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CALIFORNIA EMPLOYMENT LAW YEAR IN REVIEW

SIGNIFICANT 2023 EMPLOYMENT LAW CASES

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Arbitration Agreements

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Adolph v. Uber Technologies, Inc., 14 Cal.5th 1104 (2023)

- Employee required to arbitrate individual PAGA claim maintains standing to pursue representative PAGA court claims
  - California courts are not bound by the US Supreme Court's interpretation of state law in *Viking River*, ruling that an order compelling arbitration of a plaintiff's individual PAGA claims "does not strip the plaintiff of standing to litigate non-individual claims in court."
    - Two requirements for PAGA standing:
      1. "Someone 'who was employed by the alleged violator'" and
      2. Someone "against whom one or more of the alleged violations was committed"
    - "Only the fact of a violation is required to confer standing" to pursue a PAGA claim

Adolph v. Uber Technologies, Inc., 14 Cal.5th 1104 (2023)

- **Key Takeaways:**
  - Amend arbitration agreements to remove *wholesale* waivers of "representative" actions.
  - Have a "severability clause" that effectively permits a court to sever only terms found to be illegal while enforcing the other provisions.
  - Think strategically about arbitrating the individual PAGA claim.

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

- Enforcement of PAGA carve-out suggests need for new revisions to arbitration agreements
  - The appeal challenged the denial of a motion to compel arbitration of individual PAGA claim as permitted under *Viking River*.
  - The arbitration agreement in question contained a carve-out provision stating: "claims under PAGA … are not arbitrable under this Agreement."
  - The trial court determined that "claims under PAGA" effectively excluded "individual" PAGA claims from arbitration. The Court of Appeals affirmed.
  - The employer argued:
    - Intended to carve-out claims that applicable law deemed non-arbitrable.
  - Court concluded:
    - If the employer had intended that only *nonarbitrable* PAGA claims would not be arbitrable under the agreement – it should have drafted the clause to say so.

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

- **Key Takeaways:**
  - If the arbitration agreement carves out PAGA claims, the agreement must be clear that it only carves out *non-individual* PAGA claims from arbitration.
  - Check your arbitration agreement to ensure that language is up to date.

Chamber of Commerce v. Bonta, 62 F.4th 473 (9th Cir. 2023)

- Chamber of Commerce challenged AB 51
- AB 51 prohibits and criminalizes mandatory arbitration of FEHA and Labor Code claims as a condition of employment or continued employment.
  - The district court issued a preliminary injunction finding it likely that the FAA fully preempts AB 51, but a divided Ninth Circuit vacated the preliminary injunction, reasoning that only the enforcement of civil and criminal sanctions provisions conflicts with the FAA.
- On rehearing, the Ninth Circuit held that the FAA fully preempts AB 51 because a state law that discriminates against the formation of an arbitration agreement is preempted, even if the agreement is ultimately enforceable.

Chamber of Commerce v. Bonta, 62 F.4th 473 (9th Cir. 2023)

- **Key Takeaways**:
  - California employers, whose arbitration agreements are subject to the FAA, can require arbitration of FEHA and Labor Code claims as a condition of employment and continued employment.
  - To be safe, the arbitration agreement should explicitly state that the FAA applies.

Rocha v. U-Haul Co. of Cal., 88 Cal. App. 5th 65 (2023)

- **Background:** Plaintiffs alleged a Labor Code Section 1102.5 claim against their employer U-Haul. U-Haul moved to compel arbitration, and Plaintiffs moved to amend their complaint to add a PAGA claim based on the same allegations – which the court denied. In arbitration, the arbitrator determined U-Haul did not engage in retaliation. The trial court affirmed the arbitration award. Plaintiffs appealed, arguing that the trial court abused its discretion by denying leave to amend and that the arbitrator's decision on their non-PAGA 1102.5 claim did not preclude them from establishing PAGA standing based on the same alleged violation.

- **Holding:** Under the doctrine of issue preclusion, an arbitrator's determination that the employer did not commit an alleged Labor Code violation precluded Plaintiffs from establishing standing under PAGA based on the same alleged violation, even though the claims in arbitration were individual, non-PAGA Labor Code claims.

