Morgan Lewis

2020 RECAP: CALIFORNIA EMPLOYMENT LAW YEAR IN REVIEW

February 3, 2021

Jacqueline Cookerly Aguilera
Debra Fischer

Presenters

Jacqueline Cookerly Aguilera

Debra Fischer

Kaiser Chowdhry

Marina Gruber

Morgan Lewis

Agenda

COVID-19/Cal-OSHA

Wage & Hour

Discrimination, Harassment & Retaliation

Independent Contractors/Joint Employer

Leaves of Absence

PAGA

Arbitration

Meal & Rest Periods

Privacy

COVID-19: Cal-OSHA

Morgan Lewis

AB 685: COVID-19 Notice and Reporting

- Amends Labor Code section 6325 and adds section 6409.6.
- Expands Cal-OSHA's authority to issue stop-work orders for COVID-19 exposure.
  - May issue order if worker exposure to the risk of infection constitutes an "imminent hazard."
- Employers must provide ***written notice*** within 1 business day (in a manner that would be received by employee within 1 business day of sending – text/email sufficient) to all employees *who were on the premises* at the same time as the COVID-19 case while the person was infectious.
  - To all employees, union representatives, and employers of subcontractors (i.e., third parties)
  - Must provide notice of benefits and options (e.g., workers' comp, sick leave) to potentially exposed employees, and notice of safety and disinfection protocols to all employees.
  - Notice must also be provided to subcontractors and/or to union representatives.
  - Must maintain notification records for at least 3 years.
- Must ***report*** a "COVID-19 outbreak" to local public health agency within 48 hours.
  - "Outbreak" is currently defined by the State Department of Public Health as "at least three probable or confirmed COVID-19 cases within a 14-day period," but may change.
- Effective January 1, 2021 through January 1, 2023.

Cal-OSHA COVID-19 Emergency Temporary Standards (ETS) – High-Level Overview

- Expires on Oct. 2, 2021 (though it may become permanent before that time)
- Generally, the ETS adopts infection-control measures that have been recommended for months, including:
  - A written plan
  - Training
  - Daily health screens
  - Face coverings (required indoors at all times other than limited exceptions – e.g., alone in a room)
  - Physical distancing (under the ETS, you must maintain 6 feet at all times unless **not possible**)
  - Identifying and excluding COVID-19-exposed individuals from the workplace
  - Contact tracing

Cal-OSHA COVID-19 Emergency Temporary Standards (ETS) – What's New?

- The ETS also imposes several new requirements, including:
  - A workplace-specific COVID-19 hazard assessment
  - Specific topics that must be included in a written plan
  - Specific training topics for employees
  - PPE – sharing prohibited; other tools/items can be shared if necessary, but must be disinfected between users
  - Ventilation – maximize outdoor air to the extent feasible
  - Mandatory response actions after a positive case (e.g., notice, investigation)
  - Additional response actions during an "outbreak"
  - Testing requirements – always offered at no cost, but optional in non-outbreak settings, and mandatory during outbreaks
  - Exclusions pay
  - Extensive requirements for employer-provided housing and transportation

Cal-OSHA COVID-19 Emergency Temporary Standards (ETS) – Exclusion Pay

- "For employees excluded from work [due to being a 'COVID-19 case' or 'exposure to COVID-19'] and otherwise able and available to work, ***employers shall continue and maintain an employee's earnings, seniority, and all other employee rights and benefits, including the employee's right to their former job status***, as if the employee had not been removed from their job. Employers may use employer-provided employee sick leave benefits for this purpose and consider benefit payments from public sources in determining how to maintain earnings, rights and benefits, where permitted by law and when not covered by workers' compensation." 8 CCR 3205(c)(10)(C).

Cal-OSHA COVID-19 Emergency Temporary Standards (ETS)– Exclusion Pay – Practical Considerations

- **Two situations** where employers need to analyze whether they must provide exclusion pay:
  - Positive cases
  - Close contacts
- **Threshold question** – was the underlying exposure "work-related"?
  - Employer makes the "work-related" determination
- **Common situation** – employee tests positive, but employee confirms he or she were exposed at home where a family member also tested positive.
  - Positive case not exposed at work, so no entitlement to exclusion pay
  - Employer must still perform contact tracing. Employer determines that 5 other employees were in "close contact" to the positive case at work
  - The 5 "close contacts" must be excluded from work to quarantine, and they are all entitled to exclusion pay because their exposure was "work-related"
- Employers may offset exclusion pay with other forms of paid leave/benefits (but note that there are certain CA paid-leave laws that an employer cannot force an employee to use)
- Cal-OSHA FAQ from Jan. 8, 2021 states that if an employee is excluded from work for COVID-19 and receives workers' comp/temporary disability benefits, he or she is ***NOT*** entitled to exclusion pay
  - Cal-OSHA's reasoning is that these employees are not "otherwise able and available" to work

California Emergency COVID-19 Standards – Notice Requirements for COVID-19 Exposure

- **Employees (and their Authorized Representatives)**
  - All work-related "close contacts" must receive notice of their exposure within 1 business day
  - Notice must contain:
    - Information regarding potential exposure
    - Information regarding benefits
    - Information regarding safety and disinfection plan
  - Free Testing – all work-related "close contacts" must be offered testing at no cost. This is optional, but if the employees are tested, they must be paid for their time and reasonable expenses.
    - Practice Tips
      - Testing does not have to be during normal work hours, so long as employees are paid for their time
      - Include optional testing information in notice so it's all in one place
      - Notice does not have to be in writing, but best practice is to do so – ***if you include a reference to antidiscrimination/anti-retaliation, then this written notice could also comply with AB 685 requirements***
- **Third Parties**
  - All third-party employers whose employee(s) were present at the worksite during the COVID-19 case's infectious period (***NOTE – THIS IS THE AB 685 STANDARD NOTICE/REQUIREMENT***)
  - To comply with Cal-OSHA ***and*** AB 685, notice should contain:
    - Information regarding potential exposure
    - Information regarding safety and disinfection plan

California Emergency COVID-19 Standards – Outbreak Requirements

- Two types of outbreaks: an "outbreak" and a "major outbreak."
  1. An "outbreak" occurs when there are three or more COVID-19 cases in an exposed workplace within a 14-day period, or when the local health department determines the workplace to be the location of an outbreak.
  2. A "major outbreak" occurs when there are 20 or more COVID-19 cases in an exposed workplace within a 30-day period.
- For counting cases, Cal OSHA has confirmed that employers should use the "test date."
  - So if you have three positive cases who all tested within a 14-day period, AND those individuals were in the workplace during their infectious period, it is an "outbreak."
- **Testing** requirements during an outbreak:
  - Employer must provide testing to all employees at the worksite once a week; for a major outbreak, twice a week.
  - This testing is mandatory.
    - Cal-OSHA has stated that if an employee refuses mandatory testing, the employer does not violate the ETS so long as the testing was offered.
    - Open Question – can/should an employer exclude employees who refuse mandatory testing from the workplace, and can they do so unpaid?
- **Reporting** – within 48 hours, employers must report "outbreaks" to the local health department. The ETS specifies the information that must be provided (name, contact info, occupation, workplace location, business address, hospitalization/fatality status, NAICS code)
- Each outbreak triggers additional steps, including contract tracing, investigations, surveillance testing, and possible remedial actions.
- All requirements, including the testing regime, apply until there have been no new cases at the workplace for a 14-day period.

Practice Pointers

- Notice requirements under AB 685 vs. Cal-OSHA ETS for employees
  - AB 685 notice must be sent to all employees at the workplace during the COVID-19 case's infectious period, and must be written
  - Cal-OSHA ETS notice is only required for "close contacts"
- Certain healthcare workers (i.e., hospitals, skilled nursing, clinics, home healthcare) are exempt Cal-OSHA ETS and may be exempt under AB 685 (depending on whether they are also a "health facility"), but only because they are subject to ***more stringent rules*** under the Cal-OSHA Aerosol Transmissible Diseases standard
- <u>Employer Takeaways</u>
  - Develop a written COVID-19 Prevention Plan that complies with Cal-OSHA requirements
    - Cal-OSHA provides a template plan
  - Train employees on the written plan to ensure that all required topics are covered.
  - Comply with notice requirements under AB 685 and Cal-OSHA ETS
  - Provide exclusion pay to employees who are unable to work due to work-related COVID-19 exposure
  - Develop notice templates that fulfill these requirements (to employees, unions, and third-party employers)

COVID-19: Workers' Compensation

Morgan Lewis

SB 1159: Rebuttable Presumption of Workers' Compensation Eligibility for COVID-19 Illness

- Adds Labor Code sections 3212.86, 3212.87 and 3212.18
- Codifies rebuttable presumption in Executive Order N-62-20 that an employee's COVID-19 illness is a workplace injury and eligible for workers' compensation (WC) benefits
  - Applies if the employee worked at his or her place of employment between March 19 and July 5, 2020
  - Employer must report to WC whenever an employee tests positive within 14 days of the employee having worked at the place of employment (excluding at employee's home)
- Provides two new rebuttable presumptions for employees who get sick from COVID-19 from July 6, 2020 through January 1, 2023

  1. "Outbreak" Presumption (applicable to employers with 5 or more employees)
  - Presumption applies to employee who tests positive for COVID-19 during an "outbreak" at his or her specific worksite
  - "Outbreak" exists at a specific worksite if any of the following occurs within a ***14-day period***:
    - Worksites with 100 or fewer employees: 4 employees test positive for COVID-19
    - Worksites with more than 100 employees: 4% of employees who reported to the worksite test positive for COVID-19
    - The worksite is ordered to close by a local public health department, CA DPH, Cal-OSHA, or a school superintendent

  2. First Responders and Healthcare Workers Presumption
  - Presumption applies to certain first responders and frontline healthcare employees who test positive for COVID-19 within 14 days of working at their place of employment, even if there is no "outbreak"

SB 1159: Reporting Requirements

- Note, if neither of the 2 presumptions apply, the employee can still pursue a workers' compensation claim, but there is no rebuttable presumption that the employee is entitled to workers' comp – it would proceed as a normal WC claim.
- Employer's Reporting Requirements
  - Must report to employer's claims administrator within 3 business days after the employer "knows or reasonably should know" that an employee has tested positive for COVID-19 within 14 days after the employee worked at the employee's place of employment (excludes home)
  - Failure to timely comply with the reporting requirement or intentionally reporting false or misleading information may subject employer to civil penalties of up to $10,000
- Employers may dispute the presumption with certain evidence, including:
  - Measures to reduce potential transmission
  - Employee's non-occupational risks of COVID-19 infection
  - Employee's statements
  - Any other evidence normally used to dispute a work-related injury
  - Proof that workforce is vaccinated?

