BENDER'S CALIFORNIA
LABOR & EMPLOYMENT
BULLETIN

Vol. 2017, No. 09 • September 2017
Michael C. Sullivan, Editor-in-Chief

Inside This Issue

Protections for Transgender Employees: What California Employers Need to Know

Steven M. Zadravecz & Victoria E. Cho

Over the past few years, legal protections of transgender rights have grown increasingly prevalent across the country and, particularly, in California. On a national level, the Equal Employment Opportunity Commission (EEOC) and a few federal circuit courts have determined that transgender employees are protected under Title VII of the Civil Rights Act of 1964.[1] Nonetheless, there are presently no federal laws that explicitly protect employees from workplace discrimination or harassment based on "gender identity." In contrast, California has long advocated for the rights of transgender employees and applicants. Recently, the California Fair Employment and Housing Council (FEHC) responded to the demands for increased protections for transgender individuals, implementing new regulations under the California Fair Employment and

[1] 42 U.S.C. 2000e et seq. *See e.g.* Macy v. Dep't of Justice, EEOC Appeal No. 0120120821 (Apr. 12, 2012) (discrimination based on transgender status is sex discrimination in violation of Title VII); Lusardi v. Dep't of the Army, EEOC Appeal No. 0120133395 (Mar. 27, 2015) (denying an employee equal access to a common bathroom corresponding to the employee's gender identity constitutes discrimination on the basis of sex); Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011) (government termination of a transgender person for his or her gender nonconformity is unconstitutional sex discrimination); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (Title VII prohibits discrimination against transgender individuals based on gender stereotyping); Schwenck v. Hartford, 204 F.3d 1187 (9th Cir. 2000) (commenting that the initial approach taken in earlier federal appellate Title VII cases rejecting claims by transgender plaintiffs has been overruled by the language and logic of the *Price Waterhouse* decision).

(Continued on page 277)

A NOTE ON CITATION: The correct citation form for this publication is: 2017 Bender's Calif. Lab. & Empl. Bull. 275 (September 2017).

EBOOK ISBN 978-0-3271-6747-1

Protections for Transgender Employees: What California Employers Need to Know

Steven M. Zadravecz & Victoria E. Cho

(Continued from page 275)

Housing Act[2] (FEHA). In light of the newly enacted regulations, private employers should take caution when formulating their company policies, and should reevaluate existing policies and practices to ensure compliance with California's new regulations. Below we discuss the evolution of legal protections related to gender identity and the new California regulations.

Historical Protections for Transgender Individuals

In *Price Waterhouse v. Hopkins*,[3] the United States Supreme Court first explored the issue of sex stereotyping. The Supreme Court ruled that discrimination based on non-conformance with gender norms, stereotypes, and other sex-based considerations constitute sex discrimination under Title VII. However, the Court also explained that an employer could escape liability by proving it would have made the same decision had discrimination not played any role in the process. The 1991 Civil Rights Act subsequently reversed a portion of, and codified a portion of, the *Price Waterhouse* decision.[4] In particular, Congress disregarded the Court's conclusion regarding the "same decision" defense.[5] Congress determined that the defense should not allow an employer to escape liability altogether, but instead could only restrict the remedy available to a plaintiff employee. On the other hand, Congress codified the portion of the *Price Waterhouse* ruling related to the plaintiff's burden.[6] The Act made clear that a plaintiff need only establish that sex or some other forbidden factor was a "motivating factor" for the employer's challenged action. Though the Act largely supplanted the Court's holding in *Price Waterhouse*, the attention the Court provided to the issue of sex-based discrimination influenced the manner in which the circuit courts, including the Ninth Circuit, addressed the rights of transgender employees in the years to follow.[7]

Transgender Rights in California

In some capacity, transgender protections in California have been in place for over a decade. For example, in 2003, the California legislature amended FEHA to include gender in its definition of "sex" and thereby explicitly prohibited discrimination on the basis of "gender."[8] In articulating the need to include gender in the definition of sex, the legislature commented that the statute "will provide protection to those who are fired, evicted, or harassed every day because they exhibit traits not stereotypically associated with their sex at birth."[9] In 2011, the Gender Nondiscrimination Act[10] directly added "gender identity" and "gender expression" as protected characteristics under FEHA. "Gender expression" was defined as "a person's gender-related appearance or behavior, whether or not stereotypically associated with the person's sex at birth."[11] No particular definition was provided for "gender identity."

Since these additions were made to FEHA, further guidance about the scope of an employer's obligations has been issued by way of regulations. In February of 2016, the California Department of Fair Employment and Housing (DFEH) issued guidelines regarding the rights of transgender employees. The guidelines address what questions employers can and cannot ask applicants during the application process, how employers can implement a dress code and grooming standards in a manner that is sensitive to transgender identity and expression, and make suggestions for maintaining restrooms, showers, and locker rooms.

---

2 Cal. Gov't Code § 12940 et seq.

3 490 U.S. 228 (1989).

4 Pub. L. No. 102-166 (1991).

5 Pub. L. No. 102-166, § 107(b) (amending Title VII, 42 U.S.C. § 2000e-5(g), by adding § 706(g)(2)(B) in order to provide a limitation on available relief in mixed motive cases).

6 42 U.S.C. § 2000e-2(m) (2000).

7 *See* Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000).

8 Cal. Gov't Code § 12926(r)(1)(A)-(C); 2 C.C.R § 11030(c).

9 Assem. Bill 196, 2003-2004 Reg. Sess. (Cal. 2003).

10 Assem. Bill 887, 2011-2012 Reg. Sess. (Cal. 2011).

11 2 C.C.R § 11030(a).

While the DFEH's guidance is not binding, it sheds light on a topic of growing importance in California.[12]

Through the 2016 regulations, the DFEH set forth explicit definitions for the phrase "gender identity," which was previously undefined, as well as "transgender." Gender identity became defined as "a person's self-identification as male, female, a gender different from the person's sex at birth, or transgender."[13] Transgender became defined as "a general term that refers to a person whose gender identity differs from the person's sex at birth."[14] The regulations also defined "sex stereotype" with broad strokes, rendering it illegal to discriminate against an individual based on any "assumption about a person's appearance or behavior, or about an individual's ability or inability to perform certain kinds of work based on a myth, social expectation, or generalization about the individual's sex."[15]

Expanding the Scope of FEHA

In 2017, protections for transgender individuals were again expanded, this time to affirmatively require employers to make the workplace non-discriminatory for transgender applicants and employees. The DFEH first heard public comment on the originally proposed text of its new regulations in Los Angeles in June of 2016, and made four subsequent modifications before voting to implement the regulations in March of 2017. On March 30, 2017, the DFEH unanimously voted to adopt the new regulations, which were recently approved by the Office of Administrative Law. The 2017 regulations, which took effect July 1, 2017, establish even more robust protections for gender non-conforming individuals in the workplace. For example, in addition to defining gender identity, transgender, and sex stereotype, the regulations now include a definition for individuals who may be "transitioning." Transitioning is defined as "a process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth."[16] To clarify that the DFEH intended the regulations to apply not only to transgender employees, but also to transitioning employees, the regulation's text expressly addresses the transitioning process, commenting that "this process may include, but is not limited to, changes in name and pronoun usage, facility usage, participation in employer-sponsored activities [], or undergoing hormone therapy, surgeries, or other medical procedures."[17]

The 2017 regulations additionally expand what type of conduct constitutes discrimination. Discrimination now extends beyond overt discrimination such as terminating or failing to hire an individual on the ground that the individual is transgender. As explained in greater detail below, employers must now take certain measures to ensure transgender employees are protected in the same manner as all other employees. Specifically, employers must address an employee by the employee's preferred gender, name and pronoun; may not require an applicant or existing employee to state their gender identity or expression as a condition of employment or during the course of employment; and may not require an employee to use a particular facility, or dress or groom in a manner inconsistent with the employee's gender identity or expression.

How Must Employers Address Transgender Employees?

In accordance with the DFEH's 2017 regulations, an employer must comply with an employee's request to be identified with a preferred gender, name or pronoun. Employers will still be allowed to use the legal name and gender indicated on an employee's government-issued documents when it is necessary to meet a legally mandated obligation. Importantly, employers are expressly forbidden from discriminating against an employee for undergoing a social transition, whereby the employee changes his or her gender presentation. Employers also are forbidden from discriminating against an employee for undergoing a physical transition, whereby the employee receives hormone therapy or gender reassignment surgery. As such, employers should ensure that they appropriately address an employee that may be undergoing either a social or physical transition, in accordance with the employee's request.

What Can Employers Ask Transgender Applicants?

As to applicants, the 2017 regulations prohibit an employer from inquiring, directly or indirectly, as to an individual's sex, gender, gender identity or gender expression without a permissible defense. Such an inquiry would only be justified if the employer can demonstrate a bona fide occupational qualification, or the employee initiates communication regarding

---

12 *See* Department of Fair Employment & Housing v. Am. Pacific Corp., No. 34-2013-00151153-CU-CR-GDS (Mar. 3, 2014) (holding that a transgender employee could pursue a discrimination claim under FEHA).

13 2 C.C.R § 11030(b).

14 2 C.C.R § 11030(e).

15 2 C.C.R § 11030(d).

16 2 C.C.R § 11030(f).

17 2 C.C.R § 11030(f).

adjustments to the individual's working conditions. A bona fide occupational qualification defense cannot be justified by the mere fact that an individual is gender non-conforming, or that the sex assigned at birth is different from the sex required for the job position. On the other hand, personal privacy considerations may justify a bona fide occupational qualification defense. However, the regulations strictly limit use of this defense to instances where: (a) the job requires an employee to observe individuals in a state of nudity or to conduct body searches; (b) it would be offensive to prevailing social standards to have an individual of a different sex present; and (c) it is detrimental to the mental or physical welfare of individuals being observed or searched to have an individual of a different sex present. Notably, once an applicant has been hired, the same rule applies; employers may not ask existing employees to state whether they are transgender.

Private employers should evaluate their existing employment applications and interview process to avoid making inquiries, whether oral or written, prohibited by the new regulations. For example, an applicant need not indicate at all whether they are male or female. Employers may even be liable for discrimination if they *consider* an applicant to have been untruthful because the individual identified themselves on an employment application in a manner inconsistent with their assigned sex at birth. The breadth of the regulatory language now makes it especially important that California employers understand and implement the regulations.

Addressing the Restroom Issue: Access Based on Gender Identity

The new regulations also require employers to provide equal access to "comparable, safe, and adequate" facilities for all employees without regard to the sex of the employees. This means that an employee has the right to use the restroom or locker room that corresponds to the employee's gender identity or expression, regardless of the employee's assigned sex at birth. Further, an employee cannot be "required to undergo, or provide proof of, any medical treatment or procedure, or provide any identity document, to use facilities designated for use by a particular gender."

Only where an employer raises privacy interests about the use of restrooms or locker rooms, may the employer refuse to permit an employee to use the restroom or locker room that corresponds to the employee's gender identity or expression. Under such circumstances, the employer must provide feasible "alternative facilities" or scheduling. The regulations shed light on the scope of acceptable alternative facilities, explaining that locking toilet stalls, staggered schedules for showering, or shower curtains may be sufficient. In complying with the "alternative facilities" standard, the DFEH emphasized that alternative arrangements, where appropriate, will be allowed so employers are able to respect the privacy interests of *all* employees. However, employers must not require an employee to use a particular facility. Nor may an employer impose upon an employee any physical appearance, grooming or dress standard if the standard is inconsistent with the individual's gender identity or expression, unless the employer can establish business necessity for such a directive.

The regulations also address signage for restrooms and compliment AB 1732, which Governor Brown signed into law late last year. Effective March 1, 2017, all businesses and public buildings must identify single-user toilet facilities as "all-gender" rather than male or female. Although the law does not comment on transgender rights specifically, the legislation is a portion of the larger progression towards gender equality, and applies to private employers. This particular law is relatively simple for employers to implement. However, it is important to note that employers should educate their employees on the law and its implications on how employees should direct customers with regard to restroom usage.

Taken together, the recent changes made to the DFEH's regulations reflect an important trend in California toward providing transgender employees with greater protection. Employers will need to review the newest regulations carefully and ensure that both their company policies, as well as their practices, comply.