- **Key Takeaway:** An arbitration victory on the merits on non-PAGA Labor Code claims should bar the employee from pursuing a PAGA claim based on the same violations.

Alberto v. Cambrian, No. B314192 (Cal. Ct. App. May 10, 2023)

Substantive Unconscionability Based on Other Contracts Signed in Same Transaction

- Employee signed arbitration agreement and separate confidentiality agreement the same day.
- Court found that arbitration agreement was substantively unconscionable based, in part, on provisions of the confidentiality agreement
  - Overbroad definition of "trade secrets"
  - Disclosure constituted "irreparable harm" permitting the employer to seek relief in court, while the employee was forced to seek relief in arbitration

- Arbitration and confidentiality agreements must be read together. Executed on the same day; part of a single primary transaction of "hiring"; govern the "same issue" of resolving employment-related disputes.
- Court considered agreements together to find they were "permeated" with unconscionability, and therefore refused to sever the offending provisions.

Alberto v. Cambrian, No. B314192 (Cal. Ct. App. May 10, 2023)

- **Key Takeaways:**
  - Employers should review their arbitration agreements *and* confidentiality agreements (or any other agreement signed upon onboarding).
  - Ensure compliance with current California and federal law in order to preserve the ability to compel arbitration to the fullest extent of the law.

PAGA

In re Patacsil, 2023 WL 3964908 (Bankr. E.D. Cal. June 9, 2023)

- The Private Attorneys General Act (PAGA) allocates 75% of any penalty award to the Labor and Workforce Development Agency (LWDA) and 25% to the aggrieved employees.
- The bankruptcy court in *In re Patacsil* held that amounts payable to the LWDA qualify as penalties "payable to and for the benefit of a governmental unit" which makes them nondischargeable in bankruptcy. 11 U.S.C. § 523(a)(7).
- Thus, employers who declare bankruptcy will remain liable for 75% of the penalty award.
- However, the bankruptcy court held that the other 25% of the penalty award and any statutory attorneys' fees do not satisfy any exception in the Bankruptcy Code and therefore are dischargeable in bankruptcy.

In re Patacsil, 2023 WL 3964908 (Bankr. E.D. Cal. June 9, 2023)

- **Key Takeaway:**
  - Consult with skilled bankruptcy and employment law counsel if you seek to file for bankruptcy while dealing with a PAGA lawsuit.

Woodworth v. Loma Linda Univ. Med. Ctr., 93 Cal. App. 5th 1038 (2023)

- Employee brought class and PAGA action alleging wage and hour violations. After many years of litigation, only her individual PAGA claim for failure to provide rest periods remained.
- The Superior Court granted the employer's motion for summary adjudication on PAGA claim but denied its motion to strike the PAGA allegations, leaving only the individual rest period claim.
- Court of Appeal reversed in part, holding that **trial courts may not strike or dismiss a PAGA claim for lack of manageability**.
  - When faced with "unwieldy" PAGA claims, courts may limit the scope of the claims or the evidence to be presented at trial, but they may not prohibit PAGA plaintiffs from presenting their claims entirely.
- **Status:** Both parties petitioned for review, but only the employer's petition was granted. The case is currently stayed pending resolution of ***Estrada v. Royalty Carpet Mills, Inc.*** and ***Camp v. Home***.

Woodworth v. Loma Linda Univ. Med. Ctr., 93 Cal. App. 5th 1038 (2023)

- **Key Takeaways:**
  - California Supreme Court granted review of ***Estrada*** to determine whether courts have the power to strike or limit PAGA claims that would prove to be unmanageable.
  - California courts may be unlikely to strike or dismiss a PAGA claim for lack of manageability until that decision is issued.

Estrada v. Royalty Carpet Mills, Case No. S274340

- The California Supreme Court heard oral arguments on November 8, 2023.
- **Question on Review:** Do trial courts have inherent authority to ensure that claims under the Private Attorneys General Act "PAGA" (Lab. Code, § 2698 et seq.) will be manageable at trial, and to strike or narrow such claims if they cannot be managed?
- **Defendant/Appellant Arguments:** Yes, courts have inherent authority for two reasons:
  1. The California Constitution grants courts authority to manage all cases before them, and
  2. The court's authority to manage a case, including striking claims, was clearly established in precedent before PAGA was enacted. Thus, the PAGA statute is presumed to incorporate the law.

