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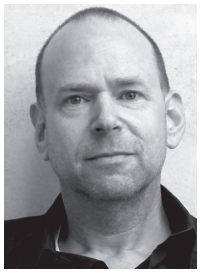

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Employment Law

By Andrew H. Friedman

2015 brought about legislation and cases that were, on the whole, decidedly favorable for employees. This article attempts to "cherry-pick" and then summarize not just the most important laws and cases from 2015 but also those that are of the most utility to the employment practitioner, whether defense, plaintiff or neutral.

■ Legislative Update

Continuing their annual tradition, the California State Legislature continued to pass, and Governor Brown continued to sign, numerous labor and employment bills that will affect the workplace in significant ways. Generally speaking, these new laws will extend additional protections to employees. What follows are brief summaries of some of the more impactful new laws. Unless noted otherwise, the new legislation became effective January 1, 2016.

Wow that was quick!

The California Legislature rapidly responded to and legislatively reversed several court decisions with which it disagreed. For example, on February 10, 2015, the Court of Appeal held, in *Gerard v. Orange Coast Memorial Medical Center*[1], that an Industrial Welfare Commission ("IWC") wage order which allowed certain health care workers to waive their second meal periods when they worked shifts longer than 12 hours was invalid. Less than eight months later, Governor Brown signed SB 327 into law, which legislatively reversed *Gerard*.[2] Both management and labor supported SB 327. Likewise, the Legislature reversed a curious decision in *Nealy v. City of Santa Monica*.[3] In that case, the Court of Appeal, relying on another poorly decided case (*Rope v. Auto-Clor System of Washington, Inc.*[4]), held that an employee who had requested a reasonable accommodation for his disability had not engaged in protected activity and that his employer could, therefore, lawfully retaliate against him and fire him for making such a request. Less than six months later, Governor Brown reversed those parts of the *Nealy* and *Rope* decisions by signing AB 987 into law. AB 987 amended Government Code section 12940, subdivisions (l) and (m) to expressly provide that a request for reasonable accommodation based on religion and/or disability constitutes protected activity under California's Fair Employment and Housing Act.

California Enacts the Country's Strictest Equal Pay Protections

The most pro-employee bill signed into law during 2015 was SB 358, the California Fair Pay Act. SB 358, the most aggressive equal pay law in the country, amended Labor Code section 1197.5 to prohibit employers from paying an employee at a wage rate less than that paid to any employees of the opposite sex for doing substantially similar work—when viewed as a composite of skill, effort, and responsibility. The new legislation requires employers to affirmatively demonstrate that a wage differential is based entirely and reasonably upon enumerated factors other than gender, such as:

- a seniority system;
- a merit system;
- a system that measures earnings by quantity or quality of production; or
- a bona fide factor that is not based on or derived from a sex-based differential in compensation and that is consistent with a business necessity.

Under the California Fair Pay Act, employers may not prohibit employees from disclosing or discussing their own wages or the wages of others, or from aiding or encouraging other employees to exercise their rights under the law. Finally, the new law contains anti-retaliation provisions and provides a private right of action to enforce its provisions.

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1. (2015) 234 Cal.App.4th 285, review granted May 20, 2015, S225205.
2. SB 327 amended Labor Code section 516 and became effective on October 5, 2015.
3. (2015) 234 Cal.App.4th 359.
4. (2015) 220 Cal.App.4th 635.

Family Members of Labor Code Whistleblowers Are Granted Protections From Retaliation

AB 1509 amended Labor Code sections 98.6, 1102.5 and 6310 to prohibit employers from retaliating against employees because a family member has, or is perceived to have, engaged in protected conduct or made a protected complaint (such as whistleblowing).

Piece-Rate Employees Are Granted Additional Protections

With the enactment of AB 1513, California tightened a loophole in the state's wage and hour laws that plaintiff employment attorneys argued allowed employers to deprive piece-rate employees of some of their rights. AB 1513 added section 226.2 to the Labor Code, which will provide three primary protections for piece-rate workers. First, section 226.2 mandates that employers must pay piece-rate employees for rest and recovery periods as well as all other periods of "other nonproductive time" separately from, and in addition to, their piece-rate pay. Second, section 226.2 requires employers to use a specific formula by which to pay a wage rate calculated on a workweek-by-workweek basis. Some employer organizations are already arguing that this formula is so complex that it will effectively make it impossible for employers to employ piece-rate employees. Finally, because section 226.2 does not contain a collective bargaining exemption, it will even protect unionized employees. Newly enacted Section 226.2 also provides a safe harbor to employers for any claim for wages, damages, liquidated damages, statutory penalties, or civil penalties based solely on the employer's failure to timely pay the employee the compensation due for rest and recovery periods and other nonproductive time for time periods prior to and including December 31, 2015, if, by no later than December 15, 2016, the employer complies with specified requirements, subject to specified exceptions.

