CALIFORNIA LEGAL UPDATE

New Legislation and Court Decisions for the Workplace in 2022

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KDG California Legislative Digest: New Legislation and Court Decisions in the Workplace 2022

Jay L. Rosenlieb[1]

I. Introduction

Democrats have supermajorities in both California legislative chambers and Governor Newsom is pursuing his previously announced policy agenda. As a result, although fewer bills were passed in 2021 as compared to 2020, there will be many changes impacting the relationship between California employees and their employers. Further, the 2021 legislative session resulted in only one piece of urgency legislation allowing time for implementation of changes. To the surprise of few, much of the rulemaking related to COVID issues was pushed off to the California Department of Public Health (CDPH) as Governor Newsom, with the exception of one piece of legislation, avoided adding legislation in this area under his signature.

California employers are well advised to familiarize themselves with the new statutory requirements so they can be ready to go as of January 1, 2022.[2, 3]

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[2] Disclaimer: The analysis and information provided in this Digest is general in its nature and content and cannot be applied to any specific situation without further analysis and gathering of facts. Users of this document are urged to consult with legal counsel.

[3] Unless otherwise stated, all legislation has an effective date of January 1, 2022.

II. Wage and Hour

A. Reminder: Minimum Wage Increases to $15.00* per hour as of January 1, 2022, for employers of 26 or more employees and $14.00 per hour as of January 1, 2022, for employers of 25 or fewer employees.

*After the state minimum wage reaches $15 an hour, the rate will be adjusted annually for inflation based on the consumer price index for urban wage earners and clerical workers (CPI-W). The minimum wage cannot, however, be lowered even if there is a negative CPI. Further, going forward the greatest increase in the minimum wage allowed in any one year is 3.5 percent. Also, the Governor will no longer be able to pause a scheduled increase, and the first adjusted increases may be accelerated if the adjusted CPI-W exceeds seven percent in that first year.

B. Senate Bill 62: Garment Manufacturing

Current Law: Existing law makes garment manufacturers liable for guaranteeing payment of wages to employees of their contractors.

Existing law requires every employer engaged in the business of garment manufacturing to keep certain records for 3 years, including, among other things, contract worksheets indicating the price per unit agreed to between the contractor and manufacturer.

Existing law requires the Labor Commissioner to deposit $75 of each garment manufacturer's registration fee into one separate account to be disbursed by the Labor Commissioner only to persons determined by the Labor Commissioner to have been damaged by the failure to pay wages and benefits by a garment manufacturer, contractor, or subcontractor.

Existing law precludes any employer, or other person or entity, who may be liable for a violation of any provision of the Labor Code from introducing as evidence, in an administrative proceeding contesting a citation or writ proceeding under specified provisions, books, documents, or records that are not provided pursuant to a duly served written request by the Labor Commissioner within the time the Labor Commissioner requests those books, documents, or records be produced, as specified.

New Law: According to the Governor's signing announcement, SB 62 aims to "protect marginalized low-wage workers, many of whom are women of color and immigrants, ensuring they are paid what they are due and improving workplace conditions."

- Expands the definition of garment manufacturing to include dyeing, altering a garment's design, and affixing a label to a garment.
- Prohibits any employee in garment manufacturing from being paid by piece rate, except as specified.

- Imposes compensatory damages of $200 per employee against a garment manufacturer or contractor, payable to the employee, for each pay period in which each employee is paid by the piece rate.
- Brand Guarantors (person contracting for the performance of garment manufacturing) shall share joint and several liability for wage violations of garment manufacturers or contractors even if the seller was completely unaware of the violations.
- Requires every employer engaged in the business of garment manufacturing and brand guarantors to keep all contracts, work orders, invoices, purchase orders, style or cut sheets and any other documentation pursuant to which garment manufacturing work was, or is being, performed for 4 years (rather than 3 years).
- The required deposit $75 of each garment manufacturer's registration fee into one separate account require these funds to be disbursed by the Labor Commissioner only to persons determined by the Labor Commissioner to have been damaged by the failure to pay wages and benefits by a garment manufacturer, brand guarantor, or contractor.
- Expands the provisions relating to preclusion of records not earlier produced to also preclude the introduction of records not provided to the Labor Commissioner in an administrative proceeding under the provisions described above relating to the payment of wages for the performance of garment manufacturing.

Note: This almost precisely replicates SB 1399 which did not make it to the Governor's desk in 2020.

C. Assembly Bill 1003: Wage Theft – Grand Theft

Current Law: Existing law regulates the payment of wages and benefits in the state. Existing law makes violation of specified wage and gratuity provisions a misdemeanor and provides for civil penalties and remedies for the recovery of wages.

Existing law defines the crime of grand theft as theft committed when the money, labor, or real or personal property taken is of a value exceeding $950. Under existing law, grand theft is generally punishable either as a misdemeanor by imprisonment in a county jail for up to 1 year or as a felony by imprisonment in county jail for 16 months or 2 or 3 years.

New Law: This new law increases the criminal penalties and expands the definitions in the statute to include independent contractors. Specifically:

1. The intentional theft of wages, including gratuities, in an amount greater than $950 from any one employee, or $2,350 in the aggregate from 2 or more employees by an employer in any consecutive 12-month period is punishable as grand theft.

a. Grand theft is generally punishable either as a misdemeanor by imprisonment in a county jail for up to 1 year or as a felony by imprisonment in county jail for 16 months or 2 or 3 years.

2. Authorizes wages, gratuities, benefits, or other compensation that are the subject of a prosecution under these provisions to be recovered as restitution in accordance with existing provisions of law.
   a. For the purposes of these provisions, independent contractors are included within the meaning of employee and hiring entities of independent contractors are included within the meaning of employer.

D. Senate Bill 639: Minimum Wages for Persons with Disabilities

Current Law: Existing law establishes a minimum wage for all industries and makes it a crime to pay an employee less than the minimum wage fixed by the Industrial Welfare Commission.

Existing law, however, permits the IWC to issue an employee who is mentally or physically disabled, or both, a special license authorizing the employment of the licensee for a period not to exceed 1 year from date of issue, at a wage less than the minimum wage. Existing law requires the commission to fix a special minimum wage for the licensee, which may be renewed on a yearly basis.

Under existing law, the IWC is authorized to issue a special license to a nonprofit organization such as a sheltered workshop or rehabilitation facility to permit the employment of disabled employees who the IWC has determined meet the requirements for paying less than the state minimum wage without requiring individual licenses of those employees. Existing law requires the IWC to fix a special minimum wage for those employees, subject to renewal.

New Law: Prohibits new special licenses from being issued after January 1, 2022. The bill permits a license to only be renewed for existing license-holders who meet requisite benchmarks. The bill would make the provision authorizing a lesser minimum wage for an employee who is mentally or physically disabled inoperative on January 1, 2025, or when the multi-year phaseout plan as described below is released, whichever is later.

SB 639 requires the State Council on Developmental Disabilities, in consultation with stakeholders and relevant state agencies, to develop a multiyear phaseout plan with stakeholder involvement, by January 1, 2023, to pay any employee with a disability, as defined, by January 1, 2025, no less than the state minimum wage otherwise required. Requires the multiyear phaseout plan to contain specified components, including benchmarks and desired outcomes for each year of the plan and a list of resources to ensure employees with disabilities can receive services based on their needs.

Commencing on the later of January 1, 2025, or when the above-mentioned plan is released, the employer of an employee with a disability will be prohibited from paying

the disabled employee less than the California minimum wage or the applicable local minimum wage ordinance, whichever is higher.

Requires the State Council on Developmental Disabilities, in developing the multiyear phaseout plan, to engage with and seek input from people with developmental disabilities who have experience working for subminimum wage and various stakeholder organizations. It requires the State Council on Developmental Disabilities to release and publicly post on its internet website a report by January 1, 2023.

Requires the State Council on Developmental Disabilities to submit a copy of the report on its multiyear phaseout plan to the appropriate policy committees of the Legislature for review on or before January 1, 2023. Requires the State Council on Developmental Disabilities to publicly post on its internet website and submit to the Legislature an annual report beginning on January 1, 2024, as specified, detailing specified information about the multiyear phaseout plan.

Effective January 1, 2025, the IWC is no longer authorized to issue a special license to a nonprofit organization such as a sheltered workshop or rehabilitation facility to permit the employment of disabled employees who the commission has determined meet the requirements for paying less than the state minimum wage.

E. Assembly Bill 1506: Newspaper Distributors and Carriers AB5 Exemption Extension

Current Law: Existing law, as established in the case of Dynamex Operations v. Superior Court (2018) 4 Cal.5th 903 (Dynamex), creates a presumption that a worker who performs services for a hirer is an employee for purposes of claims for wages and benefits arising under wage orders issued by the Industrial Welfare Commission. Existing law requires a 3-part test, commonly known as the "ABC" test, to determine if workers are employees or independent contractors for those purposes.

Existing law exempts specified occupations and business relationships from the application of Dynamex. These exemptions include a temporary exemption for newspaper distributors working under contract with a newspaper publisher and newspaper carriers, as those terms are defined, until January 1, 2022.

New Law: Extends the exemption newspaper distributors working under contract with a newspaper publisher and newspaper carriers from January 1, 2022, to January 1, 2025.

Requires every newspaper publisher or distributor that hires or directly contracts with newspaper carriers to submit specified information related to their workforce to the Labor and Workforce Development Agency on or before March 1, 2022, March 1, 2023, and March 1, 2024.

F. ***VETOED BY GOVERNOR:*** **Assembly Bill 123: Paid Family Leave Weekly Benefit Amount**

Current Law: Existing unemployment compensation disability law provides a formula for determining benefits available to qualifying disabled individuals. Under existing law, for periods of disability commencing on and after January 1, 2023, if the amount of wages paid an individual during the quarter of their disability base period in which those wages were highest exceeds $1,749.20, the weekly benefit amount is 55% of those wages divided by 13. Under existing law, a benefit that is not a multiple of $1 shall be computed to the next higher multiple of $1, and the amount of the benefit is prohibited from exceeding the maximum workers' compensation temporary disability indemnity weekly benefit amount. Under existing law, the maximum amount of benefits payable to an individual during any one disability benefit period is 52 times their weekly benefit amount, as specified.

Existing law also establishes, within the above state disability insurance program, a family temporary disability insurance program, also known as the paid family leave program, for the provision of wage replacement benefits for up to 8 weeks to workers who take time off work to care for a seriously ill family member or to bond with a minor child within one year of birth or placement, as specified. Existing law defines "weekly benefit amount" for purposes of both employee contributions and benefits under this program to mean the amount of weekly benefits available to qualifying disabled individuals pursuant to unemployment compensation disability law.

Proposed Law: The proposed law would have revised the formulas described above for periods of disability commencing after January 1, 2023, but before January 1, 2025, by redefining the weekly benefit amount to be equal to 65% or 75% of the wages paid to an individual for employment by employers during the quarter of the individual's disability base period in which these wages were highest, divided by 13, but not exceeding the maximum workers' compensation temporary disability indemnity weekly benefit amount established by the Department of Industrial Relations, depending on the amount of wages paid to the individual for employment by employers during the quarter of the individual's disability base period in which these wages were highest.

The bill would have, for periods of disability commencing after January 1, 2025, increased the wage replacement percentages to be equal to 70% or 90% depending on the amount of wages paid to the individual for employment by employers during the quarter of the individual's disability base period in which these wages were highest. The bill, however, would have made these revisions to the formula applicable to only the first 12 weeks of benefits for disability benefits that are not the paid family leave program.

Veto Message: In his veto message, the Governor stated: **"**This bill revises formulas for determining benefits under the State Disability Insurance (SDI) program, which includes Disability Insurance (DI) and Paid Family Leave (PFL) programs, beginning January 1, 2023. My Administration has been a strong advocate for expanding access to DI and PFL programs, and I am proud of the progress we have made in collaboration with the

Legislature. In 2019, I signed SB 83 (Chapter 24) which extended the maximum duration of paid family leave benefits from 6 to 8 weeks and AB 406 (Chapter 386) which required PFL applications to be provided in multiple languages.

Last year, I signed SB 1383 (Chapter 86) which provided job-protected leave to employees working for employers with five or more employees. Last year, I signed AB 138 (Chapter 78) which extended increased wage replacement rates to 2023. This bill would create significant new costs not included in the 2021 Budget Act and would result in higher disability contributions paid by employees. I look forward to continued partnership with the Legislature to ensure that workers have true access to programs providing family leave."

