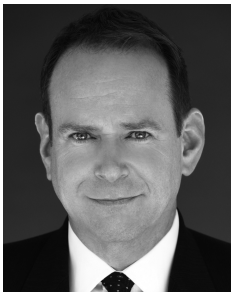
MCLE Self-Study:

TOP EMPLOYMENT LAW CASES OF 2021

By Andrew H. Friedman, Anthony J. Oncidi, & Ramit Mizrahi



Andrew H. Friedman is a founding partner of Helmer Friedman LLP in Beverly Hills, where he (almost) exclusively represents employees in all areas of employment law. Mr. Friedman is the author of a two-volume employment law treatise, LITIGATING EMPLOYMENT DISCRIMINATION CASES (James Publishing 2005-2020). Mr. Friedman served as Counsel of Record in *Lightfoot v. Cendant Mortgage Corp. et. al.* 137 S.Ct. 553 (2017), where he successfully persuaded the U.S. Supreme Court to grant *certiorari*. In January 2017, the Supreme Court, in a unanimous decision authored by Justice Sotomayor, reversed the Ninth Circuit and ruled in favor of Mr. Friedman's clients. Mr. Friedman's email address is afriedman@helmerfriedman.com. Anthony J. Oncidi is a partner in and the Chair of the Labor and Employment Department of Proskauer Rose LLP in Los Angeles, where he exclusively represents employers and management in all areas of employment and labor law. His telephone number is (310) 284-5690 and his email address is aoncidi@proskauer.com. Ramit Mizrahi is the founder of Mizrahi Law, APC in Pasadena, where she represents employees exclusively. She is Chair of the Pasadena Bar Association Labor and Employment Law Section and Immediate Past Chair of the CLA Labor and Employment Law Section. She can be reached at ramit@mizrahilaw.com.

INTRODUCTION

After 2020's slight lull, 2021 saw a resumption of what has become the new normal—a deluge of employment decisions, with an average of more than one new opinion each day! Indeed, despite the continuing pandemic, and the slow halting resumption of civil trials, federal and state appellate courts continue to regularly churn out multiple important decisions that directly affect employees and employers.

CALIFORNIA SUPREME COURT ISSUES IMPORTANT WAGE & HOUR, PROCEDURAL, AND ANTI-SLAPP DECISIONS

The California Supreme Court offered several major victories to employees in a trio of wage and hour cases.

In *Vazquez v. Jan-Pro Franchising International, Inc.*,[1] the Court held that its decision in *Dynamex Operations West, Inc. v. Superior Court*[2]—which set forth the ABC test that applies in determining whether workers should be classified as employees or independent contractors for purposes of the obligations imposed by California's wage orders—applies retroactively.

In *Donohue v. AMN Servs., LLC*,[3] a unanimous court answered two important questions about meal periods: (1) Can employers engage in the practice of rounding time punches in the meal period context? Answer: No. (2) Do time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations, including at the summary judgment stage? Answer: Yes. While the Supreme Court recognized that time rounding was, in general, permitted under federal law and prior California decisions, it decided not to follow that authority in the case of meal periods. Instead, citing "health and safety concerns" that underlie meal period requirements, the Court distinguished "the meal period context from the wage calculation context, in which the practice of rounding time punches was developed" and noted that "even relatively minor infringements on meal periods can cause substantial burdens to the employee."[4] The Court went on to endorse a concurrence by Justice Werdegar in *Brinker Restaurant Corp. v. Superior Court*,[5] oft-cited by plaintiffs' lawyers, in which she suggested that if an employer's records did not reflect a compliant meal period, it would raise a rebuttable presumption that none was provided. However, the Court did provide helpful clarification about how employers could overcome such a presumption: "by presenting evidence that employees were compensated for noncompliant meals or that they had in fact been provided compliant meal periods during which they chose to work."[6]

In *Ferra v. Loews Hollywood Hotel, LLC*,[7] the Court considered whether an employer violated California law by failing to include an employee's nondiscretionary bonuses when calculating meal and rest break premiums. Both the trial court and the Court of Appeal held in favor of the employer, concluding that the "regular rate of pay" as used in Cal. Lab. Code § 510 was not synonymous with the "regular rate of compensation" as used in § 226.7. The California Supreme Court saw things differently,

however. In an opinion authored by Associate Justice Goodwin Liu, the Court held that "regular rate of compensation" as used in § 226.7 means the same thing as "regular rate of pay" in this context.[8] Finally, the Court rejected Loews's argument that this opinion should apply only prospectively and determined the opinion applies *retroactively*.[9]