Steven Zadravecz is a partner in the Irvine office of Jones Day. He represents employers across California in all aspects of employment law, including actions in state and federal court and before administrative agencies, involving employment discrimination claims, wrongful discharge and retaliation claims, wage and hour class actions, and matters relating to unfair competition claims based on California Business and Professions Code section 17200. In addition, Mr. Zadravecz regularly counsels local, regional, and national companies on a variety of topics, including state and federal wage and hour laws, accommodating disabilities, leaves of absence, employment policies and procedures. Mr. Zadravecz can be contacted at szadravecz@jonesday.com.

Victoria Cho is an associate in the Irvine office of Jones Day. She has experience in a variety of litigation matters in both state and federal court. She has represented employers in a range of employment cases, including employment discrimination, wage and hour class actions, and trade secret litigation. Ms. Cho can be contacted at vcho@jonesday.com.

The Requirements of California Wage and Hour Law: A Primer

Dale A. Hudson & Irene Scholl-Tatevosyan

Introduction

California employers are unquestionably subject to the most comprehensive and detailed set of wage and hour rules in the country. In addition to federal law, California employers must comply with myriad state-specific wage and hour laws, which has resulted in an epidemic of class-action lawsuits alleging violations of these laws by California employers. Many employers are not even aware of all of the regulatory mandates, creating low-hanging fruit for plaintiffs' attorneys. This article provides an overview of the general California wage and hour rules that apply to companies with employees in California.

The Wage Orders

California wage and hour rules are set forth in the California Labor Code, in 18 "Wage Orders" issued by the California Industrial Welfare Commission (IWC),[1] and in court decisions interpreting these statutes and regulations. California has twelve industry-wide wage orders, five "occupation" wage orders, and a general minimum wage order. Employers are required to post the appropriate wage order(s) where they can be seen by employees, so it is important that the correct wage order be identified and posted. Employers should first determine if an industry wage applies to their business. Generally speaking, if an employer is covered by an industry wage order, such order will apply to all classifications of its employees in the industry, regardless of the work they perform. If no industry order applies, then the employer should determine which occupation order(s) govern their employees. However, there are exceptions to these rules and, in some circumstances, a company's employees may be governed by more than one wage order. The IWC has published a brochure entitled, *Which Wage Order?*, that provides employers with guidance as to which wage order(s) applies to specific businesses.[2]

The following discussion is limited to the *general* rules as reflected in *most* of the IWC Wage Orders. However, because there are significant variations among the various wage orders, it is important to examine the specific wage order(s) applicable to any specific employer.

Minimum Wage

Employers must pay each non-exempt employee[3] not less than the applicable minimum wage for *each hour of work*.[4] Under California law, an employer may not "average" an employee's compensation over a workday[5] or workweek[6] for the purpose of determining minimum wage compliance.[7] Thus, where employees are paid on a piece-rate or commission basis, they must also receive hourly pay at the minimum wage rate during so-called "non-productive time," i.e., when they are not engaged in activities that enable them to earn piece-rate or commission compensation.[8] In addition, piece-rate and commission employees must be

---

1 General Minimum Wage Order and Industry and Occupation Wage Orders 1-17. Cal. Code Regs. tit. 8 §§ 11000–11170. These wage orders are available at the IWC website at http://www.dir.ca.gov/Iwc/WageOrderIndustries.htm.

2 See http://www.dir.ca.gov/dlse/WhichIWCOrderClassifications.pdf.

3 The tests for exempt and non-exempt employees are set forth in the wage orders and other applicable laws, and are beyond the scope of this article.

4 *See* Cal. Lab. Code § 1182.12; General Minimum Wage Order; Wage Orders 1—15, secs. 4 and 10; Wage Order 16, secs. 4 and 9; Armenta v. Osmose, Inc. 135 Cal. App. 4th 314, 323 (2005).

5 A "workday" is a consecutive 24-hour period established by the employer for the purpose of calculating daily overtime. The workday can begin at any time of the day, but it must begin at the same time each calendar day. Cal. Lab. Code § 500 (a); section 2.T. of most wage orders; Dep't of Lab. Standards Enforcement, DLSE Enforcement Policies and Interpretations Manual ("DLSE Enforce. Pol. & Interp. Man.") § 48.1.2.

6 A "workweek" is a fixed and recurring period of seven consecutive 24-hour periods established by the employer for wage calculation purposes. The workweek may begin at any hour on any day, so long as it is fixed and regularly recurring. Cal. Lab. Code § 500 (b); section 2.T. of most wage orders; DLSE Enforce. Pol. & Interp. Man., *supra* note 5, at § 48.1.3.

7 *Armenta*, 135 Cal. App. 4th at 323.

8 Cal. Lab. Code §§ 221-223, 226.2; Gonzalez v. Downtown LA Motors, LP, 215 Cal. App. 4th 36 (2013).

paid separate hourly compensation during rest periods.[9] Thus, under California law, a minimum wage violation may occur even if the employee's total compensation for the workweek or weekday, when divided by his or her total hours, equals or exceeds the minimum wage.

For California employers with 26 or more employees, the minimum wage increased from $10.00 per hour to $10.50 per hour effective January 1, 2017.[10] This increase will be delayed one year for employers with 25 or fewer employees. Annual adjustments going up to $15.00 per hour are scheduled thereafter through January 2022 for employers with over 25 employees and January 2023 for employers with fewer than 25 employees.[11] Some cities and counties in California impose a higher minimum wage.

Overtime Premiums

Most non-exempt employees[12] are entitled to overtime premiums in the following circumstances:

Time and a half pay for:

- Hours worked in excess of eight hours in one workday;
- The first eight hours worked on the seventh consecutive day of work in any one workweek; and
- Hours worked in excess of 40 straight-time hours in any one workweek.[13]

Double pay for:

- Hours worked in excess of 12 hours in one day; and
- Hours worked in excess of eight hours on the seventh consecutive day of a workweek.[14]

In calculating overtime premiums, employers calculate both daily overtime and weekly overtime, and pay the greater of the two.[15]

Several exceptions exist which are beyond the scope of this summary. For example, there is an exemption for employees who are governed by a collective bargaining agreement that provides premium wage rates for all overtime hours worked and a regular hourly rate of pay of not less than thirty percent more than the state minimum wage.[16] In addition, employers can avoid paying daily overtime for shifts not exceeding ten hours by adopting an "alternative workweek" for all or some of its employees.[17] The law mandates specific procedures which must be followed in adopting such a workweek, including a secret ballot election.[18]

Meal Periods

As a general rule, all non-exempt employees must be provided with a 30-minute, uninterrupted off-duty meal period (which may be unpaid) for each work period of more than five hours. If the employee works six or fewer

---

9 Cal. Lab. Code § 226.2; Bluford v. Safeway Stores, Inc., 216 Cal. App. 4th 864 (2013). (*See* section on "Rest Periods," *infra*, for specific requirements.)

10 Cal. Lab. Code § 1182.12; General Minimum Wage Order. The federal minimum wage is $7.25 effective July 24, 2009, subject to certain exceptions. 29 U.S.C. § 206(a)(1). Compliance with the federal minimum wage is determined by dividing the employee's compensation for a workweek by the total number of hours worked; this method is not permitted under California law. *See Armenta*, 135 Cal. App. 4th at 323.

11 Cal. Lab. Code § 1182.12.

12 Employees governed by Wage Order 15, applicable to agricultural employees, are subject to different rules. Beginning January 1, 2019, a new California law will phase-in more stringent overtime rules for agricultural workers over a four year period. Assem. B. No. 1066, 2015–2016 Reg. Sess. (Cal. 2016).

13 Federal law also requires time and one-half pay for hours worked in excess of 40 hours in a workweek, but prescribes no daily overtime rules. 29 U.S.C. § 207(a)(1). This requirement normally has no practical impact on California employers, who are required to comply with the stricter California state rules. However, violation of federal minimum wage law can give rise to additional penalties. 29 U.S.C. § 260.

14 Cal. Lab. Code § 510; *see* sec. 3 of most wage orders.

15 29 U.S.C. § 218(a); 29 C.F.R. § 778.5; Aguilar v. Ass'n for Retarded Citizens, 234 Cal. App. 3d 21, 34–35 (1991); Pac. Merch. Shipping Ass'n v. Aubry, 918 F.2d 1409, 1426–27 (9th Cir. 1990). For purposes of calculating overtime, the employer must pay 1.5 times or double the employee's "regular rate of pay," which encompasses compensation beyond just an employee's hourly rate. Cal. Lab. Code § 510. The regular rate includes most "remuneration for employment" paid to an employee, such as piece-rate pay, commissions, and non-discretionary bonuses. *See* Huntington Mem'l Hosp. v. Super. Ct., 131 Cal. App. 4th 893 (2005); Marin v. Costco Wholesale Corp., 169 Cal. App. 4th 804 (2008). However, items such as discretionary tips, bonuses, holiday gifts, and stock options need not be included in the regular rate. The *DLSE Enforcement Policies and Interpretations Manual* specifies which forms of compensation should be included, and excluded, in calculating the regular rate. DLSE Enforce. Pol. & Interp. Man., *supra* note 5, at §§ 49-1–49-3.

16 Cal. Lab. Code § 514; *see* sec. 3 of most wage orders.

17 Cal. Lab. Code § 511.

18 DLSE Regulations provide detailed guidance for implementing an alternative workweek. *See* sec. 3(B) of most wage orders.

hours total in the work period, the meal period may be "waived by mutual consent of the employer and the employee."[19]

If an employee works more than 10 hours in a work period, the employee is entitled to two uninterrupted, off-duty meal periods of at least 30 minutes each.[20] If the work period is 12 or fewer hours, an employee may waive the second meal period, but only if the first meal period was taken.[21] In measuring the length of the "work period," unpaid meal periods are not counted.

An employer satisfies its obligation to provide employees with a meal period if it: (1) relieves employees of all duties; (2) relinquishes control over their activities; (3) permits the employees a reasonable opportunity to take an uninterrupted thirty-minute period; and (4) does not impede or discourage employees from doing so.[22] An employer is not required to ensure that employees actually take their meal periods.[23]

The timing of meal periods is critical. A first meal period must begin within five hours of when the employee begins his or her shift, and a second meal period must begin within 10 hours of when the employee begins his or her shift.[24] If the meal period is not provided by the prescribed time, the employee's meal break will not satisfy the legal test for a "meal period," and a violation will occur.[25] However, an employee may be provided with his or her meal period early in the five hour work period.

The wage orders provide that an employer may provide an employee with a paid, "on-duty" meal period when the nature of the work prevents an employee from being relieved of all duties and other conditions are met.[26] However, on-duty meal periods are permitted under narrowly prescribed circumstances and only if certain procedures are followed.[27] Among other things, the employee must voluntarily sign a written agreement that provides for an on-duty meal period and further provides that the employee is free to revoke the agreement at any time.[28] Employers should consult with experienced employment law counsel prior to implementing on-duty meal periods.

Note that even where employees are provided with meal periods, the employer may still be found liable for meal period violations if:

(1) The meal periods are provided but not within the prescribed time;

(2) The meal periods are less than 30 minutes long;

(3) The employees are not free to leave the premises; or

(4) The employees perform some work during the meal period.

The actual times when employees begin and end meal periods must be recorded on time records, unless all operations cease during the meal period.[29]

Rest Periods

Employers must "authorize and permit" non-exempt employees to take paid rest periods of at least 10 minutes duration for each four hours worked "or major fraction thereof."[30] (A "major fraction" of four hours means a period of more than two hours.) The rest periods "insofar as practicable shall be in the middle of each work period."[31] For this purpose, a "work period" is the period before and after each meal period.[32] Departures from the preferred schedule (i.e. the

---

19 CAL. LAB. CODE § 512(a); *see* sec. 11 of most wage orders. There are limited exceptions to meal period rules applicable to employees in the health care industry, and employees in certain industries or occupations covered by a collective bargaining agreement that meets specified requirements. *See* CAL. LAB. CODE §§ 512(c)-(e), 516(b); Wage Orders 1, 5, 9 and 16. In addition, employees in the motion picture industry may work no longer than six hours without a meal period of not less than 30 minutes nor more than one hour. Sec. 11 of Wage Order 12.

20 CAL. LAB. CODE § 512(a).

21 CAL. LAB. CODE § 512(a).

22 Brinker Rest. Corp. v. Super. Ct., 53 Cal. 4th 1004, 1040 (2012).

23 53 Cal. 4th at 1040.

24 CAL. LAB. CODE § 512(a); *see also* sec. 11 of most wage orders.

25 *Brinker*, 53 Cal. 4th at 1041–42.

26 Sec. 11(C) of most wage orders.

27 *See e.g.* DLSE Opinion Letter No. 2002.09.04 (Sept. 4, 2002).