Labor Commissioner Given Enhanced Powers to Enforce Employee Claims

SB 588 amended the Code of Civil Procedure and the Labor Code to enhance the ability of the Labor Commissioner to collect judgments against employers and other persons acting on behalf of an employer who are liable for unpaid wages.[5] The Labor Commissioner now has authority to issue a lien against an employer's property for the amount of the judgment. Under newly enacted Labor Code section 96.8, the Labor Commissioner can also collect a judgment by executing a levy on property in the possession of third parties, such as the employer's debtors. If an employer fails to pay a judgment entered against it within 30 days after the time to appeal the judgment, the employer must obtain a bond in order to continue to do business in California. Perhaps most importantly, the new law amended the Labor Code to add section 558.1 to provide for personal liability for owners, directors, officers, and managing agents of the employer who violate, or cause to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violate, or cause to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802.

Grocery Workers Given Expanded Protections

Together, AB 359 and AB 897 provide for a 90-day retention period of grocery store employees following a change of ownership. AB 359 and AB 897 amended the Labor Code to add sections 2500-2522, which require a "successor grocery store employer" to retain the current grocery workers for 90 days upon the "change in control" of a grocery store.[6] The new law, which will apply to retail stores in California that are over 15,000 square feet in size and that primarily sell household foodstuffs for offsite consumption, also requires the successor grocery store to evaluate the performance of each retained employee at the end of the 90-day transition period and "consider offering" continued employment to eligible workers.[7]

Professional Sports Team Cheerleaders Deemed Employees

With the signing of AB 202, which added section 2754 to the Labor Code, California-based professional and minor league sports teams are required to classify cheerleaders as employees.

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5. SB 588 added sections 690.020 through 690.050 to the Code of Civil Procedure, added sections 98.6, 238 through 238.5 and 558.1 to the Labor Code, and amended Labor Code section 98, all relating to enforcement of judgments by the Labor Commissioner.
6. The law permits both discharge for cause, and necessary reductions-in-force with retention based on seniority. Labor Code § 2507, subds. (b) and (c).
7. Labor Code § 2506, subd. (d).

Narrowly Tailored PAGA Cure Period Established

In one of the few bills to favor employers, Governor Brown signed AB 1506 into law, amending California's Private Attorneys General Act ("PAGA"), codified in Labor Code sections 2699, 2699.3, and 2699.5. As a result, PAGA now gives employers a narrow right to cure certain wage-statement violations before an aggrieved employee may sue under PAGA. As an emergency piece of legislation, this bill became effective upon the Governor's signature on October 2, 2015.

Governor Vetoes Bills Designed to Enhance Workplace Fairness

Unfortunately for employees, Governor Brown vetoed three bills essential to providing a fair workplace: AB 465 (which would have precluded mandatory predispute employment arbitration agreements); AB 676 (which would have prohibited an employer from discriminating against job applicants based on the applicant's status as unemployed); and AB 1017 (which would have prohibited an employer from seeking salary information from an applicant for employment).

■ Case Law Update

Continuing a nearly two-decade tradition, the California state and federal courts issued, on an almost daily basis, a veritable torrent of employment decisions in 2015. In addition, the U.S. Supreme Court issued an unusually large number of opinions impacting labor and employment practitioners.

The U.S. Supreme Court

An important whistleblowing case decided in 2015 was *Dep't of Homeland Sec. v. MacLean*.[8] *MacLean* demonstrates that, while the Supreme Court, as currently comprised with five Republican appointees and four Democratic appointees, is generally hostile to employment claims, it makes an exception for retaliation cases. Indeed, plaintiff employees have now prevailed in an astonishing 10 of the 11 retaliation cases decided by the court since 2005.[9] At issue in *MacLean* was an interpretation of a provision of the Whistleblower Protection Act of 1989 ("WPA"). The WPA generally provides whistleblower protections to federal employees who disclose information revealing "any violation of any law, rule, or regulation," or "a substantial and specific danger to public health or safety."[10] However, federal employees who make disclosures that are "specifically prohibited by law" are not protected by the WPA. In *Maclean*, the Merit Systems Protection Board upheld the termination of the plaintiff, Robert J. MacLean, from his employment with the Transportation Security Administration ("TSA") due to his unauthorized disclosure of sensitive security information.

