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CALIFORNIA EMPLOYMENT LAW

MID YEAR LEGAL UPDATE 2023

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CALIFORNIA EMPLOYMENT LAW MID YEAR LEGAL UPDATE 2023

Jay L. Rosenlieb1

# Introduction

The federal courts and the California courts continue to be very active in the employment and labor spaces, especially with regard to arbitration, class actions, and wage and hour matters. Further, Democrats continue to have supermajorities in both California legislative chambers and Governor Newsom is pursuing his previously announced policy agenda. As a result, there have been and will be many changes impacting the relationship between California employees and their employers.

These materials present and discuss new federal and California court decisions as well as legislation and administrative actions that have passed or been adopted or currently before relevant legislative bodies or regulatory bodies. Employers and HR professionals are well advised to familiarize themselves with these actual and potential developments so that they can position their businesses for the future.2

# Wage and Hour

* 1. **Reminder: Minimum Wage Adjustments**: The current California minimum wage is $15.50 regardless of the number of employees employed by the employer. Some local jurisdictions have a higher minimum wage rate. Employers must discern the applicability of local minimum wage legislation and the minimum wage in the jurisdiction where their employees work. At current count, nearly 40 local jurisdictions have adopted their own minimum wage requirements. These local laws are estimated to cover about a third of the state’s private sector jobs. Absent further action by the California Legislature and the Governor, the California minimum wage effective as of January 1, 2024, will be announced

1. Great appreciation and thanks are expressed to my colleague Marinor Ifurung for her work in preparing this update. Special thanks is also extended to Maira Alvarez, Joseph Harrison and Zachary Houston for their work in the preparation of the materials.
2. Disclaimer: The analysis and information provided in this update is general in its nature and content and cannot be applied to any specific situation without further analysis and gathering of facts. Users of this document are urged to consult with legal counsel.

toward the end of July 2023. Note: It is expected that a ballot proposition raising the minimum wage to $18.00 per hour, will be before California voters in 2024.

## Court Decisions

## Helix Energy Solutions Group v. Hewitt (2023) U.S.

* + - 1. Facts: Employee worked in the energy industry and was employed by Helix Energy Solutions Group, an offshore oil and gas company. The employee was paid a daily rate and his annual compensation was over $200,000 per year. Helix claimed he was not eligible for overtime because he was paid in excess of the federal minimum standard for salaried employees. Hewitt worked 28 day hitches on an offshore oil rig and was paid between $963 and $1,341 per day.
      2. Issue: Does the payment of a minimum wage amount per day qualify as the payment of salary, as defined in the Fair Labor Standards Act, and therefore exempt the employee from overtime?
      3. Rule: No. Highly compensated employees can be eligible for overtime pay if they are paid on a daily basis. Although the employee was paid a minimum amount per day, such an arrangement did not satisfy the salary test under the FLSA and therefore the employee was eligible for overtime pay. The FLSA salary test is met solely when employees are paid a regular predictable amount by the week or longer. The court noted that the FLSA salary basis test could be met if the employee receives a weekly guarantee or is paid a straight weekly salary.

## Quinn v. LPL Financial (2023) 2023 SOS 1427

* + - 1. Facts: Quinn was classified as an independent contractor in his work relationship with LPL Financial. Quinn and LPL Financial stipulated to facts and LPL then moved for summary adjudication.
      2. Issue: Are the provisions of the California Labor Code that exempt securities broker-dealers and investment advisors from the ABC test, and the retroactive application of the exemption (Labor Code Sections 2783 and 2785) constitutional?
      3. Rule: Yes. The California Court of Appeal and the 2nd Appellate District rejected Quinn’s argument that because the exemption covers only his profession he has been denied equal protection. Quoting the United States Supreme Court’s Warden decision, the California court held that “[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection

challenge if there is any *reasonably conceivable* state of facts that could provide a rational basis for the classification.” (Italics added.) the court also denied Quinn’s claim that he was denied due process as a result of the retroactive application of the exemption.

* + 1. **Save Local Restaurants (2023) Sacramento Superior Court:** A preliminary injunction has been granted to enjoin the implementation of AB 257, otherwise known as the Fast-food Accountability and Standards Recovery Act, which created the Fast Food Council. The Council is empowered by AB 257 to set terms and conditions of employment, including wages, in the fast-food industry. It is expected that a ballot proposition will be voted on by California voters sometime in 2024.