Estrada v. Royalty Carpet Mills

- **Plaintiff/Appellee Argument:** No, a court does not have the ability to manage or strike PAGA claims for two reasons:
  1. The language of PAGA (citing 2699(a)) does not permit a court to strike a claim, and
  2. PAGA claims (like other aggregate claims) are inherently difficult/complex and will require additional effort to manage when organizing evidence and preparing a trial plan.
- **Status:** A decision, which is expected in early February 2024, will resolve the split of authority between Second Appellate District's decision in *Wesson v. Staples of the Offices Superstore, LLC*, which held that trial court have authority to strike PAGA claims as unmanageable, and the Fourt Appellate District's decision in *Estrada v. Royal Carpet Mills, Inc.*, which held that trial courts do not have authority to deem PAGA cases unmanageable.
- **Key Takeaway:** This decision will have a significant impact on the viability and cost to litigate non-individual PAGA claims.

Wage and Hour

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Thai v. International Business Machines Corp., 93 Cal. App. 5th 364 (2023), review denied (Oct. 11, 2023)

- Issue – whether the employer was obligated to reimburse its employees for computer, internet, and phone-related expenses they incurred as a result of working at home during the COVID-19 pandemic
  - Working at home was required not by the defendant/employer
  - Instead required by Governor Gavin Newsom's stay-at-home order.

- Even if government-mandated stay-at-home orders were an intervening cause of employees working from home and incurring necessary business expenses, the employer is *still liable* to reimburse the employees for those expenses under California Labor Code 2802.

Potts v. Sirius XM Radio Inc., 2023 WL 2628234 (C.D. Cal. Mar. 7, 2023)

- Plaintiff alleged Sirius violated Labor Code section 2802 by failing to reimburse her out-of-pocket expenses for, among other things, furniture and office supplies, increased utility costs, and a portion of her rent.

- **Key Facts:**
  - Plaintiff was required to work from home in the wake of COVID-19 and shelter-in-place orders.
  - Sirius' reimbursement policies provided employees with a flat stipend, with additional reimbursement available upon request.
  - Plaintiff was also provided with a company credit card that she could have used.
  - Sirius sent Plaintiff an email reminding her to submit outstanding requests for reimbursement.
  - Plaintiff never contacted HR or submitted requests for reimbursements.

Potts v. Sirius XM Radio Inc., 2023 WL 2628234 (C.D. Cal. Mar. 7, 2023)

- The court granted Sirius' motion for summary judgment after finding that the defendant had no actual or constructive knowledge of the plaintiff's expenses.
  - An employee's failure to submit a request for reimbursement does not automatically defeat Labor Code section 2802 claim.
  - Liability depends on whether an employer "knows or has reason to know" that an employee incurred a reimbursable expense.
  - Sirius exercised due diligence to ensure that the plaintiff employees were properly reimbursed – i.e., automatic stipend, appropriate policies, communicating to employees about those policies, and reminding them to submit claims for outstanding expenses.
  - Plaintiff's failure to submit requests for additional amounts above the regular stipend meant there was "no way" that Sirius could have known her expenses actually exceeded the stipend she received.
- The case is on appeal to the Ninth Circuit.

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

- No final paycheck due after end of temporary assignment
  - Termination of a temporary assignment does not constitute a "discharge" for purposes of payment of final wages under Labor Code section 201.3.
    - RemX's employee handbook specifically stated that the employment relationship ends only upon "express" notification and that the end of an assignment will not be considered a discharge or termination of the employment relationship.
    - Plaintiff's employment relationship with RemX was never actually terminated, and she could have remained on their payroll for another assignment.
- **Key Takeaway:**
  - Temporary services providers can pay an employee whose temporary assignment has ended on their regular payroll schedule so long as that employee is not formally terminated from the staffing agency.

