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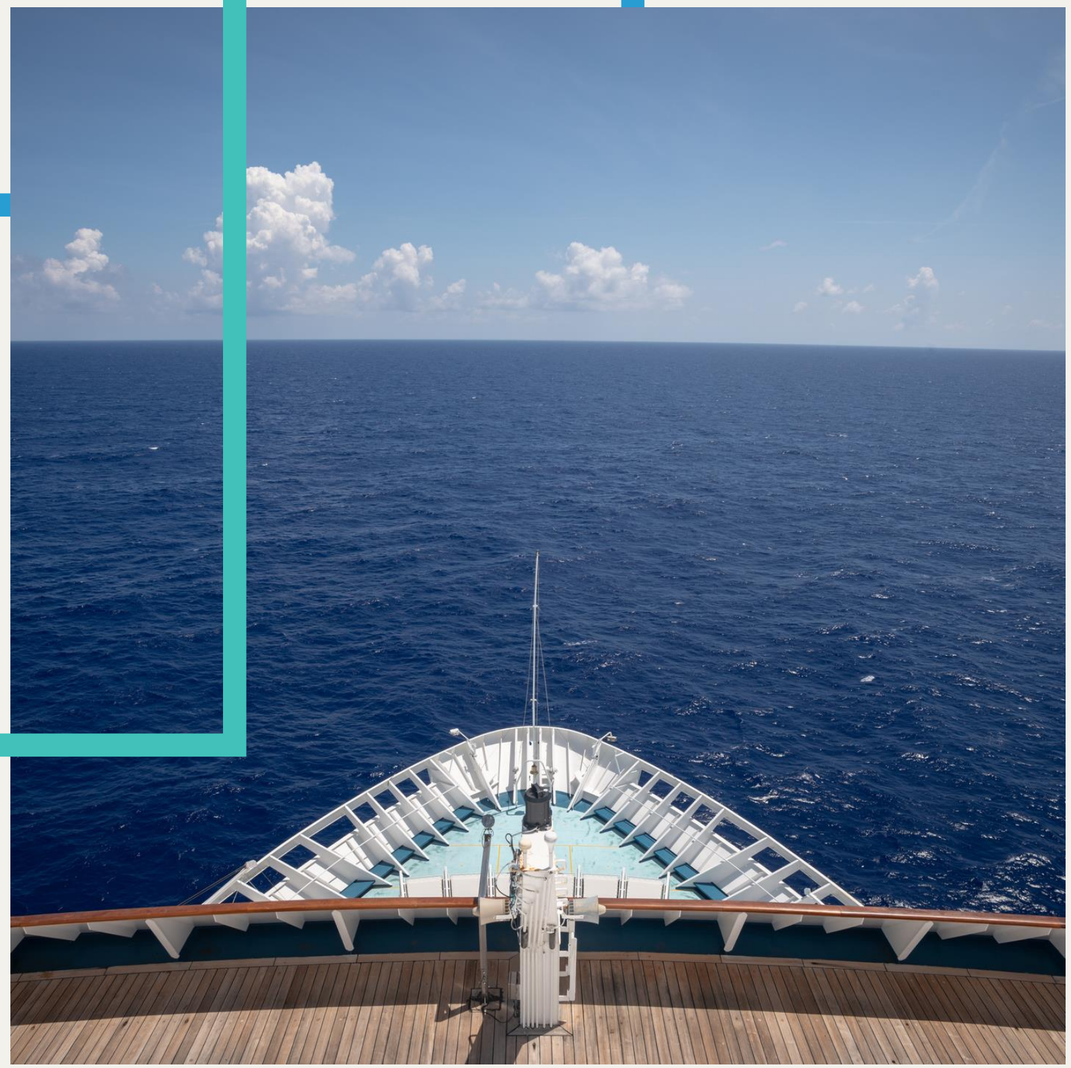

Reframing Representative Actions

Mediating PAGA and Class Claims After Viking River Cruises: Strategies for Settling in the Face of Uncertainty

ADR Services, Inc. In-House MCLE Presentation
October 12, 2022

Present By.
Hon. Ming Chin (Ret.)
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Agenda

1. Recap on PAGA: Basic elements and comparing class action
2. Viking River Cruises: The holding and what it portends
3. Possible Responses: Pending and future cases and potential legislation
4. Considerations for drafting / revising arbitration agreements
5. Practical considerations for mediating PAGA claims

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PAGA: Basics and Comparing Class Actions

PAGA: Any "aggrieved employee" may sue on behalf of the State for civil penalties, including penalties for violations involving employees other than PAGA litigant herself.

PAGA	Class Action
Focus on Penalties	Focus on Damages
Recovery Goes to State	Recovery Goes to Class
One-Step Approval Process	Preliminary & Final Approvals
No Opt-Out Opportunity	Opt-Out Opportunity

Court determines fairness as to both PAGA and class settlements and fees

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Viking River Cruises

The holding and what it portends

- Employers may compel arbitration of a plaintiff's individual PAGA claim
- With the individual PAGA claim compelled to arbitration, the plaintiff's remaining non-individual PAGA representative claims must be dismissed for lack of standing
- Decision relies upon interpretation of California statutory standing law, which had not been briefed to the U.S. Supreme Court
- Petition for rehearing denied
- **Will later CA courts disagree as to interpretation of CA standing law?**

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Possible Responses to Viking River Cruises

Cases Under Review Now or Later; Some Legislative Proposals

Chamber of Commerce v. Bonta , 13 F. 4th 766 (9th Cir. 2021):
Decision holding that FAA does not preempt CA's AB 51; withdrawn for reconsideration

Adolph v. Uber Technologies (Case No. S27467):
CA Supreme Court is reviewing

Kim v. Reins, 9 Cal. 5th 73, 85 (2020):
CA Supreme Court holds that dismissal of individual claims does not prevent bringing representative PAGA action. Is Kim v. Reins implicitly, if not explicitly, overruled?

2024 Ballot Measure:
CA Fair Pay and Employer Accountability Act, qualified for November 2024 General Election, is a statewide ballot measure that would supplant private attorney enforcement with Labor Commissioner enforcement

Other potential legislation:
David Cortese - State Senator, San Jose

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Revisiting Arbitration Agreements post-Viking River Cruises

Impact of Chamber of Commerce v. Bonta, if any? Is CA Labor Code Section 432.6 (prohibiting CA employers from requiring CA employees to agree to arbitrate employment-related disputes) still good law?

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Settlement Strategies post-Viking River Cruises

Remaining Wildcards and Strategic Considerations

- Arbitration agreement and PAGA waiver enforceability remains front and center
- Delayed motion to compel: Morgan v. Sundance, __ S. Ct. __ (21-328, 5/23/22)
- PAGA actions without a representative action waiver
- Manageability: Wesson v. Staples, LLC, 68 Cal. App. 5th 746, 765 (2021) (review denied); Estrada v. Royalty Carpet Mills, Inc., 76 Cal. App. 5th, 685, 710 (2022)(CA Supreme Court review granted)
- Penalty calculation and reduction
- Playing for time versus leveraging the uncertainty

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Practical considerations for mediating PAGA claims?

Let's Discuss.

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EXHIBIT: "REFRAMING REPRESENTATIVE ACTIONS"

Mediating PAGA and Class Claims After *Viking River Cruises*: Strategies for Settling in the Face of Uncertainty

with Justice Chin, Hon. Winifred Smith, Mark LeHocky

Impact of the SCOTUS Ruling in *Viking River Cruises, Inc. v. Moriana*

In a decision issued by the SCOTUS on June 15, 2022, in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, the Court ruled in favor of Viking River Cruises Inc. over whether it could use an arbitration agreement to force a lawsuit brought under California's Private Attorneys General Act (PAGA) on behalf of aggrieved employees into arbitration.

The Court held that employers can enforce arbitration agreements in California to the extent they require an employee to arbitrate **individual** claims under PAGA in an 8 to 1 ruling. (The sole dissent by Justice Clarence Thomas was based on the position that federal law does not apply to proceedings in state courts.)

The Court also held that, once the employee's individual claims under PAGA are compelled to arbitration, the employee would not have standing to bring a representative claim under PAGA on behalf of other aggrieved employees.

The SCOTUS *Viking River Cruises* ruling has four main holdings:

- *Iskanian*'s rule that PAGA actions cannot be divided into individual and non-individual claims is preempted, so Viking was entitled to compel arbitration of Moriana's individual PAGA claim.
- PAGA provides no mechanism for a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding.
- Under PAGA's standing requirement, a plaintiff has standing to maintain non-individual PAGA claims only if her individual claim in that action is maintained. As a result, Moriana would lack statutory standing to maintain

her non-individual claims in court and the lower court should have dismissed those claims.

- *Iskanian*'s prohibition on wholesale waivers of PAGA claims is not preempted by the FAA.

Facts of *Viking River Cruises, Inc. v. Moriana*

Before commencing her employment as a sales representative for Viking River Cruises, Inc., Angie Moriana signed an agreement with the company agreeing to resolve all future employment-related disputes in bilateral arbitration and waiving the right to bring any such dispute as a class, representative or private attorney general action. The agreement expressly allowed Moriana to opt-out of the waivers, but she chose not to. After her employment ended, Moriana filed a representative action against Viking asserting single cause of action under PAGA.

Based on Moriana's arbitration agreement, Viking moved to compel individualized arbitration. The trial court denied the motion, holding that Moriana's representative PAGA claim could not be compelled to arbitration under California law. The Court of Appeal affirmed, determining that *Iskanian* "remains good law" notwithstanding *Epic* because the collective action in *Epic* fundamentally differs from a PAGA claim in which the real party in interest is the state. Further, the Court of Appeal explained that because all PAGA claims are "representative" in that they are brought on behalf the state, Moriana alleged no personal claim for compensation that could be individually arbitrated. The California Supreme Court denied Viking's petition for review, and Viking requested review by the Supreme Court.

Main Takeaways

In two prior cases, the SCOTUS held that the Federal Arbitration Act (FAA) preempted a state law deeming class action waivers unenforceable and reaffirmed that the FAA requires courts to enforce collective action waivers in arbitration agreements. (*AT&T Mobility, LLC v. Concepcion* (2011) and *Epic Systems Corp. v. Lewis* (2018).)

The California Supreme Court held in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) that arbitration agreements containing PAGA representative action waivers were against public policy and unenforceable and that the FAA did not preempt this rule.

Under PAGA, employees who allege that they were subjected to at least one violation of the California Labor Code can sue employers on behalf of other allegedly "aggrieved employees" to recover civil penalties (and attorneys' fees and costs) for any number of violations. PAGA civil penalties are generally awarded per pay period per aggrieved employee, and thus quickly multiply when a plaintiff seeks to represent a large number of aggrieved employees regarding a multitude of alleged violations. While employers can face millions of dollars in penalties for technical violations of the Labor Code, the aggrieved employees receive little of the recovery — 75% goes to the California Labor and Workforce Development Agency (LWDA) and the remaining 25% goes to the aggrieved employees. Cal. Lab. Code § 2699(i). PAGA actions also typically generate large prevailing party attorneys' fees for the plaintiff's counsel.

Supreme Court: FAA Preempts Conflicting State Rules

The Supreme Court held that the FAA preempts the *Iskanian* Rule insofar as that rule precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate.

First, the Court rejected Viking's argument "that Iskanian's prohibition on [wholesale] PAGA waivers is inconsistent with the FAA." The Court reiterated that "the FAA 'preempts any state rule discriminating on its face against arbitration—for example, a law prohibit[ing] outright the arbitration of a particular type of claim.'" It also noted that, "under [its] decisions, even rules that are generally applicable as a formal matter are not immune from preemption by the FAA." But the Court noted that it has "never held that the FAA imposes a duty on States to render all forms of representative standing waivable by contract." In other words, FAA precedent "does not mandate the enforcement of waivers of representative capacity as a categorical rule"; it requires that the parties decide how they will arbitrate or litigate claims that arise between them. Thus, the *Iskanian*

Rule is not preempted insofar as it precludes the wholesale waiver of PAGA claims in an agreement to arbitrate.

Second, the Court addressed *Iskanian*'s "prohibition on contractual division of PAGA actions into constituent claims" and held that such a prohibition "unduly circumscribes the freedom of parties to determine 'the issues subject to arbitration' and 'the rules by which they will arbitrate,' … and does so in a way that violates the fundamental principle that 'arbitration is a matter of consent' … ." The Court reasoned that "state law cannot condition the enforceability of an arbitration agreement on the availability of a procedural mechanism that would permit a party to expand the scope of the arbitration by introducing claims that the parties did not jointly agree to arbitrate." Such a law "could defeat the ability of parties to control which claims are subject to arbitration."

The Court noted that "[i]f the parties agree to arbitrate 'individual' PAGA claims based on personally sustained violations, *Iskanian* allows the aggrieved employee to abrogate that agreement after the fact and demand either judicial proceedings or an arbitral proceeding that exceeds the scope jointly intended by the parties." It then recognized something that defense counsel have been arguing for years: "The effect of *Iskanian*'s rule mandating this mechanism is to coerce parties into withholding PAGA claims from arbitration." Because "*Iskanian*'s indivisibility rule effectively coerces parties to opt for a judicial forum rather than forgo[ing] the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution," it "is incompatible with the FAA." Accordingly, the Court held that "the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate."

Finally, the Court reversed the California Court of Appeal's decision and remanded the case for further proceedings consistent with its opinion. It noted that "[t]he agreement between Viking and Moriana purported to waive 'representative' PAGA claims. Under *Iskanian*, th[at] provision was invalid if construed as a wholesale waiver of PAGA claims. And under [the Court's] holding, that aspect of *Iskanian* is not preempted by the FAA, so the agreement remains invalid insofar as it is interpreted in that manner." However, "Viking was entitled to enforce the agreement insofar as it mandated arbitration of Moriana's individual PAGA claim." Moreover, if Moriana's individual PAGA claim was compelled to

arbitration, the Court dictated that the "correct course was to dismiss" her remaining non-individual claims because "PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding."

[**NOTE: Potential Impact on Assembly Bill 51**:

The Ninth Circuit Court of Appeals panel that originally decided *Chamber of Commerce v. Bonta*[1] issued an order 8/22/22 withdrawing its prior opinion and granting a panel rehearing. The divided panel's original decision upheld portions of AB 51), a California law that prohibits employers from requiring that employees sign an arbitration agreement as a condition of employment. In February 2022, the panel issued an order deferring consideration of the rehearing petition until after the Supreme Court's decision in *Viking River Cruises*. The panel may now rule that the FAA preempts AB 51 in its entirety following the *Viking River Cruises* decision.]

Remaining Uncertainties

While this ruling provides an answer about the validity of PAGA waivers in arbitration agreements, it creates several uncertainties:

- The Court provided an entirely new mechanism to split PAGA claims into individual and non-individual claims. It remains to be seen how an "individual" PAGA claim will be litigated for California Labor Code violations that the plaintiff personally suffered.