## Naranjo v. Spectrum Security Services, Inc. (2023) California Court of Appeal Case No. B2566232A

* + - 1. Facts: Naranjo claimed missed break premium pay. The matter went to the California Supreme Court and was remanded to the Court of Appeal to determine two issues.
      2. Issues:
         1. Whether the trial court erred in finding that Spectrum had not acted “willfully” in failing to timely pay employees premium pay (which barred recovery under LC Section 203)?; and
         2. Whether Spectrum’s failure to report missed-break premium pay on wage statements was “knowing and intentional” as is necessary under LC Section 226?
      3. Rule:
         1. Substantial evidence supports the trial court’s finding that Spectrum presented defenses at trial—in good faith—for its failure to pay meal premiums to departed employees and therefore Spectrum’s failure to pay meal premiums was not “willful” under LC Section 203; and
         2. Because an employer’s good faith belief that it is in compliance with LC Section 226 precludes a finding of a knowing and intentional violation of LC Section 226, penalties and associated attorney’s fees cannot be awarded under LC Section 226.

## Legislation

* + 1. **Proposed Legislation: SB 525**: Increase in Minimum Wage for Healthcare Workers to $21 per hour effective June 1, 2024, $25 per hour effective June 1,

2025, and then indexed thereafter. This new minim wage would apply to 21 different categories of health care facilities and defines health care services to include nursing to groundskeeping, where such services directly or indirectly support patient care. This proposed legislation has passed the Senate and is now in the Assembly, held at the desk and yet to be assigned to a committee.

* + 1. **Proposed Legislation: Protecting the Right to Organize (PRO) Act**: Federal legislation that would, among other topics, tighten the ability to classify workers as independent contractors and employees as exempt from overtime. Although the PRO Act passed the House in 2020 and 2021, the Senate has not acted. The PRO Act has been reintroduced and was the subject of a hearing before the House Education and Workforce Committee on April 19.

## Regulatory Actions

* + 1. **Proposed New Federal Overtime Rule**: Although a new overtime rule was expected from the Department of Labor this spring, the DOL’s self-imposed timeline has been missed. It is expected that the new rules will address the duties test in the federal executive, administrative, and professional exemptions and will increase the minimum salary threshold by $10,000-$15,000 per year. NOTE: Congress is also reviewing an increase in the minimum exempt threshold through the Restoring Overtime Pay Act.

# Wrongful Termination

## Court Decisions

## Young v. RemX Specialty Staffing (2023) 2023 SOS 1406

* + - 1. Facts: Young was hired by RemX and placed on an assignment at Bank of the West. RemX ended the assignment of Young at Bank of the West for allegedly being verbally abusive on the phone. Young was paid on the RemX regular payroll schedule, did not receive further assignments from RemX, and remained eligible for additional assignments. Young sued RemX for waiting time penalties pursuant to LC 201.3(b)(4), specifically applicable to payment of final wages by temporary services employers/employees.
      2. Issue: In the context of an employee of a temporary services staffing company, does termination of an assignment to a client of the staffing company constitute a “discharge”?
      3. Rule: No. A “discharge” requires the end of an employment relationship. When employees have an employment relationship with the staffing company, they do not have an employment relationship with the client of the

staffing company and termination of the assignment does not constitute termination of employment. Termination of employment only occurs when the employee is terminated by the staffing company. The court relied on legislative history in coming to its conclusion.

# Employee Leaves and Benefits

## Court Decisions

## Clarkson v. Alaska Airlines (2023) 2023 SOS 21-35473

* + - 1. Facts: Clarkson was lead plaintiff in a class action lawsuit alleging that because Alaska Airlines provided paid leave for non-military leaves it was therefore obligated to provide pay for military leaves.
      2. Issue: Must a jury be allowed to determine if leave pursuant to USERRA is comparable to other employer provided non-military leaves?
      3. Rule: Maybe. This is a question that must be submitted to a jury and is not appropriate to be decided on a motion for judgment. A jury must be allowed to determine comparability between military leave and non-military leave given that USERRA requires employers to provide employees who take military leave with the same non-seniority rights and benefits as theirs colleagues who take comparable non-military leaves.

