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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *September 2017*

11TH ANNUAL EMPLOYMENT LAW SYMPOSIUM

NOVEMBER 16, 2017
8:00 A.M. – 4:30 P.M.
FARMER & THE SEAHORSE AT THE ALEXANDRIA

TOPICS INCLUDE:

HR DISCRIMINATION & RETALIATION
WAGE & HOUR DEVELOPMENTS
HIRING STRATEGIES
CALIFORNIA FAIR PAY ACT

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LEGISLATIVE

California Legislation

Below is a summary of bills the California legislature passed that may impact California employers and employees. Governor Jerry Brown has until October 15, 2017 to sign or veto bills.

AB 168 (Eggman): AB 168 would prohibit California employers from asking job candidates about their salary history. Upon request, an employer would be required to provide an applicant with the pay scale of the desired position.

AB 569 (Gonzalez Fletcher): AB 569 seeks to protect women from being fired or disciplined over decisions related to their reproductive health, including but not limited to, the use of any drug, device, or medical service.

AB 978 (Limón): This bill would require an employer who receives a written request for a paper or electronic copy of its written injury prevention program from a current employee, or his or her authorized representative, to comply with the request as soon as practicable, but no later than 10 business days from the date the employer receives the request. The bill would require the employer to provide the copy of the written injury prevention program at no cost to the employee. The bill would authorize the employer to take reasonable steps to verify the identity of a current employee or his or her authorized representative and to designate the person to whom a request is to be made. The bill would authorize the assertion of impossibility of performance as an affirmative defense by an employer in any complaint alleging a violation of these new provisions.

AB 1008 (Bradford): Known as "Ban the Box", AB 1008 would prohibit public and private (more than five employees) employers from asking about past convictions on any application for employment. The employer could ask about conviction history after issuing a conditional offer of employment.

AB 1102 (Rodriguez): AB 1102 increases the maximum fine to $75,000 (from $20,000) for whistleblower violations in health care facilities.

AB 1209 (Gonzalez Fletcher): This bill would require, on and after July 1, 2019, and biennially thereafter, that an employer that is required to file a statement of information with the Secretary of State and that has 500 or more employees in California to collect specified information on gender pay wage differentials. The bill would require the employer to submit the information annually to the Secretary of State by July 1, 2020, and biennially thereafter. The bill would require the

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Secretary of State to publish the information described above on a website available to the public upon receiving necessary funding and establishing adequate mechanisms and procedures.

AB 1701 (Thurmond): AB 1701 would, for all contracts entered into on or after January 1, 2018, require a direct contractor, as defined, making or taking a contract in California for the erection, construction, alteration, or repair of a building, structure, or other work, to assume, and be liable for, specified debt owed to a wage claimant that is incurred by a subcontractor, at any tier, acting under, by, or for the direct contractor for the wage claimant's performance of labor included in the subject of the original contract. The bill would authorize the Labor Commissioner to bring an action under specified statutes or in a civil action to enforce this liability, as provided. The bill would also authorize a third party owed fringe or other benefits or a joint labor-management cooperation committee, as defined, to bring a civil action to enforce the liability against a direct contractor under these provisions, as specified. The bill would provide that it does not apply to any work being done by an employee of the state or any political subdivision of the state. The bill would require a subcontractor, upon request from the direct contractor, to provide specified information regarding the subcontractor's and third party's work on the project and would provide that the direct contractor could withhold disputed sums upon the subcontractor's failure to provide the requested information, as specified. The bill would provide that these obligations and remedies are in addition to any other remedy provided by law. The bill would provide that its provisions are severable.

AB 1710 (Committee on Veterans Affairs): This will would amend section 394 of the Military and Veterans Code and would expand existing protections for military service members in their civilian workplaces to include protection against hostile work environments. AB 1710 would prohibit that no military service member shall be "prejudiced or injured" by any person or employer in terms, conditions, or privileges of employment by virtue of membership or service in the military. The will would also provide that no employer, officer, or agent shall prejudice or harm a person in his/her terms or conditions of employment by reason of performance of military service or duty.

