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# California Employment Law Notes

**September 2023**

## Employers Owe No Duty Of Care To Prevent The Spread Of COVID To Employees' Household Members

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

The California Supreme Court unanimously ruled that employers are not liable to nonemployees who contract COVID-19 from employee household members who bring the virus home from their workplace, because "[a]n employer does not owe a duty of care under California law to prevent the spread of COVID-19 to employees' household members." The Ninth Circuit certified two questions to the California Supreme Court: (1) If an employee contracts COVID-19 at the workplace and brings the virus home to a spouse, does the California Workers' Compensation Act (Lab. Code, § 3200 *et seq*.) (the "WCA") bar the spouse's negligence claim against the employer; and (2) Does an employer owe a duty of care under California law to prevent the spread of COVID-19 to employees' household members? The court answered the first question in the plaintiff's favor, concluding "take home" COVID-19 claims do not fall under the Workers' Compensation regime and therefore are not barred by the exclusivity provisions of the WCA. However, as a practical matter, the court's ruling on the second question—that employers owe no such duty of care—bars negligence claims for COVID-19 infection by members of an employee's household.

Among other considerations, public policy concerns seemed to drive the Court's analysis:

> Imposing on employers a tort duty to each employee's household members to prevent the spread of this highly transmissible virus would throw open the courthouse doors to a deluge of lawsuits that would be both hard to prove and difficult to cull early in the proceedings. Although it is foreseeable that employees infected at work will carry the virus home and infect their loved ones, the dramatic expansion of liability plaintiffs' suit envisions has the potential to destroy businesses and curtail, if not outright end, the provision of essential public services. These are the type of "policy considerations [that] dictate a cause of action should not be sanctioned no matter how foreseeable the risk."

# School District Employer Did Not Violate The Law By Requiring COVID Vaccination/Weekly Testing

## *Rossi v. Sequoia Union Elementary Sch.*, 2023 WL 5498732 (Cal. Ct. App. 2023)

Pursuant to the State Public Health Officer Order of August 11, 2021, K-12 schools were required to verify the COVID-19 vaccination status of all school workers and to require proof of vaccination or weekly diagnostic screen testing. Plaintiff Gloria Elizabeth Rossi, an employee of the school district, refused to disclose her vaccination status or undergo weekly testing and would not consent to the school district's obtaining or disclosing her confidential medical information. Rossi was offered the option to work remotely, but she refused to do so, claiming she could not fulfill her job duties remotely. Ultimately, Rossi's employment was terminated for her refusal to comply with the district's test-or-vaccinate requirement. Rossi sued the district under the Confidentiality of Medical Information Act ("CMIA") for alleged discrimination based on her refusal to authorize a release of her confidential medical information and for unauthorized use of her medical information. The trial court sustained the district's demurrer without leave to amend, and the Court of Appeal affirmed dismissal on the ground that the necessity exception found within Cal. Civ. Code § 56.20(b) (i.e., complying with a lawful order of the State Public Health Officer) shielded defendants from liability as a matter of law.

# Employer Must Prove “Substantial Increased Costs” Would Result From Religious Accommodation

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

Gerald Groff, an Evangelical Christian, took a mail delivery job with the USPS at a time when postal service employees were was not required to work on Sundays. However, when the USPS began facilitating Sunday deliveries for Amazon, he was called upon to work Sundays, which ultimately resulted in his resignation from his employment after he was subjected to progressive discipline for refusing to work Sundays. Groff sued the USPS for violation of Title VII, alleging the postal service could have accommodated his Sunday Sabbath practice “without undue hardship on the conduct of [its] business.” The district court and the Court of Appeals for the Third Circuit ruled in favor of the USPS, holding that requiring an employer “to bear more than a de minimis cost to provide a religious accommodation is an undue hardship.” The lower courts held that exempting Groff from Sunday work had “imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale.” In this unanimous decision, the Supreme Court clarified earlier precedent (*Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977)) and vacated the lower court’s opinion, holding that an employer can show “undue hardship” when the burden of granting a religious accommodation would result in substantial increased costs in relation to the conduct of its particular business.

