

JacksonLewis

California Legal Update

Employment Law Updates 2022

Association of Corporate Counsel – San Diego

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Speakers



Lara P. Besser
Associate
San Diego
619-573-4929
lara.besser@jacksonlewis.com



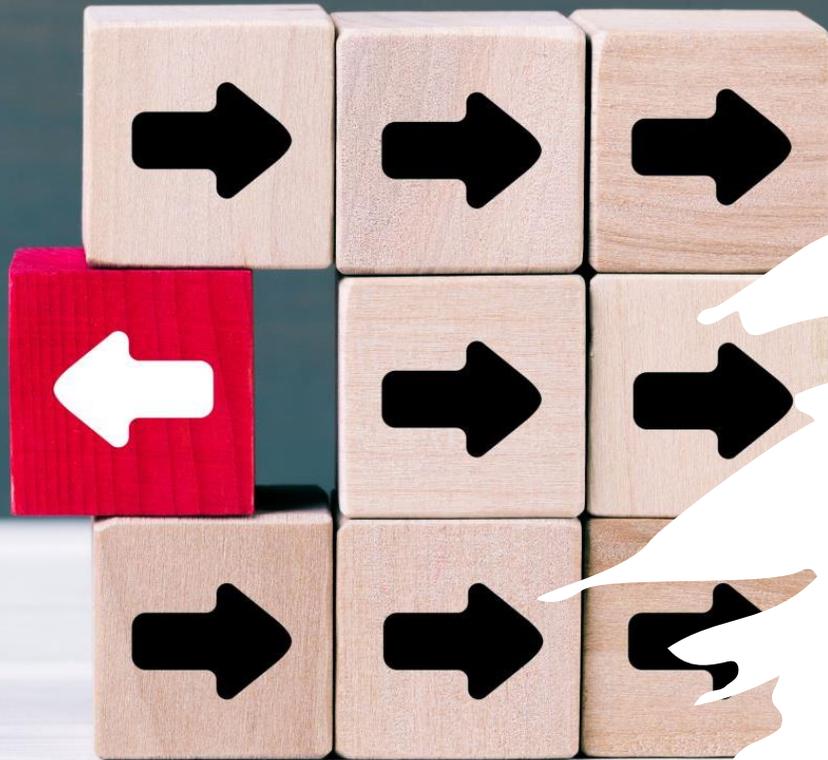
Arcelia N. Magaña
Associate
San Diego
619-573-4905
arcelia.magana@jacksonlewis.com



Agenda

- Changes to Independent Contractors Laws
- AB 1003 - Criminal Liability for Intentional Unpaid Wages
- AB 1033 - CFRA “Parent-in-Law”
- SB 657 - Electronic Documents
- SB 639 - Subminimum Wage
- SB 807- procedural modifications to DFEH
- AB 286 – Food Delivery Platform Limitations
- SB 331- Limits use of non-disclosure agreements and settlement agreement terms when settling employment legal claims involving harassment, discrimination, or retaliation
- COVID-19 Supplemental Paid Sick Leave
- Minimum wage increases
- Viking River Cruises Case
- Naranjo Case
- Batencourt Case
- Litigation Trends

Dynamex **Retroactivity**



- California Supreme Court - *Vazquez v. Jan Pro Franchising*
- *Dynamex Operations West v. Superior Court* decision applies retroactive.
- Mainly affects pending litigation that predates the Dynamex decision
- AB 5 that codified the Dynamex decision states the law regarding classification of independent contractors applies retroactively.

AB 5 & FAAA

9th Circuit Court of Appeals – *California Trucking Association v. Bonta*

AB 5 was not preempted by the Federal Aviation Administration Authorization Act of 1994

Petition for rehearing denied.

Currently pending a petition for writ of certiorari before the U.S. Supreme Court.



Federal Preemption

- 9th Circuit Court of Appeals - *International Brotherhood of Teamsters v. FMCSA*
- Held that the Federal Motor Carrier Safety Administration (FMCSA) regulations pertaining to rest breaks preempts California's meal and rest period requirements.
- Petition for rehearing denied.



Wage Theft As Grand Theft

- Assembly Bill (AB) 1003 creates a new type of grand theft for intentional theft of wages in an amount greater than \$950 from any one employee, or \$2,350 in the aggregate from two or more employees by an employer in any consecutive 12-month period.
- The new legislation allows wages, tips, or other compensation that are the subject of a prosecution to be recovered as restitution.
- No clear guidance on “intentional” though would seem to suggest more than mistake or inadvertence.
- Takes effect January 1, 2022.