SB 63 (Jackson): SB 63 would expand the California Family Rights Act to employers with 20 or more employees.

SB 306 (Hertzberg): This bill would revise retaliation claim procedures under California law. SB 306 authorizes injunctive relief (such as reinstating the employee) in retaliation cases, before the case has been completely investigated or litigated to determine whether a violation has occurred. The bill also allows the Labor Commissioner to cite an employer for retaliation independently, without an employee complaint.

SB 490 (Bradford): This bill would add section 204.11 to the Labor Code. This bill would require commissions paid to any employee licensed under the Barbering and Cosmetology Act to be due and payable at least twice during each calendar month on a day designated in advance by the employer as the regular payday. SB 490 would further authorize the employee and employer to agree to a commission in addition to the base hourly rate, among other features.

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Ninth Circuit Applies California Supreme Court's "Day of Rest" Ruling

In *Mendoza v. Nordstrom, Inc.*, the Ninth Circuit Court of Appeals ("Ninth Circuit") applied newly articulated guidance from the California Supreme Court about the requirement to provide employees with one day's rest in seven. Plaintiffs Christopher Mendoza and Meagan Gordon (collectively, "Plaintiffs") pursued class action claims, as well as a representative claim under the Private Attorneys General Act of 2004 ("PAGA"), against their former employer, Nordstrom. Plaintiffs alleged that Nordstrom violated Labor Code sections 551 and 552, California's "day of rest" rules. The case proceeded to trial in the federal district court, which ruled against Plaintiffs on their day of rest claims and dismissed the action. Plaintiffs asked the Ninth Circuit to reverse the district court's ruling. The Court of Appeals declined to do so.

Labor Code section 551 grants employees a right to one day's rest in seven. Labor Code section 552 provides that no employer shall cause his employees to work more than six days in seven. However, these rules do not apply: (1) when the nature of the employment reasonably requires that the employee work seven or more consecutive days, so long as the employee receives, within each calendar month, days of request equivalent to one in seven; or (2) when the total hours of employment do not exceed 30 hours in any week or six hours in any one day in that week. (Labor Code, §§ 554, 556.)

Because no California state court had directly opined on these statutes, the Ninth Circuit asked the California Supreme Court to provide much needed guidance. In May, the Supreme Court answered three questions as follows:

Question:	Is the day of rest required by Labor Code sections 551 and 552 calculated on a rolling basis to any seven-consecutive-day period?
Answer:	No. A day of rest is guaranteed for each workweek. Periods of more than six consecutive days of work that stretch across more than one workweek are not per se prohibited.
Question:	Does the Labor Code section 556 exemption for workers employed six hours or less per day apply so long as an employee works six hours or less on at least one day in the applicable workweek, or does it apply only when the employee works no more than six hours on each and every day of the workweek?
Answer:	The exemption applies only when the employee works no more than six hours on each and every day of the workweek.
Question:	What does it mean for an employer to "cause" an employee to go without a day of rest?
Answer:	An employer "causes" an employee to go without a day of rest when it induces the employee to forego rest to which he or she is entitled. However, an employer is not forbidden from permitting or allowing an employee, fully apprised of

the entitlement to rest, independently to choose not to take a day of rest.

With the benefit of this guidance, the Ninth Circuit examined whether Plaintiffs' day of rest claims were properly dismissed by the district court. According to the Ninth Circuit, the evidence established that neither Plaintiff ever worked more than six consecutive days in any one workweek. Therefore, because Plaintiffs could not prove that Nordstrom ever violated Labor Code sections 551 or 552, their individual claims under those statutes failed and their claims were properly dismissed.

Refusing to accept defeat, the Plaintiffs argued that the Ninth Circuit should order the district court to permit a new PAGA representative who *did* suffer violations of Labor Code sections 551 and 552 to be added to the lawsuit. The Ninth Circuit disagreed. As a preliminary matter, any putative PAGA representative must first exhaust his or her own administrative remedies before pursuing a PAGA claim. Moreover, the district court gave the Plaintiffs the opportunity to include additional plaintiffs in advance of trial; Plaintiffs declined to do so. Further, the district court *may*, but is not obligated to, permit the addition or substitution of PAGA representatives. Thus, the Ninth Circuit declined to order the district court to permit addition of new representatives.

