An Employee by Any Other Name . . . Is Still an Employee
Guidance on California’s Common Law Test for Determining Employee Status

By Raymond W. Bertrand & Brit K. Seifert

Introduction

Employers in California and elsewhere often struggle with the question of whether they are accurately classifying and treating certain workers or service providers as independent contractors, as opposed to employees. There is good reason to be concerned. A finding by a government agency or court that an employee was misclassified almost always means that employment and/or tax laws and regulations were violated. For example, companies will not have provided meal and rest periods, or overtime pay to independent contractors - which means violations of California wage and hour law once the contractor is found to be an employee for the relevant time period. A finding of employee status can expose companies to violations of myriad other laws as well, such as tax laws, workers’ compensation laws, and unemployment insurance laws.

Amidst this struggle, California employers can expect no relief from government scrutiny and challenges of misclassification of independent contractor arrangements. In 2011, the President’s “Misclassification Initiative” debuted. Its broad scope includes a federal budget allocation of millions of dollars to the United States...
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Department of Labor for federal and state misclassification initiatives.2 Such initiatives include federal and state agency information-sharing about cases of alleged misclassification, and ramped-up staffing of Labor Department investigators to target, investigate, and prosecute independent contractor misclassification.3 Just months ago, California was one of 19 states collectively awarded more than $10 million from the Labor Department to fund a niche avenue for sourcing possible misclassification cases: state agencies administering unemployment benefits.4 The Labor Department charged California and the other states with using the funds “to implement or improve worker misclassification detection and enforcement initiatives in unemployment insurance programs.”5

All of this increased attention begs the question: Can independent contractor relationships be structured so that they withstand misclassification challenges? What does a true independent contractor “look like”?

The answer requires an understanding of California’s traditional, multi-factor common law test for employee status, the principal factor of which focuses on the right of the principal to control the manner and means by which the agent carries out his or her work activities. Two recent decisions from the California Supreme Court and the United States Court of Appeals for the Ninth Circuit addressed this so-called “control test” in the context of cases involving claims of independent contractor misclassification. The decisions in Ayala v. Antelope Valley Newspapers, Inc.,6 and Alexander v. FedEx Ground Package System, Inc.,7 furnish important guidance on the standards for determining employee status under California common law principles. This guidance can assist companies in assessing if their workers are truly bona fide independent contractors under California common law, or whether they are susceptible to a government agency or court finding that they are, instead, employees misclassified as independent contractors.8

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2 See DOL FY 2011 Budget in Brief, supra note 1, at 44-45 (stating that to address the misclassification problem, the fiscal year 2011 budget included, for the Department of Labor, $12 million to support the Misclassification Initiative).

3 See DOL FY 2011 Budget in Brief, supra note 1, at 44-45.


5 See DOL News Release, supra note 4 (“The funds will be used to increase the ability of state UI tax programs to identify instances where employers improperly classify employees as independent contractors or fail to report the wages paid to workers at all. The states that were selected to receive these grants will use the funds for a variety of improvements and initiatives, including enhancing employer audit programs and conducting employer education initiatives.”). Although a specific agency, one independent contractor filing a claim for unemployment benefits with California’s Employment Development Department (“EDD”) can lead to a finding of employee status, followed by an administrative order that the business remit never-paid unemployment insurance contributions. The payment mandate may cover not just the individual contractor-pronounced-employee, but others holding similar contractor roles. Follow-on audits are also not uncommon, implicating the business’s tax and worker files, and potential contractor status challenges to a class of workers.

6 59 Cal. 4th 522 (2014).


8 It should be noted that a company’s careful avoidance of creating an employment relationship based on California’s common-law control test does not assure that the worker will be deemed a contractor in all venues. This is because no uniform, common test or standard applies to distinguish employee-versus-contractor across state and federal law, or across different government agencies’ regulations. A contractor role structured to avoid California’s common law test for employment status will not prevent a misclassification finding by the IRS, or Labor Department, or a state workers compensation agency, because they use different standards. The Ayala opinion acknowledged this issue, stating that its analysis addressed only the California common law test for employee status, and not any additional tests for employee status contained in the wage orders of the California Industrial Welfare Commission (“IWC”). Ayala, 59 Cal. 4th at 531.
The California Supreme Court’s Decision in
Ayala v. Antelope Valley Newspapers, Inc.

In June, the California Supreme Court issued its ruling in Ayala, six years after the litigation began. In the case, four newspaper delivery carriers filed a putative class action lawsuit against publisher Antelope Valley Newspapers, Inc. They claimed that the publisher misclassified them and a class of carriers in Los Angeles and Kern Counties as independent contractors instead of employees. The carriers alleged they were denied meal and rest breaks, overtime pay, expense reimbursements, and other protections in violation of California law.9

The named plaintiffs moved for class certification. They claimed that the central issue of whether the carriers were employees under California’s common law test could be resolved with common proof that included the terms of standardized written contracts each carrier entered into with Antelope Valley.10 The trial court denied class certification, finding that the resolution of the carriers’ employee status would require predominantly individualized inquiries into the publisher’s control over the carriers’ work.11

The California Court of Appeal affirmed that class certification was not appropriate for the meal and rest period and overtime pay claims, but reversed on the issue of employee status.12 The appellate court reasoned that evidence of variations in the control exercised over individual carriers was separate from the proof needed to resolve the “critical question - how much right does Antelope Valley have to control what its carriers do?”13 On that issue, the appellate court determined common proof was available so that classwide resolution was appropriate.14

The California Supreme Court granted review to resolve just one issue: Whether the carriers’ theory that they were employees under California common law could be resolved on a classwide basis.15 Though the Ayala opinion focuses on this class action question, the court’s discussion of California’s common law standards affords key guidance for employers unsure if their independent contractors are misclassified under California law.

The California common law employment test, which the California Supreme Court noted it had last addressed in 1989 in its decision in S.G. Borello & Sons, Inc. v. Department of Industrial Relations,16 consists of two analyses - a primary analysis and a secondary analysis, according to the Ayala court.17 The first analysis, the “control test,” is the more important of the two. Under the control test, the issue is whether the company or entity that engages the worker to provide services “has the right to control the manner and means of accomplishing the result desired.”18 The second analysis, according to the court, involves “a range of secondary indicia drawn from the Second and Third Restatements of Agency that may in a given case evince an employment relationship.”19 The supreme court addressed these two analyses in turn.

The control test occupied the lengthiest part of the supreme court’s opinion, giving credence to the courts’ repeated characterization of it as the “principal test of an employment relationship” and “the foremost consideration in assessing whether a common law employer-employee relationship exists. . . .”20 The supreme court articulated several guidelines very helpful to California companies regarding when relationships are employment in nature.

First, the court oriented the focus. It distinguished the correct focus from the incorrect focus. Specifically, “it is not how much control a hirer exercises, but how much control the hirer retains the right to exercise.”21 Misplaced focus on the actual day-to-day exercise of control by Antelope Valley was the precise flaw in the trial court’s decision that required reversal of the denial of class certification. “Because the trial court principally rejected certification based not on differences in Antelope Valley’s right to exercise control, but on variations in how that right was exercised, its decision cannot stand.”22 The Ayala Court honed in on this distinction, saying that what matters is the legal right to control the activities of the contractor. A

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9 Ayala, 59 Cal. 4th at 528-29.
10 59 Cal. 4th at 529.
11 59 Cal. 4th at 529. The trial court also denied class certification on the meal and rest break claims based on its finding that individualized inquiries predominated on those claims. 59 Cal. 4th at 529.
12 59 Cal. 4th at 529.
13 59 Cal. 4th at 529.
14 59 Cal. 4th at 529.
15 59 Cal. 4th at 528.
17 59 Cal. 4th at 530-31 (citing Borello, 48 Cal. 3d 341 (1989)).
18 59 Cal. 4th at 531 (quoting Borello, 48 Cal. 3d at 350).
19 59 Cal. 4th at 532.
20 59 Cal. 4th at 531, 532.
21 59 Cal. 4th at 533.
22 59 Cal. 4th at 528.
focus on how the work is done - whether control is, in fact, exercised - does not reveal whether the hiring company retained the legal right of control. More specifically, proof that the hiring company did not actually control the day-to-day work activities of the contractor does not necessarily mean that the hiring company lacked the right of such control. In fact, while the absence of an exercise of control could mean that no control was reserved, it could also indicate that the hiring company simply decided that there was no need to exercise control over the contractor’s work activities.23 “That a hirer chooses not to wield power does not prove it lacks power.”24 Orienting the analysis to the legal right of control, and not the de facto exercise thereof, is central to analyzing employee (versus contractor) status under California law.

Second, the supreme court advised that a telltale sign of control - and thus, strong indicia of an employment relationship - is the right of either party to end the work arrangement at will. “Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause. . . .”25 The rationale is obvious: retention by a company of the right to terminate the work arrangement for any or no reason vests the company with the means of controlling virtually any of the agent’s activities. The looming threat of termination is sufficiently coercive that it amounts to control, and means that the relationship is more that of an employer-employee than principal-contractor. On the flip side, the court noted, the worker’s corresponding right to end the arrangement is also relevant on the issue of control. Employees may quit their employment at any time; independent contractors are legally obligated to complete their contract.26

Third, the supreme court advised that written agreements between the parties, if they exist, are critical - a “necessary starting point” - in assessing the extent of control reserved to the parties.27 The terms of the contract reflect the parties’ own agreement as to their respective rights, including whether the hiring company retains the right to control the workers’ manner and method of providing services. Importantly, when evaluating whether contract terms create a right of control, the Ayala Court held: “Whether a right of control exists may be measured by asking whether or not, if instructions were given, they would have to be obeyed on pain of at-will discharge for disobedience.”28 In Ayala, there were two uniform, written contracts used between the carriers and Antelope Valley during the relevant period, which the court said the trial court improperly gave “only cursory attention.”29 Reviewing such contracts (again, for class certification purposes), the California Supreme Court stated that they endowed Antelope Valley with significant rights and showed the “extent of Antelope Valley’s control over what [wa]s to be delivered, when, and how, as well as Antelope Valley’s right to terminate the contract without cause on 30 days’ notice.”30

A review of the terms of the parties’ written agreements is not dispositive, however, the court warned. Contract terms “may not be conclusive if other evidence demonstrates a practical allocation of rights at odd with the written terms.”31 The parties’ course of conduct, therefore, may be relevant. Conduct inconsistent with the agreement may prevent a finding that the rights are distributed as the contract expressly states. At the same time, conduct consistent with the agreement presumably permits the terms of the agreement to be conclusive.

