, the court did not mention the existence of any IBM policy or reimbursement protocol that invited employees to seek reimbursements for the business expenses.

### 2. IBM's Challenge To The Amended Complaint Failed

IBM demurred to the employees' third amended complaint. The trial court granted the demur in March 2022, reasoning that IBM's instructions to employees to work from home were the independent, direct cause of the plaintiffs incurring necessary business expenses. Because IBM was acting in response to government orders, there was an "**intervening cause** precluding direct causation by IBM." The appeal was filed after the trial court entered judgment in favor of IBM in April 2022. The court of appeal found that the trial court's ruling was contrary to the plain language of Section 2802(a).

#### a. The Purpose Of Section 2802

The court reasoned that Section 2802 is designed to protect workers from bearing the costs of business expenses that are incurred by workers doing their jobs in service of an employer. The **three elements of a Section 2802 cause of action** are: (1) the employee made expenditures or incurred losses; (2) the expenditures or losses were incurred in direct consequence of the employee's discharge of his or her duties, or obedience to the directions of the employer; and (3) the expenditures or losses were necessary.

#### b. IBM Challenged The Complaint

Citing Williams v. Amazon.com Services LLC, 2022 U.S. Dist. Lexis 97920 (N.D. Cal. June 1, 2022), another pandemic-related expense case, the court of appeal noted that **what matters is whether the plaintiff incurred the expenses in direct consequence of the discharge of his or her duties**, or of his or her obedience to the directions of the employer. Because the case involved a demurrer, it was based on the pleadings, not a fully developed record. According to the complaint in the Williams case, Amazon **expected the plaintiff to continue to work from home** after the stay-at-home orders were imposed. That was sufficient to plausibly allege liability, even if Amazon itself was not the but-for cause of the shift to remote work.

The court of appeal in Thai agreed. It determined that the trial court erred by inserting into the analysis a **tort-like causation inquiry** that was not rooted in the statutory language. Under the statutory language, the obligation does not turn on whether the employer's order was the proximate cause of the expenses; it turns on whether the expenses were actually due to performance of the employee's duties.

*Nothing in the statute can be read to exempt expenses resulting from the Governor's orders from the reimbursement obligation*. The court rejected IBM's argument that an employer is not liable under Section 2802 for expenses imposed by an intervening government mandate. In short, the court reasoned that the only question was whether the circumstance that the expenses were being incurred at employees' homes following the March 2020 order changes IBM's reimbursement obligation. It concluded that the answer to that question is no.

### 3. Conclusion

The court of appeal reversed the trial court's judgment in favor of IBM and returned the case to the trial court for further proceedings consistent with the decision. In so holding, the court of appeal articulated a difficult standard for employers to overcome if they did not reimburse or offer to reimburse employees who were expected to telework during the pandemic for **necessary** business expenses.

The court analyzed the impact of numerous earlier cases that construed Section 2802 in reaching its conclusion. The case does not state that employers must reimburse employees for expenses that are not necessary or that liability arises where employees choose not to seek reimbursement under an employer's reimbursement protocols and policies. Employers should discuss the ramifications of the case on pending cases and existing reimbursement policies and practices with their legal counsel.

## *NINTH CIRCUIT AFFIRMS TRIAL COURT VICTORY IMPACTING THE AGRICULTURE INDUSTRY*

On June 1, 2023, the Ninth Circuit Court of Appeals affirmed the district court's decision on behalf of Red Blossom Sales, Inc. (represented by Sheppard Mullin) and Better Produce, Inc.

("Defendants") in a proposed wage and hour class action filed by agricultural labor workers ("Laborers") for unpaid wages and derivative claims. The Laborers were hired by three strawberry growers ("Growers") to pick fruit that was then marketed and sold by Defendants primarily to large retail grocery chains.

Following the Growers' bankruptcy filing, the Laborers sought to hold Defendants liable for their alleged unpaid wages as joint employers with the Growers and as "client employers" under California Labor Code Section 2810.3(a)(1)-(3) arguing that the Laborers work was within the Defendants "usual course of business." A bifurcated bench trial was held in February 2021 on the issues of Defendants liability as joint employers and client employers. On October 15, 2021, the district court issued its ruling in favor of Defendants on all theories asserted by the Laborers. The Laborers appealed only with respect to the Section 2810.3 issue.

The Ninth Circuit agreed with the district court that the Laborers were not performing work within the Defendants' "usual course of business" which is defined by the statute as "the regular and customary work of a business, performed within or upon the premises or worksite of the client employer." California Labor Code Section 2810.3(a)(6). A primary focus of the Ninth Circuit was the fact that the Laborers' work was performed on the farms where the strawberries were grown and not on the premises of Defendants.

In reaching its conclusion to affirm, the Ninth Circuit determined that the legislature by requiring the work take place on the premises of the client employer, such client employer must exercise some element of control over the place where the work is performed. The rationale being that the legislature's intent was to impose liability on those entities who could reasonably be expected to have the ability to prevent California Labor Code violations. Here, the Defendants simply did not engage in harvesting work or exercise sufficient control over the farmlands to be considered the Defendants' premises and impose liability for the Laborers' alleged unpaid wages.

This is an outstanding victory for Defendants and an important decision for all industries in the supply chain for fresh produce.

***PAGA CLAIMS NOT COVERED BY ARBITRATION AGREEMENT***

In Duran v. EmployBridge Holding Co., 92 Cal. App. 5th 59 (2023), the court of appeal found that an arbitration agreement that expressly carved out claims under the Private Attorneys General Act ("PAGA") precluded an employer from enforcing the arbitration agreement. Duran demonstrates the importance of regularly reviewing arbitration agreements due to the shifting legal landscape surrounding arbitration agreements.

**1. The Arbitration Agreement**

The plaintiff, Griselda Duran, signed an arbitration agreement as part of her employment application with the defendant ("the Company"). The agreement stated it was governed by the Federal Arbitration Act and contained a board agreement to arbitrate claims: "In the event there is any dispute between [Duran] and the Company relating to or arising out of the employment or the termination of [Duran], which [Duran] and the Company are unable to resolve informally through direct discussion, regardless of the kind or type of dispute, [Duran] and the Company agree to submit all such claims or disputes to be resolved by final and binding arbitration, instead of going to court, in accordance with the procedural rules of the Federal Arbitration Act." It also included a class and representative action waiver that applied "except as prohibited under applicable law."

Importantly, the agreement expressly carved out from arbitration: "Claims for unemployment compensation, claims under the National Labor Relations Act, *claims under PAGA*, claims for workers' compensation benefits, and any claim that is non-arbitrable under applicable state or federal law are not arbitrable under this Agreement." This was the agreement's only reference to PAGA.

The plaintiff worked for the Company until August 2019. She subsequently filed a lawsuit against the Company to recover civil penalties under PAGA for alleged Labor Code violations suffered by her and other employees.

### 2. Trial Court Finds Arbitration Agreement Does Not Cover PAGA Claims

The Company moved to compel arbitration, arguing that the court should compel arbitration of the plaintiff's claim on an individual, nonrepresentative basis. The trial court concluded the issues presented were not subject to arbitration because the agreement specifically excluded PAGA claims from arbitration. The Company appealed.

### 3. Court Of Appeal Affirms Trial Court

First, the court of appeal found that the agreement's representative action waiver could not be given any effect. In Iskanian v. CLS Transportation Los Angeles, LLC, 59 Cal. 4th 348 (2014), the California Supreme Court concluded that "an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy." In Viking River Cruises, Inc. v. Moriana, 142 S.Ct. 1906 (2022), the U.S. Supreme Court held that aspect of Iskanian was not preempted by the FAA. Based on Iskanian and Viking River, the court of appeal found that the representative action waiver did not have any effect.

Next, the court of appeal employed the ordinary rules of contract interpretation to analyze the remainder of the arbitration agreement. The court found "the language stating claims under PAGA are not arbitrable under the agreement [was] unambiguous." Accordingly, the court of appeal concluded that the trial court correctly interpreted the agreement's carve-out provision. The court noted: "It is not objectively reasonable to interpret the phrase 'claims under PAGA' to include some PAGA claims while excluding others. Thus, the carve-out provision excludes all the PAGA claims from the agreement to arbitrate." Therefore, the court of appeal affirmed the order denying the motion to compel arbitration.

### 4. Takeaway

The issue of whether PAGA claims can be compelled to arbitration has been litigated extensively for the last decade. Duran underscores the importance of employers retaining experienced counsel to draft and regularly review arbitration agreements.

## *EMPLOYER DID NOT WAIVE RIGHT TO SEEK DISQUALIFICATION OF JUDGE BASED UPON BIAS OR IMPARTIALITY*

In North American Title Co. v. Superior Court, 91 Cal. App. 5th 948 (2023), the California Court of Appeal held a defendant had not waived its right to challenge the impartiality of the trial judge after the judge made several off-hand comments regarding the defendant and its alleged motive in changing its legal name.

### 1. Background

The underlying case has a long and complicated past. In brief: the plaintiffs filed a proposed class action lawsuit against their former employer alleging various wage and hour violations. The plaintiffs named the employer as "North American Title Company" in the complaint. The court initially granted certification of two classes and then, after a bench trial, issued a statement of decision decertifying one of the classes and finding liability as to the second class.

After the bench trial, but before judgment was entered against the employer, the defendant employer sold the name "North American Title Company, Inc." to States Title FTS Title Company. The defendant employer became CalAtlantic Title, Inc. and then adopted the name Lennar Title, Inc. States Title used the "North American Title Company, Inc." name for several years, before changing its name to Doma Title of California, Inc.

The plaintiffs sought to add Doma Title as a named defendant after the bench trial. At the hearing on the plaintiffs' motion to amend, in discussing the various name changes, the trial judge made several comments about the employer defendant "playing a shell game on purpose" in an effort to avoid "a big potential liability." The trial judge ultimately granted the motion and added Doma Title to the action. The plaintiffs never served Doma Title with the amended complaint, and Doma Title filed a motion to quash service. At the hearing on this motion, the trial judge again made several

comments about the name changes and again called it a "shell game."

Subsequently, Doma Title filed a challenge to disqualify the trial judge on the grounds of bias. While the challenge was denied, Doma Title was ultimately dismissed from the action. Thereafter, the defendant employer filed a motion to disqualify the judge on the same grounds as Doma Title. The trial judge denied the motion on the ground it was untimely. The defendant employer then appealed.

**2. Decision**

Code of Civil Procedure Section 170.6 requires a motion to disqualify be made "at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." While a failure to timely file a motion for disqualification can lead to waiver of the right to disqualify, the appellate court held that this timeliness limitation did not apply to a motion to disqualify based on the judge having personal bias or prejudice. In so holding, the court noted the prohibition against waiver for bias applied to both claims of actual bias and doubts as to the ability of the judge to remain impartial.

The appellate court also held the defendant employer's motion for disqualification was sufficient because the trial judge's comments suggested that he viewed the defendant employer as having an improper motive. The appellate court noted the comments did not appear to relate to any legal or factual issues presented in the proceeding. Accordingly, the appellate court reinstated the motion for further consideration by the trial court.

## *MINIMUM WAGE INCREASED ON JULY 1, 2023 IN SOME COUNTIES AND MUNICIPALITIES*

Earlier this year, California's minimum wage was increased to $15.50 for all employers. However, local entities (like cities and counties) are allowed to establish a *higher* minimum wage rate for employees working within their jurisdiction. As of July 1, 2023, a number of localities raised their minimum wage.

The following chart summarizes these changes:

| Locality | Current Minimum Wage | New Minimum Wage (effective July 1, 2023) |
|---|---|---|
| Alameda | $15.75 | $16.52 |
| Berkeley | $16.99 | $18.07 |
| Emeryville | $17.68 | $18.67 |
| Fremont | $16.00 | $16.80 |
| City of Los Angeles | $16.04 | $16.78 |
| County of Los Angeles (unincorporated areas only) | $15.96 | $16.90 |
| Malibu | $15.96 | $16.90 |
| Milpitas | $16.40 | $17.20 |
| Pasadena | $16.11 | $16.93 |
| San Francisco | $16.99 | $18.07 |
| Santa Monica | $15.96 $18.17 (hotel workers) | $16.90 $19.73 (hotel workers) |
| West Hollywood | $17.00 (fewer than 50 employees)<br>$17.50 (50 or more employees)<br>$18.35 (hotel workers) | $19.08 (all employees) |

**1. Impact On Remote Workers**

Employers should take this as an opportunity to confirm where any of their remote employees (who are earning minimum wage) are working, as they may be subject to a higher local minimum wage rate than if they were working on-site.

