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SCMA

Southern California Mediation Association



Transforming Workplace Conflict: Mediation & the Modern Workplace

2023 Employment Mediation Institute
Loyola Law School
Saturday, August 5, 2023



Helmer Friedman LLP



Cases



Harassment



Atalla v. Rite Aid Corporation, **89 Cal. App. 5th 294 (2023)**

- Employer's motion for summary judgment granted.
- Supervisor was not acting in the capacity of a supervisor when engaged in inappropriate text message and photo exchanges occurring outside the workplace and outside of work hours, such that employer could be held strictly liable for sexual harassment.



Sharp v. S&S ACTIVEWEAR, **69 F.4th 974 (9th Cir. 2023)**

- Sexually graphic music played throughout workplace can foster a hostile or abusive environment and thus constitute discrimination because of sex.
- Harassment, whether aural or visual, need not be directly targeted at a particular plaintiff in order to pollute a workplace and give rise to a Title VII claim.
- An employer's status as an “equal opportunity harasser” provides no escape hatch for liability.



Arbitration



Adolph v. Uber Technologies, Inc., **2023 WL 4553702 (2023)**

- California Supreme Court holds that where a plaintiff has brought a PAGA action comprising individual and non-individual claims, an order compelling arbitration of the individual claims does ***not*** strip the plaintiff of standing as an aggrieved employee to litigate PAGA claims on behalf of other employees in court.



Duran v. EmployBridge Holding Company, 92 Cal. App. 5th 59 (2023)

- Employer that relied upon *Iskanian* and included a broad PAGA carve out in its arbitration agreement could not compel to arbitration an employee's individual PAGA claim – even though that claim would have otherwise been arbitrable but for the *Iskanian*-inspired carve out.



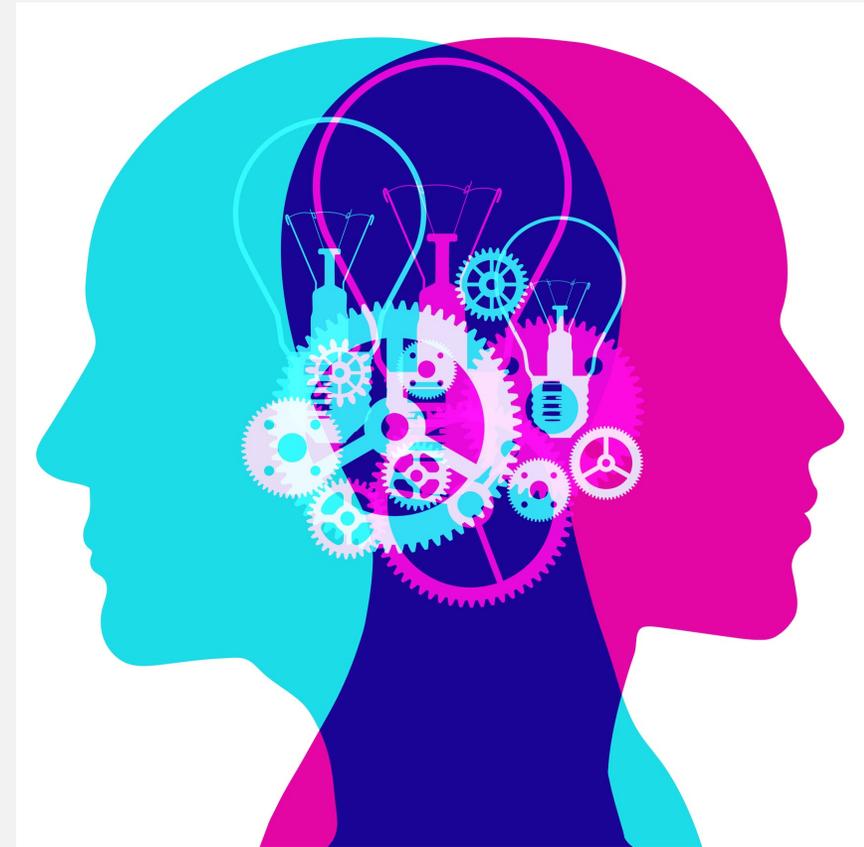
Vaughn v. Tesla, Inc., **87 Cal.App.5th 208 (2023)**

- Injunctions sought under the FEHA may be considered “public injunctions.”
- The FAA, as interpreted in *Viking River Cruises*, does not preempt the California rule prohibiting waiver of the right to seek such injunctions.
- Arbitration agreement entered into upon commencement of direct employment with employer did not cover conduct that occurred while plaintiff performed services for employer while employed by staffing agency.



Hernandez v. Meridian Management Services, LLC, **87 Cal.App.5th 1214 (2023)**

- Employee brought wrongful termination claim against multiple entities that she alleged employed her.
- Employee did not sue the only entity with whom she had an arbitration agreement.
- The other alleged employers could ***not*** use the following legal doctrines to compel arbitration:
 - Equitable estoppel
 - Agency theory
 - Third-party-beneficiary theory



Cvejic v. Skyview Capital, LLC, **2023 WL 4230980 (2023)**

- Annoyed Court of Appeal succulently holds:
“A statute gave Milan Cvejic the option to get out of arbitration if Skyview was tardy in paying its arbitration fees. Skyview was tardy in paying its arbitration fee. Cvejic was entitled to get out.



