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San Francisco's "Retail Workers' Bill of Rights"

By Catherine Nasser & Blake Pulliam

Introduction

This summer, a controversial set of ordinances, referred to as a "Retail Workers' Bill of Rights," will take effect in the City of San Francisco. Employers throughout the state would do well to take notice, as a similar measure is now pending in the California State Legislature.

Enacting a "Retail Workers' Bill Of Rights"

On November 25, 2014, the San Francisco Board of Supervisors approved two ordinances that together form a so-called "Retail Workers' Bill of Rights." The first of these ordinances, titled "Predictable Scheduling and Fair Treatment for Formula Retail Employees," restricts employers in their ability to change employee schedules without incurring additional wages.¹ The second, "Hours and Retention Protections for Formula Retail Employees," generally requires employers to offer additional hours to part-time employees and to retain the employees of a business for 90 days after it is sold.² Although San Francisco Mayor Edwin Lee declined to sign or veto either ordinance, both became law on December 5, 2014 by virtue of his inaction.³ The substantive provisions of these two ordinances became effective on July 3, 2015,⁴ and therefore, San Francisco employers should ensure they are in compliance.

¹ SAN FRANCISCO ORDINANCE NO. 241-14 (Nov. 25, 2014).

² SAN FRANCISCO ORDINANCE NO. 236-14 (Nov. 25, 2014).

³ SAN FRANCISCO CHARTER § 3.103 (requiring Mayor to sign or veto Ordinances within 10 days of passage).

⁴ SAN FRANCISCO POLICE CODE §§ 3300F.18, 3300G.17.

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San Francisco's "Retail Workers' Bill of Rights"

By Catherine Nasser & Blake Pulliam

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Which Employers Are Covered?

Whether an employer is covered under the ordinances depends on whether the employer's business fits the definition of a "Formula Retail Establishment."⁵ This definition is borrowed from San Francisco's Planning Code.⁶ An employer must be engaged in retail activities, have certain standardized features, and employ at least a minimal number of workers within San Francisco.

The City's definition of "retail" activities is broad, encompassing a wide range of sales and service enterprises including bars, liquor stores, restaurants, movie theaters, massage parlors, gyms, certain financial services, retail services and, of course, retail sales.⁷

The City's definition of a "formula" establishment is similarly inclusive. A business need only have twenty locations worldwide, and at least two of the following characteristics: a standardized array of merchandise, a standardized façade, standardized exterior signage, standardized décor and color-scheme, standardized employee apparel, a trademark, or a service mark.⁸

Assuming an employer fits this definition of a "formula retail establishment," it will be covered by the ordinances as long it employs twenty employees in the City of San Francisco, either at a single location or at multiple locations under common ownership.⁹

⁵ See SAN FRANCISCO POLICE CODE §§ 3300F.2, 3300G.3.

⁶ See SAN FRANCISCO PLANNING CODE § 303.1.

⁷ SAN FRANCISCO PLANNING CODE § 303.1(c). A total of 19 "retail sales or service activities" are enumerated.

⁸ SAN FRANCISCO PLANNING CODE § 303.1(b). While most of these characteristics are self-explanatory, standardized merchandise is defined as having 50 percent or more of in-stock merchandise from a single distributor bearing uniform markings.

⁹ SAN FRANCISCO POLICE CODE §§ 3300F.2, 3300G.3. Note that on March 17, 2015, an amendment was introduced that would increase the number of required employees to 40, and create exceptions from the ordinances if employees are covered by a collective bargaining agreement. As of May 15, 2015, these amendments were still pending before the Board.

What Do the Ordinances Require?

Under the "Retail Workers' Bill of Rights," employers at formula retail establishments must comply with a number of new requirements, which fall into four main categories: 1) predictable scheduling; 2) offering additional hours to part-time employees; 3) retaining employees after purchasing an establishment; and 4) equal treatment of full and part-time employees.

Predictable Scheduling Requirements

The first pillar of this "Retail Workers' Bill of Rights" requires employers at formula retail establishments to set schedules two weeks in advance, and to compensate employees with "predictability pay" if schedules are changed with insufficient notice.¹⁰

Specifically, predictability pay will be triggered by a change of schedule, other than those requested by an employee, made with less than seven days notice. Thus, cancelling a shift, changing the time or date of a shift, or requiring an employee to work a previously unscheduled shift on short notice will generally require additional pay.¹¹ An exception has been carved out for scheduling changes required to cover for another employee who takes leave or is otherwise absent from work without giving notice to the employer.¹² Additional common-sense exceptions include instances in which a business is closed for safety reasons or by an Act of God, and for employer mandated overtime.

Once predictability pay is triggered, the amount an employer owes depends on the amount of notice given to the employee and the length of the shift subject to change. If an employee is given less than 24 hours notice and the shift in question is more than four hours long, the employee is entitled to four hours pay at his or her regular rate.¹³ If given less than 24 hours notice for a shift that is four hours or less, the employee is entitled to two hours of pay.¹⁴ Finally, if

¹⁰ See generally SAN FRANCISCO POLICE CODE art. 33G.

¹¹ SAN FRANCISCO POLICE CODE § 3300G.3(b)-(c).

¹² SAN FRANCISCO POLICE CODE § 3300G.4(e).

¹³ SAN FRANCISCO POLICE CODE § 3300G.4(c)(2)(C).

¹⁴ SAN FRANCISCO POLICE CODE § 3300G.4(c)(2)(B).

the employee is given more than 24 hours but less than seven days notice, the employee is entitled to one hour of pay regardless of the length of the shift.¹⁵ Employers should note that these amounts are paid on top of regular wages for any time worked, and must be paid even if a shift is cancelled entirely.¹⁶

For employers that need additional flexibility in their staffing levels, scheduling of on-call shifts is expressly permitted.¹⁷ Moreover, as long as changes to these shifts are made at least 24 hours in advance, no predictability pay will be triggered. However, if the shift is not cancelled a day in advance and the employee is not called in to work, the employer must pay either two or four hours worth of wages (with the larger amount for shifts longer than four hours).¹⁸

Additional Hours Requirement

The second pillar of the “Retail Workers’ Bill of Rights” requires formula retail establishments to offer additional hours of work to current part-time employees before hiring new workers or bringing in outside contractors.¹⁹ Under these provisions, employers must offer additional hours in writing when new work becomes available, and must keep records of these offers for at least three years.²⁰ However, the ordinances do give employers some flexibility with regard to these hours. First, an employer need not offer additional hours to employees who are not qualified to do such work, or to employees who have not done similar work for the employer in the past. Second, employers need not offer additional hours to any employee already working at least 35 hours per week.²¹ Third employers are free to split additional hours among existing employees at their discretion.²² When deciding how to distribute these hours, employers should keep in mind that the Affordable Care Act²³ treats any

employee averaging more than 30 hours per week as full-time, and offering hours above this limit may trigger a duty to offer health benefits.²⁴

Retention of Workers After Changes in Control

The third major component of the “Retail Workers’ Bill of Rights” requires purchasers of a formula retail establishment to retain existing workers for three months after the sale.²⁵ Prior to any sale or change in control, the existing owner must create a list of all current employees (excluding managers and supervisors) who have been employed at the establishment for at least 90 days.²⁶ The purchasing employer must retain all employees on that list for at least 90 days following the sale of the business, and must keep them at equivalent positions, hours, and compensation.²⁷ Furthermore, although a purchasing employer is permitted to eliminate positions if it will need fewer workers than currently employed, it must terminate employees by order of reverse seniority, and may not replace those employees for at least 90 days after the sale.²⁸

As with the employee retention requirements of California’s Displaced Janitor Opportunity Act,²⁹ these provisions may have certain consequences if a unionized workforce is involved. The purchasing employer may be treated as a “successor employer” under the National Labor Relations Act,³⁰ with a duty to recognize any incumbent unions and a duty to bargain over all terms and conditions of employment, even after the 90 day retention period expires.³¹

Equal Treatment of Part-Time Employees

The fourth and final major component of the “Retail Workers’ Bill of Rights” requires that full and part-time employees be given equal treatment in matters of pay, time off, and promotions.³² In terms of pay, hourly rates must be the same for work equivalent work, though pay differentials are permitted under seniority systems,

¹⁵ SAN FRANCISCO POLICE CODE § 3300G.4(c)(2)(A).

¹⁶ SAN FRANCISCO POLICE CODE § 3300G.3(c)(2).

¹⁷ “On Call” is defined as a scheduled shift for which an employee will be told whether to report to work less than 24 hours before the start of the shift. SAN FRANCISCO POLICE CODE § 3300G.3.

¹⁸ SAN FRANCISCO POLICE CODE § 3300G.4(d).

¹⁹ SAN FRANCISCO POLICE CODE § 3300F.3(a).

²⁰ SAN FRANCISCO POLICE CODE § 3300F.3(d).

²¹ SAN FRANCISCO POLICE CODE § 3300F.3(a).

²² SAN FRANCISCO POLICE CODE § 3300F.3(b).

²³ Pub. L. No. 111-148, 124 Stat. 119-1025 (Mar. 23, 2010) (codified, as amended, at scattered sections of 42 U.S.C.).

²⁴ 26 U.S.C. § 4980H(c)(4).

²⁵ SAN FRANCISCO POLICE CODE §§ 3300F.4 and 3300F.5.

²⁶ SAN FRANCISCO POLICE CODE § 3300F.4(a).

²⁷ SAN FRANCISCO POLICE CODE § 3300F.4(b). However, termination within 90 days is permitted if done for cause. SAN FRANCISCO POLICE CODE § 3300F.5(b).

²⁸ SAN FRANCISCO POLICE CODE § 3300F.5(a) and (c).

²⁹ CAL. LAB. CODE § 1061.

³⁰ 29 U.S.C. § 151 et seq.

³¹ See generally *Spruce Up Corp.*, 209 N.L.R.B. 194 (1974).

³² SAN FRANCISCO POLICE CODE § 3300G.5.

merit systems, or systems that reward quality and quantity of production.³³ For time off, full and part-time employees within the same job classification must also be granted equivalent rights to paid and unpaid leave, though the amount of such time may be prorated based on the number of hours an employee works.³⁴ Finally, full and part-time employees are entitled to equal consideration for promotions.³⁵

Coming Soon to a City Near You?

Although the “Retail Workers’ Bill of Rights” is only effective within San Francisco’s city limits, employers throughout California may soon be subject to some of the same requirements. The Fair Scheduling Act of 2015, currently pending in the California State Assembly, would adopt nearly verbatim the predictable scheduling provisions from the San Francisco ordinances.³⁶ While this bill is slightly narrower in its definition of covered employers (specifically excluding retail *service* establishments), its requirements for scheduling and predictability pay otherwise mimic the San Francisco ordinance.³⁷

As of time of writing, the bill had passed the Assembly Committee on Labor and Employment,³⁸ and was pending before the Assembly Appropriations Committee.³⁹ While its ultimate passage is far from guaranteed, the Fair Scheduling Act may be a sign that San Francisco is becoming a testing ground for California employment law. Like California’s recently enacted sick leave law, the Fair Scheduling Act clearly

takes its inspiration from San Francisco’s employment ordinances. However, unlike the sick leave law, which passed years after San Francisco enacted similar ordinances, the Fair Scheduling Act may become law before the costs and consequences of the City’s ordinances become fully apparent. Retail employers throughout the state would therefore do well to study the impact of the scheduling requirements as they roll out in San Francisco.

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³³ SAN FRANCISCO POLICE CODE § 3300G.5(a).

³⁴ SAN FRANCISCO POLICE CODE § 3300G.5(b).

³⁵ SAN FRANCISCO POLICE CODE § 3300G.5(c).

³⁶ AB 357, 2015-2016 Reg. Sess. (Ca. 2015).

³⁷ AB 357 § 3.

³⁸ Fair Scheduling Act of 2015: Hearing on AB 357 before Assembly Committee on Labor and Employment, 2015-2016 Reg. Sess. (Apr. 22, 2015) (passing by a vote of 4-3).

³⁹ On May 13, 2015 the Appropriations Committee referred the bill to its “suspense file,” meaning the Committee will wait to consider and vote on the bill until a state budget has been passed.

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“Joint Employers” Under the Amended California Family Rights Act Regulations: How Do FMLA Standards Fit In?

By Raymond W. Bertrand & Brit K. Seifert

Introduction

Effective July 1, 2015, California employers must apply amended regulations¹ implementing the California Family Rights Act² (“CFRA”) - California’s analog to the federal Family and Medical Leave Act³ (“FMLA”). Key goals of amending the CFRA regulations were to clarify rules, and adopt and modify some of the parallel federal FMLA regulations.⁴ New language defining CFRA’s “covered employer” as including “joint employers,” however, obscures whether and how FMLA standards apply to determine if two or more businesses are treated together as a joint employer for purposes of complying with CFRA.

CFRA Regulations Incorporation of Federal FMLA Regulations

Since 2009, California employers have struggled to reconcile provisions of the FMLA and CFRA. The primary challenge has been discerning which federal regulations apply. CFRA regulations applicable before July 1, 2015 expressly stated that the definitions in the federal FMLA regulations *issued in 1995* should be applied in carrying out the requirements of CFRA, “to the extent that they are not inconsistent” with CFRA.⁵ This was no problem when the FMLA

regulations issued in 1995 remained the operative regulations.

The difficulty arose in 2009 when updated federal FMLA regulations took effect, and then again with more updated regulations in 2013 and 2015: The CFRA regulations were not also updated. As a result, they continued to incorporate the definitions contained in the former 1995 FMLA regulations. Employers were left with the difficult choice of relying on then-outdated federal regulations for CFRA compliance and updated FMLA regulations for federal compliance, or relying on the newer FMLA regulations in derogation of the CFRA’s instructions.

In 2014, the announcement of upcoming amendments to the CFRA regulations was welcome news. Employers and legal analysts hoped the changes would simplify leave law compliance by aligning CFRA’s requirements with those of the FMLA. This was the stated goal for amending the CFRA regulations: California’s Department of Fair Employment and Housing (“DFEH” or the “Department”) said the amendments would “ensure that . . . employers better understand their . . . duties,” thereby reducing litigation costs and court overcrowding.⁶

As for integrating the FMLA regulations, the Department’s Fair Employment and Housing Council (“Council”),⁷ responsible for the amendment process, announced that the amended CFRA regulations would include both adopted and modified FMLA regulations:

¹ The CFRA regulations are set forth in Title 2, California Code of Regulations, sections 11087 through 11097, as amended.