The Ninth Circuit's opinion in *Mendoza* serves as the first example of how to apply the California Supreme Court's guidance about the day of rest rules.

Ninth Circuit Upholds Summary Judgment in Favor of Employer in Age Discrimination Case

In *Merrick v. Hilton Worldwide*, the Ninth Circuit Court of Appeals ("Ninth Circuit") held that the trial court properly granted summary judgment in favor of the employer on disability discrimination and disparate treatment claims because the employee failed to show that the legitimate reason proffered for the employer's action was merely pretext for discrimination.

Plaintiff Charles Merrick ("Merrick") worked for 19 years for the Hilton La Jolla Torrey Pines Hotel ("the Hotel"), currently owned by Hilton Worldwide ("Defendant"). Merrick started as a Maintenance Mechanic for Sheraton and worked his way up to becoming the Director of Property Operations at the Hotel. In 2009, after Defendant acquired the hotel from Sheraton, Defendant instructed Remington, a subsidiary of the Hotel's joint owner, to take over primary responsibility for capital improvement projects (previously Merrick's duty).

Due to declining revenue, the Hotel underwent several reductions in force. This trend continued until May 2012, when Hilton Worldwide ordered a number of properties, including the Hotel, to reduce payroll expenses by seven to ten percent by August 2012. The decision-makers reviewed all twenty-nine members of management to evaluate job performance and disciplinary actions. No members of management had performance or discipline issues. As a starting point for their deliberations, the decision-makers prepared and reviewed a spreadsheet listing all twenty-nine Hotel managers. The spreadsheet included each employee's department, job title, start date, years of service, and salary. The spreadsheet did

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not include the employees' ages, but more than half of them were over forty. For business reasons, the decision-makers preferred to avoid eliminating positions (1) with direct guest contact, (2) with significant team member impact (*e.g.*, supervisors of large departments), and (3) that directly generated additional revenue for the Hotel. In light of the other recent layoffs, they also preferred to achieve the required payroll cut by eliminating a single position, if possible. After deliberation based on these factors and approval by Defendant's national executives, Merrick was laid off in a single employee reduction in force. He was sixty years old when he was discharged. Defendant's guidelines allowed qualified employees (including Merrick) to apply for transfer to open positions within the Hilton organization following layoffs.

Merrick filed a lawsuit against Defendant alleging that it violated the Fair Employment and Housing Act by terminating his employment because of his age. The trial court granted summary judgment for Defendant on Merrick's age discrimination claim and derivative claims because Merrick could not prove a prima facie case of age discrimination because he was not replaced by a younger worker. The appellate court affirmed on the ground that Merrick failed to raise a triable dispute as to whether Defendant's legitimate, nondiscriminatory reason for discharging him was pretextual. Merrick appealed the trial court's decision and the Ninth Circuit affirmed.

The Court reasoned that under the Americans with Disabilities Act, if the employer provides a nondiscriminatory reason for its adverse employment action, the employee must raise a triable issue of fact as to pretext. Here, Merrick did not demonstrate that Defendant's legitimate reason for the reduction in force was merely a pretext for discrimination, and further failed to establish that alternative positions were open and available at the time Merrick's position was eliminated.

In a relatively rare win for employers, this decision confirms that the employee bears the burden of proving that an employer's stated legitimate, non-discriminatory reason for an adverse employment action is merely a pretext for discrimination. This decision also serves as a reminder that employers should exercise caution when discharging employees over 40 years old, and should confirm that their legitimate, non-discriminatory reason(s) for doing so are well-documented.

Ninth Circuit Reminds Employers that Employees' Off-the-Clock Issues May also be Workplace Issues

In *Fuller v. Idaho Department of Corrections,* the Ninth Circuit Court of Appeals ("Ninth Circuit") denied summary judgment to an employer whose employee raped a fellow employee while off the-clock.