**2. Notice Requirements**

Additionally, many of the local ordinances contain specific notice requirements. The required posters typically must be posted in a conspicuous place on the work-site, and often require the notice be provided in multiple languages. Note that, for employers with remote workers, Senate Bill No. 657 allows employers to fulfill the notice requirements by emailing notices to their remote workers. Employers with remote workers should be sure to email their remote employees the required notice to confirm that all employees, including those who work from home, will have access to required information related to the increase in minimum wage.

**3. Impact On Minimum Salary Requirements For Exempt Employees**

Notably, these local minimum wage increases do not impact the minimum salary requirements for California employees exempt

under the executive, administrative, or professional exemptions. Those requirements are based on the state-wide minimum wage (not a specific localities' minimum wage), and require an employee to earn at least twice the *state* minimum wage, or $64,480.00 annually.

**4. Takeaway**

If California employers have employees working in any of the above localities, they should assess their employees' hourly wage rates and make sure that any required changes have been made to be in compliance.

### *DOL DESCRIBED FMLA CALCULATION STANDARDS WHEN TIME OFF IS TAKEN ON A HOLIDAY*

The U.S. Department of Labor ("DOL"), Wage and Hour Division released a May 30, 2023 Opinion Letter (FMLA2023-2-A) providing clarification regarding calculating the amount of leave used by an employee who took time off under the Family and Medical Leave Act ("FMLA") during a week with a holiday.

As background, after completing 1,250 hours of work for a covered employer, employees are entitled to up to 12 weeks of unpaid, job-protected leave for qualifying family and medical reasons in every 12-month period. Generally speaking, employees are permitted to take leave intermittently, either on a reduced schedule or separate blocks of time off, instead of taking full weeks.

The Opinion Letter advises that if a holiday occurs in a week that an employee is taking a full workweek of FMLA leave, the workweek should be counted as FMLA leave, regardless of the holiday. However, if the employee takes FMLA leave for less than one full workweek, and a holiday falls during that week, the holiday is not counted as FMLA leave unless the employee was otherwise scheduled and expected to work on the holiday and used FMLA on that day.

The Opinion Letter provided the following illustration: For an employee with a Monday through Friday work week schedule, in a week with a Friday holiday on which the employee would not normally be required to report, if the employee needs FMLA leave only for Wednesday through Friday, the employee would use only 2/5 of a week of FMLA leave because the employee is not required to report for work on the holiday. However, if the same employee needed FMLA leave for Monday through Friday of that week, the employee would use a full week of FMLA leave despite not being required to report to work on the Friday holiday.

The DOL explained that deducting a holiday from an employee's available FMLA leave when an employee takes intermittent leave in a block less than a week is an "interference" with the employee's rights under the FMLA.

Employers should review their leave policies and practices to ensure they are complying with the FMLA when an employee takes time off under the FMLA in a week with a holiday.

## EMPLOYMENT DISCRIMINATION DEVELOPMENTS

### *U.S. SUPREME COURT CLARIFIES RELIGIOUS DISCRIMINATION AND UNDUE HARDSHIP STANDARDS*

Title VII of the Civil Rights Act of 1964 requires employers to accommodate the religious practices of their employees, unless doing so would impose an "**undue hardship** on the conduct of the employer's business." Based on the U.S. Supreme Court's 1977 landmark decision in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), many lower courts interpreted "undue hardship" to mean any effort or cost that is "more than . . . de minimis." On June 29, 2023 the Supreme Court "clarified" what Title VII requires in the unanimous decision in Groff v. DeJoy, Postmaster General, 143 S.Ct. 2279 (2023), without overruling its 1977 decision in Hardison.

**1. Background**

The litigation was initiated by Gerald Groff, an Evangelical Christian who believes for religious reasons that Sunday should be devoted to worship and rest, not "secular labor" and the transportation

of "worldly goods." Groff began his employment with the United States Postal Service ("USPS"), which has more than 600,000 employees. He became a rural carrier associate, a job that required him to assist regular carriers in the delivery of mail.

When he took the position, it generally did not involve Sunday work. But within a few years, that changed. In 2013, USPS entered into an agreement with Amazon to begin facilitating Sunday deliveries, and in 2016, USPS signed a memorandum of understanding ("MOU") with the union that set out how Sunday and holiday parcel delivery would be handled. During a two-month peak season, each post office would use its own staff to deliver packages. At all other times, Sunday and holiday deliveries would be carried out by employees (including rural carrier associates like Groff) working from a regional hub.

The MOU specifies the order in which USPS employees are to be called for Sunday work outside the peak season. With Groff unwilling to work on Sundays, USPS made other arrangements. During the peak season, Sunday deliveries that would have otherwise been performed by Groff were carried out by the rest of the staff, including the postmaster, whose job ordinarily does not involve delivering mail. During other months, Groff's Sunday assignments were redistributed to other carriers assigned to the regional hub. Throughout this time, Groff continued to receive "progressive discipline" for failing to work on Sundays. Finally, in January 2019, he resigned.

### 2. The Lower Court Decisions

Groff filed suit under Title VII, asserting that USPS could have accommodated his Sunday Sabbath practice "without undue hardship on the conduct of USPS's business." The district court granted summary judgment to USPS, and the Third Circuit Court of Appeals affirmed, construing Hardison to mean "that requiring an employer to bear **more than a de minimis cost** to provide a religious accommodation is an undue hardship." The Third Circuit concluded that exempting Groff from Sunday work "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale." The Supreme Court agreed to review the decision, recognizing that the case presented the Supreme Court's first opportunity in nearly 50 years to explain the contours of Hardison.

### 3. The Supreme Court Vacated The Third Circuit's Decision

The Supreme Court held that merely showing "more than a de minimis cost" does not suffice to establish undue hardship or a defense to religious discrimination under Title VII. Instead, in determining an employer's undue hardship defense, Hardison referred repeatedly to "substantial" burdens, and that formulation better explains the decision. The Supreme Court described Hardison to mean that **"undue hardship" is shown when a burden is substantial** in the overall context of an employer's business. A fact-specific inquiry is required to make this determination.

### 4. Substantial Increased Costs Must Be Shown

The Supreme Court stated it is enough to say that what an employer must show is that the **burden of granting an accommodation would result in substantial increased costs** in relation to the conduct of its particular business. Courts must apply the test to take into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer.

The Court declined to adopt the elaborations of the applicable standard that the parties suggested, either to incorporate Americans With Disabilities Act caselaw or opine that the EEOC's construction of Hardison had been basically correct. Even though the Court recognized that a "good deal" of the EEOC's guidance was sensible, it found it imprudent to ratify in toto a body of EEOC interpretations that has not had the benefit of the clarification adopted by the Court in Groff.

### 5. Additional Clarifications Of Recurring Issues

The Supreme Court hastened to add clarifications regarding several "recurring issues." First, it observed that Title VII requires an assessment of a possible accommodation's effect

on "the conduct of the employer's business." **Impacts on coworkers** are relevant only to the extent those coworker impacts go on to affect the conduct of the business. Further, a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice, does not provide a defense because it cannot be considered "undue." Bias or hostility to a religious practice or accommodation thus cannot supply a defense.

Second, Title VII requires that an employer "**reasonably accommodate**" an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations. Faced with an accommodation request like Groff's, it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary.

**6. Conclusion**

The Supreme Court clarified the Title VII undue-hardship standard. It then determined it was appropriate to leave the context-specific application of that clarified standard to the lower courts in the first instance. Because the Third Circuit assumed that Hardison prescribed a "more than a de minimis cost" test, it may have misled the court to dismiss a number of possible accommodations, including those involving the cost of incentive pay or the administrative costs of coordination with other nearby stations with a broader set of employees.

The Supreme Court did not foreclose the possibility that USPS will prevail, but thought it appropriate to leave to the lower courts to apply its clarified context-specific standard, and to decide whether any further factual development is needed. It vacated the judgment of the Third Circuit Court of Appeals and remanded the case to the Third Circuit for further proceedings consistent with its opinion.

***FIRST AMENDMENT PREVENTS STATE ANTI-DISCRIMINATION LAWS FROM COMPELLING SPEECH THAT VIOLATES RELIGIOUS BELIEFS***

Many states prohibit businesses from discriminating in the provision of goods and services. As an example, Colorado has enacted anti-discrimination legislation, called the Colorado Anti-Discrimination Act ("CADA"), that prohibits businesses from engaging in unlawful discrimination when providing goods or services. Likewise, California's Unruh Civil Rights Act was enacted long ago for similar purposes. Often, these laws operate separately from state employment discrimination laws that prohibit employers from discriminating against job applicants and employees.

Occasionally, questions concerning the legality of such state laws arise when they collide with the right to engage in free speech under the First Amendment of the U.S. Constitution. That is precisely what occurred under the Colorado statute, the CADA, which was examined by the U.S. Supreme Court in its June 30, 2023 decision in 303 Creative LLC v. Elenis, 143 S.Ct. 2298 (2023). The Supreme Court ruled in a 6-3 decision that state laws cannot compel individuals to engage in speech that violates their sincerely-held religious beliefs.

**1. Background**

The case was initiated by Lorie Smith, a Christian website designer who wished to expand her graphic design business to include services for couples seeking wedding websites. However, she was concerned that Colorado would use the CADA to compel her — in violation of the First Amendment— to create websites celebrating marriages she does not endorse. She embraced the sincere belief that marriage is limited to relationships between a man and a woman and did not include same-sex couples. She thus had a policy to refuse services for same-sex weddings.

Notably, the parties stipulated to a number of facts, including the fact that Smith was willing to provide services without regard to sex, race, religion, sexual orientation, or other protected characteristics. But, she did not wish to compose original, individually-written wedding statements that would be attributed to her and describe same-

sex marriages that were contrary to her religious beliefs.

**2. The Litigation**

Smith owned 303 Creative LLC and sued the Colorado Civil Rights Commission in federal court to enjoin it from enforcing the CADA against her. At issue was her fear that the State of Colorado would require her to engage in **coerced speech** in violation of her religious view or face consequences and liability under state law. After the district court denied the injunction, the Tenth Circuit Court of Appeals affirmed. The Supreme Court reversed, holding that the First Amendment prohibits Colorado from forcing Smith to create expressive website designs speaking messages with which she disagrees.

**3. The Decision Prohibits Forced Speech Without Licensing Discrimination**

Critically, the case does not allow businesses to discriminate in the provision of goods or services in violation of state laws. Rather, the holding prevents states from **compelling** individuals to compose **speech in violation of the First Amendment and their religious beliefs** under the guise of prohibiting discrimination in the provision of goods and services. The Supreme Court emphasized the parties' stipulation that the website designer did not discriminate when deciding to whom she would provide goods or services. Put simply, she did not wish to be forced to engage in speech that violated her religious beliefs.

**4. The Majority And Dissenting Justices Disagreed Sharply**

In the majority's decision Justice Gorsuch explained that Colorado sought "to **force** an individual to speak in ways that align with its views but defy her conscience about a matter of major significance." Justice Sotomayor wrote a lengthy dissent.

The majority's decision emphasized that "the opportunity to think for ourselves and to express those thoughts freely is among our most cherished liberties and part of what keeps our Republic strong. Of course, abiding by the Constitution's commitment to the freedom of speech means all of us will encounter ideas we consider as 'unattractive' … 'misguided, or even hurtful.' … But, **tolerance, not coercion**, is our Nation's answer. The First Amendment envisions the United States as a rich and complex place where **all persons are free to think and speak as they wish**, not as the government demands. Because Colorado seeks to deny that promise, the judgment is" reversed.

**5. Summary Of Decision**

It is important to recognize the limitations on the holding that many readers have overlooked. It must be emphasized that the case did not arise in an employment setting or directly address state employment discrimination laws. It can nevertheless be anticipated that the rationale enunciated in the decision will be cited in future cases that arise in many different contexts. For example, it can be anticipated that Justice Gorsuch's statements that the law requires "**tolerance, not coercion**," and the First Amendment recognizes that "**all persons are free to think and speak as they wish, not as the government demands**" will be cited in employment disputes.

It must also be remembered that the Supreme Court reached the conclusions after emphasizing the parties' stipulation that the website designer did not wish to discriminate in providing her services. They agreed she was willing to provide services to individuals without regard to sex, race, religion, sexual orientation or other protected characteristics. She simply sought to enjoin the state from compelling her to engage in speech that violated her religious beliefs to avoid liability under the Colorado law.

## *THE IMPACT OF THE U.S. SUPREME COURT'S DECISION ON AFFIRMATIVE ACTION IN COLLEGE ADMISSIONS ON EMPLOYMENT RULES*

On June 29, 2023, the U.S. Supreme Court held in a 6-3 decision that college admissions programs cannot use an individual's race to determine who will or will not be admitted. In concluding that school admissions programs that make race-based admissions decisions violate the

Equal Protection Clause of the Fourteenth Amendment, the decision sharply narrowed earlier admissions decisions that had addressed affirmative action in higher education.