Assembly Bill 1033



- Effective January 1, 2022.
- AB 1033 provides that employers must grant eligible employees up to 12 weeks of job-protected time off from work annually to provide care to a parent-in-law with a serious medical condition under the California Family Rights Act (CFRA).
- The bill also modifies procedural aspects of the Department of Fair Employment and Housing's (DFEH) pilot program for mediating family leave disputes between small businesses and their employees.



Family Member

- Child, including adult children
- Parent
- Parent-in-law
- Spouse or registered domestic partner
- Grandparents
- Grandchildren

SENATE BILL 657

Allows Required Notices & Postings to be E-mailed to Employees



Effective January 1, 2022.

- SB 657 allows that in any instance in which an employer is required to physically post information, an employer may also distribute that information to employees by email with the document or documents attached.
- While this does not remove an employer's obligation to physically display postings as required, the measure is intended to clarify the employer's ability to communicate required information more effectively.

SENATE BILL 639 Elimination of the Subminimum Wage Certificate Program



Effective January 1, 2022;
Full Phaseout expected January 1, 2025.

- Previously, employers were authorized to pay less than minimum wage for employees with physical or mental disabilities under a subminimum wage certificate program.
- SB 639 is a plan to phase out the use of this program. Under SB 639, the program will be phased out by January 1, 2025, and no new special licenses will be issued under the program after January 1, 2022.
- Existing license holders will be required to meet benchmarks provided for in the phaseout plan in order to be relicensed.

Senate Bill 807

- Senate Bill 807 (SB 807), which makes procedural modifications to how the Department of Fair Employment and Housing (DFEH) enforces California's civil rights laws.
- The changes include modifying when and how the DFEH can appeal adverse superior court decisions regarding the scope of the DFEH's power to compel cooperation in investigations and tolling the time the DFEH has to file a civil action while dispute resolution is pending.
- The changes certain recordkeeping requirements from two years to four years

ASSEMBLY BILL 286

Effective January 1, 2022

Amends the Fair Food Delivery Act of 2020. AB 286 makes it unlawful for a food delivery platform to charge a customer any purchase price for food or beverage that exceeds the price posted by the food facility on the food delivery platform's internet website at the time of the order.

AB 286 also prohibits food delivery platforms from retaining any portion of amounts designated as a tip or gratuity. Instead, the food delivery platform must pay the entire tip or gratuity to the person delivering the food or beverage, and any tip or gratuity for a pickup order directly to the food facility.

Requires the platform to disclose to the customer and the food facility certain specified information related to fees, commissions, and costs charged to both parties.

Senate Bill 331



- Effective January 1, 2022.
- SB 331 further limits the use of non-disclosure agreements (NDAs) and settlement agreement terms when settling employment legal claims involving harassment, discrimination, or retaliation.
- A nondisparagement or other contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace shall include the following language:
 - **Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful.**

COVID-19 SUPPLEMENTAL PAID SICK LEAVE PART 2.

SB 114

Became effective February 19, 2022 and will remain in effect until September 30, 2022.

Must be provided by employers with 25 employees or more must provide this supplemental leave.

Applies to employees of a covered employer who is unable to telework because of covered reasons. There is no length of service requirement.

Employees are entitled to 40 hours of supplemental paid sick leave. A part-time covered employee is entitled to a proportionate number of hours of supplemental leave based on the schedule the employee maintains.

Permitted limitations: Employers may limit the leave for symptoms for each vaccine or booster to 3 days or 24 hours unless the employee provides verification from a health care provider that the employee (or family member) is continuing to experience symptoms.