The California Supreme Court also offered victories to employees in a duo of procedural cases. In *Pollock v. Tri-Modal Distrib. Servs., Inc.*,[10] the Court addressed two questions. First, when does the statute of limitations begin to run in a failure to promote case brought under the harassment provision of the Fair Employment and Housing Act (FEHA)?[11] The Court held that such a claim accrues, and thus the statute of limitations begins to run, at the point when an employee knows or reasonably should know of the employer's allegedly unlawful refusal to promote the employee.[12] "Second, does Cal Gov't Code § 12965(b)'s directive that a prevailing FEHA defendant 'shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so,' apply to an award of costs on appeal?" The Court answered "yes," holding that a prevailing-party employer may only recover costs on appeal if the action was "frivolous, unreasonable, or groundless when brought."[13]

In *Bonni v. St. Joseph Health System*,[14] the Court was called upon to determine what types of retaliatory conduct alleged by a doctor stemming from a hospital's medical peer review are subject to dismissal under California's anti-SLAPP statute.[15] The Court held that "[w]hile some of the forms of retaliation—including statements made during and in connection with peer review proceedings and disciplinary reports filed with official bodies—do qualify as protected activity, discipline imposed through the peer review process does not."[16] Thus, the Court held that "while the hospital may seek to strike some of the physician's retaliation claims, the hospital was not entitled to wholesale dismissal of those claims under the anti-SLAPP law."[17]

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EMPLOYEE PROTECTIONS OF A.B. 51 CAL. LAB. CODE § 432.6 AND PAGA ARE NOT PREEMPTED BY THE FAA

In *Chamber of Commerce of United States v. Bonta*,[18] the Ninth Circuit reversed in part a 2020 preliminary injunction issued by a district court and partially resurrected Cal. Lab. Code. § 432.6, which had been added by A.B. 51,[19] prohibits California employers from requiring employees and applicants with respect to claims under FEHA and the California Labor Code to waive any right, foum, or procedure, including the right to file a civil action or complaint, as a condition of employment or continued employment. It also includes enforcement mechanisms that sanction employers for violating the law including punishing employers with civil and criminal penalties for entering into agreements to arbitrate in violation of the law. In a 2-1 ruling, the Ninth Circuit held that at least part of § 432.6 is not preempted by the Federal Arbitration Act (FAA) insofar as it prohibits "pre-agreement employer behavior," i.e., requiring an applicant or employee to enter into an arbitration agreement—but only in those instances in which the employee fails or refuses to execute the agreement. [20] If, however, the employee does sign the arbitration agreement, then the statute does not apply per § 432.6(f), and the employer is not in violation of the statute or subject to its criminal and civil penalties, which the Ninth Circuit struck down in that limited context. [21] Section 432.6 applies to arbitration agreements that were entered into, modified, or extended on or after January 1, 2020.

In a spirited dissent that serves as a beacon for United States Supreme Court review, Judge Sandra Segal Ikuta noted:

> The majority holds that if the employer successfully "forced" employees "into arbitration against their will," . . . the employer is safe, but if the employer's efforts fail, the employer is a criminal. . . . This tortuous ruling is analogous to

holding that a statute can make it unlawful for a dealer to attempt to sell illegal drugs, but if the dealer succeeds in completing the drug transaction, the dealer cannot be prosecuted.[22]

In *Iskanian v. CLS Transportation Los Angeles, LLC*,[23] the California Supreme Court had held that individual employees cannot contractually waive their right to bring a representative action under the Private Attorney General's Act (PAGA), and that this state law rule is not preempted by the FAA. In *Williams v. RGIS, LLC*,[24] an employer argued that *Iskanian* was subsequently abrogated by the United States Supreme Court's decision in *Epic Systems Corporation v. Lewis*.[25] The Court of Appeal, agreeing with every published Court of Appeal decision on this issue, rejected the employer's argument and followed the holding in *Iskanian*.[26]

