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2023 California Employment Law Midyear Update

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Key Cases:

GLACIER NORTHWEST, INC. DBA CALPORTLAND V. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 174,
United States Supreme Court Docket No. 21-1449
(June 1, 2023)

Plaintiff sued a labor union representing its truck drivers after the union scheduled a strike on a day it allegedly knew plaintiff's workers would be mixing, loading, and delivering large amounts of concrete to its customers. Concrete abandoned in a truck's drum that is not rotating will harden and potentially damage the truck. Yet the union instructed the drivers to ignore plaintiff's instructions to complete the deliveries before the work stoppage. Consequently, 16 fully loaded trucks returned to plaintiff's premises. Plaintiff was able to salvage some, but not all, of the abandoned concrete. It sued the labor union in Washington state court for damages resulting from the work stoppage, arguing that the union intentionally destroyed plaintiff's property. The union moved to dismiss plaintiff's complaint on the grounds that it was preempted by the National Labor Relations Act ("NLRA"), which protects employees' rights "to self-organization, to form, join, or assist labor organizations, … and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection." The lower courts agreed and granted the union's motion to dismiss.

In a 7-to-1 decision, the United States Supreme Court reversed. Associate Justice Amy Coney Barrett wrote the opinion in which the Court concluded that while the NLRA protects striking workers, that protection is not absolute. In this case, the Court found that the union did not take reasonable precautions to protect plaintiff's property (i.e., the concrete) that it knew was highly perishable and would cause significant damage when left in the trucks' drums to harden. In fact, the Court found that the union intentionally timed the work stoppage to achieve this result. As such, the Court concluded that plaintiff's complaint against the union could proceed in state court.

PEOPLE EX REL. GARCIA-BROWER V. KOLLA'S INC.,
California Supreme Court Case No. S269456
(May 22, 2023)

This case involves an employee's complaint to her employer that he did not pay her for three work shifts. The employer responded by firing the employee and threatening to report her to immigration officials. The employee complained to the Labor Commissioner, who filed a lawsuit on her behalf alleging, among other claims, retaliation for whistleblowing in violation of California Labor Code section 1102.5. The appellate court upheld the trial court's order dismissing the 1102.5 claim, ruling that the employee was not a whistleblower because the employer already knew of his wrongdoing, i.e., that he failed to pay her wages for the three shifts. Thus, the court concluded that the employee had not disclosed wrongdoing to her employer within the meaning of Section 1102.5.

The California Supreme Court reversed. In doing so, it held that an employee who reports conduct which she reasonably believes is illegal is a whistleblower entitled to the protections of Section 1102.5 regardless of whether the person to whom the employee reports is already aware of the alleged conduct. Thus, in this case, plaintiff could bring a claim for retaliation under Section 1102.5 despite the fact that her employer knew she had not been paid.

Key Cases:

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA V. BONTA,
62 F.4th 473
(9th Cir. 2023)

In 2019, California Governor Gavin Newsom signed into law AB 51, which prohibited employers from requiring employees to sign arbitration agreements as a condition of employment or continued employment. The law was supposed to take effect on January 1, 2020. However, in December 2019, the Chamber of Commerce filed a lawsuit challenging its validity, and two days before the law was to become effective, the United States District Court for the Eastern District of California granted a temporary restraining order, blocking enforcement of the law. In 2021, the Ninth Circuit Court of Appeal reversed the district court order in part, finding that AB 51 was not preempted by the Federal Arbitration Act. The Chamber then moved for a rehearing before the full Ninth Circuit, and the court placed the case on hold, pending the United States Supreme Court's ruling in *Viking River Cruises v. Moriana*. In February 2023, the Ninth Circuit Court upheld the original district court decision and ruled that employers in California may require their employees to sign mandatory arbitration agreements as a condition of employment or continued employment.

