



2023 VIRTUAL EMPLOYMENT & LABOR LAW SUMMIT

November 14, 2023



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November 14, 2023

Significant 2023 California Court Decisions and Regulations



QUESTIONS?

- Please type questions with your name and email address into the chat function
- If we are unable to answer your question during the webinar, we will respond to you in an email

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Race Discrimination Cases

- *Owen Diaz v. Tesla* (Update) No. 3:17-cv-06748-WHO (N.D. Cal. 2021)

2017 lawsuit by plaintiff Owen Diaz, who in 2021 was awarded \$137 million. A judge agreed that Tesla was liable but said the award was excessive. He ordered a new trial on damages after Diaz declined his reduced \$15 million award.

After several legal rounds in the courts, the award was slashed to \$3.2 million. \$175,000 in damages for emotional distress and \$3 million in punitive damages. Both sides will appeal.

Tesla is facing a new filing by the EEOC, alleging that since 2015, Black workers at the Tesla plant have routinely been subjected to racist slurs and graffiti, including swastikas and nooses.

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Age Discrimination Cases

- *Atkins v. St. Cecilia Catholic School (2023)* WL 3142316

Atkins, a long-term employee and working her final year as a part-time art teacher, was terminated. She sued to school for age discrimination. The school argued that the claim was barred by the ministerial exception.

The trial court agreed, but the court of appeals reversed the decision reasoning that the ministerial exception is not a blanket defense and there were triable issues of material fact in the case.

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Age Discrimination Cases

- *Castelo v. Xceed Fin. Credit Union* 91 Cal. App. 5th 777(2023)

Castelo sued Xceed for wrongful termination and age discrimination in violation of FEHA. Castelo had signed a two-part release - a release of claims through the date of execution and a "Reaffirmation" that Castelo was supposed to sign on her last day of her employment six weeks later. Castelo signed both releases at the same time (i.e., six weeks before her employment ended).

Castelo argued that the release violated Cal. Civ. Code § 1668, which prohibits pre-dispute releases of liability. Summary judgment granted and upheld in favor of Xceed – the releases were not barred by the statute because they did not have as their purpose the immunization of Xceed from liability for a future violation of law.

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Disability/Medical Discrimination Cases

- *Hodges v. Cedar-Sinai Medical Center (2023) BC 297864*

Defendant prevailed on summary judgment of plaintiff's FEHA disability discrimination claim. Plaintiff was fired when she refused to take a flu vaccine which her employer required as a condition of employment because of her prior chemotherapy treatment.

Under the circumstances, plaintiff could not meet her burden to prove she was discriminated against because of medical condition/disability.

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Disability/Medical Discrimination Cases

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

Lin received favorable performance reviews with employer. Employer made a tentative decision to eliminate Lin's position. Before Lin was told that her position was eliminated, she fell and hurt herself in the workplace, and was placed on modified duty. Thereafter, her performance was judged more harshly.

Motion for summary judgment granted by trial court reversed by Court of Appeal, holding that although Kaiser had tentatively placed Lin on the termination list before becoming aware of her disability, it did not terminate her employment until after it was aware of her disability. The Court concluded that a reasonable jury could find that the negative evaluations Lin had received and her ultimate termination were substantially motivated by her disability.

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Disability/Medical Discrimination Cases

- *Raines v. U.S. Health Works*, 2023 WL 5341067 (Cal. S. Ct. 2023)

In this putative class action, plaintiffs allege that their employment offers were conditioned upon their completion of pre-employment medical tests conducted by U.S. Healthworks Medical Group (USHW). They further allege that during the screenings, USHW asked intrusive and illegal questions unrelated to the applicants' ability to work in violation of FEHA.

Applicants asserted FEHA claims against the prospective employers that used USHW as an "agent" of the employers. The Court examined FEHA's definition of "employer" and concluded the definition encompasses third-party corporate agents such as USHW.