It is important to note that the decision does not directly address affirmative action in the workplace, including affirmative action programs mandated by federal or state laws that rely on such programs to defend employment decisions. In evaluating its potential ramifications, employers should understand the key features of the Supreme Court's decision and what its role may be when evaluating their recruitment, hiring, promotion, and other practices. A review of the decision is therefore warranted.

### 1. The Supreme Court's Decision

Chief Justice Roberts delivered the opinion of the Court in Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 143 S.Ct. 2141 (2023). The Court framed the issue before it as whether the admissions systems used by Harvard College and the University of North Carolina ("UNC"), two of the oldest institutions of higher learning in the United States, are lawful under the Equal Protection Clause of the Fourteenth Amendment.

#### a. Both Admissions Programs Considered Race When Making Admissions

The Court explained that tens of thousands of students apply to each of the schools every year and only a small number are admitted. Both schools utilize a highly selective admissions process to make their decisions. Admission to each school can depend on a number of factors, including a student's grades, recommendation letters, and extracurricular activities. It can also depend on their race. The Court explained that race was a determinative factor for a significant percentage of admitted African American and Hispanic applicants.

#### b. The Litigation

The litigation was initiated by the Students for Fair Admissions. It is a nonprofit organization whose stated purpose is "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law." It filed separate lawsuits against Harvard and the UNC, arguing that their race-based admissions programs violates Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. After separate bench trials, both admissions programs were found permissible under the Equal Protection Clause and Supreme Court precedents. The Supreme Court granted certiorari to review the decisions and ultimately held that Harvard's and UNC's admissions programs violate the Equal Protection Clause.

#### c. The Connection Between The Programs' Goals And Means Employed

The Court observed that the admissions programs failed to articulate a meaningful connection between the means employed and the goals they pursue. In examining the programs the Court identified flaws that undercut their status. For example, the Court determined that to achieve the educational benefits of diversity, the schools measured the racial composition of their classes, using **racial categories that are plainly overbroad** (expressing, for example, no concern whether South Asian or East Asian students are adequately represented as "Asian"); **arbitrary or undefined** (the use of the category "Hispanic"); or **underinclusive** (no category at all for Middle Eastern students). The unclear connection between the goals that the schools sought and means they employed precluded courts from meaningfully scrutinizing their admissions programs.

#### d. The Programs Impermissibly Used Race As A "Negative" And A "Stereotype"

The Court determined that the schools' race-based admissions systems also failed to comply with the Equal Protection Clause's twin commands that **race may** never **be used as a "negative"** and that it **may not operate as a stereotype**. First, the Court rejected the schools' assertion that race is never a negative factor in their admissions programs. It found that college admissions are ***"zero-sum"*** and a benefit provided to some applicants, but not to others necessarily advantages the former at the expense of the latter.

Second, the admissions programs require stereotyping and thus violated earlier judicial precedents. The Court reasoned that when a university admits "on the basis of race, it engages in the offensive and demeaning assumption that students of a particular race, because of their race, think alike." Further, the Court determined that the admissions programs were vulnerable because they **lacked a logical end point** required by judicial precedent.

**2. Summary**

Because the schools' admissions programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points, they could not be reconciled with the guarantees of the Equal Protection Clause. They were thus both impermissible.

However, the Court offered some **guidance as to what could be done**. It pointed out that nothing prohibits universities from considering an applicant's discussion of how race affected the applicant's life, as long as that discussion is concretely tied to a quality of character or unique ability that a particular applicant can contribute to the university. It observed that many universities have for too long wrongly concluded that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned, but the color of the individual's skin. It concluded that the nation's constitutional history does not tolerate that choice.

**3. Ramifications On Employment Laws**

As previously noted, the Supreme Court's determination regarding affirmative action in school admissions does not directly address or resolve employment discrimination issues relating to affirmative action programs maintained by employers, or the role affirmative action programs play when justifying employment actions or defending employment discrimination claims. The decision does not consider federal or state laws prohibiting employment discrimination, such as Title VII of the Civil Rights Act of 1964 or the California Fair Employment and Housing Act. It certainly does not invalidate federal or state laws that impose affirmative action obligations on employers or court decisions that impose such obligations as a remedy to address findings of past discrimination.

Additionally, it should be remembered that some federal laws, such as Executive Order 11246, require covered employers to implement affirmative action programs under certain circumstances, and that the existence of an affirmative action program may operate as a defense in discrimination disputes, such as a direct defense or a bona fide occupational qualification ("BFOQ") in some cases. Even voluntary affirmative action programs and related programs designed to remediate identified instances of past discrimination, including court ordered affirmative action, may be permissible under certain circumstances.

In short, the Supreme Court's new decision does not immediately alter the landscape of state and federal employment laws. However, employers can anticipate that the Students for Fair Admissions decision will be cited in employment disputes in the future. Employers should therefore examine the potential ramifications of the decision with their legal counsel.

## *DISABILITY CLAIMS DISMISSED BECAUSE EMPLOYEE FAILED TO PROVIDE MEDICAL DOCUMENTATION*

In Hodges v. Cedars-Sinai Medical Center, 91 Cal. App. 5th 894 (2023), the Court of Appeal affirmed summary judgment dismissing disability claims in favor of the employer where the employee refused to get a flu vaccine in violation of the employer's mandatory vaccine policy. In reaching this determination, the court found the plaintiff failed to provide any evidence that she suffered from a disability that affected her ability to work.

**1. Background**

Hodges began working in an administrative role at Cedars in 2000. She was diagnosed with cancer in 2007 and took a leave before returning to work without restrictions in 2009. In 2017, Cedars announced a new policy requiring all employees to get a flu vaccine. This policy was implemented in conjunction with the Centers for Disease Control's ("CDC") recommendation that all healthcare workers, including non-patient care employees,

receive the flu vaccine in an effort to limit employee transmission of flu. Cedars' policy included a religious exemption and an exemption for employees with a diagnosis of any contraindication to getting the flu vaccine, such as a severe allergy. At the time the policy went into effect, Hodges had no such diagnosis.

Hodges saw her internist, Dr. Henderson, who admitted to having no expertise in advising on whether a person should or should not receive a flu vaccine for medical reasons. Dr. Henderson nevertheless provided a note to support Hodges request for an exemption. However, Dr. Henderson admitted he was unaware of Hodges having any medically-recognized contraindication to the flu vaccine.

Cedars denied Hodges' exemption request on the grounds that she failed to provide evidence of a contraindication to the flu vaccine. Cedars stated Hodges would be terminated if she did not receive the flu vaccine. She refused, and Cedars terminated her employment. Hodges then sued Cedars for several disability-related claims. Cedars successfully moved for summary judgment of Hodges' claims and Hodges appealed.

**2. Opinion**

The court first determined whether the McDonnell Douglas burden-shifting framework should apply. Under this framework: (i) the employee must first show a *prima facie* case of discrimination; (ii) the employer must then offer a legitimate non-discriminatory reason for its actions; and (iii) the employee must then prove that the proffered reason is pretext for discrimination to avoid summary judgment.

Courts had previously held that this framework did not apply to disability discrimination claims in which the employee introduces direct evidence that the employer's challenged conduct was motivated by prohibited reasons. The court thus analyzed whether or not Hodges provided direct evidence that her termination was motivated by discriminatory reasons. It concluded that she did not insofar as Cedars' decision to terminate for refusal of the flu vaccine was not prohibited by FEHA. Accordingly, the court applied the McDonnell Douglas framework.

As part of a plaintiff's *prima facie* burden on a disability discrimination claim, the plaintiff must establish that her alleged disability limited her ability to work. The court held that the note from Dr. Henderson failed to show how any of Hodges' alleged conditions would limit her ability to work. By her own admission, Hodges confirmed the side effects of her prior cancer treatment did not limit her ability to work. Dr. Henderson's view that Hodges faced special risks in getting vaccinated did not conflict with Cedars' evidence that it viewed her as able to safely receive the flu vaccine.

Cedars also offered a legitimate non-discriminatory reason for terminating Hodges: she refused to get the flu vaccine. The court explained that Cedars' mandatory vaccination policy stemmed from a concern about patient safety and was based on a recommendation from the CDC. The court concluded Cedars terminated Hodges not because she was or was regarded as disabled, but because Cedars regarded her as not disabled and fully able to receive the vaccination.

The court also noted an employer is not bound to accept an employee's subjective belief that she is disabled. Instead, the employer is entitled to rely on other medical information. The information Dr. Henderson provided Cedars did not show any contraindication to the flu vaccine. Thus, Cedars could properly terminate Hodges in its discretion for her refusal to get the flu vaccine.

With regard to her reasonable accommodation and interactive process claims, the court found no authority where an employer was bound to engage in an interactive process with an employee who claimed disability but was neither disabled nor regarded by the employer as being disabled. Because Hodges had not provided evidence of a disability, these claims also failed.

**3. Takeaway**

It is important for all employers to take employees' claims of disability seriously and engage in the interactive process to the extent necessary. However, the Hodges decision demonstrates that a disability will not be lightly presumed and an employee must actually prove her claimed disability, with medical support, to proceed on disability-related claims.

### *ELECTED OFFICIAL IS NOT AN EMPLOYEE UNDER WHISTLEBLOWER STATUTE*

In Brown v. City of Inglewood, 2023 WL 4281592 (Cal. Ct. App. May 31, 2023), a court of appeal analyzed whether an elected city official should be considered an "employee" who could assert a claim for retaliation under Labor Code Section 1102.5 against the City of Inglewood and several members of the Inglewood City Council. The court determined the answer is no.

#### 1. Background

Plaintiff Wanda Brown served as the elected treasurer for the City of Inglewood. She filed suit against the City and several members of the City Council, alleging that after she reported concerns about financial improprieties, the City and the individual defendants defamed and retaliated against her. The plaintiff asserted a claim for violation of Labor Code Section 1102.5, alleging that the defendants took various adverse actions against her, including reducing her duties and authority as treasurer and reducing her salary.

The defendants filed a special motion to strike pursuant to California's anti-SLAPP statute, which authorizes a special motion to strike a claim that arises from an act of free speech. The defendants argued that the plaintiff's claims arose from conduct that constituted free speech, namely, statements made or actions taken in connection with legislative activity. In litigating an anti-SLAPP motion, the defendant must first establish the challenged action constitutes "protected activity" and if so, the plaintiff must then show the claim has at least minimal merit.

#### 2. Whether The Conduct At Issue Constituted "Protected Activity"

Here, the court found that the referenced activity constituted "protected activity" as to the individual defendants since the activity consisted of their votes adopting City ordinances. The adoption of these ordinances allegedly caused the plaintiff to experience a decrease in pay and authority, which were her alleged adverse employment actions.

#### 3. Whether The Employee Could Succeed On Her Retaliation Claim

With respect to the second step in the analysis, the court analyzed whether the plaintiff demonstrated that her retaliation claim under Labor Code Section 1102.5 was legally sufficient. The defendants argued that the plaintiff could not succeed on her claim because she was not an "employee" for purposes of the Section 1102.5. The plain language of the statute states that it protects "employees" for certain types of retaliation. Section 1106 then addresses the definition of "employee" in this context, stating that "employee" "includes, but is not limited to, any individual employed by…any…city." Section 1106 does not state that elected officials fall within the scope of the term "employee."

The court contrasted this definition with the definition of "employee" in other sections of the Labor Code. For example, the Labor Code defines an "employee" in workers' compensation related statutes to include all "elected and appointed paid public officers." Focusing on the plain language of the various statutes, the court explained that the fact that elected officials are specifically referenced in one section of the Labor Code and not referenced in another was a reflection of the Legislature's decision to provide elected officials the benefits of the Workers' Compensation Act, but to deny them the protections of Section 1102.5. Accordingly, the court determined the defendants' anti-SLAPP motion as to the plaintiff's claim under Section 1102.5 should be granted.

### *RETALIATION FINDING WAS REVERSED BECAUSE EVIDENCE SHOULD HAVE BEEN EXCLUDED AT TRIAL*

In Kourounian v. California Dep't of Tax & Fee Admin., 91 Cal.App.5th 1100 (2023), a tax auditor obtained a $425,562 jury verdict in his favor for his retaliation claim against the California Department of Tax and Fee Administration. The plaintiff alleged he was retaliated against because he filed an internal complaint with the Equal Opportunity Office. The Department appealed, and the Court of Appeal reversed and remanded on the grounds that the trial court erred in admitting

evidence that was prejudicial and prevented the Department from receiving a fair trial.

