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California Employment Law

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HIGHLIGHTS

This release has been updated to reflect the latest developments in California employment law including numerous decisions on wage and hours laws; determining compensable hours and proper payment amounts; and equal employment opportunity laws.

In *Mejia v. Roussos Construction, Inc.* (2022) 76 Cal. App. 5th 811, a California appellate court held that the *ABC* test, as articulated by the California Supreme Court in the *Dynamex decision*, does not include a threshold hiring entity test. The trial court prejudicially erred in instructing the jury that flooring installers who asserted a misclassification claim first had to establish that they were hired by the general contractor or its agent before the *ABC* test could be applied to determine their status. The conclusive presumption under Lab. Code § 2750.5, that a person employing an unlicensed contractor was an employer did not establish that the installers, as unlicensed workers, were employees only of the subcontractors who hired them. A jury question existed as to whether those subcontractors were independent of the general contractor. ***See* Ch. 1, Overview of Wage and Hour Law, § 1.04[1][b].**

The California statute authorizes the Industrial Welfare Commission (IWC) 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 have been determined by the commission to meet the requirements in Labor Code without requiring individual licenses of such employees. The commission will fix a special minimum wage for such employees. The special license for the nonprofit corporation is renewed on a yearly basis, or more

frequently as determined by the commission. This section is repealed effective January 1, 2025. Lab. Code § 1191.5. ***See* Ch. 2, Applicability of Rules Governing Hours Worked, § 2.04[2][c].**

In 2021, the California Legislature recognized that California's continued reliance on exemptions in the Labor Code for disabled persons undermines modern principles of, and protections for, equality. It serves to reinforce the false notion that people with disabilities are less capable than their peers without disabilities. It is also subject to substantial misuse with subjective measures of how much individuals should be paid. The Legislature noted that a growing number of states have insisted that people with disabilities deserve equal pay and have banned use of exemptions that allow for subminimum wage. Commencing January 1, 2025, or when the plan as described in subdivision (c) is released, whichever is later, an employee with a disability shall not be paid less than the legal minimum wage required by Lab. Code § 1182.12 or the applicable local minimum wage ordinance, whichever is higher. Lab. Code § 1191. ***See* Ch. 2, Applicability of Rules Governing Hours Worked, § 2.04[2][c].**

In *Lindsey v. WC Logistics, Inc*. (N.D. Cal. 2022) 2022 U.S. Dist. LEXIS 28085, the court noted that nothing in the Ninth Circuit's analysis in *Int'l Bhd. Of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin*. (9th Cir. 2021) 2021 U.S. App. LEXIS 1151 suggested or held that the Federal Motor Carrier Safety Administration (FMSCA) completely preempts state law with regards to wage and hour rules. *Teamsters* applied an ordinary conflict preemption analysis to reach its conclusion that California's meal and rest break rules were preempted. The FMCSA did not completely preempt the plaintiff's state law claims for violations of California Labor Code including unpaid overtime, unpaid meal period premiums, unpaid rest period premiums, unpaid minimum wages, final wages not timely paid, wages not timely paid during employment, noncompliant wage statements, failure to keep requisite payroll records, and unreimbursed business expenses. The defendants have not established federal question jurisdiction and the court concluded that it does not have federal question jurisdiction over either the class action or the Private Attorneys General Act (PAGA) action. ***See* Ch. 2, Applicability of Rules Governing Hours Worked, § 2.06[3][b].**

Flight attendants' motion to certify a class in their action against their employer for alleged failure to provide meal breaks, rest breaks, and proper wage statements was denied because they failed to present common questions of law or fact answerable with common proof predominate over individualized questions. Examination of each flight attendant's records would be necessary both to answer the liability question (whether the flight attendant ever worked more than the requisite number of hours

without an opportunity for an off-duty break) and to calculate their damages (how many times that occurred). *Wilson v. SkyWest Airlines* (N.D. Cal. 2022) 2022 U.S. Dist. LEXIS 91983. ***See*** **Ch. 3, Determining Compensable Hours and Proper Payment Amounts, § 3.01[14][b].**

Cal. Lab. Code 226.7 has been amended to acknowledge that it is in the public interest that security officers are able to respond to emergency situations without delay. This may require security officers to remain on the premises and on call during paid rest periods, and to carry and monitor a communication device. Thus, it is the intent of the Legislature to abrogate, for the security services industry only, the California Supreme Court's decision in *Augustus v. ABM Security Services, Inc*. (2016) 2 Cal. 5th 257. ***See*** **Ch. 3, Determining Compensable Hours and Proper Payment Amounts, § 3.01[14][b].**

Some counties and cities in California have imposed their own higher minimum wage rates, including Los Angeles, where a $16.04 minimum wage for all employers took effect in July 2021. The following local minimum wages took effect on January 1, 2022, regardless of employer size: Cupertino, $16.40, Menlo Park, $15.75, Mountain View, $17.10, Oakland, $15.06, Palo Alto, $16.45, Redwood City, $16.20, San Jose, $16.20, and San Mateo, $16.20. ***See*** **Ch. 3, Determining Compensable Hours and Proper Payment Amounts, § 3.04[4].**