MacLean was a federal air marshal who disclosed to MSNBC that the TSA had decided to cut costs by removing air marshals from certain long-distance flights thought by the Department of Homeland Security to be at a high risk for a terrorist attack. MSNBC then aired the story, members of Congress expressed outrage over the cancellations, and, within

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8. (2015) ___ U.S.___ [135 S.Ct. 913].
9. See *Jackson v. Birmingham Bd. of Educ.* (2005) 544 U.S. 167 (Justice O'Connor)(Supreme Court held 5-4 that although Title IX lacks any anti-retaliation language, it nonetheless prohibits retaliation); *Burlington Northern and Santa Fe Ry. Co. v. White* (2006)548 U.S. 53 (Justice Breyer)(Supreme Court held 9-0 that a plaintiff proves retaliation if a reasonable employee would have found the challenged action materially adverse – this decision specifically rejected the holdings of many Circuit Courts of Appeal that a retaliation claim would only lay if the plaintiff suffered an ultimate adverse employment action like a demotion, pay decrease or termination); *CBOCS West, Inc. v. Humphries* (2008) 553 U.S. 442 (Justice Breyer)(Supreme Court held 7-2 that although Section 1981 lacks anti-retaliation language, it nonetheless prohibits retaliation); *Gomez-Perez v. Potter* (2008) 553 U.S. 474 (Justice Alito) (Supreme Court held 6-3 that although the ADEA's prohibition against age discrimination toward federal employees lacks any anti-retaliation language, it nonetheless prohibits retaliation); *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.* (2009) 555 U.S. 271 (Justice Souter)(Supreme Court held 9-0 that an employee who was merely interviewed during a company's internal investigation into another employee's complaint of sexual harassment was protected from retaliation under Title VII's "Opposition Clause" even though she never complained about sexual harassment); *Thompson v. North Am. Stainless, LP* (2011) 562 U.S. 170 (Justice Scalia) (holding that Title VII creates a cause of action for third-party retaliation for persons who did not themselves engage in protected activity); *Kasten v. Saint-Gobain Performance Plastics Corp.* (2011) 563 U.S. 1 (Justice Breyer)(holding 6-2 that the scope of the statutory term "filed any complaint" under the FLSA includes oral, as well as written, complaints); *Lane v. Franks* (2014) ___ U.S. ___ [134 S.Ct. 2369] (Justice Sotomayor) (director's sworn testimony at former program employee's corruption trials was citizen speech eligible for First Amendment protection, not unprotected employee speech); *Lawson v. FMR LLC* (2014) ___ U.S. ___ [134 S.Ct. 1158] (Justice Ginsburg)(whistleblower protection under Sarbanes–Oxley extended to employees of private contractors and subcontractors serving public companies). The one aberration in this winning streak – *Univ. of Texas Sw. Med. Ctr. v. Nassar* (2103) ___ U.S. ____ [133 S.Ct. 2517] (Justice Kennedy) (Holding 5 – 4 that Title VII retaliation claims must be proved according to traditional principles of but-for causation).
10. 5 U.S.C. § 2302(b)(8)(A).

24 hours, the TSA reversed its decision and put air marshals back on the flights. Rather than attempting to determine who decided to pull air marshals from the most at-risk flights, the TSA sought to find and punish the whistleblower. Eventually, MacLean appeared on NBC Nightly News to criticize the TSA's dress code for air marshals, which he believed made them too easy to identify. Although MacLean appeared in disguise, the TSA identified him and, during its investigation of his NBC appearance, confirmed that he was the person who had blown the whistle to MSNBC. Accordingly, the TSA fired MacLean for disclosing sensitive security information without authorization in violation of one of its regulations. The Supreme Court was then called upon to decide whether the TSA regulation prohibiting the disclosure of "sensitive information" meant that MacLean's disclosure was "specifically prohibited by law." The Supreme Court held that MacLean could proceed with his lawsuit because, although his disclosure violated the TSA's regulations, it was not "specifically prohibited by law." Ultimately, the Supreme Court's holding, while extremely narrow, validates the anecdotal view that employers do not fare well before the Supreme Court in retaliation cases.

Another extremely important case, this time in the context of religious discrimination, is *EEOC v. Abercrombie & Fitch Stores, Inc.*,[11] which will make it easier for an applicant/employee to sue for religious discrimination. In *Abercrombie*, the plaintiff, Samantha Elauf, applied for employment with Abercrombie & Fitch. Although Elauf wore a headscarf (pursuant to her religious obligations as a Muslim) to her interview, neither she nor the Assistant Store Manager who interviewed her mentioned the headscarf or religion. Despite the lack of discussion about the headscarf or religion, the Assistant Store Manager concluded that Elauf wore her headscarf because of her faith. Subsequently, the Assistant Store Manager, in consultation with a District Manager, decided not to hire Elauf because they determined that her headscarf conflicted with Abercrombie's employee dress policy which prohibited the wearing of "caps." The EEOC sued on Elauf's behalf, prevailed on the issue of liability on summary judgment, and obtained $20,000 at trial. On appeal, the Tenth Circuit reversed holding that an employer cannot be liable under Title VII of the Civil Rights Act of 1964[12] for failing to accommodate a religious practice until the applicant (or employee) provides the employer with actual knowledge of her need for an accommodation. The Supreme Court, in an opinion written by Justice Scalia, ruled that Title VII prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating the applicant's religious practice that it could accommodate without undue hardship regardless of whether the applicant informed the employer of her need for such an accommodation.