### 1. Background

The plaintiff, Rafi Kourounian, worked as a tax auditor for the California Department of Tax and Fee Administration (the "Department") since 1989. In 2012, he was promoted to business tax specialist 1 ("BTS1"), which included a one-year probationary period. Witnesses testified that prior to his promotion, his performance was very good and that he was one of the top producing auditors. Kourounian was described as independent, able to handle complex audits, competent and knowledgeable. During his probation, Kourounian was temporarily promoted to a supervisory position because the incumbent employee commenced a leave of absence.

Later in 2012, Kourounian was asked to investigate a taxpayer's complaint alleging that Kourounian's co-worker, Silva Saghbazarian, discriminated against the taxpayer on the basis of age. Kourounian made findings of discriminatory conduct by Saghbazarian. Relatedly, Kourounian criticized the chain of command, including Doris Chiang, for not following required procedures, and reported his findings to them.

Kourounian's limited term supervisorial position ended in January 2013 and he returned to his BTS1 position, where he was placed under the supervision of Saghbazarian and Chiang, who was Saghbazarian's supervisor - the two individuals he critiqued in his investigation.

Thereafter, Kourounian alleged that Saghbazarian subjected him to unfavorable treatment including, removing audits from him and unnecessarily requiring him to return to the office when he was engaged in audits. Kourounian further alleged that Saghbazarian made him wait hours for a meeting before cancelling it, copied her superiors on all emails to Kourounian, and sent him a memo instructing him to reduce his excessive vacation hours.

#### a. March 2013 EEO Complaint

In March 2013, Kourounian filed an EEO complaint alleging that Saghbazarian discriminated against him on the basis of age, race and/or national origin and retaliated against him because of his findings in the taxpayer complaint investigation.

As a result of the EEO complaint, Kourounian was assigned to a new direct supervisor, Chiang, for a few months. According to Kourounian, on his first day working with Chiang, she shouted at him in the presence of others, criticizing him for filing a complaint and pledging to seek revenge. To that end, Chiang eliminated Kourounian's audits and required him to stay in the office, denied him remote working privileges, and required him to send email updates concerning his workload.

#### b. May 2013 EEO Complaint

Kourounian filed a second EEO complaint in May 2013, alleging that the foregoing conduct constituted retaliation. This complaint focused exclusively on Chiang's conduct.

#### c. Kourounian Is Demoted

In the summer of 2013, and while still on probation, Kourounian was rejected for the BTS1 position and returned to his prior position. Kourounian appealed the decision but as part of a prehearing settlement conference, he entered into a settlement agreement whereby he agreed to discharge the Department from all claims (including discrimination), except for claims relating to his retaliation claims filed with the EEO office.

### 2. Trial Court Ruling

Kourounian filed a lawsuit against the Department alleging retaliation under the Fair Employment and Housing Act (FEHA). Pursuant to a demurrer filed in the action, the judge (who was not the trial judge) ruled that Kourounian's act of reporting Saghbazarian's discrimination against an elderly taxpayer was not protected under FEHA, and thus, there was no valid retaliation claim against Saghbazarian for reporting her discrimination against the taxpayer.

The Department filed a motion *in limine* seeking to exclude evidence of all conduct in Kourounian's March EEO complaint that did not constitute retaliation. Specifically, the Department wanted to exclude Kourounian's investigation of the

taxpayer complaint on the grounds that it was not protected activity under FEHA.

Kourounian acknowledged that he could not seek compensation for any of the acts complained of in his March EEO complaint. However, he argued that the March EEO complaint and its contents were admissible as to the issue of motive to show why he was retaliated against.

The trial court ruled that it was for the jury to determine whether the alleged acts were retaliation. The trial court admitted into evidence both EEO complaints. The court also overruled the Department's hearsay objections as to the EEO complaints. A jury returned a verdict in favor of the plaintiff on his retaliation claim for $425,562.

**3. The Department Appeals**

In exercising *de novo* review, the court of appeal noted that a trial court's evidentiary rulings, including those relating to hearsay, are reviewed under an abuse of discretion standard. Although an evidentiary ruling that is based on an error of law is an abuse of discretion, the court noted that it would only reverse when a party demonstrates prejudicial error occurred and caused "substantial injury" and a "different result would have been probable" absent the error. The court clarified that "probability" merely means "a reasonable chance, more than an abstract possibility." Moreover, the court noted that multiple errors may be found to be cumulatively prejudicial, despite that each error on its own may not be prejudicial.

The Department argued that the trial court erred in allowing introduction of evidence of Saghbazarian's actions which pre-dated Kourounian's protected activity of filing the March EEO complaint.

The Court of Appeal explained that as a matter of both logic and law, acts of retaliation must occur after the protected activity. Indeed, to establish a *prima facie* case of retaliation, a plaintiff must show that he engaged in protected activity and was **thereafter** subjected to adverse employment action, and that there is a causal link between the two.

Kourounian argued that the investigation of the taxpayer complaint demonstrated that Saghbazarian had a history of not liking to work with older individuals. Additionally, he argued that Saghbazarian's conduct occurring prior to the date of the March EEO complaint informed the totality of the circumstances evidencing that Saghbazarian had a motive to retaliate against Kourounian based on age and race discrimination. However, the Court of Appeal held that Kourounian waived his age and race discrimination claims, and Saghbazarian's history of not liking to work with older people was irrelevant to the retaliation claim.

After finding that the trial court erred in admitting the EEO complaints, the Court of Appeal next analyzed whether the Department was prejudiced by their admission. The Court held that the substance of the March EEO complaint was not relevant to any issue in the case, whereas the May EEO complaint was relevant to show retaliation for engagement in a protected activity, although not as hearsay. The Court of Appeal found the May EEO complaint did not prejudice the Department. However, the Court found the March EEO complaint was prejudicial because the alleged conduct involving Saghbazarian prior to the March EEO complaint had a tendency to undermine her credibility about her behavior post-March EEO complaint.

The Court of Appeal also considered that the verdict was 9-3. The Court of Appeal thus concluded there was a reasonable probability that if the evidence pertaining to conduct occurring prior to the March EEO complaint was never admitted, the Department would have received a more favorable verdict.

Accordingly, the Court of Appeal reversed the trial court's judgment.

***THE HAZARDS OF "ENCOURAGING" OR "INDUCING" ILLEGAL IMMIGRATION***

Although the terms "encourage" and "induce" typically have a broad meaning, at least seven of the nine Justices of the Supreme Court of the United States would disagree. On June 23, 2023, the U.S. Supreme Court held in United States v. Hansen, 143 S.Ct. 1932 (2023) that to "'encourag[e] or induc[e] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to,

entry, or residence is or will be in violation of law'" is not too overbroad and does not interfere with the First Amendment's protection of the freedom of speech. In other words, the Supreme Court held Congress only intended the terms "encourage" and "induce," as used in the statute, to mean the intentional solicitation or facilitation of a crime–illegal immigration–and not their more general definitions.

How could this affect employers? Employers often recruit and employ individuals from foreign countries. According to the Department of Labor, in 2022, roughly 18% of the labor force was foreign born. But what happens when a temporary visa expires and an employee wishes to continue their work for that employer? Or what about a foreign citizen who travels to the United States before securing a work visa after hearing about a great job opportunity from a recruiter? At what point does an employer "encourage" or "induce" a non-citizen to enter or stay in the United States in violation of the law?

### 1. Background

In Hansen, the defendant Helaman Hansen promised "adult adoption" as the "quickest and easiest" method for those eager to become citizens of the United States. Hansen charged over 450 individuals upwards of $10,000 for this expedited path to citizenship. Id. at 1938. However, adult adoption is not a legitimate or recognized path to citizenship. Lying to his victims, Hansen claimed they were safe to remain in the United States once they paid for his program. Id. Instead, many of these individuals remained in the United States unlawfully on expired visas. After making nearly $2 million from this scheme, Hansen was caught, charged, and convicted of, among other things, "encouraging and inducing" unlawful immigration into the United States. Id.

Hansen challenged his conviction with the Ninth Circuit Court of Appeals. In an attempt to wriggle out of at least one charge, Hansen argued Section 1324(a)(1)(A)(iv) is overbroad and violates the Constitution's protection of free speech. Summarizing the argument, Hansen claimed that as written, "encourage" and "induce" were too broad and the statute punished an inordinate amount of protected speech in relation to its legitimate goal. Given its supposed overbreadth, he argued the law should be held facially invalid. The Ninth Circuit agreed with Hansen leading the Supreme Court to take up the case.

### 2. Constitutional Overbreadth

A constitutional overbreadth challenge is a particularly unusual defense. An overbreadth challenge attacks the law itself as a violation of the First Amendment. If a law's propensity to chill protected speech and cause "speakers to remain silent" outweighs the legitimate goal of the law, "society's interest in free expression outweighs its interest in the statute's lawful applications." More succinctly, if a law's reach is too broad causing the amount of chilled protected speech to outweigh the criminalization of unprotected speech, the law is invalid. However, there must be a realistic, non-hypothetical, threat to protected speech.

### 3. "Encourage" And "Induce" As Used Were Not Overbroad

The Supreme Court summarized the issue as follows: if the terms "encourage" and "induce" were meant to specifically refer to criminal solicitation and facilitation, not their everyday meaning, the overbreadth challenge would be defeated.

First, the Supreme Court noted that the terms "encourage" and "induce" are historically among the most common words used to define criminal solicitation and facilitation, including in both federal and state penal codes. Second, the Supreme Court looked at the statutory history of Section 1324(a)(1)(A)(iv), where its 1985 origins included "'knowingly assisting, encouraging or soliciting' immigration under a contract to perform labor." Given that "encourage" was used alongside the terms "assisting" and "soliciting," terms which apparently clearly indicate criminal intent, the Supreme Court reasoned this demonstrated Congress' desire to use the term "encourage" in a narrow criminal context.

Third, given the history of the words, the Supreme Court held there was no need for the law to specifically state that "encouraging" or "inducing" be done with criminal intent as it was implied.

Finally, the Supreme Court held the balance of deterring lawful speech against criminalizing the

support of unlawful immigration tipped in favor of finding Section 1324(a)(1)(A)(iv) valid.

#### 4. Application To Employers

It is not too hard to imagine a scenario where an employer "encourages" or "induces" (in a broad sense) an employee to unlawfully enter or remain in the United States.

Although the Supreme Court did not analyze this law with respect to employers, it did note that the law originates in the employment context. Specifically, the 1885 law made unlawful the act of "knowingly assisting, encouraging or soliciting the migration or importation of any alien . . . to perform labor or service of any kind under contract or agreement." Act of Feb. 26, 1885, ch. 164, § 3, 23 Stat. 333. Clearly, asking an employee to or helping an employee remain in the United States after their visa has expired would fall under the scope of Section 1324(a)(1)(A)(iv). However, could telling a foreign applicant on a recruiting trip that they would earn more if they moved to Los Angeles be deemed encouraging that individual to enter the United States? What about an employer telling a foreign national that they do not have a position available for them now, but that a position may become available in the near future so they should be ready to start immediately? What about a foreign student whose internship ended and is awaiting a possible job offer while their visa expires?

Ultimately, given the Supreme Court's ruling, these are just hypotheticals and criminal penalties for these types of scenarios seem unlikely. Although in the general sense, an employer would be "encouraging" or "inducing" an individual to enter or remain in the country, as long as the employer does not "intend to bring about a specific result"–illegal immigration–there is no criminal violation.

As the Supreme Court noted, there are no examples of a defendant being charged under Section 1324(a)(1)(A)(iv) for potentially protected speech. However, with overbroad laws, it can be hard to tell where the line is. Therefore, employers should be cautious in statements they make to foreign citizens to avoid possibly soliciting their unlawful entry or residence in the United States.

### *WHISTLEBLOWER AWARDED OVER $7 MILLION IN DAMAGES FOR EMPLOYER CONDUCT*

California law has long protected employees acting as whistleblowers from retaliation by their employers. However, a jury's focus can extend beyond protecting the employee and enter the realm of punishment when an employer's conduct is deemed reprehensible. In Zirpel v. Alki David Productions, 2023 WL 4540422 (Cal. Ct. App. June 20, 2023), a jury recently awarded a terminated employee over $7 million in damages for claims of retaliation under both Labor Code Sections 232.5 and 1102.5, and for wrongful termination. In particular, the jury determined the plaintiff's employer, Alki David Productions, Inc. ("ADP"), terminated the plaintiff's employment "with malice, oppression, and fraud."

#### 1. Whistleblowing And Subsequent Termination

Karl Zirpel was the Vice President of Operations for ADP, a company focusing on hologram technology. In 2017, ADP began converting a church into a theater to demonstrate its hologram technology hoping to complete construction prior to a showcase event. Construction progressed slowly and days before the showcase, city inspectors made Zirpel aware of approximately 20 code violations. The inspectors also informed Zirpel that approval of the required work prior to the showcase would be impossible. Despite Zirpel's voiced concerns, ADP's owner, Alkiviades David, demanded that construction continue so they could be ready for the event.