28 Sec. 11(C) of most wage orders.

29 *See* sec. 7(A)(3) of most wage orders.

30 Some wage orders contain exemptions for employees covered by a valid collective bargaining agreement if the agreement provides "equivalent protection." See Wage Orders 9 and 16.

31 *See* sec. 12 of most wage orders.

32 Rodriguez v. E.M.E., Inc., 246 Cal. App. 4th 1027, 1044 (2016).

middle of each work period) are permitted when such departures "(1) will not unduly affect employee welfare, and (2) [are] tailored to alleviate a material burden that would be imposed on the employer by implementing the preferred schedule."[33]

Employers must "authorize and permit" employees to take rest periods, but are not required to ensure that the employees actually take rest periods.[34] Although an employee may lawfully choose to skip a rest period, proving that employees were not pressured into skipping rest periods can be challenging.

Rest periods are not required for employees "whose total daily work time is less than three and one-half (3½) hours."[35] This means that for a total work period of 3½ to 6 hours, an employee is entitled to one 10-minute rest period; for over six and up to 10 hours, the employee is entitled to two rest periods; for shifts over 10 hours and up to 14 hours, the employee is entitled to three rest periods. Employees who work over 14 hours are entitled to four rest periods.

The following table illustrates the number of meal and rest periods authorized for shifts of a specific length.

California Meal and Rest Period Mandates

Hours Worked	Meal Period Entitlement	Rest Period Entitlement
0 – 3:29	0	0
3:30 – 5:00	0	1
5:01 – 6:00	1 (can be waived)	1
6:01 – 10:00	1 (cannot be waived)	2
10:01 – 12:00	2 (**1** can be waived)	3
12:01 – 14:00	2 (cannot be waived)	3
14:01 – 15:00	2 (cannot be waived)	4

The California Supreme Court recently held in *Augustus v. ABM Security Services, Inc.*[36] that on-call rest periods are not permitted because an on-call requirement would not allow an employee to be relieved of all work duties during the break.[37] Rest periods need not be recorded for hourly employees, but they constitute part of hours worked and must be paid.[38]

Employees paid on a piece-rate basis must be compensated for rest periods at a regular hourly rate that is no less than the *higher* of:

- An average hourly rate determined by dividing the total compensation for the workweek, exclusive of compensation for rest and recovery periods, and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods; or
- The applicable minimum wage, being the higher of the applicable federal, state or local minimum wage.[39]

Employees paid by commission should be paid separate compensation for rest periods at a rate that is not less than the minimum wage, so that the rest time is not considered "unpaid."[40]

Additional Pay for Failing to Provide Employees with Meal or Rest Periods

All employers are obligated to pay their employees *one additional hour of pay* at the employee's "regular rate of compensation"[41] for each day an employee is not provided with a meal period as required. Employers are also obligated to pay employees *one additional hour of pay* at the employee's regular rate for each day an employee is not permitted to take a prescribed rest period.[42] This one hour of pay is considered a "premium wage," which is owed automatically for any violation of the employee's rights to take a meal period or rest period.[43] Of course, the employee must also be paid for all hours worked, including any time an employee works during a scheduled meal period.

---

33 246 Cal. App. 4th at 1040.

34 *Brinker*, 53 Cal. 4th at 1033.

35 *See* sec. 12 of most wage orders.

36 2 Cal. 5th 257 (2016).

37 2 Cal. 5th at 269–73.

38 *See* secs. 7(A)(3) and 12 of most wage orders.

39 CAL. LAB. CODE § 226.2(a)(3)(A).

40 *See e.g.* Vaquero v. Stoneledge Furniture, LLC, 9 Cal. App. 5th 98, 110–13 (2017).

41 In Bradescu v. Hillstone Rest. Group, Inc., No. SACV 13-1289-GW(RZx), 2014 U.S. Dist. LEXIS 150978, at *1 (C.D. Cal. Sept. 18, 2014), the court interpreted the phrase "regular rate of *compensation*" to mean the employee's hourly rate of pay. The court distinguished this from the phrase "regular rate of *pay,*" which is used to calculate overtime pay, and includes items such as commissions and non-discretionary bonuses. However, no California state courts have passed on this issue.

42 *See* CAL. LAB. CODE § 226.7; secs. 11 and 12(B) of most wage orders.

43 Franco v. Athens Disposal Co., 171 Cal. App. 4th 1277, 1302–03 (2009), *as modified* (Mar. 18, 2009).

Employers should set up procedures to pay this "premium wage" when employees are not provided with meal periods or are not permitted to take rest periods. Generally an employee is entitled to: (1) one hour of premium pay for each day on which one or more meal periods was denied; *and* (2) one hour of premium pay for each day on which one or more rest periods were denied.[44]

Maximum Hours and Days of Work

California law provides that an employer may not "cause" its employees to work more than six days in seven.[45] The law similarly provides that each employee is entitled to one day's rest in seven.[46] In *Mendoza v. Nordstrom, Inc.*,[47] the California Supreme Court recently held that an employee's entitlement to one day of rest is determined by reference to each work-week; the court rejected the argument that compliance should be determined by reference to a seven-day rolling period. The court further held that an employer causes an employee to forego a day of rest if it encourages the employee to work a seventh day or conceals the entitlement to rest. However, an employer may allow an employee, fully apprised of the entitlement to rest, to choose to work a seventh day.

These rules do not apply to any cases of emergency, nor to work performed in the protection of life or property from loss or destruction.[48] In addition, when the nature of the work reasonably requires that the employee work seven or more consecutive days, the days of rest may be accumulated, provided that in each calendar month the employee receives days of rest equivalent to one day's rest in seven.[49]

Wage Order 4 provides that a non-exempt employee may not be terminated or otherwise disciplined for refusing to work more than 72 hours in any workweek, except in an emergency.[50] Some of the other wages orders, including Wage Orders 5, 8 and 13, contain maximum hours requirements.[51] Employers should consult the applicable wage order to determine if any maximum hours rules apply to their business.

Reporting Time Pay

Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half of said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two hours or more than four hours, at the employee's regular rate. If an employee is required to report for work a second time in any one workday and is furnished less than two hours of work on the second reporting, said employee shall be paid for two hours at the employee's regular rate (commonly referred to as "call back pay.")

Reporting-time pay is not owed where:

(1) Operations cannot commence or continue due to threats to employees or property, or when recommended by civil authorities;

(2) Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities or sewer system; or

(3) The interruption of work is caused by an Act of God or other cause not within the employer's control.[52]

Split-Shift Premiums

When an employee works a split shift at the employer's request, the employee must be paid one hour's additional pay *at the minimum wage*, except where the employee resides at the place of employment.[53] However, if the employee's total pay for a workday exceeds the minimum wage for that day, including one additional hour for the split-shift premium, then no additional split-shift premium is required. Otherwise, the minimum wage pay must include the split-shift premium. In other words, if the employee's total pay for the day exceeds the minimum wage, the excess over the minimum wage is applied towards the split-shift premium.[54]

Final Pay

Where an employee is terminated by the employer, the employee must be paid all accrued wages immediately upon termination.[55]

If an employee quits, his or her wages must be paid within 72 hours, unless the employee has given 72 hours

---

44 *See* United Parcel Serv., Inc. v. Super. Ct., 196 Cal. App. 4th 57, 69 (2011).

45 Cal. Lab. Code § 552.

46 Cal. Lab. Code § 551.

47 2 Cal. 5th 1074 (May 8, 2017).

48 Cal. Lab. Code § 554.

49 Cal. Lab. Code § 554.

50 Sec. 3(L), Wage Order 4.

51 *See e.g.*, sec. 3 of Wage Orders 5, 8, and 13.

52 *See* sec. 5 of most wage orders.

53 *See* sec. 4(C) of most wage orders.

54 Aleman v. AirTouch Cellular, 209 Cal. App. 4th 556 (2012).

55 Cal. Lab. Code § 201(a).

previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.[56]

The employer must pay all earned wages, including accrued vacation benefits and any commissions that can be calculated.[57] If commissions cannot be calculated on the date of termination, they must be paid "as soon as the amount is ascertainable."[58] Once the commission is calculable, the employer may not defer payment until the next regular pay day.

Waiting Time Penalties

Labor Code section 203 requires an employer to pay "waiting time penalties" of up to an extra 30 days of pay at the employee's daily wage rate for failure to pay any wages to an employee who has quit or been terminated. The penalties continue to run until the employee is paid, up to a maximum of 30 *work days*. Unpaid wages that may trigger Labor Code section 203 include, but are not limited to: commissions, premium pay for missed meal or rest periods, overtime, and accrued vacation or paid time off (PTO) benefits.[59] A failure to pay is considered willful unless there is a good faith dispute as to whether the monies are owed.[60] Ignorance of the law is not a defense to Labor Code section 203 penalties. Nor is ignorance of the exact amount of wages due, if the employer reasonably should have known that some uncompensated work was done.

Business Expenses

An employer must reimburse an employee for costs necessarily incurred by the employee as a direct consequence of the discharge of his or her duties.[61] Thus, employees are generally entitled to reimbursement for travel expenses, mileage for use of personal vehicles, personal cell phone charges, and other expenses incurred for the benefit of the employer. Employers are not permitted to pass operating expenses of the business to employees.[62] Even where, for example, an employee has an unlimited plan on his or her personal cellphone, the employer must reimburse the employee for "some reasonable percentage of the employee's cell phone bill" if the employee uses his or her personal phone to make work-related calls.[63]

Notice to Employees Regarding Pay Information

California Labor Code section 2810.5 requires that employers provide most newly hired employees a written notice containing the following information:

- The rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime, as applicable;
- Allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances;
- The regular payday designated by the employer in accordance with the requirements of the Labor Code;
- The name of the employer, including any "doing business as" names used by the employer;
- The physical address of the employer's main office or principal place of business, and a mailing address, if different;
- The telephone number of the employer;
- The name, address, and telephone number of the employer's workers' compensation insurance carrier;
- That an employee may accrue and use sick leave, and has a right to request and use accrued paid sick leave;
- Whether paid sick leave is provided pursuant to an "accrual" or "lump sum" formula; and
- That an employee may not be terminated or retaliated against for using or requesting the use of accrued paid sick leave, and has the right to file a complaint against an employer who does retaliate.

California's Division of Labor Standards Enforcement (DLSE) has issued a template notice[64] which may be used, but its use is optional.

Employers must also give employees written notice of any changes to the above information within seven days

---

56 CAL. LAB. CODE § 202(a).

57 CAL. LAB. CODE §§ 201–202.

58 DLSE Enforce. Pol. & Interp. Man., *supra* note 5, at § 4.6.

59 *See e.g.*, DLSE Opinion. Letter No. 2003.01.28 (Jan. 28, 2003).

60 Choate v. Celite Corp., 215 Cal. App. 4th 1460, 1468 (2013).

61 CAL. LAB. CODE § 2802(a).

62 Gattuso v. Harte-Hanks Shoppers, Inc., 42 Cal. 4th 554, 562 (2007).

63 Cochran v. Schwan's Home Service, Inc., 228 Cal. App. 4th 1137, 1144 (2014).

64 The DLSE's template notice is currently available at https://www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf.

of such change (unless the change is shown on employee's wage statements).[65] The notice requirements do not apply to employees who are exempt from California overtime rules.[66]

Time and Payroll Recordkeeping Requirements

California law also requires employers to keep accurate records of time worked, including when each non-exempt employee begins and ends work, and when each non-exempt employee begins and ends each meal period. The recordkeeping requirements are substantially identical across the wage orders that may apply. For example, Wage Order 4 provides, in pertinent part:

> (A) Every employer shall keep accurate information with respect to each employee including the following:
>
> (1) Full name, home address, occupation and social security number.
>
> (2) Birth date, if under 18 years, and designation as a minor.
>
> (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
>
> (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
>
> (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
>
> (6) When a piece rate or incentive plan is in operation, the number of piece-rate units earned by each employee, and the applicable piece rates.