In *Naranjo v. Spectrum Sec. Services, Inc.*, 2022 Cal. LEXIS 2878, the California Supreme Court recognized that an itemized wage statement that "omits gross and net 'wages earned' " would run afoul of Lab. Code § 226's requirements. The trial court found that the defendant's employees had "clearly suffered an injury since they could not determine from the wage statements the correct wages to which they were entitled." An employer's obligation under Lab. Code § 226 to report wages earned includes an obligation to report premium pay for missed breaks. Missed-break premium pay may constitute wages. This means that, provided the conditions specified in the statute are otherwise met, failure to report premium pay for missed breaks can support monetary liability under Lab. Code § 226 for failure to supply an accurate itemized statement reflecting an employee's gross wages earned, net wages earned, and credited hours worked. ***See*** **Ch. 4, Payment of Wages, § 4.04[1].**

Starting in 2022, the intentional theft of wages, including tips, in an amount greater than $950.00 from a single employee or $2,350 from two or more employees during any consecutive 12-month period is punishable as grand theft. Independent contractors are included in the definition of "employees" who are protected by the law, and hiring entities that retain independent contractors are "employers" who can be charged with wage theft. *Pen. Code § 487m*. ***See*** **Ch. 4, Payment of Wages, § 4.10[1][d].**

In *Usher v. White* (2021) 64 Cal. App. 5th 883, the owner of an alleged employer was not personally liable under Lab. Code § 558.1 because the undisputed evidence showed that she was not personally involved in the determination to classify plaintiffs as independent contractors, which purported misclassification formed the basis of their class and subclass allegations and their ten causes of action and she also lacked sufficient participation in the operation and management of the employer to create a triable issue of material fact that she caused the wage and hour violations. ***See*** **Ch. 5, Administrative and Judicial Remedies Under Wage and Hour Laws, § 5.30[2].**

In a case in which a truck driver sued his former employer and its owner, the trial court did not err in finding the owner personally liable for wage and hour violations of Lab. Code § 558.1. The owner admitted he had approved the policy regarding payment of truck drivers that violated various provisions of the Labor Code. The record in the present case amply supported the trial court's finding the former employer and owner "caused" the Labor Code violations within the meaning of the statute. It was undisputed the former owner and employer was the sole owner and president of both HRT and Hepta Run, and he admitted he had approved the policy regarding payment of truck drivers that violated various provisions of the Labor Code. *Espinoza v. Hepta Run, Inc*. (2022) 74 Cal. App. 5th 44. ***See*** **Ch. 5, Administrative and Judicial Remedies Under Wage and Hour Laws, § 5.30[2].**

In *O.M. v. Nat'l Women's Soccer League* (D. Or. 2021) 544 F. Supp. 3d 1063, an action regarding the defendant's age rule that stated women under the age of 18 could not play professional soccer, the plaintiff was likely to succeed on the merits of her Sherman Anti-Trust Act claim. The plaintiff established that the defendant and its member teams had enforced the age rule by prohibiting eligible players from playing until they turned 18, the teams competed with each other for player's rights through league mechanisms and the defendant failed to meet its burden of demonstrating a procompetitive rationale. The plaintiff's preliminary injunction was granted because: (1) the plaintiff showed she had the requisite skills and was ready to play professional soccer; (2) the age rule was impeding her development as a soccer player in an irreversible manner; (3) the career of a professional soccer player was short; and (4) there were no substitutes for professional soccer. By satisfying all four of the elements, the plaintiff met her burden of establishing that a preliminary injunction was appropriate until a trial on the merits can be held. ***See*** **Ch. 6, Child Labor Laws, § 6.02[2].**

The California Family Rights Act (CFRA) requires the department of Fair Employment and Housing (Department) to create a small employer family leave mediation pilot program, for alleged violations of these family care and medical leave provi-

sions, applicable to employers with between 5 and 19 employees. The CFRA authorizes the employer or the employee to request that all parties participate in mediation through the department's dispute resolution division after the department issues a right-to-sue notice. 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 department'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 is entitled to a stay of any pending civil action or arbitration until the mediation is complete or deemed unsuccessful. The pilot program is repealed on January 1, 2024. Gov. Code § 12945.21. ***See* Ch. 8, Leaves of Absences, § 8.12[1][a].**

In *Lawson v. Grubhub, Inc.* (9th Cir. 2021) 13 F.4th 908, a case involving California law, a food delivery driver sued alleging that he was misclassified as an independent contractor. His claims under the California Labor Code for failure to pay minimum wages and overtime and federal class certification were properly denied because the driver was not typical of the class and not an adequate representative. The named driver and one other putative class member had opted out of a contractual arbitration and class action waiver. Thus, the proceedings would be unlikely to generate common answers. ***See* Ch. 9, Wage and Hour Class Actions § 9.01[2].**

In *Woods v. American Film Institute* (2021) 72 Cal. App. 5th 1022, an action seeking employee benefits, class certification under California Code of Civil Procedure, Code Civ. Proc. § 382, was properly denied to unpaid workers for an annual film festival because common issues would not predominate, given that putative class members who expected no compensation were not employees under California law. The proposed class was broad enough to include people who expected to be paid, and thus the trier of fact would have needed to decide whether each class member expected to be paid or was in fact a volunteer. ***See* Ch. 9, Wage and Hour Class Actions § 9.10[1].**

Before October 2021, employers were required to report COVID-19 outbreaks in the workplace to local public health agencies within 48 hours. The new law adjusts the timeline to 48 hours or one business day, whichever is later. The new law also clarified who must receive COVID-19 workplace exposure notifications, including that employer must provide information on COVID-19 employee-related benefits to employees who were on the same premises as a positive COVID-19 case within the infectious period. The new law also expands the list of employers exempt from the COVID-19 outbreak reporting requirement to include, for example, community clinics, adult day health centers, community care facilities, and child day care facilities. The law took effect as an urgency statute on October 5, 2021. Lab. Code § 6409.6.