This decision will provide much needed protections for religious applicants/employees deemed by their employers to need "inconvenient" accommodations. Under this decision, for example, if an employer decides not to hire an applicant for employment who happens to be Seventh-day Adventist because the employer believes (but is not certain) that the applicant will observe the Sabbath, and thus be unable to work on Saturdays, the employer violates Title VII.

In *Mach Mining, LLC v. EEOC*,[13] the Supreme Court was confronted with the question of whether and how the courts could review the efforts of the EEOC to satisfy its conciliation obligations under Title VII. In a unanimous decision authored by Justice Kagan, the Supreme Court held that, while the courts may review whether the EEOC satisfied its statutory conciliation obligations, the scope of that review is quite narrow. Indeed, the court ruled that a sworn affidavit from the EEOC stating that it has performed its conciliation obligations will typically be enough to demonstrate that it has satisfied its conciliation requirement. However, the court also held that if the employer proffers credible evidence indicating that the EEOC did not properly satisfy its conciliation obligation, a court must conduct a fact-finding hearing. Should the court find in favor of the employer, the court must stay the underlying action and order the EEOC to fulfill its conciliation obligation.

In *Young v. UPS*,[14] the Supreme Court was called upon to determine the meaning of the second clause

11. (2015) ___ U.S. ___ [135 S. Ct. 2028].
12. 42 U.S.C. §§ 2000e *et. seq.*
13. (2015) ___ U.S. ___ [135 S.Ct. 1645].
14. (2015) ___ U.S. ___ [135 S.Ct. 1338].

of the Pregnancy Discrimination Act ("PDA")[15] which provides:

> women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work

Peggy Young, a driver for UPS, sued the company arguing that it had violated the PDA by not accommodating medical restrictions resulting from her pregnancy, which precluded her from being able to lift more than 20 pounds (UPS required drivers to lift parcels weighing up to 70 pounds). Young alleged that UPS accommodated other drivers who were similar to her in their "inability to work" and that it was required to accommodate her as well. UPS, on the other hand, argued that the "other persons" whom it had accommodated fell within three discrete classes (1) drivers who had become disabled on the job, (2) drivers who had lost their DOT certifications, and (3) drivers who suffered from a disability covered by the ADA.[16] UPS said that, since Young did not fall within any of those categories, it had not discriminated against Young on the basis of pregnancy but had treated her just as it treated all "other" *relevant* "persons" (i.e., those drivers who did not fall within the aforementioned categories).

In his opinion, Justice Scalia concluded that the second clause of the PDA could have two – and only two – possible interpretations – the one offered by Young and the one offered by UPS. In his view, UPS offered the more convincing interpretation. Justice Scalia, however, wrote the dissent. The majority, in an opinion authored by Justice Breyer, opted for a third interpretation—that a PDA plaintiff can prevail by showing that the employer's policies unjustifiably burden pregnant women, and evidence that the employer accommodates non-pregnant employees while failing to accommodate pregnant employees can establish the existence of that burden. The majority's adoption of a third interpretation prompted some observers to quote Wolfgang Ernst Pauli the Austrian-born, Nobel prize winning, Swiss theoretical physicist, who, commenting on a colleague's erroneous interpretation, remarked "Das ist nicht nur nicht richtig, es ist nicht einmal falsch!"[17] The majority's interpretation prompted Justice Scalia to issue a scathing dissent:

> Faced with two conceivable readings of the Pregnancy Discrimination Act, the Court chooses neither. It crafts instead a new law that is splendidly unconnected with the text and even the legislative history of the Act. To "treat" pregnant workers "the same ... as other persons," we are told, means refraining from adopting policies that impose "significant burden[s]" upon pregnant women without "sufficiently strong" justifications. Where do the "significant burden" and "sufficiently strong justification" requirements come from? Inventiveness posing as scholarship—which gives us an interpretation that is as dubious in principle as it is senseless in practice.[18]

Finally, the Supreme Court decision that will likely have the greatest impact on employers and employees is a non-employment case – *Obergefell v. Hodges*.[19] In a highly divided 5-4 decision authored by Justice Kennedy (and issued on June 26th – the second and twelfth anniversaries of Justice Kennedy's decisions in *United States v. Windsor*[20] and *Lawrence v. Texas*[21]) the court held that the right to marry is a fundamental right and that couples of the same sex may not be deprived of that right. *Obergefell* will have profound implications for employers in many areas including anti-discrimination (many state and local anti-discrimination laws treat "marital status" as a protected class and, following *Obergefell*, same-sex spouses will have the protections under those laws), family and medical leaves, and employee benefits including health insurance and COBRA rights.

