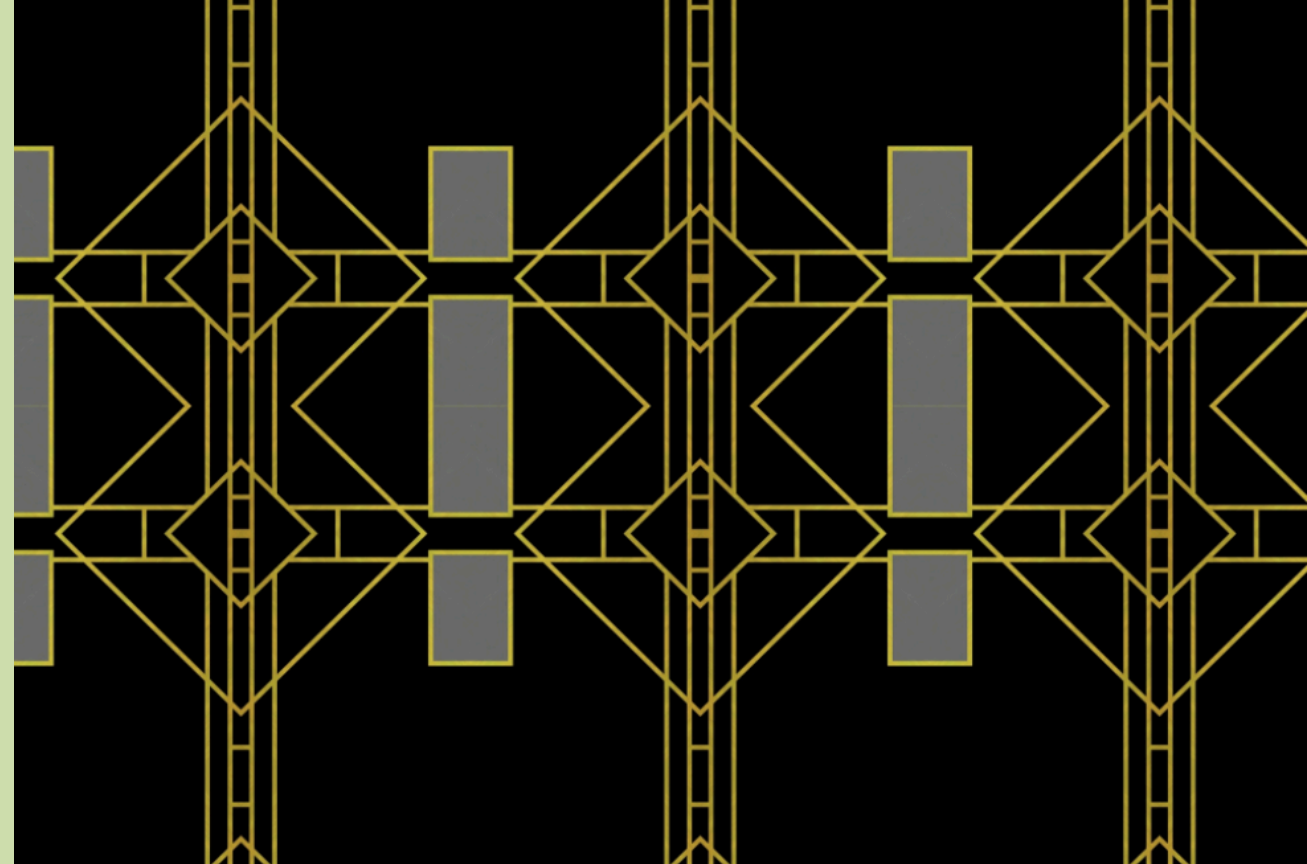




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# EMPLOYMENT MEDIATIONS & ARBITRATIONS

## IN 2021 AND BEYOND

Phyllis W. Cheng, Esq. | Mark LeHocky, Esq. | Hon. Michelle R. Rosenblatt (Ret.)

