CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

BULLETIN

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RECENT EMPLOYMENT LAW DECISIONS
OCTOBER 2019 RULINGS

CALIFORNIA COURTS OF APPEAL

DAVIS v. TWC DEALER GROUP, INC.

Arbitration provisions will be found unconscionable and unenforceable when they have sufficient elements of both procedural and substantive unconscionability

Here, as in most employment cases, the arbitration agreement was procedurally unconscionable as a contract of adhesion, written in small type in prolix legal jargon. It was also substantively unconscionable for a number of reasons, an important one including that it maintained the employer's unilateral right to modify it.

THE DAVISES SUED FOR FEHA AND WAGE CLAIMS

Three members of the Davis family worked for TWC Dealer Group, a Toyota dealership in Walnut Creek. When Appellant TWC hired a new general manager, that person allegedly made racist and ageist remarks to and about the Davises. The Davis Respondents alleged that they complained to TWC, but to no effect. They therefore resigned, obtained right-to-sue letters from the Department of Fair Employment and Housing, and sued under the Fair Employment & Housing Act, as well as alleging various wage and hour violations.

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RECENT EMPLOYMENT LAW DECISIONS
(CONT'D)

THE TRIAL COURT DENIED TWC's PETITION TO COMPEL ARBITRATION

Respondent TWC petitioned the trial court to enforce what it alleged was its arbitration agreement with the Davises. The trial court denied the petition. Finding that there was an agreement to arbitrate, the court nonetheless found that it was procedurally and substantively unconscionable, and therefore unenforceable.

THE APPELLATE COURT FOUND THAT ANY AGREEMENT WAS PROCEDURALLY UNCONSCIONABLE

The appellate court affirmed. It pointed out that there were actually three arbitration agreements that each employee, including the Davises, were required to sign.

The court found that the agreements were contracts of adhesion, meaning that they were offered on a "take it or leave it" basis, as are most arbitration agreements in the employment context. Worse, the three agreements were all printed in small type, strained the limits of legibility, and in dense legal jargon including references to statutes that weren't quoted and some that didn't say what the agreement said they did.

THE AGREEMENT WAS SUBSTANTIVELY UNCONSCIONABLE

Because a finding of unconscionability requires both procedural and substantive unconscionability – although not in equal measures – the court moved on to determine that the agreement was substantively unconscionable as well.

Importantly, the court found the fact that TWC maintained the unilateral right to alter the agreement was substantively unconscionable.

Adding to the substantive unconscionability was the near-illegibility of the agreements, and the mere existence of three, internally inconsistent and mutually contradictory agreements. This further demonstrates that facts contributing to a finding of procedural unconscionability can show substantive unconscionability as well.

The court also found that the fact that the company did not sign the agreement showed a lack of mutuality.

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DECISIONS (From Page 1)

Finally, the agreement's removal of any authority of the arbitrator to hear class, collective, or joint actions indicated an intention to prevent claims under the Private Attorneys General Act ("PAGA"), a violation of public policy.

CONCLUSION

California courts continue to protect workers' rights to seek justice in a judicial forum. Arbitration agreements will be unenforceable, and petitions to enforce them will be denied, if they unconscionably try to limit those rights.

COA, First Dist., Div. 2, Filed 10/30/19. Opinion by Justice Richman.
http://sos.metnews.com/sos.cgi?1119//A155030

FERRA v. LOEWS HOLLYWOOD HOTEL, LLC

The Regular Rate of Compensation Under Labor Code 226.7 is the Employee's Base Hourly Rate and is Different From the Employee's Regular Rate of Pay

Plaintiff Jessica Ferra filed a class action for numerous wage and hour violations on behalf of three classes of hourly employees of Defendant Loews Hollywood Hotel. The trial court granted Loews' motion for summary judgment, Ferra appealed, and the Court of Appeal affirmed. Under Labor Code section 226.7, an employer that fails to provide a meal or rest period must pay the employee one additional hour of pay at the employee's regular rate of "compensation." Under Labor Code section 510, overtime is paid at twice the employee's regular rate of "pay." Regular rate of compensation and regular rate of pay are not the same. The regular rate of compensation for missed breaks is a premium wage intended to compensate, not a penalty. The regular rate of compensation for missed breaks is therefore paid based on the employee's base hourly rate.