Repealed effective January 1, 2023. ***See*** **Ch. 20, Liability for Work-Related Injuries, § 20.21[4].**

In *Kuciemba v. Victory Woodworks, Inc*. (2022) 31 F.4th 1268 the Ninth Circuit certified the following questions to the California Supreme Court: (1) If an employee contracts COVID-19 at his workplace and brings the virus home to his spouse, does California's derivative injury doctrine bar the spouse's claim against the employer? (2) Under California law, does an employer owe a duty to the households of its employees to exercise ordinary care to prevent the spread of COVID-19? The California Supreme Court agreed to decide the issues. ***See*** **Ch. 20, Liability for Work-Related Injuries, § 20.21[4].**

In *Sandoval v. Qualcomm, Inc*. (2021) 12 Cal. 5th 256, the California Supreme Court concluded that the pattern jury instruction, CACI No. 1009B, used in this case did not adequately capture the elements of a *Hooker v. Department of Transportation* (2002) 27 Cal. 4th 198 claim. Qualcomm, the hirer, owed no tort duty to the plaintiff, the parts specialist working for Qualcomm's contractor, at the time of the plaintiff's injuries. Although Qualcomm performed the partial power-down process that preceded the contractor's work and resulted in the presence of the live electrical circuit, Qualcomm neither failed to sufficiently disclose that hazard under *Kinsman v. Unocal Corp*. (2005) 37 Cal. 4th 659 nor affirmatively contributed to the injury under *Hooker*. ***See*** **Ch. 20, Liability for Work-Related Injuries, § 20.44[2][c].**

In April of 2022, Governor Newsom signed a state-wide right to recall law requiring employers in certain industries to notify employees laid off for COVID-19-related reasons about newly-available positions and offer the new positions to the laid-off employees based on a qualification-based preference system before offering them to new hires. Lab. Code § 2810.8. The new law is similar to the local recall ordinances and right to reemployment legislation. Local ordinances will remain in effect to the extent they are more generous than the state law. Los Angeles County, California Code of Ordinances Sec. 8.202.030; Santa Monica Mun. Code § 4.66.010. The recall law became effective immediately and remains in effect through December 31, 2024. Like the local ordinances, the state law is time-limited and directed to the industries with workforces most impacted by COVID: hotels, event centers, private clubs, airport hospitality operations, airport service providers and janitorial, maintenance and security services for commercial buildings. Post-layoff changes in ownership, the form of the organization, or the location of the business will not excuse an employer from these recall protocols, as long as the business conducts the same or substantially similar operations as it did before the pandemic. Lab. Code § 2810.8. ***See*** **Ch. 21, Occupational Safety and Health Regulations, § 21.24.**

The right of recall pursuant to a Santa Monica recall ordinance, which provides laid off employees that have been employed by the employer for six months or more with a right to be rehired in certain circumstances ordinance, did not apply because the plaintiff did not work for the employer for six months or more before he was involuntarily separated from employment for economic reasons; the plaintiff's earlier period of employment that ended with his voluntary resignation did not count toward the six-month minimum period of employment, leaving him ineligible for recall under the ordinance and thus the plaintiff failed to state a cause of action under the recall ordinance, Santa Monica Mun. Code § 4.66.010, which was to protect workers who were involuntarily laid off due to economic circumstances beyond their control. *Bruni v. The Edward Thomas Hospitality Corp* (2022) 64 Cal. App. 5th 247. ***See*** **Ch. 21, Occupational Safety and Health Regulations, § 21.24.**

In 2021, the Secretary of Labor, acting through the Occupational Safety and Health Administration (OSHA), enacted a vaccine mandate for much of the country's work force. The mandate, which employers must enforce, applies to roughly 84 million workers, covering virtually all employers with at least 100 employees. It requires that covered workers receive a COVID-19 vaccine and it preempts contrary state laws. 42 U.S.C. § 247d-6d. The National Federation of Independent Businesses (NFIB) sought emergency relief from the United States Supreme Court arguing that OSHA's mandate exceeds its statutory authority and is otherwise unlawful. The Supreme Court granted their applications and stayed the rule. *Nat'l Fed. Of Indep. Bus. v. DOL* (2022) 142 S. Ct. 661. ***See*** **Ch. 21, Occupational Safety and Health Regulations, § 21.25.**

In February of 2022, a bill was introduced in the California Legislature that would require an employer to require each person who is an employee or independent contractor, and who is eligible to receive the COVID-19 vaccine, to show proof to the employer, or an authorized agent thereof, that the person has been vaccinated against COVID-19. The bill would require proof-of-vaccination status to be obtained in a manner that complies with federal and state privacy laws and not be retained by the employer, unless the person authorizes the employer to retain proof. 2021 Bill Text CA A.B. 1993. On April 18, 2022, the bill was revised to establish an exception from this vaccination requirement for a person who is ineligible to receive a COVID-19 vaccine due to a medical condition or disability or because of a sincerely held religious belief. ***See*** **Ch. 21, Occupational Safety and Health Regulations, § 21.25.**