Next, the Ayala Court turned to the separate analysis involving the remaining factors evaluated under California’s common law employment status test. Reiterating that the “foremost consideration” is the hirer’s right to control, the court allowed that “our precedent also recognize a range of secondary indicia drawn from the Second and Third Restatements of Agency that may in a given case evince an employment relationship.”32 The factors that courts “may consider,” are: “(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.”33

23 59 Cal. 4th at 533-36.
24 59 Cal. 4th at 535.
25 59 Cal. 4th at 531.
26 59 Cal. 4th at 531 n.2 (internal citation omitted).
27 59 Cal. 4th at 535.
28 59 Cal. 4th at 533.
29 59 Cal. 4th at 524.
30 59 Cal. 4th at 534.
31 59 Cal. 4th at 535.
32 59 Cal. 4th at 532.
33 59 Cal. 4th at 532.
However the Ayala Court was careful to dispel the notion that these remaining factors were evenly-weighted. The court explained that some factors are more important than others in assessing common law employment. Indeed, together with the right of control, the basic skill level required for the work may be of “inordinate importance.”34 Other factors have virtually no independent value. For example, proof of which party supplies the tools, instrumentalities, and workplace serves only to support an inference as to whether the hiring company controls the worker or not.35

**The Ninth Circuit’s Decision in Alexander v. FedEx Ground Package System, Inc.**

Two months after the California Supreme Court decided Ayala, the Ninth Circuit took up the question of independent contractor misclassification under California’s common law standards in Alexander v. FedEx Ground Package System, Inc.36

In Alexander, FedEx package delivery drivers who worked in California between 2000 and 2007 sued the company, claiming they were improperly classified by FedEx as independent contractors under state law. The drivers sought recovery of unpaid business expenses, overtime pay and other relief.37

The case was consolidated with similar cases filed against FedEx in other states as Multidistrict Litigation (“MDL”) in the United States District Court for the Northern District of Indiana, which certified the California case as a class action.38 After the MDL court denied plaintiffs’ motion for summary judgment and granted summary judgment to FedEx on the issue of the contractor status of the drivers, the California class appealed to the Ninth Circuit.39

The Ninth Circuit found that the drivers were “employees as a matter of law under California’s right-to-control test”; remanded the case; and instructed the district court to enter summary judgment for the plaintiffs on the question of employment status.40 In reaching this conclusion, the panel affirmed that the governing common law test was the multi-factor test set forth by the California Supreme Court in Borello - not the “economic opportunities test” from the United States Court of Appeals for the District of Columbia erroneously applied by the district court.41

Because Alexander involved a different procedural posture than the class certification analysis in Ayala, the Ninth Circuit’s appellate review focused on the merits of the claim, evidence, and whether the district court properly granted summary judgment to FedEx on the question of the drivers’ status. The parties stipulated that the operating agreement, and FedEx policies and procedures, governed the relationship, disputing only the extent to which the documents gave FedEx the right to control its drivers.42 The Ninth Circuit said that the majority of the operating agreement was not ambiguous, allowing the court to reach conclusions about its meaning as a matter of law. Where ambiguities did exist, the panel said that outside evidence supported the conclusion that FedEx held the right to control the drivers.43

Applying the Borello “right-to-control” test, the Ninth Circuit began with the first analysis: whether FedEx held the right to control the means and manner by which the drivers accomplished their work.44 FedEx pointed to the operating agreement’s language, arguing that it expressly established an independent contractor arrangement with the drivers. Indeed, the operating agreement’s “Background Statement” provided:

> [T]his Agreement will set forth the mutual business objectives of the two parties ... but the manner and means of reaching these results are within the discretion of the [driver], and no officer or employee of FedEx ... shall have the authority to impose any term or condition on [the driver] ... which is contrary to this understanding.

Similarly, a separate provision of the operating agreement, entitled “Discretion of Contractor to Determine Method and Means of Meeting Business Objectives,” stated that “‘[N]o officer, agent or employee of FedEx ... shall have the authority to direct [the driver].’”46

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34 59 Cal. 4th at 539.
35 59 Cal. 4th at 539-40.
The Ninth Circuit was not swayed, finding that labels applied by the parties are not dispositive: “What matters is what the contract, in actual effect, allows or requires.”47 Looking at the rights granted to FedEx in the operating agreement, as well as company policies and procedures, the court said that they “unambiguously allow FedEx to exercise a great deal of control over the manner in which its drivers do their jobs.”48 Specifically, the Ninth Circuit found:

- **FedEx had the right to control the appearance of the drivers.** The operating agreement required that drivers meet certain standards for personal appearance and hygiene. Drivers were contractually required to wear a FedEx uniform (shirt, pants/shorts, dark shoes and socks) in “good condition,” and if drivers were not well-groomed and free of body odor, FedEx managers could refuse to let them work.49

- **FedEx had the right to control the appearance of the vehicles.** Though the drivers supplied the delivery vehicles, the operating agreement granted FedEx the right to dictate the “FedEx white” color of such vehicles; require them to be clean with a logo displayed and no body damage; require that they have specific dimensions and contain shelving meeting specific length, width, and height requirements; and require the vehicles to be used exclusively for FedEx deliveries while in FedEx service, among other requirements. Again, FedEx managers could prevent drivers from working if their vehicles failed these standards.50

- **FedEx had the right to control when and how the drivers delivered packages.** The operating agreement also reserved to FedEx the authority to reconfigure a driver’s service area with five days’ notice, approve or disapprove of a driver’s proposal to prevent reconfiguration, and the ultimate discretion to reject a service area.51 Further, the agreement mandated drivers meet “standards of service,” meaning with professionalism and good decorum.52

- **FedEx had the right to control the times the drivers worked.** The Ninth Circuit also said it was “clear from the [operating agreement] that FedEx has a great deal of control over drivers’ hours.”53 FedEx structured workloads to equate to 9.5 to 11 hours per workday; adjusted driver workloads to stay within this range; and required that drivers not leave the terminal in the morning until all packages are available, load/unload packages at FedEx terminals every working day, and return to the terminal by a certain time later in the day, leaving their vehicles overnight if they wanted FedEx to load their vehicles for the next morning.54

Nor was the Ninth Circuit swayed by FedEx’s arguments that it lacked control over at least certain aspects of the drivers’ jobs. For example, the company pointed out that it did not mandate that the drivers follow specific routes or deliver packages in a particular order. However, the court stated that “FedEx’s lack of control over some parts of its drivers’ jobs does not counteract the extensive control it does exercise.”55 FedEx, according to the panel, retained all “necessary” control, as *Borello* requires.56 Indeed, the Ninth Circuit pointed to FedEx’s CEO’s deposition testimony establishing that the company had the authority to refuse to allow drivers to add routes or sell routes to third parties, or to use replacement drivers if they fell short of FedEx’s grooming and other standards.57 Citing *Ayala*, the Ninth Circuit said that “[t]he existence of the right of control and supervision establishes the existence of an agency relationship.”58

The Ninth Circuit then turned to the secondary analysis - an evaluation of the remaining factors in the common-law test. It concluded that none of them undermined the finding that the drivers were independent contractors given the “powerful evidence” of FedEx’s right to control the manner in which the drivers performed their work.59 Certain factors favored, at least in slight degree, FedEx. These consisted of the right to terminate at will because the operating agreement did not give to FedEx

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an “unqualified right to terminate,” and instead, imposed at least some constraints (e.g., allowing a driver’s termination for breach of contract); the fact that drivers provided their own vehicles and were not required to secure their other equipment from FedEx; and the parties’ beliefs, since the operating agreement expressly framed it a contractor relationship (albeit other terms in the agreement and in company procedures belied this characterization).60

Other factors favored the drivers: their work was not a distinct occupation, but instead an integrated component of FedEx’s operations; their work was performed under FedEx’s direction; there was only modest skill required for the role; the operating agreement provided for automatic, successive one-year terms for the drivers, absent notice of non-renewal by either side, suggesting an employment relationship; and the work was part of FedEx’s core business.61

One factor was neutral - method of payment. FedEx paid drivers pursuant to a complex method involving fixed and variable pay that could not easily be analogized with either hourly pay (suggesting employee status) or pay-per-job (suggesting contractor status).62

Based on this analysis, the Ninth Circuit concluded that the broad right to control afforded to FedEx in the operating agreement, and favoring employee status, was not contradicted by the secondary factors, which favored neither party.63

**Key Take-Aways for California Companies**

To the great frustration of companies in California and elsewhere, there simply are no bright lines prescribing how to structure and maintain an independent contractor arrangement in a way that clearly distinguishes it from an employment relationship. Nevertheless, the *Ayala* and *Alexander* decisions provide at least some measure of guidance in this area.

- First, both decisions underscore that it is not how much control the company actually exercises over the worker’s performance of services, but how much control the company has the right to exercise that is critical in deciding contractor versus employee status.
- Second, the way that the parties’ written agreement allocates the right of control to the parties is extremely important.

Expressions that the relationship is a contractor role, not an employment role, are somewhat important for purposes of proving how the parties’ intentions and understandings were set at the outset of the work arrangement. Indeed, such expressions devolve to the benefit of the company on a motion for summary judgment by the worker, where the facts must be viewed by the court in the light most favorable to the non-moving party. However, such expressions are of no moment when other provisions set forth in the agreement reserve to the company discretion and ultimate authority over various aspects of the individual’s work. Thus, the right of FedEx, set forth in the operating agreement, to prevent a driver from driving on a particular day if he or she failed the grooming or personal appearance standards belied the earlier expressions in the agreement that “no officer, agent or employee of FedEx ... shall have the authority to direct [the driver].”65

- Third, the arrangement should allocate to the individual the right of control over most aspects of performing the work.

The Ninth Circuit was unpersuaded by FedEx’s argument that at least some aspects of the drivers’ work was left up to the drivers. The fact that the company did not map out the exact route to drive did not diminish the many other ways that FedEx held control over the drivers’ activities.

- Fourth, *Ayala* teaches that one of the more legally-significant terms in the parties’ written agreement is the termination provision.

The contractual right to terminate at-will, even with advance notice, is likely to be found to create a corresponding right of control over how the work is performed. On the contrary,

64 *Ayala*, 59 Cal. 4th at 535.
constraints on the right to end the arrangement - on both sides - indicate the lack of a day-to-day threat of discharge and are suggestive of a contractor arrangement.

- Finally, these cases can also help companies decide whether, given the services that they need and their business and industry demands, it is desirable - or even possible - to structure defensible independent contractor relationships under the California standards.

At minimum, Ayala and Alexander stand as a reminder for California companies using or contemplating the use of independent contractors of the importance of maintaining vigilance in keeping up with legal developments involving misclassification claims.

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Another Fine Mess: Individual PAGA Action and Removal of PAGA Actions After Iskanian

By Joseph C. Liburt

Introduction

The California Private Attorneys General Act ("PAGA")\(^1\) is a theoretical mess. The case law interpreting it is inconsistent in several respects, and those inconsistencies have significant consequences. One inconsistency is whether PAGA permits an employee to bring an "individual" PAGA claim, as distinguished from a PAGA claim in which the employee represents both himself/herself and other "aggrieved employees." This article suggests that in light of the California Supreme Court’s recent decision in Iskanian v. CLS Transportation L.A., LLC\(^2\) and post-Iskanian district court decisions, it is now clearer that PAGA permits “individual” claims. One consequence of this implication is to throw further doubt on the correctness of Baumann v. Chase Investment Services Corporation\(^3\), in which the Ninth Circuit held that PAGA actions cannot be removed under the Class Act Fairness Act (“CAFA”)\(^4\) because PAGA actions do not meet the CAFA definition of “class action.”

Are They Unicorns or Donkeys: Do Individual PAGA Claims Exist?

Courts have held every possible way on this question. Several courts have flatly stated that there is no such thing as an “individual” PAGA claim.\(^5\) Conversely, other courts have held that there is indeed such a thing as an “individual” PAGA claim.\(^6\) But what has the California Supreme Court said?

The first clue in this ontological mystery shows up in Arias v. Superior Court.\(^7\) Although the supreme court did not address the question directly, it made the following curious statement: “Actions under the Labor Code Private Attorneys General Act of 2004 may be brought as class actions... At issue here is whether such actions must be brought as a class action.”\(^8\) This statement is significant because, in general, a class action is a collection of individual claims that meet certain criteria that allow them to be tried fairly on a representative basis. If, as Arias states, PAGA claims “may” be brought as class actions, this...
suggests that multiple individual PAGA claims exist that can be tried together. Or looking at it from the other side: if a PAGA claim is an indivisible unitary law enforcement action, how can it possibly be brought as a class action? If it is a single indivisible action, then there cannot be multiple individual PAGA claims to be brought together and analyzed under class action criteria. A class action analysis has no application to a single indivisible claim. So Arias’ statement that PAGA actions “may” be brought as class actions suggests that “individual” PAGA claims exist.

The second clue makes its appearance in Iskanian. There, the California Supreme Court does not hold that plaintiffs cannot bring “individual” PAGA claims. In fact, Iskanian seems to assume that an “individual” PAGA claim can be asserted, but states that barring “representative” claims frustrates the public policy behind the PAGA statute. Iskanian notes the split of authority as to the permissibility of individual PAGA claims, then states: “But whether or not an individual claim is permissible under the PAGA, a prohibition of representative claims frustrates the PAGA’s objectives.”