The Ninth Circuit

With the exception of several decisions involving the removal of cases from state to federal court, the Ninth Circuit generally issued pro-employee decisions. Perhaps the most important employment decision to come from the Ninth Circuit in 2015 is *Sakkab v. Luxottica Retail N. Am., Inc.*[22] In *Sakkab*,

15. 42 U.S.C. § 2000e(k).
16. 42 U.S.C. § 12101 *et seq*.
17. "That is not only not right, it is not even wrong."
18. *Young v. UPS, supra*, 135 S.Ct. at p. 1361 (citation omitted).
19. (2015) ___ U.S. ___ [135 S.Ct. 2584].
20. (2013) ___ U.S. ___ [133 S.Ct. 2675].
21. (2003) 539 U.S. 558.
22. (9th Cir. 2015) 803 F.3d 425.

the Ninth Circuit was presented with an issue of first impression regarding the interplay between Federal Arbitration Act ("FAA")[23] preemption and the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*.[24] In particular, the Ninth Circuit was asked to determine whether the FAA preempts the rule announced by the California Supreme Court in *Iskanian v. CLS Transportation Los Angeles, LLC*,[25] which barred the waiver of representative claims under California's Private Attorneys General Act of 2004 ("PAGA").[26] The Ninth Circuit concluded that the *Iskanian* rule "does not stand as an obstacle to the accomplishment of the FAA's objectives, and is not preempted."[27] This decision, unless overturned by the U.S. Supreme Court, will allow employees to vindicate certain Labor Code violations that would otherwise go unpunished because the employee signed an arbitration agreement that bars representative actions. Where an agreement bars representative claims, violations often go unpunished not only because arbitrating such claims on an individual basis does not make economic sense but also because the vast majority of employees would never learn about the violations.

Following closely on the heels of *Sakkab* for the distinction of being the most pro-employee employment case of 2015 is *Nigro v. Sears, Roebuck & Co.*[28] In *Nigro*, a disability discrimination, failure to accommodate, and failure to engage in the interactive process case, the defendant moved for summary judgment arguing that the plaintiff failed to proffer any evidence in support of his claims. The plaintiff, who suffered from ulcerative colitis, opposed the defendant's motion arguing that the following evidence, established by his own declaration testimony, created a triable issue of material fact because, in response to his request for accommodation: (1) a Sears General Manager told him "[i]f you're going to stick with being sick, it's not helping your situation. It is what it is. You're not getting paid, and you're not going to be accommodated"; and (2) his immediate supervisor told him that a Sears District General Manager said, shortly after the plaintiff's accommodation request, "I'm done with that guy." The district court disregarded the plaintiff's evidence because the sole "source of this evidence is [the plaintiff's] own self-serving testimony" and granted the defendant employer's motion for summary judgment.

The Ninth Circuit reversed, holding that a plaintiff can, in fact, use his own declaration – even if uncorroborated and "self-serving"– to create genuine issues of material fact thereby defeating summary judgment. In so doing, the Ninth Circuit reiterated that "it should not take much for a plaintiff in a discrimination case to overcome a summary judgment motion." The Ninth Circuit also held that later start times and finite medical leaves may be reasonable accommodations.

As Darth Vader was a frightening figure in Star Wars*, Bell Atlantic Corp. v. Twombly*[29] and *Ashcroft v. Iqbal*[30] are scary decisions for plaintiffs because they can and do result in the dismissal of meritorious claims where courts do not believe those claims have been pled with sufficient factual specificity to demonstrate their plausibility. In *Twombly* and *Iqbal*, the U.S. Supreme Court imposed a plausibility requirement on the federal pleading rules: Complaints must not only set forth the elements of a claim, they must contain enough factual content to make the claim plausible on its face. *Landers v. Quality Commc'ns, Inc.*[31] illustrates the perils of *Iqbal/Twombly* for plaintiffs alleging minimum wage or overtime violations.

Greg Landers, a former employee of Quality Communications, brought an action on behalf of himself and other similarly situated employees, against his former employer, alleging failure to pay minimum and overtime wages in violation of the Fair Labor Standards Act ("FLSA"). The district court dismissed the complaint pursuant to Rule 8 of the Federal Rules of Civil Procedure for failure to state a plausible claim under *Iqbal/Twombly* because the complaint did "not make any factual allegations providing an approximation of the overtime hours worked, plaintiff's hourly wage, or the amount of unpaid overtime wages...." Landers appealed. The Ninth Circuit affirmed, holding that in order to survive a motion to dismiss, a plaintiff asserting a claim for overtime payments must allege that he worked more than forty hours in a given workweek without

23. 9 U.S.C. § 2 *et seq*.
24. (2011) 563 U.S. 333.
25. (2014) 59 Cal.4th 348.
26. Cal. Lab. Code § 2698 *et seq.*
27. *Sakkab, supra*, 803 F.3d at p. 427.
28. (9th Cir. 2015) 784 F.3d 495.
29. (2007) 550 U.S. 544.
30. (2009) 556 U.S. 662.
31. (9th Cir. 2015) 771 F.3d 638.

being compensated for the overtime hours worked during that workweek. Although Landers alleged that he had not been paid for overtime hours worked, he failed to include details showing overtime hours worked in any given week for which he had not been paid. The court held that, while a complaint need not allege precise overtime or minimum wage calculations, the plausibility rule requires detailed allegations about at least one workweek. Further, an estimation of all unpaid overtime hours, while not "the sine qua non of plausibility" for FLSA claims, will help meet the plausibility requirement.[32]