Note: AB 123 passed the Assembly and Senate without a single "no" vote.

G. *Levanoff v. Dragas* 65 Cal.App.5th 1079 (REVIEW DENIED AND ORDERED NOT TO BE OFFICIALLY PUBLISHED SEPTEMBER 29, 2021)

Issue: Does calculating overtime wages for dual rate employees through the rate-in-effect method—by which dual rate employees are paid for overtime hours based on the rate in effect when overtime hours began—violate California law?

Ruling: No. California law does not mandate the use of the weighted average method (by which dual rate employees are paid for overtime based on an hourly rate calculated by adding all hours worked in one pay period and dividing that number into the employee's total compensation for the pay period). The Court went on to point out that defendants' dual rate employees generally received net greater overtime pay under the rate-in-effect method than they would have received under the weighted average method.

H. *Kao v. Joy Holiday* (2020) 58 Cal.App.5th 199

Issue: When may officers of a corporation be considered alter egos of a closely held corporation?

Ruling: Whether to invoke alter ego liability depends on: (1) whether there is such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and (2) whether adherence to the fiction of separate existence would, under the circumstances, promote fraud or injustice. The Court stated that a trial court may consider: (1) comingling of funds and other assets; (2) treatment by an individual of the assets of the corporation as their own; (3) failure to maintain adequate corporate records; (4) sole ownership of all stock in a corporation by members of a family; (5) the use of a corporation as a mere shell for a single venture or the business of an individual; (6) the concealment of personal business activities, or (7) the use of a corporation as a subterfuge of illegal transactions.

I. ***International Brotherhood of Teamsters v. Federal Motor Carrier Safety Administration*** **(2021) 986 F.3d 841.**

Issue: Should the Federal Motor Carrier Safety Administration (FMCSA) be permitted to determine whether federal law preempts California's meal and rest break rules as applied to drivers of property carrying commercial vehicles?

Ruling: Yes. The FMCSA only has the authority to review to review for preemption state laws and regulations on commercial vehicle safety. According to the Ninth Circuit, the FMCSA's decision reasonably relied on Congress's stated interest in uniformity of regulation. The fact that California regulated rest and meal breaks in a variety of industries did not force the conclusion that the meal and rest break rules were not "on commercial motor vehicle safety." Finally, the Ninth Circuit determined that the FMCSA did not act arbitrarily or capriciously in finding that enforcement of the meal and rest break rules "would cause an unreasonable burden on interstate commerce."

J. **Vazquez v. Jan-Pro Franchising International, Inc. (2021) 10 Cal.5th 944**

Issue: Does the holding in Dynamex apply retroactively and require that the ABC test which determines whether workers are independent contractors or employees under California wage order laws be applied?

Rule: Yes. The Ninth Circuit rejected the argument that Dynamex should not be applied retroactively. The Court determined that applying Dynamex retroactively was consistent with due process because the district court had not opportunity to consider whether plaintiffs were employees under the Dynamex standard, and neither party had the opportunity to supplement the record with regard to the Dynamex criteria. Accordingly, Dynamex and the ABC test apply retroactively.

K. ***Clarke v. AMN Services, LLC*** **(2021) 986 F.3d 1106**

Issue: Should per diem benefits be included in regular rate of pay for purposes of calculating overtime pay?

Rule: Yes. According to the Ninth Circuit, the per diem benefits received functioned as compensation for work rather than as a reimbursement for expenses incurred, and the benefits were thus improperly excluded from plaintiff's regular rate of pay for purposes of calculating overtime pay. The panel relied on a combination of factors, including: (1) the tie of the per diem deductions to shifts not worked regardless of the reason for not working; (2) a banking hours system; (3) the default payment of per diem on a weekly basis, including for days not worked away from home; and (4) the lack of regard as to whether any expenses were actually incurred on a given day.

L. ***Donohue v. AMN Services, LLC*** **(2021) 11 Cal.5th 58**

Issue: May an employer round time punches for meal period?

Rule: No. An employer cannot engage in the practice of adjusting hours that an employee has actually worked to the nearest present time increment in the meal period context. The practice of rounding time punches for meal periods is inconsistent with the purpose of the Labor Code provisions. Given the relatively short length of a 30-minute meal, the potential incursion from rounding is significant. The court also determined that time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations.

M. ***Parada v. East Coast Transport, Inc.*** **(2021) 62 Cal.App.5th 692**

Issue: Does federal law preempt application of the ABC test to motor carriers?

Rule: No. The Court concluded that federal law does not preempt application of the ABC test to motor carriers. The federal law in questions, the Federal Aviation Administration Authorization Act (FAAAA) prevents states or political subdivisions of states from enacting laws related to a price, route, or service of any motor carrier. According to the Court, the ABC test is a law of general application that does not mandate the use of employees, but rather is a means of determining whether a person is an employee or an independent contractor.

N. ***Magadia v. Wal-Mart Associates, Inc.*** **(2021) 999 F.3d 668**

Issue: Is an employer required to list the rate of its bonus adjustment on employees' wage statements?

Rule: No. Here the wage statement law was not violated because there was no hourly rate in effect during the pay period. Walmart paid its employees every two weeks and provided a paystub at the end of each semimonthly pay period. At the end of a quarter, Walmart awarded a bonus to its employees based on performance, sales, profits, and store standards for the entire quarter. In sum, because Walmart retroactively calculated the bonus based on work from multiple pay periods, it was not considered an hourly rate in effect during the pay period, and Walmart complied with the wage statement law.

O. ***Ferra v. Loews Hollywood Hotel, LLC*** **(2021) 11 Cal.5th 858**

Issue: How should employees be compensated for noncompliant meal, rest, and recovery periods?

Rule: Premium pay for noncompliant meal, rest, and recovery periods must be compensated at the employee's regular rate of pay, which should take into account the base hourly rate of pay and all other forms of non-discretionary compensation (such as

non-discretionary bonuses, commissions, and shift differentials) earned during the pay period. Employers must calculate overtime and sick leave in the same manner. Additionally, it should be noted that the ruling is retroactive, meaning employers face potential past liability for up to four years for missed meal or rest break premium payments that were not calculated with the correct regular rate of pay.

P. ***Mauia v. Petrochem Insulation, Inc.*** **(2021) 5 F.4th 1068**

Issue: Does federal or state law apply on the outer continental shelf?

Rule: Federal law generally applies on the outer continental shelf, and state law is only adopted to the extent it is applicable and not inconsistent with federal law. This means that California labor laws do not apply on the Outer Continental Shelf under the Outer Continental Shelf Lands Act because federal law already addresses those issues.

Q. ***Morales v. Factor Surfaces, LLC*** **(2021) 70 Cal.App.5th 367**

Issue: How should a former employee's regular rate of pay be determined?

Rule: A former employee's regular rate of pay should be calculated by the number of hours worked. If the number of hours worked is unclear, the regular rate of pay should be calculated by dividing the former employee's weekly compensation by 40.

R. ***Gulf Offshore Logistics, LLC v. Superior Court*** **(2020) 272 Cal.Rptr.3d 356 REVIEW DENIED AND ORDERED NOT TO BE PUBLISHED MARCH 24, 2021**

Issue: Does California law apply to non-California residents working off of the California coast?

Rule: Yes. California law applies to non-California residents working off of the California Coast. There is no preemption by federal law, because the relevant federal laws do not contain any provisions that actually or implicitly conflict with California law.

S. ***Bernstein v. Virgin America*** **(2021) 3 F.4th 1127 (PENDING OPINION BY THE SUPREME COURT OF THE UNITED STATES)**

Issue:
1: Does California law apply to employees who do not perform all of their work in California?

2: Does block payment violate California's minimum wage law?

Rule:
1: Yes. California law applies to employees who do not perform all their work in California, even if the majority of their work was not performed in California as long as the employees do not perform the majority of their work in any one state.

2: No. The Ninth Circuit determined that payment in blocks of time does not violate California's minimum wage law where the system as a whole offers a guaranteed level of compensation for each period that is greater than the minimum wage for all hours worked. The fact that pay is not specifically attached to each hour of work does not mean that the system is illegal.

T. *Department of Industrial Relations v. Bult Pacific* (2021) 62 Cal.App.5th 780

Issue: Does Civil Code Section 1671(b), which invalidates unreasonable liquidated damages provisions, apply to judgments entered pursuant to a Civil Wage Penalty Assessment?

Rule: No. Civil Code Section 1671(b) does not apply to a judgment entered pursuant to a civil wage penalty assessment, because the judgment is entered pursuant to the Labor Code rather than a contract.

III. Employee Leaves and Benefits

A. Assembly Bill 1033: CFRA Parent-in-law; Small Employer Family Leave Mediation Pilot

Current Law: The Moore-Brown-Roberti Family Rights Act, commonly known as the California Family Rights Act (CFRA), which is a part of FEHA, makes it an unlawful employment practice for an employer, as defined, to refuse to grant a request by an eligible employee to take up to 12 workweeks of unpaid protected leave during any 12-month period for family care and medical leave, as specified. Existing law defines family care and medical leave to include, among other things, leave to care for a parent.

Existing law requires the DFEH to create a small employer family leave mediation pilot program, for alleged violations of these family care and medical leave provisions, applicable to employers with between 5 and 19 employees. Existing law authorizes the employer or the employee to request that all parties participate in mediation through the DFEH's dispute resolution division after the DFEH issues a right-to-sue notice.

Existing law requires the department to initiate the mediation promptly following a request, prohibits an employee from pursuing a civil action until the mediation is complete, and tolls the statute of limitations for the employee, including for all related claims not subject to mediation, from the date of receipt of a request to participate in the program until the mediation is complete. Existing law repeals the pilot program on January 1, 2024.

New Law: The new law additionally includes leave to care for a parent-in-law within the definition of family care and medical leave and would make other conforming changes.

Specifically, the DFEH is now required, when an employee requests an immediate right to sue alleging a violation of the above-described family care and medical leave provisions by an employer, to notify the employee in writing of the requirement for mediation prior to filing a civil action, if mediation is requested by the employer or employee. It also requires the employee to contact the DFEH's dispute resolution division, prior to filing an action and to indicate whether they are requesting mediation.

The DFEH is now required, upon contacting the dispute resolution division regarding the intent to pursue a legal action for an employer's violation of the family and medical leave provisions, to notify all named respondents of the alleged violation and the requirement for mediation, if mediation is requested by the employee or employer, in writing.

Further, the DFEH is now required to terminate its activity if neither the employee nor the employer requests mediation within 30 days of receipt by all named respondents of the notification, as specified. The bill would require the department, if it receives a request for mediation from the employer or employee within 30 days of receipt, as described above, to initiate the mediation within 60 days of the department's receipt of the request or the receipt of the notification by all named respondents, whichever is later. The bill would require the mediator, once mediation has been initiated and no later than 7 days before the mediation date, to notify the employee of their right to request certain labor-related information and to help facilitate other reasonable requests for information, as specified. The employee is prohibited from pursuing a civil action unless the mediation is not initiated by the department within the time period prescribed above or until the mediation is complete or deemed unsuccessful. The new law states it will toll the statute of limitations applicable to the employee's claim from the date the employee contacts the department's dispute resolution division regarding the intent to pursue a legal action until the mediation is complete or deemed unsuccessful.

Finally, this new law entitles a respondent or defendant in a civil action that did not receive the required notification as a result of the employee's failure to contact the DFEH's alternative dispute resolution prior to filing a civil action and who had 5 to 19 employees at the time that the alleged violation occurred, to a stay of any pending civil action or arbitration until the mediation is complete or deemed unsuccessful.

B. ***INACTIVE*: Assembly Bill 1041: Employment Leave**

Current Law: The California Family Rights Act, makes it an unlawful employment practice for any government employer or employer with 5 or more employees to refuse to grant a request by any employee with more than 12 months of service with the employer, and who has at least 1,250 hours of service with the employer during the previous 12-month period or who meets certain other requirements, to take up to a

total of 12 workweeks in any 12-month period to, among other things, bond with a new child of the employee or to care for themselves or a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner.