.....

The point was to take this issue away from arbitrators, who may be financially interested in continuing the arbitration and in pleasing regular clients. The trial court was right to decide this matter of statutory law.”

Whistleblower, Labor Code Section 1102.5, Retaliation, & Wrongful Termination



Kourounian v. CA. Dept. of Tax and Fee Admin., 91 Cal. App. 5th 1100 (2023)

- Retaliation verdict overturned – “As a matter of both logic and law, acts of retaliation must occur after the protected activity.”



**An employer
cannot retaliate
against a worker
for exercising
their rights.**

People ex rel. Garcia-Brower v. Kolla's, Inc., **14 Cal. 5th 719 (2023)**

- Labor Code Section 1102.5(b) encompasses a report of unlawful activities made to an employer or agency that already knew about the violation.

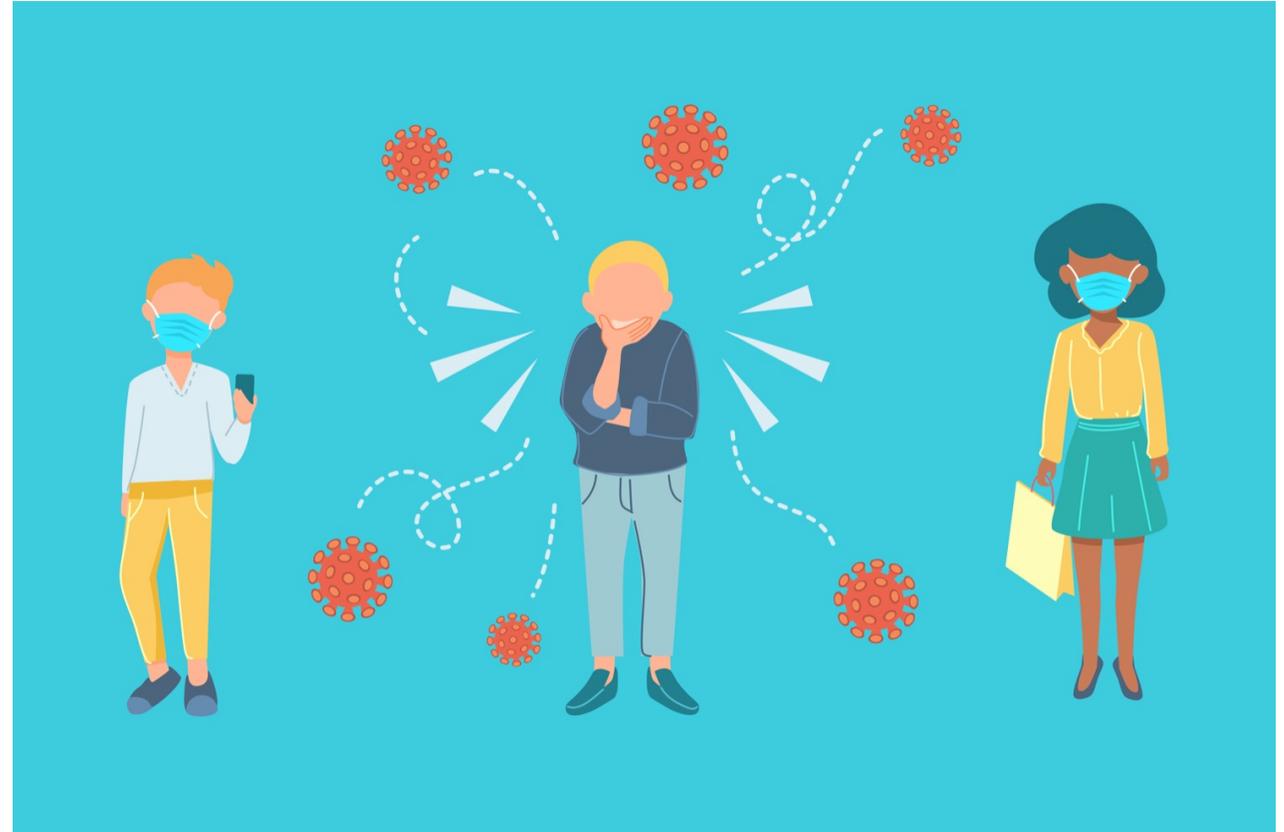


COVID-Related Issues



Kuciemba v. Victory Woodworks, Inc., **2023 WL 4360826 (Cal., 2023)**

- Under California law, employer owed no legal duty to prevent spread of COVID virus to employee's wife.