Zirpel then made an anonymous tip to the city fire inspector. When the fire inspector arrived, he informed Zirpel that Zirpel personally could be subject to liability and referred to the district attorney if any fire-related injuries occurred. Again, Zirpel voiced his concerns to his employer but was told, "[n]othing stops." When Zirpel refused to continue work, David flew into a "'fit of rage,"' moving right up to Zirpel's face and hurling obscenities, sexually aggressive statements, and homophobic slurs. David then yelled that Zirpel was fired, following him out of the building.

### 2. Consequences For Whistleblower Retaliation

At trial, the jury awarded Zirpel $368,717 in economic damages, $700,000 in non-economic damages, and $6 million in punitive damages. These damages were all affirmed on appeal.

#### a. Labor Code Section 1102.5

Labor Code section 1102.5 prohibits an employer from retaliating against an employee who refuses to participate in an activity that would violate the law or who discloses information the employee reasonably believes to be a violation of the law. To succeed on such a claim, an employee must identify the specific rule or regulation they reasonably believed was being violated. The employee must then identify the specific activity of the employer which they reasonably believed would violate that specific law. The court then determines whether the specific action of the employer would result in a violation of that specific rule or regulation. If the court determines the action would be a violation of the law, the matter is given to a jury to decide whether the employee was subject to an adverse employment action as a result of their protected conduct (i.e., refusing to violate a law or disclosing a violation).

Determining whether an employee was terminated in retaliation for whistleblowing activity requires a two-part burden shifting test. First, the employee must show by a preponderance of the evidence (more likely than not) that the whistleblowing activity was a contributing factor in the adverse action to the employee. If the employee can accomplish this, the employer has the burden of demonstrating by clear and convincing evidence (a much stricter showing) that the alleged action would have occurred even if the employee had not engaged in protected activities.

The court found ADP's failure to get approved permits before continuing work a violation of the city's municipal codes. Moreover, the court found that Zirpel's refusal to work after disclosing to ADP the inspectors' warnings of unsafe working conditions was based on a reasonable belief that continued work would violate the law. The court also agreed with the jury's determination that Zirpel's termination was causally connected to his whistleblowing activity given that Zirpel was terminated immediately after voicing his concerns about ADP continuing work in violation of the law. Finally, the court agreed ADP failed to provide any credible evidence that Zirpel's employment would have been terminated for any other reason but his protected activity. Therefore, the court affirmed ADP's liability for violations of Labor Code Section 1102.5.

#### b. Labor Code Section 232.5

Similar to Labor Code Section 1102.5, under Labor Code Section 232.5, a whistleblower is protected from retaliation and discharge for disclosing information about the employer's working conditions. The retaliation does not need to be the only reason for the employees termination, but it must be a "substantial motivating reason." Temporal proximity is strong evidence of a "substantial motivating reason." As the jury found in Zirpel, the temporal proximity was immediate. As soon as Zirpel refused to work due to concerns regarding unsafe working conditions and code violations, David flew into a "fit of rage" and fired Zirpel.

#### c. Punitive Damages

Although there is legally no cap on the amount of punitive damages a jury may award, "grossly excessive or arbitrary" awards are unconstitutional. California courts have held that the goals of deterrence and retribution are accomplished by single digit ratios of punitive damages to compensatory damages. In Simon v. San Paolo United States Holding Co., Inc., 35 Cal. 4th 1159, 1188 (2005), the California Supreme Court held that an appropriate maximum ratio is 10:1. These punitive damages must be based on the defendant's conduct and the harm suffered by the plaintiff. The more reprehensible the employers conduct, the higher the punitive damages award can be. Malicious conduct, shown through the "willful and conscious disregard of the rights or safety of others," is strong evidence of reprehensibility.

In Zirpel, The court affirmed the jury's finding that ADP's conduct was particularly malicious and reprehensible. Despite Zirpel's repeated disclosures of potentially hazardous conditions and code violations, his employer chose to completely disregard the health and safety of its employees.

When Zirpel voiced his concern, he was yelled at in front of other employees, was subjected to homophobic slurs, and was berated as he was leaving the building. Given the strength of the reprehensible conduct, the court affirmed the jury's award of a nearly 6:1 ratio of punitive to compensatory damages.

### 3. Takeaway

The simplest takeaway is that whistleblower retaliation can be costly, particularly when the employer's conduct is reprehensible. The Zirpel jury illustrates that a panel may find especially compelling the idea of punishing an employer who, in reaction to concerns of the health and safety of their employees and customers and with knowledge of unsafe working conditions, chooses to terminate a whistleblower's employment. Combine this with particularly egregious conduct (hurling obscenities, targeted slurs, and near physical altercations) and damages in the seven figures become all too real.

## COVID-19 DEVELOPMENTS

### *CALIFORNIA SUPREME COURT HOLDS THAT EMPLOYERS DO NOT OWE A DUTY OF CARE TO PREVENT SPREAD OF COVID-19 TO EMPLOYEES' HOUSEHOLD MEMBERS*

The pandemic has raised numerous legal issues, both in and outside the context of California workplaces. Those issues have arisen in a variety of contexts, including disputes implicating state and federal employment discrimination, wage and hour, telework, occupational health and safety, expense reimbursement, and numerous other laws. Two of the critically important issues that have surfaced as a result of the pandemic includes an employer's obligations and risks under the California Workers' Compensation law and general tort liability standards.

On July 6, 2023, the California Supreme Court tackled two of the issues in the decision of Kuciemba v. Victory Woodworks, Inc., 2023 WL 4722973 (9th Cir. Ct. App. 2023). The Supreme Court answered two questions regarding California law that were presented to it by the Ninth Circuit Court of Appeals concerning the scope of an employer's liability when an employee's spouse is injured by transmission of the virus that causes the disease known as COVID-19. The questions are:

### 1. The Two Questions Addressed By The Supreme Court

#### a. The Exclusive Remedy Rule:

If an employee contracts COVID-19 at the workplace and brings the virus home to a spouse, do the **exclusive remedy** features of the California Workers' Compensation Act, Labor Code Sections 3200, *et seq.*, bar the spouse's negligence claim against the employer? The Supreme Court found that the answer to this question is no.

#### b. The Duty Of Care:

Does an employer owe a **duty of care** under California law to prevent the spread of COVID-19 to employees' household members? Once again, the Supreme Court stated that the answer is no. Although it is foreseeable that an employer's negligence in permitting workplace spread of COVID-19 will cause members of employees' households to contract the disease, recognizing a duty of care to nonemployees in this context would impose an intolerable burden on employers and society in contravention of public policy. These and other policy considerations led to the conclusion that employers do not owe a tort-based duty to nonemployees to prevent the spread of COVID-19.

### 2. Conclusions

The Supreme Court ruling in connection with the first question was certainly predictable. Courts do not broadly apply the exclusive remedy provisions of California's Workers' Compensation law to prevent claims courts believe should be allowed to proceed, even though Workers' Compensation generally is the exclusive remedy for work-related injuries. Thus, that portion of the decision was anticipated.

The answer to the second question was far less predictable, given the California Supreme Court's general lack of empathy for California businesses and employers regarding issues that create significant liability and litigation.

Nevertheless, the decision is directly rooted in public policy considerations that, at least in this case, favored the employers' side of the arguments.

## MISCELLANEOUS DEVELOPMENTS

### *EMPLOYER MAY SUE UNION FOR DESTROYING ITS PROPERTY DURING STRIKE*

In a decisive blow to labor unions, the U.S. Supreme Court cleared the way for employers to sue unions over strikes specifically designed to destroy employers' property. The high court's 8-1 decision in Glacier Northwest Inc. v. International Brotherhood of Teamsters Local Union No. 174, 143 S.Ct. 1404 (2023), comes in one of the most anticipated labor cases on the Supreme Court's docket in decades. The ruling that federal law does not preempt state court lawsuits for tort damages caused by unions during strikes provides employers with a direct avenue for relief for such damages through a lawsuit and helps to equalize the balance of power in contentious labor disputes.

#### 1. Background

Glacier Northwest (the "Company") sells ready-mix concrete to its customers. Each batch of concrete, it claimed, must be mixed to the customer's specifications. The Company combines the raw ingredients in a hopper and transfers the resulting concrete mixture to one of its trucks for prompt delivery.

The ready-mix trucks preserve the concrete by keeping it rotating in the drum located at the back of the truck. Because concrete is highly perishable and begins to harden immediately once at rest, the Company claimed its business depended on its truck drivers for timely deliveries. While the rotating drum can preserve the concrete for a limited time, if it remains in the drum too long, it will harden and cause significant damage to the truck. And if the drum stops rotating, the hardening begins immediately.

#### 2. The Drivers' Union Initiates A Strike

The International Brotherhood of Teamsters Local Union No. 174 (the "Union") exclusively represented the Company's truck drivers during collective bargaining. After collective bargaining negotiations broke down in August 2017, the Union called for a strike. According to the Company, the Union timed the strike to happen in the midst of the Company batching large quantities of concrete and making deliveries that needed to be finished before hardening and destroying the trucks. The Company claimed that at least 16 drivers who had already set out for deliveries returned with their trucks fully loaded, and some completely abandoned their vehicles without a word to anyone.

The Company scrambled to avert disaster. It explained that through extensive effort and resources over 5 hours, it was able to offload the undelivered concrete in an environmentally safe manner. While the quick work prevented damages to the trucks, the concrete that the Company mixed that day was completely destroyed.

#### 3. The State Court Lawsuit

The Company sued the Union in Washington state court for damages. It claimed that the Union intentionally destroyed the Company's concrete and asserted claims against the Union for common law conversion and trespass to chattels.

The Union moved to dismiss the Company's tort claims as preempted by the National Labor Relations Act ("NLRA"). The trial court agreed with the Union, as ultimately did the Washington Supreme Court.

The Company then petitioned to the U.S. Supreme Court. The Court agreed to hear the case to resolve whether the NLRA preempts the Company's tort claims alleging that the Union intentionally destroyed its property during a labor dispute.

#### 4. The Supreme Court Determines The NLRA Is Not A Bar To The Lawsuit Against The Union

Reinforcing that the right to strike is not absolute, the U.S. Supreme Court traced the origins

of the NLRA and the prior decisions interpreting its control over labor-related disputes to authorize some lawsuits against unions whose work stoppages are intentionally structured to damage company property.

### 5. The NLRA

Enacted in 1935, the NLRA "encourag[es] the practice and procedure of collective bargaining" to resolve "industrial disputes arising out of differences as to wages, hour or other working conditions." 29 U.S.C. § 151.

The heart of the NLRA is Section 7, which protects employees' rights "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." § 157. Section 8, in turn, prohibits employers and unions from engaging in certain "unfair labor practice[s]," such as interfering with employees' exercise of their Section 7 rights. § 158. Congress created the National Labor Relations Board ("Board") to enforce the NLRA.

### 6. *Garmon* Preemption

For over sixty years, it has been settled law that the NLRA preempts and supersedes state law when the two arguably conflict. In San Diego Building Trades Council Local 2620 v. Garmon, 359 U.S. 236 (1959), the U.S. Supreme Court emphasized the importance of limiting even the potential for conflicting results between the Board and state courts that may involve labor disputes. As a result, Garmon held that States cannot regulate conduct that the NLRA protects, prohibits, or even arguably protects or limits.

### 7. The NLRA Does Not Arguably Protect Intentional Acts Of Destruction To Employer Property

As the Supreme Court noted, the Union and the Company agreed that the NLRA does not provide an absolute right to strike. Instead, the Board has long taken the position that the NLRA does not shield strikers who fail to take "reasonable precautions" to protect their employer's property from "foreseeable, aggravated, and imminent danger due to the sudden cessation of work."

In the Supreme Court's view, the conduct that the Company claimed the Union engaged in is not even arguably protected under the NLRA. Despite knowing the highly perishable nature of concrete and its limited shelf life, the Union coordinated with its drivers to initiate the strike while in the middle of batching and pretending to deliver the concrete. This, in the court's view, represented a foreseeable risk of clear harm to the Company's equipment and property.

Moreover, the Court highlighted how the Union failed to take reasonable precautions against this clear risk of imminent danger. It did not initiate the strike before the trucks were loaded, and actually went out of it way to prompt the creation of the perishable product that day before walking off the job mid-delivery. The Union also did not even take the common courtesy of alerting the Company that its trucks had been returned undelivered, and its drivers ignored the Company's instructions to facilitate a safe transfer of the materials.