The Healthy Workplaces, Healthy Families Act of 2014 (MPSL), generally entitles an employee who works in California for the same employer for 30 or more days within a year to paid sick days, as specified, including the use of paid sick days for diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member. Existing law defines "family member" for this purpose to include individuals who share a prescribed relationship with the employee.

Not Sent to Governor: This legislation was ordered to the inactive file at the request of the bill's co-author. If signed, it would have expanded the definition of persons that an employee could have taken leave to care for under CFRA and the Healthy Workplaces, Healthy Families Act of 2014 (MPSL) to include a "designated person". The bill would have defined "designated person" to mean a person identified by the employee at the time the employee requests family care and medical leave. The bill would have authorized an employer to limit designation of a person under specific circumstances.

C. *INACTIVE*: Assembly Bill 95: Bereavement Leave

Current Law: Bereavement leave is not required.

Died in Committee: This legislation remains (since May 20, 2021) pending in the Assembly Labor and Employment Committee. AB95 would have required an employer with 25 or more employees to allow an employee, upon the employee's request, to take up to 10 business days of unpaid bereavement leave due to the death of a family member (spouse, child, parent, parent-in-law, sibling, grandparent, grandchild, or registered domestic partner) within three months of the death. An employer with less than 25 employees would also be subject to the new law but would only be required to provide up to 3 business days of bereavement leave.

D. *INACTIVE*: Assembly Bill 995: Expansion of Paid Sick Leave Accrual and Use

Current Law: The Healthy Families Healthy Workplaces Act ("Paid Sick Leave Law") requires employers provide employees with no less than 3 days/24 hours of paid sick leave by the 120th calendar day of employment, and each subsequent year.

Not Sent to Governor: This legislation was ordered to the inactive file at the request of the bill's author. AB 995 would have expanded the Paid Sick Leave Law to increase the amount of accrued paid sick leave for employers to provide employees with no less than 3 days/24 hours of paid sick leave by the 120th calendar day of each 12-month period, to no less than 5 days/40 hours of paid sick leave by the 200th calendar day of the 12-month period. The bill also would have increased the accrual cap of paid sick leave from 6 days/48 hours to 10 days/80 hours.

E. *Choochagi v. Barracuda Networks, Inc. (2020) 60 Cal.App.5th 444*

Issue: What actions must an employer take to provide notice to an employee of notice of eligibility for CFRA rights?

Ruling: The employer provided sufficient notice of CFRA rights. Citing to Stevens v. Department of Corrections, the court stated that "' I]n the context of leave for an employee's own serious health condition, the mere notice that an employee seeks to use sick time is insufficient to place the employer on notice that the employee seeks CFRA-qualifying leave. Leave for an employee's health condition requires a serious health condition that makes the employee unable to perform the functions of his or her position.'" The court went on to state that "Employers are also required to include a description of CFRA leave in their employee handbooks, and are 'encouraged to give a copy of the notice' to current and new employees. … Here, Barracuda submitted as evidence its Employee Handbook, which included a section describing leaves of absence and various types of leave, including CFRA leave. Barracuda also submitted evidence that Choochagi received the Employee Handbook. … CFRA does not require the employer to provide repeated notice to an employee."

IV. Class Actions and PAGA Claims

A. *Turrieta v. Lyft, Inc.* (2021) 69 Cal.App.5th 955: Review Filed 11/10/2021

Issue: Where two different plaintiffs filed separate Private Attorneys General Act ("PAGA") actions against the same employer, does the plaintiff in one action have standing in the other to vacate or challenge the judgment of the other action on appeal?

Ruling: The Court of Appeals ruled that third-party PAGA plaintiffs lack standing to bring a motion to vacate or appeal the settlement. The Court explained that PAGA plaintiffs in another action are not aggrieved parties because it is the state's rights and not those of the third parties that will be affected by a parallel settlement.

B. *Uribe v. Crown Building Maintenance Co.* (2021) 70 Cal.App.5th 986: Rehearing Denied 10/26/2021

Issue: Does an unnamed class member have standing as a party aggrieved to vacate or challenge the approval of settlement of a PAGA claim on appeal?

Ruling: The Court of Appeals found that an unnamed class member who was granted leave to intervene and was a plaintiff in a related PAGA action had standing to appeal the approval of the settlement. The Court reasoned that because appellant had an "immediate, pecuniary, and substantial" interest in advancing her own PAGA action (which would have been extinguished by claim preclusion if the settlement was upheld), appellant had standing to challenge the settlement's PAGA component.

Distinguishing Uribe and Turrieta: Without context, the holdings of *Uribe* and *Turrieta* appear to directly conflict with one another. Fortunately, the Court in *Uribe* explains the procedural distinctions between the cases that account for the discrepancy in its published opinion.

In *Turrieta*, the trial court denied the third-party employees' requests to intervene in the action, a decision which was upheld on appeal. As a result, the reviewing court concluded that because it is the state's rights that would be affected by the settlement in a PAGA action and not those of the appellants, they did not qualify as "aggrieved employees" under the statute and lacked standing to attempt to overturn the judgment.

In contrast, the trial court in *Uribe* granted the employee's request to file a complaint in intervention. Upon completing the necessary procedural steps, the employee became a party to the action. As a result, because her own PAGA cause of action would be extinguished by claim preclusion if the settlement was affirmed, the Court determined she had the appropriate standing necessary to attempt to overturn the judgment.

Practical Implications for Employers: When multiple, similar PAGA claims have been filed, it is important to assess the status of all claims in order to create optimal strategies to protect the employer.

C. *Rojas-Cifuentes v. Superior Court* (2020) 58 Cal.App.5th 1051

Issue: Did an employee's PAGA notice sufficiently state the facts and theories required to satisfy the administrative exhaustion requirements under the Act?

Ruling: The Court of Appeals held that the plaintiff's PAGA notice sufficiently stated the specific provisions of the labor code alleged to have been violated and facts and theories to support the alleged violation. The employer argued that the plaintiff's allegation of systematic failure to keep accurate time and payroll records and detailing of several labor code sections violated by this conduct was insufficient to meet the administrative exhaustion requirements. The Court disagreed and held that a PAGA notice which provides facts and theories to support at least some allegations in the action is sufficient to meet the plaintiff's burden.

Practical Implications for Employers: The bar for the "facts and theories" requirement under Lab. Code, § 2699.3 is low. To satisfy the pleading requirements, an aggrieved employee must only provide sufficient facts and theories to show the relevant state agency that there is any basis for the allegations.

D. *Wilson v. La Jolla Group* (2021) 61 Cal.App.5th 897

Issue: Did the trial court err in denying class certification on the grounds that individual issues did not predominate because of varied employee experience?

Ruling: The Court of Appeals held that the trial court did not err in denying certification based on non-wage statement claims, but that it did err in determining that common questions did not predominate on a wage statement claim. The Court reasoned that because plaintiffs were able to make their own schedules and work as much or as little as they desired, employee experiences varied too greatly to allow for common proof of meal and rest break violations. The Court did find, however, that individual issues did not predominate on a claim for failure to provide adequate wage statements to employees as this centralized practice would be amenable to class-wide proof.

E. *Salazar v. See's Candy Shops, Incorporated* (2021) 64 Cal.App.5th 85: Review Denied and Ordered Not to be Officially Published 08/11/2021

Issue: Did the trial court err in denying class certification on the grounds that individual issues would predominate?

Ruling: The Court of Appeals held that the trial court did not err in denying class certification because it reasonably determined that individual issues would predominate, and that the plaintiff failed to provide a trial plan that offered a manageable method to determine class-wide liability without individual inquiry. The plaintiff presented time record evidence that she believed could establish liability through common proof. However, the Court determined that because these records showed that 24% of shifts over 10 hours included a second meal period, the trial court reasonably concluded that individual testimony would be necessary to demonstrate liability.

F. *Certified Tire & Service Centers Wage & Hour Cases* (2021) 66 Cal.App.5th. 190: Review Denied and Ordered Not to be Officially Published 10/13/2021

Issue: Whether the trial court erred in concluding that the employer's Technician Compensation Program (TCP) did not violate the minimum wage and rest period requirements as set forth in Wage Order 4?

Ruling: The Court of Appeals held that the TCP did not violate minimum wage and rest break requirements. Plaintiffs argued that the formula used in calculating an employee's base rate under the TCP violated California's minimum wage and rest period requirements by engaging in impermissible wage borrowing. The Court disagreed, finding that under the TCP, while an employee's base rate of pay would end up being less at the end of a pay period when they devoted a higher percentage of time to tasks that did not generate production dollars as opposed to tasks that did, all time an employee spent on the clock and all required rest periods were directly compensated at an hourly rate that exceeded the minimum wage.

Practical Implications for Employers: Alternative compensation programs designed to incentivize workplace efficiency are permissible. However, employers may not take

higher compensation contractually due for one set of hours and spread it over other, otherwise uncompensated, or undercompensated hours to satisfy minimum wage requirements.

G. *Johnson v. Maxim Healthcare Services, Inc.* (2021) 66 Cal.App.5th 924: Review Denied 11/10/2021

Issue: May an employee, whose individual claim is time-barred, may still pursue a representative claim under PAGA?

Ruling: The Court of Appeals held that the fact that an employee's individual claim is time-barred does not strip the employee of their standing to pursue PAGA remedies. The Court reasoned that under the California Supreme Court's recent decision in *Kim v. Reins International California, Inc.* (that an "aggrieved employee" has standing to pursue a PAGA claim, irrespective of whether that employee maintains a separate Labor Code claim), the expiration of the statute of limitations for an individual claim does not bar an employee from pursuing a PAGA action.

Practical Implications for Employers: An aggrieved employee's PAGA claim may continue to exist even after the statute of limitations for their individual claims have expired.

H. *Hildebrandt v. Staples the Office Superstore, LLC* (2020) 58 Cal.App.5th 128

Issue: Does the filing of a class action with similar claims entitle an employee to the benefit of class action tolling rules for their individual action?

Ruling: The Court of Appeals held that the application of the tolling rule of class actions to individual claims is fair when previously filed class actions provide the defendant adequate notice of the claims and generic identities of potential plaintiffs during the applicable limitations period. In its reasoning, the Court of Appeals relied on California Supreme Court's decision in *Jolly v. Eli Lilly & Co.* There, the Court held that such tolling is necessary to protect the efficiency of the class action device because otherwise, potential class members may be forced by the statute of limitations to file their individual actions while the class certification proceedings are still pending (thus defeating the efficiency and economical purposes of the class action).

Practical Implications for Employers: In some circumstances, if a class certification is denied, the statute of limitations is paused between the commencement of the action and the denial of class certification. This "stopping of the clock" allows purported class members to either intervene in the surviving individual action or bring their own. As a result, employers should be aware that any employee who can be found to have reasonably postponed filing their own claims because of the class action may receive additional time added to their statute of limitations.

I. *Wesson v. Staples the Office Superstore, LLC* (2021) 68 Cal.App.5th 746: Review Filed 10/19/2021

Issue: Do trial courts have inherent authority to ensure that PAGA claims will be manageable at trial and strike those that are not?

Ruling: The Court of Appeals found that trial courts have the inherent authority to ensure that PAGA claims can be fairly and efficiently tried, that courts may strike those claims they find are unmanageable, and that as a matter of due process, the defendant's right to litigate available affirmative defenses should be accounted for in the manageability determination.

J. *Lawson v. Grubhub, Inc.* (9th Cir. 2021) 13 F.4th 908: A case to watch

Issue 1: Whether California Proposition 22 (providing that if certain conditions are met, "app-based drivers" are independent contractors) applies retroactively.

Ruling 1: The Court of Appeals for the Ninth Circuit held that Proposition 22 does not apply retroactively. The Court reasoned that California has a settled presumption against interpreting statutes and ballot propositions as having retroactive applications unless expressly provided for in the legislation, which Proposition 22 does not.

Issue 2: Whether the Supreme Court's decision in *Dynamex Operations W. v. Superior Court* (which revised the applicable test for determining if a worker is an independent contractor and was ruled to apply retroactively) changes the determination of Plaintiff's status?

Ruling 2: The Court of Appeals for the Ninth Circuit declined to apply the test itself. Instead, it remanded the issue to the district court to apply the revised test.

Issue 3: Whether the ABC Test of Dynamex applies to expense reimbursement claims retroactively?

