Proskauer

# California Employment Law Notes

**July 2024**

## Employee Who Wanted To Donate/Freeze Her Eggs Was Not Protected By Pregnancy Statute

### *Paleny v. Fireplace Products U.S., Inc.,* 103 Cal. App. 5th 199 (2024)

Erika Paleny alleged harassment, discrimination and retaliation after informing her manager that she would be undergoing oocyte retrieval procedures so she could donate and freeze her eggs for her potential use at some unknown time in the future. The trial court granted the employer's motion for summary judgment on the ground that the egg retrieval and freezing procedures do not qualify as a "pregnancy-related medical condition or disability" and were therefore not protected by the California Fair Employment and Housing Act ("FEHA"). The Court of Appeal affirmed dismissal on summary judgment, holding that because Paleny was not pregnant or disabled by pregnancy or suffering from a medical condition related to pregnancy, she was not protected by FEHA.

## Whistleblower Claim Was Properly Resolved Against Employee

### *Ververka v. Department of Veterans Affairs*, 102 Cal. App. 5th 162 (2024)

Donald Ververka alleged that his employer, the California Department of Veterans Affairs ("CalVet"), had terminated him in violation of the whistleblower statute, Cal. Lab. Code § 1102.6. A jury determined that although Ververka had made protected disclosures that were "contributing factors" in CalVet's decision to fire him, CalVet was not liable because it met its burden under the statute to prove that it would have made the same decision for non-retaliatory reasons. After the judgment was entered, Ververka moved to vacate the judgment, but the trial court denied the motion. The Court of Appeal affirmed, holding that Ververka's reliance upon case law arising under the Fair Employment and Housing Act was misplaced and that an employer's "same decision" showing is a complete defense under Section 1102.6.

# $1.4 Million Age Discrimination Judgment Upheld

## *Hoglund v. Sierra Nev. Memorial-Miners Hosp.*, 102 Cal. App. 5th 56 (2024)

Following a bench trial, the trial court found in favor of Jessica Hoglund, a former laboratory supervisor who supervised all of the phlebotomists at the Hospital. Hoglund, age 56, alleged her former supervisor, Rhonda Horne who was six years younger than Hoglund, had harassed and discriminated against her because of her age. The trial court awarded Hoglund $881,800 in economic damages (lost wages) and $550,000 in noneconomic, emotional distress damages. The trial court also awarded Hoglund more than $1 million in prevailing-party attorney's fees and costs. The Court of Appeal affirmed, holding that the continuing violation doctrine applied and, therefore, the statute of limitations did not bar Hoglund's claims even though the alleged unlawful conduct began in 2011 and Hoglund did not file her administrative complaint until 2018. The Court also rejected the Hospital's contention that the verdict was not supported by substantial evidence, citing "copious evidence of Horne's age discrimination" against Hoglund.

# Sexual Harassment Defendant Properly Challenged California Jurisdiction

## *Hardell v. Vanzyl*, 102 Cal. App. 5th. 960 (2024)

Cailin Hardell sued Adrian Vanzyl among others for sexual assault and battery, sexual harassment and retaliation arising from an incident that occurred in Miami, Florida in March 2022. Vanzyl moved to quash service of the summons of the complaint on the ground that he was a non-resident of California and that he had insufficient contacts with California at the time of the incident for the trial court to exercise jurisdiction over him. The trial court agreed with Vanzyl and quashed service and denied Hardell's request to conduct jurisdictional discovery. The Court of Appeal agreed that the connection between Hardell's claims against Vanzyl was too attenuated to support specific jurisdiction over him, but further held the trial court erred in failing to permit Hardell to conduct jurisdictional discovery to determine whether it could exercise general jurisdiction over him. *Cf. Bercy v. City of Phoenix*, 103 F.4th 591 (9th Cir. 2024) (harassment claims involving conduct that allegedly occurred in part after plaintiff filed for bankruptcy belonged to the bankruptcy estate and not to plaintiff personally).

