LABOR AND EMPLOYMENT LAW UPDATE

THE YEAR IN REVIEW AND THE YEAR AHEAD

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LEGISLATIVE AND REGULATORY UPDATE

Wage and Hour

Minimum Wage

AB 10 raises California's current minimum wage from $8.00 per hour to $9.00 per hour effective July 1, 2014, and to $10.00 per hour effective January 1, 2016.

The minimum salary for employees who qualify for an administrative, executive or professional exemption will likewise increase. The salary must be equivalent to no less than two times the state minimum wage for full-time employment per month. Beginning on July 1, 2014, the minimum annual qualifying salary will be $3,120 per month, and on January 1, 2016 it will rise to $3,466.67 per month.

Also, the Labor Code requires employers to provide every employee with a written itemized statement either semimonthly, or at the time wages are paid. The itemized statement must show all applicable hourly rates in effect during the particular pay period and the corresponding number of hours worked at each hourly rate, among other items. Employers should take steps to make sure that their itemized statements and other payroll-related documents accurately reflect the increased minimum wage when the changes take effect. The 2810.5 notice as required by the "Wage Theft Prevention Act of 2011" requires employers to notify non-exempt employees in writing of any changes to their rate of pay within seven calendar days from the time the change was made, or on the next wage statement.

Penalty for Failure to Pay for Heat Illness Recovery Periods

SB 435 expands prohibitions on employers requiring employees to work during meal and rest breaks to "recovery" periods taken to prevent heat illness. Under SB 435, an employer cannot require an employee work during a recovery period provided by Cal/OSHA's heat illness regulation. The heat illness regulation allows for cool-down periods in the shade of no less than five minutes at a time on an "as-needed" basis for employees to protect themselves from overheating.

The law requires an employer to pay an employee one additional hour of pay, at the employee's regular rate of pay, for each workday that a required recovery period is not provided.

Penalties for Minimum Wage Violations Expanded

An employer who fails to pay an employee the California minimum wage is subject to civil penalties and liquidated damages to the affected employee. The ability to obtain liquidated

damages, an additional penalty in an amount equal to the unpaid wages and interest, was previously limited to a civil action in Superior Court. AB 442 expands the penalty available for citations issued by the Labor Commissioner for failing to pay minimum wage to include a requirement that the employer pay liquidated damages to the employee, in addition to existing penalties. Employer should use caution and be sure to pay employees the new minimum wage when it goes into effect on July 1, 2013.

Protections for Exercising Rights Under Labor Code

AB 263 amends Labor Code §98.6, which protects employees who assert their rights under the Labor Code. §98.6 prohibits employers from retaliating, discriminating or taking adverse action against an employee or a prospective employee for exercising any right under the Labor Code, filing or participating in a complaint with the California Division of Labor Standards Enforcement ("DLSE"), whistleblowing, or participating in political activity or filing a civil lawsuit against an employer, among other activities.

Employers are now subject to a civil penalty of up to $10,000 per employee, per violation. AB 263 also prohibits retaliation or adverse action against employees for exercising their rights under the Labor Code. The law formerly only explicitly prohibited discharge and discrimination. AB 263 also expands §98.6 to bar employers from retaliation because a worker made a written or oral complaint that they are owed unpaid wages.

Labor Commissioner Lien on Property for Labor Commissioner Awards

AB 1386 provides that once an amount due under a Labor Commissioner order, decision, or award becomes final, the Labor Commissioner may record a lien on the employer's real property. The lien will be filed in any county where the employer's property is located. The lien will continue on the employer's property until it is satisfied or released or for ten years.

Attorneys' Fees-Prevailing Party Wage Claims

SB 462 went into effect on January 1, 2014. This bill limits the ability of employers to obtain attorneys' fees awards if they are the prevailing defendant in wage disputes. SB 462, which amends Labor Code §218.5, provides that employers who win wage-claim lawsuits may recover attorneys' fees and costs from the employee only if a trial court finds that the employee filed the lawsuit in bad faith. This amendment makes it even harder for employers in California to recover attorneys' fees in wage and hour actions in California.

Employee Wage Withholdings

Previously, it was a crime for an employer to fail to remit employee authorized withholdings for health and welfare funds, pension funds, and various benefit plans. Under SB 390, employers that fail to remit state, local, or federal withholdings are now also subject to a either felony or misdemeanor criminal penalties.

Farm Labor Contractors-Successor Liability

The law requires farm labor contractors to be licensed by the Labor Commissioner and to comply with specified employment laws applicable to farm labor contractors. A person who violates farm labor contractor requirements is guilty of a misdemeanor punishable by specified fines, or imprisonment in the county jail for not more than six months, or both. SB 168 makes a successor farm labor contractor liable for wages or penalties owed by a predecessor farm labor contractor if certain conditions are met.

The wage and penalty liability attaches to the successor farm labor contractor when the successor: (a) uses substantially the same facilities or workforce to offer substantially the same services as the predecessor farm labor contractor; (b) shares in the ownership, management, control of the workforce, or interrelations of business operations with the predecessor farm labor contractor; (c) employs in a managerial capacity any person who directly or indirectly controlled the wages, hours, or working conditions of the employees owed wages or penalties by the predecessor farm labor contractor; ***or*** (d) is an immediate family member of any owner, partner, officer, licensee, director or of any person who had a financial interest in the predecessor farm labor contractor.

Discrimination and Retaliation

Fair Employment and Housing Commission Dismantled

As a supposed cost savings measure, the Governor has abolished the Fair Employment and Housing Commission ("FEHC"), and has replaced it with the Fair Employment and Housing Council, a new part of the Department of Fair Employment and Housing ("DFEH"). The Council will assume the FEHC's former regulatory functions.

The new Council will no longer adjudicate administrative claims, as the prior Commission did, but rather, will have the ability to file cases in civil court, much like the federal Equal Employment Opportunity Commission does.

California Adopts New Disability Regulations

The Fair Employment and Housing Commission ("FEHC"), prior to being dismantled, approved amendments to the California Fair Employment Housing Act's ("FEHA") disability regulations. The amendments became effective December 30, 2012.

The regulations define mental and physical disability broadly to include any disorder that affects a person's mental or bodily functions and limits a major life activity. The regulations list new examples of disabilities, such as autism, clinical depression, post-traumatic stress disorder, obsessive compulsive disorder, cerebral palsy, HIV/AIDS, seizure disorder, multiple sclerosis and heart disease. The new regulations also provide standards for determining if a job function is essential, and provide detail on employer and employee responsibilities in engaging in the interactive process and providing reasonable accommodation.

The regulations also set out examples of potential reasonable accommodations, such as permitting employees to work from home. They address the circumstances in which employers may require additional medical documentation to support a request for reasonable accommodation. The regulations also contain a lengthy discussion regarding transferring a disabled employee to a vacant alternative position as a reasonable accommodation. Although this is not a new concept, the regulations specifically state that employers are required to give preference to disabled employees when filling a vacant position. However, an exception is that employers are not required to ignore their bona fide seniority system.

Employers should review the new disability regulations to ensure that their practices comply with the new regulations. Human Resources and personnel responsible for handling leave and accommodation requests should review company policies and make sure that they are compliant with the new regulations.

Protection for Military and Veterans

AB 556 adds "military and veteran status" to the list of protected categories under the Fair Employment and Housing Act ("FEHA.") "Military or veteran status" is defined as a member or veteran of the United States Armed Forces, United States Armed Forces Reserve, United States National Guard, and the California National Guard. Service members now have the same protections as other protected categories, and employers may not discriminate against them.

Sexual Harassment Definition Clarified

SB 292 addresses the 2011 ruling in Kelly v. Conco Companies, in which an appellate court ruled that a plaintiff who brings a sexual harassment claim under the Fair Employment and Housing Act must prove that the harassment was motivated by sexual desire. Plaintiff's attorneys viewed that decision as contrary to the intent and language of the FEHA.

SB 292 overrides that case and amends the definition of harassment to clarify that sexually harassing conduct does not need to be motivated by sexual desire. The new law clarifies that hostile treatment can amount to unlawful sexual harassment regardless of whether the treatment was motivated by any sexual desire.

