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# California Employment Law Notes

**March 2022**

## California Relaxes Standard For Proving Whistleblower Claims

### *Lawson v. PPG Architectural Finishes, Inc.*, 12 Cal. 5th 703 (2022)

Plaintiff Wallen Lawson, who was discharged by his employer PPG Architectural Finishes for allegedly poor performance, brought a whistleblower claim against PPG; Lawson claimed he was terminated because he had uncovered and reported a supervisor's scheme to "mis-tint" unpopular paint colors in order to avoid buyback requirements. A federal district court, applying the familiar three-step framework of *McDonnell Douglas v. Green*, concluded Lawson did not meet his burden of proving that PPG's legitimate, non-retaliatory reason for discharging him was pretextual. Lawson appealed to the Ninth Circuit, which certified to the California Supreme Court the question of what evidentiary standard applies to whistleblower claims under California law.

After considering the legislature's intent behind and the legislative history of Cal. Labor Code § 1102.6, the plain text of the statute, as well as how other courts have addressed and interpreted similar statutes at the federal level, the California Supreme Court rejected the *McDonnell Douglas* burden-shifting standard in favor of the far-more employee-friendly "contributing-factor" standard. The "contributing-factor" standard, which is expressly set forth in Section 1102.6, enables whistleblowers to meet their burden by showing their whistleblowing activity was just one factor that contributed to the adverse action, even when there is evidence of other, legitimate factors for the employer's decision. Moreover, the heightened burden of proof on the employer ("clear and convincing evidence") will likely make it even more difficult for employers to prevail in whistleblower cases both at the summary judgment and trial phases of a case. The Supreme Court concluded, "To the extent PPG is concerned that the existing framework sets the plaintiff's bar too low by requiring only a showing that retaliation was a contributing factor in an adverse decision, PPG's remedy lies with the Legislature that selected this standard, not with this court."

# At-Will Employee Can Proceed With Labor Code § 970 Claim

## *White v. Smule, Inc.*, 2022 WL 503811 (Cal. Ct. App. 2022)

Kenneth White alleged that while he was interviewing for a job with Smule (a developer and marketer of consumer applications), Smule told him it "was planning aggressive expansion over the course of the next few years and needed an experienced project manager to lead in building out and managing teams of project managers" in the San Francisco area. Relying on the employer's representations, White accepted the position and relocated from Washington to San Francisco. White signed an acknowledgement that his employment with Smule was terminable at will. Five months later, Smule eliminated White's position after deciding to move the position to its Bulgaria office. In his lawsuit, White alleged a violation of Cal. Labor Code § 970, which prohibits an employer from inducing an employee to relocate and accept employment with knowingly false representations regarding the kind, character, existence, or duration of work. The trial court granted Smule's motion for summary judgment, but the Court of Appeal reversed, holding that an employer may not rely upon at-will employment alone as a defense to an employee's claim under Section 970. Even in the context of at-will employment, an employer may still violate Section 970 by mischaracterizing job duties, job title, reporting structures, compensation, working hours, benefits, or other terms and conditions of employment.

# Doctor Proved Age/Race/Gender Discrimination

## *Department of Corr. & Rehab. v. State Pers. Bd.*, 2022 WL 354657 (Cal. Ct. App. 2022)

Vickie Mabry-Height, M.D., sued the Department of Corrections and Rehabilitation, alleging discrimination on the basis of age, race and gender in violation of the California Fair Employment and Housing Act (FEHA). The State Personnel Board sustained Dr. Mabry-Height's complaint on the ground that she had established a prima facie case of unlawful discrimination and the Department had failed to rebut the presumption of discrimination by offering evidence that it had a legitimate, nondiscriminatory reason for its conduct. The Department petitioned the trial court for a writ of administrative mandamus seeking an order setting aside the Board's decision. The petition was denied and judgment was entered in favor of Dr. Mabry-Height, which the Court of Appeal affirmed in this opinion. The Court held that the Department produced no evidence of a nondiscriminatory reason for its failure to interview/hire Dr. Mabry-Height: "the employer must do more than produce evidence that the hiring authorities did not know why [the plaintiff] was not interviewed." Further, the Department failed to show the actual reasons why plaintiff's credentialing was revoked. Therefore, the employee was not required to prove that discrimination was a substantial motivating factor for the Department's actions. *See also Vines v. O'Reilly Auto Enterprises, LLC*, 74 Cal. App. 5$^{th}$ 174 (2022) (trial court abused its discretion by reducing prevailing-party attorney's fees award of $810,000 to FEHA plaintiff who recovered only $70,000 in damages).

# Former Owner of Company Is Enjoined From Soliciting Customers

## *Blue Mountain Enterprises, LLC v. Owen,* 74 Cal. App. 5$^{th}$ 537 (2022)

Gregory S. Owen transferred his ownership interest in several real estate and construction-related firms to Blue Mountain Enterprises, LLC, as part of a joint venture with Acolyte Limited. Owen became Blue Mountain's CEO and he agreed to a post-employment non-solicitation provision, which precluded him from soliciting Blue Mountain's customers for a period of three years after the termination of his employment. After Owen's employment was terminated for cause, Owen established a competing construction services company and sent a letter to Blue Mountain customers stating, among other things, that he was launching his new business with "greater perspective, more resources and a much stronger team." The trial court granted Blue Mountain a preliminary and permanent injunction prohibiting Owen from soliciting its customers and prevailed on its motion for summary judgment adjudication of its breach of contract claim.