## Legislation

* + 1. **Proposed Federal Paid Family Leave Program**: As proposed by the Biden administration, this program would allow up to 12 weeks of paid leave to bond with a new child, care for a family member or heal from their own serious illness. The proposal also includes up to three days of paid bereavement leave. No action has been taken by the House and the President’s budget, which included this proposal, has been rejected.
    2. **Proposed California Increases to Paid Sick Leave**: Two pieces of legislation that increase paid sick leave (SB 616 (7 days) and SB 881 (5 days)) are working their way through the California legislature. SB 616 simply increases the number of hours from 24 to 56. SB 881, on the other hand, increases the number of hours to 40. The legislation would provide some protections and clarifications that favor employers. These currently include: Limiting the maximum amount of leave in any year to 40 hours; extends the accrual date by which the 40 hours must be accrued to the 200th calendar day of employment; allows up to 80 hours to be accrued; for hourly employees, PSL is to be paid at the employee’s base rate, not

their regular rate; allows employers to require a written statement verifying the reason for the use of PSL; pre-empts local ordinances on the issue of PSL; and violations of PSL are not enforceable through PAGA. Current status in the legislature:

* + - 1. SB 881 did not pass out of committee; and
      2. SB 616 has passed out of the Senate and is now pending in the Assembly, “Held at Desk.”

# Discrimination, Harassment, and Retaliation

## Court Decisions

## 5.1.1 Opara v. Yellen (2023) 2023 SOS 21-55953

* + - 1. Facts: An employee of the United States Treasury Department alleged that she was discriminatorily terminated from her employment in violation of the federal Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964.
      2. Issue: After the employer has established a business reason or other reason for its actions that are alleged to be discriminatory, are the employee’s own allegations alone sufficient to raise a genuine issue of fact that the business reason is pretextual?
      3. Rule: In this case, no. The worker’s own allegations alone were not enough to raise a genuine issue of fact to establish pretext. The Ninth Circuit held that while the employee’s direct evidence of age discrimination did in fact establish a prima facie case of age discrimination and that the employer had established a bona fide reason for terminating the employment (violation of UNAX), the employee failed to demonstrate that the employer’s reasons for termination were pretextual. The court opined that there are two ways for an employee to demonstrate pretext: Directly by showing that the unlawful discrimination more likely than not motivated the employer or indirectly by showing that the employer’s proffered explanation is “unworthy of credence” because it is internally inconsistent or otherwise not believable. In light of the evidence in this specific case, the court held that the plaintiff failed to raise triable issues of fact. The supervisor’s comments that “anyone … too old to do this job …. should quit” and that “the job was better with young people”, while sufficient to establish a prima facie case, were uncorroborated and deemed to be self-serving and therefore insufficient to establish pretext.

## Atkins v. St. Cecilia Catholic School (2023) 2023 SOS 1273

* + - 1. Facts: Plaintiff was a 40 year employee of the defendant an elementary school operated by the Archdiocese of Los Angeles. During her final year of employment, plaintiff worked part-time as an art teacher and office administrator. Plaintiff was discharged and then brought suit claiming that she was the victim of age discrimination. Defendant claimed that it had no liability to plaintiff because of the ministerial exception that protected it from ADEA claims and other discrimination related claims. In 2012, plaintiff signed and submitted a renewed job application and checked a box indicating that she was “willing to maintain, by word and actions, a position of role model and witness to the Gospel of Christ that is in conformity with the teachings, standards, doctrines, laws, and norms of the Roman Catholic Church as interpreted by the [ADLA].” The plaintiff did not teach religion and, in her final year, worked solely as a secretary and taught visual art and art history. The plaintiff did lead students in a prayer at the end of the day.
      2. Issue: Does the ministerial exception apply to plaintiff’s employment?
      3. Rule: In this case, there was insufficient evidence to conclude, as a matter of law, that the ministerial exception did apply to Plaintiff’s employment. The Ninth Circuit remanded the matter to the trial court to reverse the granting of the employer’s motion for summary judgment.