# SPEAKERS



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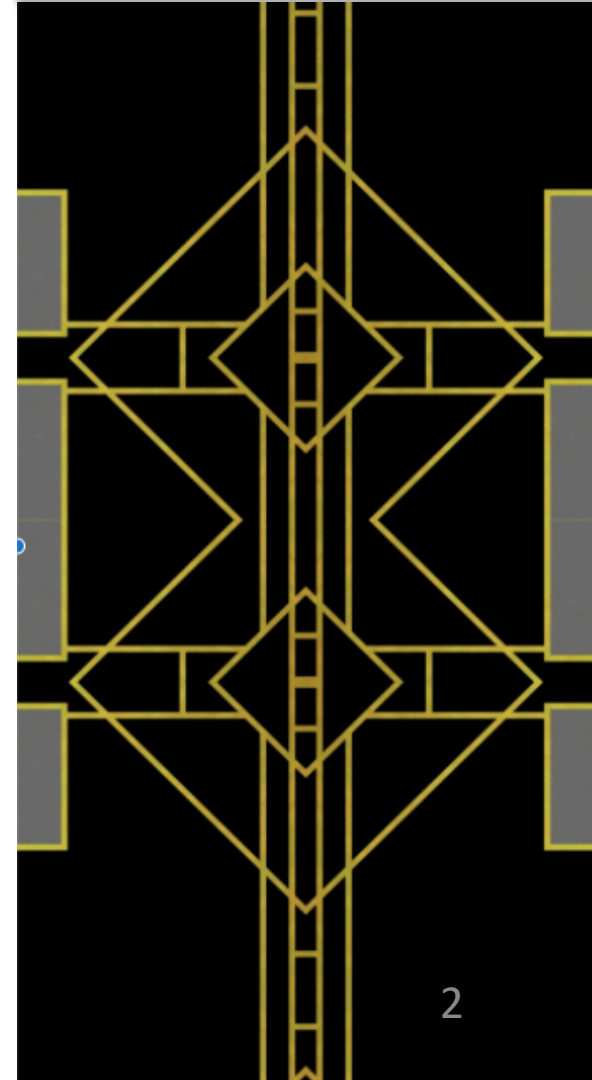
Phyllis W. Cheng, Esq.



Mark LeHocky, Esq.



Hon. Michelle Rosenblatt (Ret.)



# GOAL OF THIS COURSE

To spot post-pandemic employment issues, and discuss how the pandemic will impact the mediation and arbitration of employment cases in 2021 and beyond.

# PANDEMIC'S IMPACT

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- Court delays
- Financial uncertainty
- New workplace structure, culture and rules
- Remote hearings, mediations and arbitrations

# THE STATE OF THE COURTS UNDER THE PANDEMIC

- Cases requiring a civil trial are very unlikely to get to trial before 2022.
- Getting to trial may require a statutory preference (e.g., bumping up against a deadline) or else stipulating to an expedited one-day jury trial.
- Juror response rates, once estimated at 80%, may now be around 40%.
- Older persons are likely to be more reluctant to serve as jurors.
- Courthouse logistics are inhospitable, with limitations on the number of people who can ride in an elevator, and limitations on seating in courtrooms and jury rooms.
- The case inventory of individual judges has greatly increased. When the COVID-19 crisis subsides, inventories will increase, as cases such as unlawful detainers and foreclosures move forward.

(Source: The COVID-19 Task Force of the Orange County, California Bar and the ADR Section of the Bar jointly hosted a Zoom webinar on August 14, 2020 about the effective use of remote mediation. <https://www.calmediation.org/videoconferencing/>)

# COVID-19 CASES FILED

- As of April 30, 2021, there were 2,379 lawsuits (including 188 class actions) filed against employers due to alleged COVID-19 labor and employment violations, with nearly 600 in California. (COVID-19 Labor & Employment Litigation Tracker available at <https://www.littler.com/publication-press/publication/covid-19-labor-employment-litigation-tracker> )
- USA Today reported hundreds of these lawsuits targeting businesses for allegedly failing to provide adequate personal protective equipment (PPE), not enforcing mask-wearing or temperature checks, and failing to comply with sanitation protocols. (Paul Davidson, COVID-19 sparks more than 1,000 workplace-related lawsuits in 2020 as employees complain about safety, wages, USA Today, available at <https://www.usatoday.com/story/money/2021/01/05/covid-19-lawsuits-pandemic-spawned-over-1-000-workplace-lawsuits/4135280001/>)
- Additionally, the federal government announced almost \$4 million in citations arising from 300 OSHA workplace inspections for COVID-19 violations, including failing to implement a written respiratory protection program, and failing to properly keep records. (United States Department of Labor, U.S. Department of Labor's OSHA Announces \$3,930,381 in Coronavirus Violations, available at <https://www.osha.gov/news/newsreleases/national/01082021>)
- Recent California cases include allegations that employers failed to provide sufficient PPE and failed to implement social distancing protocols.
- One of the panelists mediated a FEHA perceived disability case, where an employer discriminated and retaliated against an employee with underlying diabetic condition by placing employee on indefinite unpaid leave because she could have had a had a severe case of COVID-19 if she were to catch it. Employer then replaced employee with another worker who had no underlying conditions. Employee did not have COVID-19, did not request any accommodation, and could perform the essential functions of her job without any accommodation.



# VIRTUAL ADR



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- Can proceed even if courts are shut down.
- Has benefits independent of safety during a pandemic.
- Can avoid travel, save on time and expense for parties.
- Convenient for busy mediators and counsel.
- Settlement and resolution rates comparable to in-person sessions.