Naranjo v. Spectrum Sec. Servs., Inc., 88 Cal. App. 5th 937 (2023) *("Naranjo III")*

- In *Naranjo v. Spectrum Sec. Servs., Inc.*, 13 Cal.5th 93 (2022) *("Naranjo II")*, the California Supreme Court held that missed meal/rest period premiums constitute "wages" that can trigger waiting time penalties and must be reported on wage statements.
- Issues on remand:
  - Whether the trial court erred in finding that Spectrum's failure to pay employees missed meal/rest premiums was not "willful," barring recovery of waiting time penalties under Labor Code section 203; and
  - Whether Spectrum's failure to report missed meal/rest period premiums on wage statements was "knowing and intentional," as required for recovery under Labor Code section 226.

Naranjo v. Spectrum Sec. Servs., Inc., 88 Cal. App. 5th 937 (2023) (*"Naranjo III"*)

- **Holdings:** A "good faith dispute" over whether meal/rest period premiums are owed precludes both: (1) a finding of "willfullness" necessary to support an award of waiting time penalties; and (2) a "knowing and intentional" wage statement violation.
- Spectrum's "good faith" defense was that its security officers were exempt from state law meal and rest period requirements under the federal enclave and intergovernmental immunity doctrines.
- Also "good faith dispute" over whether meal/rest period premiums constituted wages, until that issue was resolved in *Naranjo II*.

Naranjo v. Spectrum Sec. Servs., Inc., 88 Cal. App. 5th 937 (2023) (*"Naranjo III"*)

- **Key Takeaways:**
  - Employers should review their policies and implement procedures to ensure that missed/late/short meal and rest break premiums are paid to non-exempt employees.
  - Premiums must be paid at the "regular rate" used to calculate overtime, not their hourly base rate.
  - Premiums paid must be separately and accurately reported on employees' wage statements.
  - Assert and develop evidence to support "good faith" affirmative defense to waiting time penalties and inaccurate wage statement claims.
- California Supreme Court has granted review.

Independent Contractor/Joint Employer

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

- **Background:** AB 5 codified the onerous "ABC Test" for classifying independent contractors/employees, and AB 2257 created wide-ranging exemptions to this test.
  - AB 5's sponsor, and other state legislators, made public statements in newspapers and tweets evidencing animus towards Uber, Postmates, and other app-based ride-hailing and delivery companies.
  - Uber, Postmates, and their drivers challenged AB 5, alleging that it violated the Equal Protection, Due Process, Contract, and Bill of Attainder Clauses of the federal and state constitutions.
  - Plaintiffs appealed the district court's denial of their motion for a preliminary injunction and dismissal of their complaint.
  - Proposition 22, which classifies app-based drivers as independent contractors rather than employees, was passed after the district court's order and oral arguments in the Ninth Circuit.

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

- Reversal of Dismissal of the Equal Protection Clause Claim: Ninth Circuit held that plaintiffs plausibly alleged that **AB 5 singled out app-based ride-hailing and delivery service providers** by alleging:
  - Primary impetus for bill was author's unfavorable view of Uber, Postmates, and similar gig-based business models;
  - Creation of exemptions through lobbying/backroom dealing was "starkly inconsistent" with bill's purpose; and
  - Exclusion of plaintiffs from exemptions provided to comparable app-based workers (e.g., TaskRabbit) could be attributed to animus.
- Remand on Preliminary Injunction Issue: Ninth Circuit ordered district court to reconsider the motion for preliminary injunction because AB 2257 and Prop. 22 did not exist when initial complaint was filed.
- California has filed a petition for panel and en banc rehearing.

Castellanos v. State of Cal., 89 Cal.App.5th 131 (2023)

- **Background:** In 2019, California enacted AB 5, codifying the "ABC" test for distinguishing employees and independent contractors. In response, several app-based companies asked California voters to exempt app-based drivers and delivery businesses from AB 5 with Propostion 22.
- Group of ride-share drivers and the Service Employees International Union sought to have Proposition 22 declared invalid because it violates the California Constitution.
- Trial court ruled that Proposition 22 was unconstitutional:
  - In its entirety because it intrudes on the Legislature's exclusive authority to create workers' compensation laws;
  - To the extent it limits the Legislature's authority to enact legislation that would not constitute an amendment to Proposition 22; and
  - In its entirety because it violates the single-subject rule for initiative statutes.

