ORANGE COUNTY BAR ASSOCIATION

LABOR & EMPLOYMENT LAW SECTION WEBINAR

Carefully Considering FEHA Disability Cases Post COVID-19

Monday, October 12, 2020

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OCBA Labor and Employment Webinar – October 12, 2020

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FEHA Definition of Disability

Gov. Code § 12926.1:

> (a) The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (P.L. 101-336). Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections.
>
> (b) The law of this state contains broad definitions of physical disability, mental disability, and medical condition. It is the intent of the Legislature that the definitions of physical disability and mental disability be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling.
>
> (c) Physical and mental disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease. …. Further, under the law of this state, **"working" is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.**

Gov. Code § 12926(j), (m), and (n): Includes *perceived* disability. Perceived mental disability means being regarded by an employer as having had any mental condition that makes achievement of a major life activity difficult.

Cal. Gov. Code § 12926(o); Associational disability. Disability also includes associating with a disabled person. ***See also*** *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 246 Cal. App. 4th 180, 195 ("[t]he very definition of a physical disability … includes a perception … that the person is associated with a person 'who has or is perceived to have' a physical disability")

Interactive Process Requirements

Gov. Code § 12940(m) FEHA requires an employer to provide a reasonable accommodation for a known physical or mental disability of an employer or job applicant.

Gov. Code § 12940(n) To determine if there are any effective reasonable accommodations for the employee's physical or mental disability or medical condition (including perceived and associational disabilities), employers must engage in a timely good faith interactive process with the employee

When does the employer "know" of the disability?

2 CCR § 11069(d):

1. Once the employee/job applicant makes a request for an accommodation
2. If the need for an accommodation is obvious (need an example)
3. Need for the accommodation brought to the employer's attention by a third-party.

Good Faith Interactive Process (Requirements)

If an employer is unable to grant a requested accommodation after due consideration, the **FEHA** requires that it initiate a discussion with the applicant or employee regarding alternative accommodations. 2 CCR § 11069(c).

WHAT IS A "REASONABLE ACCOMMODATION"?

A reasonable accommodation under the FEHA means a modification or adjustment to the workplace that enables an employee or job applicant to perform the essentials of the job held or desired. *See* 2 CCR § 11068; *see also Scotch v. Art Institute of California* (2009) 173 Cal. App. 4th 986.

Employers Can Deny Requests for Accommodations

1. Employee is not qualified to perform the essential functions of the job
2. There is no reasonable accommodation; or
3. It would create an undue hardship for the employer

Gov. Code § 12926(u) defines an "undue hardship" as an action that requires significant difficulty or expense in light of these factors:

- •The nature and cost of the accommodation
- •The overall financial resources of the employer
- •The financial resources of the facilities involved in providing the reasonable accommodation
- •The employer's operations, including its composition, structure, and functions of its workforce
- •The geographic separateness or administrative or fiscal relationship of the facility or facilities

Is Attendance an Essential Function?

Parties have litigated whether attendance is an essential function of a job. In most cases, courts have held that attendance is an essential function of a job. But such holdings are often highly fact-specific. For example:

- **Telecommuting is not a reasonable accommodation where regular, in-person attendance is an essential job function.** EEOC v. Ford Motor Co., 782 F.3d 753, 763 (6th Cir. 2015). The court found that an employee's request to telework up to four days a week was unreasonable where the employee's resale buyer job required teamwork, meetings, and on-site availability to participate in face-to-face interactions. Id.
- **Telecommuting is not a reasonable accommodation where regular attendance is an essential job function for a production assembly line.** Brown v. Honda of Am., 2012 U.S. Dist. LEXIS 131555, *13-15 (S.D. Ohio Sept. 14, 2012). The court opined that the employer "is not obligated to endure erratic, unreliable attendance by its employees" and held that an employee's request to allow leave in excess of her FMLA leave was unreasonable and would constitute an undue burden on the employer. Id. at *13–14.
- **The absence of essential functions from the job description was not conclusive as regular attendance is an obvious, essential job function.** Riel v. Elec. Data Sys. Corp., 99 F.3d 678, 683 (5th Cir. 1996).