In *Perez v. City and County of San Francisco* (2022) 75 Cal. App. 5th 826, a police officer's department-authorized secondary firearm was stolen from his vehicle and the plaintiff's son was killed with that weapon. The city that employed the

officer failed to demonstrate that the plaintiff could not establish respondeat superior liability as a matter of law. In the context of the enterprise of policing, a jury could reasonably find the officer's failure to safely secure his weapon was not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. ***See*** **Ch. 30, Employers' Tort Liability to Third Parties for Conduct of Employees, § 30.02[3].**

In *Feltham v. Universal Protection Serv. LP* (2022) 76 Cal. App. 5th 1062, the going and coming rule applied in this third party negligence case because the undisputed evidence demonstrated defendant's employee did not use her car for work and she was not acting within the course and scope of her employment as a hospital security guard at the time of the accident, which occurred well after she finished her shift and while she was driving home in her personal vehicle. ***See*** **Ch. 30, Employers' Tort Liability to Third Parties for Conduct of Employees, § 30.05[4][a].**

Colonial Van & Storage, Inc. v. Superior Court (2022) 76 Cal. App. 5th 487 arose from an incident at the private residence of an employee who worked from home and was using the home for a business meeting when a family member of the employee assaulted a coworker and a business associate. The employer had no duty to protect against third party criminal conduct in the employee's home because the duty to provide a safe place to work under Lab. Code 6400 did not apply to an offsite meeting place. There was no special relationship absent evidence the employer could have prevented the harm and the assault was outside the scope of the employer-employee relationship. Claims for intentional infliction of emotional distress and vicarious liability failed because the employer lacked knowledge of the danger and the employee's knowledge was a personal matter. ***See*** **Ch. 30, Employers' Tort Liability to Third Parties for Conduct of Employees, § 30.06[2][a].**

In *Cardenas v. Horizon Senior Living, Inc.*, 2022 Cal. App. LEXIS 431, the heirs of a deceased victim of a felony sought to recover from the felons' employer on claims for wrongful death. The heirs had no cause of action under Lab. Code § 2802 because an employee's right to be indemnified by the employer did not apply to third parties. ***See*** **Ch. 30, Employers' Tort Liability to Third Parties for Conduct of Employees, § 30.09[3][a].**

In the Washington case of *Kennedy v. Bremerton Sch. Dist*. (W.D. Wash. 2020) 443 F. Supp. 3d 1223, aff'd, (9th Cir. 2021) 991 F.3d 1004, the Ninth Circuit Court rejected the employee's Civil Rights Act, 42 U.S.C. § 1983, free speech claim. The employee's practice of praying at the 50-yard line sent a message to members of the audience who were non adherents that they were outsiders, not full members of the political community, and for many young ath-

letes, the response to such a message was a desire to become an insider by joining the employee at the 50-yard line. This coercive effect violated the Establishment Clause and justified the District's decision to place the coach on leave. However, On January 27, 2022, the United States Supreme Court reversed the 9th Circuit in *Kennedy v. Bremerton School District*, 2022 U.S. LEXIS 3218. The Supreme Court held that the public school employee's prayer during school sports activities constituted protected speech and the public school employer could not prohibit it to avoid violating the Establishment Clause. ***See* Ch. 40, Overview of Equal Employment Opportunity Laws, § 40.10[3].**

In *Maner v. Dignity Health*, 9 F.4th 1114 (9th Cir. 2021), cert. denied, 2022 U.S. LEXIS 617, a Title VII action, the court affirmed the lower court's grant of grant of summary judgment to the employer on the sex discrimination claim because the employee presented no evidence that the doctor implicitly or explicitly conditioned the female researcher's favorable treatment on the receipt of sexual favors or that the female researcher submitted to coercion by consenting to the couple's ongoing relationship. The plaintiff alleged that the employer unlawfully terminated the plaintiff in retaliation for opposing instances of favoritism arising out of the relationship between the plaintiff's supervisor and the supervisor's romantic partner. The plaintiff's "paramour preference" reading of Title VII failed the test set forth in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), for assessing whether an adverse employment action violated Title VII—that is, whether changing the employee's sex would have yielded a different choice by the employer. The Ninth Circuit noted that the motive behind the adverse employment action was the supervisor's special relationship with the paramour, not any protected characteristics of the disfavored employees. The Ninth Circuit disagreed with the plaintiff's reading of *Bostock* to bar as unlawful sex discrimination for any effects on the individual that can be correlated with sex discrimination. ***See* Ch. 40, Overview of Equal Employment Opportunity Laws, § 40.10[5].**