# Fire Chief Was Terminated For Misconduct Not Because Of His Religion

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

Ronald Hittle served as the City's Fire Chief before he was fired (following an investigation by an outside investigator) because he lacked effectiveness and judgment in his ongoing leadership of the Fire Department; used City time and a City vehicle to attend a religious event and approved on-duty attendance of other Fire Department managers; failed to properly report his time off; engaged in potential favoritism of certain employees; endorsed a private consultant's business in violation of City policy; 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." Hittle pointed to what he characterized as "direct evidence of discriminatory animus" based on a comment made by the Deputy City Manager Laurie Montes that Hittle was part of a "Christian coalition" and part of a "church clique" in the Fire Department. However, the evidence showed that Montes was repeating what was written in anonymous letters sent to the City and that the comment did not originate with Montes herself. The Court noted that such remarks were in any event "more akin to 'stray remarks' that have been held insufficient to establish discrimination." Further, based on the investigation, the Court held that defendants' legitimate non-discriminatory reasons for firing Hittle were not mere pretext for religious discrimination. *See also Crowe v. Wormuth*, 74 F.4$^{th}$ 1011 (9th Cir. 2023) (police officer's Title VII sexual orientation discrimination claim was properly dismissed on summary judgment despite homophobic language used by another officer who had participated in investigation into plaintiff's misconduct).

# Court Affirms $7.1 Million Whistleblower Verdict

## *Zirpel v. Alki David Prods., Inc.*, 93 Cal. App. 5th 563 (2023)

Karl Zirpel worked as the vice president of operations for Alki David Productions ("ADP") before the principal of ADP, Alki David, 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 ADP 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. Further, ADP did not argue in its post-trial motions that it had sustained its burden under Section 1102.6 to demonstrate by clear and convincing evidence that Zirpel was fired for reasons other than his disclosures concerning the absence of a construction permit and the city inspectors' disapproval of the work done to date on the construction project. The Court also affirmed the punitive damages award on the basis that there was sufficient evidence of reprehensible conduct (e.g., David's verbal abuse of Zirpel, which was "laced with obscenities and homophobic epithets"), which justified a 6:1 ratio of punitive to compensatory damages.

# Business Entity Agents Of Employer Share Potential FEHA Liability

## *Raines v. U.S. Healthworks Med. Group*, 2023 WL 5341067 (Cal. S. Ct. 2023)

The Ninth Circuit certified to the California Supreme Court the question of whether FEHA's definition of "employer" extends to corporate agents of the employer such as a company that conducts preemployment medical screenings. 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, including whether the applicants had cancer, mental illnesses, HIV or problems with menstrual periods. The applicants asserted FEHA claims against the prospective employers that used USHW to conduct the medical screenings and USHW itself as an "agent" of the employers. In this opinion, the Court examined FEHA's definition of "employer" and concluded the definition encompasses third-party corporate agents such as USHW.

# Arbitrator Correctly Enforced Release Agreement Executed By Employee

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

Elizabeth Castelo sued her former employer Xceed Financial Credit Union for wrongful termination and age discrimination in violation of FEHA. After the parties stipulated to binding arbitration, the arbitrator granted summary judgment to Xceed based on a release that Castelo signed after she was notified of the termination decision but before her last day on the job. Castelo argued that the release violated Cal. Civ. Code § 1668, which prohibits pre-dispute releases of liability. Although Xceed provided Castelo with 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) and then later contended that her wrongful termination claim was not barred by either release, because that claim "accrued" on the date of her separation, which occurred after the releases were executed. The arbitrator (the late Hon. Enrique Romero (ret.)) enforced the releases and determined that they 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. The trial court granted Xceed's petition to confirm the arbitration award and denied Castelo's petition to vacate. The Court of Appeal affirmed the trial court's judgment.

# PAGA Plaintiffs May Maintain Representative Claims In Court After Individual Claims Are Compelled To Arbitration

## *Adolph v. Uber Techs., Inc.*, 14 Cal. 5th 1104 (2023)

After months of anticipation, the California Supreme Court answered "yes" to the critical question of whether "aggrieved" PAGA plaintiffs retain their standing to pursue representative claims in court after their individual claims have been compelled to arbitration.

Erik Adolph worked as a driver for Uber, delivering food to customers through Uber's online platform. As a condition of his employment, Adolph had to accept a technology services agreement that contained an arbitration provision. The arbitration agreement required Adolph to arbitrate, on an individual basis, work-related claims he might have against Uber. The arbitration agreement also included a provision that purported to waive Adolph's ability to bring PAGA claims on behalf of others, either in court or through arbitration.

Adolph sued Uber, claiming that the company misclassified him and other drivers as independent contractors, rather than employees. Uber moved to compel arbitration of Adolph's individual claims, which the trial court granted; the trial court subsequently dismissed Adolph's class action claims that were pending in court. However, with the court's permission, Adolph amended his complaint to eliminate his individual claims and include only a PAGA claim for civil penalties and filed a motion for preliminary injunction to prevent arbitration from proceeding. The trial court then granted the injunction. Uber appealed the injunction order and attempted to compel arbitration again, but an appellate court affirmed the trial court's decision. Uber appealed that decision as well.