Ruling 3: The Court of Appeals for the Ninth Circuit declined to answer the question. It reasoned that because the California Courts of Appeal have not squarely decided whether the Dynamex test applies to expense reimbursement claims retroactively, the Court determined that the trial court should decide in the first instance whether the test applies retroactively here.

K. *Williams v. RGIS, LLC* (2021) 70 Cal.App.5th 445

Issue: Does the FAA (Federal Arbitration Act) preempt a California state law rule that says employees cannot contractually waive their right to bring a representative action under PAGA?

Ruling: The defendant employer attempted to argue that the Federal Arbitration Act (FAA)—which requires courts to enforce agreements for individual arbitration—preempted the state rule prohibiting PAGA waivers. The defendant also argued that the United States Supreme Court's decision in *Epic Systems Corp v. Lewis* (holding that an employee who agreed to individualized arbitration could not assert claims on behalf of other employees under the FLSA or other federal class action procedures) abrogated the state rule prohibiting PAGA waivers. The Court rejected both of these arguments holding that neither the decision in Epic Systems nor the FAA preempted the California rule prohibiting PAGA waivers.

Practical Implications for Employers: Even where an employee enters into a valid and binding arbitration agreement for their individual claims, an employer may still be forced to litigate PAGA claims.

L. *Santos v. El Guapos Tacos, LLC* (Cal. Ct. App., Nov. 30, 2021, No. H046470) 2021 WL 5626375

Issue: Did the trial court err in determining that plaintiffs' PAGA notice was deficient for failing to reference other aggrieved employees?

Ruling: The Court of Appeals determined that the representative plaintiff's PAGA notice provided fair notice to the LWDA and defendants of the representative claims. The defendant employers argued that the PAGA notice did not inform the LWDA "of the claims of any other alleged similarly situated but unidentified individuals" or that the plaintiff "intended to pursue this matter on behalf of these unnamed individuals." The Court rejected this argument. The Court explained that because the notice did not refer to any claims as "my" or "ours," did not allege violations of the labor code flowing from an individual termination, did not suggest that the violations were isolated, referenced "other acts by employer" without limiting the acts solely as against either plaintiff, and stated that the plaintiffs wished to proceed with their PAGA claims as authorized by the California Labor Code, the notice sufficiently alerted the LWDA and defendants that there were other aggrieved employees implicated in the representative action.

Practical Implications for Employers: A plaintiff's PAGA notice does not need to include magic words to be sufficient to put an employer and the LWDA on notice of a PAGA claim. If it can be reasonably inferred from the notice that the injuries alleged were not isolated to the named individual, it is likely to be considered effective notice.

V. Discrimination, Harassment, and Retaliation

A. *Lawson v. PPG Architectural Finishes, Inc.* (9th Cir. 2020) 982 F.3d 752 req. for certification of question granted. 2/10/21 (Case No. S266001) (On appeal from the U.S. District Court, C.D., California)

Issue: The Ninth Circuit certified the following question to the California Supreme Court: Does the clear and convincing evidentiary standard set forth in Lab.C. § 1102.6 replace the *McDonnell Douglas* test as the relevant evidentiary standard for § 1102.5 whistleblower retaliation claims?

Next Steps: The California Supreme Court will decide whether the long-standing *McDonnell Douglas* test will be modified.

B. *Pollock v. Tri-Modal Distribution Services, Inc.* (2021) 11 Cal.5th 918 [281 Cal.Rptr.3d 498, 491 P.3d 290]

Procedural Posture(s): On Appeal; Motion for Summary Judgment; Motion for Costs
Facts: Pollock, a customer service representative, started dating Tri-Modal's executive vice-president in 2014. The executive vice-president ended the relationship in 2016. In March of 2017, another employee (a woman) was offered a promotion and accepted it, but the promotion did not take effect until May of 2017. In April of 2018, Pollock filed an administrative complaint with the Department of Fair Employment and Housing (DFEH), alleging that she was denied a series of promotions because she refused to have sex with the executive vice-president. The trial court granted summary judgment against Pollock, reasoning that the failure to promote occurred (and thus, the statute of limitations began to run) in March of 2017, when the other woman received and accepted the promotion (rejecting Pollock's argument that the failure to promote occurred in May of 2017, the effective date of the promotion). The Court of Appeal held that the "key date" for limitations purposes is when the employer tells the selected employee that he or she will be promoted, not when the selected employee actually starts the new position. The Court Appeal also awarded costs on appeal to the defendants.

Main Issue: When does the statute of limitations on a claim for failure to promote brought under the harassment provisions of the Fair Employment and Housing Act (FEHA) begin to run?

California Supreme Court Holdings:

1. The statute of limitations on a FEHA harassment claim based on failure to promote begins to run when an aggrieved employee knows or reasonably should know of the employer's decision not to promote him or her.
2. When the defendant asserts the statute of limitations as a defense against a harassment claim based on failure to promote (under the FEHA), the burden is on

the defendant to prove that plaintiff knew or should have known of the adverse promotion decision.

3. An appellate court may not award costs or fees on appeal to a prevailing FEHA defendant without first determining that plaintiff's action was frivolous, unreasonable, or groundless when brought, or that plaintiff continued to litigate after it clearly became so.

Note: In this case, the 2018 FEHA statute required litigants to file administrative complaints within one year of the "unlawful practice." The limitations period today is three years.

C. *Maner v. Dignity Health* (9th Cir. 2021) 9 F.4th 1114

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Facts: William "Bo" Maner worked as a biomedical design engineer in the obstetric and gynecological laboratory of Dr. Garfield for several decades. Maner's coworkers included Dr. Dong, a male researcher, and Dr. Shi, a female researcher. Maner learned shortly after joining the laboratory that Dr. Garfield and Dr. Shi were engaged in a long-term romantic relationship that began as a workplace affair. Dr. Garfield conferred upon Dr. Shi a greater share of workplace opportunities related to publications and intellectual property than Maner felt Dr. Shi deserved. When Dr. Garfield decided to relocate the laboratory to an installation operated by Dignity Health in Phoenix, Arizona, he persuaded Dignity Health to extend offers at the new facility to his existing team. All accepted. Dr. Garfield's lab then began to suffer from a decline in grant funding (which was used to fund employee salaries and research). Thereafter, Dr. Garfield, to alleviate the laboratory's funding issues, recommended that Dignity Health terminate Dr. Dong, which they did. Soon after, Dr. Maner was terminated for a poor performance review by Dr. Garfield and budget cuts. Dr. Shi kept her job. Maner then sued Dignity Health under Title VII (the federal anti-discrimination law) alleging sex discrimination.

Issue: Whether an employer who exhibits preferential treatment towards a supervisor's sexual or romantic partner discriminates against other employees because of their sex under Title VII (the federal anti-discrimination law).

Holding: Discrimination motivated by a "paramour preference" is not unlawful sex discrimination against the complaining employee within the ordinary meaning of Title VII's terms. Thus, Title VII is not violated by exercising a "paramour preference" for one employee over another. To the extent that a plaintiff is treated less favorably than his or her colleague, the disparate treatment is not sex discrimination if it is not due to his or her sex.

Note I: This case interprets the federal anti-discrimination statute (Title VII), not California's anti-discrimination statute (the FEHA), which tends to be much more broadly interpreted.

Note II: Petition for Certiorari docketed.

D. *Jorgensen v. Loyola Marymount University* (2021) 68 Cal.App.5th 882 [283 Cal.Rptr.3d 737, 68 Cal.App.5th 882]

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Facts: Jorgensen, a former employee of Loyola Marymount University, sued the University for age and gender discrimination when she was passed over for a promotion by the Dean. To support her age bias claim, she presented a declaration from a former school employee who said that the Assistant Dean, in connection with a different job opening, said that she wanted someone younger to be hired for that other open position. The University objected to the evidence on the grounds of relevance (because it involved a different position and a different decision-maker), conjecture, speculation, and hearsay. The trial court agreed, refused to admit the evidence, and granted the University's motion to dismiss the case before trial.

Issue: Can an age-based stray comment made by someone who is not the decision-maker, made in connection with a different job opening, be relevant in a case for age-discrimination?

Holding: Yes, citing *Reid v. Google Inc.*, 50 Cal.4th 512, 2010, which holds that the value of a stray comment depends on the precise character of the remark. The relevance increases when the declarant might influence the decision. In this case, the speaker of the stray comment (the Assistant Dean) had great potential to influence the decision-maker (the Dean) because the decision-maker had high-regard for the speaker. Considering this, the court found the comment to be relevant. Thus, an age-based remark may be relevant, circumstantial evidence of discrimination even if it is not made directly in the context of an employment decision or said by a decision-maker. Further, the other evidentiary objections were overruled, including the hearsay objection on the ground that the state-of-mind exception made it admissible.

Practical Implication for Employers: This decision illustrates the dangers of making any comments related to an employee's age or other protected characteristic, even comments made by non-decision-makers.

E. *Ballou v. McElvain* (9th Cir. 2021) 14 F.4th 1042

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Facts: Julie Ballou, a female police officer in Vancouver, Washington, scored high enough on the examination for promotion to sergeant to be eligible for promotion but was repeatedly passed over, including when she was highest on the promotion list. James McElvain, the police chief who made the promotion decisions, instigated a series of investigations into Ballou's incident reporting practices (leading to her receiving a letter of reprimand), refused to promote her during the investigations, then declined to

promote her afterwards (because of her reprimand), even though she was the most qualified candidate (thereafter promoting an officer who scored lower than her). Certain male officers who failed to follow incident reporting practices were not investigated. Further, certain male officers received promotions after being reprimanded. Ballou sent the police chief and city manager complaints alleging sex discrimination and brought a state tort claim. Afterward, Ballou was the subject of eight investigations. Ballou was eventually promoted to sergeant, months later. Ballou sued, alleging denial of equal protection (based on sexual discrimination in the police chief's refusal to promote her) and retaliation for exercise of her First Amendment rights. The district court denied the police chief's motion for summary judgment based on qualified immunity.

Issues: Is the police chief entitled to qualified immunity on plaintiff's First Amendment and Equal Protection disparate treatment claims?

Holding: As to the chief's assertion that he was entitled to qualified immunity on the employee's First Amendment retaliation claim, the First Amendment protects a public employee's right to speak out against or petition the government, including through a lawsuit, on matters of public concern. Rejecting the police chief's argument that the employee's complaints and lawsuit pertained only to matters of private, rather than public, concern, the court noted that Ninth Circuit case law clearly establishes that speech by public employees about unlawful discrimination in the workplace is inherently speech on a matter of public concern. Further, the court found the form of the employee's expression was also protected by the First Amendment under clearly established law as the Petition Clause prohibits retaliating against public employees for filing lawsuits. Ballou had stated a prima facie case of disparate treatment under Equal Protection and had raised a genuine issue of fact on whether the chief's legitimate reason for his actions was pretextual. The chief asserted that proof of discriminatory animus will not establish an Equal Protection violation absent proof that others similarly situated were treated more favorably. Although comparator evidence may substitute for direct evidence of discriminatory animus, it is not necessary if there is direct proof of discriminatory animus. Regarding qualified immunity, if the factual issues were resolved in the plaintiff's favor, the chief's alleged conduct of discriminatorily conducting an investigation and using the investigation to deny promotion fell within previously decided 9th Circuit cases, such that any reasonable officer would recognize that conduct as unconstitutional. That said, as to the police chief's contention that he was entitled to qualified immunity on the Equal Protection claim, the court found it lacked jurisdiction to resolve this question as the district court did not deny him qualified immunity on the employee's Equal Protection retaliation claim.

F. *Clark v. Superior Court* (2021) 62 Cal.App.5th 289 [276 Cal.Rptr.3d 570, 62 Cal.App.5th 289]

Procedural Posture(s): Petition for Writ of Mandate.

Facts: Plaintiff, Alicia Clark, filed an administrative complaint with the Department of Fair Employment and Housing (DFEH) that alleged that her former employer, Arthroscopic & Laser Surgery Center of San Diego, L.P. (the Defendant), had committed various acts of employment discrimination against her. In her DFEH complaint, Plaintiff provided a similar, though incorrect name of her employer. Her administrative complaint also named her managers, supervisors, coworkers, job title and period of employment at her employer. After Plaintiff filed a civil action, Defendant brought a motion for summary adjudication, which the trial court granted as to all of Plaintiff's FEHA claims on the basis that Plaintiff named the wrong entity in her DFEH complaint and failed to correct the error. Plaintiff filed a petition for writ of mandate.