In 2019, female professional soccer players on the United States Senior Women's National Soccer Team (WNT) filed a putative collective action and class action against the United States Soccer Federation, Inc. (USSF) asserting violations of the Equal Pay Act, 29 U.S.C.§ 206 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 4000e. The court granted summary judgment to the defendant on the plaintiff's equal pay act claim but denied summary judgment on some of the plaintiff's Title VII claims. *Morgan v. United States Soccer Fed. Inc*. (C.D. Cal. 2020) 445 F. Supp. 3d 635. The parties settled the equal pay lawsuit in February 2022. *www.nytimes.com/2022/05/18/sports/soccer/us-soccer-equal-pay-deal.html*. On May 18, 2022, the USSF announced that under a new collective bargaining agreement the

men's and women's national teams will be paid equally. *https://www.npr.org/2022/05/18/1099697799/us-soccer-equal-pay-agreement-women*. ***See* Ch. 40, Overview of Equal Employment Opportunity Laws, § 40.22[1].**

In *Fried v. Wynn Las Vegas, LLC* (9th Cir. 2021) 18 F.4th 643, the Ninth Circuit considered whether the working environment for a male manicurist was sufficiently hostile or abusive to violate Title VII of the Civil Rights Act. The plaintiff was a manicurist at the defendant salon. In one incident, the plaintiff became frustrated and threw a pencil at a computer because customers were requesting female manicurists more often than male manicurists. According to the plaintiff, the manager remarked that the plaintiff was working in a "female job related environment" and suggested that he look for other employment in the culinary field. On another occasion, a female coworker told the plaintiff and another male manicurist that if they wanted to get more clients, they should wear wigs to look like women. The court reversed the district court's ruling that coworkers' breakroom comments on the customer's sexual proposition were insufficiently severe or pervasive to support the plaintiff's claim. The court instructed the district court on remand to reconsider the cumulative effect of the coworkers' comments. ***See* Ch. 40, Overview of Equal Employment Opportunity Laws, § 40.25[1].**

The female police officer in *Ballou v. McElvain* (9th Cir. 2022) 29 F.4th 413 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. The police chief who made the promotion decisions instigated a series of investigations into the officer's reporting practices and refused to promote her while the investigations were pending. The female police officer sued alleging that the police chief violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment by discriminating against her on the basis of sex in refusing to promote her and by retaliating against her for objecting to that discrimination. The city and its police chief violated the Equal Protection Clause of the Fourteenth Amendment by discriminating against her on the basis of gender by intentionally subjecting her to internal affairs investigations to preclude her eligibility for promotion and then by declining to promote her to sergeant even though she was the most qualified candidate. The police chief was not entitled to qualified immunity because the female officer established a prima facie claim for disparate treatment on the basis of gender. The case was remanded to discern from the district court's order how it had resolved the police chief's assertion of qualified immunity as to the female police officer's Equal Protection retaliation claim. ***See* Ch. 41, Substantive Requirements Under Equal Employment Opportunity Laws, § 41.36[2][a].**

In *Adams v. Cty. of Maricopa* (9th Cir. 2022) 2022 U.S. App. LEXIS 243, an employment discrimination action under the Americans with Disabilities Act (ADA), *42 U.S.C. § 12101*, and the Rehabilitation Act, 29 U.S.C. § 701, the employer provided nondiscriminatory basis for terminating employee, namely the employee's long history of discourteous behavior in violation of the county's code of conduct. The employee did not address any of the code of conduct violations, much less explain how those behaviors resulted from her disability. The employer lacked adequate notice of employee's limitations and it had no duty to accommodate her because the employee expressly denied having limitations that affected her job performance and declined the option to seek accommodations. When the employee finally requested accommodations six months later, she did so only after learning that employer intended to terminate her for a valid, nondiscriminatory reason. ***See*** **Ch. 41, Substantive Requirements Under Equal Employment Opportunity Laws, § 41.51[2][a].**

In June 2019, California was the first state to outlaw the racial discrimination of individuals based on their natural hairstyles. The law, also known as the CROWN Act (Create a Respectful and Open Workplace for Natural Hair) states, "In a society in which hair has historically been one of many determining factors of a person's race, and whether they were a second class citizen, hair today remains a proxy for race." Therefore, hair discrimination targeting hairstyles associated with race is racial discrimination. The law prohibits discrimination based on hair style and hair texture by extending protection under the Fair Employment and Housing Act (FEHA), Govt. Code § 12926, and the California Education Code, Educ. Code § 212.1. On March 21, 2022, the Senate and the House enacted the Creating a Respectful and Open World for Natural Hair Act (Crown Act) of 2022. H.R. 2116. ***See*** **Ch. 41, Substantive Requirements Under Equal Employment Opportunity Laws, § 41.42[2][m].**

Siazon v. Hertz Corp. (9th Cir. 2021) 2021 U.S. App. LEXIS 7145, an age discrimination claim under California's Fair Employment and Housing Act (FEHA), was unsuccessful because the employer proffered a legitimate, nondiscriminatory reason to terminate the former employee based on his lengthy disciplinary record and the employee failed to raise a triable issue of fact that the employer's legitimate, non-discriminatory reason was pretextual. There was no triable issue of fact supporting the employee's disparate treatment argument because his younger coworkers—whom he alleged received preferential treatment—were not similarly situated because no evidence showed they had a history of similar performance issues. The employee's FEHA retaliation claim failed at step one because none of his complaints referred to protected activities. ***See*** **Ch. 41, Substantive Re-**

quirements Under Equal Employment Opportunity Laws, § 41.131[4].

Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, disability, or genetic information must consult an Equal Employment Opportunity Commission (EEOC) counselor prior to filing a complaint in order to try to informally resolve the matter. An aggrieved person must initiate contact with an EEOC counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action. 29 C.F.R. § 1614.105(a)(1). In *Aquino v. Mayorkas* (9th Cir. 2022) 2022 U.S. App. LEXIS 11, the Department of Homeland Security was entitled to summary judgment as to claimant's Title VII employment discrimination action because it was untimely. ***See*** **Ch. 42, Administrative Enforcement of Equal Employment Opportunity Laws, § 42.61[4].**

In *Verceles v. Los Angeles Unified School Dist*. (2021) 63 Cal. App. 5th 776, the appellate court reversed the trial court grant of a school district's special motion to strike under the anti-SLAPP law a teacher's complaint for discrimination and retaliation in violation of the California Fair Employment and Housing Act. The teacher's discrimination and retaliation claims depended upon the decisions to reassign him and terminate his employment rather than on any communications made during the district's investigation of his alleged misconduct or the investigation as a whole. ***See*** **Ch. 43, Civil Actions Under Equal Employment Opportunity Laws, § 43.01[7A].**

Courts generally use the lodestar method to calculate attorney's fees under the California Fair Employment and Housing Act. *Vines v. O'Reilly Auto. Enterprises, LLC* (2022) 74 Cal. App. 5th 174. ***See*** **Ch. 43, Civil Actions Under Equal Employment Opportunity Laws, § 43.01[8][h].**

Effective January 1, 2022, persons already employed as nonsworn members of a criminal justice agency are included within the exception to these prohibitions, so that information about arrests or detentions regarding specified crimes about these employees may be disclosed or sought. For the exception to apply, the employee's specific duties must relate to one of the following: (1) the collection or analysis of evidence or property; (2) the apprehension, prosecution, adjudication, incarceration, or correction of criminal offenders; or (3) the collection, storage, dissemination, or usage of criminal offender record information. The offenses for which arrests or detentions are subject to disclosure are limited to violent felonies, serious felonies, and crimes involving dishonesty or obstruction of legal processes, including, but not limited to, theft, embezzlement, fraud, extortion, falsifying evidence, falsifying or forging official documents, perjury,

bribery, and influencing, intimidating, or threatening witnesses. Lab. Code § 432.7. ***See*** **Ch. 50, Limitations on Employer Collection of Private Information About Employees, § 50.11[1].**

California's Consumer Privacy Act, Civ. Code § 1798.145, is one of the most stringent privacy laws and the first that applied to employees. Personal information that is collected about a job applicant must be used by the employer solely within the context of the employment. Beginning in January of 2023, the law has a look back provision that requires employers to provide disclosures on all information the employer has retained on an employee or applicant as far back as Jan. 1, 2022. ***See*** **Ch. 50, Limitations on Employer Collection of Private Information About Employees, § 50.12[2][c].**

The Federal Credit Reporting Act (FCRA), 15 U.S.C. § 1681b, does not create a different requirement for physical documents and electronic documents. However, electronic documents are a different medium and may have characteristics that are not transferrable to paper. *Newsome v. Graybar Elec. Co.* (N.D. Cal. 2021) 2021 U.S. Dist. LEXIS 250198. ***See*** **Ch. 50, Limitations on Employer Collection of Private Information About Employees, § 50.14[1][a].**

Effective January 1, 2023, the California Public Records Act, Gov. Code § 6250, will be reorganized and non- substantive changes will be made. ***See*** **Ch. 51, Use and Disclosure of Private Information About Employees, § 51.18[1].**

In *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal. 5th 703, the California Supreme Court addressed whether the evidentiary standard set forth in Labor Code section 1102.6 replaced *McDonnell Douglas* as the relevant evidentiary standard for retaliation claims brought pursuant to Labor Code section 1102.5. *Lawson* held that Labor Code section 1102.6, adopted in 2003, provides the governing framework for analyzing whistleblower retaliation claims brought under Labor Code section 1102.5. It "places the burden on the plaintiff to establish, by a preponderance of the evidence, that retaliation for an employee's protected activities was a contributing factor in a contested employment action. The plaintiff need not satisfy *McDonnell Douglas* in order to discharge this burden. Once the plaintiff has made the required showing, the burden shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the action in question for legitimate, independent reasons even had the plaintiff not engaged in protected activity." ***See*** **Ch. 60, Liability for Wrongful Termination and Discipline, § 60.03[2][c].**

In *Scheer v. Regents of University of California* (2022) 76 Cal. App. 5th 904 (the Regents of the University of California were not entitled to summary adjudication of a terminated employee's whistleblower claim under Lab. Code § 1102.5 because their

moving papers incorrectly applied the *McDonnell Douglas* burden-shifting framework instead of the evidentiary standard in Lab. Code § 1102.6, for whistleblower retaliation cases). ***See*** **Ch. 60, Liability for Wrongful Termination and Discipline, § 60.03[2][c].**