IYERE V. WISE AUTO GROUP,
87 Cal.App.5th 747
(2023)
(rev. denied April 26, 2023)

Plaintiffs sued defendant for discrimination, harassment, and wrongful termination arising out of their employment. Defendant moved to sever plaintiffs' claims and compel arbitration. Plaintiffs opposed the motion, arguing that they did not recall hand signing the arbitration agreements that they alleged were presented to them on their first day of employment with a stack of other documents to be signed. The appellate court reversed the trial court's order denying the motion, finding that plaintiffs admitted they signed the arbitration agreements. The court held that plaintiffs' testimony that they did not remember signing the agreements was insufficient to dispute the authenticity of their signatures. In reaching this decision, the court distinguished handwritten signatures from electronic signatures. Specifically, the court noted that "the individual's inability to recall signing electronically may reasonably be regarded as evidence that the person did not do so." In contrast, the court emphasized that "an individual is capable of recognizing his or her own personal signature." Thus, the court of appeal concluded, "[i]f the individual does not deny that the handwritten personal signature is his or her own, that person's failure to remember signing is of little or no consequence."

Key Cases:

FUENTES V. EMPIRE NISSAN,
***90* Cal.App.5th 919**
(2023)

BASITH V. LITHIA MOTORS,
90 Cal.App.5th 951
(2023)

The matters of *Fuentes v. Empire Nissan* and *Basith v. Lithia Motors*, in which defendant Lithia Motors was represented by Walsworth Partner Kellie Christianson, addressed the enforceability of two substantively similar arbitration agreements. In these companion cases, decided by the Second District California Court of Appeal, the plaintiffs in each case worked for Nissan dealerships. At the start of their employment they were required to execute arbitration agreements in which they and the dealerships agreed to arbitrate all claims against one another relating to their employment. Following their termination, the plaintiffs sued the Nissan dealerships, which, in turn, moved to compel arbitration. The plaintiffs opposed the motions on the grounds that the arbitration agreements were unconscionable. Specifically, the plaintiff in *Fuentes* argued that the agreement was illegible because it contained blurry, tiny print. She also complained that she was required to sign multiple contracts, which made the terms confusing, and the agreement did not explain the procedure for initiating arbitration. The plaintiff in *Basith* complained that as a non-lawyer, he did not understand the agreement because its terms were convoluted and contained legalese.

In both cases, the appellate court upheld enforceability of the agreements. In reaching its decision, the court noted that to invalidate an arbitration agreement based on unconscionability, a plaintiff must prove the agreement is both procedurally and substantively unconscionable. Procedural unconscionability addresses the fairness of the procedures surrounding formation of the contract.

Substantive unconscionability addresses whether the terms of the agreement are fair to the employee. The court ruled in both *Basith* and *Fuentes* that using small font size or confusing legalese, imposing coercive time pressures or preventing employees from consulting with counsel before signing, and failing to provide the rules for initiating arbitration are all issues of procedural unconscionability.

Because the court held that the plaintiffs failed to demonstrate substantive unconscionability with evidence that the actual terms of the arbitration agreements were unfair, it upheld enforceability of the arbitration agreements.

Key Cases:

ATTALA V. RITE AID CORPORATION,
89 Cal.App.5th 294
(2023)

This is a sexual harassment and wrongful constructive termination case that addresses the issue of when offensive conduct is not actionable because it is performed outside the course and scope of employment. Plaintiff was in pharmacy school when she met Erik Lund, a district manager for Rite Aid. They developed a close friendship, frequently exchanged text messages on a wide variety of topics, went out for coffee and lunch, socialized with their respective spouses, and celebrated birthdays and holidays together. Plaintiff began work as a pharmacist at Rite Aid in March 2018 and continued her close friendship with Lund. During that time, they had an extensive texting relationship that covered a multitude of topics including food, restaurants, alcohol use, vacations, exercise, weight loss, and family. The messages included photographs and images. Interspersed in these text messages were conversations about work.

One late Friday night after work, plaintiff and Lund exchanged a series of text messages on their personal devices. Initially they chatted about work. Later, they talked about the fact they had both been drinking. Lund then sent plaintiff a live video of him masturbating and a photo of his penis. Plaintiff asked him to stop. The next day, Lund texted plaintiff, "Wanted to apologize I was embarrassing [sic] drunk last night." A few days later, plaintiff's lawyer reported Lund's inappropriate messages to Rite Aid and advised that plaintiff would not return to work. Rite Aid's investigation confirmed plaintiff's allegations, and consequently, it fired Lund. Plaintiff sued Rite Aid for sexual harassment, discrimination, retaliation, and constructive termination.