Thai v. International Business Machines Corporation, 2023 WL 4443934 (2023)

- Labor Code §2802(a) flatly requires employers to reimburse employees for all expenses that are a direct consequence of the discharge of the employees' duties.
- Government's COVID stay-at-home orders do not relieve employers of duty to reimburse employees for work-from-home expenses such as internet access, telephone service, a telephone headset, and a computer and accessories



Discrimination & Reasonable Accommodation



Hodges v. Cedars-Sinai Medical Center, 91 Cal. App. 5th 894 (2023)

- Employee's claims under FEHA based on her termination for refusing to get a flu vaccine without a medically recognized contraindication to getting the flu vaccine were properly dismissed.



Lopez v. La Casa de Las Madres, **89 Cal.App.5th 365 (2023)**

- Employee loses pregnancy discrimination claim because she failed to carry her burden of proving that she had a condition related to pregnancy; could perform the essential functions of the job.



Groff v. DeJoy, **2023 WL 4239256 (2023)**

- Unanimous Supreme Court “clarifies” *Trans World Airlines, Inc. v. Hardison’s de minimis* standard for determining whether providing a religious accommodation is an undue hardship.
- New standard is “Title VII requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.”



Doe v. SoftwareONE Inc., **85 Cal. App. 5th 98 (2022)**

- Plaintiff employees without direct evidence of discrimination and unable to show pretext under *McDonnell Douglas* may still defeat summary judgment by showing that the evidence could support a reasoned inference that the challenged action was the product of discriminatory or retaliatory animus.



Opara v. Yellen, 57 F.4th 709 (9th Cir. 2023)

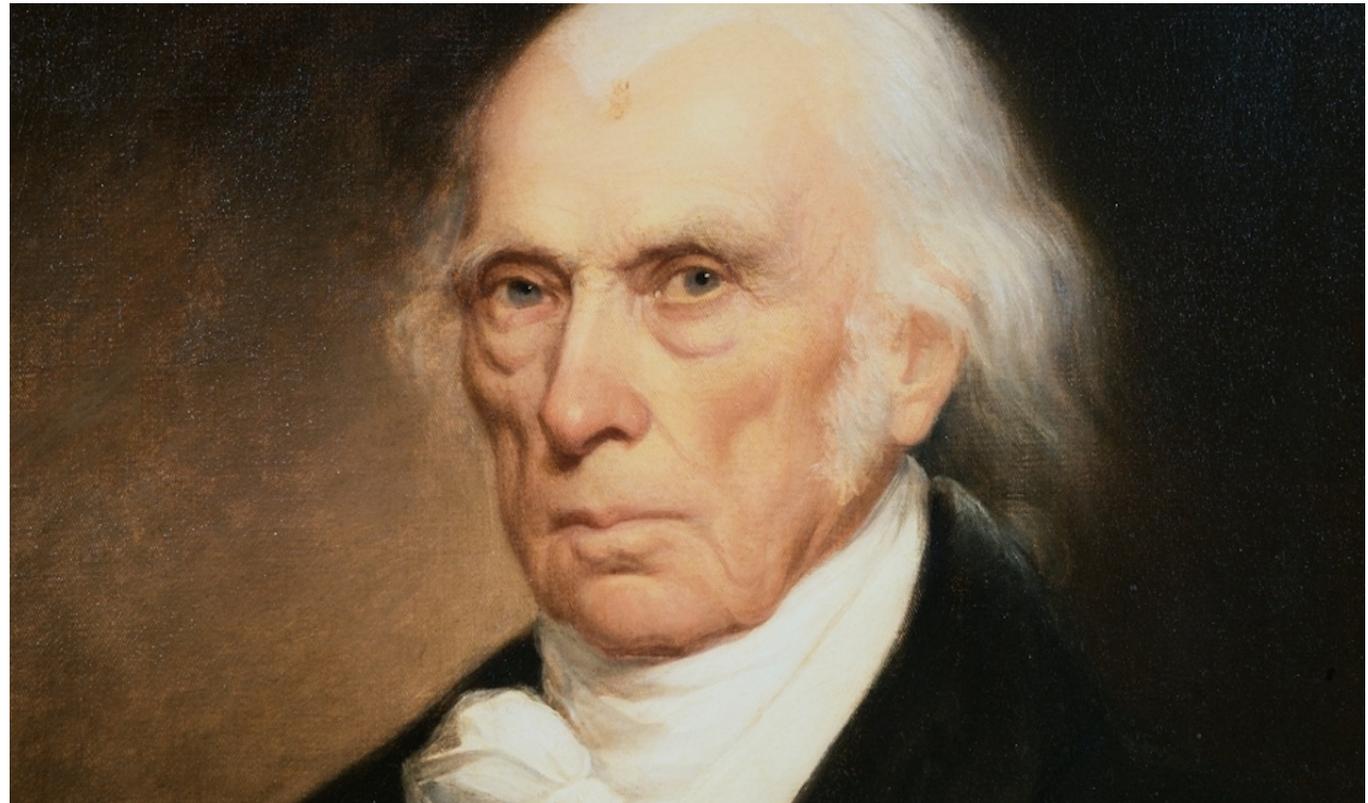
- Suggests that plaintiff must satisfy *McDonnell Douglas* burden-shifting test even if she possesses direct evidence of discrimination.
- Discounts the plaintiff’s direct evidence of discrimination because the plaintiff only presented “uncorroborated and self-serving” testimony.