## Legislation

## Regulatory Actions

**5.3.1. EEOC has begun a regulatory process to limit discrimination driven by the use of artificial intelligence in the workplace**. The EEOC hearing, held January 31 of this year, framed the use of AI by employers as “A new civil rights frontier”. The EEOC Chair Charlotte Burrows stated that “technology in employment decisions is increasing over time” and that “AI and other algorithms offer great advances, but they may perpetuate barriers [to] employment.” This hearing follows an EEOC initiative begun in 2021 to identify possible discriminatory issues created by the use of AI in recruiting, hiring, and terms and conditions of employment. The EEOC has drafted a Strategic Enforcement Plan as guidance for its in-house attorneys on issues related to AI bias and on May 18, 2023, issued guidance on the issue. This guidance is nonbinding and does not have the force of law. The guidance focuses on the potential disparate impact of employers’ use of algorithmic, automated, or AI decision-making tools to make job applicant and employee selection decisions.

Note: California is engaged in its own broad efforts to address the use of artificial intelligence in the workplace. The Civil Rights Commission and other governmental agencies are moving deliberately and quickly to examine the presence and impact of AI in the workplace. The CRC has updated its draft rule and is moving forward with the rulemaking process. As is the case with the federal government, the California focus is on the potential bias created by the use of AI in the employment decision making process. On the legislative front, AB 1651 of 2022 (The Workplace Technology Accountability Act) would have created limitations on the use of “Automatic Decision Systems” in employment decisions. AB 1651 died in the legislature. Assembly Bill 331 was introduced in January 2023 with the objective of creating requirements and restrictions on the use of “automated decision tools” in employment decisions. AB 331 is currently held in committee. Related legislation includes AB 302, SB 313, and SB 721.

# Arbitration and Mediation

## Court Decisions

## Chamber of Commerce v. Rob Bonta (2023) Case No. 20-15291

* + - 1. Facts: California enacted AB 51, effective January 2020 which imposed civil and criminal penalties on employers who made the signing of arbitration agreements a term and condition of employment. Oddly, AB 51 stated that such agreements could be enforced.
      2. Issue: Can California employers require applicants and employees, as a term and condition of employment, to sign an arbitration agreement?
      3. Rule: Assuming that the agreement is not procedurally or substantively void, California employers can require applicants and employees, as a term and condition of employment, to sign arbitration agreements. The Ninth Circuit found that AB 51 was pre-empted by the Federal Arbitration Act in that AB 51 created an “obstacle” to the FAA’s purpose. Note: Employers are cautioned to comply with the “Ending Forces Arbitration of Sexual Assault and Sexual Harassment Act of 2021” (HR 4445) which prohibits mandatory arbitration agreements of sexual harassment and sexual assault claims. Such claims may still be included in voluntary arbitration agreements.

## Drickey Jackson v. AMZN (2023) Ninth Cir. Case No. 21-56107

* + - 1. Facts: Drickey sought to represent a class of individuals, known as Amazon Flex drivers, claiming damages and injunctive relief for alleged privacy violations by Amazon.com, Inc. Drickey claimed that Amazon monitored and

wiretapped the drivers’ conversations when they communicated off hours in closed Facebook groups. Amazon moved to compel arbitration under the terms of a 2019 arbitration agreement or, in the alternative, a 2016 arbitration agreement.

* + - 1. Issue: Must the party seeking to enforce a contract prove that it provided adequate notice of the terms of the contract?
      2. Rule: Yes. The court held that Amazon failed to offer evidence to show that it had informed the class members of the 2019 change in terms and that the class members consented to the terms. The court deemed a declaration by Amazon to the effect that it had generally emailed, in 2019, amendments to the 2016 agreement, insufficient in that it failed to demonstrate and an individualized notice was sent to the Plaintiff nor that he had received the notice. As a final note on this issue, the court stated: “Although we have experienced a technological revolution in the ways parties communicate, technological innovation has not altered these fundamental principles of contract formation.” The court went on to hold that the 2016 agreement did not apply to the allegations brought by the plaintiff because he had alleged claims of “spying” by Amazon during off hours and that such claims did not depend on any terms of his contract as a driver.