PAYNE & FEARS LLP

AUGUST 2020 KEY CASE DEVELOPMENTS

I. DISCRIMINATION IN EMPLOYMENT

A. Defenses

Blue Fountain Pools & Spas Inc. v. Super. Ct., 53 Cal. App. 5th 239 (2020)

Summary: *The continuing violation doctrine tolled the statute of limitations for plaintiff's FEHA sexual harassment claim with respect to harassment occurring more than one year prior to the filing of her complaint, but after the acquisition of her employer by a new owner because plaintiff alleged harassment occurring in the year before she filed suit and plaintiff was not on notice that complaints regarding sexual harassment to the new owner would be futile.*

Facts: Daisy Arias worked for Blue Fountain Pools and Spas Inc. ("Blue Fountain") from October 2006 to May 2017. Shortly after her hire, Arias's supervisor, Sean Lagrave, began making sexual overtures toward her. Within one week of Lagrave's initial harassment, Arias complained to her direct supervisor, but nothing was done. Arias regularly complained about Lagrave from 2006 through 2012, but Lagrave's conduct continued. In her deposition, Arias admitted that by 2009, she felt that her complaints were not helping. In January 2015, Farhad Farhadian purchased Blue Fountain. Farhadian agreed to monitor Lagrave's conduct, but the sexual harassment continued through the remainder of Arias's tenure at Blue Fountain, and, Arias also accused Farhadian of participating in the harassment. In April 2017, Lagrave verbally and physically assaulted Arias. Arias reported the assault to the police and did not return to work. Arias filed a civil complaint in San Bernardino County Superior Court for sexual harassment against Lagrave, Farhadian, and Blue Fountain. Defendants moved for summary adjudication on the basis that the statute of limitations had run on the claim. The trial court denied the motion because there were questions of fact as to the applicability of the continuing violation doctrine. Defendants petitioned for a writ of mandate.

Court's Decision: The California Court of Appeal denied Defendants' petition. Defendants argued that Arias's claim was barred by the statute of limitations, and not protected by the continuing violation doctrine, because Arias was on notice as far back as 2009 that Blue Fountain would not take any steps to end the harassment. The continuing violation doctrine does not apply, and the statute of limitations on a harassment claim begins to run, when the allegedly harassing conduct acquires a degree of permanence such that it would have been clear to a reasonable employee that further efforts to end the harassment would be futile. The court rejected Defendants' argument because Arias had alleged harassing conduct that had occurred within one year of the filing of her complaint. Although harassing conduct that occurs outside the limitations period and that acquires a degree of permanence may be barred, a plaintiff may still bring a claim based on harassing conduct that occurred within the limitations period. The court also rejected Defendants' argument that the harassing conduct that Arias alleged had acquired a degree of permanence. As the court reasoned, while there was a

factual dispute as to whether Arias was on notice that further efforts to end the harassment were futile under earlier management, she was not on notice of the futility of complaining about harassment to Farhadian. Accordingly, Arias could recover for harassment occurring after Farhadian's acquisition of Blue Fountain under the continuing violation doctrine.

II. PUBLIC EMPLOYMENT ISSUES

A. California

***Morgado v. City & Cty. of S.F.*, No. A157320, 2020 WL 5036169 (Cal. Ct. App. Aug. 26, 2020)**

Summary: *City of San Francisco was entitled to offset against front pay owed to an employee the amount the employee earned from a side job during the time period he was improperly terminated and later suspended by the City.*

Facts: In 2011, the City and County of San Francisco (the "City") terminated Paulo Morgado, a non-probationary City police officer. In 2012, Morgado sued the City and various government officials, seeking injunctive relief and a writ of administrative mandate to direct his reinstatement. Morgado prevailed in a bench trial and secured an injunctive order directing the City to vacate his termination and reinstate him. In 2017, the California Court of Appeal affirmed the trial court's decision. Morgado was reinstated, but the City suspended him without pay retroactive to his 2011 termination. Morgado then sought and obtained an order holding the City in contempt for failing to comply with the prior injunction. The new injunction required the City to unconditionally vacate Morgado's termination and suspension, and compensate him with front pay and benefits lost. Rather than paying in full, the City offset the payment owed to Morgado by the amount of his earnings from a side job as a mortgage broker during the period Morgado was not working for the City. Morgado sought a second contempt order against the City. For a second time, the trial court held the City in contempt, and ordered it to pay to Morgado the amount deducted. The City appealed.

Court's Decision: The California Court of Appeal reversed, holding that the City could deduct from its payment the amount of Morgado's side income. The court relied on the general principle that a remedy should return an employee to the financial position he would have occupied had the unlawful conduct not occurred, and employees are generally not entitled to recovery over make-whole damages. In this case, had the City never terminated Morgado, he would have been unable to work as a mortgage broker and earn the side income. Thus, the court held that the City was entitled to an offset, especially because public funds were at stake. The court remanded the case to allow the parties and the trial court to determine the proper amount of the offset.

III. ARBITRATION AND MEDIATION

A. Scope and Enforceability

***Jarboe v. Hanlees Auto Grp.*, 53 Cal. App. 5th 539 (2020)**

Summary: *Defendant companies affiliated with the entity with whom plaintiff signed an arbitration agreement were not third-party beneficiaries of that agreement, and equitable estoppel compelling arbitration as to Plaintiff's claims against those Defendants was inapplicable where Defendants failed to show a sufficiently close integral relationship.*

A trial court does not abuse its discretion when it declines to stay a PAGA claim pending the outcome of arbitration.