To parse this statement correctly, it is important to understand how Iskanian redefines the meaning of “representative” claim. Under Iskanian’s novel definition of “representative,” every PAGA claim is inherently a “representative” claim in the sense of “representing” the government. Consequently, Iskanian holds that a compelled waiver of “representative” claims is not allowed under California law because it necessarily means the compelled waiver of all PAGA claims, whether individual or on behalf of other “aggrieved employees.”

Even if Iskanian’s holding is viewed under the pre-Iskanian commonly-understood definition of “representative” - meaning representing other employees - it is one thing to say that an employee cannot be required to waive the right to represent others; it is quite another thing to say that an employee must represent others. Iskanian does not even come close to holding that an employee has no choice and must represent other “aggrieved” employees, and not just herself, in a PAGA action.

As of this writing, five post-Iskanian decisions have held that individual PAGA claims can be brought.

**If Individual PAGA Claims Exist, Does This Affect Their Removability?**

In Urbino v. Orkin Services of California, the Ninth Circuit held that the individual potential recoveries of PAGA “aggrieved employees” cannot be aggregated in order to meet the $75,000 amount in controversy requirement for diversity jurisdiction. In reaching this holding, the court noted that “the traditional rule is that multiple plaintiffs who assert separate and distinct claims are precluded from aggregating them to satisfy the amount in controversy.” On the other hand, “[i]f the claims are derived from rights that they hold in group status, then the claims are common and undivided. If not, the claims are separate and distinct.” The Ninth Circuit then concluded that “all of these [Labor Code] rights are held individually. Each employee suffers a unique injury - an injury that can be redressed without the involvement of other employees. . . . Defendants’ obligation to them is not ‘as a group,’ but as ‘individuals severally.’”

Thus, under the Ninth Circuit’s analysis in Urbino, each “aggrieved employee’s” PAGA claim is separate and distinct and held individually. This analysis is

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9 Iskanian, 59 Cal. 4th at 384.
10 See also 59 Cal. 4th at 387 (insisting that “an employee is free to forgo the option of pursuing a PAGA action”). It would be odd to require every PAGA claimant to represent all “aggrieved employees,” not least because such a rule could create a race to judgment among competing PAGA plaintiffs who necessarily would have entirely overlapping claims if the rule were that every PAGA claim must represent all other “aggrieved employees.” Surely if the purpose of PAGA is to coerce employer compliance with the wage laws, it is more consistent with that purpose to permit an individual PAGA claim than to insist that an employee’s choice is to represent everyone or not assert the claim at all.
12 726 F.3d 1118 (9th Cir. 2013).
13 726 F.3d 1122.
14 726 F.3d 1122.
15 726 F.3d 1122.
16 726 F.3d 1122.
consistent with the California Supreme Court’s statement in Arias that a representative PAGA claim “may” be pursued as a class action; if each employee’s PAGA claim is separate, distinct and individual, then those several claims can be analyzed under the class action factors (e.g., commonality, predominance, etc.). It is also consistent with this article’s reading of Iskanian and the post-Iskanian district court cases that hold that an individual PAGA claim can be brought.

Several months after Urbino, in Baumann v. Chase Investment Services Corporation,17 the Ninth Circuit held that a PAGA action cannot be removed under CAFA because a PAGA action is not a “class action” as that phrase is defined under CAFA.18 Although Baumann was undoubtedly correct that the plaintiff in that case did not seek to proceed under either Rule 23 of the Federal Rules of Civil Procedure or California Code of Civil Procedure section 382, Baumann’s holding that PAGA is not “a similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action” seems incorrect because it is based on a selective reading of Arias. Baumann entirely ignores footnote 5 of Arias, discussed above, in which the California Supreme Court stated that a PAGA action “may” be brought as a class action. If a PAGA action “may” be brought as a class action, then isn’t PAGA a “State statute … authorizing an action to be brought by 1 or more representative persons as a class action”? While Arias does not mandate that a PAGA action be brought as a class action, surely it “authorizes” a PAGA action to be brought as a class action. And that is all that is required under CAFA.

Baumann tries to buttress its holding by comparing PAGA to parens patriae suits, but it reaches this comparison only by ignoring Arias’ authorization of class PAGA actions. The parens patriae comparison is entirely unnecessary in light of Arias’ authorization and CAFA’s plain language. The parens patriae comparison is also dubious on the merits for the same reason. Assuming arguendo that the parens patriae statutes do not authorize parens patriae suits to be brought as class actions, they are distinguishable from PAGA actions because the California Supreme Court in Arias specifically stated that PAGA actions can indeed be brought as class actions. The remainder of Baumann’s parens patriae discussion is simply irrelevant in light of this fundamental distinction between PAGA and parens patriae.

Because PAGA claims may be brought as class actions - which implies that individual PAGA claims exist, since a class analysis makes no sense if there are no individual claims upon which to perform a class analysis – Iskanian, and the post-Iskanian district court cases holding that individual PAGA claims can be brought, are more consistent with PAGA actions being removable under CAFA than Baumann’s holding that they are not.

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17 747 F.3d 1117 (9th Cir. 2014).
18 747 F.3d at 1121-22 (citing 28 U.S.C. § 1332(d)(1)(B), “class action” is defined under CAFA as “any civil action filed under Rule 23 of the FRCP or a similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.”).
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**WAGE & HOUR ADVISOR:**

How to Protect Yourself Against “Time Rounding” Claims

By Aaron Buckley

**Introduction**

For decades, many employers in California and elsewhere have “rounded” the time records of nonexempt employees to the nearest quarter-hour, tenth of an hour, or some other fraction of an hour for the purpose of calculating employee pay. Federal law has long permitted the practice, but no California statute expressly permits it, and no California appellate court had published an opinion holding that California law permits time rounding until October of 2012, when the California Court of Appeal issued its decision in *See’s Candy Shops, Inc. v. Superior Court.*

The *See’s Candy* opinion did not hold that time rounding is always permissible. It held that time rounding to the nearest tenth of an hour is permissible only where the practice operates in such a way that the time gained or lost as a result of the rounding averages out “over a period of time” in such a way that employees eventually get paid for all their work time. This additional requirement opened the door to wage claims, including class actions, based on allegations that time rounding had resulted in uncompensated work time. Two years after *See’s Candy,* “time rounding” class actions are becoming more common. Depending upon the size of the potential class, a time rounding class action can expose an employer to millions of dollars in potential liability. But there are things employers can and should do to protect themselves.

**Discussion**

See’s Candy employees used the Kronos electronic timekeeping system to record the times they started and ended their work times. See’s had a practice of rounding the recorded times to the nearest tenth of an hour for the purpose of calculating payroll. Pamela Silva, a former See’s Candy employee, brought a class action alleging that the rounding policy resulted in underpayment of wages to her and other employees. See’s asserted an affirmative defense that its rounding policy complied with both federal and state law. The trial court granted Silva’s motion for summary judgment, rejecting See’s time rounding defense.

The appellate court reversed, holding that “the rule in California is that an employer is entitled to use the nearest-tenth rounding policy if the rounding policy is fair and neutral on its face and ‘it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.’” In other words, time rounding is unlawful where, over time, it causes an employee to receive less pay than the employee would have received in the absence of rounding.

In the *See’s Candy* case, the company provided an expert report demonstrating that See’s policy had a net effect of slightly overpaying employees. As a result, the court held that the trial court erred in disallowing the company’s rounding defense.

Although *See’s Candy* resulted in a victory for the employer, the “over a period of time” requirement provided a roadmap to the plaintiff’s bar on what is required to establish liability for time rounding, even where the policy is neutral on its face. A time rounding case is not difficult to prove given that modern electronic timekeeping systems record both the actual time the employee clocks in or out, and the “rounded” time. This makes it easy to determine whether a policy has the effect, over time, of underpaying or overpaying employees. It is therefore no surprise that time rounding class actions are becoming more common.

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Recommendations

Fortunately, there are things employers can do to protect themselves from time rounding claims. By far the best protection is the most obvious: Do not round time; pay employees for the exact amount of time recorded. This approach is simple and easy, and you can sleep soundly at night knowing you won’t be sued for unlawful time rounding. And for many employers, there no longer is a compelling need to round time. After all, time rounding was born in the pre-electronic era when payroll calculations were done by hand, which made time-rounding a necessity for large employers. But modern electronic timekeeping systems can calculate pay with speed and precision regardless of whether the work time is rounded. As a result, the most compelling reason for time rounding no longer applies.

Some employers, however, continue to view time rounding as a necessity. They fear that eliminating time rounding might encourage some employees to “game” the system by clocking in early and clocking out late in order to generate additional compensable time, much of which will qualify for overtime pay given California’s requirement to pay overtime for any time worked in excess of eight hours per day.

Fortunately, employers that are reluctant to eliminate time rounding have another option, courtesy of See’s Candy. In that case, the company had a “grace period” policy allowing employees to punch in up to 10 minutes before their scheduled start time, and punch out up to 10 minutes after their scheduled end time.11 The grace period policy strictly prohibited employees from working during the grace period; they were only permitted to work during their scheduled shifts.12 Based on this policy, the company presumed the employees worked only during their scheduled work time, and compensated them accordingly, regardless of the times they punched in and out.13 In light of this policy, the court of appeal held that the trial court erred in disallowing See’s Candy’s affirmative defense based on its grace period policy.14 As a result, it is now clear that time rounding, combined with a grace period prohibiting employees from working outside their scheduled shifts, can be a viable defense to a time rounding claim.

Aaron Buckley is a partner at Paul, Plevin, Sullivan & Connaughton LLP in San Diego. He represents employers in cases involving wage and hour, discrimination, wrongful termination and other issues. The bulk of Mr. Buckley’s practice is devoted to the defense of wage and hour class actions.

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11 210 Cal. App. 4th at 892.
12 210 Cal. App. 4th at 892.
13 210 Cal. App. 4th at 892-93.
The End of Unclean Hands and After-Acquired Evidence as Complete Bars to Recovery? California Supreme Court Says Yes . . . and No

By Matthew Wroblewski & Meredith Grant

Introduction

In California, many employers have won cases by showing that a plaintiff employee claiming wrongful termination should never have been hired in the first place. The most common scenario occurs when the employer discovers, through discovery during the lawsuit, that the employee engaged in misconduct that would have led to the employee’s termination had the employer known about it while the employee was still employed. In most cases, the newly discovered misconduct is egregious enough to merit termination on its own, such as misrepresentations on a resume, job application, or on-the-job misconduct. Several appellate decisions have supported barring an employee’s recovery where the newly discovered evidence makes the employee unqualified for the position.1 These defenses are commonly referred to as unclean hands and the after-acquired evidence doctrine.

The California Supreme Court’s recent decision in Salas v. Sierra Chemical2 may have severely limited these defenses.3 The case involved the belated discovery that the employee had used a false social security number during his employment, and moved for summary judgment on the basis that use of a false social security number was a terminable offense.4 Although the trial court denied summary judgment, its decision was reversed by the court of appeal, which reasoned that plaintiff’s undocumented status barred him from relief under the doctrines of unclean hands and after-acquired evidence.

The employee petitioned the California Supreme Court for review, arguing that application of the after-acquired evidence doctrine undercut important public policy considerations by eliminating a potentially meritorious claim based on wholly unrelated employee wrongdoing.5 Explaining that the worker protection provisions of California employment and labor laws are available to all workers “regardless of immigration status,” the California Supreme Court held that “not allowing unauthorized workers to obtain state remedies for unlawful discharge, including prediscovery period lost wages, would effectively immunize employers that, in violation of fundamental state policy, discriminate against their workers on grounds such as disability or race, retaliate against workers who seek compensation for disabling workplace injuries, or fail to pay the wages that state law requires.”6

The employer argued that there were equal public policy concerns outside the discrimination context, such as, an

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3 Petition for Review, Salas v. Sierra Chemical Co., Case No. S196568, California Court of Appeal, at *2.
4 Omnibus Reply to Amicus Curiae Briefs, Salas v. Sierra Chemical Co., Case No. S196568, California Court of Appeal, at *1.
6 Salas, 59 Cal. 4th at 426.
employer’s interest in hiring qualified employees, the 
jeopardy of employing those not legally qualified, the 
employee’s wrongdoing, and the fundamental unfairness 
of allowing a claim based on termination which one was 
not legally able to hold.7 In the specific context of the 
Salas case, the court found that these concerns did not 
trump the public policy behind preventing discrimination 
and protecting undocumented workers.