WHAT EVIDENCE DO YOU
NEED TO PROVE THAT AN
EMPLOYER INTENTIONALLY
DISCRIMINATED AGAINST YOU?

Atkins v. St. Cecilia Catholic Sch., **90 Cal.App.5th 1328 (2023)**

- Triable issues exist as to whether ministerial exception applied to plaintiff's position because she did not teach religion to the students nor did she lead the students in any religious activities or services.



Lin v. Kaiser Found. Hosps., 88 Cal.App.5th 712 (2023)

- Although employer had tentatively placed employee RIF list before becoming aware of her disability, it did not terminate her employment until after it was aware of her disability.

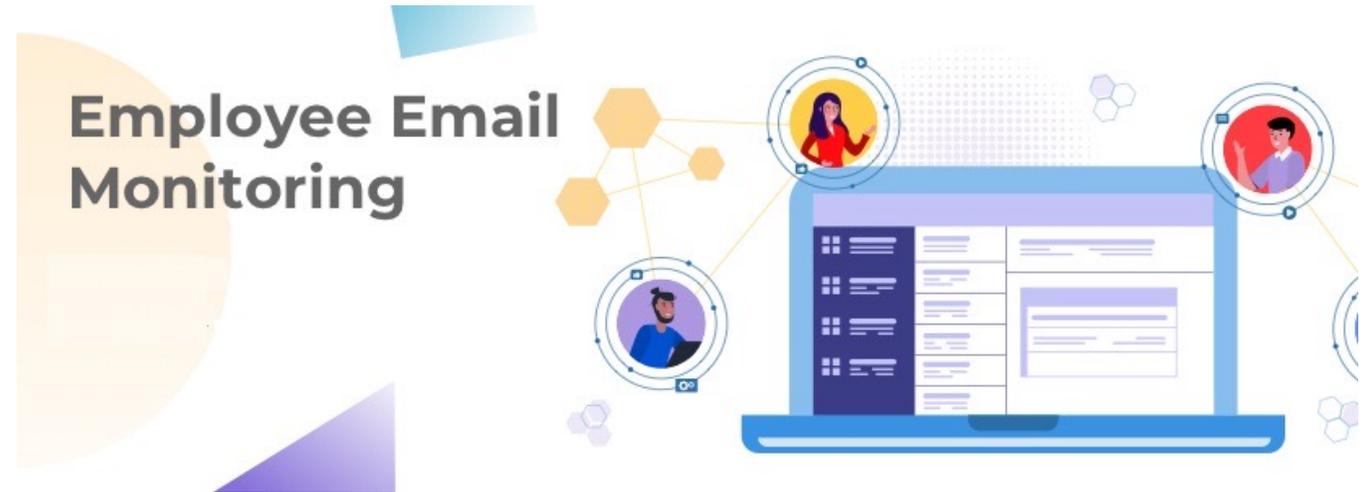


Procedural & Miscellaneous



Militello v. VFARM 1509, 89 Cal. App. 5th 602 (2023)

- Employees may have privacy interest in emails sent over employer's email system unless employer has policy of either monitoring company emails or prohibiting use of the company email for personal communications.



Technology Credit Union v. Rafat, 82 Cal. App. 5th 314 (2022)

- Court of Appeal establishes difficult – highly probable – standard that employers must meet to obtain a workplace violence restraining order against someone threatening its employees.



