
Morgan Lewis
WEBINAR SERIES
CALIFORNIA EMPLOYMENT LAW
YEAR IN REVIEW
SIGNIFICANT 2021 EMPLOYMENT LAW CASES
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Arbitration

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Chamber of Commerce v. Bonta, 13 F.4th 766 (9th Cir. 2021)

- Holding: California's prohibition of mandatory arbitration of Fair Employment and Housing Act (FEHA) and Labor Code claims as a condition of employment—even if including an opt-out provision—is not preempted by the Federal Arbitration Act (FAA). But the civil and criminal penalties prescribed by Sections 433 and 12953 are preempted by the FAA because they punish employers for the act of executing arbitration agreements.
- Reasoning: Labor Code Section 432.6 merely regulates *pre-agreement* employer behavior and does not invalidate or render unenforceable executed arbitration agreements governed by the FAA.
- Dissent: Majority's decision is inconsistent with California contract law, US Supreme Court precedent, and other circuits' precedent.
- Current Status: On October 20, 2021, Chamber of Commerce petitioned for rehearing en banc. As the Ninth Circuit has yet to issue a formal mandate, the district court's injunction remains in effect.

Garner v. Inter-State Oil Company, 52 Cal.App.5th 619 (2020)

- Holding: Based on language in the arbitration agreement, the parties had agreed to arbitrate the wage and hour claims on a *class* basis.
  - The Court relied on two sentences from the agreement:
    - "[Y]ou and Inter-State Oil Co. agree that any and all claims arising out of or related to your employment that could be filed in a court of law, **including, but not limited to, claims of . . . class action** shall be submitted to final and binding arbitration, and not to any other forum."
    - "This Arbitration Agreement Is A Waiver Of All Rights To A Civil Jury Trial Or Participation In A Civil **Class Action Lawsuit** For Claims Arising Out Of Your Employment."
  - The court found that the word "lawsuit" generally refers to court actions and that courts have distinguished lawsuits and arbitration. Inclusion of the term "lawsuit" only prohibited the plaintiff from filing class actions in court.

Alvarez v. Altamed Health Servs. Corp., 60 Cal.App.5th 572 (2021)

- Challenge to Validity of Arbitration Agreement: Argument against enforcement was that agreement was not signed by employer. Provision of the employment offer which required the CEO's signature for any modifications to the at-will status of the employee did not apply to every modification to the agreement.
- Procedural Unconscionability Challenges:
  - Plaintiff preferred that the agreement be provided in Spanish.
  - Employer did not provide a copy of the applicable arbitration rules.
  - Agreeing to arbitrate dispute was condition of employment.
- Substantive Unconscionability Challenge:
  - Appeal provision provided that either party could seek appellate review of an arbitration award by a second arbitrator.
  - But in practice only the employer was likely to do so, thus "unilaterally adding costs and time to the arbitration proceeding by seeking this review and thereby maximizing the employer's status as the better resourced party."
  - The court found the provision unconscionable, but severed it and enforced the agreement because it was the only substantively unconscionable element of the agreement and the agreement contained a severability provision.

Wage and Hour

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Donohue v. AMN Servs., LLC

- Factual background: A healthcare staffing company rounded employee time punches to the nearest 10-minute increment, which meant that meal breaks could have been recorded as 30 minutes long or starting within the first five hours, but in reality, the break could have been shorter or "late."
- For example: If an employee clocked out for lunch at 11:02 a.m. and clocked in after lunch at 11:26 a.m., the employer would have recorded the time punches as 11:00 a.m. and 11:30 a.m.

First Key Holding: No Time-Rounding for Meal Breaks

i. Employers cannot engage in the practice of rounding time punches. Rounding time punches for employee meal periods "is not consistent with the purpose of Labor Code provision providing for premium pay for shortened or missed meal periods." The practice is incompatible with the overall objective of preventing even minor infringements on meal period requirements.

Second Key Holding: Employer's Burden to Prove Compliant Meal Breaks

A time record showing a late, short or unrecorded meal break creates a rebuttable presumption that a meal-break violation occurred and that a meal premium is owed.

i. The presumption places the burden on the employer "to plead and prove, as an affirmative defense, that it genuinely relieved employees from duty during meal periods."
ii. An employer can rebut the presumption "by presenting evidence that employees were compensated for noncompliant meal periods or that they had in fact been provided compliant meal periods during which they chose to work." The latter evidence would need to show that employees voluntarily chose to work during meal periods recorded as short delayed.