GUIDELINES FOR COURTS IN EVALUATING CLASS ACTION SETTLEMENTS

In *Amaro v. Anaheim Arena Management, LLC*,[27] the Court of Appeal, bemoaning a paucity of state law guidance for evaluating class action settlements, published its opinion to fill in that void. While the opinion offers too many nuggets of wisdom to list in this article, some of the more important pieces of guidance include: (1) the release in any class action settlement should be limited to the *factual allegations* set forth in the complaint; (2) employers may settle Fair Labor Standards Act (FLSA) claims within the context of a state law wage and hour class action without requiring opt-ins; (3) a plaintiff may, in the trial court's discretion, release PAGA claims outside the one-year limitations period of her own claim; and (4) the Court of Appeal addressed what steps are necessary for plaintiffs' counsel to fend off an allegation that the settlement was the product of a collusive reverse auction.[28]

COURTS HAVE POWER TO STRIKE PAGA CLAIMS THAT WOULD BE UNMANAGEABLE AT TRIAL

In *Wesson v. Staples the Office Superstore, LLC*,[29] the trial court granted the defendant's motion to strike the plaintiff's PAGA claim for $36 million in civil penalties for alleged California Labor Code violations for misclassification on the grounds that the claim was not manageable at trial. The Court of Appeal affirmed, holding that "(1) courts have inherent authority to ensure that PAGA claims can be fairly and efficiently tried and, if necessary, may strike claims that cannot be rendered manageable; (2) as a matter of due process, defendants are entitled to a fair opportunity to litigate available affirmative defenses, and a court's manageability assessment should account for them; and (3) given the state of the record and Wesson's lack of cooperation with the trial court's manageability inquiry, the court did not abuse its discretion in striking his PAGA claim as unmanageable."[30]

CLARIFIED STANDARDS FOR: (1) LIABILITY FOR AIDING AND ABETTING UNDER FEHA; (2) INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS; (3) THE UNRUH ACT; (4) AND JOINT EMPLOYER LIABILITY

In *Smith v. BP Lubricants USA Inc.*,[31] the Court of Appeal held that, in order to make out a FEHA aiding and abetting claim[32] for harassment and discrimination, plaintiffs must prove: (1) their employer subjected them to discrimination and harassment; (2) the person/entity accused of aiding and abetting knew that the employer's conduct violated FEHA; and (3) the person/entity accused of aiding and abetting gave the employer "substantial assistance or encouragement" to violate FEHA.[33] The Court of Appeal also held that an intentional infliction claim can be based on just three racially offensive comments.[34] Similarly, the Court of Appeal held that an Unruh Act claim can also be based on just three racially offensive comments.[35]

In *Medina v. Equilon Enterprises, LLC*,[36] the Court of Appeal held that a person can be a joint employer without exercising direct control over the employee. "If the putative joint employer instead exercises enough control over the intermediary entity to indirectly dictate the wages, hours, or working conditions of the employee, that is a sufficient showing of joint employment."[37]

CONSTITUTIONAL CHALLENGES: CALIFORNIA'S BOARD OF DIRECTORS QUOTA LAW MAY VIOLATE EQUAL PROTECTION CLAUSE; CAL. LAB. CODE § 2778 SURVIVES FREE SPEECH CHALLENGE

In 2018, the California Legislature enacted S.B. 826 (2018 Cal. Stat. 954), which requires all corporations headquartered in California to have a minimum number of females on their boards of directors; corporations that fail to comply with S.B. 826 are subject to monetary penalties. In *Meland v. Weber*,[38] the district court dismissed a plaintiff shareholder's lawsuit challenging S.B. 286 under § 1983 for lack of Article III standing, reasoning that the plaintiff had not suffered an injury in fact. The Ninth Circuit reversed, holding that, to the extent that the plaintiff's alleges that S.B. 826 "requires or encourages" him to discriminate

on the basis of sex, he has suffered a concrete personal injury sufficient to confer Article III standing.[39]