(Source: Elizabeth M. Bennett, Alternative Dispute Resolution: Well-Suited To Online Proceedings, Above the Law, April 2, 2021. <https://abovethelaw.com/2021/04/alternative-dispute-resolution-well-suited-to-online-proceedings/?rf=1>)

# REOPENING CALIFORNIA

- Governor Gavin Newsom [lifted pandemic executive orders](#) June 11, 2021
- Reopen the economy [Beyond the Blueprint](#) effective June 15, 2021
  1. Terminate stay-at-home order
  2. Eliminate physical distancing, capacity restrictions, county tier systems, masks for vaccinated Californians
  3. Wind down 58 COVID-related executive orders between June and September 2021



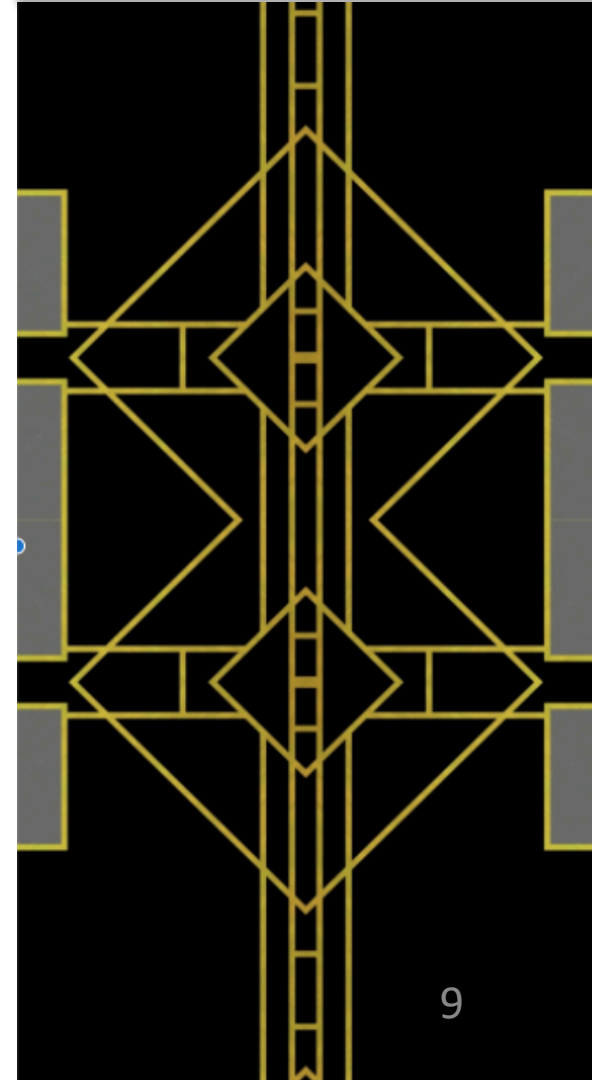
# HYPOTHESIS 1



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ABC hotel recalls workers laid-off during the pandemic, and requires all returning employees to show proof of having been inoculated with a CDC-approved COVID-19 vaccine. Chef, a laid-off cook, refuses to be vaccinated on account of the employee's phobia about needles and religious belief against vaccines. Chef asks to telework or be placed on an extended leave. ABC immediately terminates Chef, and hires a brand new employee, who had not been laid off, to replace Chef. Chef files complaints with DFEH and DLSE. The case is mediated.



# RECALL ON REOPENING



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- Employers must be aware of any recall requirements for laid-off employees that might apply.
- Collective bargaining agreements often have recall rights provisions.
- [Los Angeles](#), [Long Beach](#), [San Francisco](#), [Pasadena](#), [San Diego](#), and [Oakland](#) have recall ordinances that apply to certain sectors.

# REHIRE: CAL. LAB. CODE § 2810.8

## (SB 93)

- **Rehire:** Requires certain employers to offer to rehire employees displaced by COVID-19 pandemic within five days of establishing position, and employees within five business days to accept job. Requires employer that declines to recall a laid-off employee citing lack of qualifications, and instead hires someone other than a laid-off employee, to provide the laid-off employee a written notice within 30 days, including the length of service with employer of those hired in lieu of that recall, along with reasons for the decision. **Effective April 16, 2021 to December 31, 2024.**
- **Covered employer:** Certain hotels, private clubs, event centers, airport hospitality operations and providers of janitorial, maintenance, or security services to office, retail, or other commercial buildings, including temporary service, staffing agency or successor employer.
- **Covered employee:** Employed by the employer for 6 months or more in the 12 months preceding January 1, 2020. Most recent separation due to a reason related to the COVID-19 pandemic (i.e., public health directive, government shutdown order, lack of business, reduction in force, or other economic, nondisciplinary reason related to the COVID-19 pandemic).
- **Waiver:** Waivable by valid collective bargaining agreement.
- **Enforcement:** \$6 million appropriated to Division of Labor Standards Enforcement (DLSE) to enforce the law: \$100 civil penalties per employee, \$500 liquidated damages for each day of violation per employee.