The California Supreme Court concluded in this opinion that PAGA plaintiffs do not lose their standing to pursue a non-individual claim when their individual claims are compelled to arbitration. The Court reasoned that denying a PAGA plaintiff standing to pursue the non-individual PAGA claims was inconsistent with PAGA's purpose, because it would undermine the State's ability to deputize individuals to enforce the Labor Code, reduce state revenues and increase state costs of enforcement. The Supreme Court further held that a trial court may stay the representative civil action pending arbitration, and following arbitration, the award may be confirmed in court, which would bind the parties in the pending court action. *See also Barrera v. Apple Am. Grp. LLC*, 2023 WL 5620678 (Cal. Ct. App. 2023).

# COVID-19 Emergency Order Extending Statute Of Limitations For Civil Cases Upheld

## *LaCour v. Marshalls of Cal., LLC*, 2023 WL 5543622 (Cal. Ct. App. 2023)

Plaintiff Robert LaCour, a former “loss prevention specialist” for Marshalls, appealed from a judgment in favor of his former employer and certain affiliated entities. Marshalls filed a demurrer arguing that because LaCour’s employment with Marshalls ended in May 2019, he had only a year and 65 days to bring a PAGA claim, and having missed that deadline, his PAGA action was untimely. Marshalls also filed a motion to strike. The trial court overruled Marshalls’ demurrer and granted its motion to strike in part. Marshalls later filed a motion for judgment on the pleadings, which was granted.

Marshalls argued that since LaCour’s employment ended in May 2019, he had up to a year and 65 days to file his civil complaint (i.e., August 2020 at the latest), taking into account the 65-day tolling period. However, in response to the COVID-19 pandemic, the PAGA statute of limitations was tolled from April 6, 2020, through October 30, 2020, which had the effect of extending the deadline to file with the California Labor & Workforce Development Agency (LWDA) a notice of a PAGA claim until November 24, 2020. Marshalls argued that the emergency rule was “unconstitutional and prohibited by statute,” but the appellate court rejected this argument, concluding that the state had the authority to toll the statutes of limitation for civil cases, including PAGA.

In addition, the trial court had granted the defendants’ motion for judgment on the pleadings because it found that a previous PAGA judgment based upon a settlement agreement had a preclusive effect. However, the appellate court rejected this argument and reversed the previous judgment. The appellate court held that in the earlier case, the initial LWDA notice dealt narrowly with a complaint regarding paying employees for off-the-clock work at the end of their shifts. However, the settlement release encompassed a wide swath of Labor Code violations not mentioned in the initial notice, unfairly limiting LaCour from pursuing his claims, which were broader.

## Non-Party Plaintiffs With Overlapping PAGA Claims May Be Able To “Permissibly Intervene” In Related Actions

### *Accurso v. In-N-Out Burgers*, 2023 WL 5543525 (Cal. Ct. App. 2023)

Plaintiffs Tom Piplack and Brianna Marie Taylor filed PAGA actions in Orange and Los Angeles Counties, respectively, against respondent In-N-Out Burgers (In-N-Out). When they learned about settlement negotiations in a later, overlapping PAGA action brought by Ryan Accurso against In-N-Out in Sonoma County, Piplack and Taylor filed a proposed complaint to intervene in the Sonoma County action and moved to intervene under Cal. Code Civ. Proc. § 387 and for a stay. They requested a stay of proceedings in Accurso's case based on the doctrine of exclusive concurrent jurisdiction, arguing that Accurso should be stayed as a later-filed action.

The trial court concluded that Piplack and Taylor lacked standing to intervene and on that basis denied the motions to intervene and to stay the case. "The Court finds that neither [Piplack nor Taylor] has a personal interest in the PAGA claims being prosecuted by Accurso, but rather the interest lies with the State, as the real party in interest, and thus [Piplack and Taylor] do not have standing to intervene." "[L]ikewise," the court ruled, they "do not have standing to request a stay." In this opinion, the appellate court vacated the order and remanded for reconsideration. It agreed that Piplack and Taylor did not have the ability to "intervene as of right," but concluded it was possible that they could permissively intervene. The trial court rejected Piplack and Taylor's ability to intervene out-of-hand, but the appellate court held that the trial court must weigh arguments the plaintiffs make in favor of staying the case (fully or partially) against any arguments Accurso and In-N-Out wish to offer as to why the motion should not be heard or should be denied.