Expansion of Whistleblower Protections

Labor Code §1105.5(a) and (b) prohibits actions to prevent employees from reporting violations of law to a government agency, and prohibits retaliation against employees who have made external reports. SB 496 expands whistleblower protections to include internal whistleblowers. It prohibits employers from adopting policies preventing employees from reporting violations of laws and regulations to a person with authority over the employee or to another employee who has the authority to investigate, discover or correct the violation, regardless of whether the disclosing the information is part of the employee's job duties.

SB 496 also prevents retaliation against an employee because the employer believes that the employee disclosed or may disclose information to a government or law enforcement agency or to a person with authority over the employee or another employee who has authority to investigate, discover or correct the violation or noncompliance, if the employee has reasonable cause to believe that the information discloses a violation of law or regulations, regardless of whether disclosing the information is part of the employee's job duties.

SB 496 also makes it illegal to prevent an employee from providing information to, or testifying before, any public body conducting an investigation, hearing or inquiry where the employee reasonable believes the information or testimony discloses a violation of law or a regulation, and prohibits retaliation against an employee who provides such information or testimony.

Immigration

Retaliation and Unfair Immigration Practices

AB 263 prohibits an employer from engaging in "unfair immigration related practices" when an employee asserts protected rights under the Labor Code. AB 263 adds new Labor Code §1024.6, which prohibits an employer from discharging or discriminating, retaliating, or taking any

adverse action against an employee because the employee updates or attempts to update his "personal information," unless the changes are directly related to the skill set, qualifications, or knowledge required for the job. This law would appear to prohibit the discharge of an employee who provided a false social security number or documentation relied upon by the employer for employment verification purposes, but there are no cases on this as of yet.

AB 263 also amends Labor Code §98.6, making it illegal for an employer to threaten to contact, or contact, immigration authorities because an employee complained either orally or in writing that he/she owed unpaid wages. AB 263 authorizes a civil penalty of up to $10,000 per violation against employers that engage in unfair immigration-related practices. Employees can file a lawsuit against the employer for such violations.

SB 666 creates Labor Code §244, which provides that it is not necessary for an employee to exhaust administrative remedies in order to bring a civil action for violation of any provisions of the Labor Code unless the section under which the action is brought expressly requires exhaustion of an administrative remedy. This law makes it easier for employees to file lawsuits against their employer.

SB 666 also makes it an "adverse action," for purposes of establishing discrimination or retaliation, if an employer reports or threatens to report the suspected citizenship or immigration status of an employee, a former employee or a prospective employee, or a member of their family, to a government agency, because the person has exercised a right under the Labor Code or other laws.

License Revocation for Threatening to Report Immigration Status

SB 666 also authorizes the suspension or revocation of an employer's business license where the employer violates §244.

It also allows for disbarment of attorneys for reporting to threatening to report the suspected immigration status of a witness or party to a civil or administrative action. The law covers reports, or threats to report, employees, former employees, prospective employees or family members, as defined, to immigration authorities.

Employers are not subject to the suspension or revocation of a business license for requiring a worker to verify eligibility for employment under the Form I-9.

Criminal Extortion for Threatening to Report Immigration Status

Existing law defines extortion as the obtaining of property from another, with consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or

under color of official right. Existing law further provides that fear sufficient to constitute extortion may be induced by certain threats, including a threat to accuse the threatened individual, or his or her relative or family, of a crime.

AB 524 clarifies that a person may be guilty of criminal extortion if the person threatens to report the immigration status or suspected immigration status of an individual, or his/her relative or a member of his/her family. Under AB 524, a threat to report the immigration status or suspected immigration status of the threatened individual, or his or her relative or a member of his or her family, may also induce fear sufficient to constitute extortion.

Driver's License for Undocumented Immigrants

Under AB 60, the California Department of Motor Vehicles (DMV) will now issue driver's licenses to undocumented individuals who can prove identity and California residency. The undocumented person must meet all other licensing requirements, such as the written and behind-the-wheel exams.

The card will have a designation stating that the card is not acceptable for federal purposes, such as verifying eligibility for employment. In other words, the card is not acceptable for Form I-9 verification.

AB 60 does not take effect until January 1, 2015, or on the date the Department of Motor Vehicles (DMV) director executes a specified declaration, whichever is sooner. The DMV must adopt regulations to implement the new law, including documents acceptable for the purposes of proving identity and California residency, as well as procedures for verifying authenticity of documents.

Leaves and Benefits

SB 288 adds §230.5 to the Labor Code, prohibiting an employer from discharging, discriminating or retaliating against an employee who has been the victim of a serious criminal offense. The employer must allow employees to take time off from work to appear in any court proceeding in which a right of the victim is at issue. The law applies only to specific crimes, such as solicitation for murder and vehicular manslaughter while intoxicated. Employees must provide the employer with reasonable notice in advance of taking time off, unless advance notice is not feasible. Violations of the law will be enforced by the Labor Commissioner.

Time off for Victims of Stalking and Accommodations for Domestic Violence, Sexual Assault and Stalking Victims

SB 400 extends existing protections for victims of domestic violence or sexual assault to victims of stalking to include time off to appear at legal proceedings (all employers) and to seek medical/psychological treatment, including safety planning (employers with 25 or more employees.) SB 400 also makes it unlawful to discriminate or retaliate against an employee because of his/her status as a victim of domestic violence, sexual assault or stalking.

This law requires employers to provide reasonable accommodations to employees who are victims of domestic violence, sexual assault or stalking and who request a reasonable accommodation for their safety while at work. The law states that reasonable accommodations may include the implementation of safety measures, including: job transfer, job reassignment, modified schedule, changed work telephone, changed work station, lock installation, assistance in documenting domestic violence, sexual assault, or stalking that occurs in the workplace, implementation of safety procedures, adjustment to job structure, the workplace facility, or work requirements in response to domestic violence, sexual assault or stalking, and referral to a victim assistance organization.

The reasonable accommodation procedures mirror those in the disability discrimination laws. Employers are required to engage in a timely, good faith interactive process with the employee to determine effective reasonable accommodations. Employers are not required to take any actions which would be an undue hardship. An undue hardship is "an action that would violate an employer's duty to furnish and maintain a place of employment that is safe and helpful for all employees."

An employer can request that the employee provide a written certification that they are the victim of domestic violence, sexual assault, or stalking, and that the reasonable accommodation is for the safety of the victim while at work. The employer can request recertification every six months. Of course, this documentation must be kept confidential. Employees are required to let their employers know when the accommodation is no longer needed.

Time Off for Emergency Duty

AB 11 requires an employer with 50 or more employees to provide a temporary leave of absence of up to 14 days per calendar year for reserve peace officers and emergency rescue personnel to receive training. Previously, the law provided the training leave of absence only to volunteer firefighters. AB 11 also expands the law to cover time off for "emergency rescue training" in addition to the existing protections for fire or law enforcement training.

Paid Family Leave Benefits

SB 770, which takes effect July 1, 2014, amends sections 2708, 3300, 3301, 3302, and 3303 of the Unemployment Insurance Code. SB 770 expands Paid Family Leave (PFL) wage-replacement benefits for employees to include benefits for time taken off to care for a seriously ill grandparent, grandchild, sibling or parent-in-law. The California Paid Family Leave program allows eligible employees to take up to six weeks of partially paid leave each year. PFL does not create the right to a leave of absence, but provides California workers with some financial compensation/wage replacement during a qualifying absence.

ALRB Updates

ALRB Board Member Burt Mason Retires, Board Left Without A Quorum

ALRB Board member Bert Mason has retired just two years after he was appointed by Governor Brown. This leaves only two remaining Board members, Genevieve Shiroma and Cathryn Rivera-Hernandez. The Board must have at least three members, of its total allotted five members, to have a quorum, which is required for the Board to take certain actions, such as issuing decisions. It is unclear what the Board will do, or will be legally allowed to do, until a replacement is appointed and approved.