Facts: Plaintiff Thomas Jarboe was hired by an auto dealership where he worked for a short time before being transferred to a different location that was part of a larger group of affiliated dealerships. Following his termination, Plaintiff sued for wage and hour violations naming the automotive group, each of the affiliated dealerships (12 in total), and three individuals as defendants. Defendants moved to compel arbitration based on an arbitration agreement between Plaintiff and the dealership that hired him. The trial court granted the motion as to all of Plaintiff's individual causes of action against the first dealership, but denied it as to the other defendants, and denied it as to Plaintiff's claim under the California Labor Code Private Attorneys General Act ("PAGA"). The trial court reasoned that the operative arbitration provision applied only to the "Company" — defined in the agreement as only one dealership — and not to any other related entities. The court also determined that Plaintiff's PAGA cause of action could proceed in court while his individual claims were being arbitrated because an employee bringing a PAGA action is not acting on his or her behalf, but on behalf of the state, which is not bound by the employee's agreements. The trial court also declined to issue a stay of Plaintiff's court claims against the auto group and the affiliated dealerships pending completion of the arbitration. Defendants appealed, and the California Court of Appeal affirmed the trial court's order. Defendants petitioned for hearing.

Court's Decision: The California Court of Appeal granted the petition for rehearing, vacated its prior opinion (previously published at 49 Cal. App. 5th 830), and again affirmed the trial court's order. The court rejected Defendants' argument that they were entitled to enforce the agreement between Plaintiff and the first dealership as third-party beneficiaries or under the doctrine of equitable estoppel. The court determined that Defendants did not show the arbitration agreement between Plaintiff and the first dealership was made "expressly" for the benefit of any other entity, a required showing before a third party can enjoy third-party beneficiary status. The agreement expressly defined "Company" as the specific dealership, and neither identified nor included any other party. The court also rejected Defendants' argument that equitable estoppel required Plaintiff

to arbitrate his claims against all Defendants. Equitable estoppel applies where the claims are based on the same facts and are inherently inseparable from arbitrable claims against signatory defendants. Here, the court found no evidence that the auto group and dealerships had common ownership and the facts showed they operated separately. As a result, there was no "integral" relationship between them to support equitable estoppel. The trial court also did not abuse its discretion in declining to stay the PAGA claim while the arbitration against the first dealership proceeded. The similarity of claims against the entities and their shared "nucleus of facts" did not support staying the PAGA claim, as the PAGA claim had nothing to do with the employee and employer's contractual relationship and was instead a dispute between the employer and the state.

***Conyer v. Hula Media Servs., LLC*, No. B296738, 2020 WL 5035827 (Cal. Ct. App. Aug. 26, 2020)**

Summary: *An employee who signs an acknowledgment of receipt of a handbook that contains an arbitration clause may be bound by the arbitration clause, even if the employer did not call the employee's attention to the arbitration clause.*

Facts: When Hula Media Services, LLC ("Hula") hired Plaintiff Michael Conyer in January 2017, it provided him with a copy of its employee handbook, which did not contain an arbitration clause. Plaintiff signed a "receipt and acknowledgment" of the handbook. In November 2017, Hula distributed to all employees a revised handbook, which now contained an arbitration provision. Plaintiff was provided the revised handbook and signed a "receipt and acknowledgment" of it. In August 2018, Plaintiff sued Hula and the company's CEO for sexual harassment, failure to pay reimbursements, and other related claims. Defendants moved to compel arbitration under the November 2017 arbitration provision. The trial court denied the motion to compel, and Defendants appealed.

Court's Decision: The California Court of Appeal reversed. The court held that Hula had no obligation to point out to Plaintiff that it added an arbitration provision to the November 2017 handbook. The long-standing rule in California is that parties are bound by a contract, including arbitration agreements, even if they do not read the contract before signing. The court also rejected Plaintiff's contention that the agreement was unconscionable. While the court agreed that there was some procedural unconscionability because the employee handbook was a contract of adhesion and Hula had the right to modify the agreement from time to time, it also held that Hula's failure to provide Plaintiff with a copy of the applicable arbitration rules did not increase the level of procedural unconscionability. The court also found that one provision of the agreement was substantively unconscionable because it required the parties to pay a pro-rata share of the arbitrator's fees and costs, and it allowed Hula to recover prevailing party attorneys' fees. However, the court severed the offending provision and enforced the remainder of the arbitration agreement.

