

# EMPLOYMENT LAW UPDATE

*Relationship-Driven Results*

*July 2021*

## LEGISLATIVE

### California

#### **Senate and Assembly Bills Reach Next Level of Review**

Friday June 2, 2021 marked the last day of the legislative cycle for bills to move from their house of origin (whether the Senate or Assembly) into the other house for consideration. While significant amendment is possible, if not likely, the following proposed bills are those with the greatest *potential* impact on California employers:

#### Proposed Senate Bills

SB 331 would amend section 12964.5 of the Government Code as it applies to non-disparagement agreements, such that agreements would carve out an employee's ability to discuss conduct the employee has reason to believe is unlawful. It would also amend section 1001 of the Code of Civil Procedure to broaden prohibition on confidentiality provisions in settlement agreements to all forms of workplace discrimination—not just discrimination based on sex.

SB 606 would establish a process by which Cal/OSHA must issue a citation to an "egregious employer" for each occasion on which the employer makes no reasonable effort to eliminate a known violation.

#### Proposed Assembly Bills

AB 701 would require employers to notify non-exempt warehouse distribution employees, in writing, of quotas that the employees are required to meet, including the number of tasks to be performed and the materials to be processed and/or handled.

AB 1003 would amend the penal code to categorize employer's intentional theft of wages in excess of \$950 as grand theft.

AB 1033 would require the Department of Fair Employment and Housing ("DFEH") to notify any employee seeking an immediate right-to-sue letter alleging California Family Rights Act ("CFRA") violations of the requirement to pursue mediation before filing a civil action. Claims would be tolled during the period following initiation of the alternate dispute resolution process.

*Save  
the  
Date*

**Wednesday  
November 17, 2021**

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AB 1041 would expand the definition of “family member” under California Paid Sick Leave to add a “designated person,” defined as “a person identified by the employee at the time the employee requests paid sick days.” It would also amend the California Family Medical Rights Act to include a “designated person” defined as “a person identified by the employee at the time the employee requests family care and medical leave.”

## Areas of Practice

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Business Litigation

Community Association Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

Trial & Civil Litigation

## JUDICIAL

### Federal

#### **Ninth Circuit Court of Appeals Provides Stepping Stone Towards Additional Clarity Regarding SB 826 in *Meland v. Weber***

In *Meland v. Weber*, the Ninth Circuit Court of Appeals reversed the district court’s dismissal for lack of standing of an action brought by a corporate shareholder challenging the constitutionality of California Senate Bill 826 (“SB 826”). SB 826 requires all publicly traded companies that are incorporated or headquartered in California to have a minimum number of females on their boards of directors. SB 826 also imposes reporting requirements, including requiring the Secretary of State to publish reports showing which corporations are in compliance with the law. To enforce SB 826, the law authorizes the Secretary of State to impose fines for violations, ranging from \$100,000 to \$300,000 per violation.

Plaintiff Meland (“Meland”), a shareholder of a publicly traded company, filed a complaint against the Secretary of State alleging that SB 826 requires shareholders to discriminate on the basis of sex when exercising their corporate voting rights and was thus unconstitutional under the equal protection provisions of the Fourteenth Amendment. Because *Meland* was filed in federal court, Meland was required to establish standing under Article III of the U.S. Constitution. The first and foremost of the three necessary elements to establish standing, and the only element at issue, was whether Meland had suffered “an injury in fact.” To confer standing under Article III, an injury in fact must impact the plaintiff in a personal and individual way. The federal judge dismissed Meland’s action on the basis of lack of standing, concluding that, under SB 826, neither the requirement nor the penalty is imposed on Meland. Meland appealed.

The Ninth Circuit reversed the federal judge’s decision, holding that because Meland plausibly alleged that SB 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. Because Meland has standing to challenge SB 826’s constitutionality, review of *Meland v. Weber* will proceed. In the meantime, however, all publicly traded companies that are incorporated or headquartered in California must continue to comply with SB 826.