In finding that the after-acquired evidence cannot be 
a complete defense to claims brought under the Fair 
Employment and Housing Act (“FEHA”),8 the California 
Supreme Court relied heavily on the United States Supreme Court’s decision in McKennon v. Nashville Banner Publishing.9 The Salas Court reasoned that the anti-discrimination goals of California labor law would be substantially impaired if the after-acquired evidence doctrine was a complete defense to claims of retaliation or disability discrimination.10 The court interpreted the doctrine as a limitation on the recovery of back pay between the time of the plaintiff’s wrongful termination and the date of the employer’s discovery, but not as a complete defense.11

Balancing of equities has always been a part of courts’ reasoning when it comes to after-acquired evidence and unclean hands. For example, in 1995, the United States Supreme Court in McKennon v. Nashville Banner Publishing Company discussed the use of the unclean hands and after-acquired evidence defenses as partial equitable defenses to an employee’s back pay.12 That same year, the doctrine appeared to expand as a complete bar to liability in the California Court of Appeal decision Camp v. Jeffer, Mangels, Butler & Marmaro.13 In Camp, the California appellate court accepted the after-acquired evidence doctrine’s bar to liability as a proper balance of equitable considerations.14 There, the employee’s false representations regarding his prior felony convictions put the employer at risk of losing its government contract.15 The court found that discovery of the plaintiff employee’s prior felony was a complete bar to his recovery, reasoning that an employee who obtains a job through misrepresentation should have no recourse for an alleged wrongful termination.16 Three years later, in Murillo v. Rite Stuff Foods, the California Court of Appeals qualified the doctrine once again, emphasizing that in order to apply, there must be a settled company policy requiring immediate termination for the type of misconduct the employer later discovered.17 In Murillo, an employee fabricated her immigration status, but evidence the employer tolerated undocumented workers made the doctrine inapplicable.18

Looking Ahead

Although the California Supreme Court’s decision in Salas appears to prevent employers from arguing that an employee’s claim is completely barred because of an employee’s misconduct, the case does not mark the death knell of these types of arguments on summary judgment. As explained by Judge Baxter in his concurring and dissenting opinion, there is a key distinction between the unclean hands doctrine and after-acquired evidence defense:

[T]o the extent the majority implies that the unclean hands doctrine might serve to reduce, but not eliminate, the damage due a worker wrongfully discharged under FEHA whose own later-discovered wrongdoing would have provided legitimate grounds for termination, the majority errs. It is axiomatic that, where applicable, the unclean hands doctrine serves as a complete defense to employment-based claims.19

Just as Salas, Camp, and Murillo balanced the equities, so too must trial courts when considering if the employee’s hands are so dirty that it would be inequitable for him or her to pursue a wrongful discharge claim. Both the United States Supreme Court in McKennon and the majority opinion in Salas recognized that in the most

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8 CAL. GOV’T CODE § 12900 et seq.
10 Salas, 59 Cal. 4th at 430.
11 59 Cal. 4th at 430. The Salas Court seemed to accept the respondent’s distinction between a social security number and an undocumented worker for the purpose of wrongdoing, as it did not address the state’s legislation following SB 1818 outside of the federal pre-emption issue. See Senate Bill No. 1818, 2001–2002 Reg. Sess (May 14, 2002).
14 35 Cal. App. 4th at 632.
15 35 Cal. App. 4th at 632.
16 35 Cal. App. 4th at 638.
18 In 2002, the California Legislature enacted Senate Bill 1818, which extended employment and labor protections to all workers regardless of immigration status.
19 Salas, 59 Cal. 4th at 437 n.4.
“egregious cases,” the employee would not be entitled to any lost wages.\textsuperscript{20}

The court of appeal will likely provide more clarity on the unclean hands defense when it decides \textit{Horne v. District Council 16 International Union of Painters}.\textsuperscript{21} In \textit{Horne}, an African-American male applied for, but was denied, a union organizer position. Instead, the union selected a white applicant to serve as organizer. Horne sued the union, claiming it racially discriminated against him. Through discovery during the lawsuit, the union learned that Horne had a previous narcotics conviction, which made him ineligible for the organizer position. The union moved for summary judgment arguing that Horne could not establish a \textit{prima facie} case of discrimination under FEHA, regardless of the union’s motivation for rejecting him. Both the trial court and the court of appeal found in favor of the union. The appellate court found that evidence of the prior conviction was admissible to show that Horne was not qualified for the position. Since the law requires an employment candidate to first demonstrate that he was qualified for the job he sought before the employer has to offer any explanation for the basis of its actions, the court determined that it need not explore the employer’s motives if the candidate was ineligible for the job.\textsuperscript{22}

The California Supreme Court initially took \textit{Horne} under review, but when it decided \textit{Salas}, the court gave the \textit{Horne} case back to the court of appeal for reconsideration. Based on the \textit{Salas} decision, the appellate court may extend the analysis and further limit the unclean hands and after-acquired evidence defenses, even when it is clear that the employee is not qualified for the position for reasons other than immigration status. We’ll have to wait and see what the court of appeal does when SB 1818 and the public policy surrounding undocumented workers are out of the picture. Without these concerns pushing the equities in favor of the employee, the appellate court may open an avenue for employers to win summary judgment based on unclean hands or after-acquired evidence in egregious cases. In the end, the court of appeal, like the trial courts, will have to balance the equities when it comes to application of unclean hands and after-acquired evidence, which are, after all, equitable defenses.

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\textsuperscript{20} \textit{Salas}, 59 Cal. 4th at 431; \textit{McKennon}, 513 U.S. at 361. The \textit{Salas} Court left open the door for cases where the employee’s conduct was “particularly egregious.” 59 Cal. 4th at 431.

\textsuperscript{21} 165 Cal. App. 4th 144 (2014).

\textsuperscript{22} 165 Cal. App. 4th at 150.
CASE NOTES

ARBITRATION


On November 17, 2014, a California appellate court held that the question of whether an arbitration agreement permits class and/or representative arbitration is a gateway issue, and is thus reserved for judicial determination unless the parties clearly and unmistakably provide otherwise.

Alicia Moreno (“Moreno”) was employed by Garden Fresh Restaurant Corporation (“Garden Fresh”) in California from June 2006 to June 2013. She signed two arbitration agreements during her employment. She sued Garden Fresh in a superior court for claims related to a variety of alleged Labor Code violations that included unfair and unlawful competition, failure to pay overtime wages, failure to provide accurate itemized wage statements, and failure to provide all wages when due. Moreno filed the action as a putative class action, and also pursued representative relief under the Private Attorney General Act of 2004 (“PAGA”) (Lab. Code § 2698 et seq.).

Garden Fresh moved to compel arbitration of Moreno’s claims, on an individual basis only, based on two arbitration agreements that Moreno signed during her tenure as an employee of Garden Fresh. Garden Fresh requested that the court dismiss Moreno’s class and representative claims, arguing that the parties’ arbitration agreements did not contemplate class or representative-based arbitration. The trial court granted the motion to compel arbitration, but specifically left to the arbitrator to decide the question whether the arbitration agreements between the parties contemplated classwide and/or representative arbitration, thereby denying Garden Fresh’s request that only Moreno’s individual claims be sent to arbitration.

Garden Fresh filed a petition for a writ of mandate in a California appellate court, requesting to direct the trial court to vacate that portion of its order leaving to the arbitrator to determine whether the parties’ arbitration agreements, which are silent on the issue, contemplated class and/or representative arbitration. Garden Fresh maintained that where an arbitration agreement is silent on the issue whether class and/or representative arbitration is available, the court, not the arbitrator, should determine whether the arbitration agreement contemplates bilateral arbitration only, or rather, whether their arbitration agreement contemplates that class and/or representative claims may be pursued in arbitration.

The question before the appellate court was: when the contract is silent on the matter, who decides whether an agreement to arbitrate disputes between the parties to the agreement authorizes class and/or representative arbitration—the arbitrator or the court?

The appellate court held that the question of whether an arbitration agreement permits class and/or representative arbitration is a gateway issue, and is thus reserved for judicial determination unless the parties clearly and unmistakably provide otherwise. Although a class and/or representative action has often been thought of as merely a procedural device, the court interpreted the U.S. Supreme Court’s analysis regarding the incompatibility of this procedural device with the attributes of arbitration as suggesting that the Supreme Court views the question of whether anything other than simple, bilateral arbitration is available where the arbitration agreement between the parties is silent on the matter as being much more than a mere procedural question.

The appellate court noted that the fact that parties have entered into an arbitration agreement does not mean that they have necessarily agreed to arbitrate class and/or representative claims. The U.S. Supreme Court explained that a shift from individual to class arbitration is not simply a matter of what “procedural mode” is available to present a party’s claims because that shift fundamentally changes the nature of the arbitration proceeding and significantly expands its scope. Class arbitration also raises significant due-process concerns, since an arbitrator’s award purports to adjudicate the rights of absent parties and bind them, not just the parties to the arbitration agreement. Absent parties thus “must be afforded notice, an opportunity to be heard, and a right to opt out of the class. The appellate

court held that taking all of this into consideration, arbitration is poorly suited to the higher stakes of class litigation.

The appellate court concluded that a court, not an arbitrator, should decide whether the parties agreed to arbitrate representative claims, such as the PAGA claim in the instant case, in the face of an arbitration provision that is silent on the matter. Specifically, like a class claim, a claim brought on a representative basis would make for a slower, more costly process. Although a representative claim would not require all of the same procedural protections as a claim requiring class certification, at a minimum, there would have to be greatly expanded discovery, which could prove costly and time-consuming. In addition, representative claims increase risks to defendants by essentially aggregating the claims of many individuals into a single action. As would be the case with class arbitration, defendants would run the risk that an erroneous decision on a claim being made on behalf of a large group of potential individual claimants would go uncorrected given the absence of multilayered review. For the same reasons that arbitration is poorly suited to the higher stakes of class litigation, it is reasonable to conclude that arbitration is similarly ill-suited to the higher stakes of a collective or representative action.

The appellate court granted the writ of mandate issue directing the trial court to vacate that portion of its order leaving it to the arbitrator to determine whether the parties agreed to class and/or representative arbitration; to conduct further proceedings as necessary to determine whether the parties’ arbitration agreement contemplates class and/or representative arbitration, and whether the plaintiff’s representative PAGA claims may be arbitrated, or rather, whether that claim should be bifurcated; and to enter a new order setting forth the court’s determination as to these issues.

References. See, e.g., Wilcox, California Employment Law, § 9.05, Arbitration (Matthew Bender).


On November 14, 2014, a California appellate court ruled that an arbitration provision in the employee’s individual agreement was not pre-empted under Labor Management Relations Act § 301(a) and was enforceable, as there was no inconsistency between the collective bargaining agreement and the employee’s individual agreement, neither of which said anything about the electronic payroll system or any rounding of hours worked.

Maucabrina Willis ("Willis") was a non-exempt clerk at Centinela Hospital Medical Center ("the hospital"). She signed an employment application and employment acknowledgment form. Both forms contained provisions whereby she agreed to submit any dispute regarding her employment with Centinela Freeman Health System to binding arbitration. Also, a collective bargaining agreement between the hospital and Service Employees International Union United Healthcare Workers West ("Union") governed hospital employees. She became a union member and was covered by the collective bargaining agreement.

Prime Healthcare Centinela, LLC ("Prime LLC") acquired the hospital where the union was recognized as the hospital representative of the bargaining units, further all legal obligations under the collective bargaining agreement was assumed by the Prime LLC. The collective bargaining agreement continued to govern hospital employees which expired in December 2009, but remained in effect after its expiration. Willis’ employment at the hospital was terminated on December 12, 2011, and then the provisions set forth in the collective bargaining agreement regarding the grievance procedure remained in effect.