***Rittman v. Amazon.com, Inc.*, No. 19-35381, 2020 WL 4814142 (9th Cir. Aug. 19, 2020)**

Summary: *Amazon's "last mile drivers," who delivered packages shipped from across the United States but who did not cross state lines in making their deliveries, fell within the Federal Arbitration Act's transportation worker exemption and were thus exempted from its arbitration enforcement provisions.*

Facts: Amazon hired "last mile" drivers to complete deliveries of packages shipped from across the United States. These "last mile" drivers sued Amazon for various wage and hour violations in the United States District Court for the Western District of Washington, alleging that Amazon misclassified them as independent contractors. Amazon filed a motion to compel arbitration. The district court denied Amazon's motion. It held that the drivers fell within the Federal Arbitration Act's ("FAA") transportation worker exemption, which exempts from the FAA's arbitration enforcement provisions the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The district court found that the "last mile" drivers were engaged in interstate commerce because they delivered goods shipped around the United States, even if the drivers themselves did not cross state lines. The district court also determined that the parties did not intend Washington law to apply to the agreement. Having determined that it was not clear what law would apply to the arbitration provision, or whether the parties intended to arbitrate disputes in the event the FAA did not apply, the court concluded that there was no valid agreement to arbitrate and denied Amazon's motion to compel arbitration. Amazon appealed.

Court's Decision: The Court of Appeals for the Ninth Circuit affirmed. The court concluded that drivers making "last mile" deliveries were engaged in interstate commerce, even if they did not cross state lines. Case law and the plain text of the FAA show that workers employed to transport goods which are shipped across state lines are engaged in interstate commerce. Thus, the court held that Amazon's drivers were engaged in interstate commerce because the packages they delivered were items that were part of the interstate journey. After concluding that the FAA could not support Amazon's motion to compel arbitration, the court went on to hold that arbitration was not required under Washington law, either, because nothing in the agreement allowed the court to apply Washington law once the FAA portion was severed.

IV. CIVIL PROCEDURE

A. Class and Representative Actions

***Robinson v. Southern Counties Oil Co*, 53 Cal. App. 5th 476 (2020)**

Summary: *Res judicata bars a PAGA claim when the employer has already settled a separate PAGA claim covering the same claims and time period.*

An employee does not have standing to serve as a PAGA representative for a time period beginning after he or she was no longer employed.

Facts: Richard Robinson was a truck driver for Southern Counties Oil Company ("Southern Counties") between February 2015 and June 2017. Robinson filed a lawsuit in Contra Costa County Superior Court against Southern Counties in August 2018, asserting a single cause of action under the California Labor Code Private Attorneys General Act ("PAGA"). The thrust of his lawsuit was that Southern Counties did not provide aggrieved employees adequate meal and rest breaks. In February 2019, the San Diego County Superior Court approved a class action and PAGA settlement in *Gutierrez v. Southern Counties Oil Co.*, Case No. 37-2017-00040850-CU-OE-CTL. The *Gutierrez* settlement covered all of the claims brought in *Robinson* for the period from March 2013 to January 2018. Robinson and three other employees opted out of the *Gutierrez* class action settlement. In a First Amended Complaint, Robinson purported to represent the three opt-outs from *Gutierrez* and all Southern Counties employees after January 2018. Southern Counties demurred. The Contra Costa County Superior Court sustained Southern Counties' demurrer, concluding that claim preclusion applied to Robinson's PAGA-only lawsuit based on the settlement in *Gutierrez*. Moreover, the trial court held that Robinson could not represent employees for a period beginning after the *Gutierrez* settlement because Robinson was not employed by Southern Counties during that time. Robinson appealed.

Court's Decision: The California Court of Appeal affirmed. First, it held that claim preclusion prevented Robinson from pursuing a PAGA-only suit against Southern Counties on behalf of the three other employees who opted out of the class action settlement in *Gutierrez*. In a PAGA claim, the government is the real party, and "there is no mechanism for opting out of the judgment entered on the PAGA claim." Because *Gutierrez* resolved the state's interest against Southern Counties for certain wage and hour violations between March 2013 and January 2018, Robinson could not represent the state in another PAGA action based on those same violations against Southern Counties covering the same time period. Second, the court held that Robinson could not represent employees following the close of the *Gutierrez* settlement period—*i.e.* after January 2018. Because Robinson stopped working for Southern Counties in June 2017, he did not have standing to serve as a PAGA representative for a claim period beginning after that date. An employee cannot be an "aggrieved employee" if he or she was not affected by the conduct raised in the complaint.