SB 25

SB 25, introduced by state Senate President Pro Tem Darrell Steinberg, would dramatically change agricultural unionization, but is currently on an "inactive hold" in the state legislature. If ultimately passed, it would allow the UFW to force an employer into mandatory mediation at any time. This bill would revise the Agricultural Labor Relations Act to allow a union, certified as a collective bargaining agent before January 1, 2003, to immediately force an employer into mandatory mediation. Under existing law, an agricultural employer or certified labor organization may force mandatory mediation 90 days after a renewed demand to bargain where the parties have failed to reach agreement for at least one year, the employer committed an unfair labor practice, and the parties have not previously had a binding contract between them or 180 days after an initial request to bargain.

Although SB 25 cleared the Senate easily, it was the first favorable UFW bill to fail to make it out of Committee on the first try. It received just three votes in the Assembly Labor and Employment Committee, one short of the four required, on the first attempt. Two Democrats refused to vote, including Salinas Assemblyman Luis Alejo, who has been very supportive of farmworkers during his career.

If this bill passes, agricultural employers could be forced into fast track mandatory binding mediation with a burdensome collective bargaining agreement not only on the first agreement between the employer and the union, but also during any subsequent negotiations over later contracts. If that occurs, the UFW will never have to negotiate another collective bargaining agreement again. Rather, it can win an election and let the mediator impose contracts.

The UFW recently went to Superior Court to force immediate enforcement of a mediator's decision in Gerawan Farming, but the case is currently on appeal.

The bill would also impose the obligation to bargain on any subsequent purchaser of all or part of an employer who had the obligation to bargain under the ALRA.

Decertification Elections Foiled by ALRB

Agents of the ALRB, including Visalia Regional Director Silas Shawver, have been doing anything possible to prevent decertification elections. Shawver dismissed two successive decertification petitions at Fresno based Gerawan Farming. On the second occasion, the ALRB actually rebuked him, and ordered that the election proceed without further delay. The election proceeded, but the ballots were ordered impounded, pending the resolution of challenged ballots. Ballots were also impounded following a recent decertification election at Dole.

ALRB Issues Favorable Decision on Addresses

There has been a spate of recent cases where the UFW has reappeared after decades of absence, demanding negotiations. In the Perez Packing case, the UFW was absent for 22 years, then showed up during the off-season demanding "current addresses" for employees for purposes of negotiations. In response, the employer provided the employees off-season addresses. The UFW filed unfair labor practice charges alleging that it was entitled to in-season addresses. The Board found in favor of the employer finding that the list of off-season addresses was proper during the off-season. The Board did, however, find that the off-season address list provided was deficient because some of the addresses were PO Boxes, and that the employer did not have any addresses from some of the employees. That portion of the decision is currently on appeal. Make certain that you have up to date street addresses to avoid this issue.

On another issue, this is a case where the UFW has not been able to demand immediate mediation of a collective bargaining agreement because the current version of mandatory mediation requires that the employer have engaged in at least on unfair labor practice before the UFW can request mediation. Here, Perez has not been found to have engage in any ULP yet.

NLRB Updates

Constitutionality of NLRB Decisions

The United States Court of Appeal for the D.C. Circuit previously held that the recess appointments of two members of the NLRB back in 2012 were invalid. This throws hundreds of decisions made by the NLRB since January 2012 into jeopardy of being tossed out.

The decision was appealed, and the Supreme Court heard oral arguments on January 13, for more than ninety minutes of oral arguments. Those in attendance seemed to agree that only Ruth Bader Ginsburg and Sonia Sotomayor supported the President's unilateral appointments, and it is expected that the underlying ruling against the appointments will stand. Expect a decision later this year.

NLRB Poster Rule Overturned

The D.C. Court of Appeal has struck down the NLRB's rule requiring all employer to post a statement of employee's rights under the National Labor Relations Act. The rule would have required millions of employers across the nation to place 11-inch by 17-inch posters in a prominent area in their workplace that informed employees of their right to form a union. The court ruled that the NLRB overstepped its authority when it issued the poster rule, which would have deemed failure to display the required notice an unfair labor practice. The decision stated that the NLRB lacked authority to promulgate such a rule because Section 8(c) of the National Labor Relations Act provides that the dissemination (or non-dissemination) of non-threatening speech shall not be considered an unfair labor practice.

Employee Handbooks and the NLRB

The NLRB has been upholding numerous challenges to common employee handbook policies:

Union Free and No Solicitation

Most "union free" policies in employee handbooks will be illegal under the NLRB's most recent rulings as evidence of anti-union animus. Employers should review their handbooks and purge such policies. Employers should also seek legal guidance before implementing no solicitation policies, which must be worded very carefully to withstand scrutiny. Such policies can be found to be unfair labor practices even if no employee was actually prevented from soliciting other employees.

"...Employees are allowed on the premises only during their scheduled work hours or for company business...."

The NLRB argued that this rule impermissibly prohibited employees from discussing union issues at work. The employer argued that this rule, when read as a whole, and not piecemeal, clearly limits the no-access rule to those situations where the off-duty employee is interfering with an on-duty employee's work. The rule limits itself to work areas, is disseminated to the employees, and applies to all off-duty employees, not just those engaging in union activities.

Dress Code

"Undesirable group affiliation, gang symbols, colors, insignias, bandannas or apparel may not be worn (unless otherwise protected by law)."

The NLRB argued that this rule would illegally prohibit the wearing of union t-shirts, for example. The employer argued that this rule is clearly and unambiguously intended to prohibit appeal indicating membership in a street gang, as it specifically states. Even if any other person could theoretically engage in the NLRB's tortured reading to somehow imagine that this could possibly apply to union insignia, and it was the employer's position that no reasonable person could possibly do so, the rule even goes on to specifically state that if something is "otherwise protected by law," then it can be worn.

Electronic Communications

The NLRB has expanded the scope of protected concerted activity in connection with employees' use of email and other electronic communications. In Timekeeping Systems v. NLRB, the Board ruled that an employee's email messages criticizing the employer's new vacation policy constituted protected conduct and could not be used as a basis for termination of the employee.

Social Media Policies

- Can the employer limit what employees post on sites such as Facebook and Twitter?
- The NLRB has declared that employees can discuss work conditions on social media sites such as Facebook. In the case Hispanics United of Buffalo v. NLRB, the Board held that several employees had been wrongfully terminated after complaining about their job on Facebook.

LABOR AND EMPLOYMENT CASES – YEAR IN REVIEW

Personal liability

Tomatoes Extraordinaire, Inc. v *Berkley* (2013) 214 Cal. App. 4th 317

Individual liability under PACA

A produce seller incurred damages when a retail purchaser failed to pay for produce and then went out of business. The seller sued the retailer and the retailer's controlling officer. The seller alleged that the officer was personally liable under Perishable Agricultural Commodities Act (PACA) (7 USC§§499a-499s). PACA imposes personal liability on corporate officers who control the operations of buyers who meet the definition of a dealer by selling produce in wholesale quantities. Wholesale quantities means aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day. The trial court entered judgment in favor of the seller and against the purchaser and its officer, and the appellate court upheld the judgment.

Davis v. Kiewit Pac. Co., 220 Cal. App. 4th 358 (2013)

A business's managing or controlling agents can be personally liable for punitive damages.

Plaintiff worked day shift for a construction company. During a construction project, she had difficulty getting to portable toilets, which were often miles from her work site. After weeks of complaining about the lack of portable toilets for women, and their unsanitary condition, she was laid off. She sued for harassment, gender discrimination and retaliation. Her punitive damage claim was dismissed on summary adjudication. The jury awarded her $270,000 in damages for Kiewit's failure to supply adequate numbers of sanitary portable toilets to remote worksites at which its two women out of 100 worked. She appealed the punitive damage claim dismissal. The California Court of Appeal reversed the judgment denying punitive damages. The Court found that punitive damages are appropriate when a business acts with oppression, fraud or malice. When managing agents engage in such unlawful actions, the corporation is responsible. Here, plaintiff had the burden to prove that she complained to employees who exercised enough discretionary and authority to be managing agents. The court felt she produced enough evidence that they were managing agents. Thus, punitive damages could have been appropriate and her claim should not have been dismissed through summary adjudication.