In January 2011, Plaintiff Cynthia Fuller ("Fuller") began working as a probation and parole officer with the Idaho Department of Corrections ("IDOC"), District 3 ("District 3"). During her first week on the job, she met a senior probation officer, Herbt Cruz ("Cruz"). A few months later, they began an intimate relationship that they kept secret even though IDOC policy required reporting it. In

late July 2011, law enforcement alerted the IDOC that it was investigating Cruz for the rape of a civilian.

The IDOC placed Cruz on administrative leave with pay. District 3 Manager Kim Harvey ("Harvey") called a staff meeting where he advised the employees that Cruz was on administrative leave because of a confidential, ongoing investigation and "was not authorized to be on the premises." However, he added that the IDOC looked forward to Cruz's prompt return to work. Fuller informed Harvey of her relationship with Cruz, but he still refused to provide the basis for the investigation.

Shortly thereafter, Cruz raped Fuller. Over the following weeks, Cruz raped Fuller two more times. All of the rapes occurred outside of the workplace. After learning of Cruz's actions, Harvey took Fuller to law enforcement to aid her in reporting Cruz's action. He also informed Fuller that "Cruz had a history of this kind of behavior and that he knew of several instances." The next day, Fuller obtained a protective order requiring Cruz to remain at least 1000 feet from her. That same day, Harvey sent the following email to all District 3 employees, including Fuller:

> Just an update on Cruz. I talked to him. He sounds rather down, as to be expected. . . . Just as a reminder – and this is always one thing I hate about these things – he cannot come to the office until the investigation is complete. Nor can he talk to anyone in the Department about the investigation. So, if you want to talk to him, give him some encouragement etc., please feel free. Just don't talk about the investigation. At this point, I honestly don't know the status of it.

Fuller did not return to work; instead, she went on leave to recover from the trauma. Harvey told Fuller he would determine whether she was eligible for paid administrative leave. On September 19, Fuller was formally denied paid leave and told that the IDOC director only granted paid leave only for "acts of God, nature or pending investigation." However, the written IDOC procedure permitted paid administrative leave "due to an unusual situation, emergency, or critical incident that could jeopardize IDOC operations, the safety of others, or could create a liability situation for the IDOC." Noting that 1) Cruz was being paid during his leave and 2) the IDOC risked the safety of others by failing to disclose why Cruz was on leave and stating that it "hopes he returns soon," Fuller reiterated her request for paid leave and a reinstatement of leave used. The IDOC again declined, noting her situation was not "unusual."

The IDOC conducted an internal investigation, and ultimately determined it would terminate Cruz's employment. However, it did not inform any party, including Cruz or Fuller, of the decision for approximately two months. Fuller resigned prior to being informed that Cruz would be discharged.

After exhausting administrative remedies, Fuller sued the IDOC alleging, among other actions, a Title VII hostile work environment claim against the IDOC. The parties filed cross-motions for summary judgment on the claim and the trial court granted the IDOC's motion. The trial court rejected Fuller's hostile work

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environment claim because the rapes occurred outside the workplace and the IDOC had (allegedly) taken remedial action. Fuller appealed and a three-judge panel for the Ninth Circuit reversed.

The Ninth Circuit concluded that triable issues of fact existed with respect to the existence of a hostile work environment based on the IDOC's reaction to the rapes, as it effectively punished Fuller for taking time off, while both vocally and financially supporting Cruz.

The Ninth Circuit acknowledged that a finder of fact may ultimately determine that the IDOC acted reasonably when confronted with a difficult situation; however, a reasonable trier of fact could also find that the IDOC's actions were sufficiently severe or pervasive to create a hostile work environment. Therefore, the Court held that summary judgment was not appropriate and remanded the case for trial.

The lesson here is critical: interactions and altercations among employees outside of the workplace may eventually impact the employer. The rapes by Cruz did not take place at work, nor was he (or Fuller) on the clock at the time they occurred. However, this off-the-clock conduct gave rise to comments and actions by the employer. Poor handling of conflict between employees—even if unrelated to and outside of work—may ultimately create liability for an employer. Moreover, failing to proactively address a situation may be the difference between preventing, and instigating, legal action by an employee.