***Starks v. Vortex Industries*, Nos. B288005, B292643 (Cal. Ct. App. Aug. 25, 2020)**

Summary: *A motion to vacate a judgment in a PAGA suit is untimely if it is brought after the LWDA has cashed the settlement proceeds and thus accepted the benefits of the judgment.*

Facts: In August 2015, Chad Starks filed a California Labor Code Private Attorneys General Act ("PAGA") claim against Vortex Industries ("Vortex"). In December 2016, Adolfo Herrera filed a separate PAGA claim against Vortex based on the same alleged wage and hour violations. In October 2017, Starks and Vortex reached a court-approved settlement, and the trial court entered judgment thereon. The California Labor and Workforce Development Agency ("LWDA") did not object to the settlement and cashed Vortex's settlement check. Herrera thereafter filed a motion to intervene and a motion to vacate the *Starks* judgment. The trial court denied both motions. And, based on the *Starks* judgment, the court in *Herrera* granted summary judgment to Vortex on grounds that Herrera's PAGA claim was precluded by res judicata. *Herrera* and *Starks* were then consolidated and Herrera appealed the rulings denying his motions to intervene and to vacate the *Starks* judgment, and the ruling granting summary judgment to Vortex in *Herrera*.

Court's Decision: The California Court of Appeal affirmed the trial court's orders. First, the court held that the trial court properly denied Herrera's motion to intervene because it was untimely. It found that Herrera was unjustified in waiting two years to seek intervention, and there was no reason why Herrera could not have sought intervention sooner. Second, the court held that Herrera could not challenge the judgment in *Starks* because the LWDA accepted the benefits of the judgment by cashing the settlement proceeds. The LWDA is always the real party in interest in a PAGA suit, and because the LWDA was barred from challenging the *Starks* judgment after cashing the settlement check, so too was Herrera as the LWDA's proxy. Third, the court upheld the trial court's application of res judicata. Although Herrera was technically correct that the judgment in *Starks* was not final since he had appealed it, the trial court's application of res judicata was harmless because the court had affirmed the Starks judgment in the opinion and, once the remittitur issued, *Starks* would have satisfied the requirement of finality for purposes of res judicata.

***Davidson v. O'Reilly Auto Enterprises, LLC*, 968 F.3d 955 (9th Cir. 2020)**

Summary: *A plaintiff cannot establish commonality for purposes of class certification under Rule 23 of the Federal Rules of Civil Procedure solely by offering evidence that the employer's written policy did not comply with the law, absent evidence that the employer enforced the non-compliant policy consistently across the class.*

Facts: Kia Davidson brought a class action against her employer, O'Reilly Auto Enterprises ("O'Reilly"), alleging, among other things, that O'Reilly failed to provide rest breaks compliant with California law. California law requires employers to provide a 10-minute rest break for every four hours worked or major fraction thereof. The rest break claim was based on O'Reilly's facially defective written rest break policy which did not contain the phrase "or major fraction thereof." Davidson argued that the omission created a classwide issue that

O'Reilly failed to provide legally compliant rest breaks. The district court denied Davidson's motion to certify the rest break class. It explained that although O'Reilly's written policy was inconsistent with California law, Davidson did not provide evidence that the policy was consistently applied across the entire class such that common questions predominated. Indeed, the district court noted that Davidson's declaration did not state that she had been denied a proper rest break. On the other hand, O'Reilly provided declarations from 310 employees stating that they received proper rest breaks under California law. Davidson appealed.

Court's Decision: The Court of Appeals for the Ninth Circuit affirmed. One of the requirements for class certification is that "there are questions of law or fact common to the class." To satisfy this commonality requirement, a plaintiff must demonstrate that the class members have suffered the same injury. The court held that Davidson failed to establish commonality because she failed to show that the putative class members suffered a common injury. Although O'Reilly's written rest break policy was inconsistent with California law because it did not have the phrase "or major fraction therefore," Davidson did not show the policy was consistently applied in a way that violated the law and injured putative class members. Thus, there was no evidence that the class suffered the same injury. The mere existence of a facially defective policy without evidence that it was implemented is insufficient to meet the federal class certification standards.

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SEPTEMBER 2020 KEY CASE DEVELOPMENTS

I. WAGE AND HOUR

A. Payment of Wages

***Frlekin v. Apple, Inc.*, No. 15-17382, 2020 WL 5225699 (9th Cir. Sept. 2, 2020)**

Summary: *Time spent by employees waiting for and undergoing exit searches pursuant to company policy was compensable as "hours worked."*

Facts: Apple, Inc.'s ("Apple") retail stores in California had an "Employee Package and Bag Searches" policy, which stated: "All personal packages and bags must be checked by a manager or security before leaving the store. . . . Failure to comply with this policy may lead to disciplinary action, up to and including termination." Pursuant to this policy, employees who chose to bring personal devices, bags, or packages onto the worksite were subject to an exit search after clocking out; all other employees could leave without being searched immediately upon clocking out. Based on these policies and practices, employees who were subject to exit searches received no compensation for time spent waiting and undergoing exit searches. Employees brought a wage-and-hour class action alleging that the time spent waiting for and undergoing exit searches was compensable. In July 2015, the district court granted class certification, and the parties then filed cross-motions for summary judgment on the issue of liability. The district court granted Apple's motion for summary judgment, holding that time spent by class members waiting for and undergoing exit searches was not compensable as "hours worked" under Industrial Welfare Commission Wage Order No. 7. Plaintiffs appealed to the Court of Appeals for the Ninth Circuit, which certified a question to the California Supreme Court. The California Supreme Court held, under these circumstances, that Wage Order No. 7 required Apple to compensate its employees. *See Frlekin v. Apple Inc*., 8 Cal. 5th 1038 (2020). Following the California Supreme Court's decision, the parties submitted supplemental briefs to the Ninth Circuit addressing whether there were factual disputes that would preclude summary judgment.