# SAFE WORKPLACE

## Cal/OSHA Emergency Temporary Standards Remaining in Place

- COVID-19 Prevention Program in writing.
- Training and instruction to employees on the employer's prevention plan and their rights under the ETS.
- Notification to public health departments of outbreaks.
- Notification to employees of exposure and close contacts.
- Offer testing after potential exposures.
- Respond to COVID-19 cases and outbreaks.
- Quarantine and exclusion pay requirements.
- Prevention requirements for employer-provided housing and transportation.

# SAFE WORKPLACE

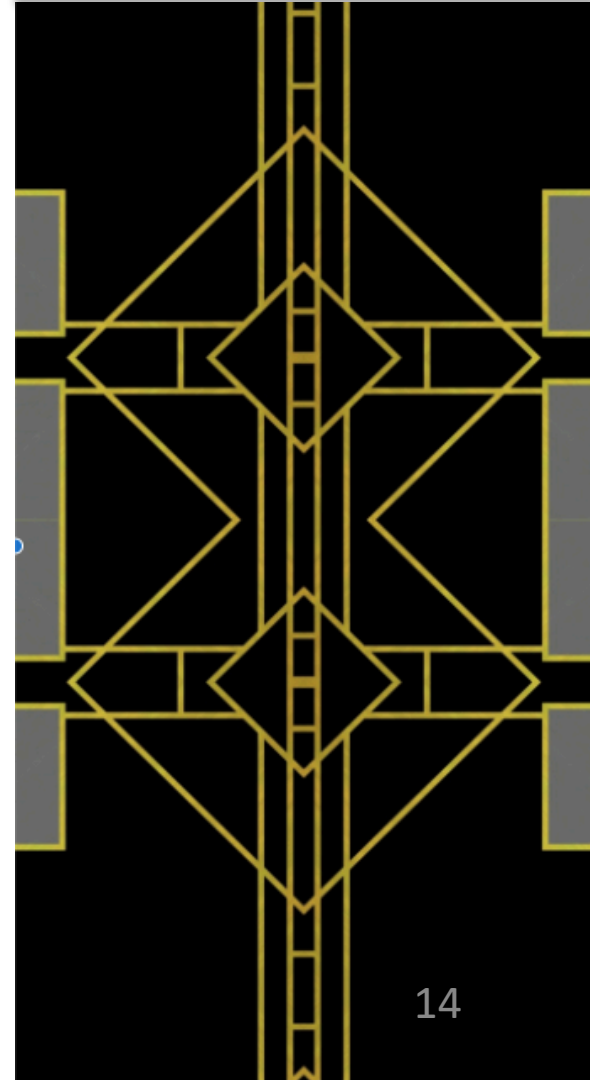
## Cal/OSHA Emergency Temporary Standards Changes

- Fully vaccinated employees without symptoms do not need to be tested or quarantined after close contacts with COVID-19 cases unless they have symptoms.
- No face covering requirements outdoors (except during outbreaks), regardless of vaccination status, though workers should be trained on CDPH recommendations for outdoor use of face coverings.
- Employers may allow fully vaccinated employees not to wear face coverings indoors, but must document their vaccination status. There are some settings where CDPH requires face coverings regardless of vaccination status. In outbreaks, all employees must wear face coverings indoors and outdoors when six-foot physical distancing cannot be maintained, regardless of vaccination status.
- Employers must provide unvaccinated employees with approved respirators for voluntary use when working indoors or in a vehicle with others, upon request.
- Employers may not retaliate against employees from wearing face coverings.

# SAFE WORKPLACE

## Cal/OSHA Emergency Temporary Standards Changes

- No physical distancing or barrier requirements regardless of employee vaccination status with the following exceptions:
  - Employers must evaluate whether it is necessary to implement physical distancing and barriers during an outbreak (3 or more cases in an exposed group of employees)
  - Employers must implement physical distancing and barriers during a major outbreak (20 or more cases in an exposed group of employees)
- No physical distancing requirements whatsoever in the employer-provided housing and transportation regulations.
- Where all employees are vaccinated in employer-provided housing and transportation, employers are exempt from those regulations
- Employers must evaluate ventilation systems to maximize outdoor air and increase filtrations efficiency, and evaluate the use of additional air cleaning systems





# COVID-19 VACCINATIONS

## [DFEH Guidance](#) and [EEOC Guidance](#)

- **Requiring vaccinations:** Permit employers to require returning employees to be inoculated with vaccine approved by the Food and Drug Administration (FDA).
- **Inquiry about vaccinations:** An employer, **who administers a COVID-19 vaccination program**, may ask employees questions related to COVID-19 that are intended to elicit information about a **disability**, if the inquiry is **job-related** and **consistent with business necessity**.
- **Proof of vaccinations:** An employer requiring an employee to receive a COVID-19 vaccination from a **third party** may require **proof of vaccination**.
- **Records of vaccinations:** Any record regarding vaccination of an employee or applicant must be maintained as a **confidential medical record**. Additionally, the Americans with Disabilities Act (ADA) requires employers to keep confidential any employee medical information obtained in the course of a vaccination program, **including pre-screening questions**.