- Justice Sotomayor's concurring opinion seemingly encourages the California Legislature to modify the scope of statutory standing under PAGA. Under the current statutory scheme, Moriana's non-individual claims require dismissal because PAGA provides no mechanism for a court to adjudicate such claims once the individual PAGA claim or claims are separated. The California Legislature may quickly propose an amendment to PAGA to

[1] Originally cited as 13 F.4th 766 (2022) – not citable/opinion withdrawn/rehearing granted.

fashion a mechanism for representative claims to survive in a judicial forum even when the individual claim is relegated to a separate proceeding.

Prediction: Some commentators believe it is certain that Courts will soon be inundated with defendants in active representative lawsuits filing motions to compel arbitration based on plaintiffs' agreement to individually arbitrate their PAGA claims. Even if the applicable arbitration agreements contain representative action waivers – provided there is a severability clause similar to the one in Moriana's agreement – employers may have success in compelling employees' PAGA claims for labor code violations they personally suffered and dismissing non-individual PAGA claims for violations suffered by others.

However, the SCOTUS left open the possibility that California could adjust PAGA to permit representative claims to survive and be brought in court. In short, this decision may not be the final word on the interplay between PAGA and the FAA.

Case list of decided and pending California cases with PAGA issues (includes *Viking River*)

Viking River Cruises v. Moriana (2022 ___ U.S. ___ 142 S. Ct. 1906. *Viking River* held that a former employer was entitled to enforce an arbitration agreement insofar as it mandated arbitration of former employee's individual PAGA claim, abrogating, in part, *Iskanian v. CLS Transp. Los Angeles LLC* (2014) 59 Cal 4th 348.

Iskanian v. CLS Transp. Los Angeles, LLC (2014) 59 Cal.4th 348. California Supreme Court held that an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy.

Armendariz v. Foundation Health Psychcare Services (2000) 24 Cal.4th 83. California Supreme Court found arbitration clause in an employment contract was unconscionable because it was too one-sided in the employer's favor. Justice Mosk opined that arbitration contracts are contracts of adhesion, and a court may refuse to enforce them under the doctrine of unconscionability where both procedural and substantive unconscionability are present.

Sonic Calabasas A, Inc. v. Moreno (*Sonic I*) (2011) 51 Cal.4th 659, *Sonic I.* Court held that an employer could not require employees to arbitrate wage claims if they elected to file an administrative claim with the state Labor Commissioner (known as a *Berman* hearing). *Sonic I* concluded that any arbitration agreement that waived a Berman hearing was unconscionable.

AT&T Mobility v. Concepcion (2011) 563 US. 333, 339-340. U.S. Supreme Court criticized California's "judicial hostility" to arbitration as it overruled *Discover Bank. Concepcion* also vacated and remanded the earlier decision in *Sonic I,* after concluding the FAA preempted *Sonic I*'s categorical rule of unconscionability.

Sonic Calabasas A, Inc. v. Moreno 2013 57 Cal.4th 1109 (*Sonic II*). Recognized that an arbitration clause in an employment contract is not always unconscionable simply because it includes a Berman waiver.

Discover Bank v. Superior Court (2005) 36 Cal.4th 148, 162-163. Court refused to enforce class action waivers in consumer contracts involving small sums of money. Overruled in *Concepcion.*

Gentry v. Superior Court (2007) 42 Cal.4th 443. *Iskanian* abrogated *Gentry*'s rule against class action waivers.

Epic Systems v Lewis (2018) 138 S.Ct. 1612. The opinion, authored by Justice Gorsuch, upheld the validity of employment contracts in which employees gave up their right to collective litigation against their employer.

https://ogletree.com/insights/supreme-court-sides-with-viking-river-over-arbitration-of-California-paga-claims/ Article appears on page 14 of the OCBA remarks to discuss the

possibility that under *Viking River* California could modify PAGA to "permit representative claims to survive and be brought in court."

Chamber of Commerce v. Bonta (9th Cir. 2021) 13 F.4th 766. The Ninth Circuit initially had enjoined imposition of California's Labor Code section 432.6 (preventing employers from requiring employees to sign arbitration agreements as a condition of employment) but withdrew the opinion for reconsideration in light of *Viking River*.

Adolph v. Uber Technologies (S274671). Pending after grant of review in the California Supreme Court. The case presents issues regarding the maintenance of representative claims for statutory civil penalties under PAGA. (Lab. Code, § 2698 et seq.).

Kim v. Reins (2020) 9 Cal.5th 73, 85. Court held that dismissal of individual claims does not prevent the availability of filing a representative PAGA action. There is a possibility that *Viking River* overruled the case.

California Practice Guide

EMPLOYMENT LITIGATION

CHAPTERS 1-7

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Hon. Ming W. Chin (Ret.) was an Associate Justice of the California Supreme Court from 1996 to 2020 and is currently a mediator, arbitrator, referee, and appellate consultant at ADR Services, Inc. He previously served as the Presiding Judge of the Court of Appeal, First District, Division Three; and earlier on the Alameda County Superior Court.

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Judge Callahan is a graduate of Stanford University and the McGeorge School of Law and has an LL.M. degree from the University of Virginia School of Law. She is also a past Regent of the University of the Pacific and she is a current Trustee for Western University and the American Inns of Court.

Judge Callahan has been a board member of the California Judges Association, and is active in continuing education programs for attorneys and judges throughout California, nationally and internationally.

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Mr. Lowe regularly speaks on employment law issues for the International Bar Association, the American Bar Association, The State Bar Labor and Employment Section, the Rutter Group and others.

IN MEMORIAM

This Practice Guide is in large part the accomplishment of **Attorney David A. Cathcart**, one of the original authors. Dave planned and organized the contents, enlisted contributions from some of California's foremost judges and litigators, and did much of the original editing. Dave was a partner in Gibson, Dunn & Crutcher LLP and was recognized nationally for his expertise in employment and labor law.

PREFACE

This Practice Guide evolved from materials originally prepared for continuing education programs presented by the California Judges Association and The Rutter Group for California judges and lawyers. As these programs continued over a period of years, the program materials became increasingly comprehensive. This Practice Guide expands upon and updates those earlier efforts.

The work before you is designed to provide a road map through the thicket of statutes, regulations and case law governing the employment relationship. Our goal is to provide concise, reliable answers to the issues most commonly encountered in employment litigation. Keep in mind, however, that this is a complex and extremely fast-changing field, and many issues are unsettled. As a result, other judges and lawyers may disagree with views expressed herein. (Indeed, the authors reserve the right to disagree on matters presented to any of us!)

This book is also intended to be a true *practice guide*. To that end, the lawyers contributing to this book have included practice pointers to alert you to common pitfalls and to assist you in representing clients effectively in employment cases.

We are committed to keeping this Practice Guide up to date and to rewriting it as required to reflect developments in the law. Our readers can help in this effort. We invite your input on how this work can be improved and on any changes or corrections you deem appropriate.

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TABLE OF CONTENTS

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CHAPTER 17

REMEDIES

CONTENTS

REMEDIES*

[17:1] **Scope:** This Chapter deals with remedies that may be sought in connection with the employment-based claims discussed in earlier chapters. Those remedies include:

- *Equitable relief* (injunctions, reinstatement, backpay, front pay and other remedies to rectify unlawful employment practices); *see ¶17:2 ff.*
- *Contract damages; see ¶17:80 ff.*
- *Extracontractual compensatory damages* (tort and statutory); *see ¶17:290 ff.*
- *Punitive damages; see ¶17:360 ff.*
- *Civil penalties under Labor Code Private Attorneys General Act (PAGA); see ¶17:760 ff.*
- *Costs; see ¶17:570 ff.*
- *Attorney fees; see ¶17:600 ff.*
- *Interest* (prejudgment and postjudgment); *see ¶17:725 ff.*

Also discussed are certain important limitations on damages recoveries in employment cases:

- *After-acquired evidence; see ¶17:470 ff.*
- *Mitigation of damages; see ¶17:490 ff.*
- *Tax treatment of judgments and settlements in employment actions; see ¶17:850 ff.*

State and federal remedies similar: Except as noted in this Chapter, the remedies available under federal and state law are similar (although damages caps exist under Title VII). As a result, state courts often rely on federal case law in determining the scope of appropriate remedies.

Remedies may be implied: Under federal law, "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to *make good the wrong done*." [*Barnes v. Gorman* (2002) 536 US 181, 187, 122 S.Ct. 2097, 2102 (emphasis added; internal quotes omitted) (not an employment case)]

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Under California law, "[f]or every wrong there is a remedy" (Civ.C. §3523). Plaintiffs may use this statute to seek appropriate remedies if a statute creates a private right but provides no remedy for its enforcement. (If the statute provides a remedy, however, no others may be implied; see *Faria v. San Jacinto Unified School Dist.* (1996) 50 CA4th 1939, 1947, 59 CR2d 72, 77.) Moreover, "[v]iolation of a *criminal* statute embodying a *public policy* is generally actionable even though no specific civil remedy is provided in the criminal statute." [*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 C4th 553, 572, 71 CR2d 731, 743 (emphasis added; internal quotes omitted) (superseded by statute on other grounds as stated in *Arias v. Sup.Ct. (Angelo Dairy)* (2009) 46 C4th 969, 95 CR3d 588)]

A. EQUITABLE RELIEF

1. [17:2] **Availability of Equitable Relief:** Equitable relief in employment cases may consist of either prohibitory injunctions (e.g., ordering the employer to cease and desist from an unlawful practice) or mandatory injunctions (e.g., directing the employer to reinstate the employee). Certain monetary damages (backpay and front pay) are also considered equitable remedies.

   a. [17:3] **Limitation—no specific performance of personal services contract:** One form of equitable relief not available in employment cases is specific performance of the employment agreement. A contract to perform personal services cannot be specifically enforced, regardless of which party seeks enforcement. [See Civ.C. §3390 (specifying obligations that cannot be specifically enforced); *Scott v. Pacific Gas & Elec. Co.* (1995) 11 C4th 454, 473, 46 CR2d 427, 438 (disapproved on other grounds by *Guz v. Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 352, 100 CR3d 352, 377)]

   "In lieu of specific performance, the remedy for breach of a personal service contract is an action for damages." [*Barndt v. County of Los Angeles* (1989) 211 CA3d 397, 404, 259 CR 372, 377—doctor could not compel specific performance of employment contract with hospital]

      (1) [17:4] **Rationale:** Denying specific performance avoids the friction and social costs likely to result when employer and employee are reunited in a relationship that has already failed. [*Barndt v. County of Los Angeles*, supra, 211 CA3d at 404, 259 CR at 376; see Rest.2d Contracts §367, comment "a"]

      (2) [17:5] **Compare—enjoining breach of certain personal service agreements:** However, a court may enjoin the breach of a written contract to render personal services "of a *special, unique, unusual, extraordinary, or intellectual character*, which gives it peculiar value, the *loss of which cannot be reasonably or adequately compensated in damages* in an action at law," provided statutorily-

specified minimum compensation requirements are satisfied. [Civ.C. §3423(e) (emphasis added); CCP §526(b)(5) (emphasis added); see also Lab.C. §2855; *Foxx v. Williams* (1966) 244 CA2d 223, 235-236, 52 CR 896, 904—although contract specified, and parties agreed, artist's services were of a "special, unique, unusual, extraordinary and intellectual character which gives them a peculiar value," artist's breach could not be enjoined because statutory minimum compensation requirements were not satisfied]

(a) [17:6] **Comment:** These statutes are usually invoked by *employers* to enjoin a "unique" *employee's* refusal to perform (e.g., an entertainer refuses to appear). But employees apparently may also invoke them to prevent an employer's breach of contract (e.g., to prevent employer from replacing the entertainer with another performer).

[17:6.1-6.4] *Reserved.*

(3) [17:6.5] **Compare—declaratory relief:** Either the employer or the employee may seek declaratory relief as to the validity of a personal services contract and rights and duties thereunder. [See *Bertero v. National Gen. Corp.* (1967) 254 CA2d 126, 135-137, 62 CR 714, 720-721]

b. [17:7] **Injunctions under anti-discrimination statutes:** Injunctive relief (e.g., decrees compelling hiring, reinstatement or promotion) may be available for violation of state or federal anti-discrimination statutes, including:

- [17:8] *FEHA:* Under the Fair Employment and Housing Act, a court may award any relief a court is empowered to grant in a civil action, including, where appropriate, declaratory or injunctive relief to stop discriminatory practices. [Gov.C. §12965(d); *Harris v. City of Santa Monica* (2013) 56 C4th 203, 211, 152 CR3d 392, 395]
- [17:9] *Title VII:* Title VII explicitly authorizes courts to "enjoin the [employer] from engaging in an unlawful employment practice, and order such affirmative action as may be appropriate. . ." [42 USC §2000e-5(g)(1); see *Howe v. City of Akron* (6th Cir. 2013) 723 F3d 651, 663-664—preliminary injunction ordering promotions proper where plaintiffs showed reasonable likelihood of success as to individual promotions and other factors warranted injunctive relief; *McGinnis v. United States Postal Service* (ND CA 1980) 512 F.Supp. 517, 523-526—preliminary injunction enjoining postal worker's dismissal appropriate where employee sufficiently demonstrated threat of irreparable injury and likelihood of success on merits that imminent dismissal for refusal

to distribute draft registration materials would violate Title VII right to freedom from religious discrimination in employment]

This authorization gives district courts broad equitable power to fashion remedies to make discrimination victims whole by putting them in the position they would have been in but for the employer's unlawful conduct:

— "Once intentional discrimination in a particular employment decision is shown . . . the disadvantaged applicant should be awarded the position retroactively unless the defendant shows by clear and convincing evidence that even in the absence of discrimination the rejected applicant would not have been selected for the open position." [*League of United Latin American Citizens (LULAC), Monterey Chapter 2055 v. City of Salinas Fire Dept.* (9th Cir. 1981) 654 F2d 557, 559 (internal quotes omitted)—retroactive promotion appropriate remedy where discrimination was cause of firefighter's failure to be promoted, and City failed to prove he would not have obtained position even absent discrimination]

The courts' power to fashion appropriate injunctive relief "survives discontinuance of the illegal conduct." [*EEOC v. KarenKim, Inc.* (2nd Cir. 2012) 698 F3d 92, 100—abuse of discretion for district court to deny EEOC's request for injunction to ensure supervisor no longer in position to sexually harass employees]

- [17:9.1] *ADA:* The remedies available under Title VII (¶*17:9*), are also available under the Americans with Disabilities Act (42 USC §12117(a)).