Issue: Can an employee exhaust his or her administrative remedies under the Fair Employment and Housing Act (FEHA) despite providing an incorrect name of his or her employer on the administrative complaint?

Holding: Yes. This is particularly true in a case such as this, in which the Plaintiff's error could not possibly have hampered any administrative investigation or prejudiced the Defendant. The court directed the trial court to vacate its order granting summary adjudication, holding that Plaintiff had sufficiently exhausted her administrative remedies against the Defendant. Plaintiff clearly and unequivocally intended to name Defendant as a respondent, even though she did not use Defendant's proper legal name and instead used two names very similar to Defendant's actual fictitious business name. Specifically, Plaintiff's DFEH complaint named, as respondents, "Oasis Surgery Center LLC" and "Oasis Surgery Center, LP" which are variants of ALCS's registered business name, "Oasis Surgery Center." The court also noted that no reasonable person could think that Plaintiff intended to identify any entity other than Defendant as a respondent, because the body of Plaintiff's DFEH complaint named her managers, supervisors, coworkers, job title, and period of employment at Defendant; with that information, the court reasoned that any administrative investigation into Plaintiff's DFEH complaint would have identified Defendant as the intended respondent.

Practical Implication for Employers: Though employers should preserve any and all defenses when facing a claim of employment discrimination, they should not count on obtaining technical victories based on minor inaccuracies in a plaintiff's Charge of Discrimination with the DFEH or EEOC.

G. *Guzman v. NBA Automotive, Inc.* (2021) 68 Cal.App.5th 1109 [284 Cal.Rptr.3d 39, 68 Cal.App.5th 1109]

Procedural Posture(s): On Appeal; Judgment; Motion for Judgment Notwithstanding the Verdict (JNOV).

Facts: Plaintiff, Gloria Guzman, timely filed an administrative complaint with the Department of Fair Employment and Housing (DFEH) against her employer for wrongful termination and various other causes of action under FEHA, identifying the respondent as "Hooman Enterprises, Inc." in the caption. In the "Additional Complaint Details" section, she identified her employer as "Defendant Hooman Enterprises Inc. DBA Hooman Chevrolet" and one of her supervisors as "Hooman Nissani." The DFEH issued her a right-to-sue letter. Plaintiff filed a lawsuit, naming "Hooman Enterprises Inc. DBA Hooman Chevrolet and DOES 1 to 10" as defendants. Defendant NBA Automotive, Inc., using the name "Hooman Chevrolet of Culver City" filed an answer. Plaintiff later amended the name on her civil complaint and filed an amended complaint with the DFEH, which the DFEH accepted and deemed to have the same filing date as the original complaint. A jury found in favor of Guzman, and the trial court entered judgment in her favor. Defendant appealed from the judgment, challenging the trial court's orders denying its motions for judgment notwithstanding the verdict and for a new trial. NBA Automotive argued that Guzman failed to exhaust her administrative remedies under FEHA because her administrative complaint, although naming something very close to NBA Automotive's correct fictitious business name, incorrectly identified "Hooman Enterprises, Inc.," rather than "NBA Automotive, Inc.," as the corporation doing business as Hooman Chevrolet of Culver City.

Issue: Can an employee adequately exhaust his or her administrative remedies even though he or she fails to state his or her employer's correct legal name in the administrative complaint before the end of the statutory limitations period?

Holding: Yes, citing to *Clark v. Superior Court* (above), if the administrative complaint sufficiently identifies his or her employer within the statutory limitations period. In this case, the administrative complaint unmistakably identified NBA Automotive as the respondent. Although Plaintiff did not state NBA Automotive's full correct legal name in her administrative complaint, she stated that the fictitious business name of her employer was "Hooman Chevrolet," a name virtually identical to "Hooman Chevrolet of Culver City," NBA Automotive's actual fictitious business name. In addition, Plaintiff's administrative complaint listed the address of Hooman Chevrolet in Culver City and named the owner, Hooman Nissani. Additionally, Plaintiff provided a detailed description of her employer, the names of the individuals who engaged in the allegedly discriminatory practices, and a narrative of multiple instances of wrongful conduct spanning 15 years. Based on this information, the court concluded that any reasonable investigation would have revealed that NBA Automotive was Plaintiff's employer. As a result, Plaintiff's administrative complaint gave Defendant sufficient notice that it was being named in the administrative complaint and would be named in any subsequent lawsuit, and Defendant did not argue that it was prejudiced by this misnomer.

Practical Implication for Employers: If an employee incorrectly names his or her employer in an administrative complaint, an employer should proceed with caution in arguing insufficient notice.

H. *Smith v. BP Lubricants USA, Inc.* (2021) 64 Cal.App.5th 138 [278 Cal.Rptr.3d 587, 64 Cal.App.5th 138]

Procedural Posture(s): On Appeal; Demurrer.

Facts: Robert Smith's employer, Jiffy Lube, held a presentation for its employees to learn about a new Castrol product, which was led by Castrol employee Gus Pumarol. Pumarol made several comments during the presentation that Smith considered to be racist and offensive. The next day a Jiffy Lube employee crossed out Smith's name and replaced it on the schedule with an offensive reference to Smith's hands that Pumarol made the day before ("banana hands"). In the ensuing weeks, Smith suffered significant physical and mental health problems because of his work-related issues, which required medical attention. Smith sued BP Lubricants USA, Inc. dba Castrol and Pumarol for violating FEHA's prohibition on racial harassment in the workplace by aiding and abetting Jiffy Lube's harassment and discrimination against him. Smith also sued Pumarol for intentional infliction of emotional distress (IIED). He also sued BP and Pumarol for racial discrimination under the Unruh Act. The trial court sustained BP and Pumarol's demurrer without leave to amend, and Smith appealed.

Issue: Did the trial court erroneously sustain the demurrer without leave to amend?

Holdings:

1. Affirmed dismissal under FEHA for aiding and abetting employment discrimination. BP and the Pumarol could be found liable for aiding and abetting Jiffy Lube's discrimination and harassment of plaintiff only if: (1) Jiffy Lube subjected plaintiff to discrimination and harassment; (2) BP Lubricants and the Pumarol knew Jiffy Lube's conduct violated FEHA, and (3) BP Lubricants and the salesperson gave Jiffy Lube "substantial assistance or encouragement" to violate FEHA. In this case, plaintiff could not meet the second and third elements as plaintiff had not pleaded any concerted activity between Jiffy Lube and defendants to commit FEHA violations, which are the crux of an aiding and abetting claim. The plaintiff's complaint did not allege that either defendant knew that Jiffy Lube was discriminating against or harassing Smith due to his race, and it also failed to allege facts showing that either defendant gave Jiffy Lube substantial assistance or encouragement in its alleged FEHA violation.
2. Reversed dismissal of the IIED and Unruh Act claims. A reasonable jury could find that Pumarol's comments were sufficiently extreme and outrageous to have resulted in an IIED upon Smith. Further, the meeting on behalf of BP, a business establishment to train Jiffy Lube employees in the use of a BP product was a business establishment to which the Unruh Act applied even though it was not open to the public. Oral harassment of a client or customer of the business establishment due to his race denies him or her of equal treatment in some aspects of the business. Thus, the court reversed dismissal of the Unruh Act claim on the ground that a business establishment (BP) could face liability under the Act for its racially harassing conduct directed towards a customer.

I. *Briley v. City of West Covina* (2021) 66 Cal.App.5th 119 [281 Cal.Rptr.3d 59, 66 Cal.App.5th 119], as modified (July 14, 2021), reh'g denied (July 23, 2021), review denied (Sept. 29, 2021)

Procedural Posture(s): On Appeal; Judgment; Other; Motion to Exclude Evidence or Testimony; Motion for New Trial.

Facts: Jason Briley worked for the City of West Covina as a deputy fire marshal. During his employment, Briley complained that various city officials, including his former supervisor, had ignored his reports of safety issues and engaged in misconduct. The city investigated Briley's complaints and concluded they were unfounded, but while that investigation was still pending, the city commissioned a second investigation of allegations that Briley had repeatedly engaged in misconduct and unprofessional behavior. At the conclusion of the second investigation, Briley's employment was terminated. Briley abandoned his pre-lawsuit appeal of termination to the city's Human Resources Commission. In this lawsuit, Briley alleged whistleblower retaliation under Cal. Lab. Code § 1102.5. At trial, the jury awarded Briley over $500,000 in lost wages, $2 million in past emotional distress damages and $1.5 million in future emotional distress damages.

Issues:

1. Whether plaintiff was required to complete his pre-lawsuit appeal of his termination to the city's Human Resources Commission.
2. Whether the $3.5million noneconomic damages award was so excessive as to suggest it resulted from passion or prejudice.

Holdings:

1. Plaintiff was justified in abandoning the appeal because it failed to satisfy the standard of due process with a reasonably impartial, noninvolved reviewer. In particular, Briley's supervisor, who was expected to decide the appeal, was personally embroiled in the controversy and there was significant animosity between the supervisor and Briley resulting from Briley's complaints about the supervisor that formed the basis for the retaliation claim.
2. Yes. The jury's total award of $3.5 million in noneconomic damages is shockingly disproportionate to the evidence of Briley's harm. Although Briley testified that the termination was "pretty devastating" and that he had some "sleep-related issues," there was no evidence that any of the problems Briley described were particularly severe. The past emotional distress damages were excessive and Briley's demeanor on the witness stand (that he cried) may have resulted in passion rather than measured judgment on the part of the jury. Further, the $1.5 million award of future noneconomic damages stands on even shakier ground because the $500,000 in economic damages the jury awarded should have eliminated any remaining financial concerns tied to his termination, as well as vindicated him. Further, Briley's counsel's personal attack on the city's counsel (calling him a liar) shortly before the

jury began deliberations may have prejudiced the jury against the city. The Court vacated the damages award and remanded the case for a new trial unless Briley accepted a reduction of the awards to $1 million in past emotional distress damages and $100,000 in future emotional distress damages.

J. *Zamora v. Security Industry Specialists, Inc.* (2021) 71 Cal.App.5th 1 [285 Cal.Rptr.3d 809, 71 Cal.App.5th 1]

Procedural Posture(s): On Appeal; Motion for Summary Adjudication; Motion for Summary Judgment.

Facts: Zamora tore his meniscus while working for SIS (a company providing security staffing services). Zamora asked for work involving less standing and physical activity but was told that there was no other work for him to do. Zamora's doctor said that he could return to work on modified duties (consisting of mostly seated work) for two months. Zamora was not offered modified work. Following Apple's assertion to SIS that it planned to cut its budget for SIS's services, Zamora was one of the employees terminated. SIS subsequently offered two of their workers different assignments. Zamora sued under the California Fair Employment and Housing Act (FEHA) for employment discrimination based on physical disability, failure to make a reasonable accommodation, failure to engage in the interactive process, retaliation, wrongful termination, and other claims. The trial court dismissed, granting summary adjudication, the claim before trial because it concluded that the employee had not shown that he could do his job with a reasonable accommodation.

Issue: What duties does an employer owe to a physically disabled employee under FEHA?

Holding: An employer has an obligation to make a reasonable accommodation for an employee's known physical or mental disability and must engage in a timely, good-faith, interactive process with the employee to determine effective reasonable accommodations. However, FEHA does not prohibit an employer from discharging an employee with a disability if the employee is unable to perform his or her essential job duties even with reasonable accommodation. In this case, the trial court's dismissal is reversed. Zamora suffered from a qualifying disability under the FEHA based on a workplace injury. The evidence in this case raises triable issues of fact as to whether Zamora could have worked in another position at SIS with his restrictions, whether SIS went through the process of considering accommodations, and whether he was discharged because of his disability.

K. *Fried v. Wynn Las Vegas, LLC* (9th Cir. 2021) 18 F.4th 643

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Facts: Plaintiff, Vincent Fried, was a manicurist in the Wynn Hotel in Las Vegas. He expressed his frustration that customers would book more appointments with female

manicurists than male ones, to which his manager told him that he was working in a female-related job, and one coworker suggested that he wear a wig. After a male customer sexually propositioned him during a pedicure, he complained. He was told to complete the pedicure, which he did. When he later complained again about the incident, his manager and his coworkers dismissed his concerns, with one coworker suggesting that he should take it as a compliment. Fried sued Wynn, alleging a Title VII hostile work environment claim. The district court granted summary judgment to Wynn, and Fried appealed.