The appellate court affirmed the trial court's order granting Rite Aid's summary judgment motion. In doing so, the court concluded that when Lund sent the inappropriate messages to plaintiff, he was not acting in his capacity as a supervisor at Rite Aid. Rather, Lund sent the messages in the context of a completely private relationship with plaintiff that was unconnected with their work. Thus, Rite Aid was not liable to plaintiff for sexual harassment, discrimination and retaliation. In addition, the court concluded that Rite Aid appropriately investigated plaintiff's complaint, promptly terminated Lund, and invited plaintiff to return to work. Nevertheless, she failed to return, and thus, was not constructively terminated.

Key Cases:

***LOPEZ V. LA CASA DE LAS MADRES*,**
89 Cal.App.5th 365
(2023)

Plaintiff worked as a shelter manager for defendant, a non-profit organization that provides assistance to victims of domestic violence. The work is stressful because many residents are escaping violent relationships, some residents are themselves violent, and some residents bring guns to the shelter. Plaintiff became pregnant and took four months off from work. Thereafter, defendant granted a number of extensions of her leave. Eventually, plaintiff requested that defendant accommodate her disability by allowing her to (1) take time off as needed to attend counseling; and (2) have flexible or shortened work days if she found the nature or stress of the work overwhelming and "triggering of severe anxiety/depressive symptoms." Plaintiff claimed she needed these accommodations for an "unknown" duration. Plaintiff supported these requests with certifications from a social worker who said plaintiff's disability required her to avoid stressful circumstances and making important decisions.

While defendant agreed to allow plaintiff to take time off to attend counseling, it objected to doing so for an unknown duration. Further, defendant determined the second accommodation was unreasonable because the shelter manager duties included working under stressful conditions. Plaintiff never returned to work.

Plaintiff sued based on various theories including pregnancy discrimination, disability discrimination, and failure to accommodate. After a bench trial, the trial court ruled in favor of defendant, and the appellate court affirmed. In reaching its decision, the court ruled that a plaintiff must prove the following elements to establish a claim for pregnancy disability based on failure to accommodate: (1) plaintiff had a condition related to pregnancy, childbirth, or a related medical condition; (2) plaintiff requested accommodation of this condition, with the advice of her health care provider; (3) plaintiff's employer refused to provide a reasonable accommodation; and (4) with the reasonable accommodation, plaintiff could have performed the essential functions of the job.

In this case, the court held that there was no evidence presented at trial that plaintiff suffered from any condition related to her pregnancy. While she appeared to claim postpartum depression, defendant presented evidence at trial that plaintiff suffered from depression prior to her pregnancy. However, even if she were able to prove depression relating to the pregnancy, the court held that she did not prove at trial that she could perform the essential functions of her job with a reasonable accommodation. Specifically, the shelter manager position required her to work under stressful conditions. Yet the social worker advised against working under stress and making important decisions at work. The court went on to state that "an adverse employment action on the basis of disability is not prohibited [by the Fair Employment and Housing Act] if the disability renders the employee unable to perform his or her essential duties, even with reasonable accommodation."

Key Cases:

LESPINOZA V. WAREHOUSE DEMO SERVS., INC.,
86 Cal.App.5th 1184
(2022)

This case addresses application of the outside sales exemption. An employee who is properly classified as "outside sales" is exempt from overtime, minimum wage, and rest and meal break requirements. The exemption applies to an employee who (1) works more than half the time away from his or her employer's place of business and (2) is engaged in sales.

In this case, defendant is the exclusive in-house product demonstration company for Costco. While defendant does not lease or own space within Costco stores, it has an office in each Costco location, where its employees clock in and out, clean and store equipment, and process paperwork. Defendant assigns each of its demonstrators, supervisors, and event managers to a Costco location. Defendant assigned plaintiff to three different Costco locations over the course of the six and a half years she worked as a demonstrator. Following her termination, she brought a class action lawsuit against defendant for various California Labor Code violations, including failure to provide rest and meal breaks.

The trial court granted defendant's motion for summary judgment, ruling that plaintiff was exempt under the outside sales exemption. However, the appellate court reversed, holding that even though defendant did not own or lease the Costco premises at which plaintiff worked, she nevertheless did not work outside defendant's place of business for purposes of the exemption. In reaching this decision, the court emphasized that Costco was defendant's exclusive client, and it "operated out of and treated all these different Costco warehouses as their satellite branches or offices." Additionally, defendant set plaintiff's hours, required her to clock in and out every day, and did not allow her to leave her demonstration booth during her shift except when she was relieved by another demonstrator. Further, defendant assigned her to work at one Costco location at a time, and at one point assigned plaintiff to work at the Alameda location for five years.