Court's Decision: The Court of Appeals for the Ninth Circuit reversed the district court's grant of summary judgment in favor of Apple and remanded with instructions to: (1) grant partial summary judgment in favor of Plaintiffs on the issue of whether time spent waiting for and undergoing exit searches was compensable; and (2) determine the remedy to be afforded to individual class members. In doing so, the Ninth Circuit rejected Apple's argument that summary judgment was not appropriate because some class members "did not bring bags or devices to work," "were never required to participate in checks," or "worked in stores with remote break rooms where they stored their belongings" (*i.e.*, were not subject to the policy).

***Sanchez v. Martinez*, No. C083268, 2020 WL 5494239 (Cal. Ct. App. Sept. 11, 2020)**

Summary: *Piece-rate employees who are provided with unpaid rest breaks are entitled to damages in the amount of the minimum wage for actual unpaid time or an additional hour of pay under California Labor Code section 226.7, but they are not entitled to both.*

Facts: Plaintiffs in this case were five farm laborers who pruned grape vines at a piece rate. In January 2009, Plaintiffs filed a suit against their former employer based on alleged violations of various labor laws, including a rest period claim. Following a trial on the merits, the trial court found in favor of the employer on all causes of action. Plaintiffs appealed to the California Court of Appeal, which reversed the trial court's judgment as to Plaintiffs' rest period claim and derivative cause of action under the California Labor Code Private Attorneys General Act ("PAGA"). On remand, the trial court entered judgment in favor of Plaintiffs on their rest break claim and PAGA claim and awarded Plaintiffs $416 in unpaid minimum wages for actual time worked during rest breaks and $17,775 in civil penalties. Plaintiffs again appealed, claiming they were entitled to be paid the minimum wage for the actual time that they took rest breaks without pay (the "*Bluford* theory of recovery") *and* an "additional hour of pay" under California Labor Code section 226.7 (the "226.7 theory of recovery"). The employer cross-appealed, claiming there was insufficient evidence to support the trial court's damages calculation.

Court's Decision: The California Court of Appeal affirmed. The court of appeal found both of Plaintiffs' theories of recovery to be legitimate—notably, acknowledging that the plain language of section 226.7 covers claims for unpaid rest periods. However, the court then explained that since Plaintiffs had already recovered the minimum wage for the actual time they took rest breaks without pay, both the rule of against double recovery and the California Supreme Court's decision in *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007), dictated that they were not also entitled to a statutory pay premium equal to one hour of pay under section 226.7. The court ultimately found none of the parties' claims warranted reversal.

II. COLLECTIVE BARGAINING/UNION ISSUES

A. Federal

***SEIU Local 121RN v. Los Robles Reg'l Med. Ctr.*, No. 19-55185, 2020 WL 5583677 (9th Cir. Sept. 18, 2020)**

Summary: *The arbitrability of a labor issue, where the relevant collective bargaining agreement includes a broad arbitration clause that is silent on the question of who will decide questions of arbitrability, is to be decided by the court not the arbitrator.*

Facts: Los Robles Regional Medical Center (the "Hospital") entered into a collective bargaining agreement ("CBA") with SEIU Local 121RN ("SEIU"), which represented registered nurses working at the Hospital. The CBA provided for a three-step procedure to address grievances, with the final step resulting in arbitration. There were exemptions to the grievance process, including certain health and safety issues and certain staffing and workload issues. In September 2017, SEIU filed a grievance asserting that the Hospital placed certain types of patients with nurses who did not have the appropriate training to care for those patients. The grievance also accused the Hospital of violating nurse-to-patient ratios established by state law. The Hospital and SEIU were unable to resolve the grievance, and SEIU notified the Hospital that it was pursuing arbitration.

The Hospital responded that the grievance was not arbitrable because it was a staffing issue. In May 2018, SEIU filed a complaint in the district court along with a motion to compel arbitration. The court held that the CBA was broad enough to authorize the arbitrator—rather than the court—to determine whether the grievance was arbitrable and granted SEIU's motion to compel. In doing so, the district court reasoned that although *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), established that a court, not the arbitrator, must make the determination whether the arbitrability of an issue is itself arbitrable when the relevant agreement is silent on that question, *United Brotherhood of Carpenters & Joiners of America, Local No. 1780 v. Desert Palace, Inc.*, 94 F.3d 1308 (9th Cir. 1996), held that labor cases are different than commercial arbitration disputes, and an arbitrator should decide arbitrability as long as the agreement includes a broad arbitration clause. The Hospital appealed.