## Castelo v. Xceed Financial Credit Union (2023) Cal. Ct. of Appeal Case No. B311573

* + - 1. Facts: Castelo sued Xceed for wrongful termination and age discrimination (FEHA). The matter was submitted to binding arbitration pursuant to a stipulation between the parties. The arbitrator granted summary judgment in favor of Xceed and, in doing so, rejected Castelo’s argument that the parties’ separation agreement violated Civil Code Section 1668 which prohibits pre- dispute releases of liability in some circumstances. The trial court denied Castelo’s motion to vacate, based on the argument that the arbitrator had exceeded his authority to rule on Civil Code Section 1668, the arbitrator’s award.
      2. Issue: Did the arbitrator exceed his authority when he granted summary judgment and rejected Castelo’s argument that the separation agreement could not be enforced based on Civil Code Section 1668?
      3. Rule: No. The court ruled that Civil Code Section 1668 is limited to future unknown claims. In doing so, the court found that Castelo signed the separation agreement after she was informed of the decision to terminate and believed at the time that she had valid claims for age discrimination and wrongful termination.

## Hill v. Xerox Business Systems (2023) Ninth Cir. Case No. 20-35838

* + - 1. Facts: Hill worked for Xerox pursuant to a proprietary system of differential pay rate known as “Achievement Based Compensation” and a Dispute Resolution Plan that required Xerox and its employees to submit “all disputes” to binding arbitration for final and exclusive resolution. Hill never signed the DRP. Xerox filed a motion to compel individual arbitration by 2,927 class members who in fact had signed the DRP.
      2. Issue: Did Xerox waive its right to compel arbitration?
      3. Rule: Yes. Based on earlier precedent that waiver of the right to compel arbitration is based on a two part test (knowledge of an existing right to compel arbitration and intentional acts inconsistent with that existing right) the Ninth Circuit held that Xerox had waived. Although Xerox was correct that the district court could not compel nonparties to the case to arbitrate until after a class had been certified and the notice and opt-out period were complete, Xerox failed to appreciate that waiver was a unilateral concept. A finding of waiver by Xerox looked only to the acts of Xerox, and bound only Xerox. Explicit relinquishment is not the only way to waive a right to arbitrate. The panel held that further undercutting Xerox’s position was its own actions throughout the course of the litigation, in which Xerox raised the 2012 DRP as to putative class members before the class had been certified and before it had the ability to move to enforce that agreement against them. The panel concluded that it was clear that Xerox had knowledge of and knew how to assert its right to compel arbitration under the 2012 DRP well before class certification and notice was complete. Xerox similarly possessed knowledge of the right to compel arbitration as against the signatories of the 2002 DRP sufficient to satisfy the first prong of the waiver test. Concerning the second prong of the test for arbitration waiver – acts inconsistent with the right to arbitrate – the panel considered the totality of the parties’ actions. The panel held that here, there was little doubt that Xerox acted inconsistently with its right to compel arbitration under the 2002 DRP. First, Xerox many times explicitly asserted as a ground for obligatory arbitration the 2012 DRP without asserting the same for the 2002 DRP. Second, Xerox further sought to take advantage of litigation in federal court by requesting extensive discovery on unnamed parties to the case—discovery which necessarily included signatories to the 2002 DRP. That Hill may not have been directly prejudiced by Xerox’s requests concerning 2002 DRP signatories was immaterial. Third, Xerox actively litigated this case through filing a motion for partial summary judgment on the issue whether unnamed class members subject to Xerox’s ABC pay scheme were “piecemeal” workers. Considering the totality of the

circumstances, the panel concluded that the district court properly found that XBS acted inconsistently with its right to compel arbitration under the 2002 DRP. Finally, the panel rejected Xerox’s contentions that it would have been futile for it to have filed a motion to compel arbitration sooner than it did, and that, accordingly, its otherwise clear waiver of the right to compel arbitration should be excused. First, Xerox argued that it would have been futile to file a motion to compel arbitration until after class certification because only then would unnamed class members be brought into the case, and only then would the district court have jurisdiction over those individuals. The panel held that waiver did not require a court to have jurisdiction over the beneficiaries of the waiver, it did not even require a lawsuit to have been filed. Second, Xerox argued that it would have been futile to compel arbitration under the 2002 DRP before the Supreme Court decided Lamps Plus v. Varela, 139 S. Ct. 1407 (2019), because before Lamps Plus, it would not have been guaranteed individual arbitration under the 2002 DRP. The panel held that regardless whether arbitration were to be conducted individually or as a class, Xerox would have had a valid right to compel arbitration under the 2002 DRP. In addition, Xerox could not rely on Lamps Plus as establishing any new law with respect to arbitration agreements that are silent regarding class arbitration because that issue was decided nearly a decade earlier. The panel concluded that it would not have been futile for Xerox to assert the 2002 DRP throughout the course of the litigation below in the same manner as it did the 2012 DRP.