## California

### **California Court of Appeal Holds That Trial Court Erred in Limiting Attorney Fees in *Moreno v. Bassi***

In *Moreno v. Bassi*, California's Fifth District Court of Appeal held that the trial court erred in applying California Code of Civil Procedure ("CCP") section 1031, which applies to the recovery of wages where the amount demanded does not exceed \$300, instead of Labor Code section 1194(a), which applies to all actions for unpaid minimum wages or overtime compensation.

In September 2013, Plaintiff Marina Moreno ("Moreno") filed a complaint against Parmjit Singh Bassi ("Bassi"), Bassi's wife, and Lucky Farms, asserting twelve causes of action, including four alleged violations of the Fair Employment and Housing Act ("FEHA") and three alleged violations of the Labor Code, seeking unpaid minimum wages, liquidated damages for failing to pay minimum wages, and waiting time penalties. The jury found for Moreno on her unpaid minimum wages and liquidated damages cause of actions, but sided with defendants on all other causes of actions, including all alleged FEHA violations. Based on the jury's decision, Moreno was entitled to receipt of \$16.00 of unpaid minimum wages and \$16.00 in liquidated damages. In October 2018, the trial court also awarded Moreno \$3.20 in attorneys' fees, based on CCP section 1031, which caps the recovery of attorneys' fees at 20% of the wages recovered, rather than Labor Code section 1994, which would have instead awarded the Plaintiff reasonable attorneys' fees. Moreno appealed the trial court award.

On appeal, the Court of Appeal ruled that, when an action seeks the recovery of minimum wages *and* the amount demanded does not exceed \$300.00, CCP section 1031 and Labor Code section 1194 overlap and cannot be harmonized. The action would fall within the literal terms of both statutes, and the question of which statute controls is not addressed by statutory text or by any other qualifying authority.

The Court of Appeal noted that CCP section 1031 dealt with the dollar amount demanded, while Labor Code section 1194 applied to the type of wages sought. Based on the history underlying California's minimum wage law, the court concluded that the type of wages in question was more important to California Legislature than the amount demanded. From this, the court held that Labor Code section 1194(a) should control in instances in which it overlaps with CCP section 1031. As an alternative basis for its position, the court also opined that Labor Code section 1194 would take precedence over CCP section 1031 as Labor Code section 1194 was the more recently enacted statute and thus could also override based on that principle.

Also addressed on appeal, CCP section 1032(b) sets forth the general rule that guarantees prevailing civil litigants an award of costs. Moreno qualified as a prevailing party because she had "a net monetary recovery" and was awarded \$19,523 in trial court costs from Bassi. Bassi cross-appealed, contending that the trial court erred in awarding costs, as almost all of Moreno's cost items had little or nothing to do with the wage claim on which she prevailed. The Court of Appeal recognized that Government Code section 12965(b) served as a specific exception

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in this case, disallowing costs related entirely to rejected FEHA claims. Thus, Moreno was prevented from recovering the costs incurred solely because the FEHA claims were included in her lawsuit, as she did not prevail on the FEHA claims.

The matter was remanded to the trial court to evaluate which costs were incurred *solely* because Moreno’s inclusion of FEHA claims and to adjust the award of costs if necessary, while also allowing for the trial court to determine the “reasonable attorneys’ fees” to be awarded to Moreno. The takeaways from *Moreno* are narrow, but two-fold. While California employers may now be subject to reasonable attorneys’ fees instead of 20% of the wages recovered in cases involving the recovery of minimum wages of no more than \$300.00, employers may also be able to prevent the recovery of costs related to failed FEHA claims.

*This is Pettit Kohn Ingrassia Lutz & Dolin PC’s employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Ryan Nell, Shannon Finley, Carol Shieh, Rio Schwarting, Christopher Reilly, Tina Robinson, Zachary Rankin, Christine Robles, Brian Jun, or Christine Dixon at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Andrew Chung, Jennifer Weidinger, Rachel Albert, Sevada Hakopian, Catherine Brackett, or Kaya Vyas at (310) 649-5772.*