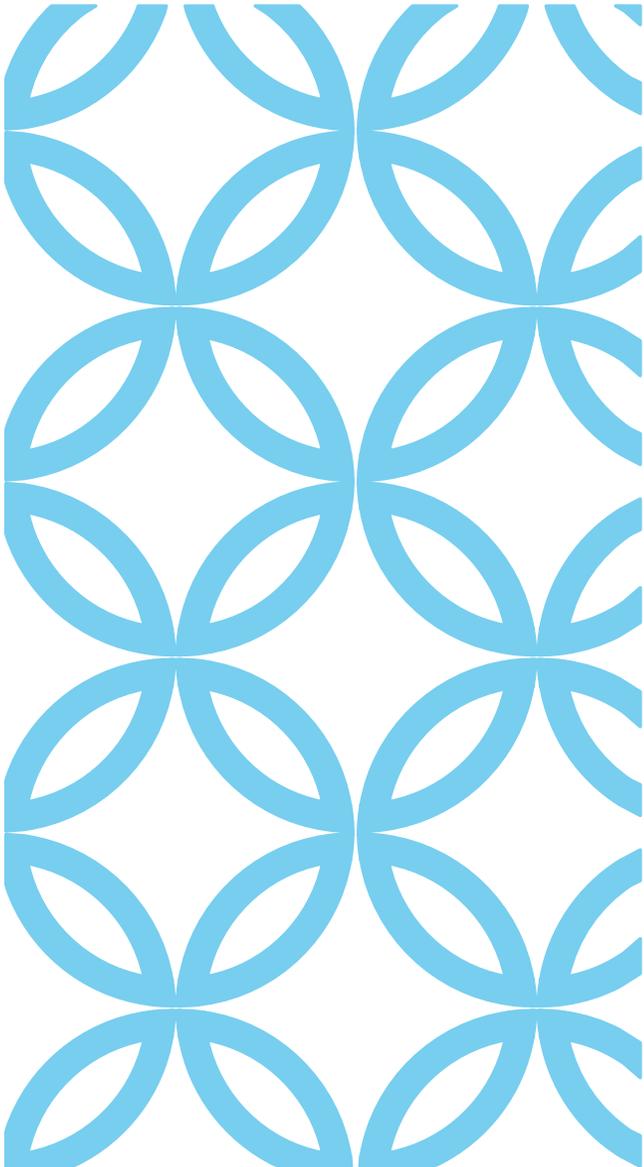
COVERED REASONS FOR USING COVID SUPPLEMENTAL PAID SICK LEAVE

1. The covered employee is subject to a quarantine or isolation period related to COVID-19 as defined by an order or guidance of the State Department of Public Health, the federal Centers for Disease Control and Prevention (CDC), or a local public health officer who has jurisdiction over the workplace.
2. The covered employee has been advised by a health care provider to isolate or quarantine due to COVID-19.
3. The covered employee is attending an appointment for themselves or a family member to receive a vaccine or a vaccine booster for protection against COVID-19.
4. The covered employee is experiencing symptoms or caring for a family member experiencing symptoms, related to a COVID-19 vaccine or vaccine booster that prevents the employee from being able to work or telework.
5. The covered employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
6. The covered employee is caring for a family member who is subject to an order or guidance or who has been advised to isolate or quarantine.
7. The covered employee is caring for a child, whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19 on the premises.

Updates in Wage & Hour

MINIMUM WAGE INCREASES

Date	Employers with 25 Employees or Less	Employers with 26 Employees or More
January 1, 2022 (current)	\$14.00 per hour	\$15.00 per hour
January 1, 2023	\$15.00 per hour	



In this case, an employee sued the company under PAGA claiming widespread CA labor code violations. When the company sought to compel arbitration based on an arbitration agreement that prohibits an employee from bringing a PAGA action, the trial court held the PAGA waiver portion of the arbitration agreement was unenforceable, applying *Iskanian*.

The CA Supreme Court denied review, but the US Supreme Court granted the companies certiorari petition which argues that *Iskanian* and *Sakkab* were wrongly decided and the USSC 2018 *Epic Systems Corp. v. Lewis* case justifies review.

Recall *Epic Systems* upheld an arbitration agreement provision that waived an employee's right to bring a class action on FAA preemption grounds.

The Takeaway: Properly drafted Arbitration Agreements may be able to insulate employers from both exposure to Class and PAGA representative Actions!