Employee Wage Statement Requirements

California Labor Code section 226 requires that each employee paycheck be accompanied by an itemized wage statement which contains specified information.[67] This requirement generally applies to *both exempt and non-exempt employees*. The California Labor Code requires that the itemized wage statements include the following information:

> (1) Gross wages earned;
>
> (2) Total hours worked by the employee, except for any employee who is exempt from California minimum wage and overtime requirements;
>
> (3) All applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate, and, if the employer is a temporary services employer, the rate of pay and the total hours worked for each temporary services assignment;
>
> (4) All deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item;
>
> (5) Net wages earned;
>
> (6) The amount of paid sick leave (or paid time off, if provided in lieu of paid sick leave) available to the employee;[68]
>
> (7) The inclusive dates of the period for which the employee is paid;
>
> (8) The name of the employee and only the last four digits of his or her social security number, or an employee identification number other than a social security number;
>
> (9) The name and address of the legal entity that is the employer and, if the employer is a farm labor contractor, the name and address of the legal entity that secured the services of the employer;
>
> (10) The number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis; and
>
> (11) If the employee is compensated on a piece-rate basis, the following additional information:
>
> a) (i) The total hours of compensable rest and recovery periods, (ii) the rate of compensation for those periods, and (iii) the gross wages paid for those periods during the pay period; and

---

65 CAL. LAB. CODE § 2810.5(b).

66 CAL. LAB. CODE § 2810.5(c).

67 Detailed rules regulating frequency of and deadlines for payment of wages are set forth in Labor Code sections 204–204.2.

68 If an employer provides unlimited paid sick leave or unlimited paid time off, the employer may indicate "unlimited" on the itemized wage statement.

b) (i) The total hours of other nonproductive time, (ii) the rate of compensation for that time, and (iii) the gross wages paid for that time during the pay period.[69]

Employers who violate any of these wage statement requirements may be liable to employees for a penalty of up to the greater of all actual damages, or $50 per employee for the initial pay period in which a violation occurs and $100 per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of $4,000 per employee.[70]

Conclusion

It is not possible for one article to provide a comprehensive explanation of all wage and hour laws that apply to California employers. However, as this overview demonstrates, California wage and hour laws are replete with traps for unwary employers. Achieving full compliance with these laws is a challenge for even the largest and most sophisticated employers; the challenge is even greater for smaller employers. However, the potential liability for non-compliance can be massive, so employers need to know these rules.

Dale A. Hudson is of Counsel and Irene Scholl-Tatevosyan is an associate in the Labor & Employment practice group of Nixon Peabody LLP in Los Angeles. Mr. Hudson provides strategic advice to California employers regarding employment law compliance and litigation avoidance. He also defends employers in employment and wage/hour litigation matters. Ms. Scholl-Tatevosyan primarily represents employers in all aspects of labor and employment matters - from wage and hour class and PAGA actions to discrimination, harassment, wrongful termination, and labor disputes. They may be reached at dhudson@nixonpeabody.com and itatevosyan@nixonpeabody.com.

---

69 CAL. LAB. CODE §§ 226, 226.2(a)(2), 246(i).

70 *See* CAL. LAB. CODE § 226(e).

WAGE & HOUR ADVISOR: California Supreme Court Allows PAGA Plaintiffs to Seek Employee Contact Information Statewide

Aaron Buckley, Jason Fischbein & Mary Allain

Introduction

On July 13, 2017, the California Supreme Court issued an opinion clarifying the scope of discovery in Private Attorneys General Act[1] (PAGA) actions, holding that PAGA plaintiffs are presumptively entitled to discover the names and contact information of other allegedly "aggrieved employees" statewide at the outset of litigation, without the need to show good cause.

Williams v. Superior Court[2]

Michael Williams was employed by Marshalls of CA, LLC at its retail store in Costa Mesa, California.[3] On March 22, 2013, after a year of employment, Williams brought a representative action against Marshalls under PAGA, alleging meal and rest break and other Labor Code violations.[4] Early in the case, Williams served special interrogatories seeking the names and contact information of all nonexempt employees at approximately 130 Marshalls stores throughout California.[5] Marshalls objected, arguing the interrogatories were overbroad, unduly burdensome, and implicated privacy rights under the California Constitution.[6] Williams moved for an order compelling Marshalls to produce the information.[7]

The trial court granted Williams' motion in part, ordering Marshalls to produce the names and contact information for employees at the Costa Mesa store where Williams had worked, subject to a "*Belaire-West*[8] notice," a discovery mechanism whereby nonparty employees are given an opportunity to opt-out of having their names and contact information produced to plaintiffs.[9] The trial court order also allowed Williams to renew his motion to compel production of the remaining names and contact information after he had been deposed "for at least six productive hours."[10]

The California Court of Appeal affirmed, holding that statewide discovery was not warranted at such an early stage in the proceedings. Concluding that Williams' "parochial" claim was insufficient to show good cause for statewide discovery, the appellate court reasoned that Williams' allegations only concerned the practices at his own store.[11] The court of appeal also weighed privacy interests, finding employees' individual privacy rights outweighed Williams' need for their identifying information.[12] By authorizing incremental discovery, the appellate court sought to avoid potentially unnecessary discovery costs, concluding that the party seeking to compel discovery must "set forth specific facts showing good cause justifying the discovery sought."[13]

The California Supreme Court granted review to consider whether (1) Williams, as a PAGA plaintiff, was entitled to the names and addresses of other employees without first showing good cause; and (2) whether the trial court should have first determined if protected privacy interests were involved by conducting a balancing test, instead of assuming the existence of protected privacy interests.[14]

In its recent opinion, a unanimous supreme court reversed the court of appeal, holding plaintiffs in PAGA actions are entitled to expansive discovery rights.

The state's high court was unpersuaded by Marshalls' objections characterizing Williams' discovery requests as overbroad, unduly burdensome, and in violation of third party privacy rights. The court explained that once

---

1 CAL. LAB. CODE § 2698 et seq.

2 No. S227228, 2017 Cal. LEXIS 5124 (July 13, 2017).

3 2017 Cal. LEXIS 5124, at *4.

4 2017 Cal. LEXIS 5124, at *4-5.

5 2017 Cal. LEXIS 5124, at *5-6.

6 2017 Cal. LEXIS 5124, at *5-6.

7 2017 Cal. LEXIS 5124, at *6.

8 Belaire-West Landscape, Inc. v. Superior Court, 149 Cal. App. 4th 554 (2007).

9 *Marshalls*, 2017 Cal. LEXIS 5124, at *6.

10 2017 Cal. LEXIS 5124, at *6.

11 2017 Cal. LEXIS 5124, at *24.

12 2017 Cal. LEXIS 5124, at *7.

13 2017 Cal. LEXIS 5124, at *7.

14 2017 Cal. LEXIS 5124, at *7.

a plaintiff files a complaint alleging Labor Code violations, the contact information of any allegedly aggrieved employees, as percipient witnesses, is relevant and discoverable.[15] Further, because fellow employees will be bound by the outcome of any PAGA action, this and other policy considerations support allowing PAGA discovery as broad as class-action discovery.[16]

The court explained that under California law, there is no requirement to show good cause or prove up the merits before being entitled to discovery, and that the California legislature calls for all discovery disputes to be resolved in the propounding party's favor.[17] Additionally, Marshalls made no showing of why Williams' discovery requests were unduly burdensome.[18]

With regard to privacy concerns, the supreme court applied the *Hill* test,[19] which places the burden on the party asserting a privacy protection to demonstrate (1) a legally protected privacy interest, (2) an objectively reasonable expectation of privacy in the given circumstances, and (3) a threatened intrusion that is serious.[20] In response, the party seeking the information may raise countervailing interests that disclosure serves, while the party seeking protection may identify feasible alternatives.[21] Here, the court concluded that fellow employees would not be expected to want to conceal their contact information from plaintiffs asserting employment law violations, and that any residual privacy concerns could be protected using *Belaire-West* notices.[22]

The court concluded that the court of appeal's legal analysis was erroneous in assuming that all cases asserting a privacy interest under the California Constitution must be overcome by a "compelling interest."[23] When lesser privacy interests are at stake, as in the case at hand, a more nuanced framework that allows for a balancing of competing considerations is appropriate.[24] The supreme court disapproved of all prior cases to the extent they required a party seeking discovery of private information to always establish a compelling interest.[25]

Conclusion

This is a troublesome decision for employers, as PAGA plaintiffs are now presumptively entitled to compel disclosure of employee information on a statewide level without first establishing that their claims have merit or are susceptible to common proof. PAGA plaintiffs are now even more likely to issue broad discovery requests soon after filing their complaints as a tool for waging litigation and leveraging settlement. This development makes collective wage and hour claims – a problem that is already a difficult and expensive one for California employers – even more problematic.

With this decision, it is more important than ever for California employers to ensure that all their wage and hour practices are compliant with California law.

Aaron Buckley is a partner at Paul, Plevin, Sullivan & Connaughton LLP in San Diego. He represents employers in cases involving wage and hour, discrimination, wrongful termination and other issues. The bulk of Mr. Buckley's practice is devoted to the defense of wage and hour class actions.

Jason Fischbein is an associate at Paul, Plevin, Sullivan & Connaughton LLP in San Diego. He represents public and private employers in all aspects of labor and employment litigation in both state and federal court, including suits for wrongful termination, harassment, discrimination, and wage and hour disputes.

Mary Allain is a third year law student at the University of San Diego School of Law. She is a member of the San Diego Law Review and the Employment and Labor Law Society. Upon graduation from law school, Mary hopes to pursue a career in labor and employment litigation.

---

15 2017 Cal. LEXIS 5124, at *22.

16 2017 Cal. LEXIS 5124, at *22.

17 2017 Cal. LEXIS 5124, at *28.

18 2017 Cal. LEXIS 5124, at *30.

19 Hill v. National Collegiate Athletic Assn., 7 Cal. 4th 1, 35-37 (1994).

20 *Marshalls*, 2017 Cal. LEXIS 5124, at *31.

21 2017 Cal. LEXIS 5124, at *31.

22 2017 Cal. LEXIS 5124, at *33.

23 2017 Cal. LEXIS 5124, at *40. The "compelling interest" test derives from *White v. Davis*, which held that privacy under the California Constitution requires that any intervention into individual privacy must be justified by a compelling interest. *White*, 13 Cal. 3d 757, 775 (1975).

24 2017 Cal. LEXIS 5124, at *38-39.

25 2017 Cal. LEXIS 5124, at *40 n.8.

SUBSCRIPTION QUESTIONS?

If you have any questions about the status of your subscription, please call your Matthew Bender representative, or call our Customer Service line at 1-800-833-9844.

CASE NOTES

DISCOVERY

Williams v. Superior Court, No. S227228, 2017 Cal. LEXIS 5124 (July 13, 2017)

On July 13, 2017, the California Supreme Court, in an action brought under the Private Attorneys General Act of 2004, held that plaintiff's interrogatory in which he requested contact information for fellow California employees sought information within, not exceeding, the legitimate scope of discovery.

Michael Williams ("Williams"), a retail employee, brought a representative action against his employer, Marshalls of CA, LLC ("Marshalls"), under the Private Attorneys General Act of 2004 ("PAGA") [Lab. Code § 2698 et seq.], alleging wage and hour violations. In the course of discovery, Williams sought contact information for fellow California employees. When Marshalls resisted, Williams filed a motion to compel. The trial court granted the motion only for the store where plaintiff worked, but denied it as to every other California store. The trial court conditioned any renewed motion for discovery on Williams sitting for a deposition and showing some merit to the underlying action. Williams filed a petition for writ of mandate to compel the trial court to vacate its discovery order. A California appellate court denied the writ petition, holding that because third-party privacy interests were implicated, plaintiff had to demonstrate a compelling need for discovery by showing that the discovery sought was directly relevant and essential to the fair resolution of the lawsuit. The California Supreme Court granted review to resolve issues of first impression concerning the appropriate scope of discovery in a PAGA action.

The California Supreme Court held that Williams's interrogatory sought information within, not exceeding, the legitimate scope of discovery. The trial court had no discretion to disregard the allegations of the complaint making the instant case a statewide representative action from its inception. The appellate court likewise misread the complaint when it described Williams's claim as "parochial" and thus affording no basis for statewide contact information. Nothing in the nature of PAGA rendered the interrogatory overbroad or justified the trial court's order.

The California Supreme Court further held that Marshalls made no showing of the burden disclosure would impose, and the statutory scheme imposed no good cause requirement for seeking information by interrogatory. Therefore, on the record in the instant case, claims of undue burden did not support the trial court's refusal to permit Williams discovery of statewide employee contact information until he supplied Marshalls with discovery and established both some merit to his personal claim and reason to be certain others had similar claims.