Ferra v. Loews Hollywood Hotel, LLC

- Factual background: Plaintiff, a bartender, was paid an hourly wage and received quarterly nondiscretionary incentive payments (bonuses). However, in instances where plaintiff was to be compensated for noncompliant meal or rest breaks the employer paid the plaintiff meal and rest period premiums solely at her hourly rate.
- **Key Holding**: The "regular rate of compensation" in Section 226.7(c) has the same meaning as "regular rate of pay" in the context of overtime premium pay. Under California law and the Fair Labor Standards Act (FLSA), an employee's "regular rate" for overtime purposes must be calculated using both hourly wages and other nondiscretionary wage payments, such as nondiscretionary bonuses, commissions, and shift differentials.
- **Takeaway:** Employers with nonexempt employees whose compensation includes nondiscretionary payments such as bonuses, commission, shift differentials, and other incentive pay should ensure that the hourly rates used to pay meal, rest, and recovery period premiums are the same as the higher "regular rate" used to calculate overtime pay.
- **Important Note: *This decision applies retroactively***

Levanoff v. Dragas

Issue: How do you properly calculate the "regular rate of pay" to determine the amount of overtime due to a non-exempt employee when they are paid more than one hourly rate across a single pay period?

- **Two Methods:**
  - Weighted Average Method (California Division of Labor Standards Enforcement Proposed Method): Where two rates are paid during a workweek, the California method for determining the regular rate of pay for calculation overtime in that workweek mirrors the federal method, based upon the weighted average of all hourly rates paid. This rate is established by adding all hours worked in the week and dividing that number into the total compensation for the week.
  - Rate in Effect Method (Fair Labor Standards Act Method): Employers may pay employees no less than 1.5 times the applicable hourly rate for each type of work they perform. The regular rate depends on what rate was "in effect" when the employee worked the overtime.

The court held that California law did not mandate the use of the weighted average method, and defendants' dual rate employees, including plaintiffs, overall received net greater overtime pay under the rate-in-effect method than they would have received under the weighted average method.

- **Takeaway**: DLSE's opinions are not binding, and the weighted average method is perhaps not the only way to calculate overtime rates for "dual-rate employees."

Independent Contractor

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Becerra v. McClatchy Company (2021)

- Case in the Court of Appeals for the State of California, Fourth Appellate District. Newspaper home delivery carriers filed a putative class action complaint against a newspaper alleging violations of the Labor Code, including failure to reimburse reasonable expenses, failure to provide itemized wage statements, and unfair business practices.

- The court held, in a unanimous decision, that California labor law regulations did not qualify for determining whether the delivery carriers were independent contractors or employees or that the trial court should have instead used the *Borello* test in guiding their analysis.

- The court also determined that the newspaper, rather than the delivery carriers, held the burden of proof as per the *Borello* test and that the carriers are indeed employees.

PAGA

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PAGA – Standing to Pursue PAGA Claim

Magadia v. Wal-Mart Assoc., Inc. (9th Cir. 2021)

- The trial court decertified a meal break class because the named plaintiff suffered no violation, but permitted the plaintiff to pursue PAGA claim under *qui tam* doctrine.
- Post-trial appeal, the 9th Circuit held that the plaintiff lacked Article III standing (federal court) to pursue a meal break claim.
- The 9th Circuit also reversed a $96M judgment on the wage statement claim because Wal-Mart's retro OT adjustment on its quarterly bonus was not an hourly rate "in effect" during the pay period for purposes of Section 226(a)(9).

Santos v. El Guapo Tacos, LLC (6th Dist. – Nov. 20, 2021)

- Judgment on the pleadings based on inadequate pre-filing PAGA notice letter that did not mention intent to pursue claim on behalf of other employees.
- Reversed: no need for PAGA notice letter to expressly state intent to pursue claim on behalf of others, especially when PAGA is representative by nature. Context of factual allegations in letter suggested systemic issues.

PAGA – Standing to Appeal/Intervene in Other PAGA Plaintiff's Settlements (Reverse Auction)

Amaro v. Anaheim Arena Mgmt, LLC (4th Dist. – Sept. 28, 2021)

- Nothing "inherently wrong" with later-filed case serving as settlement vehicle.
- Nothing in PAGA "prevents [plaintiff] from releasing claims outside the limitations period of her own claim."