² CAL. GOV’T CODE §§ 12945.1, 12945.2. CFRA was formally enacted as the Moore-Brown-Roberti Family Rights Act. *See* CAL. GOV’T CODE § 12945.1.

³ 29 U.S.C. § 2601 et seq.

⁴ Cal. Dep’t of Fair Emp’t & Hous., CFRA Regulations, *Notice of Proposed Rulemaking*, Informative Digest/Policy Statement Overview (Feb. 21, 2014) (“Overview”), available at <http://www.dfeh.ca.gov/res/docs/Council/CFRA%20Regulations/CFRA%20Rulemaking%20Notice%20final.pdf>.

⁵ CAL. CODE REGS. tit. 2, § 11087 (pre-amendment) (“The definition in the federal regulations issued January 6, 1995 (29 C.F.R. Part 825), interpreting the Family and Medical Leave Act of 1993 . . . shall also apply to this article, to the extent that they are not inconsistent . . .”).

⁶ Overview, *supra* note 4.

⁷ As of January 1, 2013, the Fair Employment and Housing Act (“FEHA”) was amended to eliminate the pre-existing Fair Employment and Housing Commission and replace it with the Fair Employment and Housing Council, embedded within the DFEH. *See* Sen. Bill No. 1038, 2011-2012 Reg. Sess. (Ca. 2013) (“S.B. 1038”). This Council succeeded to the powers and duties of the former Commission. S.B. 1038.

[T]he broad objective of the proposed amendments is to further supplement [existing CFRA] regulations, primarily by clarifying confusing rules, making technical amendments to ease readability, and adopting and modifying some of the parallel federal Family and Medical Leave Act (FMLA) regulations.⁸

And indeed, the amended CFRA regulations, effective July 1, 2015, now reference newer (though not the newest)⁹ FMLA regulations, providing:

To the extent that they are within the scope of Government Code Section 12945.2 [CFRA's statutory provisions] and not inconsistent with this article, other state law, or the California Constitution, the Council incorporates by reference the federal regulations interpreting FMLA that became effective March 8, 2013 (29 C.F.R. Part 825), which govern any FMLA leave that is also a leave under this article.¹⁰

Similarly, CFRA's amended "Definitions" section specifically states that the 2013 FMLA regulations' definitions "shall" apply "to the extent they are not inconsistent with the [CFRA] definitions."¹¹

Yet despite the updated reference to newer FMLA regulations, the amended CFRA regulations, overall, do not clarify:

- if, indeed, CFRA has adopted a particular parallel FMLA regulation (or part of it);
- when CFRA has adopted an FMLA regulation (or portion thereof) with modifications, and the nature of any such modifications; or
- which federal provisions are "inconsistent" with the CFRA so as to prevent the FMLA regulation's provision from applying.

This persistent lack of clarity was brought to the Council's attention in the final period before it approved the amendments. Specifically, a member of the public asked for clarification, on behalf of employers, as to when the FMLA regulations did, and did not, apply to CFRA compliance:

Comment: While the proposed regulations retain the statement that California incorporates the FMLA regulations to the extent that they are not inconsistent with California law, we submit that the Council should provide further clarification on some of the provisions of the FMLA that are not contained in the CFRA, and do not seem to be anticipated by the CFRA. However, because they are not strictly prohibited by the CFRA, employers are unclear about whether they are truly 'inconsistent' with California law.¹²

The Council dismissed the notion that its amended language remained confusing:

Council Response: The Council disagrees with this comment. The proposed additions seem nebulous and indefinite, would make the regulations even longer, would detract from the clarity of these regulations, and would be unnecessarily duplicative of the FMLA. As a result, no changes have been made.¹³

Yet additional guidance would have been particularly helpful to understand how many of the FMLA regulations' provisions apply to the new CFRA definition of "covered employer."

⁸ Overview, *supra* note 4. Again in March 2015, when adopting the final CFRA regulations' changes, the Council repeated that CFRA will incorporate modified versions of the current FMLA regulations: "The purposes of these amendments is to clarify rules, make technical amendments to ease readability and adopt and modify some of the parallel federal Family and Medical Leave Act regulations." Cal. Office of Admin. Law, *Notice of Approval of Regulatory Action* (Mar. 4, 2015), *avail. at* <http://www.dfeh.ca.gov/res/docs/FEHC/Notice%20of%20Approval.PDF>.

⁹ Ironically, the newer FMLA regulations now incorporated into the CFRA regulations are already outdated. Effective March 27, 2015, updated FMLA regulations revise the definition of spouse to cover same-sex couples already covered under CFRA. *See* Definition of Spouse Under the Family and Medical Leave Act, 80 Fed. Reg. 9989 (Feb. 25, 2015) (revising "spouse" in 29 C.F.R. §§ 825.102 and 825.122(b) to cover eligible same-sex marriages by looking to the law of the place in which the couple were married versus their state of residence).

¹⁰ CAL. CODE REGS. tit. 2, § 11096.

¹¹ CAL. CODE REGS. tit. 2, § 11087.

¹² *See* Cal. Dep't of Fair Emp't & Hous., Final Statement of Reasons for Proposed Amendments to the CFRA Regulations ("Final Statement"), at 58, *available at* <http://www.dfeh.ca.gov/res/docs/FEHC/Final%20Statement%20of%20Reasons%20with%20Addendum.pdf>.

¹³ *See* Final Statement, *supra* note 12, at 58.

**Joint (and Integrated) Employers Under
the Federal FMLA Regulations & Amended
CFRA Regulations**

“Covered Employer”

The FMLA and CFRA both apply to a “covered employer.”¹⁴ This is often understood as applying to a single business or employer meeting the 50-employee/20-workweek standards of each law. However, the FMLA regulations supply detail and two tests governing when two or more entities may be treated together as a “covered employer.” Because the previous CFRA regulations (before July 1, 2015) were silent on the topic, employers and courts looked to the federal FMLA regulations to supply standards to guide combined entity/joint employer determinations.

FMLA Regulations Provide Detailed Provisions About Combining Entities as a Single Employer, Including Two Tests: “Integrated Employer” and “Joint Employer”

The FMLA regulations (including those issued in 1995, and updated again in 2009 and 2015) set forth detailed provisions addressing the topic of treating two or more entities together for FMLA purposes. The regulations specify two separate tests that may apply to treat two or more entities together for FMLA coverage, and when each such test applies.¹⁵ In particular, when a corporation has an ownership interest in another corporation, FMLA regulations provide that it is a separate employer unless it meets either the “integrated employer” test or the “joint employer” test as defined in the regulations.¹⁶ In the absence of common ownership, separate entities nevertheless may be an FMLA “covered employer” if they satisfy the joint employment test.¹⁷

Under the “integrated employer” test (29 C.F.R. § 824.104(c)(2)), separate entities can be considered a single employer based on (1) common management, (2) interrelated operations, (3) centralized control over labor relations, and (4) the degree of common ownership or financial control.¹⁸ No one factor is dispositive. The “entire relationship is to be reviewed in its

totality.”¹⁹ If the test is satisfied, employees of all integrated entities are counted to determine if the FMLA applies, as well as employee eligibility.²⁰ Thus, this test can extend FMLA applicability to employers with fewer than 50 employees.²¹

The “joint employer” test (in a different FMLA provision - 29 C.F.R. § 825.106) allows separate entities (with or without common ownership) to be considered “joint employers” of the same employee if both entities exercise some control over the employee’s work and working conditions.²² The regulation states that an arrangement generally counts as joint employment when the employee’s work simultaneously benefits two or more employers, or the employee works for more than one employer at different times during the week, such as when: (1) the employers have arranged to share an employee’s services or to interchange employees; (2) one employer acts for the other employer in relation to the employee; or (3) the employers have some association related to the employee and are considered to share control of the employee because one employer controls, is controlled by, or is under common control with the other employer.²³ The joint employer test also requires review of all the circumstances versus any one factor.²⁴

The FMLA regulations explain that joint employer status imposes particular duties dependent on “primary” or “secondary” employer status. Primary employers - those with authority and responsibility to hire or fire, assign or place the employee, and provide pay and benefits²⁵ - must give leave notices, provide leave, maintain health benefits, and take primary responsibility to ensure job restoration.²⁶ Secondary

¹⁴ CAL. CODE REGS. tit. 2, § 11087, subd. (d) (“Covered employer” definition); 29 C.F.R. § 825.104 (“Covered employer”).

¹⁵ See 29 C.F.R. §§ 825.104, 825.106, 825.107.

¹⁶ 29 C.F.R. § 825.104(c)(1).

¹⁷ 29 C.F.R. § 825.106(a).

¹⁸ 29 C.F.R. § 825.104(c)(2).

¹⁹ 29 C.F.R. § 825.104(c)(2).

²⁰ 29 C.F.R. § 825.104(c)(2).

²¹ See, e.g., *Demyanovich v. Cadon Plating & Coatings*, 747 F.3d 419 (6th Cir. 2014) (holding that company that never employed more than 47 employees could be “integrated employer” under FMLA due to its shared managers (executive vice-president and human resources vice-president), shared registered business address, and other connections with affiliated company employing more than 500 employees).

²² 29 C.F.R. § 825.106(a) (“Joint employers may be separate and distinct entities with separate owners, managers, and facilities.”).

²³ 29 C.F.R. § 825.106(a)(1)-(3).

²⁴ 29 C.F.R. § 825.106(b)(1).

²⁵ 29 C.F.R. § 825.106(b)(1).

²⁶ 29 CFR §§ 825.106(c), 825.106(e).

employers have their own FMLA duties.²⁷ Some courts have declined to extend joint employer status beyond the threshold question of determining FMLA coverage; while joint employer status may allow employee totals to be added together to trigger the 50-employee threshold, it may not necessarily extend liability to all of the joint entities. Liability correlates to the relative responsibilities of primary and secondary employers.²⁸

Finally, the FMLA regulations address in detail certain kinds of business relationships relative to the joint employer test. They address both (1) temporary placement or staffing agencies, and (2) Professional Employer Organization (“PEO”) companies, which are business that, in general, contract with clients to perform particular administrative functions, such as payroll, benefits, etc.

Temporary placement/staffing agencies that supply workers to a second employer “will ordinarily” be deemed joint employers, however, the totality of the relationship must be examined.²⁹

With respect to PEO companies, the FMLA regulations expressly add to the joint employer test an “economic realities” analysis:

The determination of whether a PEO is a joint employer also turns on the economic realities of the situation and must be based upon all the facts and circumstances. A PEO does not enter into a joint employment relationship with the employees of its client companies when it merely performs such administrative functions. On the other hand, if in a particular fact situation, a PEO has the right to hire, fire, assign, or direct and control the client’s employees, or benefits from the work that the employees perform, such rights may lead to a determination that the PEO would be a joint employer with the client employer, depending upon all the facts and circumstances.³⁰

The United States Department of Labor (“DOL”) added this economic realities variant to the joint employer test for PEOs during the 2008 FMLA amendment process.

²⁷ 29 C.F.R. § 825.106(e).

²⁸ See, e.g., *Arrigo v. Link Stop, Inc.*, No. 12-cv-700-bbc, 2014 U.S. Dist. LEXIS 57763 (W.D. Wis. Apr. 25, 2014) (declining to find that business partners who were joint employers for purposes of FMLA coverage were jointly liable under the FMLA for each other’s actions).

²⁹ 29 CFR. § 825.106(b)(1).

³⁰ 29 C.F.R. § 825.106(b)(2).

The DOL recognized the emergence of PEOs as a distinct business model “unlike traditional placement or staffing agencies that supply temporary employees to clients.”³¹

The Amended CFRA Regulations Are No Longer Silent on the Issue of Combining Entities, Yet the New CFRA “Joint Employer” Test Reflects Only Portions of the FMLA Regulations

As noted earlier, the previous CFRA regulations defined “covered employer,” but - unlike the federal FMLA regulations - were silent on the topic of treating two or more businesses together as one employer under CFRA. The amended CFRA regulations break the silence; but the changes leave myriad interpretation challenges.

The amended CFRA regulations debut new provisions that expand the definition of “covered employer”³² to include “joint employers.” Yet the new CFRA definition is based on only a portion of the FMLA’s “Joint employer coverage” regulation.³³ Further, the CFRA definition contains an “economic realities” provision not found in the FMLA regulation:

Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under CFRA. Joint employers may be separate and distinct entities with separate owners, managers, and facilities. A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality *based on the economic realities of the situation*. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(A) Where there is an arrangement between employers to share an employee’s services or to interchange employees;

³¹ Family and Medical Leave Act of 1993, 73 Fed. Reg. 67933, 67937 (Nov. 17, 2008).

³² CAL. CODE REGS. tit. 2, § 11087, subd. (d)(3).

³³ See 29 C.F.R. §§ 825.106(a).

(B) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or

(C) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.³⁴

Despite the robust federal regulatory provisions detailing this area, the new CFRA regulation fails to (1) mention the FMLA's "integrated employer" test, (2) refer at all to the FMLA provisions specially dealing with temporary placement agencies and PEO companies; or (3) address primary or second status, the FMLA factors for distinguishing primary versus secondary employer status, and/or the responsibilities of each joint employer. Nor does the regulation identify factors to analyze the "economic realities" analysis now required under the CFRA joint employer standard.

Indeed, just as the Council rebuffed the opportunity to clarify the general interplay of the FMLA regulations with CFRA, it also rejected a commenter's request that some of the other FMLA joint employer provisions be added into CFRA's joint employer regulation:

Comment: The proposed language in this section that seeks to define a joint employment relationship largely mirrors that under the Family and Medical Leave Act, . . . However, it notably omits significant provisions that are included in the FMLA, which we believe should be included in CFRA as well. Specifically, 29 C.F.R. subsections 825.106(c)-(e) specify that the primary employer is responsible for giving notices required under FMLA and for job restoration, as well as factors to identify who is the primary employer. Subsection (d) sets forth that such employees must be counted by both employers for determining employee coverage and eligibility. We believe such provisions should be included in CFRA as well, to avoid any confusion amongst employers in a joint employment relationship regarding responsibilities and coverage. Accordingly, we respectfully request the Council to include similar provisions in CFRA as are found in 29 C.F.R. subsections 825.106(c)-(e).

