

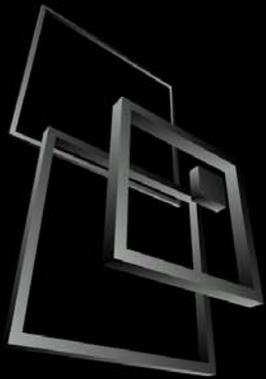


THE ANATOMY OF AN EMPLOYMENT LAWSUIT AND THE TOOLS FOR PREVENTION

Sierra Spitzer, Senior Corporate Counsel, Labor & Employment, Solar Turbines

Virginia Morrison, General Counsel, Bill Howe Family of Companies

Marie Burke Kenny, Labor & Employment Partner, Procopio Law Firm



How It All Began

The Company: Best Is Yet To Come, LLC



HIRED!

- The Company owns and operates senior living communities in 5 states and is based in San Diego
- Early 2025 – the Company hires Ingrid Sanchez
 - Junior Accountant
 - Salary \$72,000 (\$2,000 more than prior job as bookkeeper).
 - Exempt with basic accounting and bookkeeping duties
- Existing male Junior Accountant at the Company
 - 10 years of employment
 - Exempt and earns \$97,000 per year

The Wrong Hire

- The Company quickly discovers that Ms. Sanchez is a bad fit and she
 - does not possess the basic skills for the job
 - resists using the Company’s financial service platform
 - insists on manual calculations of her functions
 - is defensive and will not ask questions
 - takes too long to perform duties.
- Her manager orally counsels her but gives her a **“meets expectation”** performance evaluation at the end of 3 months.



WRONG HIRE!

The Deterioration



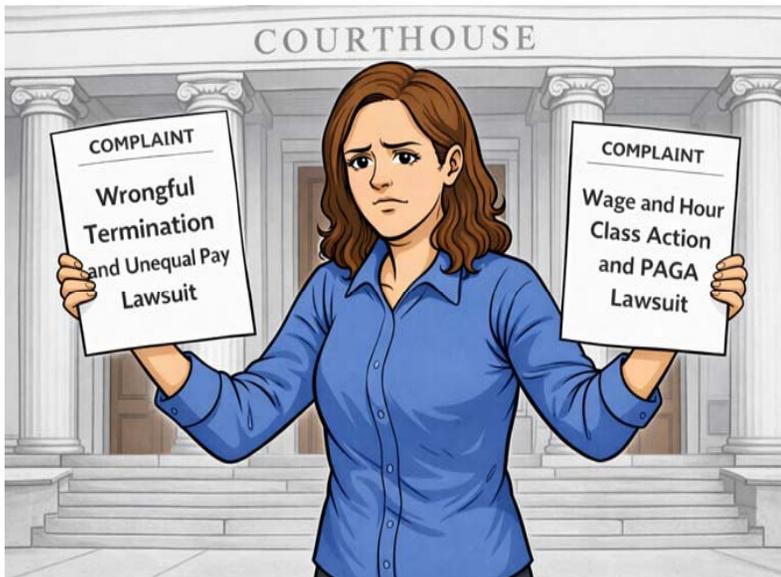
- Ms. Sanchez gets into a dispute with her supervisor and others over a bonus calculation.
 - She claims the Company can “get in trouble.”
 - She clearly does not understand the calculation.
- Her performance does not improve. She becomes disgruntled.
- She regularly complains about the Company to another employee.
- She requests to work remotely exclusively claiming a hostile work environment.
- She responds poorly and starts complaining regularly by email to her supervisor about almost every aspect of her work.

The End Game

- Instead of terminating Ms. Sanchez’s employment at the end of the year, the Company rates her performance as “needs improvement” and puts her on a PIP.
- Ms. Sanchez disagrees.
 - She argues she is entitled to a 10% salary increase and demands a raise.
 - She asserts “I’ll work harder, if you pay me more.”
- Senior management meets shortly thereafter and decides to terminate her employment.
- Ms. Sanchez learns the senior management team is meeting and sends an email announcing she is pregnant.
- Given her announcement, the Company holds off on terminating her employment.

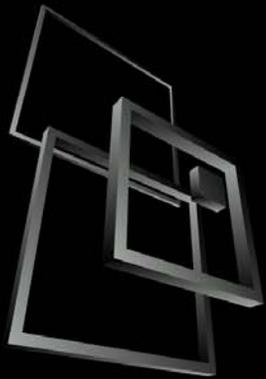


The Last Straw



- A week later, Ms. Sanchez makes another serious financial mistake.
- The Company decides to terminate her employment.
- The Company offers her one month of salary in a Separation Agreement.
- Ms. Sanchez hires a law firm.
 - Demands a million dollars.
 - Files two lawsuits.
 - Individual lawsuit.
 - PAGA and class action lawsuit.