The *Landers* holding is irrational for two reasons. First, plaintiffs suing for unpaid FLSA overtime, obviously, like Landers, allege that they worked more than forty hours in a workweek without being compensated for the overtime hours. Second, with regard to precisely how many overtime hours were worked, that figure is something that should be in the possession of the employer, as the court recognized.[33] It is not information readily available to most plaintiffs at the pleading stage. Requiring the pleadings to contain detailed information that plaintiffs normally do have in their possession until the discovery phase seems unreasonable. And, suggesting that complaints may fail the plausibility test if they do not contain that information leaves litigants and courts with little guidance.

Finally, 2015 saw the publication of an unusual number of important removal cases. These cases, taking their cue from and following quickly on the heels of the U.S. Supreme Court's end-of-the-2014-year decision in *Dart Cherokee Basin Operating Co., LLC v. Owens*,[34] significantly expand the ability of defendants to remove cases from state court to federal court. In *Dart Cherokee*, the Supreme Court appreciably enhanced the ability of defendants to remove cases to federal court, holding not only that "a defendant's notice of removal in diversity cases need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold," but also that "[e]vidence establishing the amount is required by § 1446(c)(2)(B) only when the plaintiff contests, or the court questions, the defendant's allegation."[35]

In *Ibarra v. Manheim Investments, Inc.*[36] and *LaCross v. Knight Transp. Inc.*,[37] two employment cases, the Ninth Circuit issued two opinions regarding the amount of proof a defendant must produce to establish the $5 million amount-in-controversy requirement for removing a class action lawsuit under the Class Action [U]nFairness Act of 2005 ("CAFA") when the amount is not facially apparent in the complaint.[38] Taken together, these cases clarify that, while the defendant's burden to set forth factual allegations about the amount in controversy is a minimal one, and can even be based on guesswork or assumptions, the allegations must be based on reasonable assumptions.

In *Jordan v. Nationstar Mortgage LLC*,[39] a non-employment case, the Ninth Circuit held that a case becomes removable under CAFA when the CAFA ground for removal is first disclosed, even if an earlier pleading, document, motion, order, or other paper revealed an alternative basis for federal jurisdiction.

Finally, in *Reyes v. Dollar Tree Stores, Inc.*,[40] the Ninth Circuit held that a defendant who is unsuccessful in removing a putative class action to federal court, because it did not meet the CAFA $5 million amount-in-controversy requirement, may be allowed a "second bite at the apple" if it can demonstrate that a class certification order created a new occasion for removal.

The Equal Employment Opportunity Commission

The EEOC issued one decision in 2015 which merits discussion – *Baldwin v. Dep't of Transp.*[41] In *Baldwin*, the EEOC ruled that Title VII forbids discrimination on the basis of sexual orientation. Although California law has long forbad sexual orientation discrimination, *Baldwin* marks the first time that the EEOC has taken the position that Title VII likewise forbids such discrimination.

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32. *Id.* at p. 645.
33. *Ibid.*
34. (2014) ___ U.S. ___ [135 S.Ct. 547] .
35. *Id.* ____ U.S. ___ [135 S.Ct. at p. 554].
36. (9th Cir. 2015) 775 F.3d 1193.
37. (9th Cir. 2015) 775 F.3d 1200.
38. 28 U.S.C. § 1332(d).
39. (9th Cir. 2015) 781 F.3d 1178.
40. (9th Cir. 2015) 781 F.3d 1185.
41. EEOC No. 0120133080, 2015 WL 4397641 (July 16, 2015) accessible at http://www.eeoc.gov/decisions/0120133080.pdf.

The California Supreme Court

In 2015, the California Supreme Court issued a triumvirate of employment cases – two of these decisions were highly favorable to employees. First, in *Williams v. Chino Valley Indep. Fire Dist.*,[42] a unanimous decision authored by Justice Werdegar, the court held that the Fair Employment and Housing Act ("FEHA")[43] (as opposed to Code of Civil Procedure section 1032) governs cost awards in FEHA actions, allowing trial courts discretion in making awards of both attorney fees and costs to prevailing FEHA parties, but that the trial court's discretion is limited by the rule of *Christiansburg.*[44] This decision means that an unsuccessful FEHA defendant should ordinarily be ordered to pay the plaintiff's fees and costs unless special circumstances would render such an award unjust. Conversely, a prevailing FEHA defendant should not be awarded fees or costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so.