- [17:10] *ADEA:* In an action to enforce the Age Discrimination in Employment Act, "the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes" of the Act, "including without limitation judgments compelling employment, reinstatement or promotion . . ." [29 USC §626(b) (held unconstitutional on other grounds by *Kimel v. Florida Bd. of Regents* (2000) 528 US 62, 120 S.Ct. 631); see *Howe v. City of Akron*, supra, 723 F3d at 663-664 (affirming preliminary injunction requiring employer to promote certain plaintiffs prior to trial of ADEA claims)]

- [17:11] *USERRA:* Similarly, the court is authorized to issue temporary or permanent injunctions "to vindicate fully the rights or benefits of persons" under the Uniformed Services Employment and Reemployment Rights Act (USERRA, 38 USC §4323(e)). [See *Serricchio v. Wachovia Secur. LLC* (2nd Cir. 2011) 658 F3d 169, 174 (affirming injunction ordering plaintiff's reinstatement to prior

position with fixed salary, even though prior compensation was wholly commission-based); *Bedrossian v. Northwestern Mem. Hosp.* (7th Cir. 2005) 409 F3d 840, 843-844—preliminary injunction refused where no threat of "irreparable harm" shown]

[17:12-19] *Reserved.*

2. [17:20] **Enjoining Future Unlawful Practices ("Cease and Desist" Orders):** Upon finding a Title VII or FEHA violation, the court has a "duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." [*Albemarle Paper Co. v. Moody* (1975) 422 US 405, 418, 95 S.Ct. 2362, 2372 (internal quotes omitted); see also *Donald Schriver, Inc. v. Fair Employment & Housing Comm'n* (1986) 220 CA3d 396, 409, 46 CR2d 440, 446-447—FEHA's express purpose is "to provide effective remedies" to eliminate discriminatory practices]

[17:20.1] ***PRACTICE POINTER:*** The Ninth Circuit has not yet decided whether district courts must apply the standard four-factor test—i.e., considering (1) whether a plaintiff has suffered an irreparable injury, (2) whether remedies available at law are inadequate to compensate for that inquiry, (3) the balance of hardships, and (4) the public interest—before issuing a permanent injunction in the Title VII/ADA context. In any case, "the district court must make adequate factual findings to support the scope of the injunction." [*EEOC v. BNSF Ry. Co.* (9th Cir. 2018) 902 F3d 916, 928-929 (reviewing nationwide injunction that prohibited employer from engaging in certain hiring practices)]

a. [17:21] **Application:** The following are examples of employment practices that courts have enjoined because of their unlawful discriminatory effect:

- [17:22] *Height and weight requirements with discriminatory effect.* [See *Independent Union of Flight Attendants v. Pan American World Airways, Inc.* (ND CA 1987) 50 FEP (BNA) 1698, 1706—enjoining maximum weight guidelines and "appearance checks" that discriminated against women; *United States v. Commonwealth of Virginia* (4th Cir. 1980) 620 F2d 1018, 1024—enjoining height and weight requirements for state troopers that effectively eliminated 98% of women, absent showing of need for these requirements]
- [17:23] *Tests with discriminatory impact.* [See *Vulcan Pioneers, Inc. v. New Jersey Dept. of Civil Service* (3rd Cir. 1987) 832 F2d 811, 816-817—injunction against promotion process based on test scores that adversely impacted minority applicants and had no correlation to job performance; *Easley v. Anheuser-Busch, Inc.* (8th

Cir. 1985) 758 F2d 251, 263—limiting injunction against preemployment test with racially discriminatory impact]

- [17:24] *Educational requirements with discriminatory impact*. [*Carpenter v. Stephen F. Austin State Univ.* (5th Cir. 1983) 706 F2d 608, 622-623—employer ordered to reevaluate its educational standards for promotion; *James v. Stockham Valves & Fittings Co.* (5th Cir. 1977) 559 F2d 310, 354-355—enjoining high school diploma requirement for apprenticeship program that excluded minority applicants absent showing that requirement was necessary for plant safety or efficiency]
- [17:25] *Residency requirements with discriminatory impact*. [*NAACP v. North Hudson Regional Fire & Rescue* (3rd Cir. 2011) 665 F3d 464, 485-486—injunction against municipality's use of residency requirement for hiring firefighters where requirement caused disparate impact on well-qualified, otherwise eligible African-Americans and was not justified by any business necessity]
- [17:26] *"Egregious acts of sexual harassment" creating hostile work environment*. [See *EEOC v. KarenKim, Inc.* (2nd Cir. 2012) 698 F3d 92, 100-102—abuse of discretion to deny requested injunctive relief against employee who created hostile work environment ("at a minimum," district court should have issued order (i) prohibiting employer from employing him in future, and (ii) prohibiting employer from permitting him to enter its premises); *EEOC v. Boh Bros. Const. Co., L.L.C.* (5th Cir. 2013) 731 F3d 444, 470—preliminary injunction affirmed against employer who failed to demonstrate that future instances of same-sex harassment in violation of Title VII were not reasonably likely to occur]

[17:27-29] *Reserved.*

b. [17:30] **Effect of employer's voluntary discontinuance of unlawful practice:** Courts usually reject arguments by employers that equitable relief is unnecessary because they have ceased the offending conduct. An injunction is proper unless the employer proves that *no reasonable probability* exists of further noncompliance:

"[P]rotestations of repentance and reform timed to anticipate or blunt the force of a lawsuit offer insufficient assurance that the practice sought to be enjoined will not be repeated." [*James v. Stockham Valves & Fittings Co.*, supra, 559 F2d at 354-355 (internal quotes omitted)]

c. [17:31] **Free speech issues:** Verbal harassment in the workplace is not protected by the First Amendment and may constitute employment discrimination in violation of Title VII and the FEHA. Of course, not every racial epithet or similarly

offensive language is a violation. The utterances must be so pervasive and severe as to create a hostile or abusive work environment. [See *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 C4th 121, 141-142, 87 CR2d 132, 147-148]

(1) [17:32] **Injunction as "prior restraint":** Generally, a defendant may only be punished after the fact for unlawful spoken words. An injunction against *future* utterances may be challenged as an unconstitutional "prior restraint" of speech. [See *Near v. State of Minnesota ex rel. Olson* (1931) 283 US 697, 713, 51 S.Ct. 625, 630]

(2) [17:33] **Compare—after judicial determination of unlawfulness:** But once a court determines that a specific pattern of speech is unlawful, an order prohibiting the repetition, perpetuation, or continuation of that practice is not a prohibited "prior restraint" of speech. [*Aguilar v. Avis Rent A Car System, Inc.,* supra, 21 C4th at 143-144, 87 CR2d at 148-149—upholding injunction barring supervisor from directing racial epithets at Hispanic employees *following a jury verdict* holding company liable for employment discrimination]

(3) [17:34] **Former employee's right to use employer's email system to communicate with other employees:** A former employee could *not* be enjoined on a *trespass to chattels* theory from using his former employer's email system to send messages critical of the employer to other employees. There was no actual or threatened injury to the employer's property because the employer "connected its email system to the Internet and permitted its employees to make use of this connection both for business and, to a reasonable extent, for their own purposes . . . *[Former Employee] did nothing but use the email system for its intended purpose*—to communicate with employees . . ." [*Intel Corp. v. Hamidi* (2003) 30 C4th 1342, 1359, 1 CR3d 32, 46 (emphasis added)]

Because the injunction was improper, the Supreme Court did not decide whether an injunction against communicating with the other employees would violate the former employee's "free speech" rights. [*Intel Corp. v. Hamidi*, supra, 30 C4th at 1374, 1 CR3d at 50]

[17:35-44] *Reserved.*

3. [17:45] **Equitable Relief Remedying Past Unlawful Practices:** Courts may order employers to take certain affirmative steps (mandatory injunction) to remedy past unlawful employment practices. However, mandatory injunctions may be harder to obtain than injunctions prohibiting behavior. [See *Dahl v. HEM Pharmaceuticals Corp.* (9th Cir. 1993) 7 F3d 1399, 1403; *Anderson*

v. United States (9th Cir. 1979) 612 F2d 1112, 1114—courts should refrain from granting mandatory preliminary relief "unless the facts and law clearly favor the moving party"]

a. [17:46] **Reinstatement to former job:** Reinstatement with full seniority rights is usually an available remedy for unlawful employment discrimination. [See 42 USC §2000e-5(g)(1)]

"The Act is intended to make the victims of unlawful employment discrimination whole, and [this] requires that [they be] . . . so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." (Under most collective bargaining agreements, seniority rights affect promotions, layoff, transfer, shift assignments, etc.) [*Franks v. Bowman Transp. Co., Inc.* (1976) 424 US 747, 764, 96 S.Ct. 1251, 1264 (internal quotes omitted)]

"Reinstatement" requires restoration of the employee's former salary, duties, and responsibilities; restoration of title and salary alone is not enough. [See *Norton v. San Bernardino City Unified School Dist.* (2008) 158 CA4th 749, 760-761, 69 CR3d 917, 925-926]

(1) [17:47] **Not available for mere breach of contract:** However, the employer's "obligation to employ another in personal service" may *not* be specifically enforced where the termination is merely a breach of contract (i.e., no discrimination involved). [See Civ.C. §3390, *discussed at* ¶*17:3*]

(2) [17:48] **Not available where "after-acquired evidence" of employee misconduct exists:** Reinstatement of an employee who has been discriminated against may not be ordered where, *after* termination, it is discovered that the employee has engaged in wrongdoing that would have justified the termination: "It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds." [*McKennon v. Nashville Banner Publishing Co.* (1995) 513 US 352, 362, 115 S.Ct. 879, 886] (Nor may "front pay" be awarded in such cases; *see* ¶*17:470 ff.*)

(3) [17:49] **Not available where reinstatement not feasible:** Nor is reinstatement an available remedy for employment discrimination where it is not feasible. (In such cases, plaintiff may be entitled to an award of "front pay" damages. *See discussion at* ¶*17:60*.)

(a) [17:50] **Hostile relationship:** A court may deny reinstatement if it finds such hostility between plaintiff and his or her supervisors, coworkers, etc. as to make reinstatement impractical. [See *Traxler v.*

Multnomah County (9th Cir. 2010) 596 F3d 1007, 1012—reinstatement not appropriate where "the employer-employee relationship has been so damaged by animosity that reinstatement is impracticable"; *Bergerson v. New York State Office of Mental Health, Central New York Psychiatric Ctr.* (2nd Cir. 2011) 652 F3d 277, 286—reinstatement may be "inappropriate" where "there is animosity between an employer and an employee"; compare *Hicks v. Forest Preserve Dist. of Cook County, Ill.* (7th Cir. 2012) 677 F3d 781, 792—mere "mutual dislike" between employer and employee "not a satisfactory reason to deny reinstatement"]

1) [17:51] **Litigation-engendered hostility:** In the Ninth Circuit, friction arising from the litigation process is sufficient to deny reinstatement. [*Cassino v. Reichhold Chemicals, Inc.* (9th Cir. 1987) 817 F2d 1338, 1347—no abuse of discretion where district court awarded front pay rather than reinstatement because "some hostility developed" during litigation (ADEA); *Thorne v. City of El Segundo* (9th Cir. 1986) 802 F2d 1131, 1137—"animosity generated during the protracted litigation" may contribute to existence of excessive hostility that could excuse plaintiff's failure to seek reinstatement (Title VII)]

   Other Circuits do not follow this rule and instead find that hostility engendered by litigation does not warrant denying reinstatement because "a court might deny [reinstatement] in virtually every case if it considered the hostility engendered from litigation as a bar to relief." [*Dickerson v. Deluxe Check Printers, Inc.* (8th Cir. 1983) 703 F2d 276, 281; *Sellers v. Mineta* (8th Cir. 2004) 358 F3d 1058, 1067 (J. Loken concur.opn.) (collecting cases)—litigation-engendered hostility "not extraordinary" and did not bar reinstatement; *EEOC v. Century Broadcasting Corp.* (7th Cir. 1992) 957 F2d 1446, 1462—"If 'hostility common to litigation' would justify a denial of reinstatement, reinstatement would cease to be a remedy except in cases where the defendant felt like reinstating the plaintiff" (internal quotes omitted)]

(b) [17:52] **Position no longer exists:** Likewise, reinstatement may be denied where the job no longer exists (e.g., due to legitimate layoffs). [*Palasota v. Haggar Clothing Co.* (5th Cir. 2007) 499 F3d 474, 489—reinstatement not feasible where no existing comparable position and rehiring would result in

termination of another employee; see *Teutscher v. Woodson* (9th Cir. 2016) 835 F3d 936, 951—whether employee can be reinstated without unfairly causing displacement of another employee may affect appropriateness of reinstatement award]

(c) [17:52.1] **Plaintiff medically unable to return to work:** Where an employee is not medically able to work due to non-job-related illness or disability, the employee is not entitled to reinstatement. [*Davis v. Los Angeles Unified School Dist. Personnel Comm'n* (2007) 152 CA4th 1122, 1131-1132, 62 CR3d 69, 75]

(d) [17:53] **In house counsel:** Clients have the absolute right to be represented by counsel of their choice and therefore to terminate an existing attorney-client relationship. This right applies to clients who employ in house counsel. Such employers therefore may not be compelled to reinstate a discharged in-house attorney. [*General Dynamics Corp. v. Sup.Ct. (Rose)* (1994) 7 C4th 1164, 1177, 32 CR2d 1, 9—discharged in house attorney suing for breach of contract is limited to damage action]

[17:53.1-53.4] *Reserved.*

(e) [17:53.5] **Reinstatement for delays in collective bargaining:** The Agricultural Labor Relations Board may order "make-whole" relief under Lab.C. §1160.3, which can include reinstatement of employees, with or without backpay, for certain unfair labor practices. [*Tri-Fanucchi Farms v. Agricultural Labor Relations Bd.* (2017) 3 C5th 1161, 1167-1168, 225 CR3d 545, 550-551—employer's refusal to bargain with union constituted unfair labor practice entitling workers to make-whole relief]

(4) [17:54] **Not available after plaintiff obtains new employment:** An employer's responsibility to reinstate a wrongfully-discharged employee ceases when the employee obtains a new job. Such is the case even if the employee later resigns from that job and seeks to be reinstated to the position from which he or she was wrongfully discharged. [*Fine v. Ryan Int'l Airlines* (7th Cir. 2002) 305 F3d 746, 756—"It makes no sense to make [defendant] her employer of last resort for life, if it bears no responsibility for the actions of later employers"]

b. [17:55] **Backpay:** Backpay is characterized as an equitable remedy, because it is a form of restitution and the award is committed to the trial court's discretion. [*Curtis v. Loether* (1974) 415 US 189, 197, 94 S.Ct. 1005, 1010; *Lutz v. Glendale Union High School* (9th Cir. 2005) 403 F3d 1061, 1068] (Backpay is discussed further at ¶*17:135 ff.*)

Characterizing backpay as an equitable remedy impacts the right to *jury trial; see discussion at ¶19:847 ff.*

[17:56-59] *Reserved.*

c. [17:60] **"Front pay" in lieu of reinstatement:** Although reinstatement is the preferred remedy in discriminatory discharge cases, it may not be feasible where the relationship between the parties is hostile or the former position is no longer available due to a reduction in workforce (*see ¶17:50 ff.*). Under such circumstances, an award of damages for future lost pay and benefits ("front pay") *in lieu of reinstatement* furthers the remedial goals of anti-discrimination laws "by returning the aggrieved party to the economic situation he would have enjoyed but for the defendant's illegal conduct . . . Thus, front pay is an award of future lost earnings to make a victim of discrimination whole." [*Cassino v. Reichhold Chemicals, Inc.* (9th Cir. 1987) 817 F2d 1338, 1346; *Donlin v. Philips Lighting North America Corp.* (3rd Cir. 2009) 581 F3d 73, 86—front pay is alternative to traditional equitable remedy of reinstatement where plaintiff "will experience a loss of future earnings because she cannot be placed in the position she was unlawfully denied"]

Because front pay is granted only when reinstatement is inappropriate or unavailable, it is an equitable remedy. Thus, both the availability and amount of front pay must be determined by the court. [*Traxler v. Multnomah County* (9th Cir. 2010) 596 F3d 1007, 1013-1014 (considering front pay under Family Medical Leave Act); *Barton v. Zimmer, Inc.* (7th Cir. 2011) 662 F3d 448, 454—"front pay is an available equitable remedy under the ADEA in the right circumstances, in lieu of reinstatement, just as it is under Title VII"]

Cross-refer: See detailed discussion at ¶17:220 ff.