COVID-19: Litigation Trends

Morgan Lewis

The Rise of Employment Claims Related to COVID-19

- As of January 29, 2021, over 1351 cases have been filed in court relating to COVID-19. This does not include agency filings or union grievances.
  - The most common complaints have focused on wrongful termination (431), discrimination (404), retaliation for making complaints about workplace conditions related to COVID-19 (262), and leaves of absence (148).
  - California is leading the way with at least 314 cases filed relating to COVID-19 issues, with Florida (126), New Jersey (179), and New York (98) following.
  - Top industries affected by COVID-19 litigation are Healthcare (286), Manufacturing (84), Hospitality (74), and Essential Retail (70).

Type of Claim

- Wrongful Termination (431)
- Discrimination (404)
- Workplace Conditions (252)
- Leaves of Absence (146)

State Claim Filed In

- California (314)
- New Jersey (179)
- Florida (126)
- New York (98)
- Other (615)

Industry

- Healthcare (286)
- Manufacturing (84)
- Hospitality (74)
- Essential Retail (70)
- Other (837)

COVID-19 Litigation – Throughout the United States, cont'd.

Examples of COVID-19 cases:

- Disability discrimination – defendant terminated plaintiff after failing to accommodate plaintiff's disability by requiring him to wear a mask that allegedly "exacerbated" the plaintiff's disability i.e., anxiety disorder. *DeJesus v. Bucks-Mont Eye Associates, P.C.*, No. 2:20-cv-04422 (E.D. Pa. Sept. 9, 2020).
- Disability discrimination/failure to accommodate – defendant treated plaintiff differently than other employees after she contracted COVID-19 and went on leave, and later terminated her. *Leek v. SSC Newport Beach Operating Co. LP, et al.*, No. 30-2020-01165297 (Cal. Sup. Ct. Oct. 14, 2020).
- Retaliation/wrongful termination in violation of public policy – plaintiff raised concerns about health and safety practices (e.g., PPE), and posted workplace safety concerns on Facebook. *King v. Trader Joe's East, Inc.*, No. 20-CI-002406 (Ky. Cir. Ct. Apr. 8, 2020).

COVID-19 Litigation – Throughout the United States

Examples of COVID-19 cases:

- Class action – non-reimbursement of costs to purchase facial coverings "to comply with COVID-19 orders." *Pacheco Gonzalez v. Tilly's Inc. et al.*, No. 30-2020-01158131-CU-OE-CM Cal. Super. Ct. Aug. 31, 2020).
- FLSA collective action – defendant did not pay plaintiffs for time spent on COVID-19 temperature check and symptoms screening checklist before each shift. *Harwell-Payne v. Cudahy Place Senior Living, LLC et al.*, No. 20-CV W.D. Wis. Aug. 31, 2020).
- Class action – defendant didn't pay for pre-shift work where employees were forced to "wait in line and submit to mandatory temperature checks for COVID-19 screening" before passing through a checkpoint and clocking in. *Jauregui et al. v. Cytec Engineered Materials*, No. 8:20-CV-02440 (C.D. Cal. Dec. 30, 2020).

To Vaccinate or Not to Vaccinate ….

- Currently:
  - No federal requirement for employers to provide or offer to provide the vaccine.
  - No federal prohibition on employers mandating or recommending the vaccine.
  - EEOC – employer may mandate COVID-19 vaccines, provided that reasonable accommodations (absent undue hardship) are provided under the ADA (for disabilities) and Title VII (for sincerely held religious beliefs). Unvaccinated individual is "direct threat" to workforce.
    - But EEOC position may not be accepted by the courts, and
    - State laws may provide additional exceptions or broader accommodation requirements (e.g., political objectors).
  - Recommend waiting for CA to opine
    - In the meantime, employers can encourage vaccine including by offering incentives (e.g., financial, PTO, gift cards).

Morgan Lewis COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

***SEE APPENDIX FOR MORE COVID-19 RELATED REGULATIONS**

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at **www.morganlewis.com/topics/coronavirus-covid-19**

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to **subscribe** using the purple "Stay Up to Date" button.

Morgan Lewis

Wage & Hour

Morgan Lewis

O'Grady v. Merchant Exchange Prods., Inc., 2019 WL 5617001 (Cal. Ct. App. 2019)

- Banquet server sued, alleging that mandatory service charges constituted gratuities and were therefore controlled by Labor Code Section 350 et seq.
  - Gratuity for benefit of service staff
  - Cannot share with non-service, management, employees
- Court found that "service charge" had different meanings in different contexts and did not always constitute a tip or gratuity left for the benefit of the service staff. Recent case law does not preclude this meaning, however.
- Not clear that service charges are always distinct from gratuities, and order granting demurrer was reversed.

Oliver v. Konica Minolta Business Solutions U.S.A., 51 Cal. App. 5th 1 (2020)

- Traveling technicians were required to drive their personal vehicles, sometimes loaded with employer tools and materials, to various work sites. Technicians were not compensated for "commute time" to first appointment and from last appointment of the day.
- The court reversed summary judgment for the employer and identified two key issues to determine whether the employees were entitled to compensation for their travel time:
  - Were employees "required" to commute with parts and tools, or was this optional?
  - If required, what volume of tools were employees required to transport?
- If technicians were required to transport such a large volume of tools that it would prevent them from using their commute time effectively for their own purposes, court held they may be under "control" of employer during this time.

Frlekin v. Apple Inc., 8 Cal. 5th 1038 (Feb. 13, 2020)

- Supreme Court ruling on certified question from Ninth Circuit: The time employees spend on premises waiting for and undergoing mandatory exit searches is compensable as "hours worked" under California law. Court expressly stated that its holding applied retroactively.
- Apple Store retail employees alleged they were owed wages for time spent undergoing exit searches after they clocked out, but before they left the store. Searches applied to bags/packages and Apple personal technology devices that employees voluntarily brought to work for personal convenience.
  - Court declined to apply FLSA's portal-to-portal rule, under which exit search time is not compensable.
  - Court rejected argument that employees' activity must be "required" and "unavoidable" in order to be compensable; it did not matter that employees could theoretically avoid searches by not bringing a bag or Apple device to work. The determinative factor was that ***employees are under the employer's control while waiting to be searched or being searched***.
- Ninth Circuit in Sept. 2020 ordered district court to enter judgment for plaintiffs on certified class claim.
- Employer takeaway: Employers that require "bag checks" or exit searches should address how practically to record such time (i.e., automatic time addition, edit procedure, placing time clocks at exit location). The time employees spend waiting to be searched and undergoing searches should be factored into scheduling to avoid unintended overtime.

Ward v. United Airlines, 9 Cal. 5th 732 (2020)

- Pilots and flight attendants argued that United must provide them with wage statements that complied with California Labor Code Section 226, even though they spent the majority of their working time outside California.
- The California Supreme Court answered two certified questions from the Ninth Circuit as follows:
  - Answer to Certified Question #1: Wage Order No. 9's Railway Labor Act exemption does not bar a wage statement claim brought under Section 226 by an employee who is covered by a collective bargaining agreement.
  - Answer to Certified Question #2: Section 226 applies if the employee's "principal place of work" is in California, which the Court interpreted to mean (1) the employee works ***a majority of the time in California***, or (2) for interstate transportation workers whose work is not primarily performed in any single state, if the worker has his or her ***base*** of work operations in California.
- The California Supreme Court left it to the Ninth Circuit to apply this test to United's pilots and flight attendants.

McPherson v. EF Intercultural Found., 47 Cal. App. 5th 243 (2020)

- Plaintiffs claimed entitlement to pay out of accrued vacation upon termination where the employer never expressly defined the amount of vacation employees could take. Employees were required to notify a supervisor before taking time off, but vacation days were not tracked as being accrued or taken. Based on evidence at trial, the trial court determined that the unwritten policy ***included an implied cap*** and ruled that 20 days of vacation vested annually for plaintiffs such that any unused portion must be paid out.
- Court of Appeal affirmed the ruling based on the specific facts of the case, including evidence that employees did not believe they had unlimited vacation.
- The Court provided no definitive statement of when vacation need not be paid out upon termination under a true "unlimited" plan, but suggested such policies may be valid under certain circumstances, such as if they are in writing, administered fairly, clearly indicate employees may decide when and how much time to take off, and allow sufficient opportunities for employees to actually take vacation.