While the Court emphasized that no one action in particular is required in order to qualify as a "reasonable precaution," it pointed to the Union's failure to take even minimal precautions as indicative of its failure to fulfill its duty. The calculated nature of the strike and its execution in a manner designed to compromise the safety of the Company's trucks and destroy its concrete went "well beyond the NLRA's protections" and was free to proceed in state court, where the Union would have to account for its potential liability.

### 8. Conclusion

Represented workers are sure to decry this decision as likely to chill the exercise of Section 7 rights under the NLRA. But far from threatening organized labor, this decision ensures labor practices remain safe, lawful, and reasonable and force those who destroy employer property during a strike to account for their actions. The Court's ruling does not impose any new burdens on labor. Rather, it sends a clear message that unions who take affirmative steps to endanger company property—rather than basic steps to minimize it—are not immune from suit under the NLRA.

### *CLAIMS THAT EMPLOYER STALLED HUNDREDS OF EMPLOYMENT-RELATED ARBITRATIONS PURSUED IN COURT*

On July 3, 2023, New York resident Fabien Ho Ching Ma filed a proposed class action lawsuit against Twitter, Inc. and X Corp. (collectively "Twitter") in California federal court (Ma v. Twitter Inc. et al., case number 3:23-cv-03301), claiming that Twitter refused to move forward with employment-related arbitrations, despite requiring its employees to sign arbitration agreements and successfully compelling its former employees' claims to individual arbitration.

As background, in January 2023, U.S. District Court Judge James Donato granted Twitter's motion to compel individual arbitration in a proposed class action that was initially brought by former Twitter employee Emmanuel Cornet and four others relating to their 2022 lay-offs from Twitter. Twitter also successfully moved to compel various other employment-related lawsuits to arbitration around the same time, including claims for violation of the WARN Act, discrimination, and failure to pay wages.

In the July 3, 2023 complaint, Ma specifically alleged that he and approximately 2,000 other former Twitter employees have attempted to pursue employment-related arbitration claims with JAMS against Twitter, following Twitter's successful motions to compel arbitration. However, Ma alleged that, in each of these arbitrations, JAMS notified the parties that the Minimum Standards for employment disputes apply to the claims. Those Minimum Standards require the employer to pay the full arbitrator fees, even if the relevant state law does not provide for the same requirement. In his proposed class action complaint, Ma alleged that Twitter refused to pay these required arbitration fees for the hundreds of employees who were located outside of California. Instead, Twitter requested that JAMS allow the costs to be split between the company and each respective non-California employee. JAMS denied this request, stating that its Minimum Standards were applicable to the various arbitration matters and JAMS would not administer any arbitration that did not meet its Minimum Standards. In response, Twitter informed JAMS that Twitter was refusing to proceed with arbitrations in most states outside of California, which impacted 891 separate arbitration proceedings. JAMS then informed the parties that it would decline to arbitrate any disputes in which Twitter refused to pay its required fees and in which the former employees did not waive application of the Minimum Standards. JAMS thereafter notified the parties that scheduled conferences and hearings in the matters would be cancelled.

Thus, Ma claims that he and the other former non-California employees cannot move forward with their arbitrations, unless they agree to waive the application of the Minimum Standards and pay half of the arbitrator fees, which they will not agree to do.

In the complaint's prayer for relief, Ma requests that the court order Twitter to arbitrate the claims of Ma and those similarly situated, pursuant to the terms of their arbitration agreements, including by complying with JAMS Minimum Standards and paying the required arbitration fees and costs.

The district court has not made any rulings in Ma's case thus far, but the case will be closely followed by employers to see how the court rules.

### *CALIFORNIA SUPREME COURT WILL CONSIDER THE CONSTITUTIONALITY OF PROPOSITION 22 RELATING TO APP-BASED DRIVERS*

On June 28, 2023, the California Supreme Court announced its intention to examine the constitutionality of Proposition 22, a measure that classified app-based drivers, including those working for Uber and Lyft, as independent contractors. The case is Castellanos v. State of California, 530 P.3d 1129 (2023).

#### 1. AB 5 And Proposition 22

In 2019, the California legislature passed Assembly Bill 5 ("AB 5"). The legislation established a new test for distinguishing between employees and independent contractors for the purposes of the Labor Code and Unemployment Insurance Code.

The legislation resulted in a host of litigation and adverse rulings against app-based companies like Uber, Lyft, and DoorDash, who treat their

drivers as independent contractors rather than employees. In response to the legislation and resulting litigation, several app-based companies funded Proposition 22. The measure passed in November 2020 with nearly 60% of voters in favor of the proposition. The measure added a chapter to the Business and Professions Code allowing app-based rideshare and delivery platforms to designate their workers as independent contractors, in addition to providing these drivers with new benefits and protections.

**2. Proposition 22 Is Subsequently Challenged**

In August 2021, a state trial court deemed Proposition 22 "constitutionally problematic" because it impeded the state Legislature's ability to establish workers' compensation laws. The court halted the enforcement of the measure, noting that the Legislature's power is not absolute when a ballot initiative restricts its capacity to include app-based workers in the compensation system.

However, in March 2023, the court of appeal ruled in Castellanos v. State of California, 89 Cal. App. 5th 131 (2023), that both the Legislature and voters possess lawmaking authority concerning workers' compensation, according to the California Constitution. The decision revived Proposition 22, but the panel did agree with unions and drivers that a provision on collective bargaining in the measure could not be included in an amendment requiring a seven-eighths vote in the Legislature.

Consequently, unions and drivers involved in the case sought intervention from the California Supreme Court in April 2023. On June 28, 2023, the California Supreme Court granted review. The Court will analyze the following issue: "Is Proposition 22 (the "Protect App-Based Drivers and Services Act") invalid because it conflicts with article XIV, section 4 of the California Constitution?" While under review, the court of appeal decision may be cited for its persuasive value and the limited purpose of establishing the existence of a conflict in authority. A decision is not expected until 2024.

**3. Takeaway**

The California Supreme Court's decision to review the constitutionality of Proposition 22 will likely have significant implications on the future of worker classification in California and the use of a ballot measures to override legislation.

***PROPERTY OWNER NOT LIABLE FOR ON-THE-JOB INJURY OF INDEPENDENT CONTRACTOR'S EMPLOYEE***

In Blaylock v. DMP 250 Newport Ctr., LLC, 2023 WL 4144812 (Cal. Ct. App. May 30, 2023), an employee of an independent contractor who sustained injuries after he fell through an access panel in the floor of a crawl space filed a lawsuit against the owner of the premises, DMP 250 Newport Center, LLC and the owner's property manager (collectively referred to as "DMP"). The worker alleged claims of premises liability and negligence. The allegedly injured worker was employed as a project manager by an HVAC company, Air Control Systems, Inc. ("ACS"). DMP hired ACS as an independent contractor to maintain and service its HVAC equipment. During a job at DMP, the worker was moving in the crawl space when he fell through an access panel and landed in a storage room. The worker filed a lawsuit against DMP. DMP moved for summary judgment, arguing that they did not owe the worker any duty of care in connection with his work for ACS, pursuant to the Privette doctrine, which limits a property owner's liability for on-the-job injuries to employees of an independent contractor.

Notably, there are a few exceptions to the doctrine, including the Kinsman exception whereby a property owner can be held liable if: (1) the property owner knows or reasonably should know of a concealed, pre-existing hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor.

Here, the worker argued the Kinsman exception applied and there was a triable issue of fact as to whether DMP knew or should have known of the allegedly concealed hazardous condition which he claimed was the access panel in the floor of the crawl space that he fell through. The trial court and court of appeal disagreed with the worker and ruled in favor of DMP. The court of appeal held that while the evidence may have shown that DMP should have known the access panel existed given that the panel's existence was visible from inside the storage room used by DMP, there was no

evidence showing that DMP knew or should have known the panel, which had been screwed shut, was either concealed from a person in the crawl space or hazardous. Moreover, the court noted that the worker failed to point to any authority holding that a landowner has a duty to inspect crawl spaces before it hires experienced professionals to work in such spaces. Accordingly, the court affirmed the trial's court ruling granting summary judgment in favor of DMP.

### *COURT UPHOLDS AGREEMENT PROHIBITING CUSTOMER COMPETITION*

For over 150 years, non-compete agreements in the employment arena have been void in California unless specifically authorized by statute. This long-standing public policy is expressed in Business & Professions Code § 16600, which states that "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

In Ahn v. Stewart Title Guaranty Co., 2023 WL 4343144 (Cal. Ct. App. 2023), amidst a corporate merger, an employer barred a sales executive from using a particular sales pitch to solicit customers from a competitor, who was the proposed merger partner. Rather than challenge the restriction under Section 16600, the employee sued for violations of the Cartwright Act, California's antitrust statute. The appellate court ruled against the employee, finding that the prohibition imposed on the employee did not give rise to an antitrust injury. As a result, the court determined the employee did not have standing to sue under the Cartwright Act.

#### 1. Background

The plaintiff was an experienced sales executive in the title insurance industry, with a focus on renewable energy products and infrastructure. Four underwriters dominate and compete in that space in the United States, including Fidelity National Financial, Inc. ("Fidelity") and Stewart Title Guaranty Co. ("Stewart").

In 2014, the plaintiff joined Fidelity as its Vice President for Energy Services. Fidelity recruited the plaintiff from Stewart, where the plaintiff had previously worked for fifteen years, specifically so he could compete with Stewart's title business in renewable energy.

Despite his background, the plaintiff found it difficult to compete with Stewart. Evidently, Fidelity had more stringent underwriting policies than Stewart, giving Stewart a competitive advantage and discouraging clients from switching over to Fidelity. As a result, the plaintiff had limited success in luring clients away from Stewart.

#### 2. The Proposed Merger

In March 2018, Fidelity announced a tentative merger with Stewart. Following the announcement, the plaintiff learned that if the merger went through, Stewart would have to adopt Fidelity's stricter underwriting guidelines. The plaintiff saw this as an opportunity to compete for Stewart's clients, as he believed that this would eliminate the competitive advantage that Stewart had over Fidelity and clear the way for the plaintiff to convince his prior customers to choose Fidelity over Stewart. To lure away Stewart's customers, the plaintiff began telling them about the anticipated merger and looming underwriting parity between Stewart and Fidelity.

#### 3. The Sales Restriction And Termination

Soon thereafter, the plaintiff was instructed to stop mentioning the merger or anticipated underwriting changes to prospective clients. Several large clients began to express interest in moving their projects from Stewart to Fidelity, making senior executives at both companies concerned.

The plaintiff alleged that the restrictions on mentioning the merger and underwriting changes were designed to prevent him from competing with Stewart for clients. He also claimed this was part of Stewart and Fidelity's broader agreement during the premerger period not to compete for each other's.

After the merger was approved in October 2018, the plaintiff circulated a press release to prospective clients announcing the merger. Six days later, Fidelity terminated his employment.

### 4. The Lawsuit And Summary Judgment

The plaintiff then sued Fidelity, Stewart, and others under the Cartwright Act. The Cartwright Act (Bus. & Prof. Code §§ 16700 – 16770) is California's primary antitrust statute. It generally outlaws any agreements which restrain trade or competition or fix or control prices. Under the Cartwright Act, an arrangement to allocate or avoid competing for clients would be automatically unlawful, without any need to determine whether the challenged conduct has, on balance, anticompetitive effect.

Not every person, though, has a right to bring a lawsuit for violations of the Cartwright Act. Only those who have suffered an "antitrust injury" can properly assert a Cartwright Act claim. An antitrust injury is one that stems from a "competition-*reducing* aspect or effect of the defendant's behavior," not from conduct's "neutral or even procompetitive aspects."

The plaintiff contended that the defendants violated the law by conspiring to restrict competition between Fidelity and Stewart. He further accused Stewart of tortiously interfering with his at-will employment relationship with Fidelity. The trial court eventually granted summary judgment in favor of all defendants, and the plaintiff appealed the dismissal of his claims against Stewart.

### 5. The Appellate Court Upholds The Restrictions On How The Plaintiff Could Compete For Clients

On appeal, the court largely focused on the issue of antitrust standing and what constitutes an "injury" under the Cartwright Act. The appellate court determined that that the harm flowing from the restriction on the plaintiff's sales pitches was not the type of injury the Cartwright Act was intended to protect. Accordingly, the appellate court upheld the premerger agreement between Stewart and Fidelity not to compete, including the restriction on how the plaintiff could pitch prospective clients.

Specifically, applying the antitrust injury standard to the plaintiff's claims, the court looked at whether the plaintiff's claimed injuries were (1) of a type the antitrust laws were designed to prevent and (2) flowed from the anticompetitive nature of Stewart's conduct. After examining the allegations and evidence, the court agreed that the plaintiff could not show he suffered an *antitrust* injury.