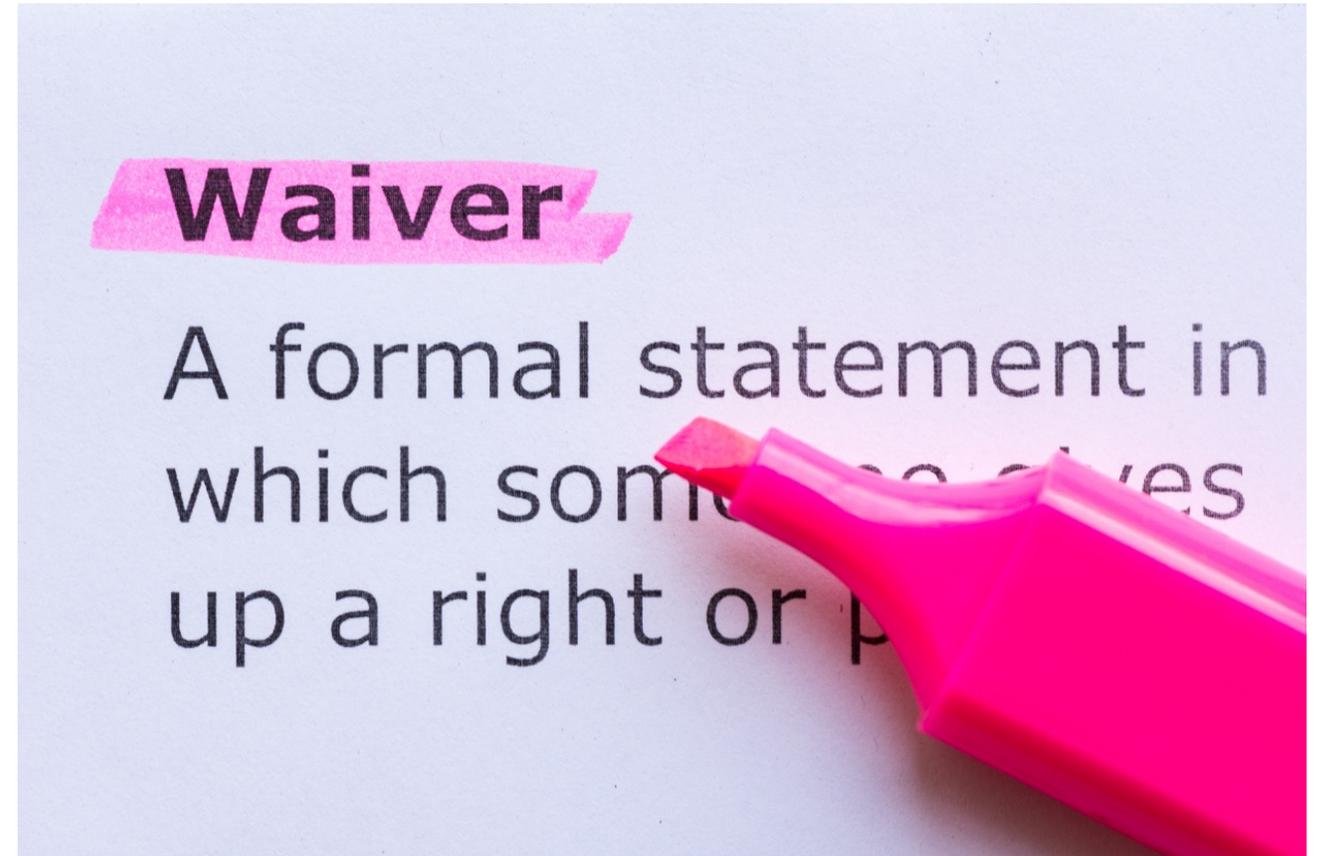
Kaur v. Foster Poultry Farms LLC, 83 Cal. App. 5th 320 (2022)

- Workers' compensation determination does not govern outcome of discrimination case



North Am. Title Co. v. Superior Court, 91 Cal. App. 5th 948 (2023)

- No implied waiver of disqualification of judge for bias or appearance of impartiality after one year.



Manuel v. Superior Court, 82 Cal. App. 5th 719 (2022)

- Employer may not inquire into former employee's immigration status



United States et al. ex rel. Schutte et al. v. Supervalu Inc. et al., 2023 WL 3742577 (2023)

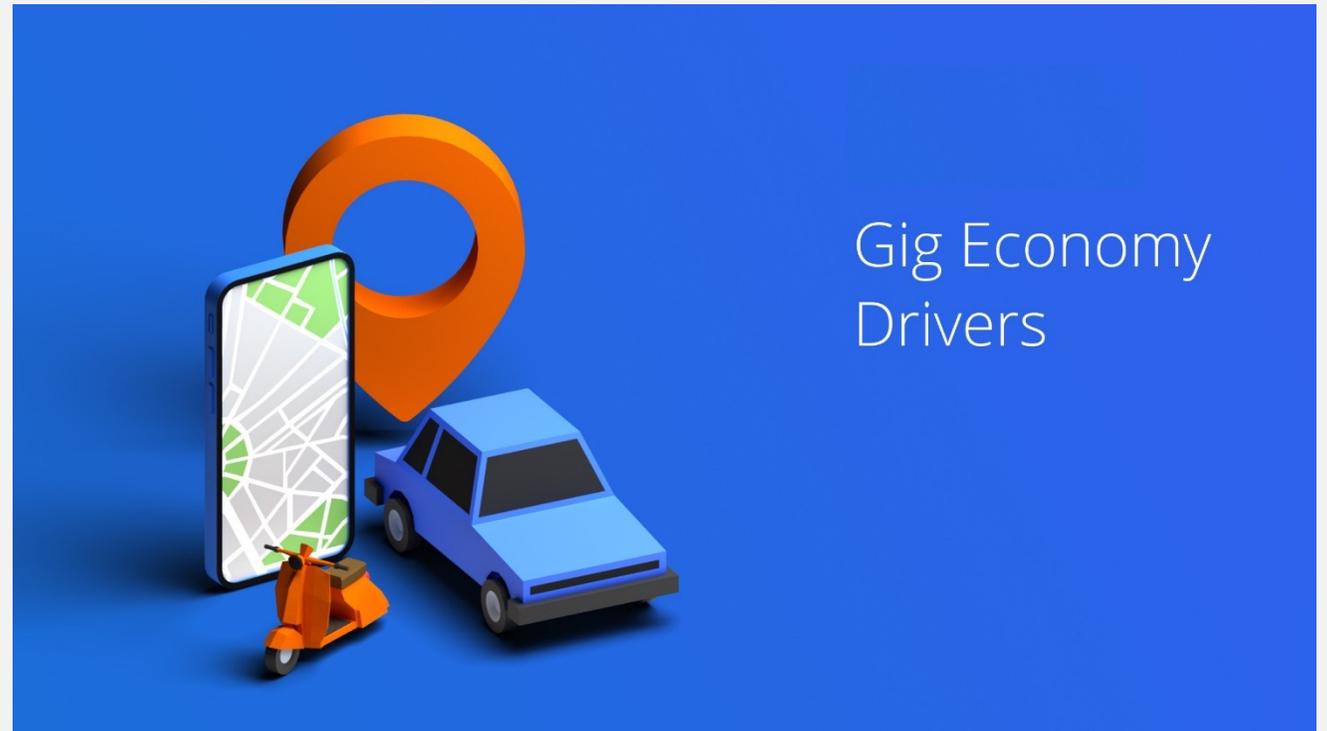
- The False Claims Act's scienter element — which asks whether a defendant “knowingly” submitted a “false” claim to the government — refers to a defendant’s knowledge and subjective beliefs — not to what an objectively reasonable person may have known or believed.