Wage and Hour

Heyen v. Safeway Inc., 216 Cal. App. 4th 795 (2013)

Non-exempt tasks performed while trying to supervise will likely be counted as non-exempt time.

Plaintiff worked at Safeway as an assistant manager. She performed hourly employee duties, such as running the cash register and stocking shelves. At the same time, she concurrently observed the general conditions of the store in her supervisory capacity. She sued Safeway for unpaid overtime and penalties, claiming Safeway misclassified her as exempt from California's overtime laws under the executive exemption. The issue in dispute was whether or not she was "primarily engaged" in managerial duties as required by the executive exemption. The trial court instructed an advisory jury to determine whether plaintiff was "primarily engaged" in exempt or nonexempt work by categorizing plaintiff's activities as either exempt or nonexempt depending on the primary purpose for which she undertook the activity. The jury found that plaintiff did not spend more than half of her time performing exempt tasks, thus, she was not exempt. Safeway appealed, arguing that the trial court erred by (1) failing to instruct the jury that plaintiff's time spent "multitasking" - performing nonexempt work while simultaneously supervising should be categorized as exempt, and by (2) failing to consider whether plaintiff performed nonexempt work by her own choice or whether it was reasonably expected by Safeway that someone holding her position would have to do such nonexempt work such as stocking shelves, running a register, etc. The California Court of Appeal affirmed the finding of nonexempt status. Under the federal regulations cited in the applicable California Wage Order, tasks performed while a manager continues to supervise are not automatically considered "exempt." Rather, the trier of fact must look to the manager's reason ("primary purpose") for undertaking the task. Those tasks which are helpful in supervising or contribute to the smooth functioning of the manager's department are exempt, and those that are not are nonexempt.

Further, tasks must be categorized as either "exempt" or "nonexempt". They can't be both and can't be counted together. Therefore, the trial court applied the correct legal standard to determine that plaintiff was "primarily engaged" in nonexempt activities. There was also evidence to support the finding that defendant could not reasonably expect plaintiff to refrain from engaging in significant amounts of nonexempt work.

Gonzalez v. Downtown LA Motors, LP, 215 Cal.App. 4th 36 (2013)

Downtime for piece rate workers must be compensated separately.

Defendant is a Mercedes dealer in Los Angeles. They established a compensation system whereby they paid their mechanics a set rate for time spent repairing vehicles based on the

anticipated time necessary to perform the tasks. Repairs would be allocated 'flags' which would be converted to hourly wages in a piece rate type system. The system required plaintiffs to stay at work and to do non-repair tasks (such as delivering cars, cleaning etc.) when not repairing vehicles but the dealership did not compensate them separately for these non-production hours. Plaintiffs would track when they were "on the clock" and those hours would be multiplied by the applicable minimum wage rate. If that amount did not satisfy the minimum wage requirements for the total hours worked, defendant would provide additional compensation to satisfy the difference. The trial court held that the payment system was unlawful and awarded damages and found the conduct to be willful, justifying waiting time penalties for terminated employees.

The California Court of Appeal affirmed, holding that an employer is not allowed to compensate certain hours it finds more profitable while avoiding payment of other hours it deems worthless.

Furthermore, it cannot avoid its responsibility to compensate employees for all hours worked simply because its employees receive a total payment that is above the calculated minimum wage. California upholds a strong public policy in favor of full payment of wages for all hours worked. Plaintiffs still worked on smaller tasks such as cleaning cars and delivering vehicles when they had no vehicles to repair, so defendant could not avoid compensating them for these hours. Furthermore, waiting time penalties for terminated employees were appropriate because the evidence showed willfulness on the dealer's part in attempting to evade proper compensation.

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

Vacation payout claim can go forward, but without risk of penalties, even though payment was made consistent with collective bargaining agreement.

The union contract between the employee's union and defendant company provided that terminated employees were entitled to "receive whatever vacation allotment is due them upon separation." The company and union had for 25 years operated under a practice that "vacation allotment" referred to the agreement's provision requiring defendant to grant employees vacation days based upon each employee's length of employment and number of hours worked during the prior year. So the employer paid terminated employees their vacation allotment determined by the prior year's hours, but did not pay them the pro rata vacation time they had accrued toward the following year's allotment. Three terminated employees filed a class action, seeking the pro rata portion of their unused vacation plus California waiting time penalties. The employee's motion for summary adjudication on the waiting time penalties was granted. The Court found that California Labor Code section 227.3 obligated an employer to pay terminated employees for their pro rata vacation time immediately upon termination because the agreement did not clearly and unmistakably otherwise provide. The trial court also awarded waiting time penalties, finding that the defendant acted willfully as it was unreasonable to believe that the agreement waived these rights. The employer appealed. The California Court of Appeal reversed the trial court's

finding, holding that while the employer was obligated to pay the accrued pro rata vacation time, its failure to do so was not willful. Under section 227.3, a union may waive its members' rights to vested vacation time by entering into a collective bargaining agreement that otherwise provides. The court of appeal rejected the employer's argument that the waiver can be inferred based on the practice of the parties and the overall circumstances. The Court found that for such a waiver to be enforceable, it must be clearly and unmistakably stated. The Court also noted that due to the fact that the Labor Code is designed to be protective of employee's rights, any ambiguities in the code are to be construed to be more protective of employee rights. Here, the union agreement did not have a sufficient clear and unmistakable waiver, as it neither mentioned pro rata vacation pay nor did it cite to section 227.3. Even though the Court found against the employer, it reversed the award of waiting time penalties, finding that the violation was not willful. The parties had a consistent uniform practice of not paying pro rata vacation time and the parties stipulated that defendant had otherwise acted in good faith.

***McDaniel v Wells Fargo Invs., LLC* {9th Cir 2013) 717 F3d 668**

Labor Code forced patronage

"Forced patronage" is forbidden under the CA Labor Code, but preempted by SEC laws. California Labor Code 450(a), prohibits an employer from compelling employees to patronize the employer in the purchase of "anything of value." In this case, the Ninth Circuit found that federal securities law preempts the enforcement of California Labor Code 450(a), the "forced-patronage" statute, against brokerage houses that forbid their employees from opening outside trading accounts.

Former Wells Fargo brokers filed a class actions in state court alleging that the brokerage firms' policy of allowing members to open self-directed trading accounts only "in house" amounted to forced patronage in violation of the California Labor Code. The class actions were moved to federal court. The district courts held that the various class actions were preempted by the federal securities regulatory framework. The Court of Appeals upheld, finding that the brokers could not proceed under the CA Labor Code. Congress has imposed affirmative, supervisory duties on broker-dealers to prevent their employees from engaging in harmful or unfair trading practices. When federal law grants an actor a choice and state law would restrict that choice, state law is preempted if preserving that choice was a significant federal regulatory objective.

Muniz v. UPS 2013 U.S. App. Lexis 24189 (9th Circuit)

$700,000 legal fee award upheld with underling award of only $27,000

Kim Muniz used UPS for gender discrimination after being demoted from Division Manager to Supervisor. The jury found that UPS violated FEHA and awarded Muniz approximately $27,000 in damages. Her attorney was awarded close to $700,000. UPS appealed, arguing that the district court abused its discretion by awarding such disparate amounts. The Ninth Circuit upheld the award. California law does not require the district court to reduce disparities in awards. Aware of its discretion to reduce fees further than it did, the district court clearly and concisely addressed each issue UPS had with their award. The district court did not abuse its discretion in declining to reduce the fee request further because the initial fee request of almost $2 million (calculated using a $1.2 million lodestar and 1.5 multiplier) was inflated. However, the panel did find that the fee award to a paralegal was based upon inadmissible hearsay. The panel remanded to the district court to reconsider the award of fees to the paralegal and to determine an award for Muniz.