The California Supreme Court finally held that the trial court did not rest its decision to limit discovery on concerns that broader disclosures would inappropriately invade any privacy interests. No discussion of *Hill v. National Collegiate Athletic Assn.*,[1] *Pioneer Electronics (USA), Inc. v. Superior Court*,[2] or the governing balancing test appeared in the hearing transcript or the trial court's order. What discovery the trial court did allow, it conditioned on prior issuance of a *Belaire-West*[3] notice to fellow Marshalls employees. From this, it appeared that the trial court concluded that Marshalls's privacy objections warranted affording Williams's fellow employees notice and the opportunity to opt out from disclosure, but did not support otherwise foreclosing discovery. However, the court stated that this did not mean that the trial court's order could not be affirmed on privacy grounds if indeed such concerns supported denial of discovery. The rule that a judgment may be affirmed on any basis fairly supported by the record applies equally to orders denying further responses to interrogatories. Because it interposed a timely privacy objection, Marshalls could rely on that ground as a basis for urging affirmance. On the merits, however, the privacy argument failed. Considering the *Hill* factors, the court concluded that they could not support a complete bar against disclosure of the information Williams sought.

Accordingly, the California Supreme Court reversed and remanded the appellate court's judgment.

---

[1] 7 Cal. 4th 1, 26 Cal. Rptr. 2d 834, 865 P.2d 633 (1994).

[2] 40 Cal. 4th 360, 53 Cal. Rptr. 3d 513, 150 P.3d 198 (2007).

[3] Belaire-West Landscape, Inc. v. Superior Court, 149 Cal. App. 4th 554, 57 Cal. Rptr. 3d 197 (2007).

References. See, e.g., Wilcox, *California Employment Law*, § 5.40, *Civil Action by Employee or Former Employee to Recover Wages and Penalties* (Matthew Bender).

DISCRIMINATION

Guerrero v. Cal. Dep't of Corr. & Rehab., Nos. 15-17001, 16-16096, 15-17043, 16-16098, 2017 U.S. App. LEXIS 12450 (9th Cir. July 12, 2017).

On July 12, 2017, the U.S. Court of Appeals for the Ninth Circuit, in a Title VII employment discrimination case against the California Department of Corrections and Rehabilitation, held that it was not clearly erroneous to find a prima facie case of disparate impact in employment selection practices because all applicants whose applications were withheld on the basis of one question were Latino, and the employee's statistical expert testified that the expected percentage of Latinos adversely affected was 42.1%.

Defendants, the California Department of Corrections and Rehabilitation ("CDCR") and the California State Personnel Board ("the Personnel Board"), appealed the district court's judgment before the U.S. Court of Appeals for the Ninth Circuit, finding that defendants had violated Title VII by discriminating against Victor Guerrero ("Guerrero"), a Latino job applicant, based on his previous use of an invalid social security number.

The Ninth Circuit held that the district court's findings in the instant case were not clearly erroneous. The general facts were undisputed. All applicants whose applications were withheld on the basis of the one question at issue were Latino. The district court was entitled to credit Guerrero's statistical expert who testified that the expected percentage of Latinos adversely affected was 42.1%. The district court also found that CDCR's statistical expert had conceded that even if two of the seven applicants had their applications withheld in part due to the question, then the question had a statistically adverse effect on Latinos. The court stated that the record supported the district court's conclusion that the question was the deciding factor for at least two of the seven relevant applicants. Given those factual findings, the district court did not err in concluding that Guerrero had established a prima facie case of disparate impact in CDCR's employment selection. Further, the court noted that under the Equal Employment Opportunity Commission's ("EEOC's") four-fifths rule, a selection practice is considered to have a disparate impact if it has a "selection rate for any race, sex, or ethnic group which is less than four-fifths . . . (or eighty percent) of the rate for the group with the highest rate" [29 C.F.R. § 1607.4(D) (2001)]. Applying the EEOC rule to the district court's factual findings, the district court properly concluded that Guerrero had established a prima facie case of disparate impact in its employment selection practices.

Further, the Ninth Circuit observed that the district court found that there was no evidence that CDCR paid anything more than lip service to Guerrero's circumstances under the EEOC factors. The district court further found that CDCR did not actually engage in an individualized assessment of Guerrero and at least three other Latino candidates, and likely misunderstood the answer to the question. The court stated that the district court's findings were supported by the record and were not clearly erroneous.

The Ninth Circuit stated that CDCR's theory that it could not be held liable for disparate impact because of its "bottom line" excellent record of hiring Latinos was precluded by binding Supreme Court and Ninth Circuit precedent [*Connecticut v. Teal*[4] and *Stout v. Potter*[5]].

The Ninth Circuit stated that the district court did not abuse its discretion when it denied CDCR the opportunity to pursue further investigation of Guerrero. CDCR merely hoped that a further investigation would produce additional evidence of wrongdoing that might justify its initial decision not to hire Guerrero, and the district court actually permitted CDCR to complete its background check to the extent it was unfinished. Under these circumstances, the district court did not abuse its wide discretion in managing discovery.

The Ninth circuit court stated that district court erred in imposing liability on the Personnel Board. The Personnel Board did not participate in the hiring decision, nor did it participate in the formulation of the question at issue. It reviewed the case only administratively. In its purely adjudicatory role in the instant case, there was no evidence that it discriminated against or interfered with the CDCR's relationship with Guerrero, nor was the Personnel Board in a position analogous to California in *Association of Mexican-American Educators v. California*,[6] where the state was so entangled with the operation of California's local school districts that individual districts were treated as "state agencies" for purposes of the Eleventh Amendment. Therefore, the Personnel Board could not be liable under a third party disparate impact theory.

---

4 457 U.S. 440, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (1982).

5 276 F.3d 1118 (9th Cir. 2002).

6 231 F.3d 572 (9th Cir. 2000).

The Ninth Circuit vacated the attorney fee award and remanded for the district court to reassess in light of reversal of the judgment against the Personnel Board because the award was based, in part, on the fact that the judgment was entered against all defendants.

Accordingly, the Ninth Circuit affirmed in part, reversed in part, and remanded the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 40.20, *Title VII of Civil Rights Act of 1964* (Matthew Bender).

DUTY OF FAIR REPRESENTATION

Demetris v. Local 514, Transp. Workers Union of Am., Nos. 15-15229, 15-15529, 862 F.3d 799, 2017 U.S. App. LEXIS 11945 (9th Cir. July 5, 2017)

On July 5, 2017, the U.S. Court of Appeals for the Ninth Circuit held that the union did not breach its duty of fair representation by excluding its members from the bulk of the equity distribution because the union's conduct was not arbitrary, discriminatory, or in bad faith.

American Airlines, Inc. and American Eagle Airlines, Inc. (collectively "American") filed for Chapter 11 bankruptcy and negotiated new collective bargaining agreements with Transport Workers Union of America, AFL-CIO ("TWU"), which represented mechanics, fleet service workers, and other laborers. The new agreements cut pension and medical benefits for TWU members and granted the TWU a stake in the equity that would be granted to unsecured creditors in the bankruptcy. TWU and American also negotiated an early separation program whereby more senior union members could choose voluntarily to leave American in exchange for lump-sum cash payments. Plaintiffs (TWU members) who took advantage of the early separation program, brought two consolidated actions under the Railway Labor Act, alleging that TWU breached its duty of fair representation by excluding them from the bulk of the equity distribution. The district court dismissed the actions. TWU members appealed the district court's judgment before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit stated that plaintiffs did not plead that TWU distributed the contested equity through a ministerial or procedural act. Rather, they contended that TWU went through a deliberative decision-making process when it settled grievances and contractual disputes in exchange for the equity. Such process utilized input from committees, experts, and membership. Specifically, plaintiffs alleged that TWU created a committee to develop the equity distribution plan, that TWU retained a financial and economic advisor to help the committee create such plan, that the final plan was presented to TWU membership across the country, and that member feedback was heard by TWU leadership. TWU approved of the final distribution plan through successive votes in both the committee charged with creating the distribution methodology and TWU's governing council. This accorded with the district court's finding that TWU gave careful consideration to its distribution plan. Therefore, the district court correctly held that TWU's equity distribution scheme was not arbitrary. Furthermore, considering that plaintiffs chose to receive substantial early separation payments at a time when it was uncertain what the ultimate value of the equity would be, the court could not say that TWU's subsequent decision to exclude them from the equity was "wholly irrational."

The Ninth Circuit stated that plaintiff pleadings lacked facts from which it could be inferred that TWU discriminated against them on the basis of raw political power. TWU's distribution plan benefited members who died during the bankruptcy, members who were unable to work due to on-the-job injuries, and members who were on leaves of absence for disability, military deployment, or who were absent under the Family and Medical Leave Act. Such members would not be able to vote in any upcoming representation elections, yet TWU distributed equity to them regardless of their political value. Further, absent from plaintiffs' allegations were any overt indications of political animus. Plaintiffs had not directed the court to any statements showing animus towards them by TWU leadership or the committee responsible for drafting the equity plan. Therefore, the district court correctly found that allegations of discrimination were implausible.

Finally, the Ninth Circuit found plaintiffs' allegation of bad faith—that TWU either deliberately misled members regarding the equity or, at the very least, deliberately delayed disclosing the distribution criteria—implausible. Plaintiffs had not alleged that TWU had already formed its plan for the equity before the deadline for choosing early separation. Rather, plaintiffs alleged that TWU did not even form the committee responsible for creating distribution plans until after the deadline for choosing early separation had passed. Such allegations were inconsistent with a nefarious, bad-faith effort to delay the formation of a distribution plan: the committee presumably responsible for such scheme had not even been formed when the allegedly bad-faith acts took place. Even assuming that TWU's letter to membership created a duty to create a plan for the equity within the communicated timeframe, plaintiffs' pleadings could at most support

the inference that TWU's failure to perform such duty constituted negligence. Plaintiffs had also failed to put any internal rule or policy that TWU violated during the equity distribution process, therefore bad faith could not be inferred.

Accordingly, the Ninth Circuit affirmed the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 42.29, *Settlements* (Matthew Bender).

EMPLOYEE RETIREMENT INCOME SECURITY ACT

Lehman v. Nelson, Nos. 15-35414, 15-35457, 15-35696, 2017 U.S. App. LEXIS 12619 (9th Cir. July 14, 2017)

On July 14, 2017, the U.S. Court of Appeals for the Ninth Circuit held that it was necessary to vacate the damages award for withholdings under the formal rehabilitation plan because the complaints did not provide adequate notice to the trustees that the rehabilitation amendment was at issue; the complaints did not satisfy the liberal pleading requirement of Fed. R. Civ. P. 8 because they did not refer to the class's claims under the amendment, nor did they explain the basis of the claims, and they included statements implying that withholdings made pursuant to the rehabilitation plan were permissible.

Richard Lehman ("Lehman") was an electrician based in the Puget Sound area. He was a member of the Puget Sound Electrical Workers Pension Trust, but his profession frequently required him to perform work for employers located outside the jurisdiction of his home pension fund. In recognition of the fact that travelers could receive multiple small pensions or lose pension benefits as a result of their work in other jurisdictions, the trustees of many local funds entered into the Electrical Industry Pension Reciprocal Agreement ("Reciprocal Agreement"). Under the Reciprocal Agreement, travelers could elect to have employer contributions electronically transferred to a designated home pension fund. The IBEW Pacific Coast Pension Fund (the "Pacific Coast Fund") was a signatory to the Reciprocal Agreement. Article 5 of the Pacific Coast Fund Pension Plan ("the Pension Plan") incorporated provisions from the Reciprocal Agreement into the Plan.

In May 2008, the Trustees of the Pacific Coast Fund learned that the fund would soon enter "critical status" under the Pension Protection Act of 2006. In response, the Trustees amended the Pacific Coast Fund Pension Plan twice—in Amendments 14 and 24—and began withholding at least $1.00 per hour from all employer contributions to improve the Plan's funding status. Lehman filed a putative class action against the Trustees under the Employee Retirement Income Security Act of 1974 ("ERISA"). Lehman alleged that the Trustees breached the Pension Plan's terms, violated ERISA §§ 204 and 305, and breached their fiduciary duties by withholding $1.00 per hour from his employer contributions without providing an accrued benefit.

The U.S. Court of Appeals for the Ninth Circuit disagreed with the district court's conclusion that the parties fully litigated issues related to Amendment 24. The court stated that the trustees were correct that the complaint focused almost exclusively on the $1.00 withholding under Amendment 14, and only vaguely referred to any withholding under Amendment 24. The complaints did not provide adequate notice that Lehman sought to recover contributions withheld under Amendment 24, particularly the withholding of increased employer contributions under the default and alternative schedules in the Rehabilitation Plan. Since the class raised the issue of contributions withheld under Amendment 24's Rehabilitation Plan for the first time in their second motion to enforce or clarify the district court's summary judgment order, and the district court's order did not analyze whether the Trustees abused their discretion by interpreting Amendment 24 to apply to contributions transferred out of the Pacific Coast Fund, the district court erred by awarding damages for withholdings under the Rehabilitation Plan.