Wage & Hour

Olson v. State of Cal., 62 F.4th 1206 (9th Cir. 2023)

- AB 5 may violate equal protection rights of independent contractor drivers and the gig companies that retain them.



Young v. RemX Specialty Staffing, 91 Cal. App. 5th 427 (2023)

- No final paycheck due after end of temporary assignment.

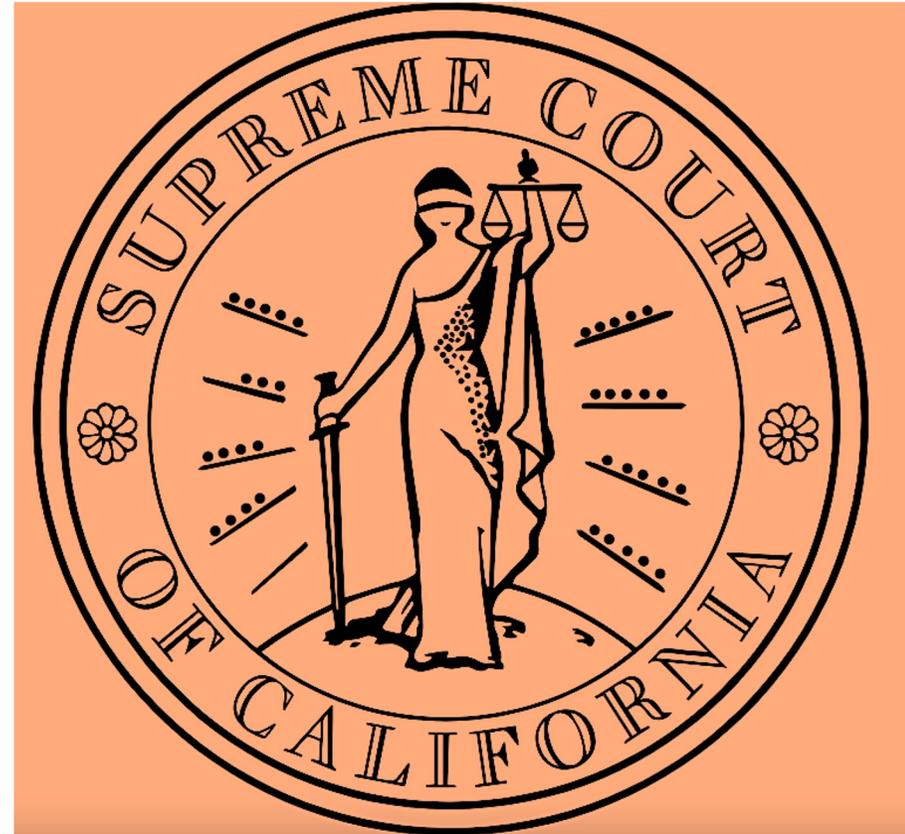


Quinn v. LPL Fin. LLC, **91 Cal. App. 5th 370 (2023)**

- Exemption of financial professionals from ABC test and retroactive application are constitutional.



LABOR & EMPLOYMENT
CASES PENDING
BEFORE THE
CALIFORNIA SUPREME
COURT



PHYLLIS W. CHENG



ARBITRATION

- *Gregg v. Uber Technologies, Inc.*, 89 Cal. App. 5th 786 (2023), *review granted*, 2023 WL 4004338 (Jun. 14, 2023); S279722/B302925
- *Piplack v. In-n-Out Burgers*, 88 Cal. App. 5th 128 (2023), *review granted*, 2023 WL 4004218 (Mem) (Jun. 14, 2023); S279546/G061098
- *Seifu v. Lyft*, 89 Cal. App. 5th 1129 (2023), *review granted*, 2023 WL 4004223 (Jun. 14, 2023); S279932/B301774

Briefing deferred pending decision in *Adolph v. Uber Technologies, Inc.*, S274671, 2023 WL 4553702 (July 17, 2023), which presents the following issue: Whether an aggrieved employee who has been compelled to arbitrate claims under the Private Attorneys General Act (PAGA) that are "premised on Labor Code violations actually sustained by" the aggrieved employee (*Viking River Cruises, Inc. v. Moriana*, 596 U.S. __, __ [142 S.Ct. 1906, 1916] (2022) (*Viking River Cruises*)); see CAL. LAB. CODE, §§ 2698, 2699(a)) maintains statutory standing to pursue "PAGA claims arising out of events involving other employees" (*Viking River Cruises*, at p. __ [142 S.Ct. at p. 1916]) in court or in any other forum the parties agree is suitable. Review granted/holding for lead case.