Issues:

1. Was granting summary judgment for the defendant proper considering that Fried was told that he was in a "female job-related environment," and that he should wear a wig?
2. Was granting summary judgment for the defendant proper considering the responses that Fried received in connection to the customer's sexual advance?

Holdings:

1. Affirmed. Fried's hostile work environment claim required Fried to prove, among other things, that "(1) he was subjected to verbal or physical conduct of a sexual nature; (2) the conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." Comments that Fried was in a "female job-related environment," and that he should look elsewhere for work or wear a wig, were not sufficiently severe or pervasive to create Title VII liability. The "objective severity" of these comments "pale[d] in comparison" to other comments the Court had previously deemed insufficient to support a hostile work environment claim, including one case involving a supervisor who referred to women as "b*tches." Even viewed cumulatively, this is type of infrequent joking or teasing is held to be part of the ordinary tribulations of the workplace.
2. Reversed. The district court erred when it focused on the customer's conduct. An employer's response to a third party's unwelcome sexual advances towards an employee can independently create a hostile work environment. Critically, Fried's manager did not take any corrective action; instead, she directed Fried to finish the pedicure. Moreover, a jury could find that this response created a hostile work environment, as the evidence showed that Fried felt uncomfortable while completing the pedicure and the customer continued to harass him. Finally, the insensitive comments made by Fried's coworkers following the incident, even if not alone sufficient to support his claim, contributed to the salon's hostile work environment.

VI. Arbitration and Mediation

A. Gamboa v. Northeast Community Clinic (2021) 2021 WL 5575536

Issue: What must a declaration contain to establish the existence of an arbitration agreement where the plaintiff denies reading or seeing it?

Ruling: The Appellate Court held that a declaration from the defendant's employee asserting that the plaintiff signed the agreement is not sufficient evidence to establish the existence of an arbitration agreement, where its existence is denied and where no factual foundation is laid establishing the declarant's personal knowledge of the agreement's existence.

Practical implications for Employers: Appoint a custodian of records responsible for arbitration agreements who witnesses employees sign the agreements.

VII. Traditional Labor

A. Service Employees International Union Local 87 v. National Labor Relations Board (2021)

Issue: What are the actions that constitute secondary picketing (coercive activity) such that workers lose the protections of the NLRA and can be terminated from their employment?

Ruling: Whether a worker is engaged in coercive activity (such as picketing) is a determination that must be supported by substantial evidence. The evidence must support a finding that the statements or actions by the workers indicated that an objective of the picketing was to coerce, in this case, the property owner, to pressure the employer to the workers' demands.

VIII. Miscellaneous

A. Senate Bill 646: Private Attorneys General Act (PAGA) – Janitorial Employees

Current Law: The Labor Code Private Attorneys General Act of 2004, authorizes an aggrieved employee to bring a civil action to recover specified civil penalties that would otherwise be assessed and collected by the Labor and Workforce Development Agency on behalf of the employee and other current or former employees for the violation of certain provisions affecting employees.

The act requires the employee to follow prescribed procedures before bringing an action and establishes alternate procedures for specific categories of violations. The act requires, except as provided, that 75% of the civil penalties recovered by aggrieved

employees be distributed to the Labor and Workforce Development Agency for enforcement of labor laws and for education of employers and employees about their rights and responsibilities, and 25% be distributed to the aggrieved employees.

Existing law requires a person or entity that employs one or more janitors or otherwise engages by contract, subcontract, or franchise agreement for the provision of janitorial services, as specified, to register with the Labor Commissioner as a property service employer annually and prohibits them from conducting business without a registration.

New Law: Excepts from the Labor Code Private Attorneys General Act of 2004 a janitorial employee, as defined, represented by a labor organization that has represented janitors before January 1, 2021, and employed by a janitorial contractor who registered with the commissioner as a property service employer in calendar year 2020, with respect to work performed under a valid collective bargaining agreement in effect any time before July 1, 2028, that contains certain provisions, including, a grievance and binding arbitration procedure to redress violations that authorizes the arbitrator to award otherwise available remedies.

Requires a janitorial contractor who has entered into a collective bargaining agreement to share, within 60 days of entering the agreement, specified information about the agreement with the Labor and Workforce Development Agency. The provisions do not apply to existing cases filed before the effective date of the law and do not prevent a janitorial employee from filing certain actions. The new law authorizes the exception until the collective bargaining agreement expires or until July 1, 2028, whichever is earlier, and would repeals these provisions on July 1, 2028.

B. Assembly Bill 73: Health Emergencies and Employment Safety – Ag Workers Wildfire Smoke

Current Law: Existing law establishes the California Department of Public Health ("CDPH") to implement various programs throughout the state relating to public health, including licensing and regulating health facilities and control of infectious diseases. Existing law requires the CDPH and the Office of Emergency Services, in coordination with other state agencies, to, upon appropriation and as necessary, establish a personal protective equipment (PPE) stockpile. Existing law requires the CDPH to establish guidelines for the procurement, management, and distribution of PPE, taking into account, among other things, the amount of each type of PPE that would be required for all health care workers and essential workers, as defined, in the state during a 90-day pandemic or other health emergency.

Current law also establishes the Personal Protective Equipment Advisory Committee ("Committee"), consisting of representatives from, among other groups, an association representing skilled nursing facilities, a statewide association representing physicians, 2 representatives of labor organizations that represent health care workers, and 2 representatives of labor organizations that represent essential workers, as defined, to

make recommendations to the department for the development of guidelines for the procurement, management, and distribution of PPE, as specified.

Existing law establishes the Division of Occupational Safety and Health ("DOSH") and the Occupational Safety and Health Standards Board within the Department of Industrial Relations and sets forth their powers and duties relating to the adoption of health and safety standards for workers. Under existing law, certain violations of a standard, order, or special order pursuant to these provisions are crimes.

Existing regulations of the DOSH protect employees exposed to wildfire smoke and include control by respiratory protective equipment among the methods to control harmful exposure.

New Law: Expands protections by specifically including wildfire smoke events among health emergencies for these purposes. Expands coverage to include agricultural workers in the definition of essential workers. The Personal Protective Advisory Committee must now include a representative of a labor organization representing agricultural workers and a representative of an organization that represents agricultural employers.

Requires the DOSH to review and update the contents of the protection from wildfire smoke training and thereafter post it on its internet website. Requires that training provided by the employer is required to be in a language and manner readily understandable by employees, taking into account their ethnic and cultural backgrounds and education levels, including the use of pictograms, as necessary.

C. Senate Bill 606: Workplace Safety – Violations of Statutes, Enterprise-Wide Violations

Current Law: Current law gives the Division of Occupational Safety and Health ("DOSH"), the power, jurisdiction, and supervision over every employment and place of employment in this state, which is necessary to adequately enforce and administer all laws requiring that employment and places of employment be safe, and requiring the protection of the life, safety, and health of every employee in that employment or place of employment.

Existing law requires the DOSH to issue a citation for a violation of provisions relating to the spraying of asbestos, or any standard, rule, order, or regulation established pursuant to specified provisions of the California Occupational Safety and Health Act of 1973 if, upon inspection or investigation, the division believes that an employer has committed a violation.

Existing law imposes penalties of certain maximum amounts depending on whether the violation is serious, uncorrected, willful, or repeated. Existing law also authorizes the DOSH to seek an injunction restraining certain uses or operations of employment that constitute a serious menace to the lives or safety of persons, as specified. Existing law

establishes requirements for a prima facie showing by the division to warrant, in the discretion of the court, the granting of a temporary restraining order.

New Law: Increases DOSH's enforcement power. The bill expands this authority by establishing two additional categories of violations for which DOSH can issue citations: (1) Enterprise-wide Violations and (2) Egregious Violations.

It creates a rebuttable presumption that a violation committed by an employer that has multiple worksites is enterprise-wide if the employer has a written policy or procedure that violates these provisions, except as specified, or the division has evidence of a pattern or practice of the same violation committed by that employer involving more than one of the employer's worksites. It authorizes the division to issue an enterprise-wide citation requiring enterprise-wide abatement if the employer fails to rebut such a presumption. It also imposes specified requirements for a stay of abatement pending appeal of an enterprise-wide citation and subjects an enterprise-wide violation to the same penalty provision as willful or repeated violations.

SB 606 requires the Division of Occupational Safety and Health to issue a citation for an egregious violation, as defined, for each willful and egregious violation determined by the division, as provided. Except as specified, SB606 requires each instance of an employee exposed to that violation to be considered a separate violation for purposes of the issuance of fines and penalties.

The new law exempts certain state agencies from the rebuttable presumption, enterprise-wide citation, and egregious violation citation provisions.

It authorizes the DOSH, in the investigation of the policies and practices of an employer or a related employer entity, to issue a subpoena if the employer or the related employer entity fails to promptly provide the requested information, and to enforce the subpoena if the employer or the related employer entity fails to provide the requested information within a reasonable period of time. It also authorizes the DOSH to seek an injunction restraining certain uses or operations of employment if it has grounds to issue a citation, as specified. Finally, SB 606 expands grounds for granting a temporary restraining order to include grounds to issue a citation, as prescribed.

D. Assembly Bill 701: Warehouse Distribution Center

Current Law: Existing law relating to employment regulation and supervision imposes special provisions on certain occupations and industries. Existing law charges the Labor Commissioner and the Division of Labor Standards Enforcement with the enforcement of labor laws.

New Law: Requires specified employers to provide to each employee, defined as a nonexempt employee who works at a warehouse distribution center, upon hire, or within 30 days of the effective date of these provisions, with a written description of each quota to which the employee is subject, including the quantified number of tasks

to be performed, or materials to be produced or handled, within the defined time period, and any potential adverse employment action that could result from failure to meet the quota. The bill provides that an employee shall not be required to meet a quota that prevents compliance with meal or rest periods, use of bathroom facilities, or occupational health and safety laws, as specified. The bill prohibits an employer from taking adverse action against an employee for failure to meet a quota that has not been disclosed or for failure to meet a quota that does not allow a worker to comply with meal or rest periods or occupational health and safety laws. It also requires that any action taken by an employee to comply with occupational health and safety laws or division standards be considered time on task and productive time for the purposes of any quotas or monitoring system.

If a current or former employee believes that meeting a quota caused a violation of their right to a meal or rest period or required them to violate any occupational health and safety law or standard, they have the right to request, and the employer is required to provide, a written description of each quota to which the employee is subject and a copy of the most recent 90 days of the employee's own personal work speed data. The bill limits a former employee to one of these requests.

Requires the Division of Occupational Safety and Health or the Division of Workers' Compensation to notify the commissioner, who is required to determine whether an investigation of violations pursuant to these provisions is appropriate, if a particular worksite or employer is found to have an annual employee injury rate of at least 1.5 times higher than the warehousing industry's average annual injury rate. The bill authorizes the commissioner to adopt regulations relating to the procedures for an employee to make a complaint alleging a violation of this part.

Requires the Labor Commissioner to enforce these provisions and authorizes the commissioner access to data including employer-reported injury data.

E. ***VETOED BY GOVERNOR:*** **Assembly Bill 1074: Displaced Workers**

Current Law: Existing law establishes the Displaced Janitor Opportunity Act, which requires contractors and subcontractors, as defined, that are awarded contracts or subcontracts to provide janitorial or building maintenance services at a particular jobsite or sites, to retain, for a period of 60 days, certain employees who were employed at that site by the previous contractor or subcontractor and offered continued employment if their performance during that 60-day period is satisfactory. Existing law authorizes an employee who was not retained, or the employee's agent, to bring an enforcement action in a court of competent jurisdiction, as specified. Existing law charges the Labor Commissioner, as Chief of the Division of Labor Standards Enforcement, with enforcing these provisions.

Existing law defines "awarding authority" to mean any person that awards or otherwise enters into contracts for janitorial or building maintenance services performed within the State of California, including any subcontracts for janitorial or building maintenance services.

Proposed Legislation: This bill would have renamed the act the Displaced Janitor and Hotel Worker Opportunity Act and would extended the provisions of the act to hotel workers.