Further, the Ninth Circuit stated that the class did not maintain that they were entitled to the surcharge payments withheld under Amendment 24 and the district court did not wrestle with the interaction between the Pension Protection Act's requirements, which were aimed at shoring up plans that enter critical status, and Amendment 24, which purported to increase the "pass through" employer contributions for travelers.

The Ninth Circuit stated that Amendment 14 could be read consistently with Article 5 if it only applied to transfers into the Pacific Coast Fund and did not apply to the "pass through" payments transferred out of the Pacific Coast Fund to the travelers' home funds. Therefore, the district court correctly ordered summary judgment to Lehman and awarded damages to the class for all contributions withheld under Amendment 14.

The Ninth Circuit observed that the district court agreed with counsel for the Reciprocal Administrator, who opined that withholding traveler contributions violated the Reciprocal Agreement, that the participating fund merely acted as a conduit for money transferred to the correct fund, and concluded that restricting

participating funds to impose withholdings only on reciprocity contributions transferred in prevented such double taxation while still allowing participating funds to protect their financial integrity. The district court did not defer to the Reciprocal Administrator by agreeing with the concern about double taxation. The district court did not determine that Lehman could enforce the terms of the Reciprocal Agreement as a stand-alone contract. Rather, the district court ruled that Lehman could enforce the terms of the Pension Plan, which in turn incorporated aspects of the Reciprocal Agreement. Nothing in the Reciprocal Agreement changed Lehman's rights to enforce the terms of the Pension Plan under ERISA § 502(a)(1)(B) [*see* 29 U.S.C. § 1132(a)(1)(B)]. Therefore, Lehman had the right to enforce Article 5, which incorporated the Reciprocal Agreement.

The Ninth Circuit observed that the Trustees enacted Amendment 14 in May 2008 based on a report from the plan's actuary that stated that the plan's funding levels were getting perilously close to critical status level under the Pension Protection Act. The Pacific Coast Fund's actuary certified that the Pension Plan was in critical status for the plan year beginning April 1, 2009. Shortly thereafter, the Trustees adopted Amendment 24, which contained the formal Rehabilitation Plan and default and alternative schedules. Because certification is the statutory trigger for ERISA § 305's rehabilitation plan requirement, the district court erred by describing Amendment 14 as a "default schedule" and applying ERISA § 305 to Amendment 14.

The Ninth Circuit stated that since the order awarding damages with respect to Amendment 24 was reversed, the court also vacated the attorneys' fees award.

Accordingly, the Ninth Circuit affirmed in part and reversed in part, and remanded the district court's judgment.

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

FALSE CLAIMS ACT

United States ex rel. Campie v. Gilead Scis., No. 15-16380, 2017 U.S. App. LEXIS 12163 (9th Cir. July 7, 2017).

On July 7, 2017, the U.S. Court of Appeals for the Ninth Circuit has held that relators pleaded sufficient factual allegations to state a claim under the False Claims Act such that dismissal for failure to state a claim was unwarranted.

The instant case involved the allegations under False Claims Act ("Act") [31 U.S.C. §§ 3729–33] that Gilead Sciences, Inc. ("Gilead") made false statements about its compliance with Food and Drug Administration ("FDA") regulations regarding certain HIV drugs, resulting in the receipt of billions of dollars from the government. Jeff and Sherilyn Campie (collectively, "relators"), two former Gilead employees, alleged that these noncompliant drugs were not eligible to receive payment or reimbursement and, therefore, any claims presented to the government for payment were false under the Act. Relators further alleged that Gilead violated the Act when it fired Jeff, who discovered and ultimately reported the violations. The district court dismissed relators' claims under Fed. R. Civ. P. 12(b)(6). It did so before the U.S. Supreme Court decided *Universal Health Servs. v. United States ex rel. Escobar.*[7]

The U.S. Court of Appeals for the Ninth Circuit held that relators stated a plausible claim that Gilead's claims seeking payment for noncompliant drugs were a basis for liability under the Act. Considering the four elements of Act's liability, relators adequately satisfied the falsity requirement under a theory of factually false certification. Gilead committed factually false certification by supplying "misbranded" goods. Specifically, Gilead represented to the FDA that its active ingredients had been manufactured in approved facilities that had been registered therewith. Relators alleged false statements permeating the regulatory process. They alleged that Gilead mislabeled and misbranded nonconforming drugs and misrepresented its compliance with FDA regulations by omitting critical information. They alleged that Gilead established policies and practices to violate the FDA's regulatory requirements and allege specific instances of such violations, such as altering inventory codes, and mislabeling or altering shipping and tracking information. Moreover, they alleged that Gilead made false statements regarding test results in order to get FDA approval and thus become eligible for government funds. Because Gilead committed either factually false or impliedly false certification through its representations to the FDA and labeling of its products, each claim was fraudulent even if false representations were not made therein.

The Ninth Circuit held that scienter element was adequately pled. Relators alleged a false statement or course of conduct made knowingly and intentionally. They alleged that Gilead took internal actions perpetuating

[7] 136 S. Ct. 1989, 195 L. Ed. 2d 348 (2016).

its fraud: altering test results, batch numbers, and inventory control numbers, and representing that nonapproved emtricitabine came from approved facilities. They also alleged that Gilead established practices to deceive the government, and repeatedly took actions to hide its fraud. In other words, relators alleged that Gilead provided statements to the government that were "intentional, palpable lies," made with "knowledge of the falsity and with intent to deceive."

The Ninth Circuit held that relators alleged more than the mere possibility that the government would be entitled to refuse payment if it were aware of the violations sufficiently pleading materiality at this stage of the case.

The Ninth Circuit held that the second amended complaint sufficiently alleged facts showing that Campie had an objectively reasonable, good faith belief that Gilead was possibly committing fraud against the government. Further, the second amended complaint alleged that Campie made clear that he expected Gilead to stop its deceptive practices and threatened to inform the FDA if Gilead continued its fraudulent conduct. Second, Campie alleged that he was "selectively circumvented" and "excluded" from the regulatory review process in which he was meant to take part, was told certain regulatory compliance actions, such as issuing a quarantine, were "not in his job description," and had conversations outside of his chain of command regarding his concerns. The second amended complaint alleged sufficient facts to show Gilead knew of Campie's protected activity.

Also, the Ninth Circuit stated that it was sufficient at the pleading stage for the plaintiff to simply give notice that he believed defendant terminated him because of his investigation into the practices specified in the complaint. Although the district court failed to address this requirement because it found the operative complaint insufficient under the other two requirements, such a showing had been made in the instant case.

In sum, the Ninth Circuit concluded that the retaliation claim included in the second amended complaint contained sufficient facts to survive dismissal under Rule 12(b)(6).

Accordingly, Ninth Circuit reversed and remanded the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 60.03, *Statutory Prohibitions and Limitations on Employer's Right to Terminate or Discipline Employees* (Matthew Bender).

LEAVES OF ABSENCE

Chatila v. Scottsdale Healthcare Hosps., No. 16-15244, 2017 U.S. App. LEXIS 12802 (9th Cir. July 17, 2017)

On July 17, 2017, the U.S. Court of Appeals for the Ninth Circuit held that the district court properly granted summary judgment in favor of the hospital on the claimant's Americans with Disabilities Act and Rehabilitation Act of 1973 claims because the claimant failed to raise a triable issue of fact that the hospital's nondiscriminatory reason for its alleged adverse employment action was pretextual.

Nadil Chatila ("Chatila") appealed before the U.S. Court of Appeals for the Ninth Circuit the summary judgment in favor of Scottsdale Healthcare Hospitals (the "Hospital") on her claims under the Family and Medical Leave Act ("FMLA"), Americans with Disabilities Act ("ADA"), and Rehabilitation Act of 1973 ("Rehab Act").

The Ninth Circuit affirmed the grant of summary judgment on the ADA and Rehab Act claims because Chatila failed to raise a triable issue of fact that the Hospital's nondiscriminatory reason for its alleged adverse employment action was pretextual. During the last three months of her employment as a pharmacy technician, Chatila made six medication errors, at least one of which would have threatened the life of a patient had the medication been administered. Chatila failed to identify any similarly situated Hospital employee without Chatila's disability who also made life threatening medication errors but did not suffer a similar adverse employment action. However, the court stated that Chatila raised triable issues of fact regarding whether she requested FMLA leave before her purported resignation and whether the Hospital interfered with her right to take leave under the FMLA.

The Ninth Circuit stated that Chatila did not expressly raise a hostile work environment cause of action in her original or amended complaint. Therefore, the district court did not err when it refused to consider Chatila's argument that she pleaded a separate hostile work environment claim.

Accordingly, the Ninth Circuit affirmed in part, reversed in part, and remanded the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 8.11[2], *Family and Medical Leave Act (FMLA)* (Matthew Bender).

OVERTIME COMPENSATION

McKeen-Chaplin v. Provident Sav. Bank, No. 15-16758, 862 F.3d 847, 2017 U.S. App. LEXIS 11950 (9th Cir. July 5, 2017)

On July 5, 2017, the U.S. Court of Appeals for the Ninth Circuit has held that because the mortgage underwriters' primary duty did not relate to the bank's management or general business operations, the administrative employee exemption under 29 U.S.C. § 213(a)(1) and 29 C.F.R. § 541.200(a) did not apply, and the underwriters were entitled to overtime compensation.

On behalf of herself and a class of mortgage underwriters, Gina McKeen-Chaplin ("McKeen-Chaplin") brought the instant action seeking overtime compensation under Fair Labor Standards Act ("FLSA"). The district court conditionally certified an opt-in class of current and former mortgage underwriters at Provident. Initially, the district court denied cross motions for summary judgment and set the case for trial. But later, on the parties' joint motion for reconsideration, the court concluded that the underwriters qualified for the administrative exemption, based on finding that their primary duty included "quality control" or similar activities directly related to Provident's general business operations, and thus the district court granted summary judgment in favor of Provident. McKeen-Chaplin appealed the district court's judgment before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit noted that in order to determine whether employees qualify for the administrative exemption, the Secretary of Labor has formulated a "short duties test." A qualifying employee must (1) be compensated not less than $455 per week; (2) perform as her primary duty "office or non-manual work related to the management or general business operations of the employer or the employer's customers"; and (3) have as her primary duty "the exercise of discretion and independent judgment with respect to matters of significance." The court stated that it was undisputed that the salary requirement for the administrative exemption was satisfied. With respect to the second requirement, the court stated that the U.S. Court of Appeals for the Second Circuit's analysis in *Davis v. J.P. Morgan Chase & Co.*[8] that "the job of underwriter falls under the category of production rather than of administrative work" should apply. It also stated that Provident's mortgage underwriters did not decide if Provident should take on risk, but instead assessed whether the particular loan at issue fell within the range of risk that Provident had determined it was willing to take. Assessing the loan's riskiness according to relevant guidelines was quite distinct from assessing or determining Provident's business interests.

The Ninth Circuit concluded that where a bank sells mortgage loans and resells the funded loans on the secondary market as a primary font of business, mortgage underwriters who implement guidelines designed by corporate management, and who must ask permission when deviating from protocol, are most accurately considered employees responsible for production, not administrators who manage, guide, and administer the business.

The Ninth Circuit observed that the district court concluded that Provident underwriters performed work that related to "quality control," such that it constituted "work directly related to management or general business operations," within the meaning of 29 C.F.R. § 541.201(b). However, the court stated that this was a legal conclusion as to the underwriters' quality control function that was not supported by the record evidence. The district court's opinion did not mention quality control, yet it made the legal conclusion that Provident's underwriters qualified for the administrative exemption primarily because of their quality control duties, which was not supported by the record. Furthermore, the district court made no finding as to the legal significance of the quality control functions that the record established were in place at Provident.

The Ninth Circuit observed that Provident's contention that because the underwriters did not work on a manufacturing production line and did not sell, they could not fall on the production side of the administrative-production dichotomy, failed to take into account the mortgage underwriters' role within Provident. Indeed, to permit the administrative exemption of an assembly line worker who checks whether a particular part was assembled properly—simply because that role bears a resemblance to quality control—would run counter to the essence of FLSA. But even if mortgage underwriters could not be cast by analogy as workers in an assembly line, the administrative-production dichotomy is not a perfectly determinative one, and the law requires that the administrative exemption be narrowly construed against the employer.