6



The Litigation

The Two Lawsuits

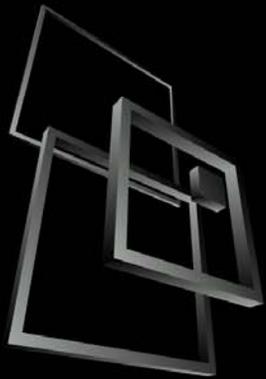
- **Individual Lawsuit**

- Gender Discrimination (FEHA)
- Pregnancy Discrimination (FEHA)
- Violation of California Equal Pay Act (as amended by the Fair Pay Act)
- Violation of the federal Equal Pay Act
- Retaliation – Labor Code § 1102.5
 - Complaint regarding bonus calculation
 - Request for pay increase
 - Pregnancy announcement
- Wrongful Termination In Violation of Public Policy
- Violation of the California Business and Professions Code

- **PAGA and Class action lawsuit**

- Failure to pay all overtime wages
 - Exempt misclassification
 - Failure to properly calculate regular rate of pay to include bonuses
- Failure to provide meal periods or premium pay
- Failure to provide rest periods or premium pay
- Failure to reimburse for business expenses
 - cell phone
 - mileage
- Failure to pay minimum wages
 - Off the clock work
- Failure to provide accurate wage statements

8



Unequal Pay Claims

The Equal Pay Standard

- “Equal pay” for “substantially similar work when viewed as a composite of skill, effort, and responsibility.”
 - Note: This is an easier standard for the employee than “equal pay for equal work.”
- No need to prove intent on part of employer
- The burden is on the employer to justify wage differential based on four factors which must be “applied reasonably”:
 - 1. A seniority system;
 - 2. A merit system;
 - 3. A system that measures earnings by quantity or quality of production; or
 - 4. A bona fide factor other than sex, such as education, training, or experience.
- Audit for pay equality.



Rizo v. Yovino, 887 F.3d 453 (9th Cir. 2019)

- A math teacher sued her employer under the federal Equal Pay Act ("EPA") alleging male counterparts were paid a higher starting salary.
- Employer set the starting salaries by adding 5% to the employee's prior salary and argued that its method qualified under the EPA's catchall exception because it was based on any factor "other than sex."
- The court held that using an employee's prior salary to determine an employee's pay perpetuates any pay disparity between genders.
- Asking for salary history is prohibited in California. If salary information is volunteered, it cannot be a factor in determining compensation.



Freyd v. University of Oregon, 990 F.3d 1211 (9th Cir. 2021)

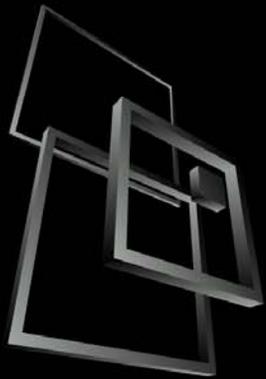


- A tenured psychology professor alleged she was paid less than male colleagues performing substantially equal work under the Equal Pay Act.
 - The university argued differences in administrative roles, research focus, and outside offers justified the pay gap and the trial court granted summary judgment in its favor.
- The Ninth Circuit applied the “common core of tasks” test and held that once shared teaching and service duties are shown, the employer must show additional duties make the jobs substantially different.
- The court reversed summary judgment because a reasonable jury could conclude the jobs were substantially equal.

Key takeaway: Minor differences will not defeat an EPA claim where core duties are substantially the same.

Tips For Preventing Unequal Pay Claims

- Do not ask for or rely on prior salary when setting pay.
- Base compensation on objective, job-related factors and apply them consistently.
- Compare roles based on their common core duties, not minor differences.
 - If pay differs, be prepared to show that additional duties are substantial and materially distinguish the roles.
- Review all compensation raises for internal equity impact.
- Conduct regular pay equity audits and document legitimate pay differences.



Wage and Hour Claims

The Continued Proliferation of Wage And Hour Claims

PAGA filings increased approximately 5% in the first year following PAGA reform



Be Proactive In Dealing With PAGA

- What To Do When You Get An Attorney Letter Addressed To The LWDA?
 - Take it seriously.
 - Consult with employment counsel.
 - Check for curable violations (e.g. wage statement).
 - Cure violations and inform the LWDA.
 - Conduct a wage and hour audit. Fix the problems.
 - Consider release agreements.
 - Check for arbitration agreements.
 - Monitor for PAGA filings