The bill would have redefined "awarding authority" under the act to include any person that awards or otherwise enters into contracts for hotel services, which include guest service, as defined, food and beverage service, or cleaning service, performed within the state, as specified. The bill would also have redefined "employee" to include a person employed as a service employee of a contractor or subcontractor who works at least 15 hours per week and whose primary place of employment is in the state under a contract to provide janitorial or building maintenance services or hotel services.

Veto Message: In his veto statement, the Governor stated this bill would have required successor employers in the hotel industry who purchased the business or property to retain workers who provided "guest services" for a 60-day transition period and offer them employment if their performance is satisfactory. The message stated: "I support efforts to ensure stability in employment for all workers, especially given the uncertainty caused by the pandemic. Last year, I signed SB 93 (Chapter 16) which included strong recall and retention protections for hotel workers who lost their job because of the pandemic and applies to existing and successor employers. There is significant overlap between this bill and SB 93, which may cause confusion for the regulated community. I encourage the Legislature to revisit the issue when the protections of SB 93 are due to expire.

F. ***VETOED BY GOVERNOR:*** **Senate Bill 788: Workers Compensation Risk Factors**

Current Law: Establishes a workers' compensation system, administered by the administrative director of the Division of Workers' Compensation, to compensate an employee for injuries sustained in the course of employment. Existing law requires a physician who prepares a report addressing the issue of permanent disability due to an industrial injury to address the cause of the permanent disability in the report, including what approximate percentage of the permanent disability was caused by other factors before and after the industrial injury, if the physician is able to make an apportionment determination.

Proposed Law: SB 788 would have prohibited consideration of race, religious creed, color, national origin, gender, marital status, sex, sexual identity, or sexual orientation to determine the approximate percentage of the permanent disability caused by other factors. The bill would also have expressed the Legislature's intent to eliminate bias and discrimination in the workers' compensation system.

Veto Message: In his veto message the Governor stated: "This bill would preclude a physician from using certain characteristics as the basis for apportionment of permanent disability."

"Current law states that physicians shall not apportion the percentage of permanent disability awarded based on the gender, race, or other personal characteristic of the employee and provides protection from the inappropriate application of apportionment law. Instead, physicians are required to apportion the disability award based solely upon the employee's own medical history and medical evidence."

"While I support efforts to combat bias within the medical profession, this bill creates confusion with well-settled law, which is likely to result in increased litigation and subsequent delays to much-needed benefits to workers. Ongoing efforts by the Division of Workers' Compensation to implement mandatory continuing education of medical-legal evaluators related to current anti-bias laws and apportionment training is better suited to achieve the intent of this bill."

NOTE: This legislation is currently before the Senate for further consideration following the Governor's veto.

G. Senate Bill 331: Settlement and Non-disparagement Agreements

Current Law: Prohibits a settlement agreement from preventing the disclosure of factual information regarding specified acts related to a claim filed in a civil action or a complaint filed in an administrative action. These acts include sexual assault, as defined; sexual harassment, as defined; an act of workplace harassment or discrimination based on sex, failure to prevent such an act, or retaliation against a person for reporting such an act; and an act of harassment or discrimination based on sex by the owner of a housing accommodation, as defined, or retaliation against a person for reporting such an act.

New Law: Clarifies that this prohibition includes provisions which restrict the disclosure of the information described above. For purposes of agreements entered into on or after January 1, 2022, expands the prohibition to include acts of workplace harassment or discrimination not based on sex and acts of harassment or discrimination not based on sex by the owner of a housing accommodation.

Provides that unlawful acts in the workplace for these purposes include any harassment or discrimination and would instead prohibit an employer from requiring an employee to sign a non-disparagement agreement or other document to the extent it has the purpose or effect of denying the employee the right to disclose information about those acts. Makes it an unlawful employment practice for an employer or former employer to include in any agreement related to an employee's separation from employment any provision that prohibits the disclosure of information about unlawful acts in the workplace. Provides that any provision in violation of that prohibition would be against public policy and unenforceable. Requires a non-disparagement or other contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace to include specified language relating to the employee's right to disclose information about unlawful acts in the workplace.

Amends Section 12964.5 of the Government Code so that employers implementing non-disparagement agreements as a condition of employment (or in a separation agreement) need to carve out an employee's ability to discuss conduct the employee has reason to believe is unlawful. Also amends Section 1001 of the Code of Civil Procedure to extend the prohibition on confidentiality provisions in settlement agreements to all forms of workplace discrimination—not just discrimination based on sex. Builds on CCP Section 1002.5 by expanding the prohibition to include acts of workplace harassment or discrimination regardless of sex.

H. Senate Bill 255: Health Care Coverage – Employer Associations

Current Law: Under existing federal law, the federal Employee Retirement Income Security Act of 1974 (ERISA), authorizes multiple employer welfare arrangements (MEWAs) in which two or more employers join together to provide health care coverage for employees or to their beneficiaries. Under existing state law, the status of each distinct member of an association determines whether that member's association coverage is individual, small group, or large group health coverage.

New Law: Authorizes an association of employers to offer a large group health care service plan contract or large group health insurance policy consistent with ERISA if certain requirements are met, including that the association is headquartered in this state, is a MEWA as defined under ERISA, and was established as a MEWA prior to March 23, 2010, and has been in continuous existence since that date. Requires the large group health care service plan contract or health insurance policy to have provided a specified level of coverage as of January 1, 2019, and to include coverage for employees, and their dependents, who are employed in designated job categories on a project-by-project basis for one or more participating employers, with no single project exceeding 6 months in duration, and who, in the course of that employment, are not covered by another group health care service plan contract or group health insurance policy in which the employer participates. Requires the MEWA and participating employers to have a genuine organizational relationship unrelated to the provision of health care benefits and requires the participating employers to have a commonality of interests from being in the same line of business, as specified.

Requires the MEWA, on or before June 1, 2022, to file an application for registration with the Department of Managed Health Care or the Department of Insurance, as applicable, and to annually file evidence of ongoing compliance with the bill's requirements with the applicable department. Prohibits a health care service plan or health insurer, on or after June 1, 2022, from marketing, issuing, amending, renewing, or delivering large employer health care coverage or large employer health insurance coverage to a MEWA that provides benefits to a resident in this state unless the MEWA is registered and is in compliance with the bill or unless the MEWA filed an application for registration and the application is pending before the applicable department.

I. Contreras-Velazquez v. Family Health Centers of San Diego, Inc. (2021) 62 Cal.App.5th 88 (Modified on Denial of Rehearing)

Issue: Punitive damages: What is the maximum amount permissible?

Ruling: Under the due process clause of the 14th Amendment to the United States Constitution, the maximum punitive damages award is no more than twice the amount of the compensatory damages. In this case, the punitive damages were reduced from $5,000,000 to $1,831,290 (twice the compensatory damages.)

J. Gulf Offshore Logistics, LLC v. Superior Court (2020) Ordered not Published

Issue: Does California wage and hour law apply to non-California residents who perform their all or most of their work in California?

Ruling: Under the facts of this case (employees were crew members of a vessel that was docked in a California port and travelled through California waters) and where federal law (the FLSA) did not pre-empt California law, California wage and hour law would apply. The court noted that pre-emption of state law may occur in three situations: (1) the federal law expressly so states, (2) the federal law is so comprehensive that it leaves no room for supplementary state regulation, or (3) the federal and state laws actually conflict.

K. Innova Solutions, Inc. v. Baran (2020) 62 Cal.App.5th 59

Issue: Does the ABC test apply to determination of employee/independent contractor status in the context of assessing unemployment insurance taxes?

Ruling: Yes: For work performed on and after the effective date of the amended definition of employee, the ABC test enumerated under in Dynamex, applies.

L. California Trucking Association v. Bonta (2021) 996 F.3d 644

Issue: Does federal law (FAAA) pre-empt and prevent enforcement of AB 5 against motor carriers operating in California.

Ruling: No. AB-5 is a generally applicable labor law that affects a motor carrier's relationship with its workforce and does not bind, compel, or otherwise freeze into place the prices, routes, or services of motor carriers.

M. Moreno v. Bassi (2021) 65 Cal.App.5th 244 (Certified for Partial Publication)

Issue: Between two statutes that provide for an award of attorney's fees, which statute will be used by the court?

Ruling: The more specific statute applies and, in the event that there is still conflict, the more recent statute applies.

Note: His was a wage and hour claim and a FEHA claim. The jury awarded nothing on the FEHA claim for sexual harassment and awarded $16.00 for unpaid minimum wages and $16.00 for liquidated damages. The trail court awarded $3.20 in attorney's fees based on Section 1032 which provides for attorney's fees equal to 20% of the wages found to be owing. The court of appeal reversed the ruling on attorney's fees and ordered a reasonable amount to be awarded based on Section 1194.

IX. COVID

A. *URGENCY LEGISLATION (EFFECTIVE OCTOBER 5, 2021):* Assembly Bill 654: COVID-19 Exposure Notification

Current Law: The California Occupational Safety and Health Act of 1973, authorizes the Division of Occupational Safety and Health to prohibit the performance of an operation or process, or entry into that place of employment when, in its opinion, a place of employment, operation, or process, or any part thereof, exposes workers to the risk of infection with COVID-19, so as to constitute an imminent hazard to employees. Existing law requires that the prohibition be issued in a manner so as not to materially interrupt the performance of critical governmental functions essential to ensuring public health and safety functions or the delivery of electrical power or water. Existing law requires that these provisions not prevent the entry or use, with the division's knowledge and permission, for the sole purpose of eliminating the dangerous conditions.

Under existing law, if an employer or representative of the employer receives a notice of potential exposure to COVID-19, the employer is required to take specified actions within one business day of the notice of potential exposure, including providing written notice to all employees on the premises at the same worksite that they may have been exposed to COVID-19. Existing law requires, if an employer or the employer's representative is notified of enough COVID-19 cases to meet the definition of an outbreak, the employer, with the exception of a health facility, to notify the local public health agency within 48 hours, as provided.

New Law: AB 654 adds the delivery of renewable natural gas to the list of utilities that the division's prohibitions are not allowed to materially interrupt.

This new law clarifies the time frame for the employer, when giving notice to the local public health agency for a COVID-19 outbreak, to give that notice within 48 hours or one business day, whichever is later. AB 654 expanded the employers exempt from the COVID-19 outbreak reporting requirement to various licensed entities, including, but not limited to, community clinics, adult day health centers, community care facilities, and child day care facilities. The bill repeals these provisions on January 1, 2023.

B. ***INACTIVE:*** **Assembly Bill 650: COVID-19 Hazard Pay Retention Bonuses – Healthcare Workers Recognition and Retention Act**

Current Law: The Healthy Workplaces, Healthy Families Act of 2014, requires employers to provide an employee, who works in California for 30 or more days within a year from the commencement of employment, with paid sick days for prescribed purposes, to be accrued at a rate of no less than one hour for every 30 hours worked. Existing law authorizes an employer to limit an employee's use of paid sick days to 24 hours or 3 days in each year of employment.

Proposed Law: This legislation was ordered to the inactive file at the request of the bill's author. The Health Care Workers Recognition and Retention Act, would have required a covered employer, as defined, to pay hazard pay retention bonuses in the prescribed amounts on January 1, 2022, April 1, 2022, July 1, 2022, and October 1, 2022, to each covered health care worker, as defined, that it employs.

The bill would have provided that hazard pay retention bonuses are in addition to all other compensation due and are not part of the health care worker's regular rate of pay or compensation. The bill would have made it a violation of these provisions for a covered employer to discharge, layoff, or reduce a covered health care worker's compensation or hours so as to prevent that worker from receiving hazard pay retention bonuses, as specified. The bill would have authorized a covered employer to reduce the total sum of the hazard pay retention bonuses by an amount equal to qualifying hazard pay and qualifying monetary bonuses already paid to a covered health care worker during the state of emergency related to the COVID-19 pandemic, as provided.

The bill would have stated the intent of the Legislature that the provisions regarding the discharge, layoff, or reduction in a covered health care worker's compensation or hours in order to avoid paying the bonuses as being a violation of these provisions be retroactively applied to March 1, 2021.

The bill would also require the commissioner to require the covered employer to pay an amount, not to exceed the reasonable administrative costs, of determining whether the employer is entitled to the exemption. The bill would provide that a covered health care provider that obtains an exemption from the commissioner pursuant to this provision may be eligible to receive grant moneys from a Health Care Worker Recognition and Retention Fund or other fund created by the Legislature for the purpose of providing hazard pay or bonuses to health care workers, upon meeting the requirements for disbursements from that fund.