Herrera v. Zumiez, Inc., 953 F.3d 1063 (9th Cir. 2020)

- Plaintiff filed a putative class action asserting employer failed to pay its California employees for "call in" shifts. If employee was called in and required to work, he or she was paid. If not called in to work, no payment was provided.
- Employer's motion for judgment on the pleadings was denied. While appeal to the Ninth Circuit was pending, the California Court of Appeal decided *Ward v. Tilly's Inc.,* 31 Cal. App. 5th 1167 (2019), which held that an employee need not physically report to work in order to be eligible for reporting-time pay.
- Holding that there was no "persuasive data" that the California Supreme Court would decide otherwise, the Ninth Circuit affirmed the denial of the employer's motion based upon *Tilly's*. The Ninth Circuit also affirmed denial of the motion as to the claim for "hours worked" based on the time employees spent calling in 3-4 times each week.
- Employer takeaways: Carefully review whether you have any policy or practice of "call in" shifts and consider discontinuing in light of federal and state appellate rulings.

Brady v. AutoZone Stores, Inc., 960 F.3d 1172 (9th Cir. 2020)

- Procedure: Plaintiff brought meal/rest period claims. The district court denied class certification. Plaintiff settled his individual claims, then appealed class cert. denial. The Ninth Circuit determined the appeal was moot.
- Holding: A putative class representative who voluntarily settles his/her individual claims and no longer retains a personal stake in the class action renders the class claims moot.
- A class representative who settles his/her individual claims no longer has a legally cognizable interest in the outcome of the class claims where he/she has no financial stake in the outcome; if the class representative retains a stake, however, then the class claims are not moot.
- Employer Takeaways: When settling with a putative class representative, make sure the settlement agreement fully resolves the employee's individual claims, including attorneys fees and costs, and *disclaims the class claims* by explicitly stating the employee is not entitled to any financial reward if the unresolved class claims are ultimately successful (i.e., no entitlement to an award enhancement fee).

Grande v. Eisenhower Med. Ctr., 44 Cal. App. 5th 1147 (2020), *review granted*, 463 P.3d 169 (Cal. S. Ct. May 13, 2020)

- Holding: The settlement of a class action between a staffing agency and its employees did not bar a subsequent action by the employees against the staffing agency's client, a hospital, where the agency and the client were not in privity, and the client was not a released party under the settlement agreement.
- The appellate court was not persuaded that the staffing agency's and its client's "joint employer" status meant that they were agents of each other. The pair affirmatively disavowed any agency relationship in their contract. Further, there was no evidence that the hospital ever actually acted as the staffing agency's agent or vice versa.
- The appellate court also rejected the contention that the hospital was a released party under the settlement agreement. The settlement included a long list of categories of people and entities who fell within the definition of "Released Parties." That list did not include words such as clients, joint employers, joint obligors, or other similar language that could reasonably be read to include the hospitals to which the plaintiff class members had been assigned.
- ***On review***: May a class of workers bring a wage and hour class action against a staffing agency, settle that lawsuit with a stipulated judgment that releases all of the staffing agency's agents, and then bring a second class action premised on the same alleged wage and hour violations against the staffing agency's *client*? On November 24, 2020 the case was fully briefed.

AB 1947: Expansion of Time to File Labor Commissioner Complaint

- AB 1947 extends the time limit under which employees can file a complaint with the DLSE (Labor Commissioner) alleging that they "have been discharged or otherwise discriminated against in violation of any law enforced by the Labor Commissioner."
- The time limit would be extended from six months to one year after the occurrence of the alleged violation(s).
- This bill authorizes a court to award attorneys fees to a plaintiff who brings a successful claim.

Discrimination, Harassment & Retaliation

Morgan Lewis

Anthony v. TRAX Int'l Corp., 955 F.3d 1123 (9th Cir. 2020)

- Holding: After-acquired evidence can be used to show that an ADA plaintiff was not a "qualified individual."
- Plaintiff Anthony suffered from mental health conditions and was terminated by Defendant TRAX when she could not return to work after a LOA. She then filed an action alleging she was terminated because of her disability, and that TRAX failed to engage in the statutorily required interactive process to find a reasonable accommodation for her employment.
- During the course of litigation, TRAX discovered that the plaintiff falsely indicated on her employment application that she had a bachelor's degree, which was a requirement for the plaintiff's position based on specific government contracts.
- TRAX argued that without the required degree, the plaintiff was not qualified for the position.
- The district court granted summary judgment in favor of TRAX, reasoning that, in light of the after-acquired evidence, the plaintiff was not a "qualified individual" within the protections of the ADA.
- The Ninth Circuit affirmed the district court ruling and further held that the employer was not required to engage in the interactive process as the plaintiff was not "otherwise qualified."

Glynn v. Superior Court, 42 Cal. App. 5th 47 (2019)

- Holding: Employees need not prove discriminatory animus to establish a claim for disability discrimination. An employer's mistaken belief as to an employee's ability to return to work with or without accommodation, even if reasonable and in good faith, constitutes direct evidence of disability discrimination.
- Summary: Plaintiff went on an approved medical leave of absence. While on leave, Plaintiff was terminated by HR personnel due to a misunderstanding of the company's leave policies. HR mistakenly believed that Plaintiff had applied and been approved for long-term disability (LTD) benefits, at which point the company policy required termination. Plaintiff had not applied for LTD benefits and, instead, sought to be reassigned to a vacant position as an accommodation in accordance with company policy.
  - After he filed suit, the employer's chief HR officer conceded to Plaintiff that he should not have been terminated and offered to reinstate him, with full back pay and benefits, while the company determined a proper job reassignment and accommodations. Plaintiff declined, asserting that no alternative position was offered and his belief that the company would fail to place him in an open position.
- In reaching its decision, the court noted that the consequences of an employer's mistaken belief as to an employee's ability to safely perform the essential functions of a job should fall on the employer and not the employee.

Jimenez v. U.S. Continental Mktg., Inc., 41 Cal. App. 5th 189 (2019)

- Holding: Employer may have FEHA liability if it exercised direction and control over temporary worker.
- Elvia Jimenez worked for Ameritemps (staffing agency). Ameritemps placed Jimenez with USCM. She worked at USCM for 5 years, performed a supervisory role, oversaw 30 workers, reported to a USCM employee, was subject to USCM's employee handbook, and received USCM training.
- On the other hand, Ameritemps hired her, tracked her time, paid her, and provided her benefits.
- USCM terminated Jimenez following an investigation of alleged bullying. Then Ameritemps terminated her.
- Jimenez sued both companies for FEHA violations. USCM framed the inquiry as a contest of relative influence, arguing that USCM did not have more control over Jimenez than Ameritemps. The jury found USCM was <u>not</u> her employer.
- Court of Appeal reversed, holding USCM <u>was</u> Jimenez's employer given that USCM exercised sufficient direction and control over the terms, conditions, and privileges of her employment.
  - Analysis of whether an entity is an employer for FEHA purposes turns on "the totality of the circumstances" (no bright-line test).
  - The inquiry with respect to the contracting employer (USCM) is considered individually, not in relation to that of the worker's direct employer (Ameritemps). There is no contest of relative influence.

Rizo v. Yovino, 950 F.3d 1217 (9th Cir. 2020)

- Holding: Under the Federal Equal Pay Act (29 U.S.C. § 206(d)(1)(iv)), reliance on a female employee's prior salary cannot justify a salary differential with her male colleagues, whether or not the prior salary was considered with other factors.
  - Any salary differential between a female employee and her male colleagues must be justified by a job-related factor. Job-related factors include:
    - Experience,
    - educational background,
    - ability, or
    - prior job performance.
  - Prior salary is not job related.
  - Prior salary potentially reflects a discriminatory marketplace.

AB 2143: Modifies the Prohibition of No-rehire Provisions in Settlement Agreements

- Section 1002.5 of the California Code of Civil Procedure prohibits the use of "no-rehire" provisions in settlement agreements to resolve employment disputes executed after January 1, 2020 where the employee has made an official complaint.
  - An "official complaint" is a claim against the employer that has been filed in court, before an administrative agency, in an alternate dispute resolution forum, or through the employer's internal complaint process.
  - An exception applies when the employer has made a good-faith determination that the employee had engaged in sexual harassment or sexual assault.

AB 2143: Modifies the Prohibition of No-rehire Provisions in Settlement Agreements, cont'd.

- AB 2143 amends Section 1002.5 by expanding the exception to the prohibition on "no re-hire" provisions while adding additional requirements applicable to employees and employers.
  - The exception now applies to employees who have engaged in "any criminal conduct," in addition to the previous exception for sexual harassment or sexual assault.
  - For employees: The official complaint must have been made in good faith before "no re-hire" provisions would be unlawful settlement terms as to that employee.
  - For employers: For the exception to apply, the employer must have documented the good-faith determination of covered misconduct by the employee before the employee files the complaint.

AB 3364: Omnibus. You Can Say That Again!

- AB 3364 makes more than 20 changes to existing provisions of state law.
- Notable among these changes for employers . . .
  - The Government Code is amended to recognize military status as a civil right under the FEHA (California's anti-discrimination statute).

AB 3364: What Is Military Status?

- Military status (along with veteran status) is defined as being a member (or veteran) of the United States Armed Forces, United States Armed Forces Reserve, the United States National Guard, or the California National Guard.
- Discrimination is prohibited based on one's military status *and* based on the perception that an individual is a member of the military or is associated with a person who is a member of the military.
  - Can't discriminate against an employee because he/she likes to wear military paraphernalia or is friends with military members.