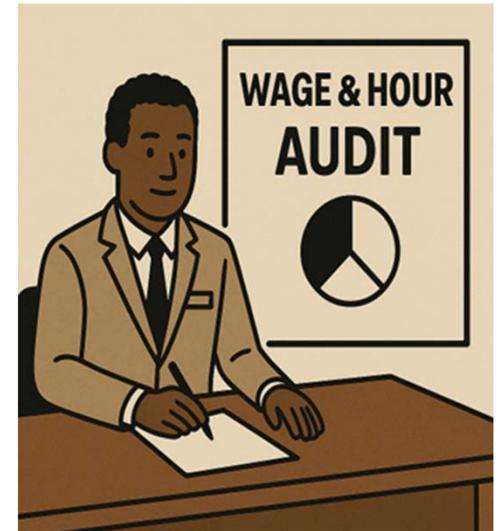
<https://cadir.secure.force.com/PagaSearch>

16



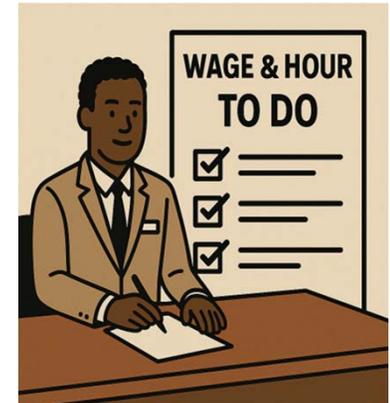
Tops Tips for Mitigating Wage and Hour Claims

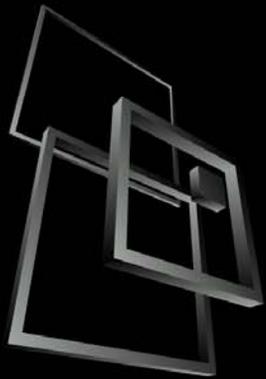
- Conduct routine, thorough wage and hour audits.
- Adopt supervisor wage and hour compliance guidelines.
- Conduct annual supervisor wage and hour training.
- Pay for actual work times recorded. **Do not round.**
- **Publish and enforce** strict policy “no working off the clock.”
- Make time reporting easy
 - (multiple clocks, tablets or mobile timekeeping etc)
- Pay for preliminary/postliminary activities
 - bag checks, donning/doffing etc
 - **Beware:** Labor Code Section 2802 – expense reimbursement issues



More Tips for Mitigating Wage and Hour Claims

- Train hourly employees on wage and hour policies (including reimbursement)
- Adopt monthly expense reimbursement attestation process.
 - Use Remote Work Agreements for remote workers
- Include incentive pay (commissions/bonuses) in the “regular rate of pay” for overtime, meal/rest period premium pay and paid sick leave.
- Provide an opportunity to correct/ supplement timekeeping records.
- Confirm exempt employees are properly classified as exempt.
- Adopt arbitration agreements* to prevent class actions.
- Use Separation and/or Release Agreements appropriately.
- **Beware:** Labor Code 206.5 - misdemeanor



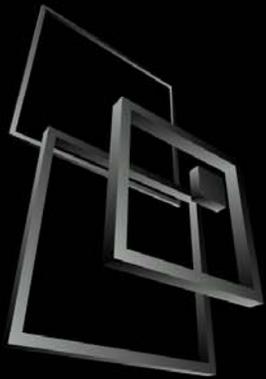


The Hiring Process

Screen Out Future Problem Employees

- Identify critical requirements for the job– skills, education, ability, and experience
- **Test** for critical requirements
 - Employment application, resume
 - Background checks (litigation)
 - Personality testing
 - Behavioral interviewing
 - Reference checks
 - Skills tests





Employment Practices

Adopt Effective Risk Mitigation Tools

- Conduct Employment Audits
 - Pay equity
 - Wage and hour
- Use Arbitration Agreements*
- Adopt Introductory Periods*
- Manage Performance Effectively
- Use Release Agreements



Arbitration: Does It Make Sense For Your Company?

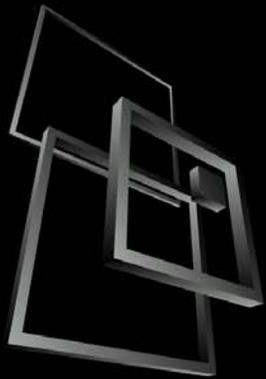
PROS

- Protection from class actions*
- Typically speedier resolution
- Privacy of proceeding
- Exclusionary rules of evidence usually not applied
- Less exposure to punitive damages or run away verdicts
- Ability to select arbitrator with subject matter (i.e. employment law expertise)



CONS

- PAGA representative and sexual harassment claims cannot be arbitrated
- No right to appeal even if the arbitrator makes a mistake of fact or law
- Summary judgment is unlikely
- Arbitration costs are high (arbitrator's hourly rate)
- Possibility of “split the baby” awards



Managing Performance

Discipline And Documentation - Considerations

- Thorough and updated job descriptions
- Company policies and practices
- Performance standards
 - Productivity/Profitability
 - Timeliness
 - Technical competence
 - Written skills
 - Technology skills
- Ability to work with others
- Communication
- Consistency
- Good documentation
 - Early review during introductory period
 - Honest performance reviews
 - Performance Improvement Plans

Performance Reviews

DO

- Be honest (biggest fail)
- Be specific (examples -who, what, when, how etc)
- Be direct and non-confrontational
- Provide positive and negative feedback.
- Identify accomplishments
 - Goals achieved/exceeded
- Identify opportunities
 - Goals not achieved/unmet
- Be fair, objective and consistent
 - The review should reflect the entire review period -
- not just a difficult or great period.