The Court of Appeal affirmed and rejected Owen's argument that the non-solicitation covenant did not meet the requirements of Cal. Bus. & Prof. Code § 16601 because the restrictive covenant was contained in Owen's employment agreement and there was no explicit transfer of good will. The Court found that Owen's transfer of his personal interest into Blue Mountain (a portion of which was later transferred to Acolyte) was sufficient to qualify for the sale-of-business exemption under Section 16601. The Court also rejected Owen's attempt to disavow the customer non-solicitation covenant because it was found in his employment agreement, stating: "Blue Mountain's ability to enforce the non-solicitation covenant is not undone by the fact that this provision is found in one contract in a multi-contract joint venture rather than another." Moreover, the Court concluded that an explicit transfer of goodwill was not required to qualify for the exemption under section 16601; rather, the transfer of goodwill could be reasonably inferred. The Court further concluded that Owen's letter to Blue Mountain customers did more than simply announce his new business. It was deemed to "petition, importune and entreat" the customers to leave Blue Mounter for better opportunities with Owen's new company.

# OSHA's COVID-19 Vaccine Mandate Exceeded Its Statutory Authority

## ***National Fed'n of Indep. Bus. v. OSHA*, 595 U.S. ___, 142 S. Ct. 661 (2022)**

The United States Secretary of Labor, acting through the Occupational Safety and Health Administration, enacted a vaccine mandate that would have required employers with at least 100 employees to require their employees (approximately 84 million workers) to receive a COVID-19 vaccination or to obtain a medical test each week at their own expense and on their own time and also wear a face mask each workday. After many states, businesses, and nonprofit organizations challenged the rule in court, the United States Court of Appeals for the Sixth Circuit lifted the stay on enforcement granted by a district court, and the applicants in this case then sought emergency relief from the Supreme Court, which was granted on the ground that OSHA's mandate exceeded its statutory authority and is otherwise unlawful. *But see Biden v. Missouri*, 595 U.S. ___, 142 S. Ct. 647 (2022) (upholding mandate of Secretary of Health and Human Services that hospitals and other facilities receiving Medicare and Medicaid funds must ensure that their staff – unless exempt for medical or religious reasons – are vaccinated against COVID-19); *Western Growers Ass'n v. Occupational Safety & Health Standards Bd.*, 73 Cal. App. 5$^{th}$ 916 (2022) (upholding California's Emergency Temporary Standards regarding COVID-19).

# Employer Not Required To Provide Workplace Seating To Grocery Cashiers

## *La Face v. Ralphs Grocery Co.*, 2022 WL 498847 (Cal. Ct. App. 2022)

Jill La Face, who worked as a grocery store cashier, filed this PAGA claim against her employer, alleging that Ralphs violated an Industrial Wage Commission order that requires employers to provide suitable seating when the nature of the work reasonably permitted the use of seats, or, for a job where standing was required, to provide seating for employee use when their use did not interfere with the employee's duties. Following a 12-day bench trial, where ergonomics experts and Ralphs employees and supervisors testified on both sides, the trial court found that Ralphs had not violated the applicable wage order because the evidence showed that even when lulls occurred in a cashier's primary duties, they were still required to move about the store fulfilling various other tasks, including cleaning and restocking shelves. The Court of Appeal affirmed, noting that "sitting at or near the checkstands instead of cleaning, restocking, and fishing for customers, would have interfered with the active duties of the cashiers." The Court further held that a PAGA claim is an "administrative hybrid" and that employees are not entitled to a jury. *See also Hutcheson v. Superior Court*, 2022 WL 354682 (Cal. Ct. App. 2022) (relation back doctrine may apply to extend statute of limitations applicable to new PAGA plaintiff who is substituted in for original plaintiff).

# Heightened Standard Of Fairness Required For Approval Of Class Action Settlement

## *Peck v. Swift Transp. Co. of Ariz.*, 2022 WL 414692 (9th Cir. 2022)

In evaluating a settlement of a class action involving Cal. Labor Code § 2802 (employer indemnity for employee expenses), the district court stated that "the parties engaged in arm's-length, serious, informed and non-collusive negotiations between experienced and knowledgeable counsel … after mediation with a neutral mediator. The settlement agreement is therefore presumptively the product of a non-collusive, arms-length negotiation." The Ninth Circuit vacated the district court's approval of the class-action settlement on the ground that the district court erroneously applied the presumption that the appellate court expressly rejected in *Roes 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1048 (9th Cir. 2019). The Court further held that objector Lawrence Peck could not appeal the PAGA settlement because he was not a party to the underlying PAGA action even though he was a member of the putative class action. *See also Espinoza v. Hepta Run, Inc.*, 74 Cal. App. 5th 44 (2022) (short-haul truck drivers' PAGA claims were preempted by federal law; personal liability for owner of company pursuant to Cal. Labor Code § 558.1 affirmed).

## Court Properly Denied Class Certification For Wage Hour Claims Involving Rounding

### *Cirrincione v. American Scissor Lift, Inc.*, 73 Cal. App. 5th 619 (2022)

Jason Cirrincione filed a putative class action lawsuit against his former employer for various wage and hour violations, including failure to pay overtime and minimum wages, meal and rest breaks, waiting time penalties, Cal. Labor Code § 2802, etc. These claims were predicated on the employer's policy and/or practice of rounding the work time of its employee, which allegedly resulted in the systematic underpayment of wages. The trial court denied Cirrincione's motion to certify seven subclasses of employees, holding that certification was not warranted because plaintiff had failed to establish that common questions of fact or law would predominate over individual questions. The Court of Appeal affirmed, holding that "an employer in California is entitled to round its employees' work time if the rounding is done in a 'fair and neutral' manner that does not result, over a period in time, in the failure to properly compensate employees for all the time they have actually worked." The Court further held that "simply alleging the existence of a uniform policy or practice (or unlawful lack of a policy) is not enough to establish predominance of common questions required for class certification."

**Related Professionals**

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