³⁴ CAL. CODE REGS. tit. 2, § 11087, subd. (d)(3) (emphasis added).

Council Response: The Council disagrees with the necessity of the proposed addition. The proposed additions are incorporated into the text of the CFRA, and their inclusion would not lend to the clarity of this section, *which is intentionally limited to addressing the test for determining when an entity will be considered a joint or integrated employer*. Reference can be made to the FMLA regulations, to the extent they are not inconsistent with these CFRA regulations. As a result, no changes have been made.³⁵

The resulting CFRA joint employer test does not "clarify[] confusing rules," as intended.³⁶ Instead, its adoption of the FMLA joint employer test to function as *the* test for determining both joint *and* integrated employer status, with its addition of the economic realities analysis, generates myriad questions. For example:

- What factors should be evaluated under the CFRA joint employer test? What factors evidence the "economic realities of the situation"? Should California employers look to FMLA jurisprudence to glean the applicable factors? (The Ninth Circuit's "economic realities" test, for example, examines whether the alleged joint employer: (1) had the power to hire and fire the employee; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records.³⁷).
- Are the four factors set forth in the separate FMLA integrated employer test incorporated into CFRA and applied to determine a CFRA "joint employer"? Or are they "inconsistent" and, thus, not incorporated?
- How do the FMLA regulations' different approach to temporary placement agencies and PEO companies apply under CFRA? Are temporary placement agencies "ordinarily" considered a joint employer (as the FMLA regulations provide), or should they be analyzed from a clean slate, based on individual situations?

³⁵ See Final Statement, *supra* note 12, at 76 (emphasis added).

³⁶ See Overview, *supra* note 4.

³⁷ *Moreau v. Air France*, 356 F.3d 942, 945 (9th Cir. 2004) (citing 29 U.S.C. § 2601(b)).

Going Forward Under CFRA's New "Joint Employer" Standard

Unquestionably, the issue of whether two or more entities will be treated together as a combined employer is critical - for both employers and employees alike. A determination of joint employer status can be determinative of CFRA coverage in the first place, and further dictate whether employees across the combined entities are entitled to leave. Likewise, joint employer status also raises compliance topics as to employee eligibility, and which entity or entities are responsible for issuing statutory notices, continuing benefits, restoring the employee to work after the leave ends and, consequently, which entity may or may not be liable under the law.

The new CFRA "joint employer" definition illuminates little relative to these inquiries. Nevertheless, the following guidelines seem reasonable based on the Council's stated purposes for the changes and its responses to public comments about the FMLA regulations' applicability:

- If businesses are deemed CFRA joint employers, FMLA guidance can apply that distinguishes between primary and secondary status and the duties associated with each. No CFRA language expressly addresses these topics and, therefore, these FMLA regulations do not appear inconsistent with the new CFRA regulations so as to preclude their reference.
- Based on the same reasoning, as prescribed by the FMLA regulations, the combined employee

groups must be counted by all joint employers for determining employee coverage and eligibility, but only the primary employer is responsible for providing the actual leave, issuing notices, job restoration, and the other itemized duties.

What is abundantly clear is that as of July 1, 2015, employers in California should tread carefully when examining their business relationships with vendors, staffing agencies, and other labor and professional services contractors for purposes of evaluating if they qualify as a CFRA "joint employer." At minimum, pending further guidance, no California employer should treat joint employer analysis as synonymous under the FMLA and CFRA.

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WAGE & HOUR ADVISOR: Los Angeles to Raise Minimum Wage to \$15 an Hour

By Aaron Buckley

Introduction

On June 10, 2015, the Los Angeles City Council gave final approval to an ordinance establishing a city minimum wage that will rise to \$15 an hour by 2020. Los Angeles will join San Francisco, San Jose, Oakland, and several smaller California cities with minimum wages higher than both the federal and state minimums.

Discussion

The federal minimum wage is \$7.25 per hour.¹ California's state minimum wage is currently \$9 per hour, and is scheduled to rise to \$10 per hour on January 1, 2016.² Each minimum wage is a floor, not a ceiling; so in California the state minimum wage governs except in cities that have established their own higher minimums.³

The City of Los Angeles does not currently have its own minimum wage, but after Mayor Eric Garcetti approves the new ordinance (which he has promised to do), it will establish a city minimum wage for employers with 26 or more employees of \$10.50 per hour effective July 1, 2016.⁴ Thereafter the minimum wage for those employers will increase to \$12.00 on July 1, 2017; \$13.25 on July 1, 2018; \$14.25 on July 1, 2019; and \$15.00 on July 1, 2020.⁵ Non-profit corporations and employers with 25 or fewer employees will be subject to a minimum wage that will trail the minimum wage for larger employers by one year (\$10.50 per hour effective July 1, 2017; \$12.00 on July 1, 2018; \$13.25 on July 1, 2019; \$14.25 on July 1, 2020; and \$15.00 on July 1, 2021.⁶ Beginning in

2022 the city's minimum wage will be adjusted for inflation on July 1 of each year.⁷

California cities that already have minimum wages higher than the state minimum include San Francisco (currently \$12.25 per hour and scheduled to rise to \$13 on July 1, 2016; \$14 on July 1, 2017; and \$15 on July 1, 2018; followed thereafter by annual adjustments for inflation each July 1);⁸ San Jose (currently \$10.30 per hour and adjusted each January 1 for inflation);⁹ and Oakland (currently \$12.25 per hour and adjusted each January 1 for inflation).¹⁰

Meanwhile, San Diego's minimum wage is on hold. In August 2014 the San Diego City Council voted to establish a city minimum wage that would rise to \$11.50 per hour by January of 2017, and would also require employers to provide their employees with up to 40 hours of paid sick leave each year.¹¹ But opponents of the ordinance gathered enough petition signatures to put the measure to a public vote, so it will go into effect only if it survives a June 2016 referendum.¹²

Conclusion

The trend of cities establishing their own minimum wages and other employer mandates, such as paid sick leave, appears to be picking up steam. Employers should take steps to stay abreast of, and comply with, all local ordinances.

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¹ 29 U.S.C. § 206(a)(1)(C).

² CAL. LAB. CODE § 1182.12.

³ 29 U.S.C. § 218(a); CAL. LAB. CODE § 1182.12.

⁴ Los Angeles, Cal., City Council File No. 14-1371, Establishment of Minimum Wage in Los Angeles (June 10, 2015) ("LA Minimum Wage Ordinance").

⁵ LA Minimum Wage Ordinance, *supra* Note 4.

⁶ LA Minimum Wage Ordinance, *supra* Note 4.

⁷ LA Minimum Wage Ordinance, *supra* Note 4.

⁸ SAN FRANCISCO, CAL., ADMIN. CODE ch. 12R.

⁹ SAN JOSE, CAL., MUNICIPAL CODE § 4.100.040.

¹⁰ OAKLAND, CAL., MUNICIPAL CODE § 5.92.020.

¹¹ San Diego, Cal., Ordinance O-20390 (Aug. 18, 2014).

¹² San Diego, Cal., City Council Resolution R-309274 (Oct. 20, 2014).

NOW EFFECTIVE: Paid Sick Days for All California Employees

By Arthur F. Silbergeld & Bennett Kaspar

The key accrual and use provisions of the Healthy Workplaces, Healthy Families Act¹ - another employee-friendly law adopted by California - are now effective. As of July 1, 2015, employers of California employees must, with limited exceptions, start accruing paid sick days for any employee who works in California for 30 or more days in a calendar year. Here is a reminder of the major provisions:

- An employee qualifies for paid sick leave by working for an employer on or after January 1, 2015, for at least 30 days within a year in California, and by satisfying a 90-day employment period, which operates like a probationary period before an employee can actually take any accrued sick leave.
 - Once an employee has met the 30-day, in-state work requirement (whether prior to July 1, 2015 or thereafter), the employer must start the accrual for that employee beginning on the first day of employment or July 1, 2015, whichever is *later*.
 - For example, an employee hired to work in California on or before June 1, 2015 would be eligible to begin accrual on July 1, 2015. However, an employee that begins work on or after June 2, 2015, and did not previously work in California for at least 30 days, must work for at least 30 days in the state before accrual may begin.
 - A full-time employee who was employed prior to April 2, 2015, i.e., more than 90 days before July 1st, will be able to *use* accrued days for one of the law's purposes (e.g. personal illness or preventive care of the employee or the employee's family member, or to recover from domestic violence, sexual assault, or stalking) starting on July 31st.
- If an employee hired after July 1, 2015 comes from another California-based job, the current employer needs to know for how many days the employee worked in California on and after July 1st.
- The employer of one or more individuals must accrue for exempt as well as non-exempt employees. Unless an exempt employee is regularly scheduled to work less than a 40 hour workweek, the new law presumes that the accrual for an exempt employee is at 40 hours per week.
- The employer must accrue paid sick days at the rate of one hour for every 30 hours worked, including overtime.
- Employers may cap annual accrual at 3 days or 24 hours.
- Accrued and unused paid sick days must be carried over, but the employer may cap accrual at 48 hours or 6 days.
- The employer does not need to accrue at all if it already provides at least 3 paid sick days that accrue and can be carried over and used as provided by this law.
 - If the employer provides 3 paid sick days to employees at the beginning of each calendar year, it doesn't have to use an accrual system.
- Paid Time Off ("PTO") can be used to provide for paid sick days.
 - If paid sick days are separate from PTO, the accrued PTO days do not have to be paid out when an employee terminates.
 - If employees may use PTO for paid sick days and for vacation days, then the remaining PTO days must be paid on termination.
 - The new law does not prohibit an employer from integrating paid vacation, holidays, and sick days into a single PTO policy. However, the employer must notify all

¹ A.B. 1522, 2013-2014 Leg., Reg. Sess. (Ca. Sept. 10, 2014).

- employees hired prior to January 1, 2015 of any change in its policies or practices that relate to paid sick leave within seven days of the change.
- Employers who have integrated PTO policies may need to ensure that the policies allow use of the PTO for at least 3 sick days.
 - The employer *may* advance paid sick days not yet accrued, but is not required to do so.
 - The employee may use whatever time is available, but the employer may require by policy that paid sick days be used in increments of at least 2 hours.
 - The employer may expect advanced notice if practicable in the circumstances. The request can be made verbally or in writing.
 - Paid sick days can be used for the employee's illness or that of a family member, including a child (biological, adopted, foster-child, step-child, or child as to whom the employee is *in loco parentis*), spouse, registered domestic partner, grandparent, grandchild, or sibling.
 - The paid sick leave may be used for diagnosis, care, or treatment of an existing health condition or preventive care. Paid sick days can also be used for reasons related to domestic violence or sexual assault.
 - Paid sick days are paid out at the employee's current hourly rate of pay.
 - The employer must post the mandatory paid sick days poster, which is available on the Division of Labor Standards Enforcement ("DLSE") website,² where employees can easily read it.
 - The employer must keep paid sick leave records for 3 years.
 - The employer has to inform each employee of how many days they have accrued on a line item in the employee's wage statement or by a separate memo on payday.
 - The employer's failure to provide paid sick days or for withholding accrued paid sick days could result in legal or equitable relief to the employee (including reinstatement, backpay, and/or the payment of sick days unlawfully withheld), as well as an additional sum in penalties of up to \$4000.
 - The employer is prohibited from retaliating against an employee for using paid sick leave, filing a complaint with the Labor Commissioner, cooperating in an investigation or prosecution of an alleged violation by the employer, or opposing a prohibited policy, practice, or act.

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² Available at [http://www.dir.ca.gov/dlse/Publications/Paid_Sick_Days_Poster_Template_\(11_2014\).pdf](http://www.dir.ca.gov/dlse/Publications/Paid_Sick_Days_Poster_Template_(11_2014).pdf).

CASE NOTES

ARBITRATION

Garcia v. Superior Court, No. B257054, 2015 Cal. App. LEXIS 420 (May 15, 2015)

On May 15, 2015, a California appellate court ruled that petitioners were engaged to transport goods shipped from foreign ports to facilities throughout Southern California; as such, their contracts with Southern Counties may arguably come within the FAA's §1 exemption. These allegations necessitated the trial court's consideration and ruling on the issue whether the parties agreements constitute "contracts of employment" of transportation workers within the meaning of the FAA's §1 exemption.

Petitioners are truck drivers who were engaged by Southern Counties Express, Inc. ("Southern Counties") to haul shipping containers from the ports of Los Angeles and Long Beach to facilities throughout Southern California. When engaged by Southern Counties, and at 90-day intervals thereafter, each of the drivers signed an "Independent Contractor" agreement; at less-frequent intervals they signed "Vehicle Lease" agreements. The independent contractor agreements provided that the contracting driver would use the specified truck to provide hauling services at Southern Counties' direction; the Vehicle Lease agreements provided that the contracting drivers would lease a specified truck from Southern Counties for that purpose. Each of the agreements contained provisions requiring the parties to submit any disputes arising under the agreements to arbitration.

In March 2013, petitioners filed administrative claims with the California Division of Labor Standards Enforcement ("DLSE") alleging Southern Counties' misclassification of petitioners as independent contractors rather than employees. Their claims sought administrative relief under Labor Code §§ 98 through 98.8, to recover minimum-wage payments, reimbursements of improper deductions from compensation and statutory penalties. Southern Counties petitioned respondent court to compel arbitration of the claims in these cases, and to stay the DLSE proceedings in each of them. The court granted an order compelling arbitration under the JAMS Streamlined Arbitration Rules and Procedures. By timely petition to this court, petitioners sought a writ of mandate or other extraordinary relief

compelling respondent court to vacate its order granting Southern Counties' petitions to compel arbitration, and to enter a new order denying the petitions to compel arbitration and to permit the administrative proceedings to continue before the DLSE.

Despite the presumption in favor of arbitration imposed by the Federal Arbitration Act ("FAA"), § 1 of that law expressly limits the FAA's application by exempting from its coverage certain contracts. Specifically, § 1 provides that nothing in the FAA shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce (9 U.S.C. § 1). The U.S. Supreme Court interpreted this language in *Circuit City Stores, Inc. v. Adams*,¹ reversing the lower court's ruling that had held the § 1 exemption from the FAA applicable to all contracts of employment. The better reading of the law, the Supreme Court held, is that § 1 exempts only contracts of employment of transportation workers—meaning workers actually engaged in the movement of goods in interstate commerce. The court in *Adams* expressly declined to consider what does and does not constitute a "contract of employment" within the meaning of the FAA, § 1.