The Ninth Circuit finally concluded that the mortgage underwriters were essential to Provident business, as are loan officers and many others who do not qualify for FLSA's administrative exemption. However, the

[8] 587 F.3d 529 (2d Cir. 2009).

question was not whether an employee was essential to the business, but rather whether her primary duty went to the heart of internal administration—rather than marketplace offerings. Mortgage underwriters at Provident were not administrators or corporate executives; their tasks were related to the production side of the enterprise. Therefore, the administrative employee exemption under 29 U.S.C. § 213(a)(1) and 29 C.F.R. § 541.200(a) did not apply and they were entitled to overtime compensation.

Accordingly, the Ninth Circuit reversed and remanded the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 3.11[1][b], *General Overtime Compensation Requirements* (Matthew Bender).

RETALIATION

Bonni v. St. Joseph Health System, No. G052367, 2017 Cal. App. LEXIS 645 (July 26, 2017)

On July 26, 2017, a California appellate court has held that a surgeon's whistleblower retaliation claim under Health & Safety Code § 1278.5 should not have been dismissed under Code Civ. Proc. § 425.16 because it did not arise from protected activity.

Aram Bonni ("Bonni"), a surgeon, sued St. Joseph Hospital of Orange ("St. Joseph"), Mission Hospital Regional Medical Center ("Mission"), and others (collectively, "defendants") for retaliation under Health & Safety Code § 1278.5 ("the whistleblower statute"). Bonni alleged that defendants retaliated against him for his whistleblower complaints by summarily suspending his medical staff privileges and conducting hospital peer review proceedings. In response to Bonni's filing of his first amended complaint ("FAC"), defendants filed a special motion under Code Civ. Proc. § 425.16 ("the anti-SLAPP statute") to strike Bonni's retaliation cause of action, asserting that his claim arose from the protected activity of hospital peer review proceedings. The trial court granted defendants' anti-SLAPP motion as to both St. Joseph and Mission. The court determined, first, that defendants had met the first prong of the anti-SLAPP statute's two-part test, which requires a moving defendant to show that the plaintiff's claim arose from activity protected under that statute [*Equilon Enterprises v. Consumer Cause, Inc.*[9]]. The court then proceeded to the second prong of the anti-SLAPP test, which requires a plaintiff to show a probability of prevailing on his or her claim. The trial court concluded that Bonni's proof failed as to St. Joseph and Mission. Bonni appealed the trial court's judgment before a California appellate court.

The California appellate court stated that defendants' motion to strike was premised on their somewhat ipse dixit notion that because of the "critical public interest in patient safety," and "the courts'" overriding goal of "protecting the health and welfare of the people of California," the peer review decision, and the statements leading up to that decision were "an inherently communicative process based on free speech and petitioning rights," and "should thus be subject to a special motion to strike." However, merely because a process was communicative did not mean that Bonni's claim necessarily arose from those communications, and merely because the peer review process serves an important public interest does not make it subject to the anti-SLAPP statute where the process is employed for a retaliatory purpose. Bonni did not allege any specific "written or oral statement or writing" which allegedly formed the basis of his retaliation claim. Instead, he alleged that an abusive peer review process was initiated by the hospitals because he made complaints about unsafe conditions at the hospitals. Thus, his claim was not based merely on defendants' act of initiating and pursuing the peer review process, or on statements made during those proceedings—but on the retaliatory purpose or motive by which it was undertaken.

The California appellate court concluded that defendants' alleged retaliatory motive in suspending plaintiff's staff privileges and subjecting him to a lengthy and allegedly abusive peer review proceeding was the basis on which liability was asserted. The alleged liability did not arise from the statements made during those proceedings. The trial court erred in ruling otherwise.

Accordingly, the California appellate court reversed the trial court's order.

References. See, e.g., Wilcox, *California Employment Law*, § 60.03, *Statutory Prohibitions and Limitations on Employer's Right to Terminate or Discipline Employees* (Matthew Bender).

TERMINATION

Khoury v. Regents of the Univ. of Cal., No.15-56088, 2017 U.S. App. LEXIS 12085 (9th Cir. July 6, 2017)

On July 6, 2017, the U.S. Court of Appeals for the Ninth Circuit has held that the professor failed to raise a genuine issue of material fact at the pretext stage on the university's decision to terminate his faculty

[9] 29 Cal. 4th 53, 124 Cal. Rptr. 2d 507, 52 P.3d 685 (2002).

position and deny him emeritus status as the professor had the benefit of a neutral hearing and decision maker, unaffected by any retaliatory bias.

After conducting an internal investigation, the Regents of the University of California ("Regents") terminated Sarkis Khoury's ("Khoury's") employment as a professor of finance at the University of California-Riverside's Anderson Graduate School of Management and denied him emeritus status. Khoury sued the Regents, arguing that the investigation and the subsequent actions taken by the Regents violated Title VII of the Civil Rights Act of 1964 ("Title VII") [42 U.S.C. §§ 2000e-2(a) and 2000e-3(a)]. The Regents countersued Khoury, alleging that Khoury had defrauded them by failing to disclose money earned from his undisclosed and unauthorized side business and by failing to disclose money earned from unauthorized teaching at a foreign university while on a sabbatical. The district court entered summary judgment in favor of the Regents on Khoury's Title VII claims, except for his claim that the initial investigation was in retaliation for protected speech. That claim was tried before a jury, which rejected it. Khoury unsuccessfully sought a judgment as a matter of law ("JMOL") on the Regents' counterclaims. The jury found in favor of the Regents on the fraudulent concealment counterclaim, awarding $14,500 in damages. Finally the district court approved the Regents' application to tax costs and ordered Khoury to pay $19,691.47. Khoury appealed the district court's judgment before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit ruled that when considering a motion for summary judgment on a Title VII retaliation claim, courts follow the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*.[10] Under this framework, an employee must set forth a prima facie case of retaliation. To do this, the employee must demonstrate that (1) he was engaged in a protected activity under Title VII, (2) the employer subsequently took an adverse employment action, and (3) a causal link exists between the two events. The Ninth Circuit stated that the district court correctly found that Khoury failed to raise a genuine issue of material fact at the pretext stage on the Regents' decision to terminate his faculty position and deny him emeritus status. The Regents terminated Khoury after a disciplinary hearing involving two distinct sets of charges. The first set of charges involved Khoury's actions regarding the university's hiring of a tenure-track faculty member. The second set of charges involved Khoury's alleged harassment of university staff, his unauthorized side business, and his unauthorized outside teaching. The Regents' decision to terminate Khoury and deny him emeritus status stemmed solely from the second set of charges. On this second set of charges, Khoury had the benefit of a neutral hearing and decision maker, unaffected by any retaliatory bias that allegedly gave rise to the first set of charges. Under these circumstances, he failed to meet his burden at the final stage of the *McDonnell Douglas* framework on the termination issue.

Further, the Ninth Circuit stated that the district court correctly denied Khoury's JMOL motion as untimely because it was not properly considered as a Fed. R. Civ. P. 50 motion. Khoury's JMOL motion did not argue that the Regents failed to present sufficient evidence to prove their counterclaims. Instead, he argued that the Regents should be barred from bringing their counterclaims under theories of collateral estoppel and judicial exhaustion.

Finally, the Ninth Circuit held that Khoury's appeal of the taxing of costs rested entirely on his contention that the district court should have granted his JMOL motion with respect to the Regents' counterclaims. Since the judgment on the counterclaims was upheld, the district court's taxing of costs was also affirmed.

Accordingly, the Ninth Circuit affirmed the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 60.03, *Statutory Prohibitions and Limitations on Employer's Right to Terminate or Discipline Employees* (Matthew Bender).

VICARIOUS LIABILITY

Alvarez v. Seaside Transportation Services LLC, No. B275980, 2017 Cal. App. LEXIS 630 (July 20, 2017)

On July 20, 2017, a California appellate court held that defendants provided sufficient evidence to trigger the Privette presumption because the undisputed facts showed that plaintiff's employer was responsible for its employees' safety on the job.

Bernie Alvarez ("Alvarez") was injured at work when he drove a maintenance van into a shipping container. Pacific Crane Maintenance Company ("PCMC"), Alvarez's employer, had been hired by Evergreen Container Terminal ("Evergreen") to perform maintenance work at a marine container terminal. Alvarez sued defendants, Evergreen and two of its contractors, Seaside Transportation Services, LLC ("Seaside") and

---

[10] 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (*McDonnell Douglas*).

Ports America, alleging general negligence. Defendants moved for summary judgment arguing that they were not liable for Alvarez's workplace injuries under the *Privette*[11] doctrine. The trial court granted summary judgment, holding that defendants had satisfied their burden to show that there was no triable issue of material fact and therefore were entitled to summary judgment as a matter of law, pursuant to the *Privette* doctrine. Alvarez appealed the district court's judgment before a California appellate court.

The California appellate court ruled that the *Privette* line of decisions establishes a presumption that an independent contractor's hirer "delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees." The *Privette* presumption affects the burden of producing evidence. However, a presumption affecting the burden of producing evidence does not arise until the foundational facts are established. The court stated that defendants provided the requisite factual foundation for the *Privette* presumption to apply. Their separate statement presented evidence that Evergreen hired Alvarez's employer to perform work at the Evergreen Terminal, that the other defendants—Seaside and Ports America were also hired by Evergreen to perform work there and that Alvarez was injured while working at the site. This evidence was sufficient to establish that the *Privette* presumption applied and, therefore, shifted the burden to Alvarez to raise a triable issue of fact.

The California appellate court further stated that Alvarez also presented no evidence that defendants were "actively involved in" or "asserted control over" "the manner of performance of the contracted work." There was no evidence that any of the defendants promised PCMC that they would comply with the Marine Safety Code. The agreement between PCMC and Evergreen, for example, only tasked PCMC with undertaking certain safety measures; it did not provide that Evergreen would retain control of any safety conditions at the worksite. Rather, the undisputed facts showed that PCMC was responsible for its employees' safety on the job. Alvarez did not raise a triable issue of fact suggesting either that defendants exercised the power to control the manner of performance of Alvarez's work or that they promised (and failed) to undertake any safety measures at the worksite. Therefore, Alvarez did not meet his burden on summary judgment of showing that defendants retained control over safety conditions at the worksite in a manner that affirmatively contributed to his injuries. In sum, the court concluded that defendants provided sufficient evidence to trigger the *Privette* presumption and Alvarez did not raise a triable issue of fact.

Accordingly, the California appellate court affirmed the trial court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 20.44[2], *Employees of Independent Contractor; Peculiar Risk Doctrine; Nondelegable Duty Doctrine* (Matthew Bender).

[11] Privette v. Superior Court, 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721 (1993) (*Privette*).

WORKERS' COMPENSATION

Baker v. Workers' Comp. Appeals Bd. & Jim Guerrero, No. H043291, 2017 Cal. App. LEXIS 662 (July 28, 2017)

On July 28, 2017, a California appellate court has held that the benefits of the Subsequent Injuries Benefits Trust Fund commence at the time an employer's obligation to pay permanent disability benefits begins.

The Subsequent Injuries Benefits Trust Fund ("SIBTF") pays a portion of the permanent disability compensation owed to a qualifying worker [Lab. Code § 4751]. Jim Guerrero ("Guerrero") applied for workers' compensation benefits after he was injured in the course of his employment as a construction laborer. He received temporary disability benefits for the periods of November 18, 2005—December 4, 2005, and January 17, 2006—June 15, 2006. His entitlement to permanent disability benefits was contested, but ultimately settled in December 2014. The resulting compromise and release agreement provided that Guerrero would receive a lump sum in satisfaction of his employer's obligation to pay permanent disability benefits, less the amount of permanent disability payments his employer had advanced during the pendency of the proceedings. Guerrero also applied for benefits from the SIBTF, asserting that a prior medical condition when combined with the work injury left him sufficiently disabled to meet the eligibility requirements for SIBTF payments. The SIBTF contested his entitlement to benefits. In October 2015, a workers' compensation administrative law judge ("ALJ") ordered the SIBTF to pay, finding that Guerrero's preexisting condition combined with the subsequent injury left him totally and permanently disabled. The ALJ fixed the beginning date for SIBTF payments as June 16, 2006, the day after temporary disability payments ceased. The SIBTF contended that its obligation should not begin until January 26, 2011 (the date when Guerrero's injuries were deemed permanent and stationary), but the ALJ rejected this argument and

ordered that SIBTF benefits commence at the same time the law required the employer to begin making permanent disability payments. The SIBTF petitioned the Workers' Compensation Appeals Board ("Appeals Board") for reconsideration of the award, and the Appeals Board denied the petition. The SIBTF then petitioned a California appellate court for a writ of review on the issue of when its payments to a qualifying worker must commence.