In order to address the misclassification of employees as independent contractors, California passed A.B. 5 (2019 Cal. Stat. 296), and later A.B. 2257 (2020 Ca. Stat. 38), which codified a more expansive test for determining workers' statuses, albeit with certain occupational exemptions. Because freelance writers, photographers, and others received a narrower exemption than was offered to certain other professionals, the American Society of Journalists and Authors, Inc., and the National Press Photographers Association (collectively, ASJA) sued, alleging violations of the First Amendment and Equal Protection Clause. In *American Society of Journalists and Authors, Inc. v. Bonta*,[40] the Ninth Circuit affirmed the dismissal of the lawsuit, finding that Cal. Lab. Code § 2778 does not implicate either the First Amendment or the Equal Protection Clause, because it did not facially limit what someone could or could not communicate and did "not restrict when, where, or how someone could speak," but instead was aimed at regulating the employment relationship.[41]

COURTS ADDRESS PLAINTIFF EMPLOYEE JUDGMENTS

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In *Magadia v. Wal-Mart Assocs., Inc.*,[42] the Ninth Circuit overturned a $100 million wage-and-hour judgment entered against Walmart. The court held that, because the plaintiff did not suffer any meal-break violation, he did not have standing to bring the claim, reasoning that "PAGA differs in significant respects from traditional *qui tam* statutes" that permit a claim to be brought on behalf of others.[43] The Court further held that while the plaintiff did have standing to bring the wage-statement claims under Cal. Lab. Code § 226(a), Walmart had not violated the statute because the quarterly bonus amounts that Walmart paid retroactively did not need to be included in the wage statements.[44] The Court also determined that Walmart's statements of final pay did not violate the wage statement law because § 226(a) permits employers to furnish wage statements semimonthly or at the time of each payment of wages, and Walmart did the former.[45]

In *Martinez v. Rite Aid Corp.*,[46] following two prior trials, which resulted in reversal of the judgments by the Court of Appeal, this wrongful termination/discrimination case was tried for a third time. The jury awarded Maria Martinez $2 million on her wrongful termination claim against her former employer Rite Aid and $4 million on her claim for intentional infliction of emotional distress against Rite Aid and her former supervisor, Kien Chau. The Court of Appeal largely affirmed the verdict in favor of Martinez but ordered that the past economic damages award be reduced by $140,840, which was the amount of wages Martinez earned from post-termination employment.[47] The Court rejected Martinez's argument (based upon *Villacorta v. Cemex Cement, Inc.*[48]) that wages earned from an "inferior job" may not be used to mitigate damages.[49]

In *Briley v. City of W. Covina*,[50] the Court of Appeal held that the jury's award to the plaintiff of $3.5 million for emotional distress damages was "shockingly disproportionate to the evidence of harm" and should have been no more than $1.1 million, which it noted was still "high" given that the plaintiff described no physical symptoms beyond "unspecified sleep-related issues," had seen a counselor only once or twice (but reported no mental health issues), and admitted on cross-examination that he had "experienced the gamut of emotions anyone would experience upon his or her termination of employment."

In *Contreras-Velazquez v. Family Health Ctrs. of San Diego, Inc.*,[51] the Court of Appeal affirmed the trial court's order reducing the punitive damages award

from $5 million to $1.83 million finding that a 2:1 ratio of punitive to compensatory damages was appropriate. The Court of Appeal found that the defendant's "somewhat or moderately reprehensible" conduct caused emotional and mental distress upon the plaintiff but that because the $750,000 emotional distress damages award was "substantial," it appeared to have contained a punitive element.[52]

In contrast to the view of the Court of Appeal toward punitive damages in *Contreras-Velazquez*, the Court of Appeal in *Rubio v. CIA Wheel Group*[53] adopted an employee-friendly view, holding that a deceased employee's estate was properly awarded $500,000 in punitive damages even though the estate was only entitled to $15,057 in compensatory damages (the deceased employee had $100,000 to $150,000 in non-economic damages, which were not recoverable after his death). The Court of Appeal held that, although non-economic damages could not be awarded after the employee's death, the punitive damages award was properly based upon more than just $15,057 in economic damages.[54]

In *Felczer v. Apple, Inc.*,[55] the Court of Appeal held that accrual of post-judgment interest on an award of prejudgment costs "begins on the date of the judgment or order that establishes the right of a party to recover a particular cost item, even if the dollar amount has yet to be ascertained."