COA 2nd Dist., Div. 3. Filed 10/9/19. 40 Cal.App.5th 1239. Opinion by Justice Egerton.
https://law.justia.com/cases/california/court-of-appeal/2019/b283218.html

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GARCIA v. MYLLYLA

A Defendant Who Fails to Produce Evidence of Its Financial Condition for the Punitive Damages Phase of Trial May Not Argue that the Plaintiff Has Submitted Insufficient Evidence of the Defendant's Financial Condition

Nine tenants sued Reijo Myllyla and other owners of an illegally operated building with uninhabitable conditions. The

(Cont'd on Page 3, **DECISIONS**)

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jury found in favor of each plaintiff in a bifurcated trial and awarded compensatory damages. The jury also found that Myllyla engaged in malice, oppression, or fraud, necessitating a punitive damages phase. Myllyla refused to produce evidence of his financial condition, though the trial court ordered him to do so. A defendant who thwarts a plaintiff's ability to meet the obligation of producing evidence of the defendant's net worth during the punitive damages phase of trial forfeits the right to object to the lack of evidence of financial condition.

COA 2nd Dist., Div. 2. Filed 10/4/19. 40 Cal.App.5th 990. Opinion by Presiding Justice Lui.
https://law.justia.com/cases/california/court-of-appeal/2019/b292322.html

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GONZALES v. SAN GABRIEL TRANSIT, INC.

Dynamex Applies Retroactively and Applies to Labor Code Claims that Seek to Enforce the Fundamental Protections Afforded by the Wage Orders

Plaintiff Francisco Gonzales worked as a driver for Defendant San Gabriel Transit ("SGT"). He filed a class action for numerous wage and hour violations on behalf of over 550 SGT drivers classified as independent contractors. The trial court denied Gonzales' motion for class certification, and Gonzales appealed. While the appeal was pending, the California Supreme Court issued its opinion in *Dynamex Operations West, Inc. v. Superior Court*, setting forth the ABC test for distinguishing employees from independent contractors. The Court of Appeal held that the ABC test applies retroactively and applies to Labor Code claims that enforce the same fundamental protections as the wage orders. The ABC test does not apply to statutory misclassification claims not directly premised on wage order protections, and the *Borello* test will still govern those claims. The Court therefore reversed and remanded for the trial court to reassess the motion for class certification in light of this holding.

CELA Involvement

Congratulations to CELA members Thomas Falvey, Armand Kizirian, and Michael Boyamian!

COA 2nd Dist., Div. 4. Filed 10/8/19. 40 Cal.App.5th 1131. Opinion by Acting Presiding Justice Willhite.
https://law.justia.com/cases/california/court-of-appeal/2019/b282377.html

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HENDERSON v. EQUILON ENTERPRISES, LLC

The *Dynamex* ABC Test Should Not Be Used to Determine Joint Employer Status

Plaintiff Billy Henderson sued Defendant Equilon Enterprises (dba Shell Oil Products US) for wage and hour violations under a joint employer theory. The gas station where Henderson worked was operated by Danville Petroleum. Shell moved for summary judgment, arguing that Danville was Henderson's sole employer. The trial court granted the motion, Henderson appealed, and the Court of Appeal affirmed. While the appeal was pending, the California Supreme Court issued its opinion in *Dynamex Operations West, Inc. v. Superior Court*. The Court of Appeal held that *Dynamex* ABC test does not apply to the joint employer analysis, and *Martinez v. Combs* still governs.

COA 1st Dist., Div. 1. Filed 10/8/19. 40 Ca.App.5th 1111. Opinion by Justice Sanchez.
https://law.justia.com/cases/california/court-of-appeal/2019/a151626.html

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JIMENEZ v. US CONTINENTAL MARKETING, INC.

California recognizes that employees may have more than one employer. This often happens in the staffing agency context. Here, the court found that the contractual obligations of the staffing agency – payroll, timekeeping, and termination of employment with the staffing agency – had no weight in determining whether the contracting company was also an employer or not. The issue is one of control, not of relative control between the two.