SB 973: Equal Pay Report Requirement

- Covered Employers Must Submit Pay Data Report to DFEH
  - Applies to employers with more than 100 employees (including employees outside of California per DFEH guidance) who are required to file annual, federal EEO-1 reports
  - Reporting year is calendar year
  - Choose single "snapshot" pay period in October through December
  - First report due by March 31, 2021
  - Searchable format
- Report Contents
  - Number of employees categorized by *race, ethnicity, and sex*
  - Categorized in each of the EEO-1 defined *job types*
  - Include previous year W-2 earnings and hours worked
  - Categorize in *pay bands* used by US Bureau of Labor Statistics
  - Required for each establishment and consolidated report that includes all employees

SB 973: Equal Pay Report Requirement, cont'd.

- Confidentiality and Retention
  - State and agencies required to keep unique employer data confidential
  - Information considered confidential under California Public Records Act
  - State may report and publish aggregated data
  - Agency must retain data for 10 years
- Enforcement
  - DFEH required to make reports available to DLSE upon request
  - Employment Development Department (EDD) required to provide DFEH upon request the names and addresses of all covered businesses
  - DFEH can use the list to determine compliance with reporting
  - DFEH may seek an order compelling compliance by employers and recover costs

SB 973: Equal Pay Report Requirement, cont'd.

- Employers Should Plan Now for Compliance
  - DFEH has published a **template** and **User Guide:** https://www.dfeh.ca.gov/paydatareporting/
  - May submit EEO-1 report if it contains the same or *substantially similar* pay data
    - Note, most EEO-1 reports will not technically comply with SB 973 because the federal government discontinued collection of pay band data categorized by race, ethnicity and sex
      - May change under Biden administration
  - Adjust systems to ensure data will be available in the format required
  - Prepare the report with the assistance and at the direction of counsel to ensure communications regarding the report, including the results and any impact the report will have to the company, are privileged. While the report is submitted to the DFEH, employers should keep communication regarding the data behind it privileged
  - Consider proactive pay equity analysis to address any areas of concern

AB 979: Diversify Boards of Publicly Traded Companies

- Requires publicly traded corporations with a principal executive office in California to diversify their boards of directors by appointing **director(s) from underrepresented communities**.
  - Defined as individuals who self-identify as "Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identify as gay, lesbian, bisexual, or transgender."
- Compliance Requirements:
  - By December 31, 2021, covered corporations must have at least one director from an underrepresented community on their boards.
  - By December 31, 2022, covered corporations with nine or more directors must have a minimum of three directors from underrepresented communities on their boards; covered corporations with more than four but less than nine directors must have a minimum of two directors from underrepresented communities on their boards.
- Companies that fail to comply will be fined $100,000 for the first violation and $300,000 for subsequent violations.
  - The California Secretary of State will publish annual reports on its website documenting compliance no later than March 1, 2022.

Independent Contractors & Joint Employers

Morgan Lewis

AB 2257: Changes to AB 5

- AB 2257 limits the ABC test's reach under AB 5 and clarifies when the *Borello* test applies.
- Provides additional exemptions for enumerated occupations, including, as a non-exhaustive example:
  - Certain competition judges and master class teachers;
  - Insurance underwriters;
  - Real estate appraisers and home inspectors;
  - Some licensed professionals (e.g., landscape architects, foresters); and
  - Musicians and related occupations (subject to specific conditions).
- Creates new exemption for two individuals who partner for a single-engagement event.
- Creates new exemption for the relationship between a data aggregator and an individual providing feedback to the data aggregator.
- Effective September 4, 2020.
- But applies retroactively to existing claims and actions insofar as its application would relieve an employer from liability.

AB 2257: Changes to AB 5, cont'd.

- Revises the Business-to-Business (B2B) Exemption (Labor Code § 2776)
  - Now includes B2B relationships involving sole proprietors.
  - Permits a business service provider (BSP) to operate out of its residence.
  - Limits the requirement that the BSP provide services directly to the contracting business, rather than the contracting business's customers, to certain situations.
  - Requires that the contract specify the payment amount, rates of pay, services to be performed, and due date for payment of services.
  - No longer requires a BSP to actually contract with other businesses, just that the BSP can contract with other businesses and can negotiate its own rates.
  - The BSP must provide its own tools, vehicles, and equipment to perform the services, but does not include necessary proprietary materials.

AB 2257: Changes to AB 5, cont'd.

- Revises the Referral Agency Exemption (Labor Code § 2777)

  The *Borello* test will apply to the relationship between a referral agency and a service provider if the service provider meets certain criteria, including:

  - Certifies to the referral agency that it has any required business licenses, tax registration, professional licenses, permits, certifications, or registration, which the referral agency must keep for at least three years;
  - Is not required to deliver services under the referral agency's name;
  - Provides its own tools and supplies;
  - Sets its own hours and terms of work or negotiates its hours and terms of work directly with the client; or
  - Sets its own rates, negotiates its rates with the client through the referral agency, negotiates rates directly with the client, or is free to accept or reject rates set by the client, without deduction by the referral agency.

AB 2257: Changes to AB 5, cont'd.

- Revises the Referral Agency Exemption (Labor Code § 2777)
  - The referral agency must not restrict the service provider from maintaining its own clientele.
  - Excludes services provided in an industry designated by the Cal-OSHA as a high-hazard industry, or for referrals for businesses that provide, among other things, janitorial, delivery, transportation, trucking, and in-home care services.
  - To qualify as a "client," a business now may only contract with a service provider for services that are otherwise not provided on a regular basis by employees at the client's business location or services that are outside of the client's usual course of business.
  - The service provider is free to accept or reject clients and contracts without being penalized in any form by the referral agency.

AB 2257: Changes to AB 5, cont'd.

- Revises the Professional Services Exemption (Labor Code § 2778)
  - Revises the list of services that qualify as professional services, such as "fine artists."
  - Amends the still photographer/photojournalist exception:
    - Eliminates 35-submission limit;
    - Includes videographers and photo editors;
    - Services must be performed under written contract, and must not directly replace an employee performing the same work at the same volume; and
    - The service provider must not primarily perform work at a hiring entity's location.
  - Exempts specific enumerated occupations, including real estate licensees and home inspectors.
  - Amends the freelancer exemption to include translators, copy editors, and illustrators.

Prop 22: App-Based Rideshare/Delivery Drivers

- Allows app-based rideshare and delivery companies to keep hiring drivers as independent contractors rather than employees.
  - Passed by California voters in November 2020 election
  - Allows drivers to decide when, where, and how much to work
  - Drivers are not entitled to benefits and protections that businesses must provide employees, such as minimum wage, overtime, unemployment insurance, and workers' compensation
  - Instead, drivers are entitled to other compensation, including minimum earnings, healthcare subsidies, and vehicle insurance

Vazquez v. Jan-Pro Franchising Int'l, Inc., Cal. No. S258191

- Holding: The state's "ABC test" from *Dynamex Operations West, Inc. v. Superior Court* (2018) for determining if workers are employees or independent contractors applies retroactively.
- The California Supreme Court issued this decision in response to a certified question from the Ninth Circuit.
- *Dynamex* holding: In order to classify a worker as an independent contractor, a hiring entity must establish three things:
  - A) Freedom from control over how to perform the service
  - B) Service is outside the business's normal variety or workplace
  - C) Worker is engaged in independently established role
- Employer takeaways: This decision opens up companies to liability for lawsuits not yet final as of the date of the *Dynamex* decision becoming final (April 30, 2018).

Salazar v. McDonald's Corp., 944 F.3d 1024 (9th Cir. 2019)

- Plaintiffs sought to hold McDonald's liable for wage and hour violations allegedly committed by its franchisee.
- The franchisee selected, interviewed, hired, trained, supervised, disciplined and fired employees for its franchises, set their wages and schedules, and paid the employees; but Plaintiffs presented evidence that the franchisee was required to use certain of McDonald's computer systems and voluntarily used others, including McDonald's proprietary timekeeping software; managers were trained at McDonald's Hamburger University; and employees were required to wear McDonald's standard uniforms.
- Plaintiffs alleged that McDonald's timekeeping system caused many employees who worked more than eight hours in a 24-hour period to miss out on overtime pay that they earned.
- Relying on California Supreme Court precedent, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of McDonald's, concluding that it was not a joint employer because:

  (1) it did not control the wages, hours, or working conditions of the workers and did not retain "a general right of control" over "day-to-day aspects" of work at the franchises;
  (2) it did not "suffer or permit" the franchise employees to work, because it did not have the power to cause or prevent class members from working; and
  (3) it could not be held liable under an ostensible-agency theory.

Leaves of Absence

Morgan Lewis

California and Federal COVID-19 Paid Sick Leave Laws Expired

- AB 1867 (applicable to employers with more than 500 employees), which allowed for 80 hours of CA COVID-19 Supplemental Paid Sick Leave and COVID-19 Food Sector Supplemental Paid Sick Leave, ***expired*** on December 31, 2020.
- The federal Families First Coronavirus Response Act (applicable to employers with fewer than 500 employees), which allowed for 80 hours of emergency paid sick leave (regular rate) and 12 weeks of emergency FMLA leave (2/3 rate), ***expired*** on December 31, 2020.
- However, the federal Coronavirus Response and Relief Supplemental Appropriations Act has been extended but only with respect to tax credits for employers with fewer than 500 employees offering paid sick leave for COVID-19-related reasons.
  - If employers voluntarily provide leave (under either the emergency paid sick leave or emergency FMLA leave), then they may be able to receive a tax credit for the provided leave
- Local COVID-19 supplemental paid sick leave laws may still be in effect and/or may be in the process of being extended.