Castellanos v. State of Cal., 89 Cal.App.5th 131 (2023)

- **Holding:** While certain provisions of Proposition 22 were unconstitutional, those provisions could be severed and the remainder of the Proposition was constitutional.
  - Propostion 22 did not intrude on the Legislature's exclusive authority to create workers' compensation laws;
  - The unconstitutional sections of Proposition 22 defining what constituted an amendment could be severed; and
  - Proposition 22 did not violate the single-subject rule simply because it embraced multiple purposes, because Propositions may properly accomplish comprehensive, broad-based reform.
- **Key Takeaway:** App-based rideshare companies who provide minimum protections in Proposition 22 continue to be exempt from AB 5.
- California Supreme Court has granted review. Attorney General filed amicus brief arguing that Proposition 22 is constitutional.

Morales-Garcia v. Better Produce, Inc., 70 F.4th 532 (9th Cir. 2023)

- **Background:**
  - Plaintiffs, agricultural workers, were hired by strawberry growers to pick fruit that was then turned over to the defendants for distribution primarily to large retail grocery chains.
  - Growers filed for bankruptcy and agricultural workers sought recovery from distributors as joint employers, and as "client employers" under Labor Code section 2810.3.
  - The district court ruled for the distributors on all theories, and plaintiffs appealed only the ruling on the "client employer" claim.
- **Relevant Statutory Definitions:**
  - A "client employer" is defined as "a business entity … that obtains or is provided workers to perform labor within its usual course of business from a labor contractor."
  - A "labor contractor" is defined as "an individual or entity that supplies … a client employer with workers to perform labor within the client employer's usual course of business."
  - "Usual course of business" is defined as "the regular and customary work of a business, **performed within or upon the premises or worksite of the client employer**.

Morales-Garcia v. Better Produce, Inc., 70 F.4th 532 (9th Cir. 2023)

- **Key Facts:**
  - Distributors leased the farms and subleased them to the growers.
  - Under sublease agreements, land could only be used to grow strawberries and the distributors owned the exclusive right to sell the strawberries to their retail customers.
  - Distributors retained right to conduct inspections, provided growers with packaging materials with the distributors' labels on them, and dictated quantity of strawberries to be produced.
  - Growers conducted farming operations and supervised plaintiffs.

- **Holding:** The Ninth Circuit affirmed, holding that the distributors were not "client employers" because the work that plaintiffs performed took place on the farms, not on the premises or worksites of the distributors.
  - To be liable under Labor Code section 2810.3, the alleged "client employer" must "exercise some element of control **over the place** where the laborers work."
  - Farms were not "worksites" because the distributors were not in the business of harvesting product grown on the farms.

FEHA, Discrimination, Wrongful Termination, Retaliation

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People ex rel. Garcia-Brower v. Kolla's Inc., (Cal. S. Ct. 2023)

- **Holding:** Whistleblowers are protected from retaliation even when the employer is already aware of the reported alleged misconduct.
- **Background:** A Labor Commissioner brought an enforcement action on behalf of a bartender who complained about unpaid wages, to which the bar owner responded by threatening to report her to immigration and terminating employment. Section 1102.5 prohibits retaliation against individuals for "disclosing information" about suspected violations of the law to their employer or other certain sources.

  The trial court dismissed the action, and, on appeal, the CA Court of Appeals upheld the decision, both interpreting "disclosure" 1102.5 to mean "the revelation of something **new**, or at least believed by the discloser to be **new**, to the person or agency to whom the disclosure is made." Thus, because the employer was at least aware, and responsible for, the unpaid wages, the reporting was not considered a "disclosure."

  The CA Supreme Court, disagreed. In reaching its decision, the Court reviewed the legislative history of CA Labor Code Section 1102.5(b) and found the legislature meant it to mean "report," "inform," or "complain." It also reviewed other sources and concluded that "disclosure" may "reasonably encompass an employee's report or complaint that calls attention to a legal violation or potential violation in the workplace."

  The Court rejected the argument that this interpretation would threaten to convert everyday workplace disputes into whistleblower cases, noting that employers are already protected under the statute's "objective reasonableness" requirement and "clear and convincing" mixed motive affirmative defense.
- **Key Takeaway:** This broader interpretation could result in additional liability for employers – consider reports of violations of which employer was already aware. This is more in-line with federal Whistleblower Protection Act.

