

# Cases Pending Before the California Supreme Court

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## Arbitration

*OTO, L.L.C. v. Kho*, 14 Cal. App. 5th 691 (2017), *review granted*, 225 Cal. Rptr. 3d 796 (2017); S244630/A147564

Petition for review after reversal of order denying petition to compel arbitration. (1) Was the arbitration remedy at issue in this case sufficiently “affordable and accessible” within the meaning of *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109 (2013) to require the company’s employees to forego the right to an administrative Berman hearing on wage claims? (2) Did the employer waive its right to bypass the Berman hearing by waiting until the morning of that hearing, serving a demand for arbitration, and refusing to participate in the hearing? Submitted/opinion due.

## Discrimination / Harassment / Retaliation

*Wilson v. Cable News Network, Inc.*, 6 Cal. App. 5th 822 (2016), *review granted*, 214 Cal. Rptr. 3d 290 (2017); S239686/B264944

Petition for review after reversal of order granting special motion to strike. In deciding whether an employee’s claims for discrimination, retaliation, wrongful termination, and defamation arise from protected activity for purposes of a special motion to strike (Civil Procedure Code § 425.16), what is the relevance of an allegation that the employer acted with a discriminatory or retaliatory motive? Submitted/opinion due.

*Bonni v. St. Joseph Health Sys.*, 13 Cal. App. 5th 851 (2017), *review granted*, 224 Cal. Rptr. 3d 684 (2017); S244148/G052367

Petition for review after reversal granting anti-SLAPP motion. Further action in this matter deferred pending consideration and disposition of a related issue in *Wilson v. Cable News Network, Inc.* S239686 (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court. Submission of additional briefing, pursuant to Cal. Rules of Court, rule 8.520, is deferred pending further order of the court. Holding for lead case.

## Public Works

*Busker v. Wabtec Corp.*, 903 F.3d 881 (9th Cir. 2018); S251135/9th Cir. No. 17-55165

Request under Cal. Rules of Court, rule 8.548, that the Supreme Court decide a question of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. Does work installing electrical equipment on locomotives and rail cars (i.e., the “on-board work” for Metrolink’s [Positive Train Control (PTC)] project) fall within the definition of “public works” under Labor Code § 1720(a)(1), either (1) as constituting “construction” or “installation” under the statute, or (2) as being integral to other work performed for the PTC project on the wayside (i.e., the “field installation work”)? Fully briefed.

*Mendoza v. Fonseca McElroy Grinding Co.*, 913 F.3d 911 (9th Cir. 2019); S253574/9th Cir. No. 17-15221

Request under Cal. Rules of Court, rule 8.548, that the supreme court decide a question of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. Is operating engineers’ offsite “mobilization work”—including the transportation to and from a public works site of roadwork grinding equipment—performed “in the execution of [a] contract for public work,” (Labor Code § 1772) such that it entitles workers to “not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed” pursuant to Labor Code § 1771? Answer brief due.

## Retirement / Pensions

*Alameda Cnty. Deputy Sheriff’s Ass’n v. Alameda Cnty. Employees’ Retirement Ass’n*, 227 Cal. Rptr. 3d 787 (2018), *review granted*, 230 Cal. Rptr. 3d 681 (2018); S247095/A141913

Petition for review after affirmance in part and reversal in part of judgment. Did statutory amendments to the County Employees’ Retirement Law (Government Code §§ 31450 et seq.) made by the Public Employees’ Pension Reform Act of 2013 (Government Code §§ 7522 et seq.) reduce the scope of the pre-existing definition of pensionable compensation and thereby impair

employees' vested rights protected by the contracts clauses of the state and federal Constitutions? Fully briefed.

*Hipsher v. Los Angeles Cnty. Employees*, 24 Cal. App. 5th 740 (2018), *review granted*, 237 Cal. Rptr. 3d 791 (2018 ); S250244/B276486 & B276486M

Petition for review after affirmance and modification of grant of peremptory writ of mandate. Further action deferred pending consideration and disposition of a related issue in *Alameda Cnty. Deputy Sheriffs' Ass'n v. Alameda Cnty. Employees' Retirement Ass'n*, S247095 (see Cal. Rules of Court, rule 8.512(d) (2)), or pending further order of the court. Holding for lead case.