AB 2017: Employee Sick Leave and Kin Care

- Bill amends Labor Code § 233, otherwise known as "Kin Care," which allows an employee to use not less than 6 months of accrued sick leave for the diagnosis, care, or treatment of the employee or the employee's family member, or ifthe employee is the victim of sexual assault, domestic violence, or stalking.
- Under Labor Code § 233, employers are prohibited from:

  1. denying the employee's right to take sick leave, or

  2. discriminating against the employee for using or attempting to use sick leave to attend to the employee's family member's illness.
- AB 2017 adds that it is at the "sole discretion of the employee" to designate his or her use of sick leave for the purposes described above.
- Effective January 1, 2021.

AB 2399: Expands Paid Family Leave

- The California Paid Family Leave program provides wage replacement benefits to employees taking time off to care for a seriously ill family member or bond with a minor child within one year of the child's birth or placement.
  - Remember this is NOT a leave entitlement. It's wage replacement program that applies only if the employee is already on a protected leave of absence.
- AB 2399 now includes covered time off for participation in a qualifying exigency related to the active duty or call to active duty of the employee's child, spouse, domestic partner, or parent in the Armed Forces of the United States.

AB 2992: Expanded Protections for Victims of Crime or Abuse

- Under Labor Code § 230, employers are prohibited from discharging an employee for taking time off to serve on a jury or appear in court pursuant to a subpoena or court order.
- Labor Code § 230.1 requires employers of 25 or more employees to allow an employee who was a victim of domestic violence, sexual assault, and/or stalking to take time off to seek medical attention or related services.
- AB 2992 expands the protections under Labor Code §§ 230 and 230.1 to provide existing protected leave to employees who are victims of any violent crime, and also to employees who are immediate family members of homicide victims. AB 2992 further allows additional reasonable forms of documentation to verify that a crime or abuse occurred to determine employee eligibility for protected leave.
  - "Crime" is defined broadly as any offense under Section 13951 of the Government Code, under which "crime" means a crime or public offense, wherever it may take place, that would constitute a misdemeanor or a felony if the crime had been committed in California by a competent adult.

SB 1383: Amendments to California Family Rights Act (CFRA)

- Background
  - The California Family Rights Act (CFRA), modeled after the federal FMLA, required an employer with 50 or more employees to grant an employee's request to take up to 12 workweeks of unpaid protected leave during any 12-month period to bond with a new child of the employee or to care for himself or herself, a child, a parent, or a spouse, provided the employee has at least 1,250 hours of service with the employer during the previous 12-month period.
    - The employer may refuse to grant the request if the employer employs fewer than 50 employees within 75 miles of the worksite where the employee is employed.
  - The New Parent Leave Act (NPLA) requires an employer to grant an employee's request to take up to 12 workweeks of unpaid protected leave during any 12-month period to bond with a new child as long as the employee has more than 12 months of service with the employer, has at least 1,250 hours of service with the employer during the previous 12-month period, and works at a worksite at which the employer employs at least 20 employees within 75 miles.

SB 1383: Amendments to CFRA, cont'd.

- SB 1383 repeals the NPLA and amends the CFRA
  - As of January 1, 2021:
    - Private employers with 5+ employees and certain public employers are covered.
    - Covered employers must provide eligible employees with up to 12 workweeks of unpaid protected leave during any 12-month period.
    - SB 1383 eliminates the "50 employees within 75 miles of the worksite where the employee is employed" qualification.
    - Employees still must have at least 1,250 hours of service with the employer during the previous 12-month period to be eligible for the leave.

SB 1383: Amendments to CFRA, cont'd.

- SB 1383 expands the definition of "family member."
  - Under the prior CFRA, eligible employees may take unpaid leave to care for a "family member" with a serious health condition. "Family member" includes a minor child (unless the child is an adult dependent child), a spouse, a domestic partner, or a parent.
  - Now "family member" includes the employee's children, spouse, parents, siblings, grandparents, grandchildren, and domestic partner.
  - Now the definition of "child" covers all adult children, whether or not they are dependent or the children of a domestic partner.

SB 1383: Amendments to CFRA, cont'd.

- Additional CFRA Changes
  - Under prior CFRA, an employer that employed both parents needed only to grant 12 weeks of total leave to both employees in connection with the birth, adoption, or foster care placement of a child. SB 1383 now requires the employer to grant 12 weeks to each parent for such leave to care for a child.
  - SB 1383 makes it an unlawful employment practice for any employer to refuse to grant a request by an employee to take up to 12 workweeks of unpaid protected leave during any 12-month period due to a qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, child, or parent in the Armed Forces of the United States.
  - SB 1383 provides that family and medical leave requested by an employee is not deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon termination of the leave. Accordingly, time to update your forms.

SB 1383: Amendments to CFRA, cont'd.

- Possible Increase in Protected Leave for Some Employees
  - For employers and employees already covered by the FMLA, SB 1383's expansion of the definition of "family member" appears to create a situation where employees could have 12 weeks of FMLA leave *and an additional 12 weeks* of CFRA leave. While leaves under FMLA and CFRA generally run concurrently, SB 1383 adds coverage for leaves to care for siblings, grandparents, grandchildren, and adult children not covered under the FMLA.
  - Example: Where an employee has exhausted 12 weeks of FMLA leave (provided the employer is covered by FMLA) for the employee's serious medical condition but also requests leave to care for a sibling under the CFRA, the employer would be faced with providing 24 weeks of protected leave to the employee with continued health insurance benefits and a guaranteed right of reinstatement.

SB 1383: Amendments to CFRA, cont'd.

- The "key employee" exception to prior CFRA allowed an employer to refuse to reinstate an employee at the end of the leave if:
  - the employee was salaried and among the highest paid 10% of employees within 75 miles of the worksite;
  - refusal to reinstate was necessary to prevent substantial economic injury; and
  - the employee received timely notice of the intent not to reinstate and an opportunity to return early but did not do so.
- This "key employee" exception has been removed.

SB 1383: Amendments to CFRA, cont'd.

- Employer takeaways:
  - Smaller employers previously excluded from CFRA will need to prepare to follow CFRA's requirements after January 1, 2021.
  - Employees already covered by CFRA should update their leave policies to include the new definition of "family member" and other new provisions of the law.
  - As before, CFRA leave will run concurrently with leave under the FMLA (CFRA's federal counterpart) *except* when the leave is for a purpose not covered by the FMLA.
    - As before, CFRA baby-bonding leave does not run concurrently with the FMLA.
    - Unlike before, employees taking leave under CFRA's new expanded reasons - which reasons are not also covered by FMLA - will be permitted to take additional FMLA leave as well.

PAGA

Morgan Lewis

Noori v. Countrywide Payroll & HR Solutions, Inc., 43 Cal. App. 5th 957 (2019)

- PAGA wage statement claim alleging that staffing company Countrywide Payroll & HR Solutions, Inc.'s wage statements failed to accurately list the name of the legal entity that is the employer, as required by Labor Code Section 226(a)(8).
- Instead, the wage statements listed an acronym, CSSG, which stands for Countrywide Staffing Solutions Group, which is a fictitious business name in some states.
- "CSSG" was not Countrywide's registered name or a minor truncation. The fact that "Countrywide Staffing Solutions Group" was listed on the detachable check was insufficient.

Noori v. Countrywide Payroll & HR Solutions, Inc., cont'd.

- Use of truncated names or fictitious business names can satisfy the statute. Examples:

Name on Wage Statement	Legal Entity of the Employer	Case
Spherion Pacific Work, LLC	Spherion Pacific Workforce, LLC	*Elliot v. Spherion Pacific Work, LLC , et al.*, 572 F. Supp. 2d 1169, 1174 (C.D. Cal. 2008), *aff'd*, 368 F. App'x 761 (9th Cir. 2010).
Farmland Mutual Insurance Co.	Farmland Mutual Insurance Company	*Mejia v. Farmland Mut. Ins. Co.*, No. 217CV00570TLNKJN, 2018 WL 3198006, at *1 (E.D. Cal. June 26, 2018).
YRC Freight (California registered fictitious business name)	YRC Inc.	*Savea v. YRC Inc.,* 34 Cal. App. 5th 173 (2019).

Noori v. Countrywide Payroll & HR Solutions, Inc., cont'd.

- Severe truncations or alterations of the employer's name can violate the statute, particularly where confusion might ensue. Examples:

Name on Wage Statement	Legal Entity of the Employer	Case
SUMMIT	Summit Logistics, Inc.	*Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949 (2005).
First Transit	First Transit Transportation, LLC (where "First Transit, Inc." also exists)	*Clarke v. First Transit, Inc.*, No. CV076476GAFMANX, 2010 WL 11459323, at *1 (C.D. Cal. Nov. 4, 2010).
Wal-Mart Associates, Inc.	Wal-Mart Stores, Inc. (where multiple Wal-Mart entities shared the same address)	*Mays v. Wal-Mart Stores, Inc.*, 354 F. Supp. 3d 1136 (C.D. Cal. 2019).
CSSG (an acronym of fictitious name "Countrywide Staffing Solutions Group," which was not registered in California)	Countrywide Payroll & HR Solutions, Inc.	*Noori v. Countrywide Payroll & HR Sol., Inc.*, 43 Cal. App. 5th 957 (2019).