Independent Contractors

Rosenfeld v *Commissioner (Misclassification)*

In this Tax Court decision, the Tax Court found that Rosenfeld was not entitled to deduct a contribution to his Simplified Employee Pension Plan (SEP) based on earnings from the British Consulate General (BGC), on the basis that Rosenfeld was an employee of BGC and not an independent contractor. He had a background in marketing and communications, and he established his own consulting business. In 2003, he entered into an agreement to promote British companies seeking to invest in the U.S. and to help U.S. companies invest in the UK. He entered into a letter of appointment with BCG and was designated a "Trade Officer Grade US8," with an annual salary. BCG categorized Rosenfeld as self-employed and under provision did not withhold taxes from Rosenfeld's salary; Rosenfeld was solely responsible for payment of all income and self-employment taxes. For taxable year 2003, Rosenfeld recorded his earnings from BCG on Schedule C. He made a contribution to his SEP plan based on the earnings he earned from BCG and other consulting assignments. The IRS claimed that (1) Rosenfeld was a common law employee of BCG and not entitled to report his earnings from BCG.

In *Michael Rosenfeld* (2011) TC Memo 2011-110, the Tax Court reviewed the standard factors in evaluating whether Rosenfeld met the standards of an independent contractor and concluded that he was an employee of BCG even though Rosenfeld continued to provide services to other companies, and the fact that he paid substantial expenses in connection with his work for BCG and other companies. The Tax Court found that BCG had the right to exercise control over Rosenfeld's work, he was paid a fixed salary, the work he provided was integral to BCG's purpose, and Rosenfeld had the opportunity to participate in employee benefit plans sponsored by BCG even though he declined to do so. The Ninth Circuit upheld the Tax Court's decision.

***Beaumont-Jacques* v. *Farmers Group, Inc.*, 217 Cal. App. 4th 1138 (2013)**

Independent contractor cannot bring sex discrimination claim.

Plaintiff recruited, trained and motivated agents for defendant, who would then sell defendant's products. Plaintiff was prohibited from representing any other company. Plaintiff had an independent contractor agreement that provided that it should not be construed to create an employer/employee relationship, that the decision regarding how much time to spend working was within the sole discretion of plaintiff, and that she had discretion with respect to the time, place and manner of performance under the contract. She quit and filed a lawsuit against defendant asserting claims for sex discrimination, breach of contract, breach of the implied covenant, and until business practices. The trial court granted summary judgment in favor of defendant because it found she was an independent contractor.

The Court of Appeal affirmed, holding that defendant did not exercise sufficient control over plaintiff to create an employment relationship. Plaintiff had discretion in recruiting and training agents; determining her hours, preparing reports; attending meetings; hiring and supervising staff; performing administrative tasks; paying for her operating costs; deducting such costs on her taxes; and identifying herself as self-employed on her tax returns. Moreover, the parties' agreement specifically stated there was no employer/employee relationship.

Whistleblowers

***McVeigh* v. *Recology SF.*, 213 Cal.App. 4th 443 (2013)**

Whistleblower claim may proceed even if reporting unlawful conduct is part of the job

This case illustrates the application of California Labor Code §1102.5, California's whistle blower statute. Here the Court found that 1102.5 applies whether reports of unlawful conduct are part of, or extraneous to, employee's regular job duties.

Plaintiff McVeigh worked for Recology at a facility where recyclables are processed, weighed, and shipped to third party purchasers. Recology used weight tags, which are submitted to the CA Department of Conservation, which would reimburse Recology the California Redemption Value ("CRV") for the weights. Plaintiff uncovered as part of his employment evidence of widespread "tag inflation" with respect to weights for recycled goods, and reported various incidents to the police.

Thereafter, his supervisors counseled him about his aggressive style and he was transferred him to another facility. When he informed the Operations Manager at his new facility that he had reported tag inflation to the police, he was ordered to stay out of the CRV buyback business. He subsequently filed an online report regarding tag inflation that was transmitted to Recology senior management and its board of directors. He was accused by another employee of "[m]isuse of authority" and "caus[ing] turmoil." After an human resources specialist investigated the accusations, he was placed on a 90-day "Performance Improvement Plan," which included "a training course on dealing effectively with others."

McVeigh claims the Operations Manager brought him into a supply room, locked the door, and threatened to fire him for continuing to push the issue. Later, McVeigh discovered what he considered to be irregularities in truck shipment logs that he had reviewed which heightened his concerns about theft. His supervisor prepared a report of McVeigh's allegations, which ended with his view that McVeigh " be separated from this organization immediately". He wrote that McVeigh had a "headstrong attitude", could not get along with other employees, stirred up "gossip, arguments, and conflicts on a regular daily basis." His "peers and supervisors made a point of avoiding him," and did not believe he "could be trusted to uphold the organization's best interests." The supervisor's report also addressed concerns that McVeigh was focused on the activity of African-American employees, while seemingly ignoring Hispanic employees and the supervisor's report indicated that McVeigh's allegations could not be substantiated. Thereafter, the GM determined that McVeigh's allegations were in bad faith and he fired him.

Plaintiff sued for, among other claims, violation of the California False Claims Act

("CFCA") and Labor Code section 1102.5(b), as well as wrongful termination in violation of public policy. The trial court granted defendant summary judgment, concluding that although plaintiff had engaged in protected conduct, the whistleblower causes of action failed because he was merely doing his job in reporting tag inflation and defendant therefore did not know he was engaging in protected activity. There was also a three year gap after he first blew the whistle on the alleged tag inflation scheme to the time of his termination.

The California Court of Appeal reversed. The claim for retaliation was viable since the conduct qualified defendant for higher reimbursement from the state. As to retaliation under CFCA, the Court found that (1) plaintiff was engaged in protected activity; (2) defendant was on notice of the potential for litigation, (3) plaintiffs reporting went beyond merely doing his job, and (4) a causal link existed between plaintiffs termination and his protected activity since his supervisor threatened to fire him if he continued his investigation of the fraud only three months before his termination. The Court also found that section 1102.5 applies regardless of whether reports of unlawful conduct are part of, or extraneous to, an employee's regular job duties. Thus, it was irrelevant whether plaintiffs duties included reporting his suspicions of unlawful conduct.

Definition of Supervisor Under Title VII

Vance v. *Ball State Univ.*, 133 S. Ct. 2434 (2013)

Title VII definition of "Supervisor" is much narrower than California's under FEHA.

Plaintiff worked as a substitute server in the dining Department at Ball State. She filed a complaint alleging racial harassment and discrimination by a co-worker, Saundra Davis, in violation of Title VII. The federal district court entered summary judgment in favor of the university, holding that the university could not be vicariously liable for Davis who did not qualify as a supervisor and did not act negligently. The Court of Appeals for the Seventh Circuit affirmed, explaining that a supervisor requires the ability to "hire, fire, demote, promote, transfer, or discipline an employee." Because the record did not indicate any of these abilities and Vance failed to make a case for negligence, the district court properly granted summary judgment.

The United States Supreme Court affirmed, holding that "an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim. An employer is strictly liable when a supervisor imposes a tangible employment action on another employee such as an inappropriate firing or hiring. However, if the supervisor creates a hostile workplace without any tangible employment action, the employer may establish an affirmative defense under *Faragher* to shield itself from liability. If allegations involve co-workers but not supervisors, the claimant must show the employer's negligence before liability attaches. The court explicitly rejected the EEOC definition of supervisor, that an employee only needs the ability to exercise significant direction over another's daily work to be a supervisor, because that definition would allow too many regular employees to qualify as supervisors.

Wrongful Termination / Discrimination

McGrory v. *Applied Signal Tech., Inc.*, 212 Cal App. 4th 1510

Employee can't bring FEHA claim after being fired for lying or withholding information during employer's investigation.

An employee claimed gender and sexual orientation discrimination against Plaintiff. The employer retained outside counsel to investigate. During the investigation, plaintiff refused to answer certain questions and was uncooperative. Ultimately, the investigation exonerated plaintiff regarding the allegations, but the investigator determined that he had been untruthful and uncooperative. The employer terminated plaintiff for violating its policies on sexual harassment and business and personal ethics by plaintiff's uncooperative and deceptive conduct during the investigation. Plaintiff sued for wrongful termination claiming that any termination based on participation in an investigation into alleged discrimination violates public policy, that

his termination was really motivated by his gender. The trial court granted defendant's motion for summary judgment. The decision was affirmed on appeal. The Court held that FEHA does not protect an employee for lying or withholding information during an internal investigation of discrimination. He also had no evidence to support his gender discrimination claim other than his own conjecture and speculation.

