

2020 Employment Law Update - California and Ninth Circuit Cases Jody Yudien, Yudien Law Firm, Walnut Creek - 925-472-0600

1. *Ridgeway v. Wal-Mart, Inc.* (9th Cir. 2020) 946 F.3d 1066

a. Employers must pay minimum wages for time spent on mandated layovers where the employer's policy imposes constraints on employees' movements during breaks.

b. California's minimum wage laws for transportation workers are not preempted by the Federal Aviation Administration Authorization Act.

2. *Brome v. California Highway Patrol* (2020) 44 Cal.App.5th 786

Statute of limitations on discrimination claims may be equitably tolled during the pendency of a workers' compensation claim if the workers' compensation claim is based on the same facts as the discrimination claim and the workers' compensation claim gives the employer adequate notice, the employer is not prejudiced, and the plaintiff acts reasonably.

3. *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038

Time employees spend on employer's premises waiting for and undergoing a mandatory exit search of personal belongings is compensable as "hours worked" under Wage Order 7.

4. *Grande v. Eisenhower Medical Center* (2020) 44 Cal.App.5th 1147 - **Supreme Court review granted**

Res judicata did not bar claims in a class action against employer where a staffing agency had previously entered into a class action settlement agreement that did not explicitly release the employer from all related claims.

5. *Rizo v. Yovino* (9th Cir. 2020) 950 F.3d 1217

Prior pay history is not a "factor other than sex" that allows an employer to pay an employee less than employees of the opposite sex who perform the same work.

6. *Scalia v. Employer Solutions Staffing Group, LLC* (9th Cir. 2020) 951 F.3d 1097, cert. pet'n pending

Neither the Fair Labor Standards Act nor federal common law provide an employer with a right to seek contribution or indemnification from another joint employer.

7. *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73

Plaintiffs who settled individual claims for Labor Code violations continues to be “aggrieved employees” and retained standing to pursue a claim under PAGA.

8. *Walker v. Fred Meyer, Inc.* (9th Cir. 2020) 953 F.3d 1082

The Fair Credit Reporting Act’s (FCRA) requirement to provide a consumer report disclosure without any “extraneous information” includes removing information that may even be helpful to an employee, but is not specific to their privacy rights.

9. *Luna v. Hansen & Adkins Auto Transp., Inc.* (9th Cir. 2020) 956 F.3d 1151

Employers may provide a FCRA disclosure alongside other job application materials, provided the disclosure appears in a standalone document; a FCRA authorization need not be contained in a standalone document.

10. *Anthony v. Trax Int'l Corp.* (9th Cir. 2020) 955 F.3d 1123

An employer may use after-acquired evidence to show that an employee is not a qualified individual under the ADA.

11. *Colucci v. T-Mobile USA, Inc.* (2020) 48 Cal.App.5th 442

Second line managers with independent hiring and firing authority, substantial discretionary authority over daily store operations, and responsibility for multiple employees and store locations can be considered managing agents for purposes of determining punitive damages.

12. *McPherson v. EF Intercultural Found., Inc.* (2020) 247 Cal. App. 5th 243

Employers who claim to provide “unlimited” vacation, but impose limits in practice, may have to pay out accrued, but unused, vacation at termination.

13. *Betancourt v. OS Restaurant Services, LLC* (2020) 49 Cal.App.5th 240 - **Supreme Court review granted**

Employees may not recover penalties for waiting time and wage statement violations based on claims of non-provision of rest or meal periods, and likewise cannot recover attorney’s fees on those claims.

14. *Jarboe v. Hanlees Auto Group* (2020) 53 Cal.App.5th 539

a. Absent strong evidence that the arbitration provision was made expressly for the benefit of affiliated entities or that there is a close and integral relationship between them and the signatory entity, affiliated entities cannot enforce an arbitration provision as third-party beneficiaries or on grounds of equitable estoppel.

b. A trial court does not abuse its discretion when, after compelling arbitration of individual wage and hour claims, it declines stay of a related PAGA claim pending the outcome of the arbitration.