Perez v. City of Petaluma (N.D. Cal. 2021) 2021 U.S. Dist. LEXIS 169405 involved the removal of a member of a community advisory committee. Perez had a long history of antagonizing local people of color, had been revealed to be a white nationalist known to post racist and made anti-Semitic comments on social media. The city council, by a vote of 5-1, adopted a resolution to remove Perez from the Committee and terminated Perez's participation on the Committee. Perez sought reinstatement on the Committee and to enjoin the defendants from implementing the resolution removing him from the Committee. Perez failed to demonstrate a likelihood of success on the merits and the court denied the injunction. The government interest outweighed the employee's First Amendment right to free speech as the record made clear that his speech and actions disrupted co-worker relations, interfered with his performance of his duties on the committee, and obstructed the work of the committee, and given the number. ***See*** **Ch. 60, Liability for Wrongful Termination and Discipline, § 60.04[2][f].**

The plaintiffs in *Kincheloe v. American Airlines, Inc*. (N.D. Cal. 2022) 2022 U.S. Dist. LEXIS 81057, who were flight attendants for the Defendant American Airlines, alleged that in March 2020, at the beginning of the COVID-19 pandemic, American offered to qualifying flight attendants an early retirement program. The March 2020 offer required flight attendants to have at least 10 years of seniority to participate. American thus presented flight attendants with two alternatives: (1) accept the March 2020 VEOP; or (2) engage in the undesirable alternative of continuing to fly on commercial aircraft when approximately 95% of air travelers were unwilling to fly due to health concerns. The bulk of plaintiffs' allegations focus on (1) the effects of COVID-19 on the air-traveling population and (2) the risk to older individuals generally when they contract COVID-19. The plaintiffs argued that these facts demonstrate that American "placed older flight attendants . . . at greater risk of COVID-19 infection" by forcing them to perform their job duties on planes. In dismissing the plaintiffs' constructive discharge action, the court noted that these allegations, however, could not plausibly establish constructive discharge because they are not conditions created by American. To state a claim for constructive discharge, the working conditions alleged by the plaintiffs must deteriorate "as a result of discrimination," not as a result of circumstances outside of the employer's control. ***See*** **Ch. 60, Liability for Wrongful Termination and Discipline, § 60.07[1][b].**

In a case involving the California

whistleblower statute for unlawful retaliation, the employer had a legitimate, nonretaliatory reason for terminating the plaintiff—namely, she had been insubordinate, disrespectful, and dishonest. The employer demonstrated by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected activities. *Vatalaro v. County of Sacramento*, 2022 Cal. App. LEXIS 475. ***See* Ch. 61, Bringing and Defending Wrongful Termination Cases, § 61.03[4][a].**

In *Andrews v. Yakima Sch. Dist. #7* (9th Cir. 2021) 2021 U.S. App. LEXIS 22645, the plaintiff's employment contract with the school district was contingent on a successful outcome of a criminal history records review including a requirement to have fingerprints taken and a drug test. When the school district rescinded the employment contract, approximately three business days prior to the first day of school, the plaintiff still had not gotten her fingerprints taken, the plaintiff's background check had not been completed and the plaintiff conceded that the drug test was never completed nor did she make any effort prior to the revocation of her employment offer to explain to the school district any reason for her failure to report for the test. No binding contract arose because the conditions precedent in this case were never satisfied. The "Intent to Hire" agreement signed by the parties was explicit in conditioning the offer by the school district on successful completion of the background check requirement. ***See* Ch. 62, Avoiding Wrongful Termination and Discipline Claims, § 62.02[4].**

Lab. Code § 925 provides that employers cannot force an employee who resides and works primarily in California to agree, as a condition of employment, to: (1) litigate a claim arising in California in a forum outside of California; or (2) waive the employee's right to the substantive protection of California law with respect to a controversy arising in California. Any provision in a contract that violates these terms is voidable by the employee, and if a violative provision is rendered void at the employee's request, the matter must be adjudicated in California under California law. In *LGCY Power, LLC v. Superior Court* (2022) 75 Cal. App. 5th 844, the prohibition in Lab. Code § 925, against requiring California employees to litigate in another state was an exception to the compulsory cross-complaint requirement of Code Civ. Proc. 426.30 and the employee timely and adequately raised the issue in the superior court. The employee could bring claims in California despite a related action in a sister state. ***See* Ch. 62, Avoiding Wrongful Termination and Discipline Claims, § 62.02[5][b].**

The anti-SLAPP (strategic lawsuit against public participation) statute provides that a motion to strike may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion is

scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing. Code Civ. Proc. § 425.16(f). ***See*** **Ch. 63, Causes of Action Related to Wrongful Termination, § 63.02[5].**

A letter specifically addressed to a former owner and the employee's "past and potential future clients" boasting that his new venture was a superior alternative to the plaintiff having "greater perspective, more resources and a much stronger team," including two former was a direct appeal for future work and that was sent directly to select representatives of the plaintiff's corporate customers constituted a solicitation as a matter of law. *Blue Mountain Enterprises, LLC v. Owen* (2022) 74 Cal. App. 5th 537. ***See*** **Ch. 70, Trade Secrets and Unfair Competition, § 70.13[3].**

In *People v. Czirban* (2021) 67 Cal. App. 5th 1073, the defendant's convictions for violating Unemp. Ins. Code §§ 2117.5, 2118.5 and Lab. Code § 3700.5, subd. (a), which arose from failure to report and withhold payroll taxes and to obtain workers' compensation insurance for bulldozer drivers, required proof beyond a reasonable doubt that the defendant was the drivers' employer because an employment relationship was an element of the crimes. The substantial evidence test applied because case law applying de novo review to employment status rulings in civil proceedings was not pertinent to a criminal case. ***See*** **Ch. 80, Unemployment and State Disability Insurance, § 80.11**.