***Harris v. City of Santa Monica*, 56 Cal. 4th 203 (2013)**

If the employer can show it would have made adverse employment decision absent pregnancy, this will limit, but not eliminate, the remedies available under FEHA.

A bus driver for the city of Santa Monica claimed she was fired by the city because of her pregnancy in violation of the FEHA. Defendant claimed plaintiff had been fired for poor job performance since she had preventable accidents during her training and probationary period, and had received two "miss-outs" regarding her late reporting to work. This case deals with jury instructions and the standard for proving discriminatory motive. Defendant asked the court to instruct the jury with that if the jury finds a mix of discriminatory and legitimate motives, the employer is not liable if the legitimate reason, standing alone, would have induced it to make the same decision. The court refused the proposed instruction, and instead instructed the jury that plaintiff had to prove her pregnancy was a "motivating factor/reason" for the discharge. The jury returned a verdict for plaintiff on her FEHA claim. The California Court of Appeal reversed, holding that the trial court's refusal to give the Defendant's proposed instruction was prejudicial error. It also determined there was substantial evidence supporting the jury verdict that plaintiff had been fired for pregnancy discrimination, and remanded for a new trial.

The Supreme Court noted that FEHA prohibits an employer from taking an employment action against a person "because of" the person's race, sex, disability, sexual orientation, or other protected characteristic. The phrase "because of" means there must be a causal link between the employer's consideration of a protected characteristic and the action taken by the employer. The existence of this causation requirement in the statute is undisputed. What is disputed is the kind or degree of causation required. The Court found that the plaintiff need show that discrimination was a *substantial* factor motivating a particular employment decision. In the present case, the jury was instructed under CACI No. 2500 to determine whether discrimination was "a motivating factor/reason" for the termination, but should have been instructed whether discrimination was "a substantial motivating factor/reason. With respect to remedies, when a plaintiff has shown that discrimination was a substantial factor motivating his or her termination, the employer is entitled to demonstrate that legitimate, nondiscriminatory reasons would have led it to make the same decision at the time. If the employer proves that it would have made the same decision for lawful reasons, then the plaintiff cannot be awarded damages, backpay, or an order of reinstatement. However, where appropriate, the plaintiff may be entitled to declaratory

or injunctive relief which would allow her to recover her attorney's fees and costs "expended for the purpose of redressing, preventing, or deterring that discrimination."

Disability

Lawler v. Montblanc North Am., LLC, 704 F.3d 1235 (9th Cir. 2013)

Disability claim cannot succeed when presence at work is an essential function of the job and employee cannot come to the worksite.

Plaintiff was as a retail store manager. She was responsible for hiring, training, supervising store staff and overall store management. These duties could only be performed at the store. She had a chronic ailment and her doctor put her on a reduced work schedule to twenty hours per week. Defendant sent a letter to plaintiff requesting information from her doctor in order to assess whether it could accommodate her request. She then had an off-duty foot injury and went on temporary disability leave. She went to the store to fax her leave documentation, saw a vice president who spoke to her in an intimidating and abrupt tone and asked her to help out at the store even though she was off duty. Her doctor then sent a letter to defendant requesting four more months of leave due to her medical condition. He also stated that there was no accommodation available to allow her to be at the store. She was terminated because her regular presence at the store was an essential function of the job. She sued for disability discrimination, retaliation and harassment under FEHA. The trial court granted summary judgment in favor of the store and the Ninth Circuit affirmed, holding that plaintiff failed to establish disability discrimination because she could not perform the essential functions of her job. She stated under oath she could not come to the store. She could not establish a case for discrimination. The Court also found that harassment claim failed because the single incident of harassment by the VP could not constitute actionable harassment and it was not severe or pervasive.

Sanchez v. *Swissport, Inc.*, 213 Cal. App. 4th 1331,153 (2013)

Disability laws may require additional leave after exhaustion of PDLL as a reasonable accommodation.

In *Sanchez v. Swissport, Inc.*, the California Second Appellate District Court ruled that an employee who has exhausted all of her leave under the Pregnancy Disability Leave Law (PDLL) is nonetheless still entitled to reasonable accommodation under FEHA. The plaintiff was employed by defendant Swissport, Inc. as a cleaning agent when she became pregnant. Her pregnancy quickly became high risk, requiring bed rest for the remainder of her pregnancy. She requested leave from work, which Swissport initially granted. After 19 weeks of leave – with three months left to go on her pregnancy – the plaintiff's employment was terminated because

she had exhausted all available PDLL and CFRA leave and was unable to return to work. The plaintiff then filed suit, asserting that Swissport was liable for failing to grant her additional leave under the FEHA. From a procedural perspective, Swissport demurred to the complaint and argued that, because it had provided the plaintiff with the four months of disability leave mandated by the PDL and CFRA, it had satisfied all of its obligations under FEHA. Sanchez claimed she was also entitled to reasonable accommodation for her pregnancy-related disability under the FEHA, in addition to her leave rights under the PDL and CFRA. The appellate court found that PDLL's "remedies augment, rather than supplant, those set forth elsewhere in the FEHA." Even after pregnancy disability leave ends under the PDLL, the employer must still engage in an interactive process and, unless the employer can show undue hardship, it must provide the employee with extended leave as a reasonable accommodation under FEHA.

***Rope* v. *Auto-Chlor Sys. of Wash., Inc.*, 220 Cal. App. 4th 635 (2013)**

"Associational disability" liability.

This case deals with the recently enacted Maykin Memorial Donation Protection Act ("DPA") which pertains to the potential risk of liability to employers who take adverse actions against individuals who have known association with disabled individuals.

In this case, an employee told his employer that he needed time off because he intended to donate a kidney to his sister and requested a leave of absence. Scott Rope worked for Auto-Chlor System as a branch manager. He requested the maximum 30 days of paid leave under the then-newly-enacted Michelle Maykin Memorial Donation Protection Act ("DPA"), which became effective January 1, 2011. The HR department told Rope he could take an unspecified amount of unpaid leave, but did not respond to Rope's requests for paid leave under the DPA, despite his repeated requests. On December 30, 2010, two days before the DPA became effective, Auto-Chlor terminated him for poor performance. The plaintiff sued Auto-Chlor for associational disability discrimination under FEHA and for DPA violations. Auto-Chlor moved to dismiss the case, which was granted by the trial court. Rope appealed. The California Court of Appeal affirmed in part and reversed in part. The Court found that the DPA did not apply retroactively because the request for leave was made before the law was effective. His whistleblower claim failed because no report was made about statutory violations by the employer. His retaliation failed because retaliation requires plaintiff to have engaged in a protected activity. Requesting this leave did not qualify as protected activity. Sixth, the claim for disability discrimination under FEHA was also inappropriate because plaintiff was not disabled. The Court found that his claim for "associational discrimination" survived. The Court stated that the Defendant had a strong incentive to terminate plaintiff for his association with the disabled. Termination would have relieved defendant from paying for an extended leave that would have occurred once the DPA became effective. By potentially engaging in associational discrimination, defendant also failed to maintain a discrimination-free environment. Finally, the

claim for wrongful termination in violation of public policy survived because an employer cannot terminate employees merely for assisting physically disabled people.

Retaliation

Westendorf v. W Coast Contractors of Nevada, Inc., 712 F.3d 417 (9th Cir. 2013)

Retaliation case goes forward without actionable sexual harassment claim.

Plaintiff sued a construction company for sexual harassment and unlawful retaliation. She alleged that while working as a project's assistant for a construction company, her supervisor and another co-worker made crude remarks about her and another female employee. Some of the comments pertained to "girly work", referring to a large breasted coworker as "Double D" , comments about women being able to have multiple orgasms, and telling Plaintiff to wear a French maid's costume when cleaning. The company president terminated her after she made multiple complaints, evidently voicing his opinion that terminating her would end her constant complaining. The federal district court granted summary judgment for the employer. The Ninth Circuit affirmed in part and reversed in part. The Ninth Circuit found that the harassing conduct was not severe and pervasive enough to alter the conditions of the workplace. Here, plaintiff alleged verbal harassment. Because she worked only once a week for a few months and the vulgar comments occurred infrequently, the conduct did not alter the conditions at work. However, evidence in support of the retaliation claim was sufficient to defeat summary judgment. An employee cannot be punished for complaining about potentially unlawful behavior because such a workplace complaint is a protected right in California.