# REASONABLE ACCOMMODATION

- [Reasonable accommodation](#): California Fair Employment and Housing Act (FEHA) requires employers with five or more employees to reasonably accommodate persons who qualify as having a disability. (Cal. Gov't Code § 12940(m); 2 Cal. Code Regs. § 11068).
- [Disability](#) under FEHA means a physical or mental disability, medical condition, or perceived as having such disabilities, including a condition that affects the **immunological system and limits a major life activity** (i.e., interacting with others, working, and major functions of the immune system), or **association** with someone with these conditions. (Gov't Code § 12926 (d), (i)-(n); 2 Cal. Code Regs., § 11065(d)).
- **Employees with compromised immune systems or who are medically at risk** can request a working-from-home arrangement or a medical leave of absence even after Shelter-in-Place orders are lifted, if those accommodations would be effective in addressing the disability. (Cal. Gov't Code § 12940(m)).
- **Other reasonable accommodations** may include telework, reassignment, protective equipment, additional leave, or other modifications to working conditions to allow the employee to perform essential job functions. (Cal. Gov't Code § 12940(p))
- [Exception: Undue hardship](#) (i.e., significant financial impact in running enterprise; creating another position; removing essential functions from job; displacing fellow employee). (Cal. Gov't Code § 12926(u); 2 Cal. Code Regs. § 11068).

# INTERACTIVE PROCESS

- FEHA requires the **affirmative duty** of an employer to engage in a “**timely, good faith, interactive process**” to determine effective reasonable accommodations with an individual who has a **known disability** or **medical condition**, or **sincere religious belief**, and requests accommodation. (Cal. Gov’t Code § 12940(j), (n); 2 Cal. Code Regs., §§ 11065(j), 11069).
- During that process, the **employee must identify the specific accommodations** that would be effective. (2 Cal. Code Regs. § 11069(d)).

# LEAVES

- California Family Rights Act (CFRA)
- Federal Family Medical Leave Act (FMLA) leave
- Pregnancy Disability Leave (PDL)
- COVID-19 Supplemental Paid Sick Leave Law (SPSL)
- Other paid sick leave
- Accrued vacation time

# DISCRIMINATION, HARASSMENT & RETALIATION

- Civil rights laws remain in effect.
- FEHA prohibits **discrimination** and **harassment** on the bases of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status.
- FEHA prohibits **retaliation** for opposing any practices forbidden under the Act or because the person has filed a complaint, testified, or assisted in any proceeding under the Act, or for requesting an accommodation for religious practice or disability, regardless of whether the request was granted.

# HYPOTHESIS 1

ABC hotel recalls workers laid-off during the pandemic, and requires all returning employees to show proof of having been inoculated with a CDC-approved COVID-19 vaccine. Chef, a laid-off cook, refuses to be vaccinated on account of the employee's phobia about needles and religious belief against vaccines. Chef asks to telework or be placed on an extended leave. ABC immediately terminates Chef, and hires a brand new employee, who had not been laid off, to replace Chef. Chef files complaints with DFEH and DLSE. The case is mediated.

- Can ABC require returning employees to be inoculated for COVID-19?
- Can Chef refuse to be vaccinated because of Chef's phobia or religious belief?
- Does ABC have to engage in the interactive process and reasonably accommodate Chef?
- Did ABC discriminate, harass or retaliate against Chef?
- Can ABC terminate Chef and hire a brand new employee to replace Chef?
- What are the risks to ABC and Chef in this action?



# HYPOTHESIS 2

Driver drives a taxi exclusively for Green Cab Company from 9 to 5. Green Cab provides Driver with vehicle and assignments for picking up and dropping off passengers whenever a cab is ordered. Driver uses a personal cell phone for assignments. Driver may or may not take meal or rest breaks, and may at times work more than 8 hours per day or 40 hours per week. Green Cab pays Driver as an independent contractor at an hourly rate. Driver sues Green Cab for misclassification, meal/rest break and overtime violations, and PAGA. The case is mediated.

# MISCLASSIFICATION: THE *DYNAMEX* ABC TEST

- **ABC Test** (*Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903 (2018))

A worker is considered an employee and not an independent contractor, unless the hiring entity satisfies all three of the following conditions:

- A. The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- B. The worker performs work that is outside the usual course of the hiring entity's business; and
- C. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

- **ABC Test is retroactive** (*Vazquez v. Jan-Pro Franchising Int'l*, 10 Cal. 5th 944 (2021) and *Vazquez v. Jan-Pro Franchising Int'l*, 986 F.3d 1106 (9th Cir. 2021))

- ABC Test is retroactive to cases pending before *Dynamex*, and is used to interpret “suffer or permit to work” under the Wage Orders.