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Religious Discrimination Cases

- *Hittle v. City of Stockton*, 76 F. 4th 877 (9th Cir. 2023)

City's Fire Chief was fired because he lacked effectiveness and judgment in his ongoing leadership of the Fire Department and had potentially conflicting loyalties in his management role and responsibilities.

Hittle sued the City under Title VII and the California Fair Employment and Housing Act ("FEHA"), alleging his termination was "based upon his religion." Court ruled in City's favor.

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Religious Discrimination Cases

- *Rademacher v. American Broadcasting Companies, Inc.* (2023)
21STCV45383

A California court determined that General Hospital actor/plaintiff's request for religious accommodation and avoid vaccination could not be accommodated.

Plaintiff failed to advance sufficient evidence of a deeply held religious belief to support his request for religious accommodation.

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Religious Discrimination Cases

- *Groff v. DeJoy*, 143 S.Ct. 2279 (2023)

A USPS employee refused to work on Sundays, instead holding the day out for rest and worship.

USSC held that “more than a de minimis cost, as that phrase is used in common parlance, does not suffice to establish undue hardship under Title VII.” “Undue hardship is shown when a burden is substantial in the overall context of an employer’s business.” when “[f]aced with an accommodation request ... it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary.”

An employer must accommodate an employee’s religious beliefs unless it can show that doing so would “result in substantial increased costs in relation to the conduct of its particular business.”

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Sexual Harassment & Hostile Work Environment Cases

- ***Sharp v. S & S Activewear*, Case No. 21-17138 (9th Cir. 2023)**

Plaintiffs who were former female and male employees of apparel manufacturer S&S Activewear alleged that S&S permitted its managers and employees to routinely play “sexually graphic, violently misogynistic” music in its warehouse in Reno, Nevada.

Plaintiff Sharp filed suit, alleging that the music and related conduct created a hostile work environment in violation of Title VII.

The district court granted the employer’s motion to dismiss, reasoning that the music’s offensiveness to both men and women and audibility throughout the warehouse nullified any discriminatory potential. The Ninth Circuit vacated the district court’s dismissal and ruled music offensive to both women and men is not a certain bar to stating a Title VII claim for sexual harassment and hostile work environment.

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Sexual Harassment & Hostile Work Environment Cases

- ***Atalla v. Rite Aid Corp.*, 2023 WL 2521909 (Cal. Ct. App. Feb. 24, 2023)**

Plaintiff, a pharmacist, sued Rite Aid alleging that a district manager had sexually harassed her, including a series of late-night text messages containing a video of a sexual act and a photo of genitals.

The Court relied on evidence demonstrating a long-standing personal relationship, and that the parties texted about family, vacations, food and dining, alcohol and drinking, people and pets, exercise, chit chat about work, and they regularly met for coffee, lunch, holiday and birthday dinners, and were acquainted with each other’s spouses.

The Court of Appeal explained that Rite Aid was not strictly liable because Rite Aid demonstrated that the harassment occurred outside of work and that Atalla a willing participant in the personal friendship that pre-existed Atalla’s employment.

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Pregnancy Discrimination Case

- *Lopez v. La Casa de las Madres (2023)* WL 2534998

Lopez claimed her employer did not permit her to take pregnancy disability leave and additional time off she needed as part of her accommodation request. In addition, Lopez needed time off as an accommodation for stress.

The trial court found that Lopez failed to carry her burden of proving that she had a condition related to pregnancy; could perform the essential functions of the job; and was denied a reasonable accommodation. Moreover, the trial court determined that Lopez had failed to prove La Casa had discriminated against her based on a disability because she did not prove that she was otherwise qualified to perform the shelter manager job, given her need to avoid stressful duties. The Court of Appeal affirmed judgment in favor of La Casa.

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National Origin Discrimination Cases

- *Opara v. Yellin, 57 F.4th 709 (9th Cir. 2023)*

Opara was terminated from her employment as an IRS revenue officer after the IRS determined she had committed several violations. Opara sued, alleging she was terminated based on age and national origin discrimination.