In the court's view, the plaintiff could not show that his lost sales and termination stemmed from a competition-*reducing* aspect of Stewart's behavior. In fact, the court viewed the plaintiff as the one who attempted to *profit* from the competition-reducing market consolidation aspects of the proposed merger. The court emphasized how the plaintiff sued under a theory that he was precluded from luring Stewart customers by using the pitch that the proposed merger with Fidelity would *reduce existing choices* in the market.

He did not sue because he was prevented from contacting Stewart's customers *altogether*, according to the court. By urging customers to switch by anticipating the eventual loss of competitive choice, the court ruled that plaintiff sought to "join, rather than disrupt anticompetitive behavior." So, while the court acknowledged that Stewart may have prevented the plaintiff from benefiting from the consolidation in the underwriting market, that did not amount to an antitrust injury. Ultimately, the court concluded that the plaintiff's theory of harm flowed from an attempt to benefit from the anticompetitive effects of the proposed merger, not from conduct the Cartwright Act seeks to protect.

In addition to his antitrust claims, the plaintiff alleged that Stewart tortiously interfered with his at will employment contract with Fidelity by contacting Fidelity's management to block his sales tactics. The plaintiff alleged that this, in turn, caused him to lose sales and resulted in his termination.

The court first reiterated that, as the California Supreme Court held in Ixcel Pharma, LLC v. Biogen Inc., 9 Cal. 5th 1130 (2020), tortious interference with at will employment requires proof of an "independently wrongful act apart from the interference itself." Based upon the plaintiff's allegations that Stewart's interference with his employment was "illegal and wrongful under the Cartwright Act," the court determined that the plaintiff's tort claims rested on the alleged antitrust violations to show independently wrongful conduct. But because the court decided that the plaintiff was unable to show an antitrust injury, it found the

plaintiff likewise could not sustain his economic tort claims.

### 6. Conclusion

It is not every day that an employer instructs its sales employees not to compete for its competitor's clients, and then terminates an employee for doing so. As this decision highlights, when that terminated employee decides to bring suit, the legal claims and theories that are pursued can make the difference between winning and losing. While an employer may be able to fend off antitrust claims in the context of premerger agreements not to compete for customers, employers should be extremely careful when looking to enter agreements that may interfere with or restrain employees' ability to perform their roles.

## *DHS ANNOUNCES NEW FORM I-9 AND REMOTE VERIFICATION FOR E-VERIFY EMPLOYERS*

The Department of Homeland Security ("DHS") announced on July 21, 2023 they will publish a revised version of Form I-9 on August 1, 2023. DHS also announced an enhanced remote verification flexibility using video for E-Verify employers, both for clean-up of I-9s created during the pandemic and going forward.

### 1. Key Changes To The I-9 Form To Be Published On August 1

- Employers can use the current Form I-9 (10/21/19) through Oct. 31, 2023
- Starting Nov. 1, 2023, all employers must use the new Form I-9
- Reduces Sections 1 and 2 to a single-sided sheet
- Supplement for Preparer/Translator Certification
- Supplement for Reverification and Rehires
- Additional Acceptable Documents and guidance for automatic extensions
- For E-Verify employers, includes a box to indicate the special remote verification of documents

### 2. New Alternative Procedure Permitting Remote Verification For E-Verify Employers Only

Starting August 1, 2023, employers enrolled in E-Verify will be allowed to follow a new flexible procedure for remote verification of I-9 supporting documents.

- **Step 1:** Applicant (post-offer) or Employee copies or photographs their I-9 supporting documents (front and back) and e-mails them to the employer (or via another form of transmission).
- **Step 2:** Employer examines the documents to ensure the documents reasonably appear to be genuine.
- **Step 3:** Employer conducts a live video interaction (i.e., **Zoom, Teams, Google Meet, FaceTime, etc.**) with the applicant or employee to ensure that the documentation reasonably relates to them. Applicant or employee must present the same documents already transmitted to the employer a second time during the live interaction.
- **Step 4:** Employer marks the alternative procedure box of Supplement B of the new I-9 form for new employees hired on or after August 1, 2023. Or if the employee was hired during the pandemic, then the employer notates "Alternative Procedure" in the Additional Information Box of the prior I-9 form and completes this task by August 30, 2023.
- **Step 5:** Employer retains the supporting documents (paper or digital) and attaches them to the I-9. (In the past, only List A documents were copied. With the new remote

flexibility, the E-Verify employer must now copy and retain all List A, or List B and C documents.)

### 3. Cleanup Of Pandemic I-9s For E-Verify Employers – Due August 30

Employers who were participating in E-Verify and created an E-Verify case for employees whose documents were remotely examined during the COVID pandemic (March 20, 2020 to July 31, 2023), may now choose to use the new alternative live video procedure starting on August 1, 2023 to satisfy the physical document examination requirement by August 30, 2023.

The employer must notate "alternative procedure" with the date of video examination in the Additional Information Box on Page 2 of the older version I-9. The employer should not create a new case in E-Verify.

E-Verify employers hiring remote employees on or after August 1, 2023 should use the new I-9 form and complete the Supplement B designating the alternative procedure.

### 4. Non E-Verify Employers Cleanup Of Pandemic I-9s Due August 30

Employers who were not enrolled in E-Verify during the COVID-19 flexibilities must complete an **in-person** physical examination by Aug. 30, 2023 for any employees hired during the pandemic.

### 5. Avoiding Discrimination With The Use Of E-Verify

Employers should be mindful of the following key issues:

- E-Verify is only to be used on new hires. The only exception is employees working on a covered federal contract that requires mandatory E-Verify.
- An I-9 should never be completed until an offer is made and E-Verify should never be used until the I-9 is completed.
- Employers that were not enrolled in E-Verify at the time they initially performed a remote examination of an employee's documents under the COVID-19 flexibilities between March 20, 2020 and July 31, 2023 may not use the qualified video flexibility on employees hired since that time unless the employee was hired after the employer enrolled in E-Verify.
- A remote employee may elect to come into the employer's office for in-person examination of their I-9 documents.
- All employers that enroll in E-Verify and are using a digital I-9 software program that interfaces with E-Verify are required to have all users participate in mandatory anti-discrimination training. https://www.e-verify.gov/book/export/html/3802

### 6. DOJ Immigrant & Employee Rights (IER)

While employers should always strive to have perfect I-9s, if they have any doubts as to whether someone is work authorized (either a new hire or someone on an automatic extension) they should consult with counsel. DOJ will hold employers **strictly liable** for any inadvertent denial of employment due to a misunderstanding of whether an employee is work authorized. Along with that comes a burdensome Civil Investigation Demand, mandatory training, fines, and public shaming.

### 7. Consult With Counsel

When you encounter any unusual I-9 issues, consult with experienced employment counsel to avoid creating liability, both as to onboarding as well as terminations.

### *STATE AND FEDERAL REGULATORS FOCUS ON VIOLATIONS OF HEAT-RELATED ILLNESS PREVENTION MEASURES*

After some of the hottest months on record, employers should be prepared to review and update their heat-related illnesses prevention policies. Such illnesses are becoming an important topic for state and federal workplace investigators.

State and federal departments have provided multiple warnings that they will target heat-related violations at workplaces. For example, in April, the Occupational Safety and Health Administration ("OSHA") announced it would be inspecting employers with operations who are considered to pose a high risk for heat illness to its employees. During such inspections, OSHA will focus on "outdoor heat," a recognized hazard, and heat illness issues.

By way of one example, the U.S. Postal Service ("USPS") recently settled a matter with the Department of Labor ("DOL") and OSHA regarding several matters related to heat injuries and illnesses. USPS will now update its trucks to include air conditioning.

Even employers whose workforce is largely indoors should be aware of heat-illness prevention measures. OSHA has proposed additional heat regulations for indoor and outdoor locations to go into effect next year.

As such, employers should be aware of general best-practices to prevent heat-related illness, while consulting their local, state and federal regulations for their type of workplace:

- Most regulations are triggered when the outdoor temperature is 80 degrees or above. However, employers in forging, metalworking, warehouse, and similar industries should carefully monitor indoor conditions as well, due to heated machinery.

- Employees should have access to suitably cool water and be encouraged to drink water every 15 minutes, even if they are not thirsty. Employees should ideally drink one quart of water per hour.

- In California, employers must provide access to shade when the outdoor temperature is 80 degrees or above, with some exceptions. Additionally, employees must be permitted to take preventative cool-down breaks of no less than 5 minutes. These cool-down breaks should be taken before the employee feels unwell.

- Employers in the agriculture, construction, landscaping and oil and gas extraction industries or who transport or deliver agricultural products, construction materials or other heavy material are subject to additional requirements when the outdoor temperature is 95 degrees or above.

Employers should train employees and supervisors on heat-illness prevention measures, signs of heat illness and what to do in an emergency.

## 2023 SEMINAR EXPERIENCE

### *WAGE-HOUR, EMPLOYMENT DISCRIMINATION, WRONGFUL DISCHARGE, FAMILY LEAVE LAWS, AND EMPLOYEE HANDBOOK SEMINARS*

Castle Publications is pleased to announce that the upcoming seminar series will be presented in person as well as via a live broadcast. Attendees at Castle's programs will see and hear Attorney Richard J. Simmons, one of the nation's most highly sought-after speakers and authors on employment law. Showcasing his energetic presentation style, Mr. Simmons will present the upcoming series while featuring his invaluable Manuals as the program texts for each of the three seminars.

Each of the programs is designed to provide a meaningful examination of the **state and federal laws** in their respective areas, as well as many practical concerns. Particular attention will be devoted to areas of frequent concern to California employers and common pitfalls that have resulted in significant employer liabilities. The programs are intended to show employers **HOW TO** avoid, limit, and eliminate liabilities. Along with the extensive course materials (provided to all registrants), the programs will enable employers to understand what the laws require and how to comply.

The Wage and Hour Laws program will be presented on September 12, 2023. It will address the recent Supreme and appellate court cases on meal periods, overtime, bonuses, hours worked, travel time, and independent contractors (the ABC test), legislative changes, sick leave, and cases on rest periods, meal periods, pay stubs, time rounding, vacation, the day-of-rest rules, exemptions, expense reimbursements and alternative work schedules. The seminar will feature the 2023 Wage and Hour Manual for California Employers by Attorney Richard J. Simmons, which exceeds 1,050 pages.

The Employment Discrimination and Employee Relations Laws program will include a discussion of the "Ban the Box," criminal history, and salary history rules, the updated sexual harassment, anti-bullying and confidentiality standards, the equal pay rules, FEHA, disability discrimination, pregnancy leave standards, and a detailed segment on avoiding wrongful discharge liability. It will be presented on September 13, 2023. It will feature the Employment Discrimination and EEO Practice Manual for California Employers by Attorney Richard J. Simmons, which exceeds 880 pages.

The Employee Handbook and Personnel Policies program will be presented on September 19, 2023. This program will include numerous topics including segments on the new family rights laws, leaves of absence, social media and networking policies, California's sick leave statute, make-up time policies, workplace security and violence protection, use of the Internet and electronic communication devices, and anti-bullying and harassment. All attendees will receive the New 2023 Employee Handbook and Personnel Policies Manual, by Attorney Richard J. Simmons. The 17th edition of the book is over 810 pages in length and contains more than 460 sample policies.

More information regarding these programs is available at www.castlepublications.com.

## FEATURED PUBLICATION

### *EMPLOYEE HANDBOOK AND PERSONNEL POLICIES MANUAL HAS BEEN UPDATED FOR 2023*

Castle Publications is pleased to announce the new, seventeenth edition of the Employee Handbook and Personnel Policies Manual, by Attorney Richard J. Simmons of the law firm of Sheppard, Mullin, Richter & Hampton LLP. The new edition of the book has been updated for 2023 and responds to numerous developments, including California's new legislation affecting bereavement leave policies, pay scales and equal pay policies and the recent changes to the California Family Rights Act, Kin-Care benefit designation rules, lactation accommodation, teleworking standards, organ and bone marrow donor time off rules, meal and rest period developments, paid family leave amendments, and no-rehire policies, to mention just a few.

The publication contains **more than 460 sample personnel policies** and is over 810 pages in length. It contains chapters on employee classifications, compensation and payroll practices, employee benefits, leaves of absence policies, discipline and terminations, layoffs, staff reductions, and safety, efficiency, and substance abuse in the workplace.