California

Court of Appeal Deals a Win to California Employers in Vacation Pay Case

In *Minnick v. Automotive Creations,* a California Court of Appeal upheld an employer's vacation pay program that made employees eligible for a week of paid vacation only after a year of service.

Automotive Creations, Inc. ("ACI") maintained a policy whereby employees were entitled to a week of paid vacation after one year of employment. ACI's policy specifically stated that employees with less than one year of service were ineligible for vacation pay. Moreover, the policy stated that vacation pay did not accrue during the first year of employment, and instead was awarded as a lump sum after the first year. Per ACI's policy, employees received any accrued but unused vacation pay at end of their employment.

Plaintiff Nathan Minnick ("Minnick") worked for ACI for six months in 2014. Because he worked for less than a year, he did not receive a payout for accrued vacation time. Minnick thereafter sued ACI for unpaid vacation pay, contending he was entitled to a pro-rated amount of vacation pay reflecting the time he worked. ACI filed a demurrer to Minnick's complaint, arguing that its policy clearly stated that (1) employees did not accrue any vacation time during the first year; and (2) the block award of vacation time after the first year was allowable under California law. The trial court sustained the demurrer and Minnick appealed.

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Labor Code section 227.3 requires employers to pay employees for any vested but unused vacation pay at the end of employment. Because vested vacation pay is considered a form of earned compensation (as opposed to a gift or discretionary bonus), it is not subject to forfeiture upon termination of employment. Minnick argued that even though ACI's policy expressly stated that vacation pay only accrued after year of service, California law should be interpreted to prohibit waiting periods on vacation pay accrual and to require any vacation pay to vest from the start of employment.

The Court of Appeal squarely rejected Minnick's theory. Citing the 2009 decision *Owen v. Macy's, Inc.*, 175 Cal.App.4th 462, the Court held that while an employer could not require forfeiture of vested vacation pay, a predetermined waiting period during which vacation pay did not accrue was lawful. Accordingly, the Court affirmed the trial court's sustaining of the demurrer.

This decision provides helpful guidance for employers with respect to the creation and management of lawful vacation pay programs, and confirms that employers have flexibility to grant vacation pay to employees in a manner that serves the interests of both the employer and the employee. As with all employee benefits, employers should carefully and regularly review their vacation pay practices and policies to ensure that they align both with the employer's intentions and California law.

Court of Appeal Overturns Trial Court and Enforces Arbitration Agreement

In *OTO, LLC v. Kho,* a California Court of Appeal held that an employer's arbitration agreement was enforceable, thereby precluding the employee from having his wage claim adjudicated by the California Labor Commissioner ("CLC").

Plaintiff Ken Kho ("Kho") was employed by OTO, LLC dba One Toyota of Oakland ("One Toyota") as an automobile mechanic from January 2010 through 2014. After his employment was terminated, Kho filed a claim with the CLC against his former employer for unpaid wages.

Kho and Toyota One engaged in lengthy early settlement negotiations, during which time Toyota One provided Kho with a draft settlement agreement. Kho rejected the draft and, in January 2015, requested a Berman hearing[1] to adjudicate his claims. The hearing was set by the CLC for the following August.

On the morning of the Berman hearing, counsel for Toyota One formally requested that the CLC take the hearing off calendar, as Toyota One had filed a motion to compel arbitration and stay the administrative proceedings the previous Friday. The CLC declined and informed counsel that the hearing would proceed as scheduled. Toyota One's counsel thereafter appeared at the hearing, but only for the purpose of serving a copy of the recently filed motion. Counsel then left and the hearing was held in counsel's (and Toyota One's) absence.

[1] A Berman hearing is a procedural vessel by which wage claims can be resolved through an administrative hearing before the CLC.

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Unsurprisingly, the CLC issued a ruling in Kho's favor in the amount of $102,912 in unpaid wages and $55,634 in liquidated damages, interest, and penalties. Toyota One posted bond and appealed the matter to state court, seeking to set aside the CLC's judgment and re-asserting its motion to compel arbitration.