## Vaughn v. Tesla (2023) 2023 SOS 40

* + - 1. Facts: Vaughn worked for Tesla through a staffing agencies prior to signing an employment letter with Tesla. The employment letter with Tesla contained an arbitration clause. Vaughn alleged that he suffered racial harassment before and after signing the employment letter.
      2. Issue: Can a court properly reply on the arbitration clause in the employment letter between Vaughn and Tesla to determine the arbitrability of claims based on conduct occurring during the periods when Vaughn was employed by the staffing agencies rather than directly by Tesla?
      3. Rule: Yes and the language excludes arbitration claims against the staffing agencies.

## Iyere v. Wise Auto Group (2023) California Court of Appeal Case No. A163967

* + - 1. Facts: Iyere and two others began working for Wise on different dates. Each purportedly signed an arbitration agreement. The agreement waived the

employees’ rights to participate in a class action and advised each to “consult with an attorney.” The acknowledgment indicated that the employee has read the agreement and understands that he can choose not to sign and sill be employed by Wise, without retaliation. Each of the three employees were fired and then filed a joint complaint. Wise moved to compel arbitration supported by a declaration form the HR director authenticating the documents bearing the handwritten signatures of the plaintiffs. In the opposition to the motion to compel, each of the plaintiffs alleged that, on his first day fo work, he was handed a stack of documents and was not given any time to review them nor given a copy of the documents and then stated: “I do not recall ever reding or signing any” binding arbitration agreement” and that “I do not know how my signature was placed” on the document.

* + - 1. Issue: Based on the facts, are the arbitration agreements enforceable?
      2. Rule: Yes. The plaintiffs offered no admissible evidence creating a dispute to the authenticity of their physical signatures and did not prove that the agreements were unconscionable.

# Class Actions and PAGA

## Court Decisions

## Gregg v. Uber Technologies (2023) 2023 SOS 1159

* + - 1. Facts: Gregg was an Uber driver and had been classified as an independent contractor. Gregg had signed an agreement with Uber requiring the arbitration of all claims and the waiver of PAGA claims.
      2. Issue: Does an employee have standing to bring a PAGA representative action in court even though they are obligated by agreement to arbitrate their individual PAGA claims?
      3. Rule: Yes. The court held that the waiver of the PAGA claims was invalid and must be severed from the arbitration agreement, that the individual PAGA claims must be resolved in arbitration, and that the representative PAGA claims must be resolved in civil court, and that the worker still had standing to bring a representative action even though his individual claims must be arbitrated. The court further held that the non-individual claims must be stayed pending completion of the arbitration. See also: Nickson v. Shemran and Seifu v. Lyft: Decided similarly to Gregg.

## Rocha v. U-Haul of California (2023) 2023 SOS 473

* + - 1. Facts: Thomas Rocha and Jimmy Rocha were employed by U-Haul of California. Their employment included, as a term and condition of employment, an arbitration agreement. The arbitration agreement stated: “Please take the time to read this material. IT APPLIES TO YOU. It will govern all existing or future disputes between you and U-Haul … or its parent, subsidiary or affiliated companies or entities, and each of its and/or their employees, directors or agents (“U-Haul”) that are related in any way to your employment with U-Haul … “ In 2015 the Rocha brother filed complaints with the EEOC alleging that their manager had harassed and discriminated against them. Several weeks later the brother were terminated. Sixty days later the brothers filed with the DFEH (now known as the CRD) and obtained immediate right to sue letters, alleging retaliatory termination of employment. The brothers Rocha filed a complaint and then an amended complaint in Superior Court alleging FEHA violations, retaliation under LC 1102.5, defamation, PAGA violations, and an action for declaratory relief seeking an order that the arbitration agreement was unenforceable. U-Haul filed a motion to compel arbitration and, following additional motions, the trial granted the motion to compel arbitration, the matter was arbitrated, and the arbitrator found in favor of U-Haul on all causes of action.
      2. Issues:
      3. Was the arbitration agreement unconscionable?
      4. Was leave to amend properly denied?
      5. Rule: As to the first issue, the court found that the arbitration agreement created only limited procedural unconscionability citing to the facts that it was a stand alone agreement and had plain disclosures in large type. As to the issue of substantive unconscionability, the court reviewed the arbitration agreement to determine if it was “overly harsh” or “one-sided”. The court rejected all arguments (costs, rights to appeal, ability to seek relief in administrative fora, and PAGA waiver). As to the PAGA waiver, the court found the clause to be severable. As to the amendment of the complaint, the court cited to an earlier case holding that “leave to amend should not be granted where … amendment would be futile.” The court found that the arbitrator’s findings precluded standing.