So this case illustrates the principle that even though there was not actionable sexual harassment, the Plaintiff could still put her retaliation case to a jury.

McCoy v. *Pac. Maritime Ass'n*, 216 Cal App. 4th 283 (2013)

Union is not liable as it is not the employer; retaliation claim can proceed without actionable harassment claim.

Plaintiff worked as a marine clerk for a terminal operator. Plaintiff and other coworkers filed a federal discrimination lawsuit against the terminal operator and the union. The parties entered into a confidential settlement agreement which provided that plaintiff would receive training to be a vessel planner. Plaintiff alleged she was not provided with proper training materials, had been shunned and isolated, and was not informed about classes offered to other trainees. Plaintiff also alleged that one vessel planner talked down to her, called her stupid on one occasion, and engaged in racially and sexually offensive behavior. Plaintiff quit and filed a grievance. A labor

arbitrator issued an opinion finding that no harassment or discrimination took place and that the grievance was frivolous. Plaintiff then filed a lawsuit against the terminal operator and the union for sexual harassment and retaliation, negligent supervision, hiring and retention, and intentional infliction of emotional distress. The trial court granted summary adjudication for defendants on all but the retaliation claim.

At trial on the retaliation case, a jury returned a verdict for plaintiff and awarded her $660,000 in economic damages. The trial court granted judgment notwithstanding the verdict or alternatively, a new trial. Plaintiff appealed and Defendants filed a cross-appeal, arguing that plaintiff's failure to establish a constructive discharge precluded her from recovering economic damages.

The Court of Appeal affirmed in part, reversed in part, and remanded for a retrial. In part, the trial court was correct in dismissing the sexual harassment and emotional distress claims. There were only a few comments over a four-month period, which, though crude and offensive, were not so severe or pervasive as to alter the conditions of employment or create a work environment permeated with sexual harassment. The conduct also failed to rise to the extreme and outrageous standard for an intentional infliction of emotional distress claim. The trial court erred in granting judgment notwithstanding the verdict on the retaliation claim as there was substantial evidence from which a jury could reasonably conclude that plaintiff was unlawfully retaliated against. There was testimony that once plaintiff's supervisor and vessel planner trainers learned about her confidential settlement agreement, she was thereafter ignored, treated with hostility, and received comparatively substandard training. Fourth, the trial court did not err in granting judgment notwithstanding the verdict in favor of the union. The agent's conduct in negotiating labor contracts, signing vessel planner agreements, and paying for the arbitration and training costs was insufficient to establish that it was plaintiff's employer. Plaintiff's trial counsel had also engaged in improper surprise by showing the jury a photo of decapitated man during closing argument and asserting that this was what defendants "wanted to do to" plaintiff, without having sought permission to do so, and which was highly inflammatory and prejudicial. Plaintiff was not precluded from recovering economic damages because under the FEHA, all forms of relief are available regardless of whether the aggrieved party was constructively discharged. Accordingly, the court of appeal remanded the case for retrial consistent with its opinion.

Respondeat Superior (Vicarious Liability)

Halliburton Energy Servs., Inc. v. *Dep't of Transp.* , 220 Cal. App. 4th 87 (2013)

Employer not liable for injury in company vehicle when using it for personal purposes.

Plaintiffs brought an action against Halliburton for damages in a car accident with one of its employees. The employee drove a company truck over fifty miles to purchase another car with his family without informing defendant. Plaintiffs sought liability under the doctrine of

respondeat superior. The trial court granted summary judgment to defendant because even though the employee drove the company truck, he was acting beyond the scope of employment.

Plaintiffs appealed. The California Court of Appeal affirmed. Under respondeat superior, an employer becomes responsible for its employees' injurious acts that occurred during the ordinary course of business, even if there is a slight deviation from their normal duties provided the deviation was foreseeable. Here, a fifty mile sojourn in the company truck for personal reasons were unforeseeable. The employee made the trip for personal reasons that had no bearing on his job and he traveled over fifty miles away from home and work.

Moradi v. *Marsh USA, Inc.*, 219 Cal. App. 4th 886 (2013)

Personal stop in vehicle used for business purposes is still course and scope of employment.

An insurance broker employed by Defendant used her personal car for work purposes, including meeting clients and potential clients. The vehicle was used for business and personal purposes. After finishing work she decided to stop at a yogurt shop and then go to yoga. In transit, she hit a motorcyclist, who sued her and her employer. The trial court granted the employer's motion for summary judgment because the employee was not acting within the scope of her employment. Once she left for yogurt and yoga, her employer was no longer liable. The motorcyclist appealed.

The California Court of Appeal reversed, finding that the employee was within the course and scope of employment when the accident occurred. Use of her personal vehicle was a condition of employment and the broker would often use her vehicle before and after work hours to travel for various business trips. Moreover, she drove other coworkers on the day of the accident and had already planned to visit more potential clients the following day. Leaving immediately after work for frozen yogurt and a yoga class did not automatically end the scope of employment responsibility. The court reasoned that the planned trip was not so abnormal that it would have been unjust to attribute the costs to the employer. Instead, the detour was found to be a minor deviation which did not create a substantial departure from the scope of employment. Therefore, the accident was foreseeable and the employer was liable for its employee's conduct.

Purton v. *Marriott Int'l, Inc.*, 218 Cal. App. 4th 499 (2013)

Employer liable for drunk driving accident occurring after employee's attendance at party.

The Marriott Hotel held annual parties as a gesture of appreciation for its employees. Michael Landri, a hotel bartender, employed by the hotel, got drunk at the party and promptly drove home. He made it home safely, and then left home to drive a coworker home. During the drive, he crashed into another vehicle and killed the driver. The victim's family sued Marriott for

vicarious liability based on the employee's actions. The trial court granted summary judgment in favor of the hotel, reasoning that the employer's vicarious liability ended when its employee had arrived home safely. The California Court of Appeal reversed. Under the doctrine of respondeat superior, an employer may be held vicariously liable for torts committed by an employee within the scope of employment. The scope of employment does not simply end when an employee arrives home after work. It is the public policy of the State of California to broadly define employment so that respondeat superior liability attaches if the employer created the employee's danger for its benefit or through a customary work activity. The direct injury does not need to occur during work hours. While the employee acted negligently by drunk driving, the employer may also have been negligent by creating the danger. The accident occurred after work hours but the company party was an annual event which could be within the scope of employment. Since the company party was a customary work activity, the court of appeal found there were triable issues of material facts to defeat summary judgment.

Invasion of Privacy

Ignat v. *Yum! Brands, Inc.*, 214 Cal. App. 4th 808 (2013)

Employer can be liable for over-disclosing an employee's private medical information.

Yum! Brands is the parent of Pizza Hut, Taco Bell and KFC. Plaintiff Melissa Ignat worked in the real estate department and evidently is bipolar. One day when she was on a medical leave of absence, her supervisor told other employees of plaintiff's health condition. She alleged that her coworkers began to shun and avoid her at work. One coworker asked her if she was going to 'go postal.' After her termination, she sued for invasion of privacy by public disclosure of private facts. The trial court dismissed her case, on the basis that there were no documents supporting the alleged disclosure. The Court of Appeal reversed, finding that a verbal disclosure of private facts is enough to violate the common law right to privacy. The court also found however that "liability for the common-law tort requires publicity; disclosure to a few people in limited circumstances does not violate the right..."

Joint Employment

Guerrero v. *Super. Ct.*, 213 Cal. App. 4th 912 (2013)

County and Agency are joint employers of in-home caregiver.