# Lyft Owes No Duty To Its Drivers To Do Background Checks On Riders

## *Al Shikha v. Lyft, Inc.*, 102 Cal. App. 5th 14 (2024)

While working as a Lyft driver, Abdu Lkader Al Shikra was stabbed by a passenger in a "sudden and unprovoked attack." Al Shikra sued Lyft for negligence based on its failure to conduct criminal background checks on all passengers. The trial court granted Lyft's motion for judgment on the pleadings, and the Court of Appeal affirmed dismissal of the complaint after concluding that conducting criminal background checks on all passengers would be "highly burdensome" to Lyft and that the type of harm Al Shikha suffered was not "highly foreseeable."

# Employer Properly Terminated Employee Who May Have Faked Injury

## *Perez v. Barrick Goldstrike Mines, Inc.*, 105 F.4th 1222 (9th Cir. 2024)

Thomas Perez, who worked as an underground haul truck driver for Barrick, alleged he was terminated in violation of the Family and Medical Leave Act (the "FMLA") after he took a leave of absence following an injury he allegedly suffered while on the job. An on-site emergency medical technician did not observe any outward signs of injury to Perez, no abnormalities in his X-rays or in the functioning of his heart or lungs. However, because Perez claimed he was suffering from severe pain, the doctor certified that he remain off work for five days and then, later, for another 11 days. After Barrick investigated the accident, it found no physical evidence that Perez's truck had collided with the side of the mine (as Perez had claimed) and received information from another employee that "Perez is faking a work-related injury in order to take time off to work on personal business (fixing rental properties)." The jury returned a verdict in favor of Barrick, finding that Perez had not shown by a preponderance of the evidence that he suffered a serious health condition or that he was terminated for seeking protected leave. Perez argued in the appeal that the district court should have instructed the jury that the only proper way for Barrick to challenge the medical certification that Perez had obtained would have been to obtain recertifications or subsequent opinions from additional medical experts. The Ninth Circuit held that an employer *may* present contrary medical evidence to defeat a doctor's certification in an FMLA certification case, but the statute does not require a second or third opinion or to seek recertifications. Thus, the jury was permitted to consider the non-medical evidence that Barrick had offered at trial in support of its position that Perez did not have a serious health condition within the meaning of the FMLA.

# Supreme Court Reshapes Administrative Law

### ***Loper Bright Enterprises v. Raimondo*, 603 U.S. ___, 144 S. Ct. 2244 (2024); *Corner Post, Inc. v. Board of Governors of Fed. Reserve Sys.*, 603 U.S. ___, 144 S. Ct. 2440 (2024)**

The United States Supreme Court has overruled its own opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and held that federal courts (not administrative agencies) are the final decision-makers regarding the meaning of otherwise ambiguous statutes. Before *Loper Bright*, when faced with an ambiguity in a statute, federal courts applied a two-step analysis, inquiring: (1) whether Congress directly spoke to the precise question at issue; and (2) if the statute is ambiguous, is the administrative agency's interpretation permissible and, if so, defer to that interpretation. *Loper Bright* eliminates "mechanical" judicial deference to an agency's interpretation.

Three days after the *Loper Bright* decision was issued, the Court held that a claim brought challenging a federal regulation accrues when the plaintiff was first injured, not when the regulation was initially promulgated. In *Corner Post*, the Court determined that the six-year statute of limitations for the claims of companies challenging credit-card interchange fees under a Federal Reserve Board regulation began accruing when they first paid the fees, rather than the earlier date in 2011 when the regulation was issued.

Because a newly incorporated company may now challenge virtually any regulation to which it is subject, there is effectively no longer any limitations period for such lawsuits, as Justice Jackson wrote in dissent. In combination with *Loper Bright*, *Corner Post* creates the potential for successful challenges not only to new regulations, but also to well-established ones that are decades old.