Finally, defendant's on-site manager and shift supervisors supervised plaintiff. Thus, the court ruled that plaintiff was not like the typical traveling salesperson who sets her own hours and decides when and where to work. "The exemption was not intended to apply to employees like [plaintiff] whose hours, schedule, and (exact) location of work are controlled by their employer."

Key Cases:

LION ELASTOMERS, LLC,
372 NLRB No. 83
(2023)

In this case, the National Labor Relations Board ("NLRB") found that Lion Elastomers LLC ("Lion") improperly disciplined Joseph Colone, a senior tech operator and active union member. Colone's union activities included participating in contract negotiations, advocating for bargaining unit employees, and filing grievances. The discipline stemmed from Colone's behavior at a safety meeting at which there was a heated discussion between employees and their supervisor regarding the number of overtime hours the company required employees to work. Lion argued that Colone's persistent questioning of the supervisor regarding the company's practices was inappropriate and violated Lion's workplace rules.

The NLRB sided with the employee, ruling that Lion could not discipline him for his behavior because it was protected by Section 7 of the NLRA, which guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." In reaching this decision, the NLRB overruled a prior decision that used a burden-shifting analysis in evaluating whether the discipline is unlawful.

The practical outcome of the NLRB's decision in *Lion* is to raise the bar significantly for employers who wish to discipline employees for abusive or inappropriate conduct. This includes employees who use profane, racist, or sexist language in the workplace. With that said, the story is not over, and we expect the employer will appeal this decision.

SHARP V. S&S ACTIVEWEAR, LLC,
9th Cir. 2023 WL 3857491
(9th Cir. June 7, 2023)

This is a hostile work environment sexual harassment case. Plaintiffs, seven women and one man, worked in an apparel manufacturing warehouse. They complained that management allowed employees to play "sexually graphic, violently misogynistic" music throughout the warehouse. The music was so loud that it was almost impossible to avoid. Moreover, the music frequently triggered male employees to pantomime the subjects addressed in the music, making graphic gestures and sexually explicit remarks, yelling obscenities, and openly sharing pornographic videos. Plaintiffs allege that employees complained daily to management about the music, to no avail. Instead, management defended the music, calling it "motivational." Plaintiffs sued for sexual harassment in violation of Title VII of the Civil Rights Act of 1964, alleging the music and related conduct created a hostile work environment. The district court dismissed the suit because the offensive music was not targeted at any specific person and because it offended both men and women. As such, the district court held that plaintiffs failed to state a violation of Title VII.

The Ninth Circuit Court of Appeal reversed the dismissal. In reaching its decision, the court ruled that "the sort of repeated and prolonged exposure to sexually foul and abusive music that [plaintiffs] allege[] falls within a broader category of actionable, auditory harassment that can pollute a workplace and violate Title VII." The court went on to reject the defense of the "equal opportunity harasser" whose conduct offends both men and women. In this regard, the court noted, "a male employee may bring a hostile work environment claim alongside female colleagues." In addition, the court pointed out that the conduct did not have to be directed at a particular individual or group of individuals to be actionable.

Key Legislation:

Minimum Wage State Laws and Local Ordinances

Effective January 1, 2023, minimum wage increased for all California employers from $15.00 per hour to $15.50 per hour. A number of municipalities have a higher minimum wage, some of which increased on January 1, 2023. Those municipalities with new minimum wages effective January 1, 2023, are:

- Belmont: $16.75
- Burlingame: $16.47
- Cupertino: $17.27
- Daly City: $16.05
- East Palo Alto: $16.50
- Foster City: $16.50
- Half Moon Bay: $16.45
- Hayward: $16.34 (employers with 26 or more employees); $15.50 (employers with 25 or fewer employees)
- Los Altos: $17.20
- Menlo Park: $16.20
- Mountain View: $18.15
- Novato: $16.32 (employers with 100 or more employees); $16.07 (employers with 26 to 99 employees); $15.53 (employers with 25 or fewer employees)
- Oakland: $15.97
- Palo Alto: $17.25
- Petaluma: $17.06
- Redwood City: $17.00
- Richmond: $16.17
- San Carlos: $16.32
- San Diego: $16.30
- San Jose: $17.00
- San Mateo: $16.75
- Santa Clara: $17.20
- Santa Rosa: $17.06
- Sonoma: $17.00 (employers with 26 or more employees); $16.00 (employers with 25 or fewer employees)
- South San Francisco: $16.70
- Sunnyvale: $17.95
- West Hollywood: $18.35 (hotel employees); $17.50 (employers with 50 or more employees); $17.00 (employers with 49 or fewer employees)

Effective April 1, 2023, unincorporated areas of San Mateo County raised their minimum wage to $16.50 per hour.