Ms. Guerrero was employed to provide in-home support services to eligible recipients in Sonoma County. Buenrostro, a disabled individual, was a recipient of such services. Sonoma County along with the Sonoma In-Home Support Services Public Authority (IHSSPA) authorized

Buenrostro to hire and engage a support services provider. Buenrostro hired plaintiff. She alleged that Buenrostro, the county and the public authority failed to pay her for personal services she provided to Buenrostro, and refused to pay minimum and overtime wages owed in violation of the Fair Labor Standards Act ("FLSA") and the California Labor Code. The trial court sustained the county and public authority's joint demurrer (motion to dismiss) without leave to amend as to all federal and state statutory wage claims. The Court found that the County and the ISHSSPA were exempt from coverage under the applicable California IWC Wage Order (15 regulating wages, hours and working conditions for household occupations). Plaintiff appealed.

The California Court of Appeal reversed, holding that the county and public authority were joint employers. There is a four-factor test used to evaluate the "economic reality of the work relationship"; namely, (1) did the alleged joint employer have the power to hire and fire? (2) Did the alleged joint employer supervise and control employee work schedules or conditions of employment? (3) Who determined the rate and method of payment? and (4) Who maintained her employment records? In this case, the Court found that the county and IHSSPA exercised considerable control over the employment relationship and were joint employers for purposes of the FLSA. Likewise, the county and IHSSPA were "employers" under the California Labor Code and the IWC Wage Order because the entities determined Buenrostro's eligibility under the program, authorized Buenrostro to hire a worker, determined the specific tasks that the household worker would perform, determined how the provider would be paid, and documented the hours worked. Third, as public agencies, the county and public authority were not exempt from the provisions of the applicable Wage Order (15), because this Wage Order, unlike other wage orders, does not expressly exempt public employees.

NLRB

WKYC-TV v. NLRB

NLRB rules employer may not stop deducting dues when contract terminates.

In the recent case WKYC-TV v. NLRB, the NLRB overruled the fifty year old decision in Bethlehem Steel Co. which held that union security/dues-check-off clauses may be cancelled by employers upon contract expiration. Now, the NLRB has held that the employer may not unilaterally cease deducting dues pursuant to a check-off provision at the expiration of the contract, without first bargaining with the union.

The Board held that dues check-off "does not involve the contractual surrender of any statutory or non-statutory right. Rather, it is simply a matter of administrative convenience to a union and employees whereby an employer agrees that it will establish a system where employees may, if they choose, pay their dues through automatic payroll deduction."

Banner Health System v. NLRB

Prohibiting work discussions of investigations unlawful

The Board evaluated the practice of routinely asking employees involved in an investigation not to discuss the facts. The Board ruled that such policies violate employees' right to engage in protected and concerted activity. Under Section 7, employees, have the right to discuss the subject of an investigation with each other.

Fresenius USA Manufacturing v. NLRB

Employees Threatening Comments Insufficient for Termination

A union supporter anonymously scribbled offensive comments on union newsletters left in the company break room during a union decertification campaign. This, coupled with his subsequent dishonesty during investigatory and disciplinary interviews, was held to be insufficient to uphold suspension and termination. The Board determined that Fresenius' questioning of the employee put him in the position of having to reveal his protected activity. The Board found the termination violated Sections 8(a)(3) and (1).

Arbitration

***Wade* v. *Ports Am. Mgmt. Corp.*, 218 Cal. App. 4th 648 (2013)**

Union member is precluded from relitigating in court after losing at arbitration.

Plaintiff was a union member who was laid off from his job at a port. He was the fourth union member laid off, and filed a grievance contending that the employer violated the seniority clause and that he was the only employee laid off out of seniority. He also contended that he was laid off due to his minority status and due to his previous grievances. At arbitration, the arbitrator decided against plaintiff and in favor of the employer. The employee then brought a wrongful termination case in Superior Court alleging violation of FEHA. The trial court granted summary judgment against plaintiff because the claim was already resolved by binding arbitration. The California Court of Appeal affirmed. Under the doctrine of res judicata, a claim is barred from litigation when it has already been litigated. Plaintiff argued that the FEHA claim was different because his termination violated the FEHA, a statute not specifically discussed during the binding arbitration. The Court of Appeal agreed with the trial court that wrongful termination was still the underlying issue and it was thus barred from being litigated again.

***Avery v. Integrated Healthcare Holdings, Inc.*, 218 Cal. App. 4th 50 (2013)**

To enforce mandatory arbitration, the agreement has to be the same one to which plaintiff agreed.

Plaintiffs worked for a chain of hospitals purchased by defendant. They were several different and separate class actions filed, which were consolidated, asserting claims for, among other things, wage and hour violations and failure to provide meal and rest periods. All but one of the eight plaintiffs had signed at least two documents agreeing to arbitrate claims relating to their employment under a process the hospitals called "the Fair Treatment Process". The arbitration agreements were in the Employee Acknowledgment Form; Application for Employment; and New Hire or Transition Letter. After the first class action was filed, the defendant unilaterally issued a new version of the employee handbook called the "Integrated Employee Handbook", which renamed the Fair Treatment Process the Alternative Dispute Resolution Process. The amended version also did away with the employee's right to bring a class or representative action. The hospitals moved to compel arbitration for each individual plaintiff. The trial court denied all motions, finding defendant failed to satisfy its burden of showing that any of the plaintiffs were subject to an enforceable arbitration agreement. The decision was upheld on appeal. The hospitals could not enforce the purported arbitration agreement contained in the Integrated Employee Handbook against plaintiffs because it issued that handbook after each of plaintiffs' claims accrued. For those who did not sign any arbitration agreement, the Court found that there was no implied-in-fact arbitration agreement because defendant could not show that the plaintiff ever received notice of the arbitration policy. With respect to the other seven plaintiffs, defendant failed to present sufficient evidence establishing that the Fair Treatment Process it presented to the trial court was same document to which each of plaintiffs agreed.

***Mendez v. Mid-Wilshire Health Care Center* 220 Cal.App.4th 534 9 (2013)**

Mandatory arbitration cannot be compelled unless union agreement specifically references statutes at issue.

The plaintiff as a nurse's aide at a skilled nursing facility that had a collective bargaining agreement. After she was fired, she filed suit under FEHA. The defendant moved to compel arbitration under the union agreement. The trial court denied the motion and the defendant SNF appealed. The Court of Appeal affirmed, finding that the union agreement did not waive her right to sue in court for FEHA violations, because it did not specifically reference FEHA, and would need explicit language in the union agreement to compel employees to arbitrate statutory discrimination claims.

***Sonic-Calabasas A, Inc. v. Moreno* Ct.App. 2/4 B204902 (2013)**

Arbitration agreement waiving Berman hearing not per se unlawful, and will be reviewed on a case by case basis.

Plaintiff Frank Moreno signed an agreement to arbitrate all employment disputes with his employer as a condition of employment. After termination, he filed a Labor Commissioner charge for unpaid vacation pay. Filing such a claim is the first step toward obtaining a so-called "Berman" hearing (a Labor Commissioner administrative hearing).

Originally, in *Sonic-Calabasas A v. Moreno* 51 Cal.4th 659 (2011), the California Supreme Court held that an arbitration agreement waiving the right to a Labor Commissioner "Berman" hearing contradicted public policy and could not be enforced. The California Supreme Court subsequently held in *Sonic–Calabasas A, Inc. v. Moreno*, 2013 WL 5645378 (Oct. 17, 2013) (*Sonic II*) that under the rule established by the US Supreme Court in *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740 (2011), the FAA (Federal Arbitration Act) preempts California law to the extent it prohibits waiver of a Berman hearing. The Court reasoned that requiring parties to participate in a Berman hearing imposes significant delays to arbitration (three to six months) and it is, therefore, inconsistent with the FAA. (This decision reverses the Court's prior ruling in *Sonic–Calabasas A, Inc. v. Moreno*.)

The Court clarified that state courts may continue to enforce unconscionability rules that do not interfere with "fundamental attributes of arbitration." The Court concluded that, while the Berman hearing rules confer important benefits on claimants by lowering their costs, arbitration may provide the same benefits. Accordingly, the Court found that an arbitration agreement in which an employee relinquishes the right to a Berman hearing does not, on its own, render the agreement unconscionable. A finding of unconscionability requires an analysis of the facts of the agreement. Thus, the Court remanded the case to the trial court to determine whether Moreno had a defense of contractual unconscionability.