Court's Decision: The Court of Appeals for the Ninth Circuit reversed and remanded, explaining that the rationale in *Desert Palace* is "clearly irreconcilable with the reasoning or theory of intervening higher authority" in *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 300–01 (2010), where the United States Supreme Court expressly rejected the notion that labor arbitration disputes should be analyzed differently than commercial arbitration disputes. The Ninth Circuit held that the district court is responsible for deciding whether SEIU's grievance is arbitrable and remanded for further proceedings.

***Belgau v. Inslee*, No. 19-35137, 2020 WL 5541390 (9th Cir. Sept. 16, 2020)**

Summary: *An employee who enters into a short-term, voluntary union membership agreement to have union dues deducted from their paycheck cannot maintain a claim for a First Amendment violation under* Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018).*

Facts: Plaintiffs were public employees who voluntarily signed irrevocable one-year union membership agreements authorizing Washington state to deduct union dues from their paychecks and transmit them to the Washington Federation of State Employees ("WFSE"). In June 2018, the United States Supreme Court issued its opinion in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), which held that compelling nonmembers to subsidize union speech violated the First Amendment. After *Janus*, some employees notified WFSE that they no longer wanted to be union members or pay dues. Per the request, WFSE terminated these employees' union memberships, but pursuant to their membership agreements, Washington continued to deduct union dues from their wages until their irrevocable one-year term expired. In August 2018, Plaintiffs filed a putative class action against WFSE and Washington, alleging that the dues deductions violated their First Amendment rights. The district court granted summary judgment for WFSE and Washington state and dismissed the case. Plaintiffs appealed.

Court's Decision: The Court of Appeals for the Ninth Circuit affirmed. The court first held that Plaintiffs' claim against the union failed under 42 U.S.C. § 1983 for lack of

state action, as (1) WFSE was a private party that was not acting "in concert" with the state, and (2) the source of Plaintiffs' alleged constitutional harm was not a state statute or policy but the particular private agreement between the union and Plaintiffs. The court went on to hold that their claim against Washington state also failed because they had affirmatively consented to deduction of union dues, rendering the issue one of contractual obligation rather than a First Amended violation. The court explained that neither state law nor the collective bargaining agreement compelled involuntary dues deduction, and thus neither violated the First Amendment.

III. ARBITRATION AND MEDIATION

A. Scope and Enforceability

***Laver v. Credit Suisse Sec. (USA), LLC*, No. 18-16328, 2020 WL 5583673 (9th Cir. Sept. 18, 2020)**

Summary: *Financial Industry Regulatory Authority Rule 13204(a)(4) prohibiting compelled arbitration of putative or certified class actions does not preempt a general class waiver set forth within employee documents.*

Facts: Christopher Laver worked as a financial adviser at Credit Suisse Securities, USA ("CSSU"). At CSSU, financial advisers were entitled to deferred compensation pursuant to form contracts governing their employment. A "Change in Control" provision in the contracts provided that only certain corporate acquisitions would allow the advisers to retain their entitlement to certain unvested deferred compensation. In October 2015, CSSU announced it had entered into an agreement with Wells Fargo that did not provide for the advisers to recover their unvested deferred compensation. Laver filed a putative class action complaint, alleging CSSU entered into the agreement to avoid paying its financial advisers millions of dollars in deferred compensation. CSSU moved to dismiss based on an arbitration clause and general class waiver set forth in an Employee Dispute Resolution Program ("EDRP"). In opposition to the motion, Laver argued that because CSSU is a member of the Financial Industry Regulatory Authority ("FINRA")—a securities industry self-regulatory organization that imposes rules regulating the conduct of its broker-dealer members—the class waiver was unenforceable because FINRA Rule 13204(a)(4) prohibited compelled arbitration of putative or certified class actions and the waiver rendered Laver unable to pursue a class action in any forum. The district court disagreed, reasoning that the Rule does not bar CSSU from enforcing the EDRP's class waiver. Laver appealed.

Court's Decision: The Court of Appeals for the Ninth Circuit affirmed. The Ninth Circuit first explained that although class action waivers are often found in arbitration agreements, the two contract terms are conceptually distinct; a class action waiver is a promise to forgo a procedural right to pursue class claims, while an agreement to arbitrate is a promise to have a dispute heard in some forum other than a court. Here, CSSU sought to dismiss Laver's class action, not arbitrate it. The Ninth Circuit held that since Laver relinquished his right to bring class claims in any forum, and because he was left with only individual claims, Rule 13204(a)(4)'s prohibition on enforcing arbitration

agreements directed at putative or certified class claims did not bar CSSU from enforcing the class waiver, and then the arbitration agreement, against Laver.