Kim v. Reins, 9 Cal. 5th 73 (2020)

- Holding: Employees who settle their individual Labor Code claims do not lose standing to pursue a claim for civil penalties under PAGA, on behalf of the state, based on the same alleged violations.
- The California Supreme Court rejected defendant Reins's argument that plaintiff Kim was no longer an "aggrieved employee" because he accepted compensation for his injury. The Court stated that standing under PAGA is based on the employer's violation, not the injury suffered by the employee.
- The Court found that "Kim became an aggrieved employee, and had PAGA standing, when one or more Labor Code violations were committed against him. (See § 2699(c).) Settlement did not nullify these violations. The remedy for a Labor Code violation, through settlement or other means, is distinct from the fact of the violation itself."
- The Court did not address what happens when an employee settles the employee's own PAGA claim. The settlement here expressly excluded the pending PAGA claim. The Court explained:
  - "His single complaint encompassed seven causes of action. The six claims for specific Labor Code violations were bifurcated and sent to arbitration at Reins's own urging. The seventh claim seeking PAGA penalties was stayed pending completion of the arbitration. The PAGA claim was never resolved. Indeed, consistent with the settlement agreement, Kim's request for dismissal of the individual claims specified that 'Cause of Action Seven for penalties pursuant to Lab. Code § 2699 et seq. ("PAGA") for the underlying violations . . . shall remain.' Reins cites no authority, and we are aware of none, holding that the resolution of some claims can bar the litigation of other claims that were asserted in the same lawsuit."

Arbitration

Morgan Lewis

Kec v. Superior Court, 51 Cal. App. 5th 972 (2020)

- Plaintiff filed a putative class and PAGA representative action for a variety of wage and hour labor code violations due to alleged misclassification.
- The parties' arbitration agreement purported to waive class actions and "other representative actions."
  - Included a provision that the class and representative action waivers were not modifiable nor severable
  - If the class and/or representative action waivers were found to be unenforceable, then the entire arbitration agreement would be deemed "null and void" (the "blow up" provision)
- The trial court found the PAGA waiver unenforceable but severed it from the rest of the arbitration agreement and granted the employer's motion to compel arbitration of Plaintiff's individual claims.
- The Court of Appeal reversed, holding that the "blow-up" provision rendered the entire arbitration agreement null and void because the representative waiver was invalid.
- The Court of Appeal concluded that selectively enforcing the agreement would defeat its goals when the parties expressly chose not to make the representative waiver provision severable like every other term in the agreement.

Arbitration Agreement Takeaways

- Review and update arbitration agreements frequently.
  - Include class action waiver
  - Include that the employer is engaged in interstate commerce and that the agreement can be governed by the Federal Arbitration Act
  - Include that the agreement does not cover claims that cannot be subject to arbitration (public injunctive relief, NLRB claims, Agency claims, ERISA plan claims, claims under federal law, etc.), ***including PAGA claims***
  - Include that participation in the arbitration program ***is a condition of employment*** and that the agreement need not be signed; rather, the employee receiving it and continuing to work after receipt is sufficient to bind the employee.
    - Make sure the employer has proof of delivery (i.e., employee can sign acknowledgement or receipt (like handbook) or other proof)
    - Make sure other HR documents are consistent with the "no signature" required provision
    - Make sure no signature is required in the "modification" provision of the agreement
      - (i.e., prospective only, doesn't apply to existing arbitrable claims, notice given by email or on an intranet, goes into effect 30 days after notice).

Arbitration Agreement Takeaways, cont'd.

- Include employer will pay those fees unique to arbitration (arbitrator fees and arbitration forum administrative fees)
- Make sure that agreement is mutual
- Make sure that agreement allows employees all the rights they would have received if claims went to court (apart from a jury trial)
- Include strong severability provisions; but not "blow up" provisions
  - Since PAGA is technically a "representative" action, separate class/collective action waiver from the representative action waiver. Easier to sever
- To avoid joint employment concerns, make the agreement between the employee and actual employer (listed on wage statements) with other related entities, supervisors, managers, parent/subsidiaries, etc., as third-party beneficiaries of the agreement.
- Consider carving out small claims since employer's portion of the AAA filing fee alone is $1,900 (JAMS and AAA rules allow for such carve outs).
- If a class action is already pending, consult with counsel because the employer may need to disclose the class action as part of arbitration rollout.

SB 1384: Labor Commissioner's Representation of Claimants Financially Unable to Represent Themselves

- Under existing Labor Code § 98.4, the Labor Commissioner *may* represent a claimant in the de novo proceedings provided for in Section 98.2 (*i.e.*, in an employee's appeal of the Labor Commissioner's wage order) if the claimant requests representation and is financially unable to afford counsel. If such employee seeks to uphold the final order without objection, the Labor Commission *shall* represent the employee.
- SB 1384 amends Section 98.4 to include "notwithstanding whether such proceedings are held in a judicial or arbitral forum." Thus, the Labor Commissioner's representation applies whether the employer appeals the Labor Commissioner's wage order in court or in arbitration.
- Moreover, when an employer petitions to compel arbitration of wage claims (rather than allow Labor Commissioner adjudication), SB 1384 amends Labor Code § 98.4 to add the following:
  - The petition must be served on the Labor Commissioner.
  - The Labor Commissioner *may* represent the claimant in proceedings to determine enforceability of the arbitration agreement, if requested.
  - If a court compels arbitration of a wage claim, the Labor Commissioner *shall* represent the claimant in arbitration of the wage claim if (i) the claimant requests representation, (ii) the claimant is financially unable to represent himself or herself, and (iii) the Labor Commissioner determines that the wage claim has merit (after an informal investigation).
- Effective January 1, 2021

Meal & Rest Breaks

Morgan Lewis

David v. Queen of Valley Med. Ctr., 51 Cal. App. 5th 653, review denied (Oct. 21, 2020)

- Former nurse alleged her meal and rest periods were interrupted and that her hours were not fully compensated due to the hospital's rounding policy.
- Holding:
  - Charge nurses looking at the clock during Plaintiff's breaks did not constitute a direction to prematurely terminate a break
  - Rounding: Rounding policy was **neutral on its face** because it rounded all employee time punches to the nearest quarter hour regardless of who benefited. Policy was also **neutral in practice** because the rounding practice did not systematically undercompensate the Plaintiff
    - Still – BEWARE of rounding!

AB 1512: New Rest Period Requirements for Security Officers

- AB 1512 amends Labor Code Section 226.7 to carve out a special exception in the security services industry in response to the California Supreme Court's 2016 decision in *Augustus v. ABM Security Services, Inc.*
- In *Augustus*, the California Supreme Court held that a private security company had failed to provide compliant rest periods under the Labor Code to security guards by requiring that guards keep their pagers and radio phones on or remain on call during a rest break.
- AB 1512 allows *certain* employers of *certain* security officers to require that the officers remain on premises and on call and to carry and monitor a communication device during their rest periods.

AB 1512: New Rest Period Requirements for Security Officers, cont'd.

- If the rest period is interrupted, the officer may start a rest period anew as soon as practicable, and the obligation to provide a rest period is satisfied if the restarted rest period is not interrupted.
  - An "interruption" occurs when the officer is called upon to perform the active duties of the post
  - Remaining on premises, remaining on call and alert, or monitoring a radio or communication device are not "interruptions"
- If the security officer cannot take an uninterrupted rest period of at least 10 minutes for every four hours worked or major fraction thereof, then the officer must be paid one additional hour of pay at the "regular base hourly rate of compensation."

AB 1512: New Rest Period Requirements for Security Officers, cont'd.

- Limitations:
- These carveouts to the rest-period requirements only apply if:
  - the security officer is registered under the Private Security Services Act;
  - the employer is a private patrol operator registered under the Private Security Services Act; and
  - the security officer is covered by a valid collective bargaining agreement that meets the conditions set forth in amended Labor Code Section 226.7(f)(3)(B).
- AB 1512's amendments to Section 226.7 do not apply to any lawsuits filed before January 1, 2021.
- The amendments to Section 226.7 will remain in effect until January 1, 2027, when they will be automatically repealed.

AB 2479: Meal and Rest Period Exemption for Safety-Sensitive Positions at Petroleum Facilities

- AB 2479 extends the exemption from meal and rest period requirements under the Labor Code to January 21, 2026 for employees who hold a safety-sensitive position at a petroleum facility to the extent that they are required to carry and monitor a communication device and to respond to emergencies, or required to remain on employer premises to monitor the premises and respond to emergencies.
- Effective January 1, 2021.