Turrieta v. Lyft, Inc. (2nd Dist. – Sept. 30, 2021)

- Denial of intervention affirmed; no standing to appeal.
- "We are not persuaded that appellants' role as PAGA plaintiffs confers upon them a personal interest in the settlement of another PAGA claim."

Uribe v. Crown Building Maint. Co. (4th Dist. – Sept. 30, 2021; modified Oct. 26, 2021)

- Settlement expanded reimbursement claim – only uniforms in PAGA letter, added cell phones in settlement.
- Sept. 30 Order: injury due to investment of "substantial time and resources" in pursuing her own PAGA cause of action.
- Oct. 26 Order (after considering *Turrieta*): injury due to inability to opt-out, and trial court permitted intervention.

PAGA – "Manageability" Requirement

Wesson v. Staples the Office Superstore, LLC (2nd Dist. – Sept. 9, 2021)

- PAGA claim that store GMs were misclassified as exempt.
- Defense filed a motion to strike PAGA as unmanageable: GM positions are not standardized; variation in non-exempt tasks across stores; many variables unique to each store and GM.
- Plaintiff agreed trial would require mini-trials for each GM, but argued only prima facie case matters, not affirmative defenses. (6 days per GM = 8-year trial)
- "[C]ourts have inherent authority to ensure that PAGA claims can be fairly and efficiently tried and, if necessary, may strike claims that cannot be rendered manageable."
- "As a matter of due process, defendants are entitled to a fair opportunity to litigate available affirmative defenses, and a court's manageability assessment should account for them."

FEHA, Discrimination, Wrongful Termination, Retaliation

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Pollock v. Tri-Modal Distrib. Serv., Inc., 11 Cal. 5th 918 (2021)

- Holding: The statute of limitations for a failure to promote claim brought under the harassment provision of the Fair Employment and Housing Act (FEHA) begins to run at the point when an ***employee knows or reasonably should know*** of the employer's allegedly unlawful refusal to promote the employee.

Maner v. Dignity Health, 9 F.4th 1114 (9th Cir. 2021)

- Holding: An employer who singles out a supervisor's paramour for preferential treatment does not discriminate against other employees "because of [their] sex" under Title VII.
  - "Paramour preference" claims posit that an employer engages in sex discrimination when there is workplace favoritism toward a supervisor's sexual or romantic partner. Such claims are not cognizable under Title VII's prohibition on sex discrimination.
  - Title VII does not prevent employers from favoring employees because of personal relationships as long as such favoritism is not based on an impermissible classification.
  - The statutory term "sex" does not encompass sexual *activity* between persons or romantic relationships between persons.

Wilkin v. Community Hospital, 2021 WL 5371427 (2021) (ordered published)

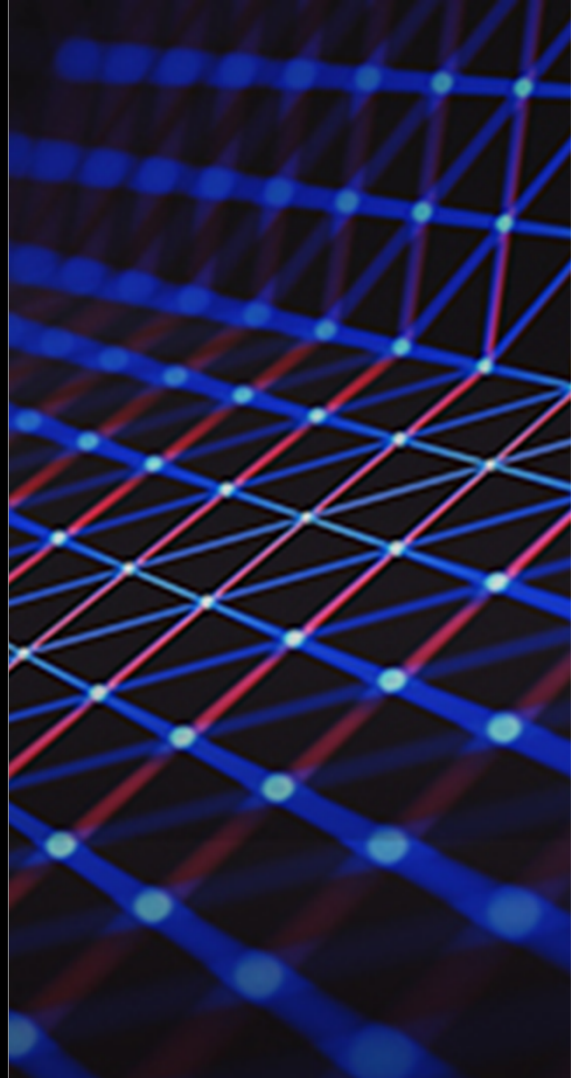
- Facts:
  - Employee nurse had a documented history of absenteeism issues. Numerous coachings and warnings issued.
  - Complaint of improper documentation of controlled substances was made against the employee. An investigation was conducted, which substantiated the complaint. The employee was interviewed as part of the investigation and submitted a written statement.
  - Decision was made to terminate the nurse's employment. She then filed claims for disability discrimination and wrongful termination, among others.
- Result: Trial court granted summary judgment in the hospital's favor. Undisputed evidence presented that the employee had violated policies governing the handling of medication and for over a year had been regularly counseled for chronic absenteeism.