ARBITRATION

- *Quach v. Cal. Commerce Club, Inc.*, 78 Cal. App. 5th 470 (2022), review granted, 297 Cal. Rptr. 3d 592 (Mem) (Aug. 24, 2022); S275121/B310458

Petition for review after reversal of order denying petition to compel arbitration. Does California's test for determining whether a party has waived its right to compel arbitration by engaging in litigation remain valid after the United States Supreme Court decision in *Morgan v. Sundance, Inc.*, ___ U.S. ___ [142 S.Ct. 1708] (2022)? Fully briefed.

ARBITRATION

- *Ramirez v. Charter Communications, Inc.*, 75 Cal. App. 5th 365 (2021), *review granted*, 2022 WL 2037698 (Mem) (Jun. 1, 2022); S273802/B309408

Petition for review after affirmance of order denying petition to compel arbitration. Did the Court of Appeal err in holding that a provision of an arbitration agreement allowing for recovery of interim attorney's fees after a successful motion to compel arbitration, was so substantively unconscionable that it rendered the arbitration agreement unenforceable? Fully briefed.

ARBITRATION

- *Zhang v. Superior Court*, 85 Cal. App. 5th 167 (2022), *review granted*, 304 Cal. Rptr. 3d 549 (Mem) (Feb. 15, 2023); S277736/B314386

Petition for review after denial of petition for writ of mandate. (1) If an employer files a motion to compel arbitration in a non-California forum pursuant to a contractual forum-selection clause, and an employee raises as a defense CAL. LAB. CODE § 925, which prohibits an employer from requiring a California employee to agree to a provision requiring the employee to adjudicate outside of California a claim arising in California, is the court in the non-California forum one of “competent jurisdiction” (CAL. CODE CIV. PROC. § 1281.4) such that the motion to compel requires a mandatory stay of the California proceedings? (2) Does the presence of a delegation clause in an employment contract delegating issues of arbitrability to an arbitrator prohibit a California court from enforcing CAL. LAB. CODE § 925 in opposition to the employer’s stay motion? Reply brief due.

EMPLOYMENT DISCRIMINATION

- *Bailey v. San Francisco Dist. Attorney's Office*, nonpublished opinion, 2020 WL 5542657 (2020), review granted (Dec. 30, 2020); S265223/A153520

Petition for review after affirmance of judgment. Did the Court of Appeal properly affirm summary judgment in favor of defendants on plaintiff's claims of hostile work environment based on race, retaliation, and failure to prevent discrimination, harassment and retaliation? Fully briefed.

EMPLOYMENT DISCRIMINATION

- *Raines v. U.S. Healthworks Med. Group*, 28 F.4th 968 (mem) (9th Cir. 2022), *cert. granted* (Apr. 27 2022); S273630/9th Cir. 21-55229

Request under California Rules of Court, rule 8.548, that this court decide a question of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. Does California's Fair Employment and Housing Act, which defines "employer" to include "any person acting as an agent of an employer" (CAL. GOV'T CODE § 12926(d)), permit a business entity acting as an agent of an employer to be held directly liable for employment discrimination? Submitted/opinion due.

WAGE AND HOUR

- *Camp v. Home Depot U.S.A., Inc.*, 84 Cal. App. 5th 638 (2022), *review granted* (Feb. 1, 2023); S277518/H049033

Petition after reversal of judgment. Under California law, are employers permitted to use neutral time-rounding practices to calculate employees' work time for payroll purposes? Reply brief due.

WAGE AND HOUR

- *Castellanos v. State of California*, 89 Cal. App. 5th 131 (2023), review granted (Jun. 28, 2023); S279622/A163655M

Petition for review after affirmance in part and reversal in part the judgment in an action for writ of mandate. Is Proposition 22 (the “Protect App-Based Drivers and Services Act”) invalid because it conflicts with article XIV, section 4 of the California Constitution? Opening brief due.

WAGE AND HOUR

- *Estrada v. Royalty Carpet Mills, Inc.*, 76 Cal. App. 5th 685 (2022)
Inc., review granted, 294 Cal. Rptr. 3d 460 (Mem) (Jun. 22, 2022);
S274340/G058397, G058969

Petition after the affirmance in part and reversal in part of judgment. Do trial courts have inherent authority to ensure that claims under the Private Attorneys General Act (CAL. LAB. CODE § 2698 *et seq.*) will be manageable at trial, and to strike or narrow such claims if they cannot be managed? Fully briefed.