(1) [17:60.1] **Compare—where basis overly speculative:** Because front pay awards "necessarily rest upon predictions and assumptions about a plaintiff's longevity, the likely duration of any future employment, the continued viability of the employer, ongoing efforts at mitigation, and countless other factors," they always are "at least partially speculative." [*Dollar v. Smithway Motor Xpress, Inc.* (8th Cir. 2013) 710 F3d 798, 809]

However, if the basis for the award "is too speculative and would be an impermissible 'windfall' for the plaintiff," recovery may be denied. [*Dollar v. Smithway Motor Xpress, Inc.*, supra, 710 F3d at 810-811 & fn. 4; *see ¶17:273 ff.*]

d. [17:61] **Hiring:** The court may order an employer that discriminated in the hiring process to hire the plaintiff. [See 42 USC §2000e-5(g)(1); see also *Franks v. Bowman Transp. Co., Inc.* (1976) 424 US 747, 763-764, 96 S.Ct. 1251, 1264;

State Personnel Bd. v. Fair Employment & Housing Comm'n (1985) 39 C3d 422, 429, 217 CR 16, 20—civil service employees covered under FEHA]

e. [17:62] **Promotion:** In appropriate cases, the court may order the plaintiff promoted as a remedy for past discrimination to make plaintiff whole. [*Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 CA4th 1376, 1382, 28 CR2d 30, 34; see *Locke v. Kansas City Power & Light Co.* (8th Cir. 1981) 660 F2d 359, 368-369; *Miles v. Indiana* (7th Cir. 2004) 387 F3d 591, 599 (recognizing rule but denying relief)]

This remedy, however, is a matter of discretion, not of right, and courts may be "hesitant to order that the injured party be promoted." A decision to promote an employee is based on "subtle and complex qualifications" that courts may not be in the best position to assess. [*Dyer v. Workers' Comp. Appeals Bd.*, supra, 22 CA4th at 1382-1383, 28 CR2d at 34]

(1) [17:63] **Rationale:** The court's broad equitable power to order reinstatement (¶*17:46*) includes the power to order remedial placement in a different or advanced position (referred to as "instatement"). [*Dyer v. Workers' Comp. Appeals Bd.*, supra, 22 CA4th at 1382, 28 CR2d at 34]

(2) [17:64] **Retroactive seniority:** Plaintiffs who have been denied merit promotions because of employment discrimination may be "deemed promoted" with seniority retroactive to the dates when they were wrongfully denied promotion. [*Lucich v. City of Oakland* (1993) 19 CA4th 494, 497, 23 CR2d 450, 451; see *Zipes v. Trans World Airlines, Inc.* (1982) 455 US 385, 399-400, 102 S.Ct. 1127, 1136—"class-based seniority relief for identifiable victims of illegal discrimination is a form of relief generally appropriate" under Title VII]

(3) [17:65] **Comment:** Courts are more likely to order promotion where the only qualification is length of service. Where other factors are involved, courts are usually reluctant to order that an injured party be promoted because this action usurps management prerogatives in determining and applying the qualifications for promotion. [*Dyer v. Workers' Comp. Appeals Bd.*, supra, 22 CA4th at 1382-1383, 28 CR2d at 34]

f. [17:66] **Elevation to partner status:** Partnership admission decisions are subject to Title VII's reach: "[N]othing in the change in status that advancement to partnership might entail means that partnership consideration falls outside the terms of [Title VII]." [*Hishon v. King & Spalding* (1984) 467 US 69, 77, 104 S.Ct. 2229, 2234-2235]

- [17:67] An accounting firm's refusal to elevate a female employee to partnership status solely because of gender

was remedied by an order requiring the firm to admit her into the partnership. [*Hopkins v. Price Waterhouse* (DC Cir. 1990) 920 F2d 967, 981]

g. [17:68] **Academic tenure:** An educational institution that denies tenure to a professor or teacher because of unlawful discrimination may be ordered to provide tenure even if this remedy "mandates a lifetime relationship between the University and the professor." [*Brown v. Trustees of Boston Univ.* (1st Cir. 1989) 891 F2d 337, 359; *Kunda v. Muhlenberg College* (3rd Cir. 1980) 621 F2d 532, 535, 546-551—college instructor, upon completion of master's degree within 2 years, should be awarded retroactive tenure]

Cases have also acknowledged, however, that courts "should be extremely wary of intruding into the world of university tenure decisions." [*Brown v. Trustees of Boston Univ.*, supra, 891 F3d at 359; see also *Kobrin v. University of Minn.* (8th Cir. 1997) 121 F3d 408, 414—courts "accord a high degree of deference to the judgment of university decision-makers regarding candidates' qualifications for academic positions"]

h. [17:69] **Purging of personnel records:** As a remedy for discriminatory criticism, a court may order modification or expungement of negative evaluations and other adverse material in plaintiff's personal file, especially where the criticism caused plaintiff no specified financial loss. [*Nolan v. Cleland* (9th Cir. 1982) 686 F2d 806, 814—no further relief could be granted for discriminatory evaluations by plaintiff's supervisor after such evaluations were ordered removed from plaintiff's personnel file; *Independent Union of Flight Attendants v. Pan American World Airways, Inc.* (ND CA 1987) 50 FEP (BNA) 1698, 1708—order expunging all adverse notations in personnel records]

[17:70-79] *Reserved.*

B. CONTRACT DAMAGES

1. [17:80] **Availability:** Damages for breach of contract may be awarded against the employer for wrongful termination of an employment contract. [See *Chyten v. Lawrence & Howell Investments* (1993) 23 CA4th 607, 615, 46 CR2d 459, 465—wrongfully discharged in house attorney entitled to salary under employment contract; *Scott v. Pacific Gas & Elec. Co.* (1995) 11 C4th 454, 474, 46 CR2d 427, 439 (disapproved on other grounds by *Guz v. Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 100 CR2d 352)—employer's breach of implied contract not to demote without good cause entitled employee to resulting pecuniary loss]

a. [17:80.1] **No third-party beneficiary recovery against payroll contractor:** Although contracts between employers and companies providing payroll services may benefit employees, it is generally not a motivating purpose of the contracting parties. As a result, where the employer may be liable to the em-

ployee for pay violations, the employee cannot pursue a breach of contract claim against the payroll company as a third-party beneficiary to the contract between the employer and the payroll company. [*Goonewardene v. ADP, LLC* (2019) 6 C5th 817, 837, 243 CR3d 299, 316]

2. [17:81] **Measure of Damages:** The measure of damages for breach of contract "is the amount which will compensate the party aggrieved for all the detriment *proximately caused* thereby, *or* which, in the ordinary course of things, would be *likely to result* therefrom." [Civ.C. §3300 (emphasis added)]

   a. [17:82] **Purpose:** Damages are awarded in a breach of contract action "to give the injured party the benefit of his bargain and insofar as possible to place him in the same position he would have been in had the promisor performed the contract." [*Martin v. U-Haul Co. of Fresno* (1988) 204 CA3d 396, 409, 251 CR 17, 23]

   b. [17:83] **"Detriment" caused:** In employment cases, the "detriment proximately caused" consists of the various elements that make up an employee's compensation, including salary, bonus, overtime pay, sick leave, life insurance, medical and dental insurance, pension and retirement benefits, etc. There may also be noncash perquisites and benefits to consider: automobiles, dependent care, vacation facilities, country club dues, etc.

[17:84] ***PRACTICE POINTER:*** Identifying the various damage elements in employment litigation is often easier than quantifying them. If plaintiff seeks long-term damages, expert opinion testimony is usually needed to quantify the claimed loss. Potential issues include:

- *Salary loss:* The length of the salary loss must be computed. This computation is easy where the employment was for a fixed term. But where the employment was for an indefinite term, the jury must determine the date plaintiff obtained or could have obtained comparable employment, which involves application of rules governing mitigation of damages (*see* ¶*17:490 ff.*).
- *Promotions:* The salary last paid does not reflect raises plaintiff would have received in the future. Expert opinion testimony may be required to prove such raises. The expert may base an opinion on the average raise that employees in plaintiff's industry are likely to receive. (Defendants may testify, of course, that plaintiff's performance was deficient so that his or her chance of a raise was below average.)

  Another method to prove salary loss is to consider the salary paid to plaintiff's replacement or substitute employee, assuming he or she has comparable ex-

perience, skill, productivity, etc. (Defendants who hire a younger worker at a lower salary will want to use this method.)

- *Bonus and profit-sharing loss:* Expert opinion testimony may also be required to prove damages for loss of bonuses and profit-sharing. The employer's earnings history and future growth prospects must be considered.
- *Present value of future earnings:* Earnings payable in the future must be discounted to their *present value* in order to account for the time value of money—i.e., to reflect the interest that can be earned on the award. Present value thus depends on an assumed interest rate. (Plaintiff's experts usually opt for a conservative rate; e.g., current interest rate on three-year Treasury Bills.)

c. [17:85] **Liquidated damages:** Employment contracts may include provisions for liquidated damages (e.g., for breach of the employee's agreement not to disclose the employer's trade secrets following termination of employment).

(1) [17:86] **Presumed valid:** Liquidated damages provisions are *presumed valid* (except in certain consumer transactions and residential leases). The burden is on the party seeking to avoid the liquidated damages to show that "the provision was unreasonable under the circumstances existing at the time the contract was made." [Civ.C. §1671(b)]

(2) [17:87] **Factors considered:** Relevant factors include:
— whether the liquidated damages provision was included in a form contract;
— the relative equality of the parties' bargaining power;
— whether the parties anticipated that proof of actual damages would be costly or inconvenient;
— the relationship the liquidated damages bear to the range of harm that reasonably could be anticipated at the time the contract was made;
— the difficulty of proving causation and foreseeability; and
— whether the parties were represented by counsel when they made the contract. [See *Weber, Lipshie & Co. v. Christian* (1997) 52 CA4th 645, 654-655, 60 CR2d 677, 681-682—partnership agreement provided liquidated damages for expelled partner's breach of covenant not to service partnership clients]

(3) [17:88] **Court determines reasonableness:** Whether a contractual provision is an unenforceable liquidated damages provision is for the court to decide. [*Morris v.*

Redwood Empire Bancorp (2005) 128 CA4th 1305, 1314, 27 CR3d 797, 802]

[17:89-94] *Reserved.*

3. **Limitations on Contract Damages**

a. [17:95] **"Proximately caused":** Damages for breach of contract must have been "proximately caused" by the breach (Civ.C. §3300; *see* ¶*17:81 ff.*).

This requirement is generally interpreted to mean that recovery is allowed only if:

— the damages would not have occurred "but for" the breach (i.e., cause-in-fact); and

— the breach was a "substantial factor" in causing the damage (i.e., there was no independent intervening event or superseding cause). [See *Greenfield v. Insurance Inc.* (1971) 19 CA3d 803, 810-811, 97 CR 164, 168—not an employment case]

(1) **Application**

- [17:96] Employee was wrongfully discharged but later ordered reinstated. He was thereafter discharged a second time because he was imprisoned and unable to report for work. His damage claim from the wrongful discharge was cut off when he was reinstated. He had no damage claim based on the second discharge because it was not wrongful (i.e., he was not ready, willing and able to work; *see* ¶*17:545*). [*Dean v. Trans World Airlines, Inc.* (9th Cir. 1991) 924 F2d 805, 812]

- [17:97] *Compare:* The result may be different where the employer *refuses to reinstate* a wrongfully discharged employee. In such cases, backpay damages may continue *despite* the employee's imprisonment (i.e., it is immaterial whether the employee is still ready, willing and able to work if the employer refuses to reemploy; *see* ¶*17:545*).

[17:98-104] *Reserved.*

b. [17:105] **Reasonably foreseeable:** The Civil Code allows recovery for detriment proximately caused "or which, in the ordinary course of things, would be likely to result [from the breach of contract]." [Civ.C. §3300]

This provision embodies the common law rule of *Hadley v. Baxendale* (1854) 9 Ex. 341, 156 Eng.Rep. 145, that a promisor need not compensate a promisee for injuries the promisor had no reason to foresee as the probable result of his or her breach when the contract was made.

As the California Supreme Court stated: "Contract damages are generally limited to those within the contemplation of the

parties when the contract was entered into or at least reasonably foreseeable by them at that time; *consequential damages beyond the expectations of the parties are not recoverable*." [*Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C4th 503, 515, 28 CR2d 475, 481 (emphasis added)—not an employment case]

(1) [17:106] **Purpose:** "This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise." [*Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, supra, 7 C4th at 515, 28 CR2d at 481]

(2) **Application**

- [17:107] Employee was wrongfully discharged from his position as a radio announcer. Employer paid his salary but refused to reinstate him to his former position. Plaintiff was entitled to prove that *his reputation* was damaged: "(T)he parties are deemed to have contracted on the assumption that the employee was to be given opportunities for the exercise of his abilities during a reasonable portion of the period covered by the contract . . . an anticipated benefit of which was the *acquisition of a reputation* in the public eye." [*Colvig v. RKO General, Inc.* (1965) 232 CA2d 56, 67-68, 42 CR 473, 480-481 (emphasis added; internal quotes omitted)]

[17:108-109] *Reserved.*

(3) [17:110] **Effect of provision for termination upon notice:** A contract provision giving both parties the right to terminate upon notice to the other may limit the employer's liability for consequential damages: "Parties who agree that a contract may be terminated for any reason, or no reason, upon the giving of the specified notice *could not reasonably anticipate* that damages could exceed that notice period." [*Martin v. U-Haul Co. of Fresno* (1988) 204 CA3d 396, 409, 251 CR 17, 24 (emphasis added)—U-Haul's dealership contract with plaintiff gave it the right to terminate on 30 days' written notice]

c. [17:111] **"Clearly ascertainable":** "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." [Civ.C. §3301]

However, recoverable damages are not limited to actual economic damages. [*Moen v. Regents of Univ. of California* (2018) 25 CA5th 845, 863, 236 CR3d 400, 415 (considering class-wide impairment stemming from loss of entitlement to health-insurance benefit)]

(1) **Application**

- [17:112] An employee wrongfully discharged solely because of his age was entitled to recover his salary from date of discharge until retirement age. No recovery was allowed, however, for *future bonuses;* their existence was "merely speculative" under the facts of the case (bonuses were entirely discretionary and based on job performance, which was disputed). [*Neufeld v. Searle Labs.* (8th Cir. 1989) 884 F2d 335, 342 (abrogated on other grounds by *Hazen Paper Co. v. Biggins* (1993) 507 US 604, 113 S.Ct. 1701); but see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 CA4th 976, 997, 16 CR2d 787, 798 (disapproved on other grounds by *Lakin v. Watkins Associated Indus.* (1993) 6 C4th 644, 25 CR2d 109)—employee awarded damages for lost future bonus payments because employees at employee's level within company "can expect to receive annual bonuses"]

- [17:113] *Compare:* Where an employee's compensation is based on the employer's "net profits," *anticipated future profits* may be recoverable for breach of an employment contract. [*Brawthen v. H & R Block, Inc.* (1975) 52 CA3d 139, 147, 124 CR 845, 850—manager employed to open new offices for employer was to receive 50% of each office's net profits]

  Any uncertainties as to the *amount* of the employer's profits will be resolved against the employer, as the party causing the breach. [*Brawthen v. H & R Block, Inc.*, supra, 52 CA3d at 148, 124 CR at 851]

  [17:114-119] *Reserved.*

d. [17:120] **No tort damages:** The contract measure of damages generally does not include certain types of damages that may be recoverable in tort cases:

(1) [17:121] **No emotional distress damages:** Damages for mental suffering and emotional distress are generally not recoverable in a breach of contract action. [*Erlich v. Menezes* (1999) 21 C4th 543, 558, 87 CR2d 886, 896 (not an employment case); *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C4th 503, 516, 28 CR2d 475, 481 (not an employment case)]

Exceptions exist only for contracts the *express object* of which is the mental and emotional well-being of one of the parties (e.g., care of infants, corpses, family heirlooms). [See *Erlich v. Menezes*, supra, 21 C4th at 559, 87 CR2d at 897]

(a) [17:122] **Comment:** Employment contracts do *not* fall in this exceptional category. That employment

contracts "carry a lot of emotional freight" does *not* necessarily make them one for the emotional well-being of the employee, and therefore does not justify an award of emotional distress damages for breach.