PLAINTIFF JIMENEZ WORKED AS A SUPERVISOR FOR DEFENDANT

Ameritemps, Inc. places its employees as temporary employees with other companies. Here, Ameritemps place Plaintiff Jimenez as a supervisor with Defendant US Continental Marketing, Inc. For ease of reference, the court referred to Ameritemps as the "direct employer," US Continental Marketing, Inc., as the "contracting employer," Plaintiff Jimenez as the "direct employee" with respect to Ameritemps and "temporary employee" with respect to US Continental.

PLAINTIFF ALLEGED SHE WAS HARASSED, DISCRIMINATED AGAINST, AND RETALIATED AGAINST BY A US CONTINENTAL DIRECT EMPLOYEE

While working for Defendant US Continental, Plaintiff Jimenez alleged that one of US Continental's direct employees

(Cont'd on Page 4, **DECISIONS**)

harassed her on the basis of her sex. She was later fired. She sued for various FEHA claims, including sexual harassment and retaliation.

THE JURY FOUND THAT US CONTINENTAL WAS NOT PLAINTIFF'S EMPLOYER

Over the course of the trial, Defendant US Continental – Ameritemps had been dropped as a defendant – used the "empty chair" defense. It pointed out that it was Ameritemps that placed Plaintiff Jimenez, paid her, and kept track of her time. It said it had no input into her firing from Ameritemps (as opposed to her firing from US Continental). The jury ultimately returned a verdict 9-3 in favor of US Continental, finding in most of the causes of action that it was not Plaintiff Jimenez's employer.

THE EVIDENCE SHOWED THAT US CONTINENTAL WAS PLAINTIFF JIMENEZ'S EMPLOYER

On appeal, the court found that the jury's verdict was not supported by the evidence. It emphasized that the contractual obligations of Ameritemps – paying Plaintiff Jimenez, keeping track of her time, and like obligations – were of no weight in determining whether US Continental was her employer as well.

Likewise, there was no relevance to the relative level of control exercised by US Continental as opposed to Ameritemps. California has long recognized that many employees have more than one employer, and this is especially true in the temporary/staffing agency context.

Instead, the court looked to the level of control that US Continental could exert over Jimenez's employment, whether that level of control was exercised or not. US Continental fired Jimenez from its own employment – it was irrelevant that it did not fire her from Ameritemps' employment. Jimenez reported to a direct employee of US Continental, and in turn supervised US Continental direct employees herself. She was disciplined by a US Continental direct employee, fired by a US Continental Direct employee, and was subject to US Continental training and the conditions of it employee handbook.

In fact, the court found that there were no facts at all to support a finding that US Continental was not Jimenez's employer. It therefore reversed the judgment, ordered a new trial, and issued instructions that the new jury should be instructed that US Continental was in fact Jimenez's employer.

CONCLUSION

California courts continue to view "employer" as an expansive term, and employees may have more than one at any given time.

CELA INVOLVEMENT

Congratulations to CELA members A. Jacob Nalbandyan and Charles L. Shute, Jr., for this excellent result.

COA, Fourth Dist., Div. 1, Filed 10/17/19. Opinion by Justice Dato.
http://sos.metnews.com/sos.cgi?1019//D075532

NEJADIAN v. COUNTY OF LOS ANGELES

A Plaintiff Alleging Violation of Labor Code Section 1102.5(c) Must Show that the Activity in Question Would Have Resulted in Violation of or Noncompliance with a Statute, Rule, or Regulation

NEJADIAN ALLEGED VIOLATION OF LABOR CODE SECTION 1102.5(c) BASED ON A VAGUE REFERENCE TO A VIOLATION OF "THE CODE"

Plaintiff Patrick Nejadian sued Defendant County of Los Angeles for multiple FEHA violations. Nejadian claimed he was subjected to abuse based on race and denied promotions based on his race and age. He complained to County management, which then denied his many transfer requests in retaliation for his complaint. Only his FEHA retaliation claim survived for trial. During trial, he sought to amend his complaint to add a Labor Code section 1102.5(c) retaliation claim. The Labor Code claim was based on Nejadian's refusal to ignore "the Code" and allow a contractor to install noncompliant septic systems. The trial court granted the request over the County's objection, finding no prejudice. Nejadian prevailed on both retaliation claims at trial. The County appealed.