## Bowerman v. Field Asset Services (2023) 2023 SOS 18-16303

* + - 1. Facts: Field Asset Services (“FAS”) is in the business of pre-foreclosure property preservation for the residential mortgage industry. Plaintiff

Bowerman was the sole proprietor of BB Home Services, which contracted with FAS as a vendor. Bowerman alleged that FAS willfully misclassified him and members of the putative class as independent contractors, rather than employees, resulting in FAS’s failure to pay overtime compensation and to indemnify them for their business expenses.

* + - 1. Issue: Does Dynamex apply to reimbursement claims based on LC Section 2802?
      2. Rule: No. The panel held that the California Court of Appeal has repeatedly limited Dynamex’s applications to claims based on or “rooted in” California’s wage orders. Here, the class members’ expense reimbursement claims were not based on a California wage order, but on Cal. Labor Code § 2802. Nor were they “rooted in” a California wage order, even though the class members belatedly invoked Wage Order 16-2001 in their class certification briefing. Note: The court also reversed the interim award of attorney’s fees in favor of the plaintiff in the amount of $5,000,000 was to be reversed in light of the holding that the grant of summary judgment in favor of the class was in error.

## Wood v. Kaiser Foundation (2023) California Court of Appeal Case No. D079528

* + - 1. Facts: Wood sued, for herself and on behalf of others, Kaiser Foundation claiming that sick leave was not being paid at the correct rate, that sick leave was being wrongfully denied that the method of payment of accrued vacation was in violation of state law. Wood used PAGA as the basis for her lawsuit, in reliance, in part, on LC 248.5(e) which provides “… that any person or entity enforcing this article on behalf of the public as provided for under applicable state law …” shall be entitled to specific relief including attorney’s fees. Kaiser’s demurred claiming that PAGA did not apply and that the correct law was the Unfair Competition Law. The trial court sustained the demurrer without leave to amend.
      2. Issue: Is PAGA the proper statutory scheme for a representative action to enforce violations of California’s MPSL law?
      3. Rule: Yes. The court found the phrase “enforcing this article on behalf of the public” in LC 248.5(e) to be ambiguous—it could refer to PAGA or it could refer to the UCL. In so finding, the court was able to embark on a quest of statutory interpretation with the critical inquiry being: “What did the Legislature mean?” Following a lengthy analysis of the legislative history leading to the passage of LC Section 248.5(e) and related sections, the court concluded that PAGA did apply and reversed the trial court.

# Labor

## Court decisions

## Gola v. University of San Francisco (2023) Case No. A161477

* + - 1. Facts: Gola had a position as adjunct faculty at the University Of San Francisco. Gola received an appointment outlining the terms and conditions of employment. The appointment letter referred to the collective bargaining agreement which governed the bargaining unit through which Gola was represented. Gola was discharged and brought claims for unpaid wages, late payment of wages, and violation of LC 226(a).
      2. Issue: Are claims for unpaid wages, late paid wages, and wage statement noncompliance preempted by the federal Labor Management Relations Act?
      3. Rule: In this case, yes with respect to the unpaid and late paid wages and no with respect to the alleged LC 226 violations. The first two claims brought by Gola could not be resolved without interpreting the collective bargaining agreement.