Willis filed a class action complaint against Prime before a superior court alleging Labor Code violations: failure to pay minimum wages; failure to pay all wages owed upon termination; and civil penalties for inaccurate wage statements. The complaint also alleged an unfair competition cause of action. Willis alleged that she was not paid for all the hours she worked. The electronic system used by Prime Healthcare Services, Inc. ("Prime") to calculate payroll systematically computed less total hours than the actual time that she worked. As a result, she was not paid minimum wages for all the hours she worked and received inaccurate wage statements. Further, she was not paid all wages owed to her upon termination.

Prime filed a petition to compel arbitration and dismiss the class claims. Prime contended that Willis was required to arbitrate her employment-related claims pursuant to her arbitration agreement with the Centinela Freeman Health System. Willis filed an opposition to Prime’s petition to compel arbitration. She argued that the collective bargaining agreement did not waive her right to bring statutory claims in court, further she never agreed to arbitrate any employment disputes with Prime Healthcare Services, Inc.

Prime did not seek to enforce the grievance procedure and arbitration provisions in the collective bargaining agreement. Rather they were trying to enforce an arbitration provision pursuant to Willis’ separate individual
agreement with Centinela Freeman Health System. The trial court denied the motion to compel arbitration. The trial court found the individual arbitration agreement was inconsistent with the collective bargaining agreement and therefore unenforceable.

Prime appealed before a California appellate court challenging the trial court’s ruling that the arbitration provision in Willis’ individual agreement was unenforceable because the individual and collective bargaining agreements were inconsistent.

The appellate court ruled that as there was no inconsistency between the collective bargaining agreement and the Willis’ individual agreement, neither of which said anything about the electronic payroll system or any rounding of hours worked, an arbitration provision in her individual agreement was not pre-empted under Labor Management Relations Act (“LMRA”) § 301(a) and was enforceable. Willis agreed to arbitrate statutory claims, and a contractual exclusion from arbitration for employees subject to a collective bargaining agreement was inapplicable because Willis agreed otherwise.

The appellate court observed that present case was subject to the limited pre-emptive effect of § 2 of the Federal Arbitration Act (“FAA”). The FAA controls the enforceability of the agreement to arbitrate and related standing issues. Collective-bargaining contracts generally contain procedures for the settlement of disputes through mutual discussion and arbitration. These provisions were among those which are to be enforced under § 301 of the LMRA. Further, it had been described as a generalized code to govern a myriad of cases which the parties negotiating the collective bargaining agreement could not anticipate. The present matter fell within the context of the myriad of cases where the issue of § 301(a) pre-emption and federal common law was relevant.

The appellate court observed that an individual contract cannot waive any benefit to which an employee otherwise would be entitled under a collective bargaining agreement. The court relied on the U.S. Supreme Court’s ruling that individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. An employee’s separate individual contract which was consistent with the collective bargaining agreement may be enforced.

The appellate court noted that the arbitration clause in the present case was subject to the FAA. If there was no inconsistency in the two agreements, the arbitration provision in the individual agreement must be enforced. There was nothing in the collective bargaining agreement or individual agreement about the electronic system or any rounding of hours worked. No inconsistency was present in terms of the relevant language in the collective bargaining and individual agreements. Moreover, the “any dispute” language in the individual agreement covered Willis’ statutory claims while the collective bargaining agreement did not. Reference to the collective bargaining agreement to verify wage rates or assist in damage calculation was insufficient to preempt a separate agreement. Nothing in the National Labor Relations Act has any pre-emptive effect over present litigation. The arbitration provision in the individual agreement was enforceable under the FAA. For federal pre-emption purposes, there was no inconsistency between Willis’ individual agreement and the collective bargaining agreement.

The trial court order denying the petition to compel arbitration was reversed by the appellate court.

References. See, e.g., Wilcox, California Employment Law, § 90.21, Appeal of ruling on motion to compel arbitration (Matthew Bender).

**COLLECTIVE BARGAINING**

**ADT, LLC**, No. 05-CA-127502, 2014 NLRB LEXIS 875 (November 12, 2014).

*On November 12, 2014, the National Labor Relations Board (“NLRB”) ruled that when an employer was on notice that one of its Union’s reasons for requesting information was in order to formulate bargaining proposals, the employer’s refusal to divulge this information was a refusal to bargain in violation of § 8(a)(5) and (1) of the National Labor Relations Act.*

ADT, LLC (“ADT”) sells, installs, services, and monitors commercial and residential alarm systems. It operates nationwide and maintains an office in Boca Raton, Florida. ADT employed 2,483 installers in the U.S. as of April 17, 2014. ADT paid 1,516 installers an hourly rate and many others were paid via commission. The program under which commissions were paid was described as a refusal to bargain in violation of § 8(a)(5) and (1) of the National Labor Relations Act.

**ADT, LLC** (“ADT”) sells, installs, services, and monitors commercial and residential alarm systems. It operates nationwide and maintains an office in Boca Raton, Florida. ADT employed 2,483 installers in the U.S. as of April 17, 2014. ADT paid 1,516 installers an hourly rate and many others were paid via commission. The program under which commissions were paid was called the High Velocity Commissioned Installation (“HVCI”) program. The Charging Party Union represented installers, service technicians, and clerical employees in three bargaining units: Columbia, Maryland; Springfield, Virginia and Lanham, Maryland and Gaithersburg, Maryland. There are three different
collective bargaining agreements for these units. About half the employees in each unit are installers.

In late March or early April 2014, ADT’s Labor Relations Director notified the union business representative that ADT was discontinuing the HVCI program in the Columbia, Springfield/Lanham and Gaithersburg bargaining units. This became effective April 16, 2014. On April 11, 2014, the Union demanded bargaining on the decision and effects of the decision to discontinue the HVCI program in these three bargaining units. The Regional Director for NLRB Region refused to issue a complaint based on the Union’s charge that ADT refused to bargain over the discontinuance of the HVCI compensation program. The Union filed an appeal with the National Labor Relations Board (“NLRB”), which was denied by the General Counsel’s Office of Appeals in September 2014. The Office of Appeals also stated that ADT was not obligated to bargain over the effects of its decision since the only effect was to apply the terms and conditions of the hourly installers. The Appeals Office further noted that the Union had not made a National Labor Relations Act (“NLRA”) § 8(a)(3) discrimination allegation in its charge. Thus the issue in this matter was solely whether ADT was obligated to provide the Union with the information it requested in its April 11, 2014 letter.

The General Counsel alleged that ADT violated §8(a)(5) and (1) of the NLRA by failing and refusing to provide the Union information that the Union requested relating to ADT’s discontinuance of its commission compensation program for employees represented by the Union in three different bargaining units. ADT contended that it was not required to provide this information because the Union waived its bargaining rights over this issue.

Ordinarily, information concerning unit employees’ terms and conditions of employment is presumptively relevant and must be provided. However, when a union waives its right to bargain over a change to a term or condition of employment, it is no longer entitled to information requested for that purpose. In the instant case, the Administrative Law Judge (“ALJ”) found that the waiver language in the collective bargaining agreements is so broad that it gave ADT a carte blanche to eliminate the HVCI program. The ALJ therefore concluded that ADT was not obligated to give the Union any further information as to the business justification for the change.

The ALJ found that while the Union request was not limited to HVCI installers represented by the Union, ADT violated the NLRA in not providing those records. If ADT did not understand that this was all the Union was seeking, it was required to either seek clarification or comply with the request by providing the payroll records of unit installers. Due to the Union’s waiver, it was not entitled to the information regarding other locations where HVCI was being eliminated for purposes of bargaining a change in the existing contracts. However, given the fact that the collective bargaining agreement in the Columbia bargaining unit expired in November 2014 and for Lanham/Springfield in 2015, the ALJ concluded that ADT was obligated to provide this information for purposes of bargaining a new contract. The Union might use this information to bargain for restoration of the HVCI program in Columbia and Lanham/Springfield, or a higher hourly wage for unit installers.

In light of the expiration of the Columbia and Lanham/Springfield contracts, the ALJ found that ADT could reasonably anticipate the relevance of this information to the Union in formulating contract proposals in advance of bargaining. At a minimum, the information would be useful, in conjunction with additional information requests, in determining why the business interests of ADT necessitated cessation of the HVCI program at some locations, but not at others. Conceivably the Union could then formulate bargaining proposals that would make restoration of the HVCI program in its three bargaining units more attractive to Respondent.

In conclusion, the ALJ found that ADT was on notice that one of the Union’s reasons for requesting the information was in order to formulate bargaining proposals. Accordingly, ADT’s refusal to divulge this information was a refusal to bargain in violation of §8(a)(5) and (1) of NLRA.

ADT was ordered to bargain with the Union as the exclusive collective bargaining representative of the installers, technicians, and administrative employees at its facilities in Lanham, Maryland, Springfield, Virginia, Columbia, Maryland and Gaithersburg, Maryland by providing the Union with the following information requested by the Union on April 11, 2014: the payroll records for all unit installers who were compensated via the HVCI program at any time since April 11, 2011, since that date; the locations and dates of other offices where the HVCI program has been discontinued and whether or not each of these locations is a union or non-union facility.

References. See, e.g., Lareau, National Labor Relations Act: Law and Practice, § 12.07, Obligation to Furnish Information (Matthew Bender).
On November 25, 2014, the U.S. Court of Appeals for the Ninth Circuit held that an employer has no duty to bargain with a union over its decision to close its business or a part of its business; such duty stems from National Labor Relations Act ("NLRA") §§ 8(a)(1) and 8(a)(5) (29 U.S.C. § 158(a)(5), (1)), which make it an unfair labor practice for an employer or a union to fail to bargain in good faith over certain mandatory subjects; that is, over wages, hours, and other terms and conditions of employment. Rock-Tenn Services, Inc. ("Rock-Tenn") petitioned the U.S. Court of Appeals for the Ninth Circuit for review of the National Labor Relations Board ("the Board") holding that Rock-Tenn violated National Labor Relations Act ("NLRA") §§ 8(a)(1) and 8(a)(5) (29 U.S.C. § 158(a)(5), (1)) in bargaining on the effects of a plant closure at Fresno, California.

The Ninth Circuit held that the Board’s order would be enforced if it correctly applied the law and its factual findings were supported by substantial evidence. The duty to bargain is limited to mandatory subjects, and within that area neither party was legally obligated to yield. The court held that the Board validly rejected Rock Tenn’s position that it did not commit unfair labor practice under 29 U.S.C. § 158(d) by insisting on permissive subject because record supported the Board’s determination that there was no prior agreement to link permissive subject of early collective bargaining agreement ("CBA") termination to Rock Tenn’s offers on mandatory subjects.

The Ninth Circuit held that an employer has no duty to bargain with a union over its decision to close its business or a part of its business. An employer does have a duty to bargain in good faith with an incumbent union, however, over the effects of a closure. Such duty stems from NLRA §§ 8(a)(1) and 8(a)(5) (29 U.S.C. § 158(a)(5), (1)), which make it an unfair labor practice for an employer or a union to fail to bargain in good faith over certain mandatory subjects; that is, over wages, hours, and other terms and conditions of employment. Rock-Tenn argued that it was entitled to link permissive and mandatory subjects of bargaining because the subjects were part of a “quid pro quo package proposal.” The Board rejected that formulation, because if the argument were to be accepted, it would mean that a permissive subject of bargaining would become mandatory whenever it was presented together with a mandatory subject.

The Ninth Circuit noted that the Board had, however, held that a permissive bargaining subject may be treated as a mandatory bargaining subject when there is a sufficient nexus between the subjects, such that they are inextricably intertwined. The court assumed, without deciding, that such a framework agreement would have altered the bargaining obligations otherwise applicable under Borg-Warner,2 pursuant to the Board’s “inextricably intertwined” exception.