NEJADIAN FAILED TO SPECIFY A LAW THAT WOULD HAVE BEEN VIOLATED, AND SUBSTANTIAL EVIDENCE SHOWED NO VIOLATION OF ANY LAW

The Court of Appeal reversed, finding that Nejadian had failed to provide substantial evidence to support either claim. Unlike under Labor Code section 1102.5(b), which requires only a reasonable belief, 1102.5(c) claims require the plaintiff to show that the activity in question would actually result in a violation or noncompliance with a statute, rule or regulation. The question of whether the activity in which the plaintiff was required to participate was illegal is a question of law, and the trial court must make the determination. Once the court determines that the activity would result in a violation or noncompliance with a law, the jury must then decide whether the plaintiff refused to participate in the activity, and, if so, whether the refusal was a contributing factor in the employer's decision to engage in an adverse action. For the court to make

(Cont'd on Page 5, **DECISIONS**)

the initial legal determination, the employee must identify what specific activity he refused to participate in and what specific statute, rule, or regulation would be violated by that activity. Nejadian only testified that his supervisor wanted him to disregard some of the rules regarding septic systems but never identified a specific statute, rule, or regulation that would be violated. In addition, the California Plumbing Code allows the County to grant exceptions when homes are being rebuilt after destruction by fire, which was the case here. Nejadian therefore did not meet his burden of proof to show that any law would have been violated. The Court of Appeal reversed the judgment in Nejadian's favor and ordered judgment entered for the County.

COA 2nd Dist., Div. 4. Filed 10/1/19. 40 Cal.App.5th 703. Opinion by Justice Willhite.
https://law.justia.com/cases/california/court-of-appeal/2019/b285016.html

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NINTH CIRCUIT

SALAZAR v. McDONALD'S CORP.

A Franchisor is Not Liable Under a Joint Employer Theory if it Does Not Satisfy the Joint Employer Test, Even if Pay Violations Were the Fault of the Franchisor's Computer System

McDONALD's ARGUED IT WAS NOT PLAINTIFFS' JOINT EMPLOYER.

Plaintiff Guadalupe Salazar and others filed a class action lawsuit against a McDonald's franchise operated by The Haynes Family Limited Partnership ("Haynes"), which operated eight McDonald's franchises in the area. Salazar accused Haynes and McDonald's of engaging in numerous wage and hour violations, including overtime and meal and rest break violations. The plaintiffs and Haynes reached a settlement, but McDonald's moved for summary judgment on the ground that it was not a joint employer. The trial court granted McDonald's MSJ, and the plaintiffs appealed.

McDONALD's DID NOT MEET THE DEFINITION OF AN EMPLOYER UNDER ANY APPROVED TEST AND WAS THEREFORE NOT LIABLE FOR WAGE AND HOUR VIOLATIONS.

The Court of Appeal affirmed. Wage Order No. 5-2001 defines "employer" as one "who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." Subsequent case law defined "employer" as one who: (a) exercises control over wage, hours or working conditions; or (b) suffers or permits someone to work; or (c) engages, thereby creating a common law relationship. The California Supreme Court later held that a franchisor is not a joint employer of a franchisee's employees unless "it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees." Here, Haynes selected, interviewed, and hired its own employees. Haynes trained the employees, set their wages, and paid them. Haynes also set employees' schedules and supervised and disciplined employees. McDonald's was not involved in any of those functions. However, McDonald's required Haynes to use its computer systems and to have at least one manager trained by McDonald's present during each shift. Haynes voluntarily used McDonald's suite of applications for scheduling, timekeeping, and determining pay. Plaintiffs alleged that McDonald's system did not recognize overtime when employees worked an overnight shift and subsequent day shift, set overtime thresholds at 9 hours per day and 50 hours per week, and scheduled meal breaks later than the five-hour mark of a shift. Under the control test, McDonald's was not an employer because it exercised no direct control over wages, hours, or working conditions and did not retain a general right to control day-to-day aspects of work at the franchises. Under the suffer or permit test, McDonald's was not an employer because it did not acquiesce to the plaintiffs' employment and was not in a position to terminate or replace them. Under the common law test, McDonald's was not an employer because McDonald's did not have the right to control the manner and means of accomplishing the desired result. Therefore, though it was arguably McDonald's fault that the plaintiffs were paid improperly because of errors in its computer programs, McDonald's was not a joint employer and could not be liable for wage and hour violations.