*Marin Ass'n of Public Employees v. Marin Cnty. Employees' Retirement Ass'n*, 2 Cal. App. 5th 674 (2016), *review granted*, 210 Cal. Rptr. 3d 15 (2016); S237460/A139610

Petition for review after affirmance sustaining demurrer without leave to amend. Further action deferred pending the decision of the Court of Appeal, First Appellate District, Division Four, in *Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Employees' Retirement Ass'n*, A141913 (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court. Submission of additional briefing, pursuant to Cal. Rules of Court, rule 8.520, is deferred pending further order of the court. Holding for lead case.

*McGlynn v. State of Calif.*, 21 Cal. App. 5th 548 (2018), *review granted*, 234 Cal. Rptr. 3d 710 (2018); S248513/A146855

Petition for review after affirmance sustaining demurrer. Further action deferred pending consideration and disposition of a related issue in *Alameda Cnty. Deputy Sheriffs' Ass'n v. Alameda Cnty. Employees' Retirement Ass'n*, S247095. Holding for lead case.

## Tort Liability

*Gonzalez v. Mathis*, 20 Cal. App. 5th 257 (2018); *review granted*, 232 Cal. Rptr. 3d 731 (2018), S247677/B27 2344

Petition for review after reversal of judgment. Can a homeowner who hires an independent contractor be held liable in tort for injury sustained by the contractor's employee when the homeowner does not retain control over the worksite and the hazard causing the injury was known to the contractor? Fully briefed.

## Unemployment Insurance

*Skidgel v. CUIAB*, 24 Cal. App. 5th 574 (2018), *review granted*, 238 Cal. Rptr. 3d 118 (2018); S250149/A151224.

Petition for review after affirmance of judgment. Are In Home Supportive Services workers (Welfare & Institutions Code §§ 12300 *et seq.*) who are providers for a spouse or a child eligible for unemployment insurance benefits? Fully briefed.

*United Educators of San Francisco v. CUIAB*, 247 Cal. App. 4th 1235 (2016), *review granted*, 211 Cal. Rptr. 3d 97 (2016); S235903/A142858 & A143428

Petition for review after affirmance of judgment for writ of administrative mandate. This case presents issues concerning the entitlement of substitute teachers and other on-call paraprofessional employees to unemployment insurance benefits when they are not called to work during a summer school term or session. Fully briefed.

## Wage and Hour

*Donohue v. AMN Services, LLC*, 29 Cal. App. 5th 1068 (2018), *review granted*, 245 Cal. Rptr. 3d 1 (2019), S253677/D071865

Petition for review after affirmance of judgment. Can employers utilize practices upheld in the overtime pay

context to round employees' time to shorten or delay meal periods? Answer brief due.

*Frlekin v. Apple, Inc.*, 870 F.3d 867 (9th Cir. 2017); S243805/9th Cir. No. 15-17382

Request under Cal. Rules of Court, rule 8.548, that the California Supreme Court decide a question of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages or bags voluntarily brought to work purely for personal convenience by employees compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 7? Fully briefed.

*In re Certified Tire and Service Centers Wage and Hour Cases*, 28 Cal. App. 5th 1 (2018), *review granted*, 242 Cal. Rptr. 3d 417 (2019); S252517/D072265

Petition for review granted after affirmance of judgment. Further action deferred pending consideration and disposition of a related issue in *Oman v. Delta Air Lines, Inc.*, S248726 (see Cal. Rules of Court, rule 8.524 (c)), or pending further order of the court. Submission of additional briefing deferred pending further order of the court. Holding for lead case.

*Kaanaana v. Barrett Business Services, Inc.*, 29 Cal. App. 5th 778 (2018), *review granted*, 243 Cal. Rptr. 3d 827 (2019); S253458/B276420, B279838

Petition for review after reversal of judgment. Should the phrase "work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type" in Labor Code § 1720(a) (2) of California's Prevailing Wage Law (Labor Code §§ 1720–1861) be interpreted to cover any type of work

regardless of its nature, funding, purpose, or function, including belt sorting at recycling facilities? Answer brief due.

*Kim v. Reins Int'l. California, Inc.*, 18 Cal. App. 5th 1052 (2017), *review granted*, 230 Cal. Rptr. 3d 681 (2018); S246911/B278642

Petition for review after affirmance of judgment. Does an employee bringing an action under the Private Attorneys General Act of 2004 (PAGA) (Labor Code §§ 2698–2699.6) lose standing to pursue representative claims as an “aggrieved employee” by dismissing his or her individual claims against the employer? Fully briefed.