The trial court reviewed Toyota One's motion, which attached the "Comprehensive Agreement – Employment At-Will and Arbitration" that had been executed by Kho during his employment. In reviewing that acceptability of arbitration agreements, courts look for both procedural unconscionability (the manner in which the agreement was executed) and substantive unconscionability (acceptability of the terms of the agreement). Here, the trial court ruled that there was sufficient procedural and substantive unconscionability to deny Toyota One's motion to compel arbitration, notably holding that substantive unconscionability existed because Kho would likely have been required to incur the cost of an attorney to proceed with arbitration.

On appeal, the Court of Appeal cited *Sonic-Calabasas A, Inc. v. Moreno* ("*Sonic II*") to point out that both procedural *and* substantive unconscionability must exist for an agreement to be unenforceable (the two factors are examined concurrently on a sliding scale). It noted that, while the trial court ruled that the agreement required matters to proceed in a trial-like proceeding (unlike a more streamlined CLC proceeding), this option was sufficiently affordable and accessible to satisfy the *Sonic II* analysis. The agreement was therefore not substantively unconscionable, and denial of the motion to compel arbitration was improper.

As always, California employers seeking to implement and enforce arbitration agreements must ensure that those agreements are carefully drafted. Trial courts are showing an increased willingness to deny motions to compel arbitration when the relevant agreement does not appear to be sufficiently "fair" to affected employees. Employers are advised to have their arbitration agreements reviewed by counsel, who can advise as to whether or not the agreements' terms may be deemed to be procedurally or substantively unconscionable.

Court of Appeal Confirms that Labor Code Section 558 Awards Are Not Civil Penalties under PAGA

In *Esparza v. K.S. Industries, L.P.*, plaintiff Richard Esparza ("Esparza") sued his former employer ("the Company") for various Labor Code violations. Esparza's complaint included a representative claim under the Private Attorneys General Act of 2004 ("PAGA"). Because Esparza had signed a mandatory arbitration agreement, the Company moved to compel the dispute to arbitration. Esparza objected, asserting that, per the California Supreme Court's opinion in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, representative PAGA claims are not subject to arbitration. The trial court denied the motion, and the Company appealed.

The Company argued that Esparza's PAGA claim was more than it appeared to be—instead of seeking to exclusively recover civil penalties (as is permitted), Esparza also sought to recover unpaid wages pursuant to Labor Code section 558 ("Section 558"). In *Iskanian*, the Supreme Court recognized a

distinction between "civil penalties" and "statutory damages." The Court stated that, prior to the enactment of PAGA, civil penalties were enforceable only by the state, and under PAGA, 75% of the penalties recovered must be allocated to the state. Thus, where civil penalties are imposed, only the state receives the proceeds. On the other hand, civil penalties *do not include* any recovery that could have obtained by individual employees suing in their individual capacities (i.e., victim-specific relief or "statutory damages"). According to the Supreme Court, representative PAGA claims for civil penalties may not be compelled to arbitration.

To determine whether Esparza improperly sought unpaid wages via his PAGA claim, the Court of Appeal analyzed whether Section 558 provides for a civil penalty or statutory damages. Section 558 states:

> (a) Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a *civil penalty* as follows:
>
> > (1) For any initial violation, fifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid *in addition to an amount sufficient to recover underpaid wages*.
> >
> > (2) For each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid *in addition to an amount sufficient to recover underpaid wages*.
> >
> > (3) *Wages recovered pursuant to this section shall be paid to the affected employee*.