(2) [17:123] **No punitive damages:** Similarly, *punitive or exemplary damages* are not recoverable for breach of contract: "In the absence of independent tort, punitive damages may not be awarded for breach of contract *even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious*." [*Applied Equip. Corp. v. Litton Saudi Arabia Ltd.,* supra, 7 C4th at 516, 28 CR2d at 481 (emphasis added; internal quotes omitted); see also Civ.C. §3294—punitive damages authorized only in actions "for breach of an obligation *not* arising from contract" (emphasis added)]

[17:124-134] *Reserved.*

4. [17:135] **Backpay:** Prevailing plaintiffs in an employment termination case are generally entitled to backpay, or lost compensation, in the amount they would have received but for the termination, less sums earned, or that reasonably could have been earned, from other employment. [*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 C3d 176, 181, 89 CR 737, 740]

— "[B]ack pay refers to the amount that plaintiff would have earned but for the employer's unlawful conduct, minus the amount that plaintiff did earn or could have earned if he or she had mitigated the loss by seeking or securing other comparable employment." [*Lowe v. California Resources Agency* (1991) 1 CA4th 1140, 1144, 2 CR2d 558, 560, fn. 3; see *Brady v. Thurston Motor Lines, Inc.* (4th Cir. 1985) 753 F2d 1269, 1278]

Backpay cannot be awarded on mere speculation. But "absolute accuracy" in the damages calculation is not essential. "Backpay should be awarded even when the precise amount of the award cannot be determined. Any ambiguity in what the claimant would have received but for discrimination should be resolved against the discriminating employer." [*Hance v. Norfolk Southern Ry. Co.* (6th Cir. 2009) 571 F3d 511, 520 (internal quotes omitted); see *Harris v. City of Santa Monica* (2013) 56 C4th 203, 233, 152 CR3d 392, 413—no right to backpay if it "would provide the plaintiff with an unjustified windfall" in light of mixed-motive defense; see also *Tyson Foods, Inc. v. Bouaphakeo* (2016) 577 US 442, 457, 136 S.Ct. 1036, 1047—employees could rely upon expert's representative sample as permissible means of proving hours worked in class action setting]

• [17:135.1] **Compare—"mixed-motives" cases:** Where the trier of fact finds the defendant was motivated by both discriminatory and nondiscriminatory reasons, plaintiff's recovery is limited to injunctive and declaratory relief, attorney fees and costs; compensatory damages may not be awarded. [*Harris*

v. City of Santa Monica, supra, 56 C4th at 232-235, 152 CR3d at 413-415; *Davis v. Farmers Ins. Exchange* (2016) 245 CA4th 1302, 1324-1325, 200 CR3d 315, 332-334; *see discussion at ¶17:648.5*]

a. [17:136] **Purpose:** In discrimination cases, a backpay order is a reparation order designed to vindicate the law's purpose of making employees whole for losses suffered. [*Ofsevit v. Trustees of Calif. State Univ. & Colleges* (1978) 21 C3d 763, 776-777, 148 CR 1, 9, fn. 14]

"The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." [*Albemarle Paper Co. v. Moody* (1975) 422 US 405, 418-419, 95 S.Ct. 2362, 2372]

[17:136.1-136.4] *Reserved.*

b. [17:136.5] **Nature of remedy:** Despite its *equitable* nature, backpay is "a presumptive entitlement of a plaintiff who successfully prosecutes an employment discrimination case." [*Johnson v. Spencer Press of Maine, Inc.* (1st Cir. 2004) 364 F3d 368, 379; see *Bergerson v. New York State Office of Mental Health, Central N.Y. Psychiatric Ctr.* (2nd Cir. 2011) 652 F3d 277, 286—"An award of backpay is the rule, not the exception" (internal quotes omitted); *Lutz v. Glendale Union High School* (9th Cir. 2005) 403 F3d 1061, 1067-1069—"award of back pay is an integral part of the equitable remedy of reinstatement"]

(1) [17:136.6] **Not subject to Title VII damages caps:** Backpay is not an element of "compensatory damages" under 42 USC §1981a, and therefore is not subject to the §1981a(b)(3) caps on compensatory and punitive damages (*¶17:296*). [42 USC §1981a(b)(2); see *Johnson v. Spencer Press of Maine, Inc.*, supra, 364 F3d at 379]

[17:136.7-136.9] *Reserved.*

(2) [17:136.10] **Right to jury trial?** Backpay remains an *equitable* remedy awarded in the court's discretion *in Title VII cases*, so that claims for backpay are not jury triable (*see ¶19:848*). [*Spencer v. Wal-Mart Stores, Inc.* (3rd Cir. 2006) 469 F3d 311, 315; *Lutz v. Glendale Union High School*, supra, 403 F3d at 1069—same result in ADA cases]

Compare—where backpay award mandatory: A right to jury trial may exist, however, for claims under statutes making backpay awards mandatory (e.g., FLSA); *see discussion at ¶19:849 ff.*

c. [17:137] **Period covered:** Both Title VII and the FEHA provide for an award to successful plaintiffs of backpay from the time of the unlawful adverse action until the date of judgment. [42 USC §2000e-5(g); Gov.C. §12965; see *Kraszewski v. State Farm Gen. Ins. Co.* (9th Cir. 1990) 912 F2d 1182, 1184]

Title VII limitation: The right to backpay under Title VII must accrue *within the two-year period* preceding the filing of a charge with the EEOC. [42 USC §2000e-5(g)(1)]

[17:137.1-137.4] *Reserved.*

(1) [17:137.5] **Effect of employer interference with earnings:** In calculating backpay, the jury may consider plaintiff's earnings before the employer's discriminatory acts depressed plaintiff's earnings, rather than earnings at the time of termination. [See *Palasota v. Haggar Clothing Co.* (5th Cir. 2007) 499 F3d 474, 484—in calculating backpay in ADEA case, jury could use employee's peak earnings rather than lower earnings at time of termination caused by employer's deliberate effort to get rid of older employees]

(2) [17:138] **Effect of resignation:** Title VII and the FEHA differ as to whether an employee who resigns after experiencing discrimination, but *who was not constructively discharged*, may recover backpay for the post-resignation period.

(a) [17:139] **Title VII:** Under Title VII, such an employee may not recover backpay. [See *Hertzberg v. SRAM Corp.* (7th Cir. 2001) 261 F3d 651, 659; *Satterwhite v. Smith* (9th Cir. 1984) 744 F2d 1380, 1381, fn. 1]

1) [17:139.1] **Rationale:** An employee should not quit at the first sign of discrimination. Restricting backpay awards encourages employees to work within the existing employment relationship to overcome resistance and eradicate discrimination. [See *Thorne v. City of El Segundo* (9th Cir. 1986) 802 F2d 1131, 1134]

(b) [17:140] **FEHA:** Because the underlying statutory objective of the FEHA is "to make the victim of discrimination whole," economic damages are recoverable on FEHA claims despite the absence of a constructive discharge. [*McCoy v. Pacific Maritime Ass'n* (2013) 216 CA4th 283, 308, 156 CR3d 851, 873—"FEHA does not limit damages and all forms of relief granted to civil litigants generally . . . are available . . . regardless of whether the party aggrieved was constructively discharged" (internal quotes omitted); *Cloud v. Casey* (1999) 76 CA4th 895, 908, 90 CR2d 757, 765]

- [17:141] A female employee, who was denied a promotion to company controller because of gender discrimination, voluntarily resigned. *Because no comparable position was available*, she could not be "made whole" by staying on

the job. An award of postresignation backpay and front pay damages was therefore proper (subject to duty to mitigate damages). [*Cloud v. Casey*, supra, 76 CA4th at 908, 90 CR2d at 765]

d. [17:142] **Items recoverable:** Backpay includes "not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as part of his compensation." [*Wise v. Southern Pac. Co.* (1970) 1 C3d 600, 607, 83 CR 202, 207]

(1) [17:143] **Salary and wages:** Past earnings include regular wages plus, if applicable, overtime, shift differential pay, and premium pay; i.e., the "stream of income" the worker would have received. [*Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.* (9th Cir. 2001) 244 F3d 1152, 1157-1158; see *Kossman v. Calumet County* (7th Cir. 1988) 849 F2d 1027, 1028—overtime wages included in backpay; see also *Ofsevit v. Trustees of Calif. State Univ. & Colleges* (1978) 21 C3d 763, 776, 148 CR 1, 9—wrongfully discharged teachers entitled to salary from date of dismissal to date of reinstatement]

(a) [17:143.1] **Adjustment for promotions; "lost-chance" damages:** Backpay may be increased to take into account promotions the employee was *likely* to have received. [See *Bishop v. Gainer* (7th Cir. 2001) 272 F3d 1009, 1015-1016]

Where the likelihood of promotion cannot be determined (e.g., because the employee would have had to compete with others for the promotion), the court may in appropriate cases award "lost-chance" damages—i.e., multiplying the additional pay that the employee would have earned from promotion times the percentage chance that the employee would have received the promotion. [*Bishop v. Gainer*, supra, 272 F3d at 1016-1017]

- [17:143.2] For example, where three employees vie for promotion to the same position involving a $5,000 annual pay raise, one who is discriminatorily eliminated from consideration may receive "lost-chance" damages by multiplying the additional backpay the employee would have earned in the position ($5,000 per year) by the chance he or she had of receiving the promotion (all other things being equal, 33 1/3%). [*Bishop v. Gainer*, supra, 272 F3d at 1016]

[17:143.3-143.4] *Reserved.*

(b) [17:143.5] **Includes wages that could have been earned if employer had accommodated employee's disability:** When an employer discharges an employee disabled by pregnancy instead of reasonably accommodating her disability by a temporary transfer to a less strenuous or dangerous position, backpay may be owed for the period in which the plaintiff *could have been employed* in the less strenuous position. [See *SASCO Elec. v. California Fair Employment & Housing Comm'n* (2009) 176 CA4th 532, 543-544, 97 CR3d 482, 490-491 (pregnancy discrimination case)]

(2) [17:144] **Incentive compensation:** Incentive compensation such as bonuses and commissions may be recoverable as contract damages, if the employee's right to the damages can be proved with reasonable certainty. [*Brawthen v. H & R Block, Inc.* (1975) 52 CA3d 139, 148, 124 CR 845, 851—wrongfully discharged employee entitled to receive 50% of employer's "net profits" from certain operations; *Smith v. Brown-Forman Distillers Corp.* (1987) 196 CA3d 503, 518-519, 241 CR 916, 924—$230,000 compensatory damages for 4 years upheld where wrongfully discharged employee's pay was $27,000 plus bonuses, last bonus was $10,000, and bonuses would have been higher in later years because of employer's increased profits; see *Moncada v. West Coast Quartz Corp.* (2013) 221 CA4th 768, 778-779, 164 CR3d 601, 609-610—promise to pay employees bonus "sufficient to retire" if employees stayed until company was sold was not vague and indefinite since retirement amounts could be determined using standard formulas and actuarial tables]

(3) [17:145] **Tips:** Where an employee's earnings include tips, "backpay" may include what the employee would have received in tips. [*Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.* (9th Cir. 2001) 244 F3d 1152, 1157—action for WARN Act violation; *see ¶6:165*]

(4) [17:146] **Health insurance:** Health insurance received as a fringe benefit of employment is recoverable as part of a backpay award. Recovery may be allowed for the *replacement cost* to the plaintiff (premiums plaintiff must pay to obtain substitute coverage), not merely the amount it would have cost the employer to provide such coverage. [*Wise v. Southern Pac. Co.* (1970) 1 C3d 600, 607-608, 83 CR 202, 207]

(5) [17:147] **Unused vacation:** Payment for unused vacation time is recoverable as part of backpay. Vacation pay constitutes additional compensation for services

rendered. [*Henry v. Amrol, Inc.* (1990) 222 CA3d Supp. 1, 4-5, 272 CR 134, 136]

(a) [17:148] **Nonforfeitable:** California law prohibits employers from enforcing a "use it or lose it" vacation policy (unused vacation time not compensable and cannot be carried over to following year): "[W]henever a contract of employment . . . provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages . . ." [Lab.C. §227.3; see *Henry v. Amrol, Inc.*, supra, 222 CA3d Supp. at 4-5, 272 CR at 136]

Compare: A "use it or lose it" policy may be enforceable in other states, however. In such states, recovery for unused vacation time may be denied. [See *Bonura v. Chase Manhattan Bank, N.A.* (SD NY 1986) 629 F.Supp. 353, 358-359]

(6) [17:149] **Life insurance:** Where the employer provided life insurance, the measure of damages includes the *face value of the policy* that would have been in effect at the wrongfully discharged employee's death. But that amount must be *reduced* by the proceeds of a substitute policy that the wrongfully discharged employee obtained or *could have obtained* in an effort to mitigate damages. [*Sposato v. Electronic Data Systems, Corp.* (9th Cir. 1999) 188 F3d 1146, 1148 (applying Calif. law)]