*Lawson v. Z.B., N.A.*, 18 Cal. App. 5th 705 (2017), *review granted*, 230 Cal. Rptr. 3d 440 (2018); S246711/D071279

Petition for review after grant of petition for peremptory writ of mandate. Does a representative action under PAGA seeking recovery of individualized lost wages as civil penalties under Labor Code § 558 fall within the preemptive scope of the Federal Arbitration Act (9 U.S.C. §§ 1–16)? Submitted/opinion due.

*Oman v. Delta Air Lines, Inc.*, 889 F.3d 1075 (9th Cir. 2018), S248726/9th Cir. No. 17-15124

Request under Cal. Rules of Court, rule 8.548, that the supreme court decide questions of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. (1) Do Labor Code §§ 204 and 226 apply to wage payments and wage statements provided by an out-of-state employer to an employee who, in the relevant pay period, works in California only episodically and for less than a day at a time? (2) Does California minimum wage law apply to all work performed in California for an out-of-state employer by an employee who works

in California only episodically and for less than a day at a time? See Labor Code §§ 1182.12, 1194; Cal. Code Regs. tit. 8, § 11090(4). (3) Does the *Armenta/Gonzalez* bar on averaging wages apply to a pay formula that generally awards credit for all hours on duty, but which, in certain situations resulting in higher pay, does not award credit for all hours on duty? See *Gonzales v. Downtown LA Motors, LP*, 215 Cal. App. 4th 36 (2013); *Armenta v. Osmose, Inc.* 135 Cal. App. 4th 314 (2005). Fully briefed.

*Stewart v. San Luis Ambulance, Inc.*, 878 F.3d 883 (9th Cir. 2018), S246255/9th Cir. No. 15-56943

Request under Cal. Rules of Court, rule 8.548, that the supreme court decide questions of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. (1) Under the Labor Code and applicable regulations, is an employer of ambulance attendants working twenty-four hour shifts required to relieve attendants of all duties during rest breaks, including the duty to be available to respond to an emergency call if one arises during a rest period? (2) Under the Labor Code and applicable regulations, may an employer of ambulance attendants working twenty-four hour shifts require attendants to be available to respond to emergency calls during their meal periods without a written agreement that contains an on-duty meal period revocation clause? If such a clause is required, will a general at-will employment clause satisfy this requirement? (3) Do violations of meal period regulations, which require payment of a “premium wage” for each improper meal period, give rise to claims under Labor Code §§ 203 and 226 when the employer does not include the premium wage in the employee’s pay or pay statements during the course of the violations? The case also includes the

following issue: What effect, if any, does Proposition 11, the Emergency Ambulance Employee Safety and Preparedness Act (Lab. Code, §§ 880 et seq.) have on the resolution of the questions presented and on whether this court should decide the questions of California law presented in a matter pending in the Ninth Circuit Court of Appeals? Supplemental briefs due.

*Voris v. Lampert*, nonpublished opinion, 2017 Cal. App. Unpub. LEXIS 2163, 2017 WL 1153334 (2017), *review granted*, 2017 Cal. LEXIS 5196; S241812/B265747

Petition for review after affirmance in part and reversal in part of judgment. Is conversion of earned but unpaid wages a valid cause of action? Submitted/opinion due.

*Ward v. United Airlines, Inc.*, 889 F.3d 1068 (9th Cir. 2018), S248702/9th Cir. No. 16-16415; *Vidrio v. United Airlines, Inc.*, 889 F.3d 1068 (9th Cir. 2018) S248702/9th Cir. No. 17-55471

Request under Cal. Rules of Court, rule 8.548, that the supreme court decide questions of California law presented in consolidated matters pending in the United States Court of Appeals for the Ninth Circuit. (1) Does Labor Code § 226 apply to wage statements provided by an out-of-state employer to an employee who resides in California, receives pay in California, and pays California income tax on her wages, but who does not work principally in California or any other state? (2) The Industrial Wage Commission Wage Order No. 9 exempts from its wage statement requirements an employee who has entered into a collective bargaining agreement (CBA) in accordance with the Railway Labor Act (RLA). (See Cal. Code Regs., tit. 8, § 11090(1)(E).) Does the RLA exemption in Wage Order No. 9 bar a wage statement claim brought under Labor Code § 226 by an employee who is covered by a CBA? Fully briefed. <sup>42</sup>