Effective July 1, 2023, the minimum wage for workers in unincorporated areas of Los Angeles will increase to $16.90 per hour. Workers in the City of Los Angeles will see an increase in minimum wage to $16.78 per hour.

Remote workers are subject to the minimum wage of the municipality in which they work, which may not be the same as their employer's office or the office to which they are assigned. Thus, it is important for employers to be mindful of where their remote workers are located to ensure compliance with minimum wage laws.

Key Legislation:

AB 2188 – Marijuana Antidiscrimination Law

This new law takes effect on January 1, 2024. It makes it illegal for most employers to discriminate against employees who use marijuana away from the workplace during non-working hours. In addition, the new law precludes employers from taking adverse action against applicants and employees when results of drug tests reveal traces of nonpsychoactive cannabis metabolites but not the presence of active levels of tetrahydrocannabinol ("THC") or current impairment. While the new law does not prevent employers from maintaining drug-free workplaces, it will change the way employers enforce their policies. There are some exceptions to the law for the building and construction industries and for federal contractors. Notably, the law does not allow employees to use, possess, or be impaired by marijuana while at work.

Providing Urgent Maternal Protections for Nursing Mothers Act

Since 2010, federal law has required employers to provide non-exempt, breastfeeding workers with reasonable break time and a private space, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, to express milk. This new law, which became fully effective in April 2023, extends these rights to exempt workers. It also increases the time period of the accommodation from one year to two years after the child's birth. An employee can sue her employer for failure to comply with this law. However, she must first give her employer notice of the violation and then allow 10 days for the employer to take corrective action.

Since 2002, the California Labor Code has required employers to accommodate breastfeeding employees by providing reasonable break time and a private space to express milk. Unlike federal law, state law has not distinguished between exempt and non-exempt employees. Nor has it imposed a limit on how long an employer must accommodate a breastfeeding worker. Because California provides greater protection than federal law, California employers must comply with the California law.

There are some limited exceptions to the federal and California laws regarding lactation accommodation, including for small employers with less than 50 employees if they meet certain conditions.

Pending Legislation:

AB 524 Discrimination – Family Caregiver Status

This proposed law would add “family caregiver” as a protected class under the California Fair Employment and Housing Act, thus prohibiting employment discrimination against employees based on this status. The bill defines “family caregiver” as “a person who contributes to the care of one or more family members.” Under the proposed law, “family member” is a spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or “any other individual related by blood or whose association with the employee is the equivalent of a family relationship.”

The bill is currently under consideration before the California Assembly Appropriations Committee.

SB 365 – Civil Procedure: Arbitration

Under existing law, a party has an immediate right to appeal a trial court’s order denying a motion to compel arbitration. The trial court generally will stay the proceedings in the underlying case until the appeal is resolved by the appellate court. Under this proposed law, an appeal of a motion to compel arbitration will not stay the underlying case, and thus the case will move forward in the trial court while the appellate court decides the appeal.

The bill is currently under consideration before the California Senate Appropriations Committee.

Pending Legislation:

SB 399 – California Worker Freedom from Employer Intimidation Act

Subject to certain limited exceptions, this proposed bill would prohibit an employer from disciplining, terminating, or taking any adverse employment action against an employee who refuses to attend an employer-sponsored meeting or to receive or listen to any communication by an employer (or the employer's agent or representative) whose purpose is to communicate its opinions about religious or political matters. The law authorizes an employee to bring a civil action against his employer. Under the proposed bill, "religious matters" are matters relating to religious affiliation and practice and the decision to join or support any religious organization or association. "Political matters" are matters relating to elections for political office, political parties, legislation, regulation, and the decision to join or support any political party or political or labor organization.

The bill is currently under consideration before the California Senate Appropriations Committee.