# Supreme Court Clarifies Federal Arbitration Act

## ***Smith v. Spizzirri*, 601 U.S. 472 (2024); *Coinbase, Inc. v. Suski*, 144 S. Ct. 1186 (2024)**

In *Smith*, the Court held that under Section 3 of the Federal Arbitration Act, when a federal court determines that a dispute is subject to arbitration, and a party requests a stay of the court proceeding pending arbitration, Section 3 compels the court to issue a stay, and the court lacks the discretion to dismiss the suit pending the outcome of the arbitration. Per the Court, Section 3 "overrides any discretion a district court might otherwise have had to dismiss a suit when the parties have agreed to arbitration." In *Coinbase*, the Court held that when parties rely on two inconsistent documents, one which states that disputes under the contract are arbitrable, and the other stating that all disputes under the contract must be decided by a court, a court must decide which document controls. The issue arose because Coinbase's user agreement broadly calls for arbitration, but Coinbase also offered a sweepstakes for users to win the cryptocurrency "Dogecoin." The rules of the sweepstakes provided that each entrant in the sweepstakes must submit to the jurisdiction of California courts. The Court held that "a court, not an arbitrator" must decide whether the sweepstakes rules superseded the user agreement.

## Employer Failed to Provide Sufficient Proof That Employee Actually E-Signed Arbitration Agreement

### *Garcia v. Stoneledge Furniture LLC*, 102 Cal. App. 5th 41 (2024)

On the first day of Isabel Garcia's employment, she completed onboarding paperwork electronically. When in 2021, Garcia sued her employer under the Fair Employment and Housing Act alleging a store manager sexually assaulted her, the employer moved to compel arbitration. Garcia opposed to the motion to compel by denying that she ever actually electronically signed the arbitration agreement and said she did not remember anyone ever asking her to do so. The trial court denied the motion to compel arbitration, and the appellate court affirmed on the ground that the employer failed to prove the authenticity of the signature, and the evidence it provided did not show that *only* Garcia could have placed the electronic signature on the arbitration agreement. The employer could have presented stronger evidence "that the signatory was required to use a unique, private login and password to affix the electronic signature, along with evidence detailing the procedures the person had to follow to electronically sign the document and the accompanying security precautions." Instead, the employer submitted evidence in a declaration that only "summarily concluded" that Garcia signed the arbitration agreement. *See also Ramirez v. Golden Queen Mining Co., LLC*, 102 Cal. App. 5th 821 (2024) (reversing trial court's denial of motion to compel arbitration, holding that plaintiff's declaration that he did not remember signing arbitration agreement did not rebut the employer's initial showing that an arbitration agreement existed).

# FAA Preempts Latest California Anti-Arbitration Statute

## ***Hernandez v. Sohnen Enterprises, Inc.*, 102 Cal. App. 5th 222 (2024)**

In this decision, the Court of Appeal held that the Federal Arbitration Act (FAA) preempts California Code of Civil Procedure Section 1281.97, which requires that an employer pay (and the arbitrator receive) all arbitration fees that are owed within 30 days or face an automatic "waiver" of the right to arbitrate. The Court relied in part upon Justice John Shepard Wiley Jr.'s spirited dissent in *Hohenshelt v. Superior Court*, 99 Cal. App. 5th 1319 (2024) (*review granted*). Likely the most important takeaway from *Hernandez* is that employers should confirm that their arbitration agreement expressly states that it is governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* Failure to invoke the FAA may mean that the more employee-friendly (and *arbitration-hostile*) California Arbitration Act (including Section 1281.97) will apply. *Compare Keeton v. Tesla, Inc.*, 103 Cal. App. 5th 26 (2024) (disagreeing with *Hernandez* and holding that Section 1281.98 is not unconstitutional, noting that "*Hernandez* is distinguishable [from *Keeton*] because the arbitration agreement in that case specifically said it was governed by the FAA").