Second, in *Mendiola v. CPS Sec. Solutions, Inc.*[45] the court was called upon to decide whether the California wage order[46] covering security guards required their employer to pay them for two types of time spent at their assigned worksites: (1) on call time; and (2) sleep time. As to on call time, the employer argued that because the guards could engage in personal activities – including sleeping, showering, eating, reading, watching television, and browsing the Internet – they were not under the employer's control and were therefore not entitled to compensation. As to sleep time, the employer argued that all industry-specific wage orders implicitly incorporated a federal regulation that permits the exclusion of eight hours of sleep time from employees' 24–hour shifts. Recognizing that an employer may hire an employee to do nothing or to wait to do something, the California Supreme Court rejected the employer's argument and held that the guards were entitled to compensation for both on call time and sleep time.

In stark contrast to the pro-employee decisions in *Williams* and *Mendiola*, the California Supreme Court issued a pro-employer decision in *Richey v. AutoNation, Inc.*[47] that leaves more issues unresolved than it answers. Avery Richey worked for AutoNation. AutoNation had a policy that precluded outside employment of any kind, including self-employment, while on an approved leave. During his non-work time Richey began plans to open a seafood restaurant. Richey hurt himself moving furniture at his home and took a CFRA medical leave. During his leave, his supervisor reiterated that outside employment of any kind, including self-employment, while on an approved leave was not allowed.

AutoNation, not trusting Richey, dispatched an employee to spy on him. The employee purportedly witnessed Richey working at the restaurant. AutoNation fired Richey for engaging in outside employment while on a leave of absence in violation of company policy. Richey sued AutoNation for violating CFRA. AutoNation's motion to compel arbitration was granted. The arbitrator found that regardless of whether Richey actually violated the "no outside employment while on a leave of absence policy," AutoNation had an "honest belief" that Richey violated the policy and therefore was not liable. The trial court confirmed the arbitrator's award. The Second Appellate District vacated the award correctly finding that California does not recognize the "honest belief" defense. The California Supreme Court concluded that although the arbitrator may have committed error in adopting the "honest belief" defense – a defense that it described as untested in the California courts and whose viability it refused to decide– any error that may have occurred did not deprive the employee of an unwaivable statutory right because Richey violated his employer's written policy prohibiting outside employment while he was on medical leave. The Supreme Court indicated in a footnote that it was expressing no opinion as to whether AutoNation's policy forbidding outside employment in this context was an illegal restraint on Richey's CFRA leave because Richey supposedly forfeited that argument by not making it before the trial court.[48] If AutoNation's policy is illegal, then what was the point of this decision? Unfortunately, employees,

42. 61 Cal. 4th 97 (2015).
43. Gov. Code § 12900, et seq.; and see § 12965, subd. (b) for cost provision.
44. *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n* (1978) 434 U.S. 412.
45. (2015) 60 Cal.4th 833.
46. IWC Wage Order 4.
47. (2015) 60 Cal.4th 909.
48. *Id.* at p. 920, fn. 3.

employers, their counsel, and the lower courts may have to waste hundreds of thousands of hours and hundreds of millions of dollars unnecessarily litigating the issues left unresolved in *Richey* over the next decade or so.

The California Courts of Appeal

Labor Code section 1102.5(b) clearly and explicitly prohibits, among other things, employers from retaliating against employees for disclosing information (or because the employer believes that the employee disclosed or may disclose information) to a government or law enforcement agency. Despite the plain language of the statute, employers routinely attempt, and usually fail, to convince the courts to narrowly interpret it. For example, in *Cardenas v. M. Fanaian, D.D.S., Inc*.,[49] the plaintiff, Rosa Lee Cardenas, sued her employer alleging that it illegally terminated her employment as a dental hygienist because she reported to the police that a co-worker stole her wedding ring. In response, the employer argued Cardenas had not engaged in protected activity under Labor Code section 1102.5, subdivision (b) because the Legislature intended to limit the application of section 1102.5 to employee disclosures of wrongdoing concerning the employer's enterprise, operations or practices. The Court of Appeal rejected the employer's stinted interpretation concluding that section 1102.5 broadly "prohibits an employer from retaliating against an employee who discloses information to law enforcement where the employee has a reasonable belief that a violation of law has occurred."[50] On December 16, 2015 the California Supreme Court granted review of *Cardenas* and will decide whether section 1102.5 prohibits retaliation against an employee for reporting any alleged violation of the law or only for reporting violations that involve the employer's business activities.[51]

Employers also attempt to defeat employment claims by using a statute of limitations defense. To avoid this defense, employees attempt to rely on the continuing violations theory. In *Jumaane v. City of Los Angeles*,[52] the Court of Appeal affirmed the dismissal of a FEHA case on statute of limitations grounds explaining that the "continuing violation doctrine requires proof that the conduct occurring outside the limitations period was (1) similar or related to the conduct that occurred earlier; (2) the conduct was reasonably frequent; and (3) the conduct had not yet become permanent."[53] *Jumaane* is a must-read case for defense and plaintiff employment litigators handling harassment/retaliation claims with acts occurring outside of the statute of limitations time period.