- **Implications for employers:** ABC Test replaced “common law tradition” previously applied in *S.G. Borello & Sons v. Dep't of Industrial Relations*, 48 Cal. 3d 341 (1989). Can apply to cases accruing in 2014 and seek damages going back further. Burden on alleged employer to meet all three prongs in order to justify classifying a worker as an independent contractor.

# MISCLASSIFICATION: AB 5 (CAL. LAB. CODE §§ 2750.3, 3351, et seq.)

- [AB 5](#) (Stat. 2019, Chap. 296, as amended) codified *Dynamex*, amended section 3351 of and added section 2750.3 to the Labor Code, and amended sections 606.5 and 621 of the Unemployment Insurance Code, relating to employment.
- **Exemptions:** AB 5 exempts from *Dynamex*, and instead applies the *Borello* test to various occupations (i.e., surgeon, dentist, podiatrist, psychologist, veterinarian, lawyer, architect, engineer, private investigator, accountant, securities broker-dealer or investment adviser or their agents and representatives, direct sales salesperson, commercial fisherman, contractor for professional services, graphic designer, writer, editor, cartoonist, fine artist, realtor, etc.). (Cal. Lab. Code § 2750.3(b).)

# MISCLASSIFICATION: PROP. 22 GIG ECONOMY CARVE-OUT

- [Proposition 22](#) (Cal. Lab. Code §§ 7448-7467): A number of “gig economy” companies, including Uber, Lyft, DoorDash, Postmates, and Instacart, who were unsuccessful at obtaining a legislature carve-out for their workers, bypassed the legislature and judiciary by taking the issue directly to California voters with Prop 22 in the November 2020 General Election.
- Prop 22 declares certain “app-based” drivers to be independent contractors, so long as certain specific wage and hour protections are provided for the drivers.

# TRACKING BREAK TIME, MEAL TIME, AND OVERTIME IN AND POST PANDEMIC



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- **Telework timekeeping:** Non-exempt employees must record all time worked and take all meal, rest breaks and overtime just as though they were at an office or other physical workspace.
- **Rounding:** Rounding clock in/out times, while potentially defensible, may invite class action or PAGA litigation. Rounding of meal periods is prohibited. (*Donohue v. AMN Services, LLC*, 11 Cal. 5th 58 (2021)).
- **Reimbursement for remote work:** Employers must provide employees or reimburse them reasonable expenses incurred for items needed to work from home. Reimbursement is required for an employee's personal cell phone, voice and data plan, Zoom, WebEx, Skype and other connections required for business purposes.
- **Travel Time** - Travel time during the workday that requires a non-exempt employee working from home to drive may be compensable.
- **Collective bargaining agreements (CBA) may not supplant minimum pay law for all time worked:** CBA confirming a bargained for practice whereby employer paid for post-shift mandatory travel time but not pre-shift travel time does not override Wage Order mandating employees be paid not less than minimum wage for all time worked. (*Gutierrez v. Brand Energy Services*, 50 Cal. App. 5th 786 (2020)).

# PAGA UPDATE

- **Venue in PAGA case is proper in county where employer allegedly committed Labor Code violations.** (*Crestwood Behavioral Health v. Superior Court*, 60 Cal. App. 5th 1069 (2021)).
- **PAGA notice is sufficient where PAGA claim contains multiple causes of action.** (*Rojas-Cifuentes v. Super. Ct.*, 58 Cal. App. 5th 1051 (2020)).
- **Employees can still pursue PAGA penalties even after settling their individual claims.** (*Kim v. Reins Int'l Cal., Inc.*, 9 Cal. 5th 73 (2020)).
- **PAGA waivers are unenforceable and the Federal Arbitration Act (FAA) does not preempt this prohibition.** (*Olson v. Lyft, Inc.*, 56 Cal. App. 5th 862 (2020)).
- **PAGA settlement rejected as based upon inadequate calculation of damages:** Judge Andrew Chang's recent rejection of a settlement involving Lime Scooter's ongoing PAGA litigation provides a useful roadmap of perceived shortfalls in negotiating and justifying such settlements. *Neutron Holdings Wage and Hour Cases*, San Francisco Superior Court (2/18/2021): <https://rbgg.com/wp-content/uploads/Lime-Juicers-Redacted-Order-Denying-Torres-PAGA-Settlement-1559-1.pdf>



# HYPOTHESIS 2

Driver drives a taxi exclusively for Green Cab Company from 9 to 5. Green Cab provides Driver with vehicle and assignments for picking up and dropping off passengers whenever a cab is ordered. Driver uses a personal cell phone for assignments. Driver may or may not take meal or rest breaks, and may at times work more than 8 hours per day or 40 hours per week. Green Cab pays Driver as an independent contractor at an hourly rate. Driver sues Green Cab for misclassification, meal/rest break and overtime violations, and PAGA. The case is mediated.

- Is Driver properly classified as an independent contractor?
- Should Green Cab reimburse Driver for using a personal cell phone?
- What are the risks for Green Cab and Driver in this action?