15. *Fleming Distribution Co. v. Younan* (2020) 49 Cal.App.5th 73

Employer waived right to arbitrate by its unreasonably delay in filing a petition to compel arbitration until after a hearing on the merits before the Labor Commissioner.

16. *Bostock v. Clayton Cty.* (2020) ___ U.S. ___, 140 S.Ct. 1731, 207 L.Ed.2d 218

Title VII prohibits discriminating against employees on the basis of sexual orientation or gender identity.

17. *Ward v. United Airlines, Inc.* (2020) 9 Cal. 5th 732

a. The exemption in Wage Order No. 9-2001 for employees covered by a collective bargaining agreement governed by the Railway Labor Act does not bar a wage statement claim brought under Labor Code §226.

b. Labor Code §226 applies to wage statements provided by an employer if the employee's principal place of work is in California.

18. *Oman v. Delta Air Lines, Inc.* (2020) 9 Cal.5th 762

a. Labor Code sections 204 and 226 do not apply to pay periods in which an employee works only episodically and for less than a day at a time in California unless the employee works primarily in California during the pay period, or does not work primarily in any state but has his or her base of operations in California.

b. California's limits on "wage borrowing" permit compensation schemes that promise to compensate all hours worked at a level that is at or above the minimum wage, even if particular components of those schemes fail to attribute to each and every compensable hour a specific amount equal to or greater than the minimum wage.

19. *Gulf Offshore Logistics, LLC v. Superior Court* (2020) 58 Cal.App.5th 264

Applying *Ward* and *Oman*, wage and hour laws apply to seamen working on a ship that sailed between California ports and oil drilling platforms outside California's jurisdictional limits because they worked in California for a significant portion of their job and reported for work at the California port from which their boat sailed to the oil platforms.

20. *Oliver v. Konica Minolta Business Solutions U.S.A., Inc.* (2020) 51 Cal.App.5th 1

Employees may be entitled to wages and mileage reimbursement for their commutes from home to jobsites and vice versa if they are under their employers' control such that they cannot use the commute time effectively for their own purposes.

21. *Our Lady of Guadalupe Sch. v. Morrissey-Berru* (2020) ___ U.S. ___, 140 S.Ct. 2049, 207 L.Ed.2d 870

The ministerial exception, grounded in First Amendment's religion clauses, barred teachers' employment discrimination claims where teachers educated their students in the Catholic faith and guided their students to live their lives in accordance with that faith.

22. *Aixtron, Inc. v. Veeco Instruments Inc.* (2020) 52 Cal.App.5th 360

Neither the Federal Arbitration Act nor the California Arbitration Act grant an arbitrator subpoena power to order prehearing discovery from third parties if the arbitration agreement did not provide for such discovery rights.

23. *Garner v. Inter-State Oil Co.* (2020) 52 Cal.App.5th 619

Language of arbitration agreement that included "waiver of all rights to a civil jury trial or participation in a civil class action lawsuit" did not waive employee's right to pursue class claims altogether, but rather only waived his ability to pursue class claims in court, but permitted arbitration of class claims.

24. *Canela v. Costco Wholesale Corp.* (9th Cir. 2020) 965 F.3d 694

Representative actions brought under PAGA cannot be brought as a "class action" under the Class Action Fairness Act of 2005.

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

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

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

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

Employee cannot establish commonality for purposes of class certification under FRCP Rule 23 by only offering evidence that the employer's written policy does not comply with the law; employee must further show that the employer enforced the non-compliant policy consistently across the class.

27. *Conyer v. Hula Media Services, LLC* (2020) 53 Cal.App.5th 1189 - **Depublished and Review Granted**

Employee who signed an acknowledgment of receipt of a handbook that contained an arbitration clause was bound by the arbitration clause, even though the employer did not call the employee's attention to the arbitration clause.