SB 616 – Increase in Number of Paid Sick Days

Current law requires most employers (with a few limited exceptions) to provide employees with a minimum of 24 hours or three days (whichever is greater) of paid sick leave by the 120th calendar day of employment, each calendar year or in each 12-month period. The proposed law would increase the minimum amount of required paid sick leave to 56 hours or seven days (whichever is greater) by the 280th calendar day of employment, each calendar year or in each 12-month period.

Under existing law, an employer who uses the accrual method of granting paid sick leave must allow employees to carry over to the next year unused accrued sick leave. However, the employer may limit the amount of accrued sick leave the employee may use in a year to 24 hours or three days (whichever is greater). The proposed law would increase the limit to 56 hours or seven days per year (whichever is greater).

In addition, existing law allows an employer to cap the total amount of unused sick leave an employee may accrue to 48 hours or six days (whichever is greater). The proposed bill would increase the cap to 112 hours or 14 days (whichever is greater).

It should be noted that if the employer awards employees the full amount of sick leave at the start of each year of employment (the front-loaded method), no accrual or carryover is required.

Consistent with the current law, the proposed bill does not require an employer to pay the employee for unused accrued sick leave upon termination.

The bill is currently under consideration before the California Senate Appropriations Committee.

Pending Legislation:

SB 809 – Fair Chance Act: Conviction History

If passed, this proposed law would essentially prohibit most private employers from conducting criminal background checks of its applicants and employees or from considering conviction information even if the applicant or employee provides it voluntarily or it is readily available online. Under the proposed bill, employers would generally be prohibited from taking "adverse action against an employee or discriminat[ing] against an employee in the terms, conditions, or privileges of their employment based on their arrest or conviction history or [from ending] an interview, reject[ing] an application, or otherwise terminat[ing] the employment or promotion application process based on conviction history information provided by the applicant or learned from any other source."

The law would allow an employer that is required by state or federal law to conduct a criminal background check to do so only after it extends a conditional offer to the applicant.

The law would require employers to disclose to applicants (1) the position's specific job duties for which a conviction may have a direct and adverse relationship that has the potential to result in an adverse employment action; or (2) all laws and regulations that prohibit or restrict the hiring or employment on the basis of a conviction.

Fair Pay and Employer Accountability Act

This is a ballot initiative that would repeal the Private Attorneys General Act ("PAGA") that allows lawyers to file lawsuits on behalf of employees seeking monetary penalties against employers for California Labor Code violations. The ballot initiative is intended to curb abusive PAGA lawsuits resulting in little recovery to aggrieved employees but huge attorney's fees to the lawyers filing such lawsuits.

The proposed law would require the California Department of Labor Standards Enforcement to be a party to all labor complaints filed with the Labor Commissioner. It would not allow the recovery of attorney's fees, but 100% of any penalties awarded by the Labor Commissioner would be paid to the aggrieved employee (as opposed to 25% under PAGA).

California voters will vote on this initiative in November 2024.

COVID-19 Update

On February 28, 2023, California's COVID-19 State of Emergency ended. On May 11, 2023, the federal Public Health Emergency for COVID-19 ended. As a result, employers are no longer required to maintain a stand-alone COVID-19 prevention plan, report outbreaks and cases to local health authorities, or pay employees COVID-19 Supplemental Paid Sick Leave.

However, effective February 3, 2023, the new Cal/OSHA COVID-19 regulation requires employers to:

1. Provide masks to employees who request them.
2. Require employees to wear masks when mandated by public health authorities.
3. Report to Cal/OSHA employee deaths, serious injuries, and serious occupational illnesses.
4. Report major outbreaks to Cal/OSHA. A major outbreak means 20 or more positive cases in a rolling 30-day period.
5. Improve ventilation in accordance with Cal/OSHA and public health department guidelines.
6. Exclude employees who have contracted COVID-19 from the workplace until they are no longer an infection risk.
7. Make no-cost testing and paid time off available to employees who have had close contact with an infected person in the workplace.
8. Implement policies to prevent the spread of COVID-19 after close contact in the workplace.
9. Provide employees with information about COVID-19-related benefits they may receive under federal, state, and local laws and regulations, and under the employer's policies.
10. Address COVID-19 as a workplace hazard under Cal/OSHA's requirements for an Injury and Illness Prevention Program. The employer must include their COVID-19 prevention plan either in their Injury and Illness Prevention Program or in a stand-alone document.
11. Notify affected employees of exposures in the workplace.