Driver filed wage-and-hour claims that included a PAGA claim. Driver settled Driver's individual wage claim in mediation.

- Can Driver still pursue PAGA penalties when the action is litigated or settled?
- What if Driver worked for Uber or Lyft instead of Green Cab?

# MEDIATION BEST PRACTICES

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- Preparation
- Individual cases
- Class Action/PAGA claims

# HYPOTHESIS 3

Programmer signed an arbitration agreement with Tech Company as an independent contractor to develop software. The arbitration agreement included a class action waiver. Programmer could telework, used his own computer and cell phone and worked whenever he wanted to put in the time, often late at night or over the weekend. Programmer could also take on other clients in addition to Tech. Tech paid programmer straight time for the hours he worked. Programmer has sued Tech alleging class claims and a PAGA claim for wage-and-hour violations, and for individual claims under the FEHA.

# EMPLOYMENT ARBITRATION CASE LAW UPDATE



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- **Gateway issue of whether an aggrieved employee is entitled to raise claims under PAGA is not arbitrable.** (*Contreras v. Superior Court*, 61 Cal.App.5th 461 (2021)).
- **Threshold question of whether plaintiff is employee or independent contractor in PAGA cases not arbitrable.** (*Rosales v. Uber Technologies, Inc.*, 63 Cal. App. 5th 937 (2021)).
- **Where plaintiff transportation worker in interstate commerce was exempt from FAA coverage, and the class action waiver was unenforceable under California law under the Gentry analysis, the unenforceable class action waiver did not render the arbitration provision unenforceable as to plaintiff's individual claims.** (*Betancourt v. Transportation Brokerage Specialists, Inc.*, 62 Cal. App. 5th 552 (2021)).
- **Statutory claims not arbitrable under collective bargaining agreement in absence of clear and unmistakable waiver of right to judicial forum.** (*Wilson-Davis v SSP America, Inc.*, 62 Cal. App. 5th 1080 (Mar. 11, 2021)).
- **Title VII related statutory claims were arbitrable where there was a knowing waiver of judicial remedies.** (*Zoller v. GCA Advisors LLC*, 993 F.3d 1198 (9th Cir. 2021)).

# EMPLOYMENT ARBITRATION CASE LAW UPDATE

- **Appellate review provision stricken from employment arbitration agreement:** Ambiguities as to procedure for review in arbitration appellate review provision deemed substantively unconscionable. (*Alvarez v. Altamed Health Services Corp.*, 60 Cal. App. 5th 572 (2021)).
- **Judicial merits review applied to invalidate arbitrator's decision impacting statutory rights:** Despite broad immunity from judicial merits review, arbitrator found to have exceeded his powers by failing to reach the merits of a statutory claim that employment agreement's confidentiality provisions contravened Business & Professions Code section 16600. (*Brown v. TGS Management Co., LLC*, 57 Cal. App. 5th 303 (2020)).

# HYPOTHESIS 3

Programmer signed an arbitration agreement with Tech Company as an independent contractor to develop software. The arbitration agreement included a class action waiver. Programmer could telework, used his own computer and cell phone and worked whenever he wanted to put in the time, often late at night or over the weekend. Programmer could also take on other clients in addition to Tech. Tech paid programmer straight time for the hours he worked. Programmer has sued Tech alleging class claims and a PAGA claim for wage-and-hour violations, and for individual claims under the FEHA.

- The Court tentatively rules that the class action waiver is void and that the entire arbitration agreement is therefore unenforceable. Tech Company argues that the Court should compel arbitration of Programmer's individual claims. If the Court finds that the only unenforceable provision is the class action waiver, can Programmer's individual claims be compelled to arbitration?
- Tech Company requests that the arbitrator decide the gateway issue of whether Programmer is an "aggrieved employee" under PAGA. Programmer argues that is a matter for the Court and that all aspects of the PAGA claim should be stayed during the arbitration. Can the Court delegate the gateway issue to the arbitrator?
- Tech Company requests that the arbitrator also decide the threshold question of whether Programmer is an employee or independent contractor under the PAGA claim. Can the arbitrator decide the threshold question?