Another commonly asserted defense is the after-acquired evidence doctrine. This defense was thoroughly discussed in *Horne v. Dist. Council 16 Int'l Union of Painters & Allied Trades*.[54] In *Horne*, an applicant for a position as a union organizer brought a FEHA action against the union alleging racial discrimination. The union prevailed on summary judgment arguing that evidence it obtained in discovery – an admission that the plaintiff was a convicted felon – meant that under the federal Labor–Management Reporting and Disclosure Act ("LMRDA"),[55] the plaintiff was legally barred from holding the organizer position. The Court of Appeal properly reversed finding that, under *Salas v. Sierra Chem. Co.*,[56] "after-acquired evidence cannot be used as an absolute bar to a worker's FEHA claims."[57] Rather, the after-acquired evidence could only be used during the damages portion of the trial.

Hirst v. City of Oceanside[58] is an important opinion interpreting a provision within FEHA prohibiting employers from harassing a "person providing services pursuant to a contract."[59] In *Hirst*, the plaintiff, a phlebotomist, was an employee of a company that had a contract with the defendant City to provide phlebotomist services to its police department. The plaintiff sued the City alleging that one of its police officers sexually harassed her as she was providing her phlebotomist services. After the plaintiff prevailed at a jury trial, the city moved for a judgment notwithstanding the verdict on the ground that the plaintiff was not a "person providing services pursuant to a contract"; rather, the defendant only had a contract with the plaintiff's employer not with the plaintiff.

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49. (2015) 240 Cal.App.4th 1167, review granted Dec. 16, 2015, S230533.
50. *Cardenas v. M. Fanaian, supra*, 240 Cal.App.4th at 1185.
51. *Cardenas v. M. Fanaian,* Case Summary, Dec. 16, 2015, S230533.
52. (2015) 241 Cal.App.4th 1390.
53. *Id*. at p. 1402 (citation omitted).
54. (2015) 234 Cal.App.4th 524.
55. 29 U.S.C. § 504(a).
56. (2014) 59 Cal.4th 407.
57. *Horne, supra*, 234 Cal.App.4th at 541.
58. (2015) 236 Cal.App.4th 774.
59. Government Code §12940, subd. (j)(1).

The City lost on its JNOV motion and again before the Court of Appeal, which concluded that "there is no basis in [FEHA] to preclude recovery for an individual who provided services under a contract merely because he or she is also employed by a separate entity with respect to the work performed."[60]

Royal Pac. Funding Corp. v. Arneson[61] brings to mind an old Liberace saying, "Too much of a good thing is…wonderful." In *Arneson*, an employer, who had appealed from a Labor Commissioner award for unpaid commissions, dismissed the appeal and paid the award after the employee retained counsel who engaged in "very effective saber-rattling by serving [the employer] notice that [the employee] was reserving the right to present claims beyond just unpaid commissions."[62] At issue on appeal was whether the employee was entitled to attorney's fees. The trial court concluded that, because there was no award "on the merits," fees could not be awarded. Correctly recognizing that such a ruling "incentivizes employers to file frivolous appeals and then withdraw them at the last minute so as to inflict gratuitous legal costs on an employee who has been otherwise successful at the Labor Commission level,"[63] the Court of Appeal reversed and awarded fees to the employee (both on the case below and the appeal itself).

In *Dickson v. Burke Williams, Inc.*,[64] the Court of Appeal addressed whether a plaintiff can prevail on a claim of failure to take all reasonable steps to prevent sexual harassment from occurring[65] without also prevailing on a claim for sexual harassment. The jury in *Dickson* found that the plaintiff had been subjected to unwanted sexual harassment, but that the harassment was not "severe or pervasive." The jury found against plaintiff on the sexual harassment claim, but in favor of plaintiff on the claim of failure to take reasonable steps. Relying on *Trujillo v. N. Cnty. Transit Dist.*,[66] the Court of Appeal held that there can be no valid claim for failure to take reasonable steps to prevent harassment where there is no actionable harassment. *Dickson* effectively renders meaningless the legislative requirement that employers take all reasonable steps necessary to prevent discrimination and harassment from occurring.

In *Cifuentes v. Costco Wholesale Corp*[67], the plaintiff prevailed on a breach of employment contract claim and received a judgment in the amount of $325,692.07. Costco paid the judgment but withheld federal and state payroll taxes from the award. The plaintiff then claimed the judgment was not satisfied, citing *Lisec v. United Airlines, Inc.*[68] The Court of Appeal held that Costco had properly withheld payroll taxes from the award of lost wages.

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60. *Hirst, supra*, 236 Cal.App.4th at 791.
61. (2015) 239 Cal.App.4th 1275.
62. *Id.* at p. 1277.
63. *Id*. at p. 1280.
64. (2015) 234 Cal.App.4th 1307.
65. Cal. Gov't Code § 12940, subd. (j)(1).
66. (1998) 63 Cal.App.4th 280.
67. (2015) 238 Cal.App.4th 65.
68. (1992) 10 Cal.App.4th 1500.