Privacy

Morgan Lewis

CCPA and Proposition 24

- CCPA requires privacy of consumer information, but exempts certain information collected by businesses of their employees, officers, directors, medical staff, and contractors.
- What personal information does it **exempt**?
    1) Information of workers collected in the course of acting as job applicants.
    2) Emergency contact information of job applicants.
    3) Information that is necessary to administer benefits to these workers/applicants.
- However, employers must:
    1) provide **notice** to applicants and workers when collecting this info **AT** or **BEFORE** (better before) the point of collecting the personal information (should include link to applicable privacy policy). Ways to provide this notice include posting on company website for job applicants, attaching notice to each job application, providing to new hires during onboarding process, adding to handbooks, sending notices via email, etc. Employers must notify the employee of:
        a) The type of **PERSONAL INFORMATION**
        b) AND PURPOSE OF COLLECTION.
    2) provide **security measures** to protect information
    3) avoid using information for **other purposes** than intended
- Proposition 24 extends these exemptions to January 2023, disallows "sharing" on top of "selling" of personal information, and **includes a new anti-discrimination/retaliation provision**

Upcoming Webinars

- ***New Cal-OSHA COVID-19 Regulations,*** Thursday, February 18. **Register here**
- ***Biweekly Webinar Series: Returning to Work in California: Highlights of Major State and Local Orders,*** Wednesday, February 10 and Wednesday, February 24. **Register here**

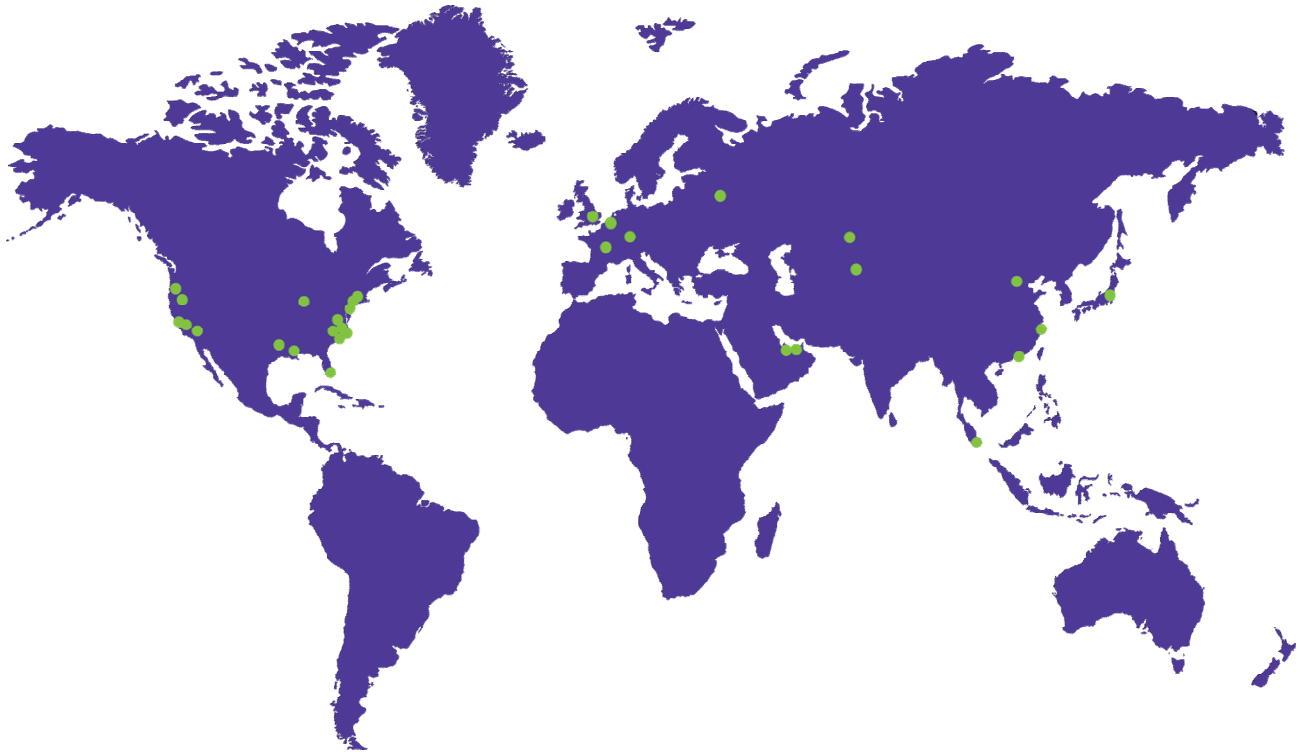
THANK YOU

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Abu Dhabi
Almaty
Beijing*
Boston
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong*
Houston
London
Los Angeles
Miami
Moscow
New York
Nur-Sultan
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
San Francisco
Shanghai*
Silicon Valley
Singapore*
Tokyo
Washington, DC
Wilmington



Morgan Lewis

*Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan Lewis operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong as a registered foreign law firm operating in Association with Luk & Partners. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

Morgan Lewis

APPENDIX

Appendix - Table of Contents

Appendix: More COVID-19 Related Statutes

Morgan Lewis

AB 2537: Personal Protective Equipment; Healthcare Employees

- This bill creates Labor Code Section 6403.3, which requires public and private employers of workers in general acute care hospitals to supply those employees who provide direct patient care (or provide services that directly support personal care) with PPE.
  - The bill also requires these employers to ensure that the employees use the PPE supplied to them.
- Beginning April 1, 2021, these employers must maintain a supply equal to 3 months of normal consumption of the following specified equipment: N95 filtering face-piece respirators, powered air-purifying respirators with high efficiency particulate air filters, elastomeric air-purifying respirators and appropriate particulate filters or cartridges, surgical masks, isolation gowns, eye protection, and shoe coverings.
  - These employers must provide an inventory of their stockpile and a copy of their written procedures to Cal-OSHA upon request. The bill would authorize the assessment of a civil penalty of up to $25,000 for each violation to maintain the required stockpile.
- This bill also requires general acute care hospitals, on or before January 15, 2021, to be prepared to report to the Department of Industrial Relations their highest 7-day consecutive daily average consumption of PPE during the 2019 calendar year.

SB 275: Mandatory PPE Stockpiles

- The State Department of Public Health and the Office of Emergency Services are required to establish a PPE stockpile.
- Beginning the later of Jan. 1, 2023, or after adoption of specified regulations, requires healthcare employers (including clinics, health facilities, and home health agencies) to maintain an inventory of new, unexpired PPE sufficient for at least 45 days of "surge consumption" in the event of a declared state of emergency.
- Civil penalties may be assessed for non-compliance, but potential for exemption from penalties if supply chain obstacles beyond the employer's control prevent the employer from obtaining required levels of PPE.

AB 2658: Hazards Protection for Household Domestic Workers

- Existing law prohibits laying off or discharging an employee for refusing to perform work in violation of prescribed safety standards, where the violation would create a real and apparent hazard to the employee or fellow employees. "Employment" is defined for these and other purposes to exclude household domestic service.
  - AB 2658 amends Labor Code Section 6310 so that "employee" is now defined to include a domestic work employee for purposes of the statute's hazard provisions, except for a person who performs household domestic service that is publicly funded.
- AB 2658 also amends Labor Code 6311.5 to make it a crime for a person, after receiving notice to evacuate or leave, to willfully direct an employee to remain in, or enter, an area closed under specific provisions of law due to a menace to the public health or safety. For these purposes, the term "employee" includes a person who performs household domestic service, including household domestic service that is publicly funded.

AB 2043: Agricultural Workplace Health and Safety

- Adds Labor Code section 6725
- Requires Cal-OSHA to:
  - disseminate, in both English and Spanish, information on best practices for COVID-19 infection prevention, consistent with Cal-OSHA agricultural industry guidance, and contact information for Cal-OSHA that employees can use to report workplace safety complaints;
  - Work with community organizations to conduct an outreach campaign targeted to agricultural employees to educate re: available COVID-19-related employment benefits (e.g., paid sick leave or workers' comp); and
  - Compile and report the results of any investigations about practices or field conditions.
- Effective immediately and until state of emergency is lifted

AB 107: FTB COVID-19 Reporting

- Adds section 19551.2 to the Revenue and Taxation Code, and amends other laws.
- Requires the Franchise Tax Board (FTB), upon request, to disclose, in an anonymized manner, tax return information to the state's EDD to verify income for the EDD's administration of programs related to COVID-19 (e.g., the CARES Act and other emergency relief).
- Effective immediately.

Appendix: Wage & Hour

Morgan Lewis

Barriga v. 99 Cents Only Stores LLC, 2020 WL 3481717 (Cal. Ct. App. 2020)

- Certify off the clock and meal period classes. Defendant submitted employee declarations in opposition, and Plaintiff moved to strike those declarations, arguing that they were obtained via coercion.
- Trial court has the duty/authority to exercise control over pre-cert communications – declarants misled or declarations not freely and voluntarily given sufficient.
- Potential coercive communications with employees include:
  - Not told declaration would be used against them;
  - Told attorneys were merely doing an internal investigation;
  - Summoned to meeting, but not told they could decline to be interviewed; and
  - Employees testified they felt pressured to sign declaration.
- Remanded for trial court to reconsider striking the declarations with instruction to "carefully scrutinize" the declarations for coercion and abuse.
  - After considering declarants' deposition testimony, the trial court found no compelling evidence that employees were misled or that declarations were not voluntarily given and denied plaintiff's motion to strike defendant's declarations.

AB 2765: Prevailing Wages

- California law requires that generally no less than the general prevailing rate of per diem wages be paid to workers employed on public works.
- AB 2765 expands the definition of "public works" for these purposes to include any construction, alteration, demolition, installation, or repair work done under private contract on a project for a charter school when the project is paid for with the proceeds of certain bonds.
- This bill adds section 1720.8 to the Labor Code.
- Effective January 1, 2021.

AB 3075: Wages and Enforcement – Three Changes to Existing Law

Change 1:

- Under existing law, every corporation, limited liability company, and limited liability partnership must file a Statement of Information with the California Secretary of State disclosing information about the entity such as its name, the business addresses of incumbent directors, the street address of principle executive office, etc.
  - Must be filed within 90 days of filing of the entity's original articles or annually thereafter during the applicable filing period (calendar month of filing of original articles and the preceding five months).
- Under AB 3075, Statements of Information filed with the California Secretary of State must indicate whether any officer or director, or, in the case of a limited liability company, any member or manager, has an outstanding final judgment issued by the DLSE or a court for the violation of any wage order or any provision of the Labor Code.
  - Statements of Information are and will continue to be submitted under penalty of perjury.
  - New requirement begins January 1, 2022 or upon certification by the Secretary of State that California Business Connect is implemented, whichever is earlier.