VIKING RIVER CRUISES

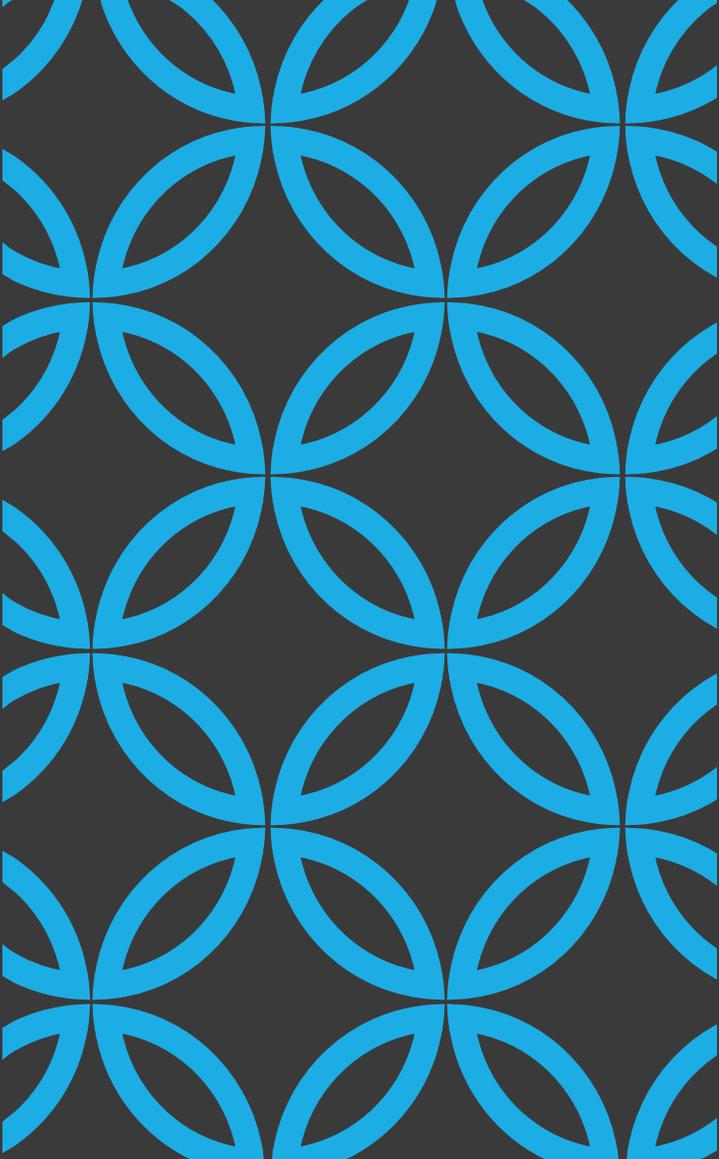
NARANJO V. SPECTRUM SECURITY SERVICES, INC.

This case involves a class of security guards who alleged meal break violations and sought premium wages, waiting time penalties, inaccurate pay stub penalties, and attorney's fees.

The Court of Appeal held that unpaid premium wages for meal period violations did not entitle employees to pay stub penalties or waiting time penalties.

Why Employers Should Watch This Case

This case will resolve a long-standing debate on whether waiting time penalties are recoverable for meal and rest period violations. If the California Supreme Court disagrees with the lower courts, it will increase potential penalties for California meal and rest period violations, as violations could be compounded by alleged pay stub penalties and waiting time penalties.



BETANCOURT V. OS RESTAURANT SERVICES, LLC

Betancourt sued her former employer for meal and rest break violations and sought (1) Wage Statement penalties (LC 226) for failing to list rest break premiums on the wage statements; (2) waiting time penalties (LC 201-203) for failing to pay rest period premiums upon termination; and (3) attorney's fees (LC 218.5 and 226). The parties settled the meal and rest break claims but disagreed on attorney's fees and Plaintiff filed a motion for attys fees.

The Court of Appeal held an action for failure to provide meal and rest breaks under LC 226.7 is not an action for underpayment of wages, as defined in LC 218.5, therefore attorney's fees are not recoverable.

Why Employers Should Watch This Case: **This case extends the application of Naranjo to indicate attorney's fees are not recoverable from pure meal/rest break claims. If the Court overturns both Naranjo/Betancourt, it will greatly increase the value of these claims.**

LITIGATION TRENDS

Increased litigation in regular rate of pay for meal and rest period premiums stemming from *Ferra v. Lowes* and earned sick leave

PAGA predicated on Cal/OSHA

Filing of Class Actions and PAGA actions separately.

WHAT TO LOOK OUT FOR

(AB 1761) and SB 1162 - Pay Transparency

Proactive Wage Range Disclosure

If passed, it would require pay scales to be included in each job posting. It also would require an employer to announce/post any opportunity for promotion to all current employees prior to making a promotion decision and include the pay scale for the position in the notice.

Pay Data Reporting

If passed, it would:

- 1) Expand the pay data reporting obligation to include “employees hired through” a third- party, i.e. labor contractor/staffing agency.
- 2) Impose a monetary penalty for not filing of \$100/employee, and \$200/employee for subsequent violations
- 3) Require employers to disclose specific median and vaverage hourly rates of pay by job category, race, ethinciaty and sex;
- 4) Require the state to publish each private employer’s pay data report on the internet
- 5) Shift the Due Date to the second Wednesday of May beginning 2023

WHAT TO LOOK OUT FOR

Proposition to raise
the minimum wage
to \$18

Recent Rounding Litigation

Cirrincione v. American Scissor Lift, Inc.

This decision builds further supports that rounding procedures, so long as conducted in a fair and neutral manner that does not undercompensate employees over a period of time, are still permitted under California law. Although employers should remember that last year the California Supreme Court ruled that employers were not permitted to round time for meal breaks.

WHAT TO LOOK OUT FOR