# Disability Leave Is Not "Compensation" Under California Workers' Compensation Law

## *California Dep't of Corr. & Rehab. v. WCAB*, 2023 WL 5198517 (Cal. Ct. App. 2023)

Under the Workers' Compensation Act, if a worker is injured because of the employer's serious and willful misconduct, the "compensation" the worker is entitled to receive increases by one half. The statute defining "compensation" limits the term to benefits or payments provided by Division 4 of the Labor Code. In this case, the Court held that "compensation" does not include industrial disability leave, which is provided by the Government Code, and therefore is not subject to being increased by one half in cases of serious and willful employer misconduct.

While at his job as a correctional officer at the Lancaster State Prison in August 2002, respondent Michael Ayala was severely injured in a preplanned attack by inmates. He filed a workers' compensation claim and alleged that the injury was caused by the serious and willful misconduct of his employer, petitioner California Department of Corrections and Rehabilitation (CDCR). Labor Code § 4553 provides that "[t]he amount of compensation otherwise recoverable shall be increased one-half . . . where the employee is injured by reason of serious and willful misconduct" by the employer. Ayala and CDCR agreed that the injury caused Ayala 85% permanent disability, but they could not agree whether CDCR engaged in serious and willful misconduct.

The Workers' Compensation judge agreed with CDCR and found that the base compensation was what Ayala would have been paid in temporary disability. But on reconsideration, the Board again rescinded and reversed the workers' compensation judge's decision, this time finding that the base compensation was what Ayala was paid on industrial disability leave and enhanced industrial disability leave. The appellate court held that industrial disability leave and enhanced industrial disability leave are not "compensation" as that term is used in section 4553 and thus are not subject to a 50 percent increase.

## Nurse May Proceed With Class Certification On Wage Statement Claim

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

Nicole Woodworth was a registered nurse at Loma Linda University Medical Center from December 2011 to June 2014. In June 2014, she filed a putative class action against Loma Linda, alleging various wage and hour claims on behalf of herself and other employees. She later amended her complaint to add a cause of action under the PAGA. After several years of litigation, only her individual PAGA claim for failure to provide rest periods remained.

The Court of Appeal reversed many of the previous orders in the litigation, including, in part, the order denying class certification. The appellate court determined that the trial court erred with respect to Woodworth's proposed stand-alone wage statement class, which consisted of employees who received allegedly inaccurate wage statements and remanded for reconsideration certification of the class. Woodworth alleged that prior to June 2018, the medical center issued wage statements that did not include a line showing total hours worked by an employee. The trial court held that common questions did not predominate among the putative class because the wage statements of different workers at the medical center were too varied and determining liability would require an individualized review of the wage statements. However, the appellate court said that a theory of liability would require different "samples" to prove liability, but it would not require a review of each wage statement. The appellate court also held that trial courts may not strike or dismiss PAGA claims for a lack of manageability; instead, when facing "unwieldy" PAGA claims, trial courts may limit the scope of the claims or the evidence presented at trial.

# Principal Of Former Employer Liable Based On Alter Ego Theory

## *Hacker v. Fabe*, 92 Cal. App. 5th 1267 (2023)

In 2005, attorney Jacqueline Fabe filed claim for unpaid wages against her employer with the Labor Commissioner. Her employer then filed a malpractice suit against Fabe, and Fabe in response filed a retaliation suit with the Labor Commissioner. Fabe and the Labor Commissioner later won on all claims. In March 2010, Fabe filed a motion to add Ron Hacker, the principal of Fabe's former employer, to the judgment as a judgment debtor. This motion was denied without prejudice. Fabe and the Commissioner tried to enforce the judgment against Fabe's employer for years without success.

After years of back-and-forth, in 2020, the trial court granted a motion by the Labor Commissioner to amend the judgment to add Hacker as an alter ego judgment debtor. Hacker appealed this order. He contended there was “virtually no evidence” he commingled his assets or operations with those of the judgment debtor; that the original judgment was not renewed during the 10-year limitation period; the doctrine of laches bars the alter ego motion; and the denial of an earlier alter ego motion barred the current motion under *res judicata* principles.

The Court of Appeal rejected Hacker’s arguments and affirmed the trial court’s order and judgment.  The court cited Hacker’s complete control over Fabe’s former employer, his control of the litigation, his sharing of attorneys with Fabe’s former employer, his transfer of the company to another person immediately after the judgment and his destruction of relevant records of assets as evidence that Hacker acted in bad faith and was hiding behind the corporate shell of Fabe’s former employer.  Hacker’s other arguments for why he should not be added as a judgment debtor were also rejected.

**Related Professionals**


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