The district court granted summary judgment, and the Ninth Circuit affirmed, concluding that Opara's direct evidence of age-related discriminatory animus was insufficient to raise a genuine issue as to pretext concerning the reasons offered by the employer for the termination, because it consisted entirely of Opara's own uncorroborated and self-serving testimony.

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Retaliation Case

- ***Zirpel v. Alki David Productions*, 93 Cal. App. 5th 563 (2023)**

Plaintiff claimed Defendant fired him for allegedly disclosing information that Zirpel reasonably believed evidenced a violation of safety standards and for disclosing information about ADP's working conditions.

The jury returned a special verdict in Zirpel's favor, finding Defendant had violated state whistleblower statutes (Cal. Lab. Code §§ 232.5 and 1102.5), and awarded Zirpel \$369,000 in economic damages; \$700,000 in emotional distress damages; and \$6 million in punitive damages.

The Court of Appeal affirmed the judgment, holding that substantial evidence supported the jury's finding that Zirpel reasonably believed he had disclosed to ADP and city inspectors unsafe working conditions and code violations at the location in question.

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PAGA Case

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

Plaintiff had electronically signed an arbitration agreement, which contained a class and representative action waiver, and a carve-out provision stating that "claims under PAGA . . . are not arbitrable under this Agreement." Defendant moved to compel arbitration.

The Court of Appeal held that both individual and non-individual representative PAGA claims were excluded from arbitration pursuant to an arbitration agreement's broad carve-out for "claims under PAGA."

"If [Defendant] intended the clause to be a truism—that is, only nonarbitrable PAGA claims would not be arbitrable under the agreement—it should have drafted the clause to say so."

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Reimbursement of Employee Expenses

- *Thai v. International Business Machines Corp.*, Cal. Court of Appeal No. A 165390

Plaintiff sued under Labor Code 2802, alleging IBM failed to reimburse for expenses incurred to perform regular job duties from home following Governor Newsom's Covid-related stay-at-home order. Plaintiff argued that, to accomplish his job duties from home, he required internet access, telephone service, a telephone headset, and a computer and accessories, all of which were items IBM provided to its employees in its offices. IBM argued that the Governor's order was an intervening cause of the work-from-home expenses and had absolved IBM of liability under Section 2802.

The trial court sustained IBM's demurrer. On appeal, however, a three-justice panel unanimously reversed the trial court's ruling. The Court explained that, per the plain language of Section 2802(a), an employer's obligation to reimburse work expenses "turns on whether the expenses were actually due to performance of the employee's duties."

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Employer Liability for COVID-19 Spread

- *Kuciemba v. Victory Woodworks, Inc.* (2023) 31 F.4th 1268

Plaintiff claimed that he contracted COVID-19 while working. As a result, his family members also became ill with the infection.

The Court ruled that California employers owe no duty of care to prevent the spread of COVID-19 to employees' household members.

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Labor Code Case

- *Hartstein v. Hyatt Corporation*, No. 22-55276 (9th Cir. 2023)

Former California employees of Hyatt Corporation who were laid off after the COVID-19 pandemic struck in March 2020. Plaintiffs were laid off in March 2020 with the understanding that the layoff was temporary. Later, they were terminated in June 2020. Plaintiffs contend that Hyatt violated California law by failing to pay them immediately for their accrued vacation time.

The Ninth Circuit panel concluded that the prompt payment provisions of the California Labor Code required Hyatt to pay Plaintiffs their accrued vacation pay in March 2020.

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Timekeeping Cases

Anticipated Decision From California Supreme Court on Timekeeping

- *Camp v. Home Depot USA*, 84 Cal. App. 5th 638 (2022)

The California Supreme Court recently agreed to hear a class-action case that could limit how employers in the state may use time rounding to calculate employees' work hours.

An employee alleged that Home Depot's policy of rounding clock-in and clock-out times to the nearest quarter-hour resulted in unpaid minimum and overtime wages. As a result, plaintiff claims he wasn't paid for at least 470 minutes over four and a half (4.5) years of work due to the rounding policy.