FURTHER CLARITY ON ATTORNEYS' FEES AND COSTS

In *Wasito v. Kazali*,[56] the Court of Appeal held that Cal. Lab. Code §§ 206 and 206.5 preclude a [Cal. Code Civ. Proc. §] 998 offer that resolves disputed wage claims if there are undisputed wages due at the time of the offer."

In *Patterson v. Superior Court of Los Angeles County*,[57] the trial court awarded the defendant employer attorneys' fees after it prevailed on a motion to enforce an arbitration agreement which contained a provision providing for attorneys' fees to the party prevailing on the motion. The Court of Appeal held that "[b]ecause a fee-shifting clause directed to a motion to compel arbitration, like a general prevailing party fee provision, risks chilling an employee's access to court in a FEHA case absent [Cal. Gov't Code §]12965(b)'s asymmetric standard for an award of fees, a prevailing defendant may recover fees in this situation only if it demonstrates the plaintiff's opposition was groundless."[58]

In *Missakian v. Amusement Industry, Inc.*,[59] the Court held that an in-house counsel's oral agreement with his employer for a bonus and a share in recovery from litigation instituted by the employer was void under Cal. Bus. & Prof. Code **§** 6147, which requires contingency fee agreements to be in writing; a new trial was granted on his promissory fraud claim.

ADDITIONAL DISCRIMINATION AND HARASSMENT DECISIONS OF NOTE

In *Guzman v. NBA Automotive, Inc.*,[60] the Court of Appeal rejected an employer's attempt to set aside a FEHA judgment in favor of the plaintiff employee. The employee was employed by "NBA Automotive, Inc. *dba* Hooman Chevrolet of Culver City," but her FEHA complaint erroneously named "Hooman Chevrolet *dba* Hooman Enterprises, Inc." The Court of Appeal rejected the employer's claim that she had failed to adequately exhaust her administrative remedies. Guzman sufficiently identified her employer in her FEHA complaint by providing a name that was "virtually identical" to her employer's fictitious business name, listing the address of the company, naming its owner, and providing details about the company and those who engaged in the discriminatory conduct; this was sufficient to put the employer on notice.[61] "To allow NBA Automotive to escape liability for discriminatory conduct merely because Guzman identified her employer administratively with a name that was nearly the same as, but not quite identical to, her employer's actual fictitious business name would be contrary to the purposes of FEHA."[62]

In *Jorgensen v. Loyola Marymount University*,[63] the Court of Appeal reversed a grant of summary judgment in an age discrimination case, finding that the trial court inappropriately sustained objections to and did not consider a stray comment reflecting an age-based discriminatory mindset. The plaintiff employee sued alleging that she was fired because of her age. In opposition to her former employer's summary judgment motion, the plaintiff relied, in part, on the declaration of another former employee who stated that the decision-maker had once commented, in the context of a hiring decision unrelated to the plaintiff, that she "wanted someone younger" for the position. The Superior Court sustained the employer's relevance, conjecture, speculation, and hearsay objections and granted summary judgment. The Court of Appeal reversed, finding that the objections were "wide of the mark" and that the stray comment

was sufficient, along with other evidence adduced by the plaintiff, to survive summary judgment.[64]

In *Maner v. Dignity Health*,[65] the Ninth Circuit affirmed summary judgment in favor of the employer in a plaintiff's sexual harassment case, holding that an employer who singles out a supervisor's paramour for preferential treatment does not discriminate against other employees "because of [their] sex." The Court reasoned that "the motive behind the adverse employment action is the supervisor's special relationship with the paramour, not any protected characteristics of the disfavored employees."[66]