DON'T

- Speculate: I can't imagine any areas for improvement for this employee.
- Exaggerate or sugarcoat:
 - Employee is the best/worst/most/utmost.
- Make it personal. It's the performance, not the person.
- Favor certain employees and overlook their issues.
- Say "always," "never" and "every" – proven wrong
- Make references to leaves of absence or protected categories or protected activities
 - Employee was very diligent before CFRA leave.
 - Employee was distracted by wedding planning.



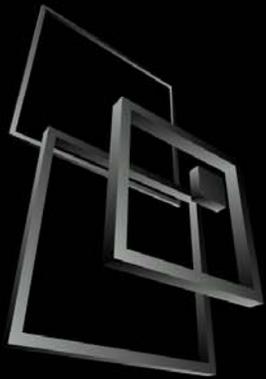
Planning Disciplinary Action

- When should you discipline?
 - Gather your facts
 - Investigate as necessary
 - Misconduct v. Performance (next slide)
 - Don't try to justify the action after the fact
 - No “papering” the file retroactively
 - Make sure the reason you give is supportable and unchanging
 - Make sure that you are being consistent
 - What did the performance reviews say?
 - Make sure you are following Company policy and practice



Performance v. Misconduct

- **Performance - can't or won't do job**
 - Counsel and provide true opportunity for improvement
 - Interim review
 - Performance Improvement Plan*
 - Offer support – resources and coaching
 - Terminate as appropriate
- **Misconduct – violation of rule, practice, insubordination**
 - Investigate and then terminate as appropriate
 - Major versus minor offenses
 - Consider precedent



Termination Decisions

Making A Termination Decision

- Gather facts before the decision
 - Performance – past reviews, work samples, expectations, opportunity to improve, etc
 - Misconduct – investigate, consider nature of offense (minor v. major)
- Be consistent with Company practice and policies (HR)
- Is the decision “fair?”
- Is it a high-risk termination?
 - Is any protected category or protected activity implicated?
- Has the Company complied with all legal obligations?
 - Wage and hour, paid sick leave, leaves etc
- Are multiple individuals involved in the termination decision to ensure objectivity?

Termination Notice

Informing The Employee Of The Termination Decision

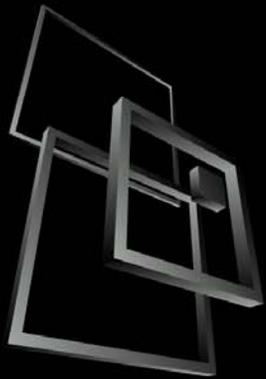
- Do it **privately** (and **keep it private**)
- Do it in person
- Have a witness present
 - But not an audience!
- Tell the employee the reason(s)
 - Be candid and respectful
 - The reason you state must be the reason you later rely on
- Let the employee respond
- Do not apologize!
- Do wish the person future success



What Triers of Fact Look For



- Information gathered before the termination decision is made
- Investigation where necessary
- True opportunity to improve before termination
- Witnesses, contemporaneous documentation
- What was the reason given to the employee for the termination?
- What is the reason argued to the jury/judge/arbitrator for the termination?
- Policies and practices
 - Are they consistent?



Risk Prevention

Preventing Liability

- Good hiring practices
- Setting forth clear expectations of your employees
- Respectful, direct, non-confrontational communications
- Consistent treatment – no favoritism
- Mentoring/coaching
- Treat employees with dignity and respect
 - Treat employees the way they want to be treated



Why Employees Sue?

- They feel they've been mistreated.
 - It's not just what happens, but “how” it happens.
- Unclear expectations.
 - Employees don't understand what is expected.
- Perceptions of relative unfairness.
 - Inconsistent application of rules.
- Lack of communication.
 - They feel left in the “dark” and they “assume” the worst.
 - Employees worry about the future,
- They feel disrespected.
- They feel “unheard.”



Thank you!



Sierra Spitzer
Senior Corporate Counsel
Labor & Employment
Solar Turbines



Virginia Morrison
General Counsel
Bill Howe Family of Companies



Marie Burke Kenny
Partner
Labor & Employment
Procopio Law Firm