# Employer Fails to Show that Former Employee Had Express or Implicit Agreement to Arbitrate

## *Mar v. Perkins*, 102 Cal. App. 5th 201 (2024)

Winston Mar brought an action against SierraConstellation Partners, LLC and its CEO (collectively, the "Sierra defendants"), alleging that the LLC had to purchase his partnership interest within 120 days of written notice of his dissociation. In response, the Sierra defendants filed a motion to compel arbitration, arguing that Mar was an employee bound by the arbitration agreement in the LLC's handbook. The trial court denied the motion to compel, and the Court of Appeal affirmed, holding that the Sierra defendants did not meet their burden to show an express or implied-in-fact agreement to arbitrate was formed. The company's handbook included a signature line for employees, which Mar had refused to sign. When Mar told the LLC's Chief People Officer he would not sign the arbitration agreement, the Chief People Officer responded that if he continued to work for the Sierra defendants, he would be deemed to have accepted the terms of the Employee Handbook, including the arbitration agreement. The Sierra defendants argued that because Mar continued to work for the Sierra defendants after refusing to sign the arbitration agreement, he was implicitly bound by the arbitration agreement. The Court rejected this argument, holding that "Where an employee promptly and unequivocally rejects an arbitration agreement as a modified term of employment, mutual assent to arbitrate is lacking."

# Ninth Circuit OKs ABC-Test Statute Despite Different Classification Tests For Different Workers

## *Olson v. State of Cal.*, 104 F.4th 66 (9th Cir. 2024) (*en banc*)

California's Assembly Bill 5 ("AB 5"), which was enacted in 2018, subjects different but similar types of workers to different kinds of classification tests. In December 2019, rideshare driver Lydia Olson, alongside Uber and Postmates, filed a complaint against the State of California attempting to enjoin the state from enforcing AB 5 on Equal Protection and Due Process grounds, among others. In this *en banc* opinion, the Ninth Circuit held that AB 5 properly provides one test to determine the classification of Uber drivers as either independent contractors or employees, while using another test for dogwalkers who provide services through the app Wag! The Ninth Circuit explained that the distinction between Uber and Wag! is rational and does not violate the Constitution because the California legislature perceived "Uber, Postmates, and other transportation and delivery services as more substantial contributors to the problem of [worker] misclassification than referral agencies engaged in other services [like dog-walking]."

# Section 1981 Prohibits Employers From Discriminating Against United States Citizens

## *Rajaram v. Meta Platforms, Inc.*, 105 F.4th 1179 (9th Cir. 2024)

Plaintiff Purushothaman Rajaram, a naturalized U.S. citizen, applied unsuccessfully to work for Meta Platforms, Inc. several times. Rajaram alleged that Meta refused to hire him because it preferred to hire noncitizens holding an H-1B visa to whom Meta could pay lower wages. Rajaram's sole claim in this lawsuit was that Meta violated 42 U.S.C. § 1981 ("Section 1981") by discriminating against U.S. citizens in hiring. The district court dismissed Rajaram's complaint, holding that Section 1981 does not bar discrimination based on U.S. citizenship, but the Ninth Circuit reversed, holding that "An employer that discriminates against United States citizens gives one class of people—noncitizens, or perhaps some subset of noncitizens—a greater right to make contracts than 'white citizens.' If some noncitizens have a greater right to make contracts than 'white citizens,' then it is not true that '[a]ll persons' have the 'same right' to make contracts as 'white citizens.'"