WAGE AND HOUR

- *Huerta v. CSI Elec. Contractors, Inc.*, 39 F.4th 1176 (9th Cir. 2022), *cert. granted* (Aug. 31, 2022); S275431/9th Circ. No. 21-16201

Request under California Rules of Court, rule 8.548, that this court decide questions of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. (1) Is time spent on an employer’s premises in a personal vehicle and waiting to scan an identification badge, have security guards peer into the vehicle, and then exit a Security Gate compensable as “hours worked” within the meaning of California Industrial Welfare Commission Wage Order No. 16? (2) Is time spent on the employer’s premises in a personal vehicle, driving between the Security Gate and the employee parking lots, while subject to certain rules from the employer, compensable as ‘hours worked’ or as “employer-mandated travel” within the meaning of California Industrial Welfare Commission Wage Order No. 16? (3) Is time spent on the employer’s premises, when workers are prohibited from leaving but not required to engage in employer-mandated activities, compensable as “hours worked” within the meaning of California Industrial Welfare Commission Wage Order No. 16, or under CAL. LAB. CODE §1194, when that time was designated as an unpaid “meal period” under a qualifying collective bargaining agreement? Fully briefed.

WAGE AND HOUR

- *Iloff v. LaPaille*, 80 Cal. App. 5th 427 (2022), *review granted*, 299 Cal. Rptr. 3d 770 (Mem) (Oct. 26, 2022); S275848/A163504

Petition for review after affirmance in part and reversal in part. (1) Must an employer demonstrate that it affirmatively took steps to ascertain whether its pay practices comply with CAL. LAB. CODE and Industrial Welfare Commission Wage Orders to establish a good faith defense to liquidated damages under CAL. LAB. CODE §1194.2(b)? (2) May a wage claimant prosecute a paid sick leave claim under section 248.5(b) of the Healthy Workplaces, Healthy Families Act of 2014 (CAL. LAB. CODE § 245 et seq.) in a de novo wage claim trial conducted pursuant to CAL. LAB. CODE § 98.2? Fully briefed.

WAGE AND HOUR

- *Naranjo v. Spectrum Security Services, Inc.*, 13 Cal. 5th 93 (2022), review granted (May 31, 2023); S279397/B256232

Petition for review after affirmance in part and reversal in part of judgment. Does an employer's good faith belief that it complied with CAL. LAB. CODE § 226(a) preclude a finding that its failure to report wages earned was "knowing and intentional" as is necessary to recover penalties under CAL. LAB. CODE § 226(e)(1)? Answer brief due.

WAGE AND HOUR

- *Rattagan v. Uber Techs.*, 19 F.4th 1188 (9th Cir. Dec. 6, 2021), *cert. granted* (Feb. 29, 2022) S272113/9th Circ. No. 20-16796

Request under California Rules of Court, rule 8.548, that this court decide questions of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. Under California law, are claims for fraudulent concealment exempted from the economic loss rule? Fully briefed.

WAGE AND HOUR

- *Ruelas v. County of Alameda*, 51 F.4th 1187 (9th Cir. Nov. 1, 2022), *cert. granted* (Jan. 11, 2023) S277120/9th Cir. No. 21-16528

Request under California Rules of Court, rule 8.548, that this court decide a question of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. Do non-convicted incarcerated individuals performing services in county jails for a for-profit company to supply meals within the county jails and related custody facilities have a claim for minimum wages and overtime under CAL. LAB. CODE § 1194 in the absence of any local ordinance prescribing or prohibiting the payment of wages for these individuals? Fully briefed.

WAGE AND HOUR

- *Stone v. Alameda Health System*, 88 Cal. App. 5th 84 (2023), *rev. granted*, 2023 WL 3514241 (May 17, 2023); S279137/A164021

Petition for review after affirmance in part and reversal in part an order in a civil action. (1) Are all public entities exempt from the obligations in the CAL. LAB. CODE regarding meal and rest breaks, overtime, and payroll records, or only those public entities that satisfy the “hallmarks of sovereignty” standard adopted by the Court of Appeal in this case? (2) Does the exemption from the prompt payment statutes in CAL. LAB. CODE § 220, subdivision (b), for “employees directly employed by any county, incorporated city, or town or other municipal corporation” include all public entities that exercise governmental functions? (3) Do the civil penalties available under the Private Attorneys General Act of 2004, codified at CAL. LAB. CODE § 2698 *et seq.*, apply to public entities? Answer brief due.

WAGE AND HOUR

- *Turrieta v. Lyft, Inc.*, 284 Cal. Rptr. 3d 767 (2021), *review granted*, 288 Cal. Rptr. 3d 599 (Mem) (Jan. 5, 2022); S271721/B304701

Petition for review after affirmance of judgment. Does a plaintiff in a representative action filed under the Private Attorneys General Act (CAL. LAB. CODE § 2698 *et seq.*) (PAGA) have the right to intervene, or object to, or move to vacate, a judgment in a related action that purports to settle the claims that plaintiff has brought on behalf of the state? Fully briefed.

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Thank you



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