(a) [17:150] **Where no replacement policy:** If the employee chose *not* to obtain replacement insurance after his or her discharge, the measure of damages is apparently limited to the amount of the *premiums* the employer would have paid had the termination not occurred. [*Farris v. Lynchburg Foundry* (4th Cir. 1985) 769 F2d 958, 966; and see *Sposato v. Electronic Data Systems, Corp.,* supra, 188 F3d at 1148]

(7) [17:151] **Pension benefits:** Lost pension and other deferred compensation benefits may be recoverable as backpay. [*County of Alameda v. Fair Employment & Housing Comm'n* (1984) 153 CA3d 499, 509, 200 CR 381, 386—fringe benefits properly included in backpay award (citing *United States v. Lee Way Motor Freight, Inc.* (10th Cir. 1979) 625 F2d 918, 945—"A normal part of the backpay award should have been the inclusion of the company's health, welfare and pension benefits"); *Ackerman v. Western Elec. Co., Inc.* (ND CA 1986) 643 F.Supp. 836, 855, aff'd (9th Cir. 1988) 860 F2d 1514—plaintiff entitled to full backpay award, which includes pension benefits]

(a) [17:152] **Calculating loss:** No widespread consensus exists on how to calculate these lost benefits. [See *Ventura v. Federal Life Ins. Co.* (ND IL 1983) 571 F.Supp. 48, 50-51—pension paid through normal retirement date; *Blum v. Witco Chem. Corp.* (3rd Cir. 1987) 829 F2d 367, 374—lost pension benefits may be calculated as part of "front pay"]

[17:152.1] ***PRACTICE POINTER:*** *Expert testimony is usually required* to establish the extent of lost pension or other deferred compensation benefits. Plaintiff's own testimony may not suffice to establish how long he or she is likely to have worked, how salaries would have increased, what choices would have been made with respect to pension benefits, and life expectancy. [See *Donlin v. Philips Lighting North America Corp.* (3rd Cir. 2009) 581 F3d 73, 82-84]

(8) [17:153] **Lost stock options:** A wrongfully discharged employee who was entitled to participate in the employer's stock option plan (e.g., having been awarded options to purchase a specified number of shares of employer's stock at the end of each employment year) is entitled to compensation for the lost stock option rights. [*Scully v. US WATS, Inc.* (3rd Cir. 2001) 238 F3d 497, 506-507 (applying federal, New York, and Pennsylvania law); *Haft v. Dart Group Corp.* (D DE 1995) 877 F.Supp. 896, 903 (decided under Delaware law)]

(a) [17:154] **Calculating loss:** Calculating the employee's loss is difficult because it cannot be known whether and when the employee would have exercised such options if they had been issued. Courts have basically taken two different approaches either of which or a combination of which may be used in a particular case. [See *Scully v. US WATS, Inc.*, supra, 238 F3d at 510-512 (same result under federal, New York and Pennsylvania law)]

1) [17:155] **Conversion approach:** One approach measures plaintiff's lost profit by comparing the stock option's exercise price to the *higher* of:

— the stock's value when plaintiff was wrongfully discharged (i.e., the date of conversion); or

— the highest intermediate stock price between the date of discharge and a reasonable time thereafter during which the stock could have been replaced. [See *Schultz v. Commodity Futures Trading Comm'n* (2nd Cir. 1983)

716 F2d 136, 139-141; *Haft v. Dart Group Corp.,* supra, 877 F.Supp. at 902]

This approach allows a plaintiff who was wrongly denied a stock option a limited recovery for his or her lost opportunity to enjoy a reduced risk of loss and a greater likelihood of profit. [*Scully v. US WATS, Inc.*, supra, 238 F3d at 510-512]

2) [17:156] **Breach of contract approach:** Another approach measures plaintiff's lost profit simply by the difference between the stock option's exercise price and the market price of the same stock at the time of breach. [*Scully v. US WATS, Inc.*, supra, 238 F3d at 512]

According to one court, this approach avoids "the speculativeness and hindsight problems attendant to the conversion theory" (¶*17:155*). [*Scully v. US WATS, Inc.*, supra, 238 F3d at 512]

a) [17:157] **Comment:** The criticism of the contract approach is that if the stock is selling at or near the option price, the wrongfully discharged employee loses any upside potential. The employer thus is arguably "rewarded" for its breach because the employee is not fully compensated for his or her loss. [See *Scully v. US WATS, Inc.*, supra, 238 F3d at 511]

3) [17:157.1] **Combination approach:** A combination of the conversion approach and the breach of contract approach also has been applied. [*Scully v. US WATS, Inc.,* supra, 238 F3d at 508-512—damages calculated by multiplying the number of options by the difference between the options' exercise price and the stock's open market price on date of employee's attempted exercise]

(b) [17:158] **Restricted vs. unrestricted shares:** That the optioned shares are "restricted" (may not be sold until a future date) has been held not to affect the valuation methodology. Measuring damages as of the end of the restricted period would be unduly speculative because there is no way to know whether the employee would have sold the shares at that time or whether the stock price would be higher or lower than its market price at breach date. [*Scully v. US WATS, Inc.*, supra, 238 F3d at 513 (same result under federal, New York and Pennsylvania law)]

(9) [17:159] **Relocation costs:** The costs a wrongfully discharged employee incurs in relocating to find

other employment may be treated as detriment "proximately caused" by the employer's breach within the meaning of Civ.C. §3300.

Although no known California authority exists on this question, such recovery has been permitted in other states. [See *Graffius v. Control Data Corp.* (Minn. Ct. App. 1989) 447 NW2d 215, 217—discharged plaintiff entitled to compensation for moving expenses incurred as direct result of wrongful termination]

[17:160-169] *Reserved.*

e. [17:170] **Limitations and offsets to backpay:** The amount of any backpay award may be reduced by a variety of payments or benefits the wrongfully discharged employee received.

Defendant has the burden of showing that an otherwise appropriate backpay award should be limited. [*Richardson v. Restaurant Mktg. Assocs., Inc.* (ND CA 1981) 527 F.Supp. 690, 697; *SASCO Elec. v. California Fair Employment & Housing Comm'n* (2009) 176 CA4th 532, 543, 97 CR3d 482, 491]

(1) [17:171] **Severance pay:** Backpay awards must be reduced by the amount of any severance or separation pay plaintiff receives from the defendant employer. [*Ryan v. Raytheon Data Sys. Co.* (D MA 1984) 601 F.Supp. 243, 253; *Berndt v. Kaiser Aluminum & Chem. Sales, Inc.* (ED PA 1985) 604 F.Supp. 962, 964, aff'd (3rd Cir. 1986) 789 F2d 253; *Grundman v. Trans World Airlines, Inc.* (SD NY 1990) 54 FEP 224]

(2) [17:172] **Reduction for absenteeism?** According to some courts, the backpay award to a plaintiff with a record of absenteeism should be offset by the estimated period plaintiff would have been absent. [*Syvock v. Milwaukee Boiler Mfg. Co., Inc.* (7th Cir. 1981) 665 F2d 149, 161 (overruled on other grounds by *Coston v. Plitt Theatres, Inc.* (7th Cir. 1988) 860 F2d 834)—plaintiff's backpay award discounted to account for plaintiff's 12% absenteeism rate]

(3) [17:173] **Reduction for periodic layoffs:** The backpay award to a plaintiff whose employment was subject to periodic layoffs should be reduced by the percentage of the year that plaintiff would not have been working because of such layoffs. [*Johnson v. Ryder Truck Lines, Inc.* (WD NC 1980) 30 FEP 659—plaintiff was an "extra board" truck driver who lacked seniority and therefore would have been laid off periodically throughout year]

(4) [17:173.1] **Reduction for inability to work:** A backpay award may be reduced by an amount representing the period of time a wrongfully discharged (or demoted) employee was unable to work due to a non-job related illness

or disability. [See *Davis v. Los Angeles Unified School Dist. Personnel Comm'n* (2007) 152 CA4th 1122, 1134, 62 CR3d 69, 77 (employee wrongfully demoted)]

(5) [17:174] **Compensation from other employment:** Courts uniformly reduce backpay awards by the amount of any wages, paid vacations, sick pay, and other fringe benefits plaintiff obtains on a new job. [See *Naton v. Bank of Calif.* (9th Cir. 1981) 649 F2d 691, 700; *Tanner v. California Physicians' Service* (ND CA 1978) 27 FEP 593—fringe benefits of new job offset if fringe benefits of old job are included in damages sought]

(a) [17:174.1] **Compare—inferior employment:** Wages earned at an inferior job do not need to be used to mitigate damages "because doing so would result in senselessly penalizing an employee who, either because of an honest desire to work or a lack of financial resources, is willing to take whatever employment he can find." [*Villacorta v. Cemex Cement, Inc.* (2013) 221 CA4th 1425, 1433, 165 CR3d 441, 447 (internal quotes omitted) (*discussed at ¶17:515.2*)]

(6) [17:175] **Retirement benefits:** Courts differ on whether a backpay award must be reduced by post-termination retirement or pension benefits a wrongfully discharged employee receives from the employer (see *Mize-Kurzman v. Marin Comm. College Dist.* (2012) 202 CA4th 832, 873, 136 CR3d 259, 294 (citing text)):

- [17:176] One view is that because the purpose of a backpay award is to restore the employee to the status quo, pension benefits *should be deducted* from the award, since plaintiff would not have received such payments had he or she not been discharged. [*McMahon v. Libbey-Owens-Ford Co.* (6th Cir. 1989) 870 F2d 1073, 1079; see *Cline v. Roadway Express, Inc.* (4th Cir. 1982) 689 F2d 481, 490—where plaintiff received full amount of stock credited to his retirement account on discharge, backpay was reduced by value of stock at time of transfer to prevent "windfall" to plaintiff; *Mize-Kurzman v. Marin Comm. College Dist.*, supra, 202 CA4th at 873, 136 CR3d at 294 (citing text)]
- [17:177] Other courts *refuse* any deduction for payments from pension and retirement plans. According to these courts, plaintiff should not have to exhaust retirement benefits to which he or she was entitled when "but for the unlawful termination [he or] she would have received regular wages." [*Blake v. J.C. Penney Co., Inc.* (8th Cir. 1990) 894 F2d 274,

282; *Davis v. Odeco, Inc.* (5th Cir. 1994) 18 F3d 1237, 1244—because employee contractually entitled to fringe benefits, reducing backpay award would provide employer with "undeserved windfall"; see *Mize-Kurzman v. Marin Comm. College Dist.*, supra, 202 CA4th at 877, 136 CR3d at 297 (citing text) (opining that court would be required to exclude evidence of retirement benefits as collateral source)]

(a) [17:178] **Eligibility for retirement benefits:** Where a discharged employee could have retired and received retirement benefits, but did not, evidence of retirement eligibility and related income is inadmissible under the collateral source rule. Retirement benefits are a collateral source, even if they derive directly from employment with the defendant employer. [*Mize-Kurzman v. Marin Comm. College Dist.*, supra, 202 CA4th at 877-878, 136 CR3d at 297-298]

[17:179] *Reserved.*

(7) [17:180] **Governmental benefits:** Anti-discrimination statutes typically authorize awards of "such legal or equitable relief as may be *appropriate* to effectuate the purposes" of the statute (e.g., ADEA, 29 USC §626(b) (emphasis added) (held unconstitutional on other grounds by *Kimel v. Florida Bd. of Regents* (2000) 528 US 62, 120 S.Ct. 631); ¶*17:10*). It is unsettled whether it is "appropriate" to reduce backpay awards by the amount of governmental benefits plaintiff receives (e.g., social security, unemployment insurance, disability insurance, welfare benefits, etc.).

(a) [17:181] **Impact of "collateral source" rule:** Most courts hold that benefits an injured party receives from a source *wholly independent of the wrongdoer* (a "collateral source"—e.g., unemployment insurance benefits) should not be deducted from damages. [See *Naton v. Bank of Calif.* (9th Cir. 1981) 649 F2d 691, 699 (recognizing rule, but not reaching issue); *Hamlin v. Charter Township of Flint* (6th Cir. 1999) 165 F3d 426, 435—disability pension benefits from source independent of employer did not reduce front pay award against employer under ADA; *Doyne v. Union Elec. Co.* (8th Cir. 1992) 953 F2d 447, 451-452—pension payments received from source independent of employer did not reduce front pay award against employer in age discrimination case; see also *Mize-Kurzman v. Marin Comm. College Dist.*, supra, 202 CA4th at 874, 136 CR3d at 294 (citing text)]

1) [17:182] **Compare—payments attributable to defendant:** The collateral source rule generally does not apply, however, when the payment comes from the defendant or a source identified with defendant (e.g., disability insurance benefits provided by employer). In such cases, any payments plaintiff receives must be used to offset defendant's liability because "it is as if the tortfeasor himself paid." [*Green v. Denver & Rio Grande Western R.R. Co.* (10th Cir. 1995) 59 F3d 1029, 1032; but see *Mize-Kurzman v. Marin Comm. College Dist.*, supra, 202 CA4th at 874, 877-878, 136 CR3d at 294, 297-298 (citing text)—retirement benefits are collateral source even though derived directly from employment with defendant employer]

2) [17:183] **Factors considered:** In determining whether benefits are from a "collateral" source, courts consider whether:
   — the employee personally contributed to fund the plan;
   — the plan arises under a collective bargaining agreement;
   — the plan covers both work-related and nonwork-related injuries;
   — payments from the plan are contingent upon the employee's length of service; and
   — the plan itself contemplates a setoff of benefits paid against recovery in a tort action or other proceedings. [See *Hamlin v. Charter Township of Flint* (6th Cir. 1999) 165 F3d 426, 435]

(b) **Unemployment insurance**

1) [17:184] **State courts:** California trial courts routinely hold that unemployment insurance benefits constitute a collateral source and may not be deducted from damages in a wrongful termination action. [*Mize-Kurzman v. Marin Comm. College Dist.*, supra, 202 CA4th at 876, 136 CR3d at 296; see *Monroe v. Oakland Unified School Dist*. (1981) 114 CA3d 804, 810-812, 170 CR 867, 870-871]

2) [17:184.1] **Federal courts:** There appears to be a split of opinion in the Ninth Circuit whether such benefits can be offset, largely rooted in the fact that the employer contributes at least indirectly to such benefits. [See *Kauffman v. Sidereal Corp.* (9th Cir. 1983) 695 F2d 343, 347—

unemployment benefits not offset; compare *Naton v. Bank of Calif.* (9th Cir. 1981) 649 F2d 691, 699 (recognizing district court has discretion whether to deduct benefits); see generally *McLean v. Runyon* (9th Cir. 2000) 222 F3d 1150, 1156, fn. 7 (collecting cases)—9th Circuit "precedent is not absolutely clear as to whether a district court has discretion to deduct collateral benefits from a damages award under Title VII"]

Other federal courts likewise disagree whether unemployment benefits are a "collateral source."