In Romero v. Watkins & Shepard Trucking, Inc. (9th Cir. 2021) 9 F.4th 1097, the Ninth Circuit affirmed the district court's ruling that the Federal Arbitration Act (FAA) does not apply to a stand-alone binding arbitration agreement in which the plaintiff waived his right to bring a class action. The Ninth Circuit held that the district court correctly concluded that the plaintiff, a truck driver who did not himself cross state lines but delivered goods that had once crossed state lines, fell within FAA's exemption for transportation workers engaged in interstate commerce and the exemption could not be waived by private contract. ***See*** **Ch. 90, Arbitration of Employment Disputes § 90.01.**

A Racketeer Influenced and Corrupt Organizations (RICO) claim was precluded by the Labor Management Relations Act (LMRA) because the right or duty upon which the claim was based was created by or substantially depended on analysis of a collective bargaining agreement (CBA). The plaintiff's RICO claims could not properly proceed in court at this time and the case was dismissed without prejudice. The CBA provided a process for arbitration of disputes and the LMRA precluded court adjudication of the RICO claims before the arbitration process had been exhausted. *Columbia Exp. Terminal v. Int'l Longshore & Warehouse Union* (9th Cir. 2022) 23 F.4th 836. ***See*** **Ch. 90, Arbitration of**

Employment Disputes § 90.10[2][a].

On July 14, 2021, the United States Senate introduced the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021." 117 S. 2342. It was enacted on March 3, 2022. 9 U.S.C. § 402. The law amends the Federal Arbitration Act and prohibits enforcement of arbitration clause in employment contract in cases involving sexual harassment. This limitation would cover any agreement involving such conduct regardless of whether the claims at issue arise under federal, state, local, or tribal law. ***See*** **Ch. 90, Arbitration of Employment Disputes § 90.20[2][a].**

In *Martinez-Gonzalez v. Elkhorn Packing Co., LLC*, (9th Cir. 2022) 25 F.4th 613, a case involving California law, the Ninth Circuit considered whether an arbitration agreement between a California based vegetable grower and a migrant worker resulted from undue influence and economic duress was unenforceable. Under California law, the doctrine of economic duress did not render the arbitration agreements unenforceable because the defendant did not commit a wrongful act and reasonable alternatives were available to the plaintiff. The plaintiff asserted that the defendant committed a wrongful act by asking him to sign the arbitration agreement after he made the journey from Mexico to California, where he was dependent on the defendant for housing and had already started harvesting lettuce. The employee did not allege that the employer's actions were unlawful or tortious and the employer did not make any false claim, bad-faith threat or refusal to pay its debt. ***See*** **Ch. 90, Arbitration of Employment Disputes § 90.20[2][a].**

The evidence in *Nunez v. Cycad Management LLC* (2022) 77 Cal. App. 5th 276 supported factual findings that the Agreement was adhesive because it was presented to the plaintiff as a nonnegotiable condition of his employment. It was procedurally unconscionable because it was given to the plaintiff in English, which he could not read, without adequate explanation or a fee schedule. It was substantively unconscionable because it allowed the arbitrator to shift attorney's fees and costs onto the plaintiff and drastically limits his ability to conduct discovery. ***See*** **Ch. 90, Arbitration of Employment Disputes § 90.20[2][b].**

In December of 2021, the United States Supreme Court agreed to review whether California Private Attorneys General Act (PAGA) claims can be forced into arbitration in the case of *Viking River Cruises Inc. v. Moriana*, 2020 Cal. App. Unpub. LEXIS 6045, *cert. granted*, (2021) 142 S. Ct. 734. In *Viking River Cruises Inc. v. Moriana*, 2022 U.S. LEXIS 2940, the Supreme Court held that the Federal Arbitration Act (FAA) preempted California's *Iskanian* rule insofar as it precluded division of the Private Attorneys General Act (PAGA) actions into individual and non-individual claims through an

agreement to arbitrate. The prohibition in *Iskanian* on PAGA waivers presents parties with the same impermissible choice as the rules the court has invalidated in its decisions concerning class-and collective-action waivers: either arbitrate disputes using a form of class procedure or do not arbitrate at all. As a result, *Iskanian's* indivisibility rule effectively coerces parties to opt for a judicial forum rather than forgoing the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution and thus is incompatible with the FAA. The agreement between Viking and Moriana purported to waive "representative" PAGA claims. Under *Iskanian*, this provision was invalid if construed as a wholesale waiver of PAGA claims. Under the Supreme Court's holding, that aspect of *Iskanian* is not preempted by the FAA, so the agreement remains invalid insofar as it is interpreted in that manner. But the severability clause in the agreement provides that if the waiver provision is invalid in some respect, any "portion" of the waiver that remains valid must still be "enforced in arbitration." Based on this clause, Viking was entitled to enforce the agreement insofar as it mandated arbitration of Moriana's individual PAGA claim. The lower courts refused to do so based on the rule that PAGA actions cannot be divided into individual and non-individual claims. The judgment of the California Court of Appeal was reversed and the case was remanded for further proceedings. ***See*** **Ch. 90, Arbitration of Employment Disputes § 90.20[2][c].**

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