## Glacier Northwest v. International Brotherhood of Teamsters (2023) U.S.

* + - 1. Facts: Glacier delivers concrete to customers in Washington State using ready-mix trucks. Concrete is highly perishable, and if allowed to harden will cause significant damage to the vehicle. Glacier’s drivers are members of Teamsters Local 174. Following the expiration of a collective bargaining agreement, the union called for a work stoppage after 16 trucks were already loaded with concrete and making deliveries. The drivers refused to make the deliveries and returned with fully loaded trucks. On that day Glacier executed emergency procedures and was able to avoid significant damage to the trucks, but all of the concrete mixed that day hardened and became useless. Glacier sued for tort claims in state court and the union moved to dismiss claiming that the NLRA preempted state tort claims.
      2. Issue: Does the National Labor Relations Act impliedly preempt a state tort claim against a union for intentionally destroying an employer’s property in the course of a labor dispute?
      3. Rule: Yes. In an 8-1 decision (Jackson dissenting, the United State Supreme Court held, that while the NLRA gives workers the right to strike, the NLRA does not preempt an employer’s state tort claims related to the destruction of company property during a labor dispute where the striking workers failed to take reasonable precautions to avoid foreseeable, aggravated, and imminent danger to the employer’s property due to the sudden cessation of

work. The Court found that the union, far from taking reasonable precautions, actually executed the strike in a manner designed to achieve the results of damage to the trucks.

## Legislation

* + 1. **The PRO Act**: The United States Senate has held its own set of hearings on the Protecting the Right to Organize (PRO) Act following its reintroduction in the Senate on February 28, 2023, at Senate Bill 567. This version of the PRO Act, in addition to those items detailed in Section 2.3.2, above, will impose penalties of up to $100,000 for violations of workers’ rights (e.g. termination of employment) to support unions, pre-empt state “right to work” laws, bar employers from permanently replacing strikers, legalize sympathy, solidarity, and secondary strikes, “modernize” the union election process, “facilitate” initial collective bargaining agreements by imposing binding arbitration to determine a 2-year first contract if the union and the employer cannot come to agreement after negotiating at least four months, and make it legal again for unions to boycott businesses that buy or sell “scab-made” products and for workers to refuse to deliver or handle goods produced by “scabs” at other companies.

## NLRB and Regulatory Actions

* + 1. **NLRB restricts use of non-disparagement clauses in severance agreements**: On February 21, 2023, the NLRB ruled that employers cannot include a non- disparagement clause in a severance agreement if the effect of the clause is to give up rights otherwise protected under the NLRA, including talking about their work or criticizing their former employers.

# Miscellaneous

## Court Decisions

## Todd Roberts v. Springfield Utility Board (2023) Ninth Circuit Case No. 21.36052

* + - 1. Facts: Roberts worked for Springfield Utility Board. As part of an internal investigation into Roberts’ alleged misconduct, Springfield restricted Roberts from speaking with potential witnesses and other Springfield employees regarding the subject of the investigation while it was underway. Roberts brought suit against Springfield, specific Springfield employees, and Springfield’s legal counsel, alleging that the restrictions on his ability to speak with other employees about the subject of the investigation violated his rights pursuant to the First Amendment.
      2. Issue: Does a restriction on an employee’s ability to discuss the facts and circumstances of an on-going workplace investigation violate that employee’s First Amendment rights?
      3. Rule: No. The communication restriction did not violate the First Amendment because if did not limit Roberts’ ability to speak about “matters of public concern.” Nothing in Springfield’s instructions barred his from speaking about any alleged mismanagement at Springfield or other topics that would potentially relate to a matter of public concern. Rather, the restrictions merely barred his from personally discussing his own alleged violation of Springfield policies—a matter of private concern, personal concern—with potential witnesses or fellow Springfield employees.

## Regulatory Actions

* + 1. **Federal ban on non-compete clauses**: The Federal Trade Commission has proposed a ban on non-compete clauses between employers and employees. The proposed rule states that a “non-compete clause means a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating business, after the conclusion of the worker’s employment with the employer.” Existing non- compete clauses would have to be rescinded. The original deadline for submission of comments was extended from March 20, 2023, to April 19, 2023. The FTC continues to work the proposed rule through the rulemaking process and is projected to vote on the new rule in April 2024. As of late February 2023, the FTC had devoted over 6,000 hours to the rulemaking process on non- compete clauses through the efforts of 47 FTC employees, contractors, consultants, and advisors. Note: General Counsel for the NLRB, in a memo dated Amy 30, 2023, took the position that non-compete clauses violate the NLRA, noting that the position applies to unionized and non-unionized employees.