The California appellate court stated that giving the plain language of § 4751 a common sense meaning, it read that the Legislature's mandate that SIBTF benefits (when an employee qualifies for them) "shall be paid in addition to" permanent disability benefits to mean that the SIBTF is required to commence payments at the same time as an employer's obligation to make permanent disability payments begins. To hold otherwise would contravene the requirement of § 4751 that whenever an employee qualifies for SIBTF payments, they shall be paid "in addition to" the permanent disability payments made by the employer. The trigger for the start of SIBTF benefits must be the qualifying employee's entitlement to permanent disability payments from the employer. Once permanent disability payments are required for an employee who also qualifies for SIBTF benefits, the SIBTF is obligated to pay benefits "in addition to" those permanent disability benefits.

The California appellate court further noted that Lab. Code § 4656 was amended to provide for a 104-week cap on temporary disability benefits. Under the amended statute, temporary disability payments are now payable for a maximum of 104 weeks. To avoid a gap in payments to an injured worker whose medical condition is not deemed permanent until after the 104-week maximum temporary disability period, the Legislature concurrently amended Lab. Code § 4650 to provide that permanent disability payments must commence when temporary disability payments stop, even if the injury has not yet been deemed permanent and stationary. The overall effect of these amendments was to change the timing for permanent disability payments to begin, from when the injury has been declared permanent and stationary (under the former version of the statutes) to when temporary disability payments cease (under the current version). As a result, the timing for the start of SIBTF benefits, which under Lab. Code § 4751 must be paid "in addition to" permanent disability benefits, necessarily also changed.

The California appellate court stated that the status quo for payment of SIBTF benefits has not changed. Such benefits were previously payable at the time permanent disability payments commenced, and they remain payable at the time permanent disability payments commence. The fact that the Legislature chose not to amend Lab. Code § 4751 when it changed the time for payment of permanent disability benefits actually weakened SIBTF's argument. Had the Legislature intended for SIBTF benefits to be payable only upon a declaration of permanent and stationary status rather than being paid in addition to permanent disability payments from the employer (as the statute reads), it could have changed Lab. Code § 4751 to so provide—but it did not.

The California appellate court noted that once it is determined that a worker's permanent and stationary injury qualifies the worker for SIBTF benefits, the proper accrual date for those benefits is the date the employer's obligation to pay permanent disability began. Therefore, the court concluded that the start date for SIBTF benefits in the instant case was correctly determined.

Accordingly, the California appellate court affirmed the Appeals Board's decision.

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

Chugach Mgmt. Servs. v. Jetnil, No. 15-72873, 2017 U.S. App. LEXIS 13139 (9th Cir. July 21, 2017)

On July 21, 2017, the U.S. Court of Appeals for the Ninth Circuit ruled that the zone of special danger doctrine would apply to the local nationals who are employed on a Defense Base Act-covered contract in their home country in the same way as it would apply to a foreign national.

Edwin Jetnil ("Jetnil"), a citizen of the Republic of the Marshall Islands ("RMI"), was employed by a U.S. government contractor, Chugach Management Services, when he was injured. On February 3, 2009, Jetnil filed his first report of injury with the U.S. Department of Labor's (DOL's) Office of Workers' Compensation Program ("OWCP"). Jetnil described the injury and reported the injury as compensable under the Defense Base Act ("DBA"). On February 20, 2009, Chugach filed a notice of controversion of right to compensation with the OWCP, stating that it respectfully controverted Jetnil's claim for disability benefits, as the injury leading to claimant's present status did not arise within the scope and the course of his employment, so the claim was not compensable under the DBA. The case was

referred to an administrative law judge ("ALJ"). The ALJ issued a decision and order on July 1, 2014, making multiple factual determinations and awarding medical benefits and compensation for total temporary disability benefits to Jetnil, pursuant to the DBA, beginning from January 15, 2009.

Though Jetnil's injury was not directly caused by his employment, the ALJ, relying on *O'Leary v. Brown-Pacific-Maxon, Inc.*,[12] determined that the unconventional conditions of Jetnil's employment placed him in an environment with unique risks, which created a zone of special danger that led to his amputation. The Benefits Review Board ("BRB") affirmed the ALJ. The BRB rejected petitioners' argument that as a matter of law the zone of special danger doctrine may never be applied in cases involving local nationals who are injured while working in their home countries. The BRB reasoned that the text of the DBA does not distinguish between local and foreign nationals and that the Supreme Court and Congress have not excluded foreign nationals even though both institutions had the opportunity. Instead, the BRB concluded that "the application of the zone of special danger doctrine" depends on a factual determination; the doctrine "may or may not be applicable to a local national working for a DBA employer in his home country, depending on the specific circumstances presented by the individual case." In applying the zone of special danger doctrine to Jetnil, the BRB concluded that substantial evidence supported the ALJ's conclusion that Jetnil's injury arose out of the reasonable and foreseeable risks associated with the obligations and conditions of Jetnil's employment. Therefore, the BRB stated that Jetnil was entitled to the awarded benefits. Petitioners petitioned the BRB's decision before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit held that the zone of special danger doctrine can apply to local nationals working in their home countries. The ALJ and BRB did not commit legal error by applying the zone of special danger doctrine to Jetnil.

The Ninth Circuit concluded that substantial evidence supported the ALJ and BRB's determination that Jetnil's injury was compensable because it arose out of the conditions of his employment and occurred while he was engaged in a reasonable and foreseeable activity. The court stated that the ALJ's factual determinations were largely undisputed. Jetnil would not have been on Gagan Island but for his employment. Gagan Island is remote, accessible only by boat, and accessible only with the permission of Chugach. Jetnil traveled to Gagan Island on a boat secured by Chugach, and Chugach provided housing and food for Jetnil during his four-day stay on the island. Moreover, Jetnil was injured while engaging in the traditional Marshallese activity of reef fishing. Given that the activity was common in RMI, it was foreseeable and reasonable that Jetnil would reef fish during his time off.

The Ninth Circuit stated that the circumstances under which other courts had applied the zone of special danger doctrine were similar to the circumstances of the instant case. However, the court also stated that the situation presented in the instant case clearly resembled cases like *O'Leary*, *Kalama*,[13] *Self*,[14] and *Takara*,[15] not cases like *Kirkland*[16] and *Gillespie*.[17] Therefore, the court concluded that the BRB and ALJ decision was not contrary to the law, irrational, or unsupported by substantial evidence. Also, it held that substantial evidence supported the ALJ and BRB decision and the award of temporary total disability benefits.

Accordingly, the Ninth Circuit denied the petition for review.

References. See, e.g., Wilcox, *California Employment Law*, § 5.40, *Requirement That Injury Arise Out of and in Course of Employment* (Matthew Bender).

---

[12] 340 U.S. 504, 71 S. Ct. 470, 95 L. Ed. 483 (1951) (*O'Leary*).

[13] Kalama Servs. v. Dir., OWCP, 354 F.3d 1085 (9th Cir. 2004).

[14] Self v. Hanson, 305 F.2d 699 (9th Cir. 1962).

[15] Takara v. Hanson, 369 F.2d 392 (9th Cir. 1966).

[16] Kirkland v. Dir., OWCP, 925 F.2d 489 (1991).

[17] Gillespie v. Gen. Elec. Co., 21 BRBS 56 (1988).

CALENDAR OF EVENTS

2017

Sept. 5	CALBAR Labor & Employment Law Section Webinar: *DFEH's New Workplace Harassment Guide*	12:00 PM - 1:00 PM
Sept. 7	NELI: *Americans with Disabilities Act Workshop*	Luxe Sunset Boulevard Hotel 11461 Sunset Boulevard, Los Angeles, CA 90049 (310) 476-6571
Sept. 8	NELI: *California Disability Workshop*	Luxe Sunset Boulevard Hotel 11461 Sunset Boulevard, Los Angeles, CA 90049 (310) 476-6571
Sept. 28	CALBAR Labor & Employment Law Section Webinar: *The Aging Population of Lawyers: Competency, Impairments, Accommodations and Transitions*	12:00 PM - 1:00 PM
Oct. 6	CALBAR Workers' Compensation Section Webinar, *Workers' Compensation Specialization Exam Essay (1-4) Prep Series: Part 1 of 3*	12:00 PM - 1:00 PM
Oct. 7	CALBAR Workers' Compensation Section, *6th Annual Rating Extravaganza*	The State Bar of California, 845 S Figueroa Street Los Angeles, CA (415) 538-2256.
Oct. 13	CALBAR Workers' Compensation Section Webinar, *Workers' Compensation Specialization Exam Essay (5-8) Prep Series: Part 2 of 3*	12:00 PM - 1:00 PM
Oct. 14	CALBAR Litigation Section, *2017 Litigation Summit*	Marriott Union Square 480 Sutter Street San Francisco, CA 94108 (415) 538-2546

Oct. 20	CALBAR Workers' Compensation Section Webinar, *Workers' Compensation Specialization Exam Essay (9-12) Prep Series: Part 3 of 3*	12:00 PM - 1:00 PM
Oct. 25	NELI: *Affirmative Action Workshop*	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Oct. 26-27	NELI: *Affirmative Action Briefing*	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Nov. 7	NELI: *Americans with Disabilities Act Workshop*	Luxe Sunset Blvd. Hotel 11461 Sunset Boulevard Los Angeles, CA 90049 (310) 476-6571
Nov. 8	NELI: *California Disability Law Workshop*	Luxe Sunset Blvd. Hotel 11461 Sunset Boulevard Los Angeles, CA 90049 (310) 476-6571
Nov. 18	CALBAR Workers' Compensation Section, *Workers' Compensation Section Fall Conference*	Hyatt Regency Los Angeles International Airport 6225 West Century Blvd. Los Angeles, CA 90045 (415) 538-2256
Nov. 30-Dec. 1	NELI: *Employment Law Conference*	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000

2018

Mar. 25-28	NELI: *Employment Law Briefing*	Renaissance Indian Wells Resort & Spa 44-400 Indian Wells Lane Indian Wells, CA 92210 (760)773-4444

Apr. 12-13	NELI: *ADA & FMLA Compliance Update*	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
July 11	NELI: *California Employment Law Update*	Catamaran Resort 3999 Mission Boulevard San Diego, CA 92109 (858) 488-1081
July 12-13	NELI: *Employment Law Update*	Catamaran Resort 3999 Mission Boulevard San Diego, CA 92109 (858) 488-1081

EDITORIAL BOARD
Contact Information

COLUMNISTS
Contact Information

Eye on the Supreme Court

Brian M. Ragen
Mitchell Silberberg & Knupp LLP
Los Angeles
byr@msk.com

Wage & Hour Advisor

Aaron Buckley
Paul, Plevin, Sullivan & Connaughton LLP
San Diego

Verdicts and Settlements

Deborah J. Tibbetts
Paul, Plevin, Sullivan & Connaughton LLP
San Diego

REPORTERS
Contact Information

April Love
(Labor)
Littler Mendelson, P.C.
Houston
alove@littler.com

Brit K. Seifert
(Wage and Hour)
Paul Hastings LLP
San Diego
britseifert@paulhastings.com

EDITORIAL STAFF

GUEST AUTHORS

Mary Allain
Paul Plevin Sullivan & Connaughton, LLP
101 West Broadway, Ninth Floor
San Diego, California 92101-8285
(619) 237-5200

Victoria E. Cho
Jones Day
3161 Michelson Drive, Suite 800
Irvine, CA 92612-4408
(949) 553-7552
vcho@jonesday.com

Jason Fischbein
Paul Plevin Sullivan & Connaughton, LLP
101 West Broadway, Ninth Floor
San Diego, California 92101-8285
(619) 243-1574
jfischbein@paulplevin.com

Dale A. Hudson
Nixon Peabody LLP
300 South Grand Ave., Suite 4100
Los Angeles, CA 90071-3151
(213) 629-6015
dhudson@nixonpeabody.com

Irene Scholl-Tatevosyan
Nixon Peabody LLP
300 South Grand Ave., Suite 4100
Los Angeles, CA 90071-3151
(213) 629-6012
itatevosyan@nixonpeabody.com

Steven M. Zadravecz
Jones Day
3161 Michelson Drive, Suite 800
Irvine, CA 92612-4408
(949) 553-7508
szadravecz@jonesday.com