a) [17:185] **View rejecting offset:** Some federal courts hold unemployment benefits received by a successful employment discrimination plaintiff are *not* offsets against a backpay award. [See, e.g., *Rasimas v. Michigan Dept. of Mental Health* (6th Cir. 1983) 714 F2d 614, 627; *Brown v. A.J. Gerrard Mfg. Co.* (11th Cir. 1983) 715 F2d 1549, 1550 (per curiam)—"as a matter of law," state-funded unemployment benefits not deductible from Title VII backpay award; *Craig v. Y & Y Snacks, Inc.* (3rd Cir. 1983) 721 F2d 77, 85]

   1/ [17:186] **Rationale:** Allowing such deduction would relieve the employer of its obligation to make the wrongfully discharged plaintiff whole, and would force plaintiffs to exhaust benefits they otherwise might have used in the future. [See *Craig v. Y & Y Snacks, Inc.*, supra, 721 F2d at 84]

b) [17:187] **View that offset discretionary:** Other cases hold that even if such payments come from a "collateral source," the court has *discretion* to deduct the amount received from any award of backpay. [See *Guthrie v. J.C. Penney Co., Inc.* (5th Cir. 1986) 803 F2d 202, 209-210]

c) [17:188] **Comment—Supreme Court analysis:** The U.S. Supreme Court has arguably determined it is within the trial court's discretion to allow or disallow deduction of unemployment compensation benefits from a backpay award. In *Albemarle Paper Co. v. Moody* (1975) 422 US 405, 419, 95 S.Ct. 2362, 2372, the court noted that Title VII's backpay provision is expressly modeled on

the National Labor Relations Act's backpay provision; and in interpreting the latter provision, has held the NLRB did not abuse its discretion in refusing to deduct unemployment benefits from a backpay award. [*NLRB v. Gullett Gin Co.* (1951) 340 US 361, 364, 71 S.Ct. 337, 339; see *Kauffman v. Sidereal Corp.*, supra, 695 F2d at 347 (addressing interplay of *Albemarle* and *Gullett Gin*)]

(c) [17:189] **Disability benefits:** Disability benefits paid to an employee from a policy whose premiums are paid by the plaintiff alone, with no contribution from the employer, generally constitute a collateral source. Thus, such benefits may not reduce the employer's liability for lost wages. [*Whatley v. Skaggs Cos., Inc.* (10th Cir. 1983) 707 F2d 1129, 1138; see *Helfend v. Southern Calif. Rapid Transit Dist.* (1970) 2 C3d 1, 9-10, 12-13, 84 CR 173, 178-179, 181 (medical insurance payments)]

However, if the employer paid or contributed to the policy premiums, the benefits received may serve as an offset. [See *Helfend v. Southern Calif. Rapid Transit Dist.*, supra, 2 C3d at 6, 84 CR at 175—"if an injured party receives some compensation for his injuries from a source *wholly independent* of the tortfeasor, such payment should not be deducted from the damages" (emphasis added); *Rotolo Chevrolet v. Sup.Ct. (Staudt)* (2003) 105 CA4th 242, 247, 129 CR2d 283, 286—plaintiff "is not entitled to characterize the disability pension payments he receives from his employer as a collateral source replacing regular pension payments that he would have received from his employer"]

It is unclear whether California State Disability Insurance benefits (the premiums for which are, by law, withheld from employee earnings by employers) may offset damages. [See *Mayer v. Multistate Legal Studies, Inc.* (1997) 52 CA4th 1428, 1435-1436, 61 CR2d 336, 340, fn. 3 (accepting plaintiff's concession to offset state disability benefits but noting that similar benefits, such as unemployment benefits, "are not to be deducted from damages in wrongful termination actions"]

(d) [17:190] **Welfare benefits:** It is not clear whether public assistance benefits should be deducted from a backpay award.

- [17:191] One case holds welfare benefits may not be treated as a nondeductible "collateral

source" because plaintiff made no payments into a special fund to provide for those benefits. Accordingly, backpay was reduced by welfare payments received under a state statute treating such payments as a loan by the state to the recipient. [*Dillon v. Coles* (3rd Cir. 1984) 746 F2d 998, 1007; but see *EEOC v. O'Grady* (7th Cir. 1988) 857 F2d 383, 390—"The *Dillon* court allowed a narrow exception to the no-offset rule when a state defendant may recoup benefits under a state statute . . . Where a state defendant may not recoup such funds, however, the back pay award may not be offset"]

(e) [17:192] **Social Security:** Courts disagree on whether Social Security benefits should be deducted from a backpay award or whether they are nondeductible under the "collateral source" rule.

In California and some other jurisdictions, Social Security benefits are a "classic collateral source" and may not be deducted from a backpay award. [*McKinney v. California Portland Cement Co.* (2002) 96 CA4th 1214, 1226, 117 CR2d 849, 857 (benefits paid to decedent's spouse); *Maxfield v. Sinclair Int'l* (3rd Cir. 1985) 766 F2d 788, 795—Social Security benefits should not be deducted because "[t]here are no significant discernible differences between Social Security benefits, unemployment benefits and pension benefits"]

Other courts treat the matter as within the trial court's discretion. [See *Flowers v. Komatsu Mining Systems, Inc.* (7th Cir. 1999) 165 F3d 554, 558—court has discretion whether to deduct social security disability payments from ADA backpay award; *Guthrie v. J.C. Penney Co., Inc.* (5th Cir. 1986) 803 F2d 202, 209—within court's discretion not to deduct social security benefits from ADEA backpay award; *EEOC v. Wyoming Retirement System* (10th Cir. 1985) 771 F2d 1425, 1431-1432—court did not abuse discretion in deducting social security benefits from backpay award to avoid "burden[ing] the public treasury to provide a windfall to the plaintiffs"]

(f) [17:193] **Workers' compensation benefits:** A disabled worker who is wrongfully discharged may seek both workers' compensation benefits and a backpay award against the employer. No deduction from backpay is allowed for workers' compensation benefits paid while plaintiff was *unable to work.* But, consistent with the rule that an employee must *mitigate*

damages (¶*17:490 ff.*), a deduction is proper for any portion of such benefits that represents salary or wages plaintiff *could have* earned when able to return to work. [See *Bevli v. Brisco* (1989) 211 CA3d 986, 994, 260 CR 57, 62; see also *Moysis v. DTG Datanet* (8th Cir. 2002) 278 F3d 819, 828]

[17:194-198] *Reserved.*

(8) [17:199] **Undocumented workers?** The policy expressed in federal immigration law precludes the NLRB from awarding backpay to undocumented aliens who are not legally authorized to work in the United States. [*Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 US 137, 149, 122 S.Ct. 1275, 1283—workers laid off after supporting union-organizing campaign]

Although *Hoffman* deals only with NLRB remedies, the EEOC has announced that it will no longer seek reinstatement or backpay for undocumented workers for periods after discharge. (This does not, however, affect the EEOC's enforcement of federal anti-discrimination laws that otherwise protect undocumented workers.) [EEOC Directives Transmittal No. 915.002, 6/27/02]

But payment for *work performed* is still governed by federal wage and hour laws. Moreover, state labor and employment laws may be enforceable *regardless* of an employee's immigration status. *See discussion at* ¶*11:1224 ff.*

(9) [17:200] **Tax withholding:** The employer is required to withhold sums for social security taxes (FICA) and income taxes from a backpay award to a former employee. Even though an employer-employee relationship no longer exists, the award constitutes "remuneration for employment," or "wages" (26 CFR §31.3121(a)-1(i)), and therefore is subject to tax withholding. [*Rivera v. Baker West, Inc.* (9th Cir. 2005) 430 F3d 1253, 1259; *Gerbec v. United States* (6th Cir. 1999) 164 F3d 1015, 1026; *see detailed discussion at* ¶*17:850 ff.*]

[17:201] *Reserved.*

f. [17:202] **Events terminating backpay:** Any of the following events *might* terminate plaintiff's right to recover backpay:

(1) [17:203] **Expiration of contract term:** In an action based on a *fixed-term* employment contract (e.g., five years), backpay is determined by calculating lost wages over the balance of the contract term (*see* ¶*17:143*). Liability for backpay thus terminates when the contract term expires. [See *Smith v. Brown-Forman Distillers Corp.* (1987) 196 CA3d 503, 518, 241 CR 916, 924—damages awarded until agreed retirement date; *Drzewiecki v. H*

& R Block, Inc. (1972) 24 CA3d 695, 704-705, 101 CR 169, 175—where employment contract provided for *automatic renewal from year to year* as long as employee was performing competently, trial court did not abuse discretion in awarding damages for 10 years from date of wrongful discharge, which was held to be a reasonable period for duration of employment]

(a) [17:204] **Rationale:** "Once there has been a finding of unlawful discrimination, backpay should not be denied for a reason that, if applied generally, would frustrate Title VII's purpose of eradicating discrimination and making whole those who suffer because of it." [*Richardson v. Restaurant Mktg. Assocs., Inc.* (ND CA 1981) 527 F.Supp. 690, 696]

(2) [17:204.1] **Elimination of position:** Likewise, backpay liability generally terminates at the point at which plaintiff's position would have been eliminated for nondiscriminatory reasons. [See *Martinez v. El Paso County* (5th Cir. 1983) 710 F2d 1102, 1106]

(3) [17:205] **Employer out of business:** Absent a fixed employment term, a wrongfully discharged employee's recovery of backpay is cut off when the employer goes out of business, because plaintiff's employment would have terminated in any event at that time. [See *Richardson v. Restaurant Mktg. Assocs., Inc.*, supra, 527 F.Supp. at 697; *Miano v. AC & R Advertising, Inc.* (SD NY 1995) 875 F.Supp. 204, 222]

Similarly, the right to backpay ends when the employer sells its business and terminates all its employees. [*EEOC v. Monarch Machine Tool Co.* (6th Cir. 1980) 737 F2d 1444, 1453]

However, backpay may continue to accrue if a successor corporation is formed. [*Slack v. Havens* (9th Cir. 1975) 522 F2d 1091, 1095 (superseded by statute on other grounds as recognized by *Yartzoff v. Reilly* (9th Cir. 1994) 42 F3d 1405)] In that event, the successor corporation has the burden to establish that its predecessor in interest complied with applicable wage order requirements. [*Maldonado v. Epsilon Plastics, Inc.* (2018) 22 CA5th 1308, 1327, 232 CR3d 461, 474-475]

(4) [17:205.1] **Employee ineligible for employment:** The backpay period ends "if the plaintiff dies, retires, or otherwise is not eligible for employment or reinstatement." [*EEOC v. Monarch Machine Tool Co.*, supra, 737 F2d at 1453]

(5) [17:206] **Employer's unconditional offer of reinstatement:** Plaintiff has a *duty to mitigate damages* flowing from the employer's wrongful acts, and failure to do so may terminate the employer's liability for backpay (*see ¶17:490 ff.*). Thus, "[a]bsent special circumstances, rejection of an employer's unconditional job offer ends the accrual of potential backpay liability." [*Ford Motor Co. v. EEOC* (1982) 458 US 219, 241, 102 S.Ct. 3057, 3070—involving Title VII claims, but consistent with California law; *Albert v. Smith's Food & Drug Ctrs., Inc.* (10th Cir. 2004) 356 F3d 1242, 1253-1254; see *Boehm v. American Broadcasting Co., Inc.* (9th Cir. 1991) 929 F2d 482, 485]

(a) [17:207] **Unconditional:** To have this effect, the employer's offer of reinstatement must be unconditional. [See *Ford Motor Co. v. EEOC*, supra, 458 US at 232, 102 S.Ct. at 3066, fn. 18]

Whether the offer is unconditional for mitigation purposes is a question for the trier of fact. [*Pierce v. F.R. Tripler & Co.* (2nd Cir. 1992) 955 F2d 820, 830]

- [17:208] A reinstatement offer that *requires settlement* of any part of plaintiff's claim against the employer is not unconditional and does not cut off backpay. [*Odima v. Westin Tucson Hotel* (9th Cir. 1995) 53 F3d 1484, 1496-1497]

(b) [17:209] **Substantially equivalent job:** The former employer must prove that the reinstatement offer is for a job "substantially equivalent to the position from which [the plaintiff] was wrongfully discharged." [*Boehm v. American Broadcasting Co., Inc.*, supra, 929 F2d at 485-487—jury found that newly-created job requiring wrongfully discharged executive *to report to the person who had replaced him* was *not* "substantially equivalent" to former job]

Jobs are not "substantially equivalent" merely because they offer similar salaries; they must be in the *same specific line of work*. [*Floca v. Homcare Health Services, Inc.* (5th Cir. 1988) 845 F2d 108, 111]

(c) [17:210] **Reasonableness of refusal as fact question:** "Special circumstances" may justify the employee's refusal to accept reinstatement. The trier of fact must consider the circumstances under which the reinstatement offer was made in determining the reasonableness of the employee's refusal. [*Ortiz v. Bank of America Nat'l Trust & Sav. Ass'n* (9th Cir. 1987) 852 F2d 383, 386-387; *Abuan v. Level 3 Communications, Inc.* (10th Cir. 2003) 353 F3d 1158, 1176-1178]

- [17:211] Plaintiff's refusal to accept employer's reinstatement offer did not cut off her right to backpay where doctors testified she should never work again for this employer and the jury found her mental condition made reinstatement an *unreasonable* alternative. [*Ortiz v. Bank of America Nat'l Trust & Sav. Ass'n*, supra, 852 F2d at 386]
- [17:211.1] Plaintiff's reluctance to accept reinstatement in a new position, ultimately leading to employer's withdrawing reinstatement offer, was reasonable in view of the animosity that developed between plaintiff and employer resulting from the lawsuit. Hence, the trial court did not abuse its discretion in concluding that reinstatement was not feasible. [*Abuan v. Level 3 Communications, Inc.*, supra, 353 F3d at 1176-1178 (case involved front pay but same principles applied to backpay)]

(6) [17:212] **Effect of failure to retain new job?** Courts differ on whether plaintiff is entitled to recover backpay after termination of a subsequent employment:

- [17:213] Some courts hold, as a matter of law, that if plaintiff either voluntarily quits or is fired from a new job for cause, the amounts plaintiff *could* have earned on the new job should be deducted from any backpay award. [See *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 CA4th 1495, 1502-1503, 44 CR2d 565, 568; *J.H. Rutter Rex Mfg. Co., Inc. v. NLRB* (5th Cir. 1973) 473 F2d 223, 241]
- [17:213.1] One court held that termination for cause from a later job cut off damages from the original wrongful termination by breaking the chain of causation. [See *Alexander v. Community Hosp. of Long Beach* (2020) 46 CA5th 238, 266-267, 259 CR3d 340, 366-367—damages suffered by plaintiffs after being fired from subsequent comparable employment were caused not by original wrongful termination but by state's decision to prosecute them for alleged conduct that was part of basis for original termination]
- [17:214] Other courts state the defendant employer's backpay liability continues if the subsequent employment terminates *without compelling or justifying reasons*. [*EEOC v. Delight Wholesale Co.* (8th Cir. 1992) 973 F2d 664, 670—"a voluntary quit does not toll the backpay period when it is motivated by unreasonable working conditions or an earnest search for better employment"; *Brady v. Thurston Motor Lines, Inc.* (4th Cir. 1985) 753 F2d 1269, 1278-1280]