Southern Counties' effort to enforce the arbitration provisions of the parties' agreements raised the applicability of the FAA's § 1 exemption as a threshold issue. But the trial court ordered the matter to arbitration without hearing argument, taking further evidence, or indicating its consideration of the issue. It expressly limited the parties' argument and presentation of evidence to the single question whether the agreements were procedurally unconscionable and concluded they were not. At the close of the January 2014 hearing the court scheduled further evidentiary hearings, but limited the issue to be heard to be only the agreements' "procedural and substantive unconscionability."

Petitioners were entitled to the court's determination whether their agreements were contracts of employment for transportation workers engaged in interstate commerce, within the meaning of the FAA's § 1 exemption as interpreted by the Supreme Court in

¹ 532 U.S. 105, 121 S. Ct. 1302, 149 L.Ed.2d 234 (2001).

Adams. That law, if it applies, would exempt their agreements from the FAA's requirement that their arbitration agreements must be enforced. There is a strong policy in favor of enforcing agreements to arbitrate, and under the FAA. Questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. Nevertheless, there is no policy compelling persons to accept arbitration of controversies which no statute has made arbitrable.

The evidence relevant to the question whether the drivers' agreements Southern Counties were "contracts of employment" within the meaning of the FAA's § 1 exemption included evidence that Southern Counties owned the trucks it provided to petitioners for their work hauling containers for Southern Counties' customers; that its leases of those trucks to petitioners were coincidental with petitioners' agreements to drive the trucks for the company's hauling business, and to be compensated for doing so (less lease payments for use of the trucks) without regard to the amounts paid to Southern Counties by the hauling customers. Southern Counties provided petitioners with commercial licenses and permits needed for entry into and exit from the ports of Los Angeles and Long Beach, where their loads were picked up. Southern Counties specified the insurance they would have, purchasing it for them and deducting the premiums from their compensation. Southern Counties required that its logo would be on the trucks' doors, and required installation of a GPS tracking service to permit it to monitor the progress of deliveries. The agreements' requirement that Southern Counties' identification must be removed from the truck's doors before the trucks could be used for any other purpose limited the truck's use to hauling only for Southern Counties during an agreement's term.

By failing to rule on the threshold question whether the arbitration provisions of their agreements were exempt from the application of the FAA by virtue of § 1 of the FAA and Labor Code § 229. Petitioners were engaged to transport goods shipped from foreign ports to facilities throughout Southern California; as such, their contracts with Southern Counties may arguably come within the FAA's § 1 exemption. These allegations necessitated the trial court's consideration and ruling on the issue whether the parties their agreements constituted contracts of employment of transportation workers within the meaning of the FAA's § 1 exemption.

References. See, e.g., Wilcox, *California Employment Law*, § 90.02, *State Law* (Matthew Bender).

Ashbey v. Archstone Prop. Mgmt., Inc., No. 12-55912, 2015 U.S. App. LEXIS 7819 (May 12, 2015)

On May 12, 2015, the U.S. Court of Appeals for the Ninth Circuit ruled that in seeking to compel arbitration, the employer met its burden under the Federal Arbitration Act to show the existence of a valid, written agreement to arbitrate and that the agreement to arbitrate encompassed the dispute at issue. The employee knowingly waived his right to a judicial forum for his Title VII claim and equivalent state-law claims by signing an acknowledgement of receipt of the employer's company policy manual. That acknowledgement explicitly notified the employee that the manual contained a dispute resolution policy, and it did so in two places; the employee expressly agreed "to adhere" to the manual and the dispute resolution policy.

Michael Ashbey ("Ashbey") was employed at Archstone Communities LLC ("Archstone") from December 1996 until November 2010, when he was fired. He began as a Service Technician and was promoted to Regional Service Manager in 2003. In 2009, Ashbey signed a document entitled "Acknowledgment of Receipt of Archstone Company Policy Manual 2009" ("Acknowledgment"). As the Acknowledgment twice mentioned, the Company Policy Manual for 2009 ("Manual") (as well as the Manual for 2010) contained a detailed Dispute Resolution Policy section explaining Archstone's arbitration policy.

In November 2011, Ashbey filed a complaint in California state court alleging, among other claims, unlawful retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), and equivalent state-law claims. In his complaint, Ashbey alleged that in 2006, Archstone employee Alex Winborn ("Winborn") began harassing Ashbey's wife, who also worked for Archstone. In June 2010, shortly after Ashbey's wife complained of Winborn's unlawful conduct, Archstone terminated her employment. Ashbey further alleged that, following the termination of Mrs. Ashbey's employment, Archstone engaged in retaliatory conduct towards him by first altering his employment conditions and then by wrongfully terminating his employment. Ashbey demanded a jury trial.

Archstone removed the case to federal district court on the grounds of both diversity of citizenship and federal question (Title VII) jurisdiction. Archstone then filed a Motion to Compel Arbitration pursuant to the Manual's Dispute Resolution Policy. The district court denied Archstone's motion as to all of Ashbey's claims.

Archstone filed an appeal before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit held that in seeking to compel arbitration, the employer met its burden under the Federal Arbitration Act to show the existence of a valid, written agreement to arbitrate and that the agreement to arbitrate encompassed the dispute at issue.

The Ninth Circuit found that the Acknowledgment explicitly notified Ashbey the Manual contained a Dispute Resolution Policy, and it did so in two places. Ashbey expressly agreed “to adhere” to the Manual and the Dispute Resolution Policy. The fact that the Acknowledgment did not list the terms of the Policy was not fatal to the Policy’s enforcement. The full text of the Policy was at Ashbey’s fingertips; he acknowledged he had received directions on how to access both the Manual and the Dispute Resolution Policy contained in the Manual. Anyone who reviewed the Dispute Resolution Policy would immediately realize he was entering into an agreement to waive a specific statutory remedy afforded him by a civil rights statute. The Dispute Resolution Policy was not ambiguous on that point: (1) the policy stated it was governed by the Federal Arbitration Act; (2) the policy stated that all disputes between Employee and the Company were to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial; and (3) the policy stated it applied, without limitation, to disputes arising out of the employment relationship including, without limitation, disputes over harassment and claims arising under the Civil Rights Act of 1964. In short, Archstone presented Ashbey the express choice lacking in both *Kummetz* and *Nelson*. The Ninth Circuit held that Ashbey knowingly waived his right to a judicial forum for his Title VII claim and equivalent state-law claims.

The Ninth Circuit concluded that the district court erred in denying Archstone’s Motion to Compel Arbitration. Accordingly, the district court’s order denying Archstone’s Motion to Compel Arbitration was reversed and the case remanded for entry of an order granting Archstone’s Motion to Compel Arbitration.

References. See, e.g., Wilcox, *California Employment Law*, § 90.21, *Appeal of Ruling on Motion to Compel Arbitration* (Matthew Bender).

ATTORNEY’S FEES AND COSTS

Williams v. Chino Valley Independent Fire Dist., No. S213100, 2015 Cal. LEXIS 2485 (Cal. May 4, 2015)

On May 8, 2015, a California Supreme Court ruled that Gov’t Code § 12965(b), is an express exception to Code

Civ. Proc. § 1032(b), and governs cost awards in cases under the Fair Employment and Housing Act. Thus, costs that would be awarded as a matter of right to the prevailing party under § 1032(b), are instead awarded in the discretion of the trial court.

Loring Winn Williams (“Williams”) sued defendant Chino Valley Independent Fire District (“the District”) for employment discrimination in violation of the California Fair Employment and Housing Act. (FEHA; Gov’t Code § 12900 et seq.) The trial court granted summary judgment for the District and, in a separate order, awarded the District its court costs. Williams appealed from the latter order, contending that in the absence of a finding his action was frivolous, unreasonable or groundless, defendant should not have been awarded its costs.

Code Civ. Proc. § 1032(b) provides that civil defendants are entitled as a matter of right to recover their costs except as otherwise expressly provided by statute. Unless Gov’t Code § 12965(b) expressly excepts FEHA parties from this entitlement, therefore, a prevailing FEHA defendant is entitled to its costs as a matter of right. The court concluded that Gov’t Code § 12965(b) is an express exception to Code Civ. Proc. § 1032(b) and the former, rather than the latter, therefore governs cost awards in FEHA cases. The FEHA statute expressly directs the use of a different standard than the general costs statute: Costs that would be awarded as a matter of right to the prevailing party under Code Civ. Proc. § 1032(b) are instead awarded in the discretion of the trial court under Gov’t Code § 12965(b). By making a cost award discretionary rather than mandatory, Gov’t Code § 12965(b) expressly excepts FEHA actions from Code Civ. Proc. § 1032(b)’s mandate for a cost award to the prevailing party.

The court’s determination that Gov’t Code § 12965(b), as an exception to Code Civ. Proc. § 1032(b), makes an award of ordinary costs to a prevailing FEHA party discretionary rather than mandatory is consistent with the federal court interpretation of similar language in the Americans with Disabilities Act of 1990 (ADA). The ADA provision giving trial courts discretion to award the prevailing party a reasonable attorney’s fee, including litigation expenses, and costs (42 U.S.C. § 12205), has been construed to make an exception to the command of Fed. R. Civ. Proc. 54(d) that costs be awarded the prevailing party in a civil action unless a federal statute, these rules, or a court order provides otherwise. Cost awards have therefore been held governed by *Christiansburg Garment Co. v. EEOC*²

² 434 U.S. 412, 54 L. Ed. 2d 648, 98 S. Ct. 694 (1978).

when made in actions under the ADA. By contrast, several federal circuit court decisions have, as previously explained, declined to apply the *Christiansburg* standard to costs awarded in actions under Title VII of the Civil Rights Act of 1964. But those decisions were based at least in part on the absence of any provision in Title VII making the award of costs discretionary with the trial court. Thus, regardless of whether those decisions were correct in not applying the *Christiansburg* standard to cost awards in Title VII and rehabilitation act cases, their reasoning was inapplicable here. The relevant Title VII section (42 U.S.C. § 2000e-5(k)) is similar to Gov't Code § 12965(b) as to attorney fees, but not as to ordinary court costs. By making fees discretionary as part of the costs, but not making costs themselves discretionary, the Title VII phrasing makes an attorney fee award discretionary but does not suggest that “the costs” are similarly discretionary, but rather that they are a given, to which fees “may” attach. In contrast, both the ADA and FEHA expressly extend the court’s discretion to fees “and” costs, not merely fees “as part of” the costs.

On its face, the language of Gov't Code § 12965(b) does not distinguish between awards to FEHA plaintiffs and to FEHA defendants: It simply provides trial court discretion in making fee and cost awards to the prevailing “party.” But the legislative history of the bill by which this language entered the law, and the underlying policy distinctions reflected in that history, persuade the court the Legislature intended trial courts to use the asymmetrical standard of *Christiansburg* as to both fees and costs.

An early version of the 1978 bill that introduced trial court discretion to award costs and fees to prevailing employment discrimination parties (by amendment to Lab. Code, former § 1422.2), would have allowed awards only to prevailing plaintiffs. In the January 11 analysis, the responsible Assembly committee was informed that the corresponding federal law allowed awards to prevailing defendants as well, but only on a restrictive standard of frivolousness. A week later, the Assembly amended the bill to change “plaintiff” to “party,” and about a week after that, the high court filed *Christiansburg*, which approved the lower courts’ earlier use of a restrictive standard for fee awards to prevailing Title VII defendants. The Legislature later passed the bill without further changes to the fees and costs provision. The court found inescapable the inference that the Legislature, in giving the trial courts discretion to award fees and costs to prevailing parties in employment discrimination suits, intended that discretion to be bounded by the *Christiansburg* rule, or something very close to it. The Legislature’s choice of

statutory language indicates it intended the same rule apply to ordinary litigation costs as to attorney fees.

Although the history of the 1978 amendment to Labor Code former § 1422.2 demonstrates a legislative desire to follow the model of Title VII, and federal courts later held the *Christiansburg* standard does not govern ordinary costs in Title VII actions, nothing in the history suggests the Legislature anticipated this distinction would be drawn. The language the Legislature actually chose, moreover, differs from the Title VII provision in treating costs and fees in parallel. As discussed earlier, the fees and costs provision of Gov't Code § 12965(b)—added by the 1978 amendment to Labor Code former § 1422.2 and later recodified in the Government Code as part of FEHA—resembles the fees and costs provision of the ADA more closely than it does the Title VII fee provision, and the ADA provision has been construed to establish trial court discretion, bounded by the *Christiansburg* standard, over awards of ordinary costs as well as attorney fees.

In amending California’s employment antidiscrimination law to authorize discretionary awards of attorney fees and costs, the Legislature, like Congress before it, sought to encourage persons injured by discrimination to seek judicial relief. It may well be that in FEHA cases, as in civil litigation generally, attorney fees are typically much larger than ordinary litigation costs.

In the end, the language and history of Gov't Code § 12965(b) persuade the court that the Legislature intended a trial court’s discretion to be exercised in the same manner for costs as for attorney fees. The statute treats the two in parallel and without distinction, providing discretion in the award of attorney’s fees and costs to a prevailing FEHA party [Gov't Code § 12965(b)]. The history of the statutory amendment adding this language to Gov't Code § 12965(b)’s predecessor shows the Legislature was aware of and embraced the asymmetrical rule applied in Title VII cases. Although Title VII discretion was later found to apply only to attorney fees, the Legislature used language providing discretion as to costs as well, and similar language in the federal ADA has since been construed as calling for use of *Christiansburg*’s asymmetrical standard for both costs and fees. And while ordinary costs are generally likely to be smaller than attorney fees, a broader application of *Christiansburg* is nonetheless consistent with the legislative policy. In FEHA cases, even ordinary litigation costs can be substantial, and the possibility of their assessment could significantly chill the vindication of employees’

civil rights. Statutory language and legislative history thus point in the same direction.

For these reasons, the court concluded the *Christiansburg* standard applied to discretionary awards of both attorney fees and costs to prevailing FEHA parties under Gov't Code § 12965(b). To reiterate, under that standard a prevailing *plaintiff* should ordinarily receive his costs and attorney fees unless special circumstances would render such an award unjust. A prevailing "defendant," however, should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so. The court disapproved *Perez v. County of Santa Clara*,³ *Knight v. Hayward Unified School Dist.*,⁴ and *Hatai v. Department of Transportation*,⁵ to the extent they held ordinary costs were not governed by this standard.