AB 3075: Wages and Enforcement – Three Changes to Existing Law, cont'd.

Change 2: Don't get pinched!

- Adds Section 200.3 to the Labor Code, making a successor to any judgment debtor liable for any wages, damages, and penalties owed to any of the judgment debtor's former workforce pursuant to a final judgment.

- Successorship is found if any of the following are met:
  - Use of substantially the same facilities or workforce to offer substantially the same services
  - Having substantially the same owners or managers that control labor relations
  - Employing as a managing agent any person who directly controlled the wages, hours, or working conditions of the judgment debtor's workforce
  - Operating a business in the same industry and having an owner, partner, officer, or director who is an immediate family member of any owner, partner, officer, or director of the judgment debtor
- This section does not limit other means of establishing successor liability for wages, damages, and penalties.

AB 3075: Wages and Enforcement – Three Changes to Existing Law, cont'd.

Change 3:

- Currently, local jurisdictions are not precluded from enforcing local labor standards that are more stringent than state standards.
- This bill goes further to expressly authorize local jurisdictions to enforce local standards relating to the payment of wages that are more stringent than state standards.

AB 3374: Part-Time Clinical Nursing Faculty

- Under existing law, a single community college district may employ, for up to four semesters or six quarters, a person serving as full-time clinical nursing faculty or as part-time clinical nursing faculty teaching not more than 67% of the hours per week considered a full-time assignment for regular employees having comparable duties.
- AB 3374 amends Education Code Section 87482 to state that the full-time or part-time clinical nursing faculty referenced above may be employed by a single community college district for up to four semesters or six quarters within any period of three consecutive academic years.

AB 736: Expands Professional Exemption to Adjunct Faculty at Private Colleges and Universities

- Applies to private, non-profit colleges and universities
- Adjunct, or part-time, professors and other faculty may be classified as exempt professional employees if they satisfy both a duties test and a salary test
- Duties Test
  - Primarily engaged in an occupation commonly recognized as a "learned or artistic profession" as defined in the statute
  - Customarily and regularly exercises discretion and independent judgment in the performance of duties
- Salary Test
  - Paid a monthly salary that is at least twice the state minimum wage for full-time employment
  - If employed per course or laboratory taught, paid a salary for the course/laboratory that is calculated by classroom hours in accordance with the minimum hourly rates specified in the statute
  - If employed under a collective bargaining agreement (CBA), paid pursuant to the CBA if it expressly provides in clear and unambiguous terms the classification of employment in a professional capacity
- Effective September 9, 2020

Appendix: Discrimination, Harassment & Retaliation

Morgan Lewis

SB 493: Student Sexual Harassment Prevention and Investigation at Colleges and Universities

- Applies to postsecondary institutions that receive state financial assistance
- Required Training and Obligations for Employees and Campus Residential Staff
  - Must designate at least one employee (e.g., Title IX coordinator) to coordinate efforts to comply with this law
  - Must notify employees of their obligation to report sexual harassment to appropriate school officials
  - Training for all employees on identification of sexual harassment and reporting
  - Training as specified under Education Code § 67386(b)(12) for all employees engaged in grievance procedures, including trauma-informed practices and implicit bias
  - Annual training for all on-campus housing staff (including student staff) on trauma-informed handling of reports of sexual harassment
- Must adopt certain grievance procedures that provide for prompt and equitable resolution of sexual harassment complaints filed by students

SB 493: Student Sexual Harassment Prevention and Investigation at Colleges and Universities, cont'd.

- Must adopt rules and procedures for sexual harassment prevention with the following elements:
  - Primary concern is student safety.
  - Duty to respond to all incidents of sexual harassment involving covered individuals, including off-campus incidents.
  - Duty to promptly investigate and respond to all possible sexual harassment by covered individuals of which it knows or reasonably should know, even if there is no formal complaint.
  - School must take complainant's confidentiality request seriously, while at the same time considering its responsibility to provide a safe and nondiscriminatory environment.
- Required Notices and Publication
  - Disseminate a notice of nondiscrimination to (1) employees, (2) volunteers, and (3) individuals or entities under contract with the institution.
  - Publish certain information on website, including contact information for Title IX/Compliance coordinator and other officials with authority to investigate and respond to complaints and grievance procedures.
- Effective January 1, 2022.

Appendix: Choice-of-Law

Morgan Lewis

Oman v. Delta Air Lines, 9 Cal. 5th 762 (2020)

- Flight attendants argued that Delta's compensation system failed to pay for all hours worked and that Delta must comply with California's timing-of-pay (Section 204) and wage statement (Section 226) requirements even though they spent the majority of their working time outside California.
- The California Supreme Court answered two certified questions from the Ninth Circuit as follows:
  - Answer to Certified Question #1: California's limits on "wage borrowing" permit compensation schemes that promise to compensate all hours worked at or above the minimum wage, even if particular components of those schemes fail to attribute to each and every compensable hour a specific amount equal to or greater than the minimum wage. Delta's pay system, which included a formula that ensured payment of at least minimum wage for all hours worked, was lawful.
  - Answer to Certified Question #2: Like Section 226, Section 204 applies if the employee's "principal place of work" is in California, which Court interpreted to mean (1) the employee works a majority of the time in California or (2) for interstate transportation workers whose work is not primarily performed in any single state, if the worker has his or her base of work operations in California. The Supreme Court left it to the Ninth Circuit to apply this test to Delta flight attendants.

Oman v. Delta Air Lines, cont'd.

Employer Takeaways:

- The CA Supreme Court affirmed the *Armenta* line of cases but clarified that California does not prohibit "wage averaging," only "wage borrowing" from agreed-upon wages to compensate for other uncompensated time.
- Non-traditional pay systems, such as Delta's credit-based system, may comply with California's minimum wage requirements.
- To determine whether Labor Code Sections 204 and 226 apply, the test is the employee's "principal place of work" during the relevant pay period.
- Because the Supreme Court determined that Delta's compensation system complied with California law, it did not address the circumstances under which California's minimum wage law applied to employees who spent the majority of their working time outside California.

Gulf Offshore Logistics, LLC v. Superior Court, 58 Cal. App. 5th 564 (Dec. 7, 2020)

- Oil rig workers operating off the coast of California sued for violations of California wage and hour law. Workers were all non-residents of California and, although docked in California ports, rarely left their vessel. Employer was headquartered in Louisiana, had employment agreements signed under Louisiana law, and conducted training in Louisiana, and the vessel was registered in Louisiana.
- Court of Appeal originally held that Louisiana law governed. California Supreme Court ordered reconsideration in light of *Ward* and *Oman*, following which the Court of Appeal held that work performed in California's territorial waters was subject to California employment law even though the waters were also within federal territorial boundaries and because California served as the base for the crew's work operations.
- Court rejected arguments that the FLSA and general maritime law preempted California wage and hour law.

Appendix: Cases Pending Before the California Supreme Court

Morgan Lewis

Ferra v. Loews Hollywood Hotel, LLC, 40 Cal. App. 5th 1239 (2019)

- Issue: Did the legislature intend the term "regular rate of compensation" in Labor Code section 226.7, which requires employers to pay a wage premium if they fail to provide a legally compliant meal period or rest break, to have the same meaning and require the same calculations as the term "regular rate of pay" under Labor Code section 510(a), which requires employers to pay a wage premium for each overtime hour?
- The California Court of Appeal and trial court held that "regular rate of compensation" and "regular rate of pay" are not synonymous, and the premium for missed meal and rest periods is the employee's base hourly wage.
  - The question before the lower courts was whether the employer should have included nondiscretionary bonuses in its calculation of missed meal and rest period premiums.
  - After analyzing the plain language, legislative history, and persuasive federal authority, the Court of Appeal found that the legislature intended for "regular rate of compensation" and "regular rate of pay" to have different meanings, and that meal and rest period premiums do not include any adjustments to the straight-time rate.
- Procedural Posture:
  - The case has been fully briefed.
  - Oral argument has not yet been set.

Gonzales v. San Gabriel Transit, Inc., 40 Cal. App. 5th 1131 (2019)

- Holding: The Court reversed the lower court's denial of class certification, with instructions to apply the ABC test to determine whether the requirements of commonality and typicality for the purposes of certification of a class action were satisfied.
  - Plaintiff sought to represent a class of 500 delivery drivers who were classified by San Gabriel Transit as independent contractors.
  - The trial court denied Plaintiff's motion for class certification, finding that he failed to demonstrate there was a community of interest or typicality among the drivers.
  - The court ultimately reversed in light of the California Supreme Court's decision in *Dynamex.*
- Review was granted by the California Supreme Court on January 15, 2020. Stay tuned.

Naranjo v. Spectrum Security Services, Inc., 40 Cal. App. 5th 444 (2019)

- Security guards for a private federal detention contractor brought a class action alleging the employer's on-duty meal period policy, which did not provide the employees the option to opt out, violated California law.
- Court of Appeal held:
  - On-duty meal period policy must be in writing and include language advising that employees may revoke the agreement at any time.
  - Meal and rest period premiums are not "wages," and therefore employees are precluded from pursuing derivative penalties under Labor Code sections 203 (untimely wage payments) and 226 (wage statement violations).
  - Unpaid premium wages for violations of the Labor Code's meal break provisions accrue prejudgment interest at 7%.
- Review granted by California Supreme Court regarding derivative penalties and prejudgment interest.
  - The case has been fully briefed.
  - Oral argument has not yet been set.