Key Cases Pending Before the California Supreme Court

RAMIREZ V. CHARTER COMMUNICATIONS,
75 Cal.App.5th 365 (2022)
(rev. granted 510 P.3d 404 (2022))

Plaintiff and defendant entered into an arbitration agreement at the outset of plaintiff's employment. Following her termination, plaintiff sued defendant in state court for discrimination and wrongful termination. Defendant moved to compel arbitration. The appellate court upheld the trial court's order denying the motion, ruling that the arbitration agreement was substantively unconscionable because it allowed the party prevailing on a motion to compel arbitration to recover its attorney's fees.

The California Supreme Court granted review. The issue before the court is whether this attorney's fees provision makes the arbitration agreement unconscionable. The case is fully briefed, but the Supreme Court has not yet scheduled oral argument.

Key Cases Pending Before the California Supreme Court

CORBY KUCIEMBA, ET AL. V. VICTORY WOODWORKS INC.,
31 F.4th 1268 (9th Cir. 2022)
(request for certification granted June 22, 2022)

Mr. Kuciemba worked for a furniture construction company at a jobsite in San Francisco in 2020. He alleged that defendant failed to comply with San Francisco health orders when it transferred workers to his jobsite who it knew were infected with COVID-19. Plaintiff alleges he contracted COVID-19 from the workers and infected his wife with the disease. As a result, Ms. Kuciemba developed serious respiratory illness requiring her to be hospitalized on a ventilator for a month. The Kuciembas sued defendant, alleging that its negligence caused Ms. Kuciemba to contract COVID-19. The trial court granted defendant's motion to dismiss, ruling that the Kuciembas' claims were barred by the exclusive remedy under the Worker's Compensation Act and that defendant did not owe a duty of care to Ms. Kuciemba. The California Supreme Court agreed to answer the following questions posed by the Ninth Circuit Court of Appeal:

1. If an employee contracts COVID-19 at his workplace and brings the virus home to his spouse, is the spouse's claim against the employer barred by the exclusive remedy of worker's compensation?
2. Under California law, does an employer owe a duty to the households of its employees to exercise ordinary care to prevent the spread of COVID-19?

The case is fully briefed, and the parties presented oral argument on May 9, 2023.

EEOC 2022 Complaint Filing Statistics

A total of 73,485 complaints were filed with the United States Equal Employment Opportunities Commission ("EEOC") in 2022, a 16.5% increase over 2021, when it received 61,331 complaints.

The number of complaints has increased to pre-pandemic levels. For example, in 2019 and 2018, the EEOC received 72,675 and 76,418 complaints, respectively. The EEOC has not yet provided a breakdown of the 2022 complaints, but we suspect, based on recent trends, that a significant percentage of complaints are for retaliation and disability discrimination.

Notable Verdicts and Settlements

ROBYNN EUROPE V. EQUINOX HOLDINGS, INC.
U.S. District Court, Southern District of New York

Plaintiff's verdict of $11.3 million in a racial and sexual discrimination and harassment, retaliation, and wrongful termination jury trial.

Plaintiff worked as a personal trainer at an Equinox gym in Manhattan from 2018 to 2019. She alleged that a coworker made inappropriate comments sexualizing Black women and referring to Black trainers as lazy.

In addition, there was evidence that Equinox accommodated a client's specific request for a white trainer. Plaintiff claimed that Equinox did nothing in response to her complaints, and instead fired her in order to replace her with a white man. Equinox denied plaintiff's claims, arguing that it thoroughly investigated plaintiff's complaints and terminated plaintiff for chronic tardiness. The jury deliberated for just over two and a half hours before awarding plaintiff $1.25 million in pain and suffering and $11 million in punitive damages. The parties stipulated to an award of $16,000 in back pay.

WENDY CUNNING V. SKYE BIOSCIENCE, INC.
U.S. District Court, Central District of California

Plaintiff's verdict of $4,853,460 in a whistleblower jury trial.

Plaintiff was vice president of business operations for defendant, a pharmaceutical company that develops proprietary cannabinoid derivatives to treat glaucoma and other diseases. She alleged she was terminated after she complained that the company's CEO engaged in illegal activities including alleged fraud, self-dealing, and insider trading. Defendant denied plaintiff's allegations, and argued that she was terminated for legitimate business reasons after less than two years of employment. The jury reached its verdict after deliberating for less than a day. It awarded plaintiff $1,353,460 in compensatory damages and $3.5 million in punitive damages.