Groff v. DeJoy, 600 U.S. ___, 143 S. Ct. 2279 (2023)

- **Holding:** To defend a denial of a religious accommodation under Title VII, an employer must show that the burden of granting the accommodation would result in "substantial increased costs" in relation to the conduct of its particular business.
- **Background:**
  - Plaintiff, an Evangelical Christian, worked for the USPS. The USPS began requiring Plaintiff to work on Sundays, and Plaintiff cited religious reasons that he could not work on Sunday (observing Sabbath). Initially USPS transferred him to a location that did not make Sunday deliveries, but eventually was required to do so.
  - USPS tried to restribute his deliveries to other employees, including those whose regular duties did not involve delivering mail. After repeated scheduling conflicts and overtime expenses, employee was subjected to progressive discipline and later resigned, bringing this lawsuit under Title VII.
  - The lower court granted summary judgment in favor of the USPS, and the Court of Appeals affirmed, finding that the USPS would have suffered an undue hardship because it would have been required to bear more than a *de minimis* cost to provide the requested religious accommodation.
  - SCOTUS vacated the lower court's opinion, holding that an employer can show "undue hardship" when the burden of granting a religious accommodation would result in substantial increased costs in relation to the conduct of its business, taking into account all relevant factors, including the accommodation at issue and the practical impact of the accommodation in light of the nature, size, and operating cost of the employer.
- **Key Takeaway:** "Substantial increased costs" is a new, higher standard for defending a denial of a religious accommodation that many employers will have a difficult time meeting under Title VII. Not all hope is lost: lower court can find USPS met higher standard on remand.

Raines v. U.S. Healthworks Medical Group, 2023 WL 5341067 (Cal. S. Ct. 2023)

- **Holding:** Businesses with at least five employees that carry out FEHA-regulated activities as an agent of an employer may be held directly liable for employment discrimination under the FEHA.
- **Background:** Plaintiffs were job applicants who received offers of employment contingent upon passing a medical screening. The screening included a detailed health history questionnaire conducted by U.S. Healthworks (USHW) – a third-party provider.
  - Plaintiff alleged USHW asked intrusive questions unrelated to the applicants' ability to work, when FEHA precludes employer (or its agent) from requiring medical or physical exam unless it is after the offer has been made and the exam is "job related and consistent with business necessity."
  - The district court granted USHW's motion to dismiss, and then the Ninth Circuit certified a question of the agent's direct liability for FEHA violations. FEHA defines "employer" for purposes of the FEHA as including "any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly…"
  - CA Supreme Court held that business-entity agents with at least five employees that carry-out FEHA regulated activities as an agent may be held directly liable for employment discrimination. But it declined to "identify the specific scenarios" in which it could face direct liability.
- **Key Takeaway:** This decision provides clarification on the scope of third-party FEHA liability that was previously lacking. It also opens up more litigation against vendors providing hiring, screening, human resources, accommodations, or other services who now more clearly could face liability under FEHA.

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

- **Holding:** Harassment need not be targeted at a particular plaintiff to give rise to a Title VII claim, and the condut's offensiveness to multiple genders is not a bar to stating a Title VII claim.

- **Background:** Eight former employees, seven of which were women and one of which was a man, brought Title VII hostile work environment claim against the employer, alleging that the playing of sexually graphic and violently misogynistic music in workplace created a hostile work environment. The plaintiffs alleged the music was"[b]lasted from commercial-strength speakers placed throughout the warehouse" and thus nearly impossible to escape.

  The defendant argued the "equal opportunity harasser" defense should apply because all employees were subject to the same behavior, rather than just one protected group. On appeal, the Ninth Circuit rejected the defendant's argument, reasoning that that the repeated and prolonged exposure to music "saturated with sexually derogatory content" could constitute "music as harassment." The court held that "targeting a specific person is not a prerequisite" and coextensive of male and female plaintiffs "provides no defense" to harassment.

- **Key Takeaway:** Employer should continue to prohibit sexually explicit or derogatory audio and visual media in the workplace. The "equal opportutinity harasser" is no longer an "escape hatch for liability." But Title VII still is not a "civility" code.