Decisions in two California Supreme Court cases need to be reconciled: *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018) and *Donahue v. AMN Servs., LLC*, 11 Cal. 5th 58 (2021).

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Timekeeping Cases

Anticipated Decision From California Supreme Court on Timekeeping

Troester case held that the Labor Code requires employers to pay employees for all hours worked, even small increments of time. *Troester* effectively eliminated the “de minimis” rule.

In the *Donohue* case, the Court rejected the rounding of meal period start/end times. Court noted that technological advances in timekeeping have assisted employers with tracking time more precisely.

Court also ruled in *See's Candy Shops v. Superior Court* (2012) 210 Cal. App.4 that a time-rounding policy is lawful when it is fair, neutral and used in a way that doesn't ultimately result in failure to pay employees properly for all the time they actually worked.

Experts think... "Court ultimately will declare that time rounding is not permissible when technology permits employers to accurately record the actual time worked by employees."

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Timekeeping Cases

- *Woolworth v. Loma Linda University Medical Center*, No. E072704, 2023 WL 4701976 (Cal. Ct. App. July 24, 2023)

Employers may not round time punches, even if the rounding is neutral, if the employer can, and has, accurately recorded employee time.

Petition for review after the Court of Appeal affirmed in part and reversed in part orders in a civil action. The court ordered briefing deferred pending decision in *Camp v. Home Depot U.S.A., Inc.*

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Regulations

- CA Consumer Privacy Agency Reversed
- Amendments to Fair Chance Act
- Cal/OSHA COVID-19 Prevention Non-Emergency Regulation

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CA Consumer Privacy Agency Reversed

- Starting January 1, 2023, the CPRA applied to employees, contingent workers, and independent contractors under the CCPA. This means that the requirements surrounding disclosure, collection, safeguarding, and sharing of personal information now applies to employees, prospective employees.
- Original enforcement date was July 1, 2023.
- In March 2023, the Chamber of Commerce filed a lawsuit against the Consumer Privacy Protection Agency (CPPA) to enjoin the state agency from bringing any enforcement actions under the CCPA regulations because the implementing regulations were untimely finalized until March 29, 2023.
- The Superior Court agreed with the Chamber's rationale and issued ruling **enjoining enforcement** of the regulations until March 2024.

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Amendments to Fair Chance Act

- General Process still same:
 - Initial assessment
 - Pre-Adverse Action Letter
 - Reasonable Waiting Period (5 business days)
 - Additional Assessment
 - Adverse Action letter

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Amendments to Fair Chance Act (cont'd)

- Broader definitions of “employer” (includes joint employers, agencies) and “applicant”(includes existing employees)
- Voluntary disclosure of information (prior to conditional offer) cannot be considered
- Restrictions on advertising (e.g., “Must have clean record”)
- Employers who violate FCA waive ability to consider criminal history.
- Individualized assessment must include nature and gravity of the offense; amount of time that has passed; nature of the job; evidence of rehabilitation or mitigating circumstances.

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Amendments to Fair Chance Act (cont'd)

- Timeframes for applicants to respond to pre-adverse action notices
 - If notice is transmitted via email, the notice is deemed received 2 business days after it is sent.
 - If notice is sent through the mail, the notice is deemed received:
 - 5 calendar days from the date of mailing if mailed in California;
 - 10 calendar days from the date of mailing if sent to a U.S. address outside of California; and
 - 20 calendar days from the date of mailing if sent to an address outside of the U.S.

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Cal/OSHA COVID-19 Prevention Non-Emergency Regulation (Effective until February 2025)

- California still has Non-Emergency Regulations (NER) which remain in effect until February 2025.
- Employers must ensure employees are protected in the workplace should an outbreak occur in the workplace.
- During the pandemic, an outbreak was defined as three or more employees in an exposed group testing positive for COVID-19 within a 14-day period.
- California Department of Public Health revised its definition to make it less likely for employers to experience an outbreak, by changing the definition to 3 positive COVID-19 cases during a *7-day period*.

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