"PRO-COMPETITIVE" NONSOLICITATION CLAUSE DOES NOT VIOLATE ANTITRUST LAW

In *Aya Healthcare Servs. v. AMN Healthcare, Inc.*,[67] both parties were healthcare staffing agencies. AMN Healthcare contracted with Aya Healthcare for Aya to staff temporary assignments of travel nurses to hospitals at which AMN could not fulfill all of its clients' staffing demands.[68] In AMN's agreement with Aya, Aya agreed not to solicit AMN's employees; eventually, Aya became AMN's biggest associate vendor.[69] After Aya began to actively solicit AMN's travel nurse recruiters, the parties' business relationship "soured."[70] Aya sued AMN, challenging its nonsolicitation provision under the Sherman Antitrust Act and California law. The District Court granted AMN's summary judgment, and the Ninth Circuit affirmed, holding that although the nonsolicitation agreement is a "horizontal restraint," it is "reasonably necessary to the parties' procompetitive collaboration." [71] Aya failed to demonstrate that this agreement "has a substantial anticompetitive effect that harms consumers in the relevant market;"[72] to the contrary, it promotes competition—"more hospitals receive more traveling nurses because the non-solicitation agreement allows AMN to give assignments to Aya without endangering its established network of recruiters, travel nurses, and of course, hospital customers."[73]

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ENDNOTES

1. 10 Cal. 5th 944 (2021).
2. 4 Cal. 5th 903 (2018).
3. 11 Cal. 5th 58 (2021).
4. *Id.* at 69-70.
5. 53 Cal. 4th 1004 (2012).
6. *Id.* at 77.
7. 11 Cal. 5th 858 (2021).
8. *Id.* at 863.
9. *Id.* at 878-80.
10. 11 Cal. 5th 918 (2021).
11. Cal. Gov't Code §§ 12940(j), 12960.
12. 11 Cal. 5th at 929.
13. *Id.*
14. 11 Cal. 5th 995 (2021).
15. Cal. Code Civ. Proc. § 425.16.
16. 11 Cal. 5th at 1004.
17. *Id.*
18. 13 F.4th 766 (9th Cir. 2021).
19. 2019 Cal. Stat. 711.

20. 13 F.4th at 781.
21. *Id.*
22. *Id.* at 790-91 (Ikuta, J., dissenting).
23. 59 Cal. 4th 348 (2014).
24. 70 Cal. App. 5th 445, 285 Cal. Rptr. 3d 435 (2021).
25. ---U.S.---, 138 S.Ct. 1612 (2018).
26. 285 Cal. Rptr. 3d at 442.
27. 69 Cal. App. 5th 521 (2021).
28. *Id.*
29. 68 Cal. App. 5th 746 (2021).
30. *Id.*
31. 64 Cal. App. 5th 138 (2021).
32. Cal. Gov't Code § 12940(i).
33. 64 Cal. App. 5th at 146.
34. *Id.* at 148.
35. *Id.* at 151-54.
36. 68 Cal. App. 5th 868 (2021).
37. *Id.* at 875.
38. 2 F.4th 838 (9th Cir. 2021).
39. *Id.* at 849.
40. 15 F.4th 954 (9th Cir. 2021).
41. *Id.* at 964-965.
42. 999 F.3d 668 (9th Cir. 2021).
43. *Id.* at 676.
44. *Id.*at 682.
45. *Id. See also General Atomics v. Superior Court*, 64 Cal. App. 5th 987 (2021) (employer did not violate Cal. Lab. Code § 226 by separately referencing multiple regular and overtime rates of pay on wage statements).
46. 63 Cal. App. 5th 958 (2021).
47. *Id.* at 976.
48. 221 Cal. App. 4th 1425 (2013).
49. *Id.*
50. 66 Cal. App. 5th 119 (2021).
51. 62 Cal. App. 5th 88 (2021).
52. *Id.* at 111.
53. 63 Cal. App. 5th 82 (2021).
54. *Id.*at 85.
55. 63 Cal. App. 5th 406, 409 (2021).
56. 68 Cal. App. 5th 422 (2021).
57. 70 Cal. App. 5th 473 (2021).
58. *Id.*
59. 69 Cal. App. 5th 630 (2021).
60. 68 Cal. App. 5th 1109 (2021).
61. *Id.*at 1118.
62. *Id.*
63. 68 Cal. App. 5th 882 (2021).
64. *Id.*
65. 9 F.4th 1114 (9th Cir. 2021).
66. *Id.* at 1122.
67. 9 F.4th 1102 (9th Cir. 2021).
68. *Id.* at 1106.
69. *Id.*
70. *Id.*
71. *Id.* at 1110.
72. *Id.* at 1114.
73. *Id.* at 1110.