The Ninth Circuit observed that as the Board held, the language on which Rock-Tenn relied did not oblige the Union to do anything; it only stated that it was the Rock-Tenn’s intent in future plant closures, if any, to bargain a severance/impact bargaining formula that is not inconsistent with the severance/impact bargaining agreements at San Jose. The court found that the Board therefore validly rejected Rock-Tenn’s position that it did not commit an unfair labor practice by insisting on a permissive subject because there was an agreement allowing it to do so.

The Ninth Circuit reviewed the Board’s choice of remedy for an abuse of discretion. The Board’s remedial order could be reversed if it was a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.

The Ninth Circuit held that for an effects-bargaining violation, the standard remedy is known as a Transmarine3 remedy, and includes back pay and an order to bargain over the effects of the decision. Rock-Tenn did not show that the Board abused its discretion in awarding a Transmarine remedy to the 92 Fresno plant employees. Rock-Tenn’s sole argument on this point was that only the four employees discharged on the date of the closure were affected by the violation. But the Board determined that the Company’s violation in fact affected all of the employees terminated from the Fresno plant as a result of the closure, that is, all 92 had been denied the benefit of collective-bargaining representation concerning the effects of the Fresno closure. The parties clearly intended to address the impact of the Fresno closure on all Fresno employees in their effects bargaining, and not just the four who were terminated on the actual date of closure.

As the Board provided ample reasoning in its opinion for its decision to award a Transmarine remedy to all 92 employees, the Ninth Circuit concluded that the Board did not abuse its discretion in this case. Rock-Tenn was


correct that any backpay previously paid to the unit employees to date should be offset against any amounts determined to be due.

For the foregoing reasons, Rock-Tenn’s petition for review was denied and the Board’s petition for enforcement was granted.

References. See, e.g., Wilcox, *California Employment Law*, § 1.03[2], *Collective Bargaining Agreement* (Matthew Bender).

**DAMAGES UNDER FEHA**
(Fair Employment and Housing Act)


On November 26, 2014, a California appellate court held that under California’s Fair Employment and Housing Act ("FEHA"), an employer’s failure to make reasonable accommodation for the known physical or mental disability of an employee is an unlawful employment practice pursuant to Gov. Code § 12940(m). The court noted that a reasonable accommodation is any modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired. Moreover, although an employer does not have an obligation to create a new job, reassign another employee, or promote a disabled employee, courts have made it clear that an employer has a duty to reassign a disabled employee if an already funded, vacant position at the same level exists.

The appellate court observed that although the interactive process is an informal process designed to identify a reasonable accommodation that will enable the employee to perform his or her job effectively, an employer’s failure to properly engage in the process is separate from the failure to reasonably accommodate an employee’s disability and gives rise to an independent cause of action. The FEHA required the District to engage in an ongoing dialogue regarding the accommodations Swanson believed she needed to mitigate her cancer-related conditions, but the District failed to present any evidence to show it engaged Swanson in such a dialogue.

The judgment of the trial court was reversed.


**DISCIPLINARY ACTION**


On November 13, 2014, a California appellate court ruled that under the interpretive rule that where a statute does not prescribe the method of notice, personal service is contemplated, the requirement to notify a public safety officer of proposed discipline...
Baron R. Earl ("Earl"), a parole agent was disciplined by his employer, California’s Department of Corrections and Rehabilitation ("the Department") for conducting a purportedly unlawful search of a residence. Following an administrative hearing, the discipline was upheld by the State Personnel Board ("Board"). Earl filed a mandamus petition with a superior court seeking to overturn the decision of the Board. The trial court denied the administrative mandamus petition, thereby upholding the imposition of discipline.

Earl contended that he was entitled to actual notice of the contents of the “Letter of Intent” within one year of the date of discovery, and not service by mail as perfected by the Department and therefore timely appealed before a California appellate court.

The appellate court ruled that under the interpretive rule that where a statute does not prescribe the method of notice, personal service is contemplated, the requirement to notify a public safety officer of proposed discipline within the year pursuant to Gov. Code § 3304(d)(1) means that the officer has to receive actual notice within the same year as the investigation.

The appellate court applied the same interpretive rule and observed that the Department was required to notify the public officer. A certified mail received after the outer limit of the relevant time period was not sufficient notification. Thus, the Board erred in failing to dismiss the action, and the trial court erred when it declined to issue a writ compelling the Board to do so.

The judgment was therefore reversed with directions to the trial court to issue a writ of mandate commanding the Board to grant Earl’s motion to dismiss.

The appellate court observed that the notification is required to occur within a year of the discovery of the misconduct. When the Legislature uses language which has received definitive judicial construction, the courts presume that it intended to adopt that construction. For many years an unbroken line of California courts have held that a statute requiring that a notice shall be given, but which is silent as to the manner of giving such notice, contemplates personal service thereof. Thus actual notification must occur within the same year as the investigation. The court held that not only completion of the investigation, but also the requisite notification to the officer, must be accomplished within a year of discovery of the misconduct. The statute is silent on the method of notice. Under accepted canons of statutory interpretation, where a statute does not prescribe the method of notice, personal service is contemplated. Thus, unless a different purpose is found within the statutory scheme to justify an exception, the presumption of the personal service method of notice applies. The court applied the interpretive rule in the instant case, where the Department was required to notify the public safety officer. The certified mail received after the outer limit of the relevant time period was not sufficient notification.

The appellate court applied the same interpretive rule and observed that the Department was required to notify the public officer. A certified mail received after the outer limit of the relevant time period was not sufficient notification. Thus, the Board erred in failing to dismiss the action, and the trial court erred when it declined to issue a writ compelling the Board to do so.

The judgment was therefore reversed with directions to the trial court to issue a writ of mandate commanding the Board to grant Earl’s motion to dismiss.

References. See, e.g., Wilcox, California Employment Law, § 1.04A, Public Employers and Employees (Matthew Bender).

MINIMUM AND OVERTIME WAGE CLAIMS


On November 12, 2014, the U.S. Court of Appeals for the Ninth Circuit held that although an employee under the Fair Labor Standards Act is not required to approximate the number of hours worked without compensation, in order to survive a motion to dismiss and comply with Fed. R. Civ. P. 8 (a), the employee

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4 Mays v. City of Los Angeles, 43 Cal. 4th 313, 74 Cal. Rptr. 3d 891, 180 P.3d 935 (2008).
must allege at least one workweek when he worked in excess of 40 hours and was not paid for the excess hours in that workweek, or was not paid minimum wages.

Greg Landers ("Landers") was employed by Quality Communications, Inc. ("Quality") as a cable services installer. He brought suit individually and on behalf of other similarly situated persons (collectively "plaintiffs") in a Nevada district court alleging inter alia that he was subjected to a "piecework no overtime" wage system whereby he worked in excess of 40 hours per week without being compensated for his overtime and Quality failed to pay him and other similarly situated individuals, minimum wages and overtime wages in violation of the Fair Labor Standards Act ("FLSA"). In the alternative, Landers alleged that even if he were paid some measure of overtime, the overtime payment was less than that required by the FLSA.

Quality moved to dismiss the complaint pursuant to Fed. R. Civ. P. 8 and 12. The district court granted the motion determining that the complaint did not make any factual allegations providing an approximation of the overtime hours worked, Landers’s hourly wage, or the amount of unpaid overtime wages. Given these deficiencies, the district court concluded that the allegations asserted in the complaint were merely consistent with Quality’s liability, but fell short of the line between possibility and plausibility of entitlement to relief under Fed. R. Civ. P. 8.

Landers filed a timely appeal before the U.S. Court of Appeals for the Ninth Circuit challenging the dismissal. This case presented an issue of first impression in the Ninth Circuit. The court had never before addressed the degree of specificity required to state a claim for failure to pay minimum wages or overtime wages under the FLSA.

The Ninth Circuit concluded that an employee under the FLSA is not required to approximate the number of hours worked without compensation because in order to survive a motion to dismiss and comply with Fed. R. Civ. P. 8 (a), the employee must allege at least one workweek when he worked in excess of 40 hours and was not paid for the excess hours in that workweek, or was not paid minimum wages.

The Ninth Circuit held that the requirement that plaintiffs plead with specificity a workweek in which they were entitled to but denied overtime, was designed to ensure that plaintiffs provide sufficient detail about the length and frequency of their unpaid work to support a reasonable inference that they worked more than 40 hours in a given week. The Ninth Circuit relied on its sister circuit decisions where it was held that a plaintiff need not identify precisely the dates and times he or she worked overtime. An allegation that a plaintiff typically worked a 40-hour workweek, and worked uncompensated extra hours during a particular 40-hour workweek would state a plausible claim for relief.

The Ninth Circuit agreed with the Eleventh Circuit that a plaintiff may establish a plausible claim by estimating the length of his average workweek during the applicable period and the average rate at which he was paid, the amount of overtime wages he believes he is owed, or any other facts that will permit the court to find plausibility. The court further held that most (if not all) of the detailed information concerning a plaintiff-employee’s compensation and schedule is in the control of his employer-defendants. The court applied this reasoning with equal force to Landers’s minimum wage claims.

In the instant case, Landers failed to state a claim for unpaid minimum wages and overtime wages. The complaint did not allege facts showing that there was a specific week in which he was entitled to but denied minimum wages or over-time wages. The court noted that although plaintiffs in these types of cases cannot be expected to allege with mathematical precision, the amount of overtime compensation owed by the employer, they should be able to specify at least one workweek in which they worked in excess of 40 hours and were not paid overtime wages. Landers’s allegations failed to provide sufficient detail about the length and frequency of his unpaid work to support a reasonable inference that he worked more than 40 hours in a given week. Instead, Landers merely alleged that he was not paid for overtime hours worked. Although these allegations raise the possibility of under-compensation in violation of the FLSA, the court noted that a possibility is not the same as plausibility.

The Ninth Circuit concluded that Landers’s comparable allegations failed to state a plausible claim under Fed. R. Civ. P. 8. Landers’s allegations fell short of this standard, and the district court properly dismissed his complaint for failure to state a plausible claim.

References. See, e.g., Wilcox, California Employment Law, § 3.11[1][b], General Overtime Compensation Requirements (Matthew Bender).

OVERTIME WAGES


On November 10, 2014, a California appellate court ruled that the employer violated mandatory overtime
the same menu; and managerial employees were evalu-
restaurants and every employee; each restaurant offered
it utilized an operations manual that applied to all re-
training practices were uniform throughout the chain;
Plaintiffs presented evi-
nence that JCS's hiring and
persons employed by JCS in California as a salaried
Martinez filed the original complaint in a superior
court seeking to represent a class of salaried managerial
employees as exempt, and same could be proved through
resolution of common issues; further, representation of
the class was not defeated by a conflict between general
managers and assistant managers because the general
managers could be separated into a subclass.

Roberto Martinez (“Martinez”), Lisa Saldana
(“Saldana”), Craig Eriksen (“Eriksen”), and Chanel
Rankin Stephens (“Stephens”) (collectively, “plain-
tiffs”) are current or former employees of different
Joe’s Crab Shack (“JCS”) restaurants in California.
Martinez filed the original complaint in a superior
court seeking to represent a class of salaried managerial
employees who worked at JCS restaurants on claims
that they had been misclassified as exempt employees
and were entitled to overtime pay. The trial court denied
motion for class certification on the ground that he was
not an adequate class representative. Saldana, Eriksen,
and Stephens were permitted to join the lawsuit. Plain-
tiffs moved for certification of a class consisting of all
persons employed by JCS in California as a salaried
restaurant employee.

Plaintiffs presented evidence that JCS’s hiring and
training practices were uniform throughout the chain;
it utilized an operations manual that applied to all re-

taurants and every employee; each restaurant offered
the same menu; and managerial employees were evalu-
ated using the same form and procedure. All managerial
employees were classified as exempt employees and were
expected to work a minimum of 50 hours per week.
JCS submitted declarations from approximately 27 puta-
tive class members, each of whom reported significant
variance among the duties associated with specific
management positions, the amount of time they routinely
spent on particular tasks and the total amount of time
worked each week.