9th Circuit. Filed 10/1/19. 939 F.3d 1051. Opinion by Judge Graber.
https://law.justia.com/cases/federal/appellate-courts/ca9/17-15673/17-15673-2019-10-01.html

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SPECIAL REQUEST FOR MENTOR COMMITTEE MEMBERS

HELP US CARRY ON ONE OF CELA'S GREAT TRADITIONS: MENTORSHIP.
THE CELA MENTOR COMMITTEE IS RECRUITING NEW COMMITTEE MEMBERS.

Our committee work has grown significantly over the years. Our mentorship matching has generated hundreds of great connections between CELA stalwarts and newcomers as well as law students. The organization is very proud of this tradition and grateful for all the time and effort our Mentor volunteers have given to help continue CELA's central mission of raising the confidence and competence of practitioners who dedicate their lives to vindicating civil rights in the workplace.

We are particularly looking for new committee members in Northern California (although we welcome more Southern California members to join as well) who can help match mentees and mentors, recruit mentors and develop opportunities for mentors and mentees to commiserate. The committee meets the first Thursday of every month at 10:00am. We are looking for members of all experience levels to join the committee.

This is a great opportunity for those of you who want to be more involved in CELA and help new members connect with our more experienced members.

For more information....

If you have any questions, feel free to reach out to us. If you are interested in joining the committee, please contact Alexandra Menna at alexandra@cela.org

Alireza Alivandivafa, Co-Chair (aalivandi@gmail.com)
Mythily Sivarajah, Co-Chair (mythily@wmlayers.com)

If you are interested in volunteering to be a mentor or in being matched with a more experienced CELA member mentor, contact us at info@cela.org.

☛ WE NEED PRACTICE ARTICLES ☚

The CELA Bulletin is distributed to judges and attorneys statewide.
We are looking for scholarly articles on practice matters important to the plaintiff's bar.
It is a great way to get your name out there!
Your article should keep its audience in mind, and promote CELA's mission of advancing the rights of workers.

If you have something you'd like to submit to the Bulletin, please get it to me at cbyrnes_esq@yahoo.com or to Tracy at tfehr@akgllp.com (or both is good, too). We will give preference to articles that haven't been published elsewhere.

CELA MARKETPLACE

The "CELA Marketplace" is a new way for our attorney members to find the goods & services they need for success. Primarily, it is a business directory on our website featuring companies that see a mutual value in connecting with our members.
From language interpreters to judge analytics to financial services, we have been enrolling businesses to join the Marketplace – and will continue to do so.

The Marketplace program is the result of a strategic planning process over the course of two years involving the CELA Board, staff, and membership looking at our needs and our path forward.

Please visit cela.org/marketplace today! If you would like to refer a contact of yours to join the Marketplace, please share that link.

COMING EVENTS

WEBINAR

Friday, January 31, 2020, @ 12:00pm - 1:15 pm

LITIGATING INDIVIDUAL PLAINTIFF WAGE CASES

This webinar will cover forum selection, fighting arbitration or civil court; discovery issues in single wage cases and preparing for trial.

Tuesday, March 17, 2020, 10:00am-6:30pm

14th ANNUAL CELA LOBBY DAY

Sheraton Sacramento, CA

October 16, 2020 - October 17, 2020

CELA 33rd ANNUAL EMPLOYMENT LAW CONFERENCE

Loews Coronado Bay, San Diego, CA

(skills seminar on Thursday, October 15)

COMING SOON in 2020

Date TBD

16th ANNUAL ADVANCED WAGE & HOUR SEMINAR

Northern California

Date TBD

7th ANNUAL CELA TRIAL COLLEGE

Southern California

SAVE THE DATES

October 15, 2021 - October 16, 2021

CELA 34th ANNUAL EMPLOYMENT LAW CONFERENCE

Hilton San Francisco, San Francisco, CA

(skills seminar on Thursday, October 14)

September 29, 2023 - September 30, 2023

CELA 36th ANNUAL EMPLOYMENT LAW CONFERENCE

Hilton San Francisco, San Francisco, CA

(skills seminar on Thursday, September 28)

CELA MEMBER CASE VICTORIES

If you would like to include a recent victory in our listserv news and in the annual "CELA Victories!" presentations at the CELA Conference, please submit it here:

https://goo.gl/forms/dQzXIEOAe0hJ8w992