# Employer May Have Fraudulently Concealed COVID-19 Outbreak

## *Chavez v. Alco Harvesting, LLC*, 102 Cal. App. 5th 866 (2024)

Plaintiff Maria Chavez's husband alleged that her husband died due to COVID-19 complications in July 2020, after contracting the disease while working for his employer, Alco Harvesting, LLC. Per Chavez's complaint, the company placed Chavez's husband in "close living quarters" that precluded social distancing and "facilitated the transmission of COVID-19." Alco allegedly became aware of a COVID-19 outbreak where Chavez's husband resided, but it failed to report the outbreak to the health department or notify its employees. The complaint alleges that a week elapsed between the deceased employee's reporting his symptoms to Alco and a positive COVID-19 test and that he died five days after that positive test. The trial court sustained the employer's demurrer, but the Court of Appeal reversed the dismissal, holding that Chavez sufficiently pled all elements of the fraudulent concealment exception to the Workers' Compensation Act's exclusivity rule: (1) the employer knew that the plaintiff had suffered a work-related injury; (2) the employer concealed that knowledge from the plaintiff; and (3) the injury was aggravated as a result of such concealment. *Cf. Frayo v. Martin*, 102 Cal. App. 5th 1025 (2024) (holding that former employee who alleged his employer terminated him because he refused to take a COVID-19 test failed to state a prima facie discrimination case under California's Confidentiality of Medical Information Act.)

# Prelitigation PAGA Notice Satisfied Legal Requirements

## *Ibarra v. Chuy & Sons Labor, Inc.*, 102 Cal. App. 5th 874 (2024)

The trial court dismissed Edelmira Ibarra's action under the Private Attorneys General Act of 2004 ("PAGA") on the ground that Ibarra failed to comply with PAGA's prefiling notice requirements. Ibarra's notice identified four named defendants who employed Ibarra from January 2021 to July 2021 and alleged that all four defendants committed numerous wage and hour violations against her "and all other current and former non-exempt employees of Employers in the State of California during the last four years." Defendants argued that the prelitigation notice did not clearly identify the "aggrieved employees" at issue in the lawsuit. The Court of Appeal reversed the trial court's dismissal, holding that the Labor Code does not specify that "aggrieved employees" be defined in a particular way. Instead, the prefiling notice must be specific enough that the Labor Workforce and Development Agency and any defendants can understand the factual basis for the alleged violations. Under this standard, Ibarra's notice was sufficient.

# Time Employees Spent “Booting Up and Shutting Down” Computers Could Be Compensable

## *Cadena v. Customer Connexx LLC*, 2024 WL 3352712 (9th Cir. July 10, 2024)

Customer Connexx LLC operates a call center for an appliance recycling business, and plaintiffs Cariene Cadena and Andrew Gonzales worked as call center agents for the company. As part of their jobs, agents had to use an electronic timekeeping software to track when they clocked in and out. To clock in and out, plaintiffs had to have a functioning computer, but at the call center plaintiffs allegedly would often have to boot up and shut down the computers during the workday. Cadena and Gonzales filed a collective action under the Fair Labor Standards Act (FLSA), alleging that “Connexx owed its call center workers unpaid overtime wages under the FLSA for booting up and booting down their computers before and after clocking into the company's timekeeping software program each shift.”

Previously, in *Cadena v. Customer Connexx LLC*, 51 F.4th 831 (9th Cir. 2022), the Ninth Circuit concluded that time spent booting up computers is compensable under the FLSA because it is an “integral and indispensable” part of call center agents’ duties, but remanded the case to determine whether the time spent booting up and shutting the down the computers was “*de minimis*,” which would mean Connexx did not have to pay overtime for this work. A district court then granted summary judgment to Connexx, concluding that the time spent on booting up and shutting down computers was *de minimis*. Plaintiffs appealed this decision, and the case ended up back in the Ninth Circuit. In this latest opinion, the Ninth Circuit affirmed that the *de minimis* doctrine remains good law, but stated that granting summary judgment for Connexx at this stage was inappropriate, as “when the summary judgment record is viewed in the light most favorable to [plaintiffs], the regularity of the work and the lack of practical difficulty in recording the time favor a conclusion that the time at issue is not *de minimis*.” The Ninth Circuit then remanded the case back to the district court level, stating a trial would be necessary to resolve the disputed fact issues.

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