The trial court denied the motion for class certification
on the grounds that plaintiffs had failed to establish that their
claims were typical of the class, they could adequately
represent the class, common questions pre-dominated the
claims, and a class action was the superior means of
resolving the litigation.

Plaintiffs appealed before a California appellate court.
The appellate court observed that the employer violated
mandatory overtime wage laws which was by nature a
common question eminently suited for class treatment.
JCS operated a chain of restaurants governed by the
same policies and procedures, many of which were
promulgated in employee handbooks and training
 manuals. In addition, exempt employees were expected
to work a minimum of 50 hours per week, another
common issue that disposed of the need to assess
whether employees worked sufficient hours to earn
overtime compensation in any particular week. The
parties identified a finite task list, suggesting that jobs
within JCS were highly standardized, and many of the
tasks performed by assistant managers are identical to
those performed by non-exempt employees.

The appellate court observed that courts in overtime
exemption cases must proceed through analysis of the
employer’s realistic expectations and classification of
tasks rather than asking the employee to identify in
retrospect whether, at a particular time, he or she was
engaged in an exempt or nonexempt task. The trial
court should have asked whether JCS’s realistic expec-
tations and the actual requirements of the job resulted in
the exercise of supervisorial discretion by managerial
employees or instead relegated employees to the utility
role described. Conceivably, were the court to find JCS’s
expectations for certain groups of managerial employees
unrealistic, no further inquiry would be required to
establish liability. Further, class wide relief remains the
preferred method of resolving wage and hour claims,
even those in which the facts appear to present difficult
issues of proof. By refocusing its analysis on the policies
and practices of the employer and the effect those policies
and practices have on the putative class, as well as
narrowing the class if appropriate, the trial court may in
fact find class analysis a more efficient and effective
means of resolving plaintiffs’ overtime claim.
The order denying class certification was reversed, and the cause was remanded by the appellate court.

References. See, e.g., Wilcox, California Employment Law, § 2.02, Employees Covered by Minimum Wage Provisions; § 3.11[1][b], General Overtime Compensation Requirements (Matthew Bender).

PENSION FUND


On November 6, 2014, a California appellate court ruled that the retired employees’ claim against the Stanislaus County Employees Retirement Association (“Association”) would fail on governmental immunity grounds because the Association’s liability, if any, was vicarious liability for its board of administration’s failure to sue the actuarial services provider for underfunding of the pension plan, and that failure to sue was the result of the exercise of the discretion vested in the administration board.

Dennis Nasrawi, Michael O’Neal, and Rhonda Biesemeier (collectively, “plaintiffs”) were retired public employees of Stanislaus County (“County”) and beneficiaries of a public pension trust administered by the Stanislaus County Employees Retirement Association (“Association”). Buck Consultants LLC (“Buck”) and Harold Loeb (“Loeb”) provided actuarial services to the Association. The Association, which was managed by a nine-member board of administration (“Board”), administers a pension trust fund for current and former County employees.

Plaintiffs alleged in a superior court that the Association deliberated underfunded the pension fund. Plaintiffs pursued claims against the Association for the alleged adoption of a schedule of negative amortization and transfers from non-valuation reserves in another action, O’Neal.5 Plaintiffs alleged that Buck and Loeb prepared an actuarial valuation of the pension fund, which materially understated the fund’s liabilities by negligently relying on inappropriate actuarial assumptions. As a result, the County’s annual employer contribution to the pension fund was $40 million lower than it should have been. Their negligence caused the pension trust to be dramatically underfunded. Plaintiffs alleged the Association breached the fiduciary duties imposed on it by Cal. Const. art XVI, § 17 by not suing Buck and Loeb. Plaintiffs further alleged that Buck and Loeb aided and abetted other breaches committed by the Association. They further alleged that the Association breached the fiduciary duties imposed on it by Cal. Const. art. XVI, § 17 by failing to sue Buck and Loeb for its negligent preparation of the actuarial valuation. According to the plaintiffs, the Association’s breach had caused economic injuries to the pension fund and sought damages to be paid to the trust fund.

The Association, Buck and Loeb demurred to the complaint. The trial court sustained the Association’s demurrer without leave to amend on grounds that plaintiffs failed to demonstrate compliance with the Government Claims Act (§ 810 et seq.); the decision whether to pursue a negligence claim against Buck and Loeb was a discretionary one for which the Association has immunity under Cal. Gov. Code § 815.2; and plaintiffs failed to alleged legally cognizable damages. The court sustained Buck and Loeb’s demurrer without leave to amend on the theory that plaintiffs’ failure to state a breach of fiduciary duty claim against the Association was fatal to their claim against Buck and Loeb. The court reasoned that plaintiffs’ aiding and abetting claim was predicated on their breach of fiduciary claim against the Association and thus necessarily failed.

Plaintiffs appealed before a California appellate court. The appellate court concluded that the retired employees’ claim against the Association would fail on governmental immunity grounds because the Association’s liability, if any, was vicarious liability for its board of administration’s failure to sue the actuarial services provider for underfunding of the pension plan, and that failure to sue was the result of the exercise of the discretion vested in the administration board. Because the primary purpose of the employees’ claim against the association was to obtain money damages, the court held the claim was subject to the presentation requirements of the Cal. Gov. Code § 810. The Cal. Gov. Code § 905(f) exception to the claim presentation requirement was not implicated, as per the employees alleged tortious wrongdoing by the association.

The appellate court observed that the plaintiff’s complaint expressly requested damages and recovery paid to the Association’s trust fund. The appellate court observed that even if it was assumed that plaintiffs had carried their burden with regard to amending their complaint to seek equitable relief, their claim against the Association would fail on governmental immunity grounds. Various fiduciary duties are imposed on the board under Cal. Const. art. XVI, § 17. Accordingly, the Association’s liability, if any, was vicarious liability for the board’s failure to sue. Whether the Association

5 O’Neal v. Stanislaus County Employees’ Retirement Assn., Superior Court of California, County of Stanislaus, case No. 648469, Fifth Appellate District, case No. F061439 (O’Neal).
could be held liable for the board’s failure to sue Buck and Loeb turned on whether that omission was the result of the exercise of the discretion vested in the board pursuant to Cal. Gov. Code § 820.2. The court concluded that it was. Given the breadth of those duties, Cal. Const. art. XVI, § 17 necessarily vests the board with discretion in the manner in which it fulfills those duties. The decision whether to pursue litigation necessarily required a judgment based on an evaluation of the merits of the potential claim and possible defenses, as well as a cost-benefit analysis of the litigation. The decision, requiring as it did, comparisons, choices, judgments, and evaluations, comprises the very essence of the exercise of “discretion” and the appellate court concluded that such decisions were immunized under Cal. Gov. Code § 820.2.

The appellate court observed that Buck and Loeb’s contention that plaintiffs failed to state a claim against them because Buck and Loeb owed no fiduciary duties to plaintiffs fails to carry the day. This contention ignored the distinction between liability based on conspiracy to commit a tort and liability for aiding and abetting a tort. Tort liability arising from conspiracy presupposes that the co-conspirator was legally capable of committing the tort, i.e., that he or she owed a duty to plaintiff recognized by law and was potentially subject to liability for breach of that duty. The appellate court concluded that the trial court erred in sustaining the actuarial services provider’s demurrer as the complaint adequately alleged each of the requisite elements of a claim for aiding and abetting a breach of fiduciary duty.

The judgment of trial court was reversed in part and affirmed in part.

References. See, e.g., Wilcox, California Employment Law, § 41.67, Retirement or Pension Plans and Benefits (Matthew Bender).

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RETALIATION


On November 21, 2014, a California appellate court held that the policy under Lab. Code § 1102.5(b), of encouraging employees to notify an appropriate government agency when they have reason to believe their employer is violating regulations precludes an employer from retaliating, not only against employees who actually notify an agency of suspected violations, but also against employees whom the employer suspects of such notifications.

Cecilia Diego (“Diego”) was hired by Pilgrim United Church of Christ (“Pilgrim United”) as an at-will employee. She went on to become a “mentor teacher.” Another Pilgrim United’s employee, Cynthia Saldana (“Saldana”) informed Diego that she anonymously lodged a complaint with the Community Care Licensing Division of the California Department of Social Services (“Licensing”) regarding a foul odor in one of the classrooms and inadequate sand beneath the playground equipment. Diego was fired. She believed Pilgrim United terminated her employment because of the anonymous report to Licensing.

Diego sued Pilgrim United in a superior court alleging wrongful termination in violation of California public policy. She alleged that she was terminated from her employment as a result of the director’s mistaken belief that she had lodged a complaint with Licensing which resulted in an unannounced inspection of the preschool. Pilgrim United argued that it was entitled to judgment as a matter of law on the basis that Diego could not establish an essential element of her claim for wrongful termination in violation of public policy, namely, that the termination of her employment violated a policy articulated by constitutional or statutory authority. More specifically, Pilgrim United posited that no constitutional or statutory authority extended whistleblower protections to employees merely believed to have engaged in protected activity.

The trial court granted Pilgrim United’s motion, ruling in relevant part that Diego did not meet her burden of establishing a significantly important public policy that was implicated by constitutional or statutory authority. The court based its decision on Diego’s failure to cite to any case holding that an employer’s mistaken belief that the employee reported a violation can support a claim for wrongful termination in violation of public policy.

Diego timely appealed before a California appellate court.

The question presented before the appellate court was whether California public policy precludes Pilgrim United from retaliating against Diego based on Pilgrim United’s mistaken belief that Diego had disclosed information to Licensing regarding Pilgrim United’s alleged violation of, or noncompliance with, state regulations applicable to preschools.

The appellate court observed that the policy under Lab. Code § 1102.5(b) of encouraging employees to notify an appropriate government agency when they have reason to believe their employer is violating regulations precludes an employer from retaliating, not only against employees who actually notify an agency
of suspected violations, but also against employees whom the employer suspects of such notifications.

The appellate court noted that the statutory provisions on which Diego relied include former Lab. Code § 1102.5 (b). The court decided that former Lab. Code § 1102.5 (b) establishes the Legislature’s declaration of a public policy sufficient to allow Diego’s claim to proceed.

The appellate court held that former § 1102.5(b) precludes an employer from retaliating against an employee for disclosing a violation of state regulations to a governmental agency. Consistently, the Supreme Court has stated that the purpose of former § 1102.5(b) is to encourage workplace whistleblowers to report unlawful acts without fearing retaliation. Given that the public policy behind former § 1102.5(b) is to encourage employees to report suspected violations of law, as applicable here the court had to determine whether that policy applied to a terminated employee who was merely perceived by the employer to be a whistleblower. The court believed it did. Accordingly, Pilgrim United’s alleged actions in discharging Diego were sufficiently tethered to the policy delineated in former § 1102.5(b).

Further, the appellate court ruled that § 1102.5(b) forbids termination of employment where the employee disclosed information to a government agency when she had reasonable cause to believe the information evidenced a violation or noncompliance with a state regulation. Consistent with the broad public policy interest in encouraging workplace whistleblowers to report unlawful acts without fearing retaliation, this policy benefits society at large, not any specific employer or employee. In the instant case, the conduct prohibited by the policy was Pilgrim United’s retaliation based on an employee’s report of violations of state regulations in the workplace.

Pilgrim United’s focus was misdirected to the language of former § 1102.5(b), rather than to the policy delineated in the statute. The purpose is to ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees they discharge.

The appellate court concluded that in deciding the public policy delineated in former § 1102.5(b), namely, to encourage employees to notify an appropriate government agency when they have reason to believe their employer is violating regulations adopted pursuant to laws enacted for the protection of corporate shareholders, investors, employees, and the general public, courts do so with great care and due deference to the judgment of the legislative branch. This policy applies to preclude retaliation by an employer not only against employees who actually notify the agency of the suspected violations but also against employees whom the employer suspects of such notifications. Otherwise, the policy to encourage the reporting of alleged violations will be frustrated.