Among the numerous policies included in the new book are sample Family and Medical Leave Policies and policies covering electronic communications devices, social media, the Internet, email, telework and telecommuting. In addition, the new edition contains sample policies regarding voicemail, computer access, make-up time under AB 60, policies against harassment, anti-bullying, vacation pay, holiday pay, sick pay under the state rules, dress and grooming, medical leaves, policy

announcements, compensatory time off, acknowledgement forms, cell phones, standards of conduct progressive discipline, at-will statements, drug and alcohol deterrence, drug testing, benefit disclaimers, doctor statements requirements, and time off rights.

The book is now available to order from Castle Publications, LLC for only $199.00, plus tax and shipping ($227.91 total) for the print format and $239.00 for the electronic format. Orders can be submitted online at www.castlepublications.com.

Our separate electronic product, Sample Policies, is also available (for an additional fee) and allows consumers to print and edit policies from the Employee Handbook and Personnel Policies Manual so they can build their own handbooks. Included with this product is a zip file containing all the policies in Chapter 11 of the Manual in Word format. Sample Policies is also available to order from Castle Publications, LLC for only $199.00. Or purchase Sample Policies and the Employee Handbook and Personnel Policies Manual together, for $299.00 plus tax and shipping ($337.41 total) for the print format and $349.00 for the electronic format. Orders can be submitted online at www.castlepublications.com.

## NEW PUBLICATIONS

### *2023 EDITION OF WAGE AND HOUR MANUAL IS NOW AVAILABLE*

The 2023 edition of the Wage and Hour Manual for California Employers, (Twenty-Sixth Edition) is now available. The Manual is authored by Attorney Richard J. Simmons, a partner with the law firm of Sheppard, Mullin, Richter & Hampton LLP. The new edition is more than 1,050 pages, and provides a detailed analysis of the California and federal wage and hour laws.

Simmons' Wage and Hour Manual for California Employers is generally regarded as the best resource available on the California and federal wage and hour requirements. The new edition will examine new case law developments, including the Supreme Court's Dynamex v. Superior Court, Troester v. Starbucks, Alvarado v. Dart and Gerard v. Orange Coast decisions, new statutory rules, the amendments to state law adopted by the Legislature, and amendments to the federal law, including the overtime exemption regulations. It also addresses numerous other judicial and regulatory developments. This includes a review of new cases involving the white collar exemptions, the "salary basis" rules, commissions, standards on "unconscionability of contracts," and deductions from wages, as well as many other topics.

The book also discusses the state and federal wage and hour laws that govern employers, meal and rest period requirements, the federal laws regulating government contractors, independent contractor and joint employment relationships, the legal standards regulating the maximum number of hours employees can work, the employment of minors, minimum wage obligations, tipped employee rules, hours worked, overtime standards, flexible work arrangements, exemptions, the payment of wages, record-keeping rules, tort liability issues, posting obligations, uniforms, medical examinations, enforcement standards, and a variety of additional topics.

The book is now available to order from Castle Publications, LLC for only $199.00, plus tax and shipping ($227.91 total) for the print format and $239.00 for the electronic format. Orders can be submitted online at www.castlepublications.com.

### *NEW 2023 CALIFORNIA'S PAGA – LITIGATION AND COMPLIANCE MANUAL AVAILABLE NOW*

As previously noted in the ALERT, an unprecedented number of PAGA cases continue to be filed. Authored by Sheppard Mullin Attorneys Richard J. Simmons, Ryan J. Krueger, and Tyler J. Johnson, the new California's Private Attorneys General Act (PAGA) Litigation and Compliance Manual examines the sweeping changes to employment law contained in the Private Attorneys General Act ("PAGA"). The law has been nicknamed the "Sue Your Boss" Law because of the incentives it gives employees to sue employers. It applies to all California employers and emphasizes the need for total compliance with California's unique rules.

PAGA penalties for a single Labor Code violation can equal **$100 for each employee times the number of pay periods for which the violation lasts**. As an example, an employer with 100 employees could face penalties of **$10,000 per pay period** for just one violation. If the employer uses a weekly pay period and the violation lasts a year, the penalties could be $520,000. Strikingly, the penalties can double for subsequent violations. Worse yet, the statute is entirely one-sided so employees who win are assured recovery of their attorneys' fees even though employers can never recover their fees under PAGA, even if a case is proved to be baseless.

In this publication, Attorneys Richard J. Simmons, Ryan J. Krueger, and Tyler J. Johnson from the law firm of Sheppard, Mullin, Richter & Hampton LLP examine PAGA from top to bottom. In addition to reviewing every section of the law, the book delves deeply into the cases that have construed it, the hurdles that employees must exhaust before filing a lawsuit, litigation strategies, defenses, the effect of arbitration agreements on PAGA actions, and compliance issues. It includes an in-depth review of the purpose and structure of PAGA, meal period, rest period, pay stub, seating and other claims, trial strategies, damages and remedies.

The publication emphasizes compliance rules and includes a number of checklists. One checklist allows employers to audit their policies and practices. It also provides an extensive review of key cases, including a chapter devoted to the Supreme Court cases in the field since 2004. The authors identify proactive strategies, high risk areas, and valuable guidance designed to aid compliance efforts and reduce exposure to liability.

This book is now available to order from Castle Publications, LLC for only $199.00, plus tax and shipping ($227.91 total) for the print format and $239.00 for the electronic format. Orders can be submitted online at www.castlepublications.com.

## *NEW EDITION OF BOOK OF HUMAN RESOURCES FORMS JUST PUBLISHED*

Castle Publications, LLC is pleased to announce that Attorney Richard J. Simmons has released the new 2023 edition of the Book of Human Resources Forms (Tenth Edition) in both print and electronic formats. The publication was written on the premise that every employer and human resources representative must administer a wide variety of personnel practices at every stage of the employment relationship.

In order to act consistently and legally, standardized procedures and practices are essential. As a result, a critical need existed for personnel forms that guide each HR, personnel, payroll and employee relations representative through the maze of governing rules and regulations. The need for standardized forms begins with the hiring, recruitment and application process and continues through the time an employee terminates.

### 1. Over 250 Forms

The new publication is more than 500 pages long. It presents over 250 personnel and HR forms that will greatly simplify many personnel administration tasks. These include a vast collection of forms that guide those responsible for personnel administration through the entire employment relationship, from its inception to its conclusion, and beyond.

The sample forms and letters include updated job applications incorporating "Ban the Box" restrictions, offer letters, counseling forms, performance improvement plans, meal period forms, cell phone reimbursement forms, expense reimbursement forms, time card certifications, disciplinary actions plans, layoff notices, leave of absence forms, change of status forms, and many more. This publication is an essential resource for every employer. Any one of the forms will pay for the entire cost of the publication.

### 2. Chapters Cover Entire Employment Relationship

The chapters of the book include forms in the following general areas: (a) pre-hire forms, (b) new-hire and orientation forms, (c) payroll practice forms, (d) employee benefit forms, (e) personnel action and status forms, (f) leave of absence and time-off forms, (g) disciplinary action and grievance forms, (h) education assistance and training forms, (i) separation and post separation forms, and (j) government forms.

### 3. Electronic Publication Also Available

The electronic version of this book includes all the features of our other electronic publications plus a zip file containing all of the non-government forms in Word format. This allows for easy-customization of the forms to add a company logo, employee data, or other company information.

This book is now available from Castle Publications, LLC for only $199.00, plus tax and shipping ($227.91 total) for the print format and $239.00 for the electronic format. Orders can be submitted online at www.castlepublications.com.

## *UPDATED EDITION OF LEAVES OF ABSENCE AND TIME OFF FROM WORK MANUAL NOW AVAILABLE*

In his new edition of the Leaves of Absence and Time Off From Work Manual (Twenty-Third Edition), Attorney Richard J. Simmons of Sheppard, Mullin, Richter & Hampton LLP addresses the California and federal laws that regulate leaves of absence and time off from work. The publication provides an overview of the key laws in the area, examines which employers are subject to those laws, and describes their requirements, including the recent California amendments.

The publication delves into the complicated issues that surface due to the overlapping obligations that exist where two or more laws intersect. This includes the Family and Medical Leave laws, the American With Disabilities Act ("ADA"), pregnancy disability leaves, and the rules applicable to occupational disabilities. The publication provides checklists that employers can utilize to determine which laws regulate leaves and whether employees qualify for leaves or extensions.

The Manual provides readers a number of helpful appendices and forms. Among others, they include a sample leave designation form, FMLA and CFRA notices, a sample leave of absence request form, reproduction of the CFRA, a checklist to evaluate time off requests, and the California pregnancy disability leave regulations.

The publication is more than 240 pages in length. It can be ordered directly from Castle Publications, LLC for only $99.00, plus tax and shipping ($117.41 total) for the print format and $139.00 for the electronic format. Orders can be submitted online at www.castlepublications.com.

## *CALIFORNIA'S SICK PAY OBLIGATIONS – THE HEALTHY WORKPLACES, HEALTHY FAMILIES ACT UPDATED FOR 2023*

All California employers must revise their sick pay policies by January 1, 2023 to comply with **new state rules**. A few years back, California enacted the first state law requiring employers to provide paid sick leave. The new rules had to be administered in tandem with California's other rules, including the "kin-care" standards and the state leave of absence laws governing pregnancy disability leaves and family and medical leaves. These rules were just the beginning.

The California sick pay laws enacted in 2023 are examined in the new edition of Attorney Richard Simmons' publication, California's Sick Pay Obligations – The Healthy Workplaces, Healthy Families Act. The new edition includes a detailed discussion of AB 2017 and the latest SB 95, the "COVID-19 Supplemental Paid Sick Leave Act." The publication reviews the obligations imposed on employers under California's **sick pay law** and the **amended version of the kin-care law**.

Apart from the new rules, the Healthy Workplaces, Healthy Families Act requires virtually all California employers to provide paid sick leave that accrues at minimum rates. The law applies to employees who meet basic eligibility rules, including full-time, part-time, temporary and seasonal employees. Employers must also include additional information in their new-hire Wage Theft Prevention Act notices and comply with new posting, record-keeping, reporting and pay stub rules.

The book can be ordered from Castle Publications, LLC for only $99.00, plus tax and shipping ($117.41 total) for the print format and $119.00 for the electronic format. Orders can be submitted online at www.castlepublications.com.

### *MEAL AND REST PERIOD PUBLICATION EXAMINES LATEST SUPREME COURT DECISION ON MEAL AND REST BREAK PREMIUMS*

The new 2023 edition examines California's unique meal and rest period rules, the liabilities that exist for violations and the Supreme Court's landmark decisions in the recent **Naranjo v. Spectrum Security** and **Donohue v. AMN** cases. The new sanctions created for violations of these rules will lead to class action lawsuits and millions of dollars in liability.

Castle Publications has a **solution** to many of the problems created by these rules. In the ninth edition of his book, California's Meal And Rest Period Rules: Proactive Strategies For Compliance, California's leading expert on wage-hour law, Attorney Richard J. Simmons from the law firm of Sheppard Mullin, has identified training and compliance strategies for all California employers. All California employers must be aware of their obligations and the high price they may pay for noncompliance. The new edition of the book examines the new Naranjo case, other recent cases, and compliance programs. It discusses ways to **make timekeeping systems an employer's ally rather than its enemy**. It also includes sample forms and many valuable resources, including new-hire and attestation forms as well as significant opinion letters.

The new edition is designed to assist employers to understand and address their legal obligations, **train their supervisors**, and **update their policies and practices**. It also describes "best practices" and lays out over 20 proactive approaches that can aid employers to avoid and defend costly lawsuits. **Sample forms** are included to remind new and existing employees of their right to meal and rest periods and secure their cooperation.

California's Meal And Rest Period Rules: Proactive Strategies For Compliance is now available in print and electronic formats. It can be ordered directly from Castle Publications, LLC for only $99.00, plus tax and shipping ($117.41 total) for the print format and $139.00 for the electronic format. Orders can be submitted online at www.castlepublications.com.

## ABOUT THE ALERT

The *ALERT* is a publication of Castle Publications, LLC, and is published bi-monthly. Subscriptions are available in hard copy or electronic format for $135.00 per volume (six issues) and are payable in advance. Single issues are available for $25.00 each. For more information, please call Castle Publications, LLC at (213) 455-7617 or visit our website at www.castlepublications.com.

The *ALERT* is intended to apprise readers of noteworthy developments involving labor and employment laws affecting or possibly affecting California employers. Its contents are based upon recent statutes and decisions, but should not be viewed as legal advice or legal opinions of any kind whatsoever.

The articles contained in the *ALERT* represent interpretations by its authors and may be affected by various developments, including judicial and administrative appeals, legislative activity, and conflicting judicial authority. Accordingly, employers and other readers are advised to consult their own legal counsel with respect to any of the issues, statutes, decisions, or matters discussed in the ALERT, and should rely on the advice of their counsel and not on the ALERT when making or implementing personnel-related decisions.

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