28. *Sanchez v. Martinez* (2020) 54 Cal.App.5th 535

Piece-rate employees who receive unpaid rest breaks are entitled to damages in the amount of the minimum wage for actual unpaid time or an additional hour of pay under Labor Code §226.7, but not both.

29. *SEIU Local 121RN v. Los Robles Reg'l Med. Ctr.* (9th Cir. 2020) 976 F.3d 849

Where a collective bargaining agreement includes a broad arbitration clause that is silent on the question of who will decide questions of arbitrability of labor issues, arbitrability is to be decided by the court, not the arbitrator.

30. *Garcia-Brower v. Premier Automotive Imports of CA, LLC* (2020) 55 Cal.App.5th 961

Employers have a duty to investigate the accuracy of any criminal conviction report prior to terminating an employee on the basis of the report where there is evidence that the report may be incorrect.

31. *Lares v. Los Angeles County Metropolitan Transportation Authority* (2020) 56 Cal.App.5th 318

Where an employer's no-fault absenteeism policy provides that an employee may clear absences that otherwise would count for purposes of disciplinary action by working (or being available to work) during a certain clearance period, the employer does not violate CFRA by extending the absence clearance period by the number of days the employee was on CFRA leave during that period, provided that the employer extends the absence clearance period by the number of days the employee was on any unpaid leave.

32. *Midwest Motor Supply Co. v. Superior Court* (2020) 56 Cal.App.5th 702

Labor Code §925 provides that a forum-selection clause in an employment contract is voidable by an employee if the contract containing the clause was "entered into, modified, or extended on or after January 1, 2017." This case holds that §925 applies when any part of a contract containing a forum-selection clause is modified on or after January 1, 2017, not just when the forum-selection clause itself is modified on or after January 1, 2017.

33. *Semprini v. Wedbush Securities., Inc.* (2020) 57 Cal. App. 5th 246

A compensation plan based solely on commissions, with recoverable advances on future commissions, does not qualify as "salary" for purposes of the administrative exemption.

34. *Brown v. TGS Management Co.* (2020) 57 Cal. App. 5th 303

Broad confidentiality provisions in an employment agreement that effectively prevent an employee from practicing his profession in perpetuity constitute a de facto noncompete agreement in violation of Business and Professions Code §16600.

35. *Coughenour v. Del Taco, LLC* (2020) 57 Cal.App.5th 740.

Employee who signed an arbitration agreement with an employer as a minor and continued employment for four months after reaching majority age had adequately disaffirmed the agreement and rendered it unenforceable by filing a lawsuit against the employer within four months of separation and eight months of reaching majority.

36. *Shirvanyan v. Los Angeles Community College Dist.* (Nov. 30, 2020, Nos. B296593, B297419) ___ Cal.App.5th ___ [2020 Cal. App. LEXIS 1237]

Employee suing for failing to engage in an interactive process concerning making a reasonable accommodation for the employee's disability is not required to suggest a possible accommodation to begin the process, but employee must, by the time of trial, be able to show that a reasonable accommodation existed at the time the employer should have begun the interactive process.

37. *Ali v. Daylight Transport, LLC* (Dec. 4, 2020, No. A157104) ___ Cal.App.5th ___
[2020 Cal. App. LEXIS 1255]

Even though the employer called the plaintiff an independent contractor, the relationship was close enough to an employment relationship to make the Armendariz (24 Cal.4th 83) standards of unconscionability applicable.

38. *Rojas-Cifuentes v. Superior Court* (Dec. 21, 2020, No. C085463) ___ Cal.App.5th ___
[2020 Cal. App. LEXIS 1210].)

A single PAGA claim alleging violations of 8 different Labor Code sections probably stated 8 separate “causes of action” for purposes of summary adjudication. Employer moved for summary adjudication to the PAGA claim as a whole, rather than as to the 8 separate claims, and since employee raised a triable issue as to one of the 8 claims, summary adjudication was denied.