References. See, e.g., Wilcox, *California Employment Law*, § 43.01, *California Fair Employment and Housing Act* (Matthew Bender).

DISABILITY DISCRIMINATION

Higgins-Williams v. Sutter Medical Foundation, C073677, 2015 Cal. App. LEXIS 455 (May 26, 2015)

On May 26, 2015, a California appellate court ruled that the trial court properly granted summary adjudication as to disability discrimination and related causes of action under Gov't Code §§ 12926, 12940 because the alleged disability—an inability to work under a particular supervisor because of anxiety and stress related to the supervisor's standard oversight of job performance—was not a disability recognized under California's Fair Employment and Housing Act, Gov't Code § 12900 et seq.

In September 2007, defendant Sutter Medical Foundation (Sutter) hired Michaelin Higgins-Williams ("Williams") as a clinical assistant in Sutter's Shared Services Department (the Department or the Shared Services Department). The Department's clinical assistants work as "floaters" doing patient intake. Since 2007, Norma Perry ("Perry") had been Sutter's regional manager overseeing the Department. From 2007 through 2011, Debbie Prince ("Prince") was Williams' immediate supervisor in the Department, and reported to Perry. In June 2010, Williams reported

to her treating physician, Alexander Chen, M.D., (Dr. Chen) that she was stressed because of interactions at work with Human Resources and her manager. Dr. Chen diagnosed Williams as having adjustment disorder with anxiety. Based on Dr. Chen's diagnosis, Sutter granted Williams a stress-related (disability) leave of absence from work under the CFRA and the federal Family and Medical Leave Act of 1993 (FMLA; 29 U.S.C. § 2601 et seq.), from June 28, 2010, through August 2, 2010. Dr. Chen reported plaintiff's disabling condition as stress when dealing with Human Resources and her manager. Plaintiff exhausted her available CFRA and FMLA leave entitlements when she took this leave of absence from June 28 through August 2, 2010. When plaintiff returned to work on August 3, 2010, she received a negative performance evaluation from supervisor Prince, which was also signed by regional manager Perry; this was Williams' only negative evaluation while employed at Sutter.

Williams sued Sutter for disability discrimination and related claims under California's Fair Employment and Housing Act ("FEHA") (Gov't Code § 12900 et seq.) and for leave-related causes of action under California's Moore-Brown-Roberti Family Rights Act ("CFRA") (Gov't Code §§ 12945.1, 12945.2). The trial court granted summary judgment for the employer.

An employee's inability to work under a particular supervisor because of anxiety and stress related to the supervisor's standard oversight of the employee's job performance does not constitute a disability under FEHA. Williams and Dr. Chen, acknowledged on several occasions, both directly and through requests for a transfer from the Department, that plaintiff was unable to work under her regional manager Perry or her supervisor Prince because of anxiety and stress related to their standard oversight of Williams' job performance; Dr. Chen diagnosed Williams as having adjustment disorder with anxiety, and reported Williams disabling condition as stress when dealing with her Human Resources and her manager. This is precisely the inability to work under a particular supervisor that *Hobson v. Raychem Corp.*⁶ says does not rise to a FEHA-recognized disability. Admittedly, Williams was correct that *Hobson* had been disapproved on one point and questioned on another. First, the state supreme court has disapproved *Hobson* to the extent it held or suggested that disability under FEHA requires a substantial limit on a major life activity. And, second, *Hobson's* point that the inability to perform one particular job did not constitute a FEHA-qualified disability,

³ 111 Cal.App.4th 671, 679, 3 Cal. Rptr. 3d 867 (2003).

⁴ 132 Cal.App.4th 121, 33 Cal. Rptr. 3d 287 (2005).

⁵ 214 Cal.App.4th 1287, 1299, 154 Cal. Rptr. 3d 659 (2013).

⁶ 73 Cal.App.4th 614, 628, 86 Cal. Rptr. 2d 497 (1999).

has been questioned by a Ninth Circuit case. What no decision has disapproved or questioned, however, was the *Hobson* point directly on point here—that is, that an employee’s inability to work under a particular supervisor because of anxiety and stress related to the supervisor’s standard oversight of the employee’s job performance does not constitute a mental disability under FEHA. The court concluded that the undisputed facts show that Williams did not suffer from a FEHA-recognized mental disability; consequently, the trial court properly granted summary adjudication of this cause of action because Williams could not establish the element of a disability.

Moreover, Williams did not create a genuine issue of fact on leave-related causes of action under Gov’t Code § 12945.2, because her deposition did not indicate if or when she could return as a clinical assistant, did not indicate she could work under the supervisor whose oversight caused her anxiety and stress, and did not indicate she could actually work under a regional manager who allegedly singled the employee out for negative treatment. Accordingly, the judgment was affirmed except as to the award of costs to Sutter.

References. See, e.g., Wilcox, *California Employment Law*, § 41.32, *Disability and Medical Condition Discrimination* (Matthew Bender).

MEDIATION AND CONCILIATION

Gerawan Farming, Inc. v. Agricultural Labor Relations Bd., F068526, F068676, 2015 Cal. App. LEXIS 416 (May 14, 2015)

On May 14, 2015, a California appellate court ruled that an agricultural employer should have been given an opportunity to prove abandonment to the Agricultural Labor Relations Board once a union requested Lab. Code §§ 1164-1164.13’s mandatory mediation and conciliation (MMC) process because an employer, in defending against a union’s request to institute the MMC process, could challenge the union’s status as the employees’ bargaining representative by raising a claim of abandonment based on the union’s conduct. The MMC statute on its face violates equal protection principles; the MMC statute constitutes an improper delegation of legislative authority because it leaves the resolution of fundamental policy issues to others and fails to provide adequate direction and safeguards for the implementation of that policy.

Agricultural employer Gerawan Farming, Inc. (“Gerawan”) and United Farm Workers of America (“UFW”) have never reached mutually acceptable terms to enter a collective bargaining agreement

(“CBA”) regarding Gerawan’s agricultural employees. UFW was certified as the employees’ bargaining representative in 1992, but after engaging in initial discussions with Gerawan, disappeared from the scene for nearly two decades. In late 2012, UFW returned and the parties renewed negotiations. A few months later, at UFW’s request, the Agricultural Labor Relations Board (“the Board”) ordered the parties to a statutory Mandatory Mediation and Conciliation (“MMC”) process pursuant to Lab. Code § 1164 et seq. Under the MMC process, if a 30-day mediation period does not succeed in producing a CBA by voluntary agreement, the mediator decides what the terms of the CBA should be and reports that determination to the Board. Once the mediator’s report becomes the final order of the Board, the report establishes the terms of an imposed CBA to which the parties are bound. Here, following the Board’s final order adopting the mediator’s report, Gerawan petitioned this court for review under § 1164.5, challenging the validity of the order and the MMC process on both statutory and constitutional grounds. Among Gerawan’s claims was the contention that UFW’s lengthy absence resulted in an abandonment of its status as the employee’s bargaining representative.

The court agreed with Gerawan’s statutory argument that it should have been given an opportunity to prove abandonment to the Board once UFW requested the MMC process. More fundamentally, the court agreed with Gerawan’s constitutional arguments that the MMC statute violated equal protection principles and constituted an improper delegation of legislative authority. Accordingly, the Board’s order, *Gerawan Farming, Inc.*,⁷ was set aside.

The court held that an employer, in defending against a union’s request to institute the MMC process, may challenge the union’s status as the employees’ bargaining representative by raising a claim of abandonment based on the union’s conduct, such as long-term absence or disappearance from the scene, long-term failure to carry out its duties, and/or lack of meaningful contact with the employees and the employer over an unreasonably long period of time. The gist of the defense was that by virtue of such long-standing absence, lack of contact, etc., the union effectively abdicated its statutory role by gross abandonment thereof. The court had reached this holding within the peculiar context of this case—namely, the employer’s ability to defend a union’s MMC request. The court’s opinion is intended to be limited to that context.

⁷ 39 ALRB No. 17 (Gerawan I) (2013).

As the court's ruling made clear, the Board applied the wrong legal standard when it held that abandonment could not be based upon factors such as those present in this case. Further, because the Board summarily rejected the viability of Gerawan's abandonment claim, it never adequately considered the import of Gerawan's evidentiary showing on that issue. It followed that the Board abused its discretion when it ordered commencement of the MMC process without properly considering Gerawan's claim of union abandonment. Since the Board improperly sent the parties to commence the MMC process, the Board's subsequent order premised thereon in Gerawan I (to approve the mediator's report) was rendered invalid.

Generally speaking, when the Board applied the wrong standard, the court returns the case to the Board so that it can apply the proper standard. It is a guiding principle of administrative law that an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. If the court followed this general rule here, the court would remand the present matter to the Board for new proceedings to be conducted on the issue of abandonment in accordance with the principles set forth herein, to allow the Board to determine, based on the totality of the union's conduct and any other relevant circumstances, the question of whether UFW abandoned its status as the employees' bargaining representative. Here, however, remand was not available because the MMC statute was constitutionally invalid. As a result, the appropriate disposition concerning the Board's statutory error and abuse of discretion was to simply set aside and reverse the Board's approval of the mediator's report in Gerawan I.

In Justice Nicholson's dissent in *Hess Collection Winery v. Agricultural Labor Relations Bd.*,⁸ he gave the following explanation of why he believed the MMC statute violated equal protection principles. He assumed that treatment of an agricultural employer that did not reach agreement with the union on an initial CBA could be different from the treatment of an agricultural employer that reached an agreement with the union on an initial CBA because of the state's interest in promoting CBAs. Here, however, the disparate treatment was not just between employers with initial CBAs and employers without such agreements. Application of § 1164 and the related statutes resulted in

disparate treatment "within" the class of employers without an initial CBA because the agreement imposed on each employer in this class would be different. While the legitimate state interest that the judge assumed for argument exists may justify disparate treatment between classes, it cannot justify disparate treatment within the class.

Section 1164 sets forth the classification at issue in this case: agricultural employers who, for whatever reason, did not agree to the terms of an initial CBA. Within this class, the law does not treat the individual employers similarly. Instead, each employer would be subjected to a different legislative act, in the form of a CBA. Thus, similarly situated employers are treated dissimilarly.

Beyond the classification set by § 1164, there was no rational way to break the agricultural employers down into smaller groups. The statute made no such attempt, except, of course, to break it down so that every agricultural employer was the one and only member of the class. This means of classification, however, is the very antithesis of equal protection. While the Legislature may have intended this as a way to avoid the political retribution it might incur if it enacted laws applicable equally across the class, that motivation is entirely insufficient to justify the disparate treatment.

The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. Here, the discrimination—that is, holding Hess, and no other agricultural employer, to the terms of a private legislator's decision—is intentional because the mediator has no power to extend the enactment to other agricultural employers. The mediator could have had no intent other than to impose a CBA enforceable only as to Hess and no other agricultural employer. Furthermore, the discrimination is arbitrary because there are no standards set forth pursuant to which the mediator's decision in this case will be the same as a mediator's decision in any other case under § 1164 and the related statutes. Enforcement of the mediator's decision violates equal protection principles and, therefore, should be set aside. This court agreed with Justice Nicholson's dissent in *Hess* that the MMC statute on its face violates equal protection principles.

The MMC statute grants to the mediator and the Board the power to establish employment terms that will be imposed by the force of law (that is, to legislate) with regard to a particular employer (that is, create and compel an entire CBA) without any definite policy

⁸ 140 Cal.App.4th 1584, 1591, 1597, 45 Cal. Rptr. 3d 609 (2006).

direction, goal or standard that is supposed to be reached or implemented. The law presents factors, but factors alone are not enough. Additionally, there are no adequate mechanisms or safeguards in place under the MMC statute to protect against favoritism in the use of such delegated power. The court concluded the MMC statute involves an unconstitutional delegation of legislative authority because it left the resolution of fundamental policy issues to others and it fails to provide adequate direction and safeguards for the implementation of that policy.

References. See, e.g., Wilcox, *California Employment Law*, § 90.20, *Individual Arbitration Agreements* (Matthew Bender).

PREVAILING WAGE DETERMINATION

Vector Resources, Inc. v. Baker, D065224, 2015 Cal. App. LEXIS 453 (May 26, 2015)

On May 26, 2015, a California appellate court ruled that based on the Legislature's interchangeable use of the terms "determine," "establish," and "fix," in Lab. Code, §§ 1773 and 1773.9, the court held that in "determining" prevailing wage rates, the department establishes and fixes rates within the meaning of Gov. Code § 11340.9(g).

This action arises out of a determination by the Department of Industrial Relations ("the Department") that plaintiff Vector Resources, Inc. ("Vector") failed to pay the appropriate prevailing wages to its workers on a public works project for the San Diego Unified School District. Specifically, the Director of Industrial Relations ("the Director") issued a decision in which she found that Vector underpaid its employees by failing to pay a higher "shift differential" rate for work performed during shifts commencing after 12:00 noon. The director's decision was based on regulatory language in a document entitled "Important Notice To Awarding Bodies And Other Interested Parties Regarding Shift Differential Pay In The Director's General Prevailing Wage Determinations" ("the Important Notice"), which was posted on the Department's Web site. The Important Notice addresses shift differential pay for various crafts used on public works projects, and is augmented by additional regulatory language in a "Note" that the Department places on the cover page of prevailing wage shift provisions. The parties refer to this Note as "the Stamp."

Vector filed a declaratory relief action against the Department, seeking a declaration that the Important Notice and Stamp are invalid and unenforceable as "underground regulations" because they were not

promulgated in compliance with the notice and hearing requirements of the Administrative Procedure Act ("APA") [Gov't Code § 11340 et seq.]. Vector and the Department filed cross-motions for summary judgment, based largely on stipulated facts. The court granted the Department's motion on the ground that under Gov't Code § 11340.9(g), the Important Notice and the Stamp are exempt from the notice and hearing requirements of the APA because they are part of an overall prevailing wage determination process that constitutes "rate setting."

Vector contended the summary judgment in favor of the Department must be reversed because (1) the Department admitted that the shift premium rule is a regulation, (2) the Department admitted that that regulation was not adopted in compliance with the APA, (3) the Department failed to prove that the shift premium regulation establishes or fixes rates within the meaning of Gov't Code § 11340.9(g), (4) the court erred in failing to specifically cite the evidence it relied on to grant summary judgment, (5) the court's written order ignored the law and the admissible evidence, and (6) the Department's motion relied upon inadmissible evidence.