C. **SB114 COVID-19 Supplemental Paid Sick Leave**

Current Law: Effective January 1, 2002,through September 30, 2022.

Provided for COVID-19 supplemental paid sick leave for covered employees, as defined, who are unable to work or telework due to certain reasons related to COVID-19, as follows:

- Up to 40 hours of COVID-19 supplemental paid sick leave for each covered employee when an employee is unable to work due to a positive COVID case of the employee or designated family member.
  and
- Up to 40 hours of COVID-19 supplemental paid sick leave for each covered employee if that covered employee is unable to work or telework due to any of the following reasons:
  - The covered employee or eligible family member is subject to a quarantine or isolation period related to COVID-19 as defined by an order or guidance of the State Department of Public Health, the federal Centers for Disease Control and Prevention, or a local public health officer who has jurisdiction over the workplace. If the covered employee is subject to more than one of the foregoing, the covered employee shall be permitted to use COVID-19 supplemental paid sick leave for the minimum quarantine or isolation period under the order or guidance that provides for the longest such minimum period.
  - The covered employee has been advised by a health care provider to isolate or quarantine due to COVID-19.
  - The covered employee is attending an appointment for themselves or a family member to receive a vaccine or a vaccine booster for protection against COVID-19, subject to the limitation of up to 3 days (24 hours) per vaccine unless health care provider verification of additional leave is provided.
  - The covered employee is experiencing symptoms, or caring for a family member experiencing symptoms, related to a COVID-19 vaccine or vaccine booster that prevent the employee from being able to work or telework.
  - The covered employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
  - The covered employee is caring for a child whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19 on the premises.

There is no employer tax credit for providing this COVID Paid Leave.

D. Listing of CDPH COVID Orders: See https://www.cdph.ca.gov/

E. Listing of Executive Orders: https://www.gov.ca.gov/category/executive-orders/

F. ETS 3205: COVID-19 Prevention

On December 16, 2021, there was a second readoption of the Cal/OSHA COVID ETS, with some modifications effective January 15, 2022, and expected to expire April 14, 2022. The Governor also issued an Executive Order allowing a third readoption not to extend past December 31, 2022.

The Current ETS 3205 effective date has been extended by 21 days to May 6, 2022, per Executive Order N-5-22.

Updates Proposed effective with the <u>third readoption</u> on May 6, 2022:

- Face Coverings requirements are deferred to CDPH
    - Any face coverings will no longer be required to pass light test
- Vaccination status removed (deleted "fully vaccinated")
    - All symptomatic employees (regardless of vaccination status) are to be tested on Company time at Company cost if exposed to COVID in the workplace
- Except for return to work, the type of COVID test no longer restricted. Can use at home tests, self-test and self-administered if no other option exists (e.g. date/time stamped photo)
- Cleaning/Disinfecting of surfaces removed
- Requirement for partitions in absence of physical distancing removed
- Addition of new term "returned case" – employees who return to work after having had COVID and recovered from COVID
    - Employer not required to make COVID testing available to returned cases
- Exclusion and return to work requirements are deferred to CDPH
- Close contact definition is deferred to CDPH

Second Readoption Key Points:

- **COVID-19 tests redefined to include self-tests**. It clarifies that self-tests cannot be both self-administered and self-read unless observed by an employer or telehealth proctor. This means that an employee cannot simply report the results of an at home test to their employer.
- **"Fully vaccinated" redefined to allow mix and match vaccines.**
- **"Worksite" definition clarified regarding remote worksites**
    - "Worksite" does not apply to locations where the worker worked by themselves without exposure to other employees, or to a worker's personal residence or alternate work location chosen by the worker when working remotely.

- **COVID Testing to be made available to all workers exposed to COVID in the workplace**, regardless of vaccination status. The only exception is those that have had COVID-19 in the past 90 days.
- **Face Coverings**
  - Change to permissible types. Must have at least two layers of fabric and not let light pass through them when held up to a light source. Must completely cover nose and mouth, with no large gaps on the outside of the face.
  - Exemptions: If the employee's condition or disability does not permit a non-restrictive alternative [face covering], the employee shall be at least six feet apart from all other persons and either fully vaccinated or tested at least weekly for COVID-19 during paid time and at no cost to the employee.
- **Exclusions from the workplace – Isolation and Quarantine**
  Changed in Alignment with CDPH

Note that the tables below do not apply to healthcare personnel and also do not apply to Emergency Medical Services personnel (AFL-21.08.7).

- **Table 1: Exclusion Requirements for Employees who Test Positive for COVID-19 (Isolation)**

Requirements apply to **all** employees, regardless of vaccination status, previous infection, or lack of symptoms.	• Employees who test positive for COVID-19 must be excluded from the workplace for at least 5 days. • Isolation can end and employees may return to the workplace after day 5 if symptoms are not present or are resolving, **and** a diagnostic specimen* collected on day 5 or later tests negative. • If an employee is unable or chooses not to test and their symptoms are not present or are resolving, isolation can end and the employee may return to the workplace after day 10. • If an employee has a fever, isolation must continue and the employee may not return to work until the fever resolves. • If an employee's symptoms other than fever are not resolving, they may not return

	to work until their symptoms are resolving **or** until after day 10 from the positive test. • Employees must wear face coverings around others for a total of 10 days after the positive test, especially in indoor settings. • * Antigen test preferred.

- **Table 2: Employees who are Exposed to Someone with COVID-19 (Quarantine)**

Requirements apply to employees who are: • Unvaccinated+; OR • Vaccinated and booster-eligible++ but have not yet received their booster dose. +Includes persons previously infected with SARS-CoV-2 within the last 90 days.	• Employees must be excluded from the workplace for at least 5 days after their last close contact with a person who has COVID-19. • Exposed employees must test on day 5. • Quarantine can end and exposed employees may return to the workplace after day 5 if symptoms are not present and a diagnostic specimen* collected on day 5 or later tests negative. • If an employee is unable or chooses not to test and does not have symptoms, quarantine can end and the employee may return to the workplace after day 10. • Employees must wear face coverings around others for a total of 10 days after exposure, especially in indoor settings. • If an exposed employee tests positive for COVID-19, they must follow the isolation requirements above in Table 1.

	• If an exposed employee develops symptoms, they must be excluded pending the results of a test. • Employees are strongly encouraged to get vaccinated or boosted. * Antigen test preferred.

Employers are not required to exclude asymptomatic employees in this category if:

- A negative diagnostic test* is obtained within 3-5 days after last exposure to a case;
- Employee wears a face covering around others for a total of 10 days; and
- Employee continues to have no symptoms.

▪ **Table 3: Employees who are Exposed to Someone with COVID-19 (NO Quarantine Required)**

Requirements apply to employees who are:	Employees do not need to quarantine if they:
• Boosted; OR • Vaccinated, but not yet booster-eligible.	• Test on day 5 with a negative result. • Wear face coverings around others for 10 days after exposure, especially in indoor settings. • If employees test positive, they must follow isolation recommendations above. • If employees develop symptoms, they must be excluded pending the results of a test.

In addition to the above, pursuant to section 3205(c)(10)(E), when an order to isolate, quarantine, or exclude an employee is issued by a local or state health official, the employee shall not return to work until the period of isolation or quarantine is completed or the order is lifted even if the order exceeds the specified exclusion requirements in the ETS or CDPH recommendation.

G. CDPH Order – Health Care Workers – COVID-19 Booster Requirement

a. Effective December 22, 2021, CDPH Updated the Health Care Worker Vaccine Requirement to include COVID-19 Booster Shots
b. Health care workers are to have COVID-19 boosters 6 months after a two-dose COVID-19 vaccine regiment, or two months after a one-dose Johnson & Johnson vaccine.
c. Those employees currently eligible for booster shots are to have the booster no later than February 1, 2022.
d. Medical and Religious Exemptions continue.
e. Health care workers with exemptions and those booster eligible employees who have not yet received a booster by December 27, 2021, must be tested twice weekly in acute and long-term care settings.
    i. Must also wear a surgical mask (N95) or higher-level respirator at all times while in the facility.
    ii. CDPH strongly recommends that all workers in skilled nursing facilities (including those that are fully vaccinated and boosted) undergo at least twice weekly testing.

H. BLOCKED BY SUPREME COURT – Inactive: OSHA ETS COVID-19 Vaccination and Testing

Note: Could return as a permanent standard, rather than an emergency temporary standard.

a. Would have applied to employers with 100 or more employees (company-wide).
b. Would have required employees to be vaccinated for COVID-19 or tested for COVID-19 weekly beginning February 9, 2022.
c. Would have provided reasonable paid time off for Employee Vaccinations
d. Would have followed the CDC regarding return to work after COVID-19 test or diagnosis
e. Would have required reporting work-related COVID-19 fatalities to OSHA withing 8 hours and work-related COVID-19 in-patient hospitalizations with 24 hours of knowledge.

I. Centers for Medicaid and Medicare Services (CMS) COVID Vaccination Requirement

Supreme Court ruled that the federal government has authority to impose conditions in connection with funding for public programs such as Medicare and Medicaid.

a. Requires COVID-19 vaccination for healthcare workers at Medicare and Medicaid - certified providers and suppliers.
    i. Applies to eligible staff working at almost all CMS-certified facilities that participate in the Medicare and Medicaid programs, regardless of clinical responsibility or patient contact.

ii. Does not apply to all healthcare entities (e.g. physicians offices that are not subject to CMS health and safety regulations).

b. Compliance dates extended so workers must be fully vaccinated by February 28, 2022, with some enforcement discretion.
c. Medical and Religious exemptions allowed.
d. Employers must track vaccination status and exemptions.
e. Penalties of non-compliance include civil monetary penalties, denial of payments, and termination of participation.
f. Interim final rule: **https://www.federalregister.gov/public-inspection/2021-23831/medicare-and-medicaid-programs-omnibus-covid-19-health-care-staff-vaccination**
g. Frequently asked questions: **www.cms.gov/files/document/cms-omnibus-staff-vax-requirements-2021.docx**

X. … And the Ones that Got Away…: Legislation that died in committee

A. **AB 385: Limitations to PAGA** sought to ease the litigation risk of the pandemic on employers by prohibiting employees from maintaining an action under PAGA for violations of the Labor Code arising between March 4, 2020, and the state of emergency termination date.

B. **AB 231, AB 612, and AB 25: Independent Contractors:** Three bills were introduced in the continued attempt to reform AB 5. AB 231 would have made permanent the exemption from the ABC test for licensed manicurists, by providing that they be indefinitely governed by the multifactor *Borello* test instead of the ABC Test. AB 612 would have created a new exemption from the ABC test for a bona fide business-to-business arrangement that involves a voluntary deposit, to be made available to entities that utilize their own employees to produce, locate, or procure tangible personal property, which it owns, leases, or otherwise has the lawful right to possess. AB 25 would have replaced the ABC test with the multifactor *Borello* test.

C. **AB 757: Documenting COVID-19 Tests:** AB 757 would have authorized a private employer to request prescribed documentation of a positive COVID-19 test or diagnosis if (1) an employee reports that the employee is unable to work due to a positive for COVID-19 test result and (2) the employer determines that an employee may be subject to a 14-day exclusion from the workplace as required under certain law or regulations.

D. **AB 1028: Telework Flexibility Act** would have authorized telecommuting employees to waive overtime up to 10 hours of work per day and waive split shift premiums if the employee requests an employee-selected remote work flexible schedule, and it would permit an employee to choose when to take any meal or rest period during the workday. The bill also would have prohibited an employee from recovering PAGA penalties meal and rest break violations if the employee engaged in remote work.

E. **AB 230: Workplace Flexibility Act of 2021** would have permitted an individual, nonexempt employee to request an employee-selected flexible work schedule, allowing for workdays of up to 10 hours per day within a 40-hour workweek, where the employee would not be entitled to overtime compensation for those additional daily hours.

F. **AB 530: Labor Code Private Attorneys General Act or 2004: Filing Requirements** would have required an "aggrieved employee" to inform the employer which specific violations of the Labor Code are being alleged under each subdivision of PAGA and to inform the employer if statutory right-to-cure provisions apply.