Atalla v. Rite Aid Corp., 2023 WL 2521909 (Cal. Ct. App. 2023)

- Female employee and male supervisor had long-standing personal relationship that predated their working relationship; they socialized with their spouses, sent hundreds of texts with jokes and personal matters, went to lunch and coffee together. However, after supervisor sent a series of late-night text messages containing a "live photo" of him masturbating and a photo of his penis. He said he was "so drunk right now" and that he "meant to send to wifey." He apologized next day. Employee's lawyer promptly alleged harassment and Rite Aid investigated, terminated supervisor's employment, and welcomed employee back to work. Superior Court granted summary judgment for Rite Aid. Employee appealed.
- Court of Appeal affirmed summary judgment for Rite Aid because it agreed that the evidence did not support an inference that the text chain conduct was work-related in that supervisor was acting in his capacity as a supervisor, and in turn the conduct properly imputable to Rite Aid. In reaching this conclusion, the Court relied on evidence demonstrating a long-standing personal relationship between the employee and supervisor that was wholly unconnected to their work and predated their working relationship. Court also held that there was no constructive termination where Rite Aid terminated the employee.

Atalla v. Rite Aid Corp., 2023 WL 2521909 (Cal. Ct. App. 2023)

- **Key Takeaways**:
  - Under FEHA, employers generally remain strictly liabile for a supervisor's harassment, even where the employer is unaware of the supervisor's alleged bad actions.
  - However, *Atalla* limits the extent to which employers can be held responsible for conduct stemming from employees' personal relationships and after-hours conduct.

Lin v. Kaiser Found. Hosps., 2023 WL 2202544 (Cal. Ct. App. 2023)

- **Holding:** A genuine issue of material fact existed on the plaintiff's disability discrimination and related claims where the employer planned to lay off the plaintiff *prior* to learning of the plaintiff's disability but finalized her termination *after* learning of her disability.
- **Background:** Kaiser planned to terminate the plaintiff before she became disabled by placing her on an economic-based RIF.
  - Plaintiff as selected by the manager for performance difficulties, though lacking contemporaneous documentation. Subsequently, the plaintiff suffered a shoulder injury and had accommodations. The plaintiff's supervisor then completed numerical ratings of performance as part of the RIF, and plaintiff had the lowest rating. The supervisor discussed her performance with HR, noting that she was slow at typing and would be slower with the injury. Later, supervisor met with employee and noted her unavailability had occasionally forced teammates to complete her tasks.
  - Finally, Kaiser completed the layoff plans and terminated the plaintiff. In reversing the district court's order granting summary judgment in Kaiser's favor, the court noted that Kaiser's placement of the plaintiff on the RIF list before learning of her disability was not dispositive and did not preclude her FEHA claims as a matter of law. The court concluded that a jury could conclude that decision to leave her on the list and terminate was based, at least in part, on the disability.
- **Key Takeaways:** Don't overemphasize timing: even where an employer learns of a disability or other protected conduct ***after*** tentatively identifying an employee for a RIF or termination, the employer should carefully analyze the risk of the decision—including whether the evidence prior to the tentative identification is strong.

COVID-19

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Kuciemba v. Victory Woodworks, Inc., 14 Cal. 5th 993 (2023); 74 F.4th 1039 (9th Cir. 2023)

- **Holding:** Employers are not liable to nonemployees who contract COVID-19 from employee household members who bring the virus home from their workplace, because "[a]n employer does not owe a duty of care under California law to prevent the spread of COVID-19 to employees' household members."
- **Reasoning:** The wife of an employee asserted a third-party claim for negligence due to her husband's transmission of COVID-19 from the worksite to her at home. The district court granted the employer's motion to dismiss, and on appeal the Ninth Circuit certified questions for the California Supreme Court regarding the scope of an employer's tort liability for the spread of COVID-19. The California Supreme Court held that 1) if an employee contracts COVID-19 at the workplace and brings the virus home to a spouse, the derivative injury rule of California's workers' compensation law does not bar a spouse's negligence claim against the employer; but 2) an employer does not owe a duty of care under California law to prevent the spread of COVID-19 to employees' household members.
- **Key Takeaway:** The court's ruling—that employers do not owe a duty of care—bars negligence claims for COVID-19 illnesses by members of employees' households.