A prevailing wage determination is exempt from the notice and hearing requirements of the APA if it is a regulation that establishes or fixes rates, prices, or tariffs [Gov't Code § 11340.9(g)]. The prevailing wage statutes reveal that the Department of Director's "determining" prevailing rates is semantically equivalent to "fixing" or "establishing" rates. Lab. Code § 1773 show that the terms "determine" and "fix" are used interchangeably and have the same meaning in the statute—that is, the Director's "determination" of a prevailing wage rate fixes (that is, establishes) that rate. Lab. Code § 1773.9 similarly illustrates that there is no semantic difference between "establishing" a prevailing wage rate and "determining" such a rate. Based on the Legislature's interchangeable use of the terms "determine," "establish," and "fix," the court concluded that in "determining" prevailing wage rates, the Department "establishes and fixes rates" within the meaning of Gov't Code § 11340.9(g).

The court further held that the Important Notice and Stamp both constitute regulations that "establish" rates within the meaning of Gov't Code § 11340.9(g), notwithstanding the fact that they do not establish or fix a shift differential rate for a particular craft, classification, or type of work within a specific locality. The Important Notice and Stamp establish prevailing wage rates for shifts outside of normal working hours—that is, they establish that a worker must be paid the applicable

shift differential pay for the shift he or she is working. Accordingly, as integral parts of the prevailing wage determination process, the Important Notice and Stamp are exempt from the notice and hearing requirements of the APA. The court concluded that the Important Notice and Stamp are also exempt from the notice and hearing requirements of the APA under Lab. Code § 1773.5(d), because they clearly are determinations by the Director of Industrial Relations that, at minimum, relate to, if not establish or fix, shift differential pay rate (that is, the rates for shifts outside of normal working hours).

The court construed the term “shift rate” in the italicized statutory language as a reference to the pay rate for shifts outside of normal working hours. Thus, Lab. Code § 1773.5(d) broadly exempts from the APA “any determination relating to” the general prevailing rate for shifts outside of normal working hours. The Important Notice and Stamp clearly are determinations by the Director that, at minimum, “relate to,” if not establish or fix, shift differential pay rate (that is, the rates for shifts outside of normal working hours). Accordingly, the Important Notice and Stamp are exempt from the notice and hearing requirements of the APA under Lab. Code § 1773.5(d). The judgment was thus affirmed.

References. See, e.g., Wilcox, *California Employment Law*, § 3.10, *Minimum Payment Requirements other than the Minimum Wage* (Matthew Bender).

RETIREMENT BENEFITS

Marzec v. California Public Employees Retirement System, No. B246667, B246671, 2015 Cal. App. LEXIS 393 (May 8, 2015)

On May 8, 2015, a California appellate court ruled that police officers and firefighters who bought additional retirement service credit under former Gov’t Code §§ 20909(a), 21052, or military service credit under Gov’t Code §§ 21024, 21032, but gained nothing because they received disability retirement benefits before age 50 under Gov’t Code § 21413, instead of service retirement benefits under Gov’t Code § 21362.2, had no claim for breach of statutory duty because buyers of service credits were not in a category of membership under Gov’t Code §§ 20370(a), 20371, 21420, entitling them to receive annuities.

These consolidated appeals concern the calculation of retirement benefits under the Public Employees’ Retirement Law (“PERL”), Gov’t Code § 20000 et seq. The plaintiffs were former police officers and firefighters employed by local public agencies that provide employee retirement benefits through the California

Public Employees’ Retirement System (CalPERS). In order to enhance their service retirement benefits, plaintiffs purchased additional years of service credit through one of several optional programs offered by CalPERS. Subsequently, each plaintiff was disabled on the job and took an industrial disability retirement before reaching service retirement age. As a result, CalPERS pays each plaintiff a monthly disability retirement allowance of 50% of his final compensation. CalPERS did not, however, pay plaintiffs any additional allowance as a result of their purchase of additional years of service credit. Plaintiffs alleged CalPERS’s failure to pay such enhanced benefits gave rise to a variety of causes of action, including breach of statutory duty, breach of contract, rescission, breach of fiduciary duty, and constitutional claims. In the first action, the trial court sustained CalPERS’s demurrer to all causes of action without leave to amend, concluding that plaintiffs had not properly pled an entitlement to the additional retirement benefits they claimed as a matter of statutory, constitutional, or contract law. As to the second action, the trial court granted judgment on the pleadings on the same bases.

Plaintiffs’ first cause of action was for breach of statutory duty. Although plaintiffs asserted that they have a statutory entitlement either to an additional retirement benefit or to a refund of the payments they made to purchase “military service credit” (“MSC”) or “additional retirement service credit” (“ARSC”), they do not clearly identify the provision (or provisions) they contend entitle them to such additional benefits or to a refund.

Although plaintiffs discuss many provisions of the PERL, they identify only one that they contend requires CalPERS to provide them an ARSC or MSC benefit in addition to their disability allowances. That provision is Gov’t Code § 21420. ARSC and MSC did not fall into any of the enumerated statutory categories and did not have either attribute of membership. ARSC is a benefit that was offered to some individuals who were already members of CalPERS, not a means by which individuals could qualify for CalPERS membership. Moreover, an employee’s purchase of ARSC did not obligate an employer to make CalPERS contributions on the employee’s behalf. To the contrary, Gov’t Code § 21052 provides that if an employee elects to purchase ARSC, it is the employee, not the employer, who is required to contribute an amount equal to the increase in employer liability. ARSC, therefore, is not a “category of membership” because it neither qualified an individual for membership in CalPERS nor obligated an employer to make any contributions on that individual’s behalf. The same is true of MSC. The statutory

language, therefore, does not support the contention that plaintiffs were entitled to non-disability retirement benefits based on their investment in MSC or ARSC.

The court next found Gov't Code § 21037, added by Senate Bill 268, instructive. Gov't Code § 21037 and its history made clear that the Legislature was aware that CalPERS was construing the statute in precisely the manner plaintiffs challenged—that is, to mean that CalPERS members who became disabled after purchasing service credit would not receive any additional retirement benefits as a result of their service credit purchase. The Legislature chose to address this circumstance by permitting members who purchased service credit with installment payments to suspend payments prospectively only—not by providing for a refund of payments already made or offering a disabled retiree an annuity purchased with those payments. If the Legislature had intended a more expansive remedy, the court presumed it would have said so. Thus, the court concluded that the trial court properly sustained CalPERS's demurrer to the breach of statutory duty action.

Plaintiff's second cause of action was for breach of contract. Although plaintiffs asserted that the MSC and ARSC contracts contained CalPERS's promises to increase plaintiffs' future retirement benefits, plaintiffs do not identify the particular language they believe contained such promises. The contractual language did not support this construction. CalPERS's offer, was not for a guaranteed future income stream, as plaintiffs suggested, but rather for "additional service credit" associated with a particular employer (City of Stockton), employment category (local police), and retirement formula. Further, although the offer letters identify an "estimated monthly pension increase" for each plaintiff, they nowhere suggested that a pension increase was promised or guaranteed. To the contrary, the offer letters said that each projected increase was only an "estimate." In addition, the offer letters stated that (1) the projected increases assumed retirement "at Age 50," and (2) if plaintiffs take a disability retirement, "this additional service credit may not benefit them." Taken together, this language was not reasonably susceptible to the meaning plaintiffs ascribe to it: That they were "promised" a pension increase if they purchased MSC or ARSC, even if they retired before age 50, and even if they took a disability retirement. Accordingly, plaintiffs have not stated a claim for breach of contract, and the demurrer to that cause of action was properly sustained.

Plaintiff's third cause of action is for rescission. Plaintiffs asserted that through a variety of member

publications, CalPERS described MSC and ARSC as a way to "increase" a member's retirement benefit, without disclosing "a risk of loss of MSC or ARSC if a Member takes Industrial Disability Retirement." Further, CalPERS publications did not disclose that because CalPERS accounts for, characterizes, or otherwise treats the Members' contributions or investment in MSC or ARSC as "normal contributions" associated with the job that the Member held at the time that he purchased the optional benefit, CalPERS could seize or fail to credit the investment, fail to pay an additional annuity, and in effect transfer the investment to the employer. Plaintiffs alleged that their consent therefore was given under a mistake of fact or law, or was induced by fraud, and the contracts were unlawful, contrary to public policy, and substantively and procedurally unconscionable. Plaintiffs offer to restore everything of value which the Plaintiffs received from CalPERS under the contract upon condition that CalPERS did likewise.

The trial court sustained the CalPERS's demurrer to this cause of action, concluding that the service credit packets clearly disclosed that this additional service credit may not benefit employees who are considering disability retirement rather than service retirement. Although Plaintiffs contended that the loss of their permissive service credits violated their reasonable expectations at the time of contracting, this was not possible because the contract disclosed that the credits may be lost upon disability retirement. Contrary to the trial court, this court concluded that plaintiffs stated a cause of action for rescission. Thus, at the demurrer stage plaintiffs were required only to plead—not to prove—a cause of action for rescission. The demurrer to the third cause of action should have been overruled.

Plaintiff's fourth cause of action alleged breach of fiduciary duty. There was no dispute that CalPERS is a fiduciary. This fiduciary relationship was judicially guarded by the application of Civil Code § 2235, which provides that all transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence. In the present case, there appeared to be factual disputes about what CalPERS disclosed or what representations were made. Indeed, although plaintiffs attached to their complaint some of the communications between CalPERS and plaintiffs concerning their service credit purchases, there was no suggestion in the complaint that these are all of the relevant disclosures on which plaintiffs based their cause of action. Thus, the breach of

fiduciary duty claim should not have been disposed of at the demurrer stage.

Plaintiff's fifth cause of action alleged denial of equal protection of law. This court agreed with the trial court that the complaint failed to state an equal protection claim. The complaint assumed that two disability retirees—one who purchased MSC/ARSC, and one who did not—were similarly situated if they served in the same position, for an equivalent number of years, and retired at the same age. By this assumption plaintiffs erred, because the disability retiree who purchased MSC/ARSC had more years of retirement credit. There is no equal protection violation.

Plaintiff's sixth cause of action alleged denial of due process. Plaintiffs cited no legal support for the assertion that CalPERS's action constituted a violation of procedural or substantive due process. The argument therefore was forfeited.

Plaintiff's next cause of action alleged unconstitutional impairment of contract. This court agreed with the trial court that plaintiffs did not state a claim for unconstitutional impairment of contract. Although plaintiffs' industrial disability and pension rights vested when plaintiffs accepted public employment, their right to receive either industrial disability benefits or service retirement benefits was subject to conditions and contingencies. Specifically, to be entitled to an industrial disability benefit, plaintiffs had to suffer a work-related disability; alternatively, to be entitled to a service retirement benefit, plaintiffs had to remain in their local safety positions until at least age 50. Because all plaintiffs retired before age 50, their rights to service retirement benefits never matured. As a matter of law, therefore, the denial of service retirement benefits was not an unconstitutional impairment of contract.

Accordingly, the judgment was affirmed in part and reversed in part.

References. See, e.g., Wilcox, *California Employment Law*, § 41.67, *Retirement or Pension Plans and Benefits* (Matthew Bender).

SEXUAL HARRASMENT

Hirst v. City of Oceanside, No. D064549, 2015 Cal. App. LEXIS 389 (May 8, 2015)

On May 8, 2015, a California appellate court ruled that a phlebotomist had standing to sue a city for sexual harassment by a police officer because she fell within the "person providing services pursuant to a contract" category of former Gov't Code § 12940(j), as her

services for the police department were specifically performed pursuant to the terms of the contract, and the jury found that the officer sexually harassed her when she was performing those contractual services; the phlebotomist had the right to control the performance of the services and discretion as to the manner of performance because monitoring by the police department was purely a function of its obligation to control the suspect, ensure the phlebotomist's safety, and preserve the validity of the blood evidence.

Kimberli Hirst ("Hirst"), an employee of American Forensic Nurses, Inc. ("AFN"), brought a Fair Employment and Housing Act ("FEHA") claim against the City of Oceanside ("City"), alleging she was sexually harassed by an Oceanside police officer, Gilbert Garcia ("Garcia"), while she was providing phlebotomist services on behalf of the Oceanside Police Department. The jury found Hirst proved her claim and awarded her \$1.5 million in damages against the City. After reducing the amount for which Garcia was found responsible, the court entered judgment in Hirst's favor for \$1.125 million.

The City moved for a new trial and for a judgment notwithstanding the verdict ("JNOV"). In the new trial motion, the City contended the damages award was unsupported by evidence. In the JNOV motion, the City argued Hirst was not entitled to recover under the FEHA because she was not a City employee, special employee, or a person providing services pursuant to a contract under Gov't Code § 12940(j)(1). The court denied the JNOV motion, but granted the new trial motion finding the damage award was excessive. The court ordered a new trial on both liability and damages because the issues were so interrelated that damages could not be separated from the facts underlying liability.

Hirst did not appeal from the new trial order, but the City appealed from the denial of its JNOV motion, contending Hirst had no standing to recover damages on her FEHA claim against the City.

The court concluded that Hirst fell within the "person providing services pursuant to a contract" category, and therefore did not reach the special employee question. The record showed that Hirst was providing services to the City "pursuant to a contract" during the time she was sexually harassed by a City employee. AFN and the County entered into a contract requiring AFN to provide employees for on-call phlebotomist services to law enforcement agencies throughout the County. AFN hired Hirst to fulfill the obligations of this contract, and Hirst's blood drawing services for the Oceanside Police Department were specifically

performed pursuant to the terms of the contract. The jury found that Garcia sexually harassed Hirst when she was performing these contractual services.

The facts showed that Hirst satisfied the statutory definition of “a person providing services pursuant to a contract.” When she was dispatched to the Oceanside Police Department, Hirst exercised her own professional judgment in implementing the blood drawing services. Although the police department closely monitored this work, this was purely a function of its law enforcement obligation to control the suspect, ensure Hirst’s safety, and preserve the validity of the blood evidence. There was no evidence that the Oceanside Police Department had employment authority over Hirst, other than to secure the environment in which this work was performed. This type of supervision does not create an employment relationship or negate a worker’s independent contractor status. Further, Hirst was customarily engaged in the phlebotomist business, and this business was not a usual part of the City’s public duties. Hirst also brought equipment to perform these services and did not use the City’s property or rely on its expertise, and the evidence showed the blood drawing work was not a skill ordinarily possessed by the City’s law enforcement personnel.