***In re Grice*, No. 20-70780, 2020 WL 5268941 (9th Cir. Sept. 4, 2020)**

Summary: *Trial court that compelled rideshare worker to arbitrate his claims under the Federal Arbitration Act did not commit clear error as a matter of law warranting grant of writ petition where worker failed to clearly and unmistakably establish that he was exempt under Section 1 of the Federal Arbitration Act.*

Facts: William Grice, an Alabama-based driver for Uber Technologies, Inc. ("Uber"), filed a putative class action lawsuit against Uber, alleging that Uber failed to safeguard his and other Uber drivers' and riders' personal information and mishandled a data security breach. Uber moved to compel arbitration of Grice's action under the Federal Arbitration Act ("FAA"). Grice opposed the motion, arguing that he was exempt under Section 1 of the FAA, which exempts from its coverage "contracts of employment" of three categories of workers: "seamen," "railroad employees," and a residual category comprising "any other class of workers engaged in foreign or interstate commerce." Specifically, Grice argued that he was part of a "class of workers engaged in foreign or interstate commerce" under Section 1 because he "[drove] passengers (who are engaged in interstate travel) and their luggage to and from airports." The district court disagreed and compelled arbitration. Grice petitioned the Court of Appeals for the Ninth Circuit for a writ of mandamus vacating the district court's referral to arbitration.

Court's Decision: The Court of Appeals for the Ninth Circuit denied the writ, explaining that mandamus could not be granted unless Grice demonstrated, at a minimum, that the district court's interpretation of the FAA exemption amounted to "clear error as a matter of law." The Ninth Circuit acknowledged that most courts have defined "transportation workers" to mean those engaged in the actual movement of *goods* in interstate commerce, but a broader interpretation—the actual movement of *people or goods*—has been embraced by several courts in recent decisions to address the status of rideshare drivers and other gig economy workers. However, the court ultimately held that, even accepting that there are some tensions between the district court's ruling and recent circuit cases addressing the scope and application of the exemption clause to the rideshare industry, the lack of controlling precedent forbidding the result reached by the district court foreclosed Grice from meeting his burden of showing a clear error as a matter of law.

IV. CIVIL PROCEDURE

A. Class and Representative Actions

***Doe v. Google, Inc.*, No. A157097, 2020 WL 5639449 (Cal. Ct. App. Sept. 21, 2020)**

Summary: *PAGA action arising from a confidentiality agreement that allegedly restrains competition, whistleblowing, and freedom of speech rights is not preempted by the National Labor Relations Act.*

Facts: Plaintiffs sued Google, Inc., Alphabet, Inc., and Adecco USA, Inc. (collectively, "Google") under the California Labor Code Private Attorneys General Act ("PAGA") alleging that Google required employees to sign a confidentiality agreement that restrained competition (*e.g.*, by prohibiting disclosing wages in negotiating a new job with a prospective employer), whistleblowing (*e.g.*, by prohibiting employees from disclosing violations of state and federal law to managers, private attorneys, or government officials), and freedom of speech (*e.g.*, by prohibiting engagement in lawful conduct during nonwork hours). Notably, Google's confidentiality agreement contained a "savings clause," which stated that the company's rules were not intended to limit employees' right to discuss wages, terms, or conditions of employment with other employees, or their right to communicate with government agencies regarding violations of law. Plaintiffs alleged the savings clause was meaningless and contrary to Google's policies and practices of enforcement. At the same time, Plaintiffs filed an unfair labor practice charge against Google with the National Labor Relations Board ("NLRB"). Google demurred to the entire state court complaint on the grounds that, under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the National Labor Relations Act ("NLRA") preempted Plaintiffs' confidentiality claims. The trial court sustained Google's demurrers without leave to amend. Plaintiffs appealed, asserting that the PAGA claims were not, in fact, preempted by the NLRA.

Court's Decision: The California Court of Appeal reversed. The court explained that, although the analysis is case-specific, there is a presumption that conduct which "arguably" constitutes an unfair labor practice under the NLRA is subject to *Garmon* preemption, unless the conduct is of "merely peripheral concern" to the NLRA or "the regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, the court of appeal could not infer that Congress had deprived the States of the power to act." Based on this test, the court of appeal concluded that both factors were met and warranted reversing the trial court's decision and allowing the PAGA suit to proceed. The complaint in this case made no mention of union organizing or other concerted activity, and alleged violations of state law that could be proven without considering whether Google's actions also amounted to unfair labor practices under the NLRA. The asserted statutes protecting competition, whistleblowing, and free speech fit within the state's historic police powers and address conduct affecting individual employees, as opposed to the NLRA's focus on concerted activity, and Plaintiffs' state court action posed no threat to the NLRA's exercise of its own jurisdiction.