Additional Cases

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

- **Holding:** Emails exchanged between an employee and her spouse were protected by the spousal privilege, even though they were sent on the company's network using company email, because there is a presumption in favor of the privilege and there was insufficient evidence to establish the employee lacked a reasonable expectation that communications were private.
- **Background:** In a dispute between business partners, one partner moved to disqualify opposing counsel, arguing that plaintiff improperly provided private emails sent on the company's network, which counsel attempted to use in the litigation in violation of the spousal communications privilege. Affirming the trial court's order disqualifying the attorney, the Court noted that the lack of a policy governing electronic systems monitoring, or any other policies that would put the sender on notice that email communication was not private.
- **Key Takeaway:** Employers should have clear, well-defined policies on the use of company equipment and networks including:
  - Defining resources and systems covered by the policy;
  - Notifying employees there is no reasonable expectation of privacy when using company devices;
  - Notifying employees that company issued devices and systems are monitored; and
  - Requiring acknowledgment of policy.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

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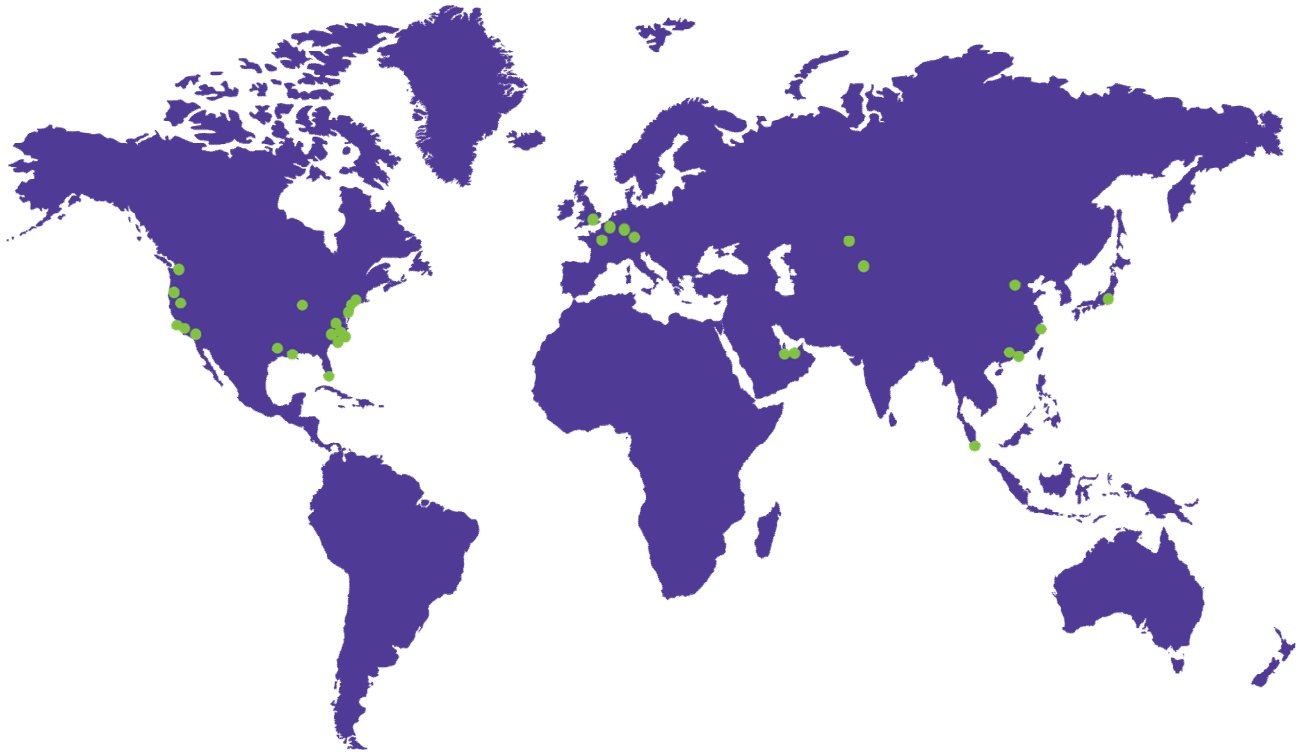
Seattle
Shanghai
Shenzhen
Silicon Valley
Singapore
Tokyo
Washington, DC
Wilmington



Morgan Lewis 150 YEARS

THANK YOU