Moreover, the court found that AFN was a corporation that must act through its agents. As a business entity, AFN did not personally provide the phlebotomist contractor services; its services were performed by individuals (including Hirst) acting on AFN’s behalf. It would be unreasonable to conclude the Legislature would have intended that AFN had standing but those who actually performed the services “pursuant to a contract” were barred from recovery.

The specific language of the statute supported this conclusion. Gov’t Code § 12940(j)(1) provides an employer may be liable when an employee harasses a “person providing services pursuant to “a” contract.” This provision does not require the protected person to be “the” contracting party. Likewise, Gov’t Code § (j)(5)(B) provides that the person must be “customarily “engaged” in an independently established business.” This provision does not state that the person must own or operate the “independently established business.” Engaged means to be “involved in the activity,” not run the operation.

The City contended that if the Legislature had intended an employer would be liable to “each service provider’s employees,” it would have defined the expanded category “to include independent contractors and their employees.” But the Legislature did not define this category as “independent contractors.” Rather, it used

the phrase “person providing services pursuant to a contract,” and defined this phrase to include persons functioning as an independent contractor at the employer’s business. This description supports that an employee of an independent contractor has standing to bring an action for sexual harassment under the FEHA.

The court’s determination is also supported by the statute’s legislative history. Hirst was a skilled worker whose work was in the nature of an independent contractor, that is, the City did not control the means by which the work was accomplished (other than to provide law enforcement supervision), and the City was concerned primarily with the results of the work. In performing the phlebotomist services, Hirst was required to work in the presence of City employees, and was frequently required to be in a locked booking room with a City police officer to perform the phlebotomist services. The fact that a worker in Hirst’s position previously could not recover for a City employee harassment whereas a City employee working alongside her could do so was a motivating reason for the Legislature’s decision to expand harassment protections to nonemployee contract workers. Hirst thus had standing to recover against the City under the facts presented at trial.

The Legislature specifically provided that recovery against an employer for a “nonemployee’s” acts depend on the extent of the employer’s control and any other legal responsibility which the employer may have with respect to the conduct of those nonemployees. This means the potential scope of an employer’s liability over “nonemployee” harassment is more limited than an employer’s liability for its own employees’ conduct. For example, in the situation here where the evidence showed the contract worker’s employer (AFN) had little or no bargaining power over a public entity such as the Oceanside Police Department and little or no process for influencing or addressing the behavior of the offending police officer, this alternative avenue for redress was not a substitute for obtaining meaningful relief. As the harasser’s employer, the City had more effective and immediate means to prevent and/or correct the harassment. There is nothing in the statutory language or the legislative history suggesting the Legislature intended that a contract worker is precluded from recovery as a matter of law because he or she has an alternative (but less direct and potentially less effective) means for redress. The courts have long recognized that a dual employer relationship may exist and that the existence of a second employer does not necessarily preclude statutory protection from both employers.

The court necessarily presumed the Legislature enacted the contract worker amendment with this principle in mind.

The court was also unpersuaded by the City's arguments that upholding the jury's finding that Hirst is a "person providing services pursuant to a contract" under Gov't Code § 12940(j)(1) and (j)(5) would lead to an unwarranted expansion of FEHA. This contract worker category applies only to harassment claims by a worker performing work "pursuant to a contract" with the harasser's employer, and requires that the plaintiff prove the perpetrator was a supervisor or agent or that the perpetrator's employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action. The conclusion that Hirst had standing under these provisions did not impose any additional duties on the employer as employers have an affirmative duty to take all reasonable steps necessary to prevent their employees from engaging in prohibited harassment, and to provide the necessary training and guidance to their employees. As recognized by the City's human resource manager in this case, these standards and affirmative duties necessarily extend to employee conduct towards employees and other contract workers. Protecting those who work alongside employees from harassment implements the statutory goals of affording equal opportunity and eliminating discrimination and harassment in the workplace. Under the statutory language, there is no reasoned basis to distinguish between a contract worker who owns his or her own business and a contract worker who is employed by an independent business to perform the same type of work. Because both individuals are potentially subject to the same harassing conduct, it is only reasonable to conclude the Legislature intended they have equivalent remedies.

The Legislature also amended Gov't Code § 12940(j) to include an "unpaid intern" and "volunteer" within the scope of FEHA protection. In so doing, the Legislature cited its inclusion of independent contractors in 1999 as an example of the need to protect all categories of workers, stating that there is an argument that, like an independent contractor, an unpaid intern may be subject to the same harassing conditions as traditional employees and is therefore in need of protection under the law.

In sum, Hirst was an individual performing services pursuant to a contract. There is no basis in this statutory phrase or the definition of the phrase to preclude recovery for an individual who provided services under a contract merely because he or she is also employed by a separate entity with respect to the work performed.

References. See, e.g., Wilcox, *California Employment Law*, § 40.27, *Executive Order 11246: Prohibition Against Discrimination by Government Contractors* (Matthew Bender).

TAXATION OF RETIREMENT PAYMENTS

Sewards v. Comm'r, No. 12-72985, 2015 U.S. App. LEXIS 7821 (May 12, 2015)

On May 12, 2015, the U.S. Court of Appeals for the Ninth Circuit ruled income is excluded from taxation under 26 U.S.C. § 104(a)(1) if it is received under workmen's compensation acts as compensation for personal injuries or sickness. Taxpayer retired due to a service-connected disability and received a disability pension equal to one-half his previous salary. Based on his years of service, he received an additional amount to bring his pension up to what he would have received as a service pension. The panel held that this additional amount was taxable because it was paid not based on taxpayer's injuries, but based on his years of service.

This case involved the taxation of retirement payments made to Jay Swards ("Swards"), a former employee of the Los Angeles County Sheriff's Department. Like all County employees who retire with a service-connected disability, Swards was entitled to receive a disability pension equal to one-half his previous salary. Because Swards had completed 34 years of service, however, he received an additional amount to bring his pension up to what he would have received as a service pension. The question presented in this case was whether that additional amount was taxable under the Internal Revenue Code. Swards argued that the entire amount of the retirement allowance may be excluded from taxation because it was a worker's compensation pension. The Tax Court rejected Swards's argument, concluding that the portion of Swards's retirement allowance exceeding what he would have received solely based on disability was subject to taxation. Swards now appealed that ruling.

There is no dispute that Swards's retirement allowance was calculated with reference to his years of service. Swards argues, however, that this fact does not bring the payments within the limitation in Treasury Regulation § 1.104-1(b) because Swards was eligible for retirement, and received any pension at all, solely because of his service-connected disability. Swards argues that an individual's benefit is determined by age or length of service only when such factors are used to decide whether the individual qualifies for retirement, but not when such factors are used to calculate the amount of the benefit. On the other hand, the Commissioner argued that the limitation applied when

an individual who retires with a service-connected disability receives an allowance amount that is at least in part based on his years of service. The court noted that Swards's interpretation was not supported by the text of the regulation. Rather, the interpretation advocated by the Commissioner aligned with the most natural reading of the regulation.

Treasury Regulation § 1.104-1(b) limits the scope of § 104(a)(1) by specifying that the workmen's compensation exclusion does not apply to a retirement pension to the extent that it is determined by reference to the employee's age and length of service. Thus, whether retirement benefits are excludable from gross income depends on whether the relevant statute determines the taxpayer's benefits by reference to his length of service.

Moreover, the interpretation advocated by the Commissioner in this case was consistent with the interpretation adopted by the Internal Revenue Service ("IRS") in Revenue Rulings issued over the last 40 years. In Revenue Ruling 72-44, the IRS examined a Louisiana statute that provided disability payments for firefighters injured in the line of duty [Rev. Rul. 72-44, 1972-1 C.B. 31]. Like the California statute at issue in this case, the Louisiana statute provided for a firefighter to receive a disability pension equal to the greater of one-half his salary or the amount of his service pension. The IRS concluded that an individual's payments were excludable from taxation only to the extent that they did not exceed one-half of the individual's salary. The IRS examined a similar statute in Revenue Ruling 80-44 and reached the same conclusion. The IRS's long-standing interpretation of Treasury Regulation § 1.104-1(b) through Revenue Rulings is reasonable, and thus entitled to substantial deference. The text of Treasury Regulation § 1.104-1(b) and the consistent interpretation of that text by the IRS demonstrate that it applies to retirement payments that are calculated with reference to an employee's age or length of service. Accordingly, Swards's argument that the payments at issue fall outside the limitation in that regulation fails.

Furthermore, Treasury Regulation § 1.104-1(b) is a reasonable interpretation of § 104(a)(1). As the Sixth Circuit explained: Treasury Regulation § 104(a)(1) is designed to exclude disability payments, not pension payments, from income [Treas. Reg. § 1.104(b)] simply identifies what is a pension payment and distinguishes it from a disability payment. The regulation does not, as Swards argued, create a subclass of disability pension recipients. Rather, the regulation simply clarifies when a payment is made for personal

injuries or sickness, and when it is made for some other reason, such as years of service. Accordingly, the regulation is consistent with the statute. In short, the question of how to differentiate between payments made to an employee as compensation for a workplace injury from those made for some other purpose is not answered by § 104(a)(1). Because the Treasury Department's rule is a reasonable interpretation of that statute, it is within the scope of the agency's delegated authority.

The fundamental question in determining whether benefits are excludable under § 104(a) is upon what basis were the retirement payments in question paid? Like any other County employee who retired with a service-connected disability, Swards was entitled to receive one-half his final salary based on his injuries. That amount was excludable. Because Swards had completed 34 years of service, however, he received additional amounts so that, in accordance with the state statute, his service-connected disability pension was the same as what he would have received as a service pension. Those additional amounts were paid not based on his injuries, but based on his years of service, and thus were not excludable.

References. See, e.g., Wilcox, *California Employment Law*, § 80.37, *Effect of Remuneration During Period of Unemployment on Amount of Benefits* (Matthew Bender).

UNEMPLOYMENT COMPENSATION BENEFITS

Robles v. Employment Development Dept., A139774, 2015 Cal. App. LEXIS 373 (May 4, 2015)

On May 4, 2015, a California appellate court ruled that in a case in which the Employment Development Department continued to refuse to award a claimant unemployment compensation benefits, there was a persistent failure on the Department's part to obey the commands of a writ of mandate and that the trial court's enforcement order under Code Civ. Proc. § 1097, was necessary and proper to effect that enforcement.

This controversy—which involved the wrongful denial of unemployment compensation benefits—began in January 2010 because of a pair of shoes. More than five years later, Employment Development Department ("EDD or the Department") continued to refuse to award Jose Robles ("Robles") the benefits to which he would have been entitled absent the Department's error, this despite being ordered to do so twice by the

trial court and once by a California appellate court. [See *Robles v. Employment Development Dept.*⁹]. Most recently, in response to Robles's motion to enforce writ of administrative mandate, the trial court ordered EDD to pay withheld federal extension benefits, costs and interest in the amount of \$45,560.39, within 30 days.

The Department filed an appeal before the California appellate court arguing that Robles was not entitled to benefits for weeks in which he did not certify that he was able, available, and actively looking for work in accordance with EDD's current regulatory scheme. Thus, EDD asserted, the trial court's order was at odds with both federal and state law.

The California appellate court believed that the only reasonable interpretation of the court's mandate in *Robles I* to "award Robles the unemployment insurance benefits withheld" was that Robles had to receive the benefits to which he would have been entitled had the Department properly found him eligible for unemployment compensation in 2010. The trial court's subsequent peremptory writ of administrative mandamus ("Writ") commanding EDD and the Board to award to Robles "the unemployment insurance benefits that were withheld beginning January 5, 2010 and including extensions under state or federal law" was in accord with the court's *Robles I* holding and had to be similarly construed. However, the federal work search requirements set forth in 42 U.S.C. § 503(a)(12) were adopted in 2012 and have been expressly held to apply only "to weeks beginning after the end of the first session of the State Legislature which begins after the date of enactment" [of Public Law 112-96 on February 22, 2012]. Thus, by their express terms, these federal requirements were inapplicable to the benefits that—absent EDD error—should have been paid to Robles by the Department in 2010 and 2011.

The California appellate court found specious EDD's argument that it risked being defunded by the federal government should Robles be awarded unemployment benefits by the trial court in the instant case without properly certifying to his continuing availability and search for work. The court doubted the trial court's enforcement order would be construed as a failure to substantially comply with § 503(a)(12), even assuming the provision was applicable to the instant case. Indeed, the Department of Labor had declined to pursue defunding in the face of much more egregious and systemic noncompliance by EDD with federal law in

the processing of unemployment benefit claims, viewing such a sanction as inimical to the beneficiaries of the state's unemployment compensation program.

The California appellate court held that there was nothing in federal law that would preclude the trial court's issuance of its enforcement order in the instant case. Indeed, with respect to federal law compliance, EDD might more usefully focus on 42 U. S. C. § 503(a)(1). That federal statute mandates that a state's method of administering its unemployment insurance program must reasonably insure full payment of unemployment compensation "when due," language which has been construed to mean that compensation payments "are required at the earliest administratively feasible stage of unemployment." [42 U.S.C. § 503(a)(1)].

The California appellate court determined that there was a persistent failure on EDD's part to obey the commands of the Writ and that the trial court's enforcement order was "necessary and proper" to effect that enforcement. (Code Civ. Proc. § 1097.) EDD's chosen process in response to the Writ had utterly failed to result in the timely payment of all of the benefits to which Robles was entitled. Further, Robles had shown himself substantively eligible for the identified benefits by attesting to his availability, and diligent search, for work. Indeed, assuming good cause excused Robles's failure to return the certification forms EDD asserted it mailed to him and also allowed for the aggregating of the usual bi-weekly claims, the declarations submitted by Robles in the trial court arguably fully complied with the certification requirements mandated by state law and EDD regulation. (See Cal Unemp Ins Code § 1253; Cal. Code Regs. tit. 22, §§ 1326-6, 1326-10.) Whether they did or not, however, the California appellate court believed that, under the circumstances presented to it, the trial court had the authority to order the immediate payment of benefits without requiring Robles to jump any additional procedural hurdles.

Accordingly, the trial court's judgment was affirmed, and the matter was remanded to the trial court for implementation of its enforcement order.