Notable Verdicts and Settlements

OWEN DIAZ V. TESLA, INC.
U.S. District Court, Northern District of California

Plaintiff's verdict of $3,175,000 in a racial discrimination and harassment jury trial.

The first jury trial of this matter resulted in a $137 million verdict, which we reported in our 2022 mid-year report. The judge reduced the original verdict to $15 million, and subsequently granted a new trial at the request of both plaintiff and defendant. The jury in the second trial concluded that plaintiff, an elevator operator, had been subjected to a racially hostile work environment at Tesla, and awarded him $175,000 in compensatory damages and $3 million in punitive damages.

YOUNES MCHAAR V. FEDEX GROUND PACKAGE SYSTEM, INC.
Santa Clara County Superior Court

Plaintiff's verdict of $2 million in a disability discrimination, harassment, failure to accommodate, and constructive termination jury trial.

Plaintiff, who is deaf, worked for FedEx for seven years as a package handler. He alleged that he repeatedly asked FedEx to provide a sign language interpreter for important meetings, including monthly safety meetings, and video remote interpretation ("VRI") for other meetings. While he alleged FedEx agreed to provide these accommodations, they failed to do so. Instead, plaintiff claimed FedEx retaliated against him by manufacturing a file of workplace infractions. Ultimately, plaintiff resigned while his proposed termination was under consideration. FedEx denied plaintiff's allegations, arguing that it adequately accommodated plaintiff's disability by providing in-person interpreters and VRI. In addition, FedEx alleged that plaintiff voluntarily resigned after giving two weeks' notice. The jury rejected FedEx's claims and found in favor of plaintiff.

Notable Verdicts and Settlements

PHILLIPS V. STARBUCKS CORP.
U.S. District Court, District of New Jersey

Plaintiff's verdict of $25.6 million in a race discrimination jury trial.

Starbucks fired Plaintiff, a 13-year employee, after two Black men were arrested because they refused to leave a Starbucks store after being asked to leave. Plaintiff was the regional manager who was responsible for overseeing the Starbucks location where this incident occurred. Plaintiff sued Starbucks for discrimination and wrongful termination. She alleged that the only reason she was terminated was because she is white, and Starbucks needed a scapegoat to stem the public backlash created by the incident involving the two Black men. Starbucks argued that it terminated plaintiff for failure of leadership. The jury concluded that plaintiff's race was a determinative factor in Starbuck's decision to terminate her. After deliberating more than five hours, the jury awarded plaintiff $600,000 in compensatory damages and $25 million in punitive damages.

About Walsworth:

Walsworth's employment lawyers provide a broad spectrum of employment litigation, as well as advice and counsel services. We represent a wide variety of large and small businesses, public entities, and nonprofit corporations. We also act as coordinating and local counsel by assisting our clients and their national counsel in managing all aspects of discovery, trial preparation, and trial in large-scale litigation.

We have successfully defended single plaintiff, multi-plaintiff, and class action claims in state and federal courts, and in private, binding arbitration and mediation. These cases involved allegations of wrongful termination, harassment, discrimination, whistleblowing, wage and hour violations, breach of contract, failure to accommodate, failure to engage in the interactive process, failure to prevent discrimination and harassment, violations of the Family and Medical Leave Act ("FMLA") and the California Family Rights Act ("CFRA"), misappropriation of trade secrets, and unfair competition. We have also successfully represented employers at administrative hearings before the Equal Employment Opportunity Commission, the California Department of Fair Employment and Housing, the California Division of Labor Standards Enforcement, the Employment Development Department, and the Workers' Compensation Appeals Board in connection with Labor Code Section 132a discrimination/retaliation and serious and willful claims. Our team has also represented public entities in arbitrations, Skelly (disciplinary) hearings, and Pitchess motions.

Our Work:

We litigate and provide advice and counsel for a full scope of labor and employment matters, including but not limited to:

- Disability Access and Accommodation
- Employee Handbooks
- Executive Compensation
- FMLA/CFRA Leave Management
- Independent Contractor Agreements
- Policy Memoranda (including anti-harassment policies and investigation guidelines)
- Severance Policies and Separation Agreements
- Sexual Harassment Policies and Prevention Training
- Terminations
- Whistleblower Claims
- Workplace Investigations and Audits

Get in Touch:

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