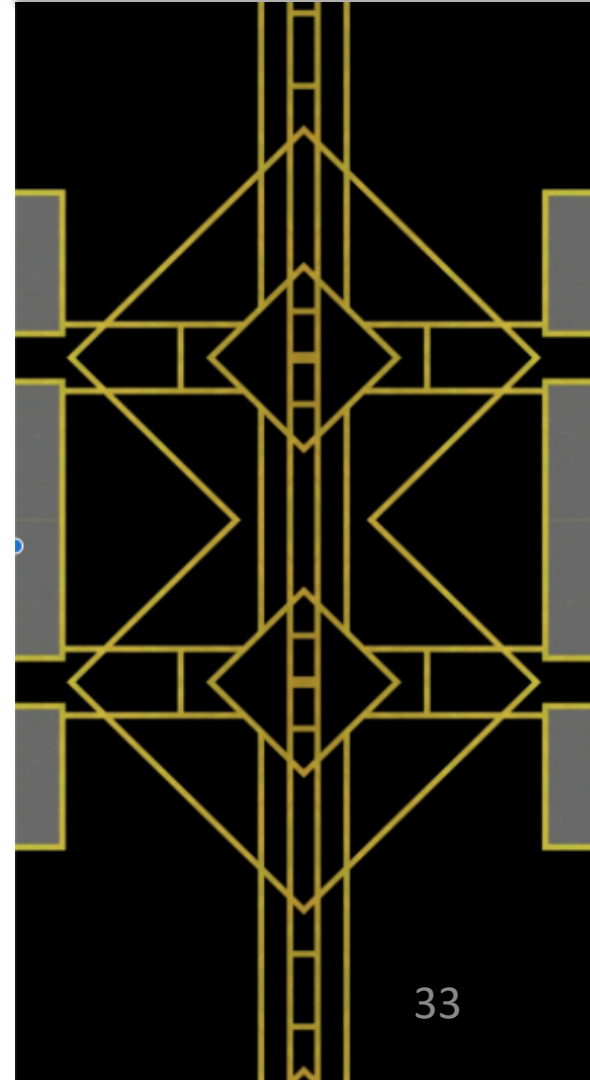


# BEST PRACTICES IN ARBITRATION



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- Don't like the Arbitration Agreement? Seek a stipulation to use other rules.
- Find out if the arbitrator will be issuing an Interim Award so that you can determine when to bring motions for attorney's fees and costs or when to notify the arbitrator of a rejected 998 (e.g., *Heimlich v. Shivji*, 7 Cal. 5th 350 (2019)).
- Prepare as you would for court, treat your arbitration hearing like a trial, and your arbitrator as you would a judge, even if the setting and the rules seem more relaxed (e.g., *Grabowski v. Kaiser Foundation Health Plan, Inc.* 64 Cal. App. 5th 67 (2021)).
- Your arbitration brief is key: be sure to set forth the applicable law.
- Meet and confer before the arbitration hearing: witness lists, exhibits, seek stipulations to foundation, authentication, admission of evidence, and to undisputed facts.
- Know your arbitrator's expectations: service of briefs, MILs, process.



# BEST PRACTICES IN REMOTE AND HYBRID ARBITRATION HEARINGS

- Look into the camera
- Lean in for a close-up
- Get a tutorial specific to the video conference platform
- Practice screen-sharing
- Prepare your client and witnesses on the platform
- Take breaks and use them wisely
- Maintain the same decorum as in a courtroom (dress, drinks, background, etc.)

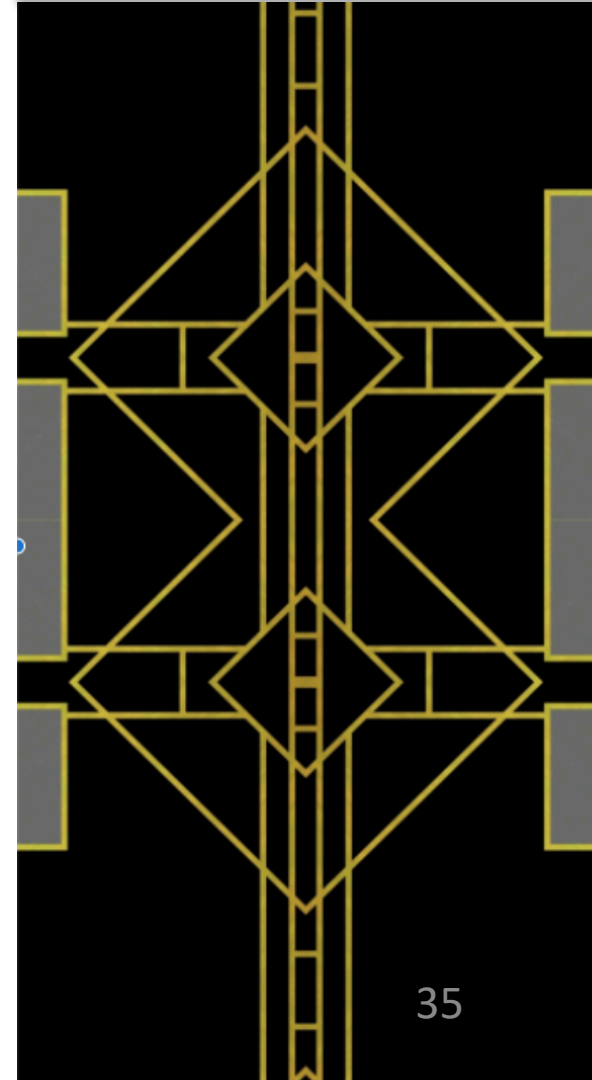
# THANK YOU

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