Coronavirus 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.

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.



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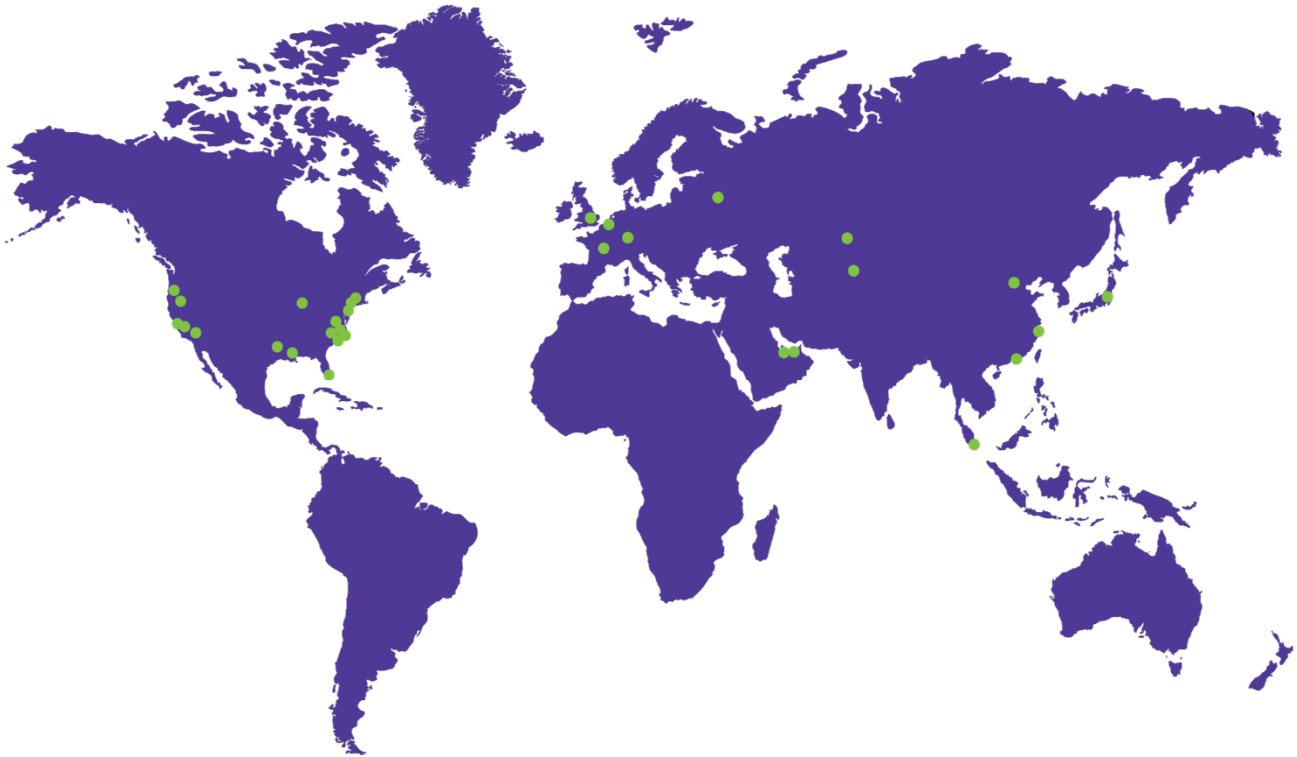

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