References. See, e.g., Wilcox, California Employment Law, § 60.04[1], Public Policy Limitations on Discharge; § 60.03[2][c][i], Labor Code Section 1102.5 (Matthew Bender).

TERMINATION


On November 10, 2014, the U.S. Supreme Court granted certiorari to the U.S. Court of Appeals for the Fifth Circuit in a case where police officers alleged that they were fired from their employment for bringing to light criminal activities of one of the aldermen and their Fourteenth Amendment due process rights were violated holding that federal pleading rules do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted.

Tracey L. Johnson (“Johnson”) and David James, Jr. (“James”) were police officers for the City of Shelby County, Mississippi (the “City”). In 2009, the City’s board of aldermen (“board”), which has sole authority over the City’s employment decisions, terminated Johnson and James, allegedly for violation of City residents’ rights and police procedure. James requested and obtained a grievance hearing from the City, after which the board upheld their terminations.

Johnson and James filed a suit in district court, claiming that they were fired, not because of their alleged misconduct, but because they refused to turn a blind eye to the criminal activities of one of the aldermen, Harold Billings (“Billings”). They alleged that the City’s conduct violated their Fourteenth Amendment due process rights and that Billings maliciously interfered with their employment in violation of state law.

Following discovery, the City and Billings filed a motion for summary judgment where the City argued that it was entitled to judgment in its favor because Johnson and James did not invoke 42 U.S.C. § 1983 in their complaint, but instead sought to maintain their action against the City directly under the Fourteenth Amendment. Billings contended that the malicious interference claim was barred by Johnson and James’ failure to comply with the notice provision of the Mississippi Tort Claims Act (“MTCA”). The
The Fifth Circuit held that the court has consistently upheld such dismissals, explaining that the proper vehicle for these allegations is 42 U.S.C. § 1983. A complaint is fatally defective in that it fails to state a claim upon which relief may be granted when it does not invoke § 1983 for claims of constitutional violations under color of state law.

The Fifth Circuit observed that Johnson and James’ entire argument turned on their contention that malicious interference claims cannot be brought against a state or its subdivisions for the acts of their employees, because the employee will never be acting within the scope of his employment if he acts with malice. Johnson and James’ contention that if Billings maliciously interfered with their employment, he acted outside the scope of his employment was incorrect under Mississippi precedent. The district court, therefore, properly determined that the MTCA applied and that Johnson and James’ claims were barred because they did not comply with its notice requirements.

The Fifth Circuit defended its requirement that complaints expressly invoke § 1983 as not a mere pleading formality. The requirement according to the Fifth Circuit serves a notice function because certain consequences flow from claims under § 1983, such as the unavailability of respondeat superior liability, which bears on the qualified immunity analysis. No “qualified immunity analysis” was implicated here, as petitioners asserted a constitutional claim against the city only, not against any municipal officer.

Petitioners’ complaint was not deficient in that regard. Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim pursuant to Fed. R. Civ. P. 8(a)(2) and (3), (d)(1), (e).

On petition for a writ of certiorari to the U.S. Supreme Court, the Court granted the writ petition and held that federal pleading rules do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted.

References. See, e.g., Wilcox, California Employment Law, § 60.03[2][c], Whistleblowing Activities (Matthew Bender).

WHISTLEBLOWER RETALIATION


On November 7, 2014, the U.S. Court of Appeals for the Ninth Circuit ruled that before an employee may opt out of the agency process and bring a retaliation suit against a respondent in federal court, the respondent must have had notice of, and an opportunity to participate in, the agency action for one year.

The Hanford Nuclear Site—a former nuclear weapons production facility produced an estimated one million gallons of nuclear waste leaked from the storage tanks into the ground and polluted the groundwater beneath 85 square miles of the site. The Department of Energy (“DOE”) led the effort to clean up the pollution at Hanford. To assist in its clean-up effort at Hanford, DOE contracted with Bechtel National, Inc. (“Bechtel”). Bechtel subcontracted with URS Energy & Construction, Inc. (“URS E&C”) for work on the WTP.

In the wake of a report detailing problems with the Hanford clean-up, Dr. Walter Tamosaitis (“Tamosaitis”), an employee of URS E&C, was appointed to lead a study reviewing technical challenges within the WTP. Tamosaitis wanted to extend the deadline for solving the issue to September 2010, while Bechtel wanted it resolved by June 2010. Bechtel rejected Tamosaitis’s advice and announced closure of the issue by June. Tamosaitis objected. He brought a 50-point list of environmental and safety concerns to a meeting hosted by Bechtel, forwarded the same list to a URS employee and WTP Assistant Project Manager and reached out to several WTP consultants by email hoping that they would oppose closure and publicize his concerns.

Tamosaitis was fired from the WTP project. Tamosaitis was reassigned, in a non-supervisory role, to a basement office in a URS facility off the Hanford site. He was later offered other positions with URS, but they required relocation.

Tamosaitis filed a discrimination action with the Department of Labor, Occupational Safety and Health Administration (“DOL-OSHA”), against URS, Inc., and asserted workplace discrimination on account of activities protected under the Energy Reorganization Act (“ERA”) (42 U.S.C. § 5851). Tamosaitis added
DOE as defendants and gave notice that he intended to bring an action in federal court pursuant to the ERA’s opt-out provision. DOL-OSHA dismissed the agency complaint.

Tamosaitis filed his complaint in a federal court against URS Corp., URS E&C, and DOE alleging violations of the ERA whistleblower protection provision, 42 U.S.C. § 5851 and asserted workplace discrimination on account of activities protected under the ERA. Tamosaitis also requested a jury trial.

The district court granted DOE’s motion to dismiss ruling that Tamosaitis did not wait a full year after naming DOE in his agency complaint and so did not exhaust his administrative remedies against DOE. Summary judgment was granted to URS Corp. The court ruled that Tamosaitis had no statutory or constitutional right to a trial by jury. The district court held that there was no genuine issue of material fact as to whether URS E&C took adverse action because of Tamosaitis’s conduct. The court concluded that Tamosaitis was not fired, and nothing created a genuine issue of material fact that URS E&C has discriminated against him in violation of the ERA.

Tamosaitis appealed before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit ruled that before an employee may opt out of the agency process and bring a retaliation suit against a respondent in federal court, the respondent must have had notice of, and an opportunity to participate in, the agency action for one year. Administrative exhaustion was sufficient as to URS Energy where Tamosaitis gave adequate notice to URS Energy that it was the named respondent to his complaint. Tamosaitis introduced sufficient evidence to create a triable issue as to whether his whistle blowing activity was a contributing factor in the adverse employment action URS Energy took against him. The Ninth Circuit also held that there was a genuine issue of fact as to whether Tamosaitis’ compensation, terms, conditions, or privileges of employment were affected by his transfer to another position. Tamosaitis did not have a statutory jury trial right for his ERA whistleblower suit. The Ninth Circuit concluded that Tamosaitis did have a constitutional right to a jury trial for his claims seeking money damages.

The Ninth Circuit observed that as a general rule, adding a new respondent to an administrative complaint restarts the one year exhaustion clock as to that person. Allowing an employee to sue a person who was not a party in the administrative proceedings for a full year before the case was moved to federal court would severely undermine the efficacy of the administrative exhaustion scheme. The format and level of specificity required to name a respondent in an agency complaint is a separate question. Because there was no administrative complaint pending against DOE for one year before Tamosaitis filed suit against DOE in federal court, administrative exhaustion requirement was not satisfied as against DOE. Tamosaitis gave adequate notice to URS E&C that it was the named respondent to his complaint, such that URS E&C could be defended, and in fact was defended, against the original agency complaint. The administrative exhaustion was sufficient as to URS E&C.

Since Tamosaitis had shown that his protected activity was a contributing factor in the adverse employment action he suffered, he met his burden for establishing a prima facie case of retaliation under the ERA. The ERA contains no bona fide occupational qualification defense. Instead, where retaliation is a contributing factor to an employer’s adverse action, the statute requires that the employer demonstrate by clear and convincing evidence that it would have taken the adverse action even if the employee had not participated in the protected activity. URS E&C has made no such showing.

The Ninth Circuit observed that the ERA provides for an action at law or equity for de novo review, and makes no express reference to a jury trial. Although Tamosaitis had not alleged complete termination, his claim for wrongful transfer was for present purposes sufficiently analogous to wrongful discharge to conclude that the nature of the statutory right was legal. The right to a jury trial turns to a considerable degree on the nature of the forum in which a litigant finds himself. The agency was properly vested with the ability to hear and make findings as to such a dispute without a jury, the fact that Congress has given adjudicatory power to DOL-OSHA in the first instance did not cut away the constitutional right to a jury when the suit moved to federal court. Once the retaliation claim was in the district court—a forum which traditionally employs juries and is constitutionally obliged to do so for claims meeting certain criteria—a cause of action meeting those criteria was not shorn of a jury trial right because it could have been decided by an administrative agency without a jury.

The judgment of the trial court was affirmed in part and reversed in part by the Ninth Circuit.

References. See, e.g., Wilcox, California Employment Law, § 60.033[d][ii], Whistleblowing Activities (Matthew Bender).
## CALENDAR OF EVENTS

### 2015

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<tr>
<td>Jan. 14</td>
<td>DFEH Webinar: Sexual Harassment</td>
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<td>10:00 AM - 12 PM</td>
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<tr>
<td>Jan. 16</td>
<td>CALBAR Labor and Employment Law section, Nuts and Bolts of an Employment Practice - For New Employment Lawyers</td>
<td>The State Bar of California 180 Howard Street San Francisco, CA (415) 538-2590</td>
<td>12:00 PM - 1:00 PM</td>
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<tr>
<td>Jan. 16</td>
<td>CALBAR Workers’ Compensation section Webinar, Constitutional Remedies in Workers’ Compensation</td>
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<tr>
<td>Jan. 22</td>
<td>CALBAR Litigation section Webinar, Core Skills: Winning with Trial Presentation Technology</td>
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<tr>
<td>Jan. 30</td>
<td>CALBAR Labor and Employment Law section, Nuts and Bolts of an Employment Practice - For New Employment Lawyers</td>
<td>Robinson Courtroom Loyola Law School 919 Albany St. Los Angeles, CA (415) 538-2590</td>
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<td>Jan. 30</td>
<td>CALBAR Workers’ Compensation section Webinar, Utilizing the MTUS to Get Medical Treatment Approved</td>
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<td>Mar. 18</td>
<td>DFEH Webinar: Sexual Harassment</td>
<td>Hotel Del Coronado 1500 Orange Avenue, Coronado, California 92118 (619) 435-6611</td>
<td>10:00 AM - 12:00 PM</td>
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<td>Mar. 22-25</td>
<td>NELI: Employment Law Briefing</td>
<td>Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000</td>
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<td>Apr. 2-3</td>
<td>NELI: ADA &amp; FMLA Compliance Update</td>
<td>Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000</td>
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<td>May 7-8</td>
<td>NELI: Employment Law Conference - Mid Year</td>
<td>Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000</td>
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<td>May 20</td>
<td>DFEH Webinar: Sexual Harassment</td>
<td>Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000</td>
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<td>July 15</td>
<td>DFEH Webinar: Sexual Harassment</td>
<td>Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000</td>
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<td>July 16-17</td>
<td>NELI: Employment Discrimination Law Update</td>
<td>Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000</td>
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<td>Aug. 20-21</td>
<td>NELI: Public Sector EEO and Employment Law Conference</td>
<td>Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000</td>
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<td>Sept. 16</td>
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<td>Oct. 7</td>
<td>NELI: Affirmative Action Workshop</td>
<td>Westin St. Francis, 335 Powell Street San Francisco, CA 94102, (415) 397-7000</td>
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<td>Oct. 8-9</td>
<td>NELI: Affirmative Action Briefing</td>
<td>Westin St. Francis, 335 Powell Street San Francisco, CA 94102, (415) 397-7000</td>
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<td>Oct. 8-11</td>
<td>CALBAR: 88th Annual Meeting of the State Bar of California</td>
<td>Anaheim, CA (415) 538-2210</td>
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