Esparza argued that Section 558 clearly states that the award—"an amount sufficient to recover underpaid wages"—is a civil penalty within the meaning of PAGA and *Iskanian*. However, the rule of nonarbitrability adopted in *Iskanian* is limited to claims "that can *only* be brought by the state or its representatives, where any resulting judgment is binding on the state and any monetary penalties largely go to state coffers." (*Iskanian*, 59 Cal.4th at 388.) Applying this rule, the appellate court concluded that Section 558 provides for statutory damages, *not* a civil penalty. First, the statute makes clear that 100% of the wages recovered go to the employee, not to the state. Second, the claim for unpaid wages could be pursued by Esparza in his own right, not just by a state agency. Thus, Esparza's Section 558 claim fell outside the scope of the *Iskanian* rule and was therefore subject to arbitration. So too was Esparza's attempt to recover unpaid wages on behalf of other aggrieved employees, since those employees could pursue the recovery of unpaid wages in their own right and the wages recovered would not go to state coffers.

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In light of the Esparza decision, employers should carefully examine any PAGA claims to ensure plaintiffs are not trying to include a backdoor claim for unpaid wages via Section 558. If any such claims are asserted, employers should consider whether to sever and arbitrate such claims from properly asserted, nonarbitrable requests for PAGA civil penalties.

Court of Appeal Reverses Summary Judgment on FEHA Retaliation Claim

In *Light v. California Department of Parks and Recreation*, a California Court of Appeal reversed summary judgment granted in the employer's favor in connection with a Fair Employment and Housing Act ("FEHA") retaliation claim.

Plaintiff Melony Light ("Light") was a temporary Office Technician at California Department of Parks and Recreation's ("Department") Ocotillo Wells District. Leda Seals ("Seals") was the Administrative Officer of the Ocotillo Wells District and Light's supervisor. Kathy Dolinar ("Dolinar") was the Superintendent of the Ocotillo Wells District and Seals' supervisor.

Light was friends with coworker, Delane Hurley ("Hurley"). Seals believed Hurley to be lesbian. Seals repeatedly made comments to Light intended to make her uncomfortable about her friendship with Hurley, to enlist Light in Seals' harassment of Hurley based on her sexual orientation, and to encourage Light to cease all contact with Hurley.

Hurley filed a discrimination complaint with the Department's Human Rights Office, which sent investigators to the Ocotillo Wells District to investigate. Before Light met with investigators, Seals told Light that she and Dolinar expected Light to lie to the investigators. Light was expected to be on Dolinar's "team" and protect her supervisors. Seals threatened to end Light's career if she didn't lie to protect Dolinar.

After Light spoke with investigators, Seals repeatedly asked what Light told investigators. Light refused to tell Seals, which made her very upset. Seals requested Light be transferred and began to distance herself from Light. Additionally, Seals verbally and to some extent physically attacked Light. Thereafter, Light filed her own complaint for retaliation with the Department's Human Rights Office.

After filing her complaint, Light was denied training for a different position, and her hours were significantly reduced (eventually to zero). Approximately a week before her last scheduled work day, Light went on medical leave.

Light filed a lawsuit alleging numerous claims against the Department, Seals, and Dolinar, including retaliation, harassment, disability discrimination, assault, false imprisonment, negligent infliction of emotional distress, and intentional infliction of emotional distress. The Department, Seals, and Dolinar moved for summary judgment on the claims and the trial court granted the motion. Light appealed.

A California Court of Appeal reversed the trial court's decision. While the Department argued that Light did not suffer an adverse employment action, the

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Court noted that the FEHA not only protects against ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement. The court considers the totality of the circumstances to determine whether the plaintiff has suffered an adverse employment action. The Court reasoned that a reasonable trier of fact could conclude that Light suffered adverse employment actions when Seals isolated Light, moved her to a different office, and verbally and to some extent physically attacked her. Moreover, the Department denied Light training for another position and reduced Light's scheduled hours to zero.[2] Taken together, these actions could be interpreted as a material and adverse change in Light's employment.

This case highlights the fact that an employer must tread carefully after an employee makes a complaint, as a broad spectrum of conduct could be deemed to adversely affect the material terms of the employee's employment and therefore be considered "retaliatory." Employers are advised to consult with legal counsel before taking any action against an employee who has complained about alleged illegal conduct, regardless of the merit of the complaint.

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[2] The Court noted that the reduction of Light's hours alone could constitute a material and adverse employment action by the Department.

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