References. See, e.g., Wilcox, *California Employment Law*, § 80.39, *Claims Procedures* (Matthew Bender).

WAGE AND HOUR LAWS

Verdugo v. Alliantgroup, L.P., G049139, 2015 Cal. App. LEXIS 466 (May 28, 2015)

On May 28, 2015, a California appellate court ruled that an employer seeking to enforce a forum selection

⁹ 207 Cal.App.4th 1029, 144 Cal. Rptr. 3d 36 (2012) (Robles I).

clause in an employment agreement bore the burden to show that litigating wage and hour claims in the designated forum of Texas would not diminish in any way the employee's substantive rights under California law, which under Lab. Code §§ 219(a), 1194(a), could not be waived.

Plaintiff Rachel Verdugo (“Verdugo”) appealed from an order granting a motion to stay this wage and hour lawsuit based on a forum selection clause in her employment agreement with defendant Alliantgroup, L.P. (“Alliantgroup”). The clause designated Harris County, Texas, as the exclusive forum for any dispute arising out of Verdugo’s employment, and also included a provision designating Texas law as governing all disputes. Verdugo contended the trial court erred because enforcing the forum selection clause and related choice-of-law clause violated California’s public policy on employee compensation.

Verdugo based all her claims on Labor Code provisions that not only establish when and how employers must pay overtime and other forms of compensation, provide meal and rest breaks, and provide accurate wage statements to all California employees, but also establish specific remedies for an employer’s violation of these provisions, including recovery of unpaid wages, interest, civil penalties, and attorney fees. To protect these important rights and remedies, the Labor Code declares they cannot be waived by agreement.

Alliantgroup failed to show enforcing the forum selection clause and related choice-of-law clause in Verdugo’s employment agreement would not diminish her statutory rights by requiring her to litigate her claims in Texas under Texas law. Alliantgroup contended Verdugo’s statutory rights would not be affected by enforcing the forum selection clause because a Texas court most likely would reject the parties’ choice-of-law clause and apply California law. Alliantgroup’s supposition about what a Texas court is likely to do is not sufficient to meet its burden because Alliantgroup’s arguments on appeal suggest it will argue against applying California law if this case is litigated in Texas, and Alliantgroup has not cited any authority that convinced the court a Texas court necessarily would apply California law.

The few cases Alliantgroup cited did not address how a Texas court will view a choice-of-law clause in the context of a wage and hour dispute between a Texas employer and a California employee, and Alliantgroup failed to address the competing policies of these two states. Alliantgroup could have eliminated any doubt about which law would apply to Verdugo’s claims by stipulating to have the Texas courts apply California

law, but failed to do so. Instead, Alliantgroup carefully phrased its arguments in terms of vague possibilities while simultaneously seeking to minimize the significance of the California statutory rights on which Verdugo based her claims. Alliantgroup therefore had not shown Verdugo’s unwaivable statutory rights would not be diminished.

The trial court’s order was thus reversed. The court of appeal held that the employer bore the burden to show that litigating wage and hour claims in the designated forum of Texas would not diminish in any way the employee’s substantive rights under California law, which could not be waived (Lab. Code §§ 219(a), 1194(a)). Because the employer did not establish that a Texas court would apply California law, the employer failed to show that enforcing the forum selection clause would not diminish the employee’s unwaivable statutory rights. Although the trial court retained jurisdiction when staying the action on forum non conveniens grounds, Texas would not become an unsuitable forum if its courts applied Texas law in deciding the claims, and thus the forum selection clause violated public policy even though it was possible the stay might be lifted.

References. See, e.g., Wilcox, *California Employment Law*, § 1.03, *Effect of Contractual Provisions* (Matthew Bender).

WORKERS’ COMPENSATION

Lozano v. Workers’ Comp. Appeals Bd., B258000, 2015 Cal. App. LEXIS 408 (May 13, 2015)

On May 13, 2015, a California appellate court ruled that because the presumption of Lab. Code § 3212.1, regarding occupational causation of cancer in firefighters serving a U.S. Department of Defense installation did not change the test for liability, but reallocated to the employer the burden of producing evidence under Evid. Code § 550(a), applying the presumption to post-enactment litigation arising from events that occurred before the amendment of the statute was prospective and proper. Accordingly, although a firefighter contracted cancer and died from the cancer before the operative date of the amendment, the dates of these events had no legal significance with regard to the applicability of the presumption and did not render its use a retroactive application of new law in the post-enactment adjudication of the surviving family members’ claim.

William Lozano (“William”) worked as a fire engineer for Pyramid Services, a Department of Defense installation from November 1, 1981, to July 1, 2007. William

claimed injury arising out of and occurring in the course of his employment in the form of stomach cancer. William died on September 20, 2007, as a result of the stomach cancer. William sought payment of accrued and unpaid compensation and reimbursement for self-procured medical treatment. William's widow sought death benefits for herself and her daughters (collectively, "Lozanos") and reimbursement of burial expenses.

On October 3, 2013, the workers' compensation judge ("WCJ") found William was not entitled to invoke the cancer presumption because, at the time of his death in 2007, Lab. Code § 3212.1 did not include active fire-fighting members of a fire department that served a U.S. Department of Defense installation. Without the cancer presumption, the Lozanos had the burden of proof on causation. Based on the opinion of Dr. O'Neill, the WCJ found the Lozanos failed to meet the burden of proof that William sustained injury arising out of and occurring in the course of employment. The Lozanos petitioned for reconsideration. The Workers' Compensation Appeals Board ("WCAB") denied reconsideration. The WCAB found that, at the time the cancer manifested, William was not a member of a qualifying fire department. Because the WCAB concluded that Senate Bill 1271 did not include any indication the Legislature intended it to apply retroactively, it affirmed the WCJ's initial finding that the cancer presumption did not apply.

Here, the cancer presumption does not change the test for liability, but solely reallocates the burden of producing evidence by imposing it on the employer. The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence (Evid. Code § 550(a)). Absent evidence that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer (Lab. Code § 3212.1(d)), the employee is entitled to a finding that the cancer arose out of and in the course of employment.

Thus, making the cancer presumption available to firefighters serving a U.S. Department of Defense installation regulates the procedure to be followed in determining the legal rights of individuals like William and his family. In allocating the burden of producing evidence it is paradigmatically a matter of procedure. It does not change the legal effect of past events and its application to postenactment litigation is both prospective, and proper. The WCAB erred in determining that the application of the presumption would be an improper retroactive application of the law.

It is not entirely clear whether the WCAB declined to apply the cancer presumption because William died before the operative date of the amendment or because the cancer manifested itself before that operative date. Neither event, however, is of legal significance when it comes to the applicability of the cancer presumption. As noted, the circumstance that the event giving rise to the claim occurred prior to the effective date of the statute is of no moment in a statute that governs modes of procedure. The WCAB erred in holding that the allowing the use of the cancer presumption here was a retroactive application of the law.

In conclusion the court of appeal, annulled WCAB decision and remanded the case for further proceedings, held that decedent firefighter, who died in 2007 of stomach cancer, was entitled to Labor Code § 3212.1 presumption that cancer arose out of and in course of employment, when the court of appeal found that decedent, at time he developed stomach cancer, was employed by fire department that served U.S. Department of Defense installation, that Labor Code § 3212.1(a) was amended, effective 1/1/2009, to include active firefighting members of a fire department that serves a U.S. Department of Defense installation, such as decedent, that this amendment effected only procedural change, that is, by moving burden of presenting evidence, so that Labor Code § 3212.1 presumption is properly applied in post-enactment adjudication of present claim.

References. See, e.g., Wilcox, *California Employment Law*, § 20.30, *Procedure for Obtaining Benefits* (Matthew Bender).

Kimco Staffing Services, Inc. v. State of California, Civil No. B257258, 2015 Cal. App. LEXIS 394 (May 8, 2015)

On May 8, 2015, a California appellate court ruled that in upholding the constitutionality of Lab. Code, § 3701.9, a rational basis existed for treating temporary services employers (TSE's) and leasing employers (LE's) differently from other employers with respect to self-insurance. The legislature reasonably could conclude that the annual method of determining the self-insured security deposit based on the self-insured's projected losses and liabilities was inadequate to account for a potential exponential increase in risk during a calendar year, notwithstanding the government's ability to audit and adjust security deposits. The potential for a rapid increase in the number of employees, coupled with the delay in adjusting the

amount of the self-insurance security deposit, was a rational basis for excluding TSE's and LE's from the workers' compensation self-insurance program.

This controversy arose out of the adoption of Lab. Code § 3701.9, added in 2012 as part of Senate Bill No. 863 (SB 863) (2011-2012 Reg. Sess.), which significantly reformed the workers' compensation law. The final Senate Committee bill analysis indicated that the stated purpose of SB 863 was to reduce frictional costs, speed up medical care for injured workers, and to increase permanent disability indemnity benefits to injured workers. (Sen. Com. on Labor & Industrial Relations, Analysis of SB 863 (2011-2012 Reg. Sess.) as amended Aug. 30, 2012, p. 1.)

Section 3701.9, enacted as part of SB 863, prohibited temporary services employers ("TSE's") and leasing employers ("LE's") from being self-insured. Plaintiffs Kimco Staffing Services, Inc. ("Kimco") and KimstaffHR, Inc. ("KimstaffHR") (collectively, "plaintiffs") alleged a violation of equal protection under the Fourteenth Amendment to the United States Constitution (first cause of action) and deprivation of equal protection under the California Constitution (Cal. Const., art. 1, § 7) (second cause of action). The gravamen of the complaint was that Lab. Code § 3701.9, which eliminated the right of TSE's and LE's to self-insure, was invalid because it singled out these employers and prohibited them from participating in California's workers' compensation self-insurance program. In doing so, § 3701.9 "treated similarly situated entities differently and arbitrarily, and irrationally distinguished between them."

The State supported its demurrer with a request for judicial notice of a complaint filed in 2011 by the Fund against Mainstay Business Solutions ("Mainstay") and other defendants in the Sacramento Superior Court ("the Mainstay complaint").

The trial court concluded the second amended complaint failed to plead facts sufficient to constitute a violation of equal protection under either the federal or California Constitutions and sustained the demurrer to both causes of action without leave to amend. Plaintiffs appealed before a California appellate court.

Because the California appellate court concluded that § 3701.9's classification was supported by a rational

basis, it was unnecessary for the court to address whether TSE's and LE's were similarly situated to other employers. The court assumed, without deciding, that TSE's and LE's were similarly situated to other employers.

The California appellate court found that unlike traditional or worksite employers, which only hired employees consistent with their business needs, TSE's and LE's were in the business of providing employees to other businesses. TSE's and LE's admittedly had an "incentive to add new clients" and to expand their payrolls. Therefore, as the trial court observed, TSE's and LE's could change the scope of their workers' compensation risk dramatically during the course of a year, by taking on new clients and adding employees to their payroll. While a TSE's or LE's pay-roll might grow rapidly during a calendar year, the company's self-insurance deposit would not be adjusted until the subsequent year. (Lab. Code § 3701(c).) The court held that the potential for a rapid increase in the number of employees, coupled with the delay in adjusting the amount of the self-insurance security deposit, was a rational basis for excluding TSE's and LE's from the workers' compensation self-insurance program. (Lab. Code § 3701.9.)

The California appellate court held that the Legislature reasonably could conclude that the annual method of determining the self-insured security deposit based on the self-insured's projected losses and liabilities calculated as of December 31 of each year (Lab. Code § 3701(c)) was inadequate to account for a potential exponential increase in risk during a calendar year, notwithstanding the ability of the California Department of Industrial Relations to audit and adjust security deposits. Thus, a rational basis existed for treating TSE's and LE's differently from other employers with respect to self-insurance. Thus, plaintiffs did not and could not allege a violation of equal protection.

Accordingly, the judgment of dismissal was affirmed.

References. See, e.g., Wilcox, *California Employment Law*, § 20.03, *Insurance Requirements for Employers* (Matthew Bender).

CALENDAR OF EVENTS

2015

July 9-10	CALBAR Labor and Employment Law Section, Fifth Annual Advanced Wage & Hour Conference and Annual Meeting	J.W. Marriott at L.A. Live in Los Angeles
July 10	CALBAR Workers' Compensation Section, Webinar: The AMA Guides: Quirky Appointment Issues and the AMA Guides	12:00 PM - 1:00 PM
July 15	DFEH Webinar: Sexual Harassment Prevention Training	10:00 AM - 12:00 PM
July 16-17	NELI: Employment Discrimination Law Update	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
July 18-19	CALBAR Workers' Compensation Section, Workers' Compensation Legal Specialization Boot Camp 2015	Concord Hilton 1970 Diamond Blvd. Concord, CA 94520 (415) 538-2256
July 25-26	CALBAR Workers' Compensation Section, Workers' Compensation Legal Specialization Boot Camp 2015	Marina del Rey Marriott 4100 Admiralty Way Marina del Rey, CA 90292
Aug. 14	CALBAR Labor and Employment Section, Webinar: Employment Law 101 for Small Businesses	12:00 PM - 1:00 PM
Aug. 14	CALBAR Workers' Compensation Section, Webinar: The AMA Guides: Can You Use the AMA Guides to Rebut a GAF/WPI Rating? If So, How?	12:00 PM - 1:00 PM
Aug. 18	NELI: California Disability Law Workshop	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Aug. 19	NELI: Americans With Disabilities Act Workshop	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Aug. 20-21	NELI: Public Sector EEO and Employment Law Conference	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Aug. 24	NELI: California Disability Law Workshop	Luxe Sunset Boulevard Hotel 11461 Sunset Boulevard Los Angeles, CA 90049 (310) 476-6571

Aug. 25	NELI: Americans With Disabilities Act Workshop	Luxe Sunset Boulevard Hotel 11461 Sunset Boulevard Los Angeles, CA 90049 (310) 476-6571
Aug. 28	CALBAR Workers' Compensation Section, Webinar: Syncope vs Seizure in the Workplace	12:00 PM - 1:00 PM
Oct. 7	NELI: Affirmative Action Workshop	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Oct. 8-9	NELI: Affirmative Action Briefing	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Oct. 8-11	CALBAR: 88th Annual Meeting of the State Bar of California	Anaheim, CA (415) 538-2210
Dec. 3-4	NELI: Employment Law Conference	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
2016		
April 7-8	NELI: ADA & FMLA Compliance Update	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000

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