- [17:214.1] Another court has held an employee entitled to backpay even if *fired for misconduct* on the new job: "Had there been no discrimination at employer A, the employee would never have come to work (or have been fired) from employer B." [*Johnson v. Spencer Press of Maine, Inc.* (1st Cir. 2004) 364 F3d 368, 381-383]

Cross-refer: Mitigation of damages is discussed further at ¶*17:490 ff.*

g. [17:215] **Additional award to cover negative tax consequences of lump-sum backpay award?** To accomplish the "make whole" purpose of backpay awards (¶*17:136*), some courts in their discretion may award an additional amount to cover the higher income tax plaintiff must pay on receipt of a lump-sum payment (putting plaintiff in a higher tax bracket than if paid in due course). [*Clemens v. Centurylink Inc.* (9th Cir. 2017) 874 F3d 1113, 1116-1117; see *Eshelman v. Agere Systems, Inc.* (3rd Cir. 2009) 554 F3d 426, 443—$6,893 awarded to compensate for higher taxes payable on receipt of $170,000 backpay award; see also *Sears v. Atchison, Topeka & Santa Fe Ry., Co.* (10th Cir. 1984) 749 F2d 1451, 1456—tax component appropriate where protracted nature of litigation resulted in plaintiff receiving 17 years of backpay in one lump sum; *EEOC v. Joe's Stone Crab, Inc.* (SD FL 1998) 15 F.Supp.2d 1364, 1380]

Other courts refuse to enhance backpay to cover increased tax liability resulting from a lump-sum award. [*Dashnaw v. Pena* (DC Cir 1994) 12 F3d 1112, 1116 (superseded by statute on other grounds as recognized by *Rann v. Chao* (DC Cir. 2003) 346 F3d 192); *Hukkanen v. International Union of Operating Engineers, Hoisting & Portable Local No. 101* (8th Cir. 1993) 3 F3d 281, 287; *Best v. Shell Oil Co.* (ND IL 1998) 4 F.Supp.2d 770, 776; see *Bryant v. Aiken Regional Med. Ctrs., Inc.* (4th Cir. 2003) 333 F3d 536, 549, fn. 5—no abuse of discretion in denying additional award; see *Barber v. California State Personnel Bd.* (2019) 35 CA5th 500, 518, 247 CR3d 474, 486—employee was not entitled to equitable relief of increased tax liability recovery because such relief was not authorized under statute pertaining to public-sector employees]

[17:216-219] *Reserved.*

5. [17:220] **Loss of Future Earnings ("Front Pay"):** Damages may include, in addition to backpay, an award of the salary and benefits a wrongfully discharged plaintiff would have earned from the employment *after* the trial. [*Mize-Kurzman v. Marin Comm. College Dist.* (2012) 202 CA4th 832, 873, 136 CR3d 259, 293-294, fn. 17 (citing text); see *Pollard v. E.I. du Pont de Nemours & Co.* (2001) 532 US 843, 848, 121 S.Ct. 1946, 1949; *Smith v. Brown-Forman Distillers Corp.* (1987) 196 CA3d 503, 518, 241 CR 916,

924] (Backpay, by contrast, covers such losses *before* judgment; *see* ¶*17:135 ff.*)

[17:220.1] ***PRACTICE POINTER:*** *Expert testimony is usually required* to support a front pay award. Plaintiff's own testimony will not suffice unless he or she has the specialized knowledge or training to perform "forward-looking speculation" as to annual pay raises or pension benefits, or to calculate "present-value discounting," or to interpret "life expectancy charts." [See *Donlin v. Philips Lighting North America Corp.* (3rd Cir. 2009) 581 F3d 73, 83]

a. [17:221] **Nature of remedy:** "A front pay . . . award is the monetary equivalent of the equitable remedy of reinstatement." [*Pollard v. E.I. du Pont de Nemours & Co.*, supra, 532 US at 853, 121 S.Ct. at 1952, fn. 3 (internal quotes omitted); *see discussion at* ¶*7:1130 ff.*]

(1) [17:222] **Reinstatement as preferred remedy:** Front pay may be awarded *only when reinstatement is inappropriate,* such as when there is no position available or hostility pervades the employer-employee relationship (*see* ¶*17:211.1*). [*Traxler v. Multnomah County* (9th Cir. 2010) 596 F3d 1007, 1012—while reinstatement is preferred, "sometimes it simply isn't practical"; *Passantino v. Johnson & Johnson Consumer Products, Inc.* (9th Cir. 2000) 212 F3d 493, 512—"Front pay may be awarded whenever the antagonism between the plaintiff and her employer is such that it would be inappropriate to expect her to return to work"; *Kucia v. Southeast Ark. Comm. Action Corp.* (8th Cir. 2002) 284 F3d 944, 948—front pay awarded "in situations where reinstatement is impracticable or impossible"]

[17:223-224] *Reserved.*

(2) [17:225] **Front pay not subject to Title VII damages caps:** As an equitable remedy, front pay is not an element of "compensatory damages" under 42 USC §1981a and therefore is not subject to the §1981a(b)(3) caps on compensatory and punitive damages (*see* ¶*17:296*). [*Pollard v. E.I. du Pont de Nemours & Co.* (2001) 532 US 843, 848, 121 S.Ct. 1946, 1949]

(a) [17:226] **Rationale:** Although in the abstract front pay might be considered compensation for future pecuniary loss, legislative history makes clear that Congress did not intend to limit the availability of such awards in §1981a. [*Pollard v. E.I. du Pont de Nemours & Co.*, supra, 532 US at 852-853, 121 S.Ct. at 1951-1952]

(3) [17:227] **Compare—lost earning capacity:** In addition to "front pay," Title VII authorizes an award for lost earning

capacity (which is a "nonpecuniary loss" within the meaning of 42 USC §1981a(b)(3) and hence subject to damage caps; *see* ¶*17:296*).

To recover for lost earning capacity, plaintiff must produce competent evidence suggesting that his or her injuries "have *narrowed the range of economic opportunities available* to him [or her]." Plaintiff must show the injury has caused "a diminution in his [or her] ability to earn a living." [*Williams v. Pharmacia, Inc.* (7th Cir. 1998) 137 F3d 944, 952 (emphasis added)]

(a) [17:228] **Different injuries:** The two awards compensate for different injuries:

- *Front pay* gives the employee the earnings he or she would have received *from the defendant employer* had the employee been reinstated to his or her *old job* or for the likely period of time it will take to secure comparable employment;
- The award for *lost earning capacity* "compensates [plaintiff] *for a lifetime of diminished earnings* [from other employers] resulting from the *reputational harms* [he or] she suffered as a result of [employer's] discrimination." [*Williams v. Pharmacia, Inc.,* supra, 137 F3d at 953 (emphasis added)]

[17:229] *Reserved.*

b. [17:230] **Determined by judge in federal court:** As a remedy "in lieu of reinstatement," front pay is an *equitable remedy* determined by the court, not the jury, in statutory employment discrimination actions in federal courts. [*Traxler v. Multnomah County* (9th Cir. 2010) 596 F3d 1007, 1011; see *Mize-Kurzman v. Marin Comm. College Dist.* (2012) 202 CA4th 832, 873, 136 CR3d 259, 293-294, fn. 17 (citing text)]

The trial judge is given considerable discretion in determining both whether, and how much, front pay should be awarded. [*Traxler v. Multnomah County*, supra, 596 F3d at 1011; *Rodriguez-Torres v. Caribbean Forms Manufacturer, Inc.* (1st Cir. 2005) 399 F3d 52, 67; *Abuan v. Level 3 Communications, Inc.* (10th Cir. 2003) 353 F3d 1158, 1176-1177; *EEOC v. W&O, Inc.* (11th Cir. 2000) 213 F3d 600, 618]

According to some cases, the trial court must "*temper the use of front pay* by recognizing the potential for windfall to the plaintiff." [*Dotson v. Pfizer, Inc.* (4th Cir. 2009) 558 F3d 284, 300 (emphasis added; internal quotes omitted); *Caudle v. Bristow Optical Co., Inc.* (9th Cir. 2000) 224 F3d 1014, 1020]

(1) [17:231] **Compare—California courts:** In FEHA actions, front pay has been treated as a damage issue for the

trier of fact, which "must determine the amount and extent of back pay and front pay necessary to make [plaintiff] whole." [*Cloud v. Casey* (1999) 76 CA4th 895, 910, 90 CR2d 757, 766-767; see *Mize-Kurzman v. Marin Comm. College Dist.*, supra, 202 CA4th at 873, 136 CR3d at 293-294, fn. 17 (citing text)]

[17:232-234] *Reserved.*

c. [17:235] **Measure:** Front pay is intended to be a transitional remedy that is *temporary* in nature and measured by the employee's projected earnings and benefits over the period of time until he or she is *likely to become reemployed* or *likely to retire*, if reemployment is unlikely. [*Mize-Kurzman v. Marin Comm. College Dist.*, supra, 202 CA4th at 873, 136 CR3d at 293-294, fn. 17 (citing text); see *Williams v. Pharmacia, Inc.* (7th Cir. 1998) 137 F3d 944, 954—plaintiff "entitled to front pay only until such time that the employee can reasonably be expected to have moved on to similar or superior employment"; *Anastasio v. Schering Corp.* (3rd Cir. 1988) 838 F2d 701, 709-710—front pay measured by period of time until plaintiff likely to retire]

The U.S. Supreme Court has cited with apparent approval lower court cases upholding front pay awards "equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of the judgment *and the time when the employee can assume his new position*." [*Pollard v. E.I. du Pont de Nemours & Co.*, supra, 532 US at 850, 121 S.Ct. at 1950 (emphasis added; internal quotes omitted)]

The amount awarded may also reflect the *cost of training or relocating* to obtain another position. [See *Caudle v. Bristow Optical Co., Inc.* (9th Cir. 2000) 224 F3d 1014, 1020]

(1) [17:236] **Limitation—plaintiff's duty to mitigate damages:** An award of front pay in lieu of reinstatement "does not contemplate that a plaintiff will sit idly by and be compensated for doing nothing, because the duty to mitigate damages by seeking employment elsewhere significantly limits the amount of front pay available." [*Whittlesey v. Union Carbide Corp.* (2nd Cir. 1984) 742 F2d 724, 728; *Cassino v. Reichhold Chemicals, Inc.* (9th Cir. 1987) 817 F2d 1338, 1347; *Anastasio v. Schering Corp.,* supra, 838 F2d at 709—purpose is not to guarantee every plaintiff "an annuity to age 70"; *Suggs v. ServiceMaster Ed. Food Mgmt.* (6th Cir. 1996) 72 F3d 1228, 1234—front pay not meant to be a "windfall"]

(2) [17:237] **Relevant factors:** A claimant's work and life expectancy are pertinent factors in calculating front pay. [*Mize-Kurzman v. Marin Comm. College Dist.*, supra, 202 CA4th at 873, 136 CR3d at 293-294, fn. 17 (citing text); see *Anastasio v. Schering Corp.,* supra, 838 F2d at 709]

Plaintiff's age is also an important factor, of course. But many other factors bear on plaintiff's reemployment potential, including "work life expectancy, salary and benefits at the time of termination, any potential increase in salary through regular promotions and cost of living adjustment, the reasonable availability of other work opportunities, the period within which the plaintiff may become re-employed with reasonable efforts, and methods to discount any award to net present value." [*McInnis v. Fairfield Communities, Inc.* (10th Cir. 2006) 458 F3d 1129, 1146 (internal quotes omitted)]

(a) [17:238] **Projected earnings from new job:** That plaintiff may earn more from a new job than he or she was earning at the time of the wrongful discharge does not automatically bar an award of future damages, because plaintiff may have received promotions and salary increases had he or she not been terminated at the former employment. This issue is for the trier of fact. [*Nelson v. United Technologies* (1999) 74 CA4th 597, 616, 88 CR2d 239, 252]

[17:239-244] *Reserved.*

(3) [17:245] **Work expectancy:** Plaintiff's work expectancy may depend on his or her employment contract as well as the employer's solvency:

(a) [17:246] **Fixed-term contracts:** Where the parties have agreed on employment for a specified period of time, plaintiff may recover for lost earnings through the remaining term of the contract. [See *Smith v. Brown-Forman Distillers Corp.* (1987) 196 CA3d 503, 518, 241 CR 916, 924—affirming award until retirement date one year beyond trial where the parties had agreed on employment for that period; *Drzewiecki v. H & R Block, Inc.* (1972) 24 CA3d 695, 705, 101 CR 169, 175—awarding future contract damages for 10-year period under written employment agreement expressly providing for automatic renewals]

(b) [17:247] **Contract without definite term:** Where plaintiff proves an express or implied agreement for employment termination only for cause, but no fixed length of employment exists, damages are based on projected earnings over the *period of time plaintiff is likely to have remained employed*, as determined by the trier of fact. [*Rabago-Alvarez v. Dart Indus., Inc.* (1976) 55 CA3d 91, 97, 127 CR 222, 225 (upholding trial court's finding that 4 years from date of termination was reasonable period for duration of plaintiff's employment with defendant employer); see also *Drzewiecki v. H & R Block, Inc.*, supra, 24

CA3d at 705, 101 CR at 175—evidence of plaintiff's age, physical condition and excellent employment record supported finding plaintiff would have remained with employer another 10 years; *Toscano v. Greene Music* (2004) 124 CA4th 685, 694-695, 21 CR3d 732, 738-739 (*discussed at ¶17:255.3*)]

1) [17:248] **Lifetime front pay upheld under FEHA:** An award of front pay that compensated plaintiff for the remainder of her entire working life has been upheld under California's FEHA. [See *Bihun v. AT&T Information Systems, Inc.* (1993) 13 CA4th 976, 996-997, 16 CR2d 787, 797-798—damage award upheld based on finding that plaintiff would have remained with AT&T "indefinitely" but for sexual harassment (disapproved on other grounds by *Lakin v. Watkins Associated Indus.* (1993) 6 C4th 644, 25 CR2d 109); see also *Hope v. California Youth Auth.* (2005) 134 CA4th 577, 594, 36 CR3d 154, 168—$917,000 award upheld based on evidence that, but for unlawful harassment, plaintiff would have been employed by state until retirement age]

2) [17:248.1] **Lifetime front pay under Title VII?** Federal courts have been cautious about lengthy front pay awards under Title VII. The employee's stated intent to continue working for the employer until retirement does *not* by itself support a front pay award for the remainder of the employee's work life. The court must consider other factors, including the employee's age, the length of time employees in similar positions stay working for that employer and other comparable employers, *the employee's duty to mitigate damages* and the time reasonably required to secure similar employment: "The longer a proposed front pay period, the more speculative the damages become." [*Peyton v. DiMario* (DC Cir. 2002) 287 F3d 1121, 1128-1129 (internal quotes omitted)]

   - [17:248.2] Front pay awards have been considered "unduly speculative" where the discharged employee is in his or her forties. [*Stafford v. Electronic Data Systems Corp.* (ED MI 1990) 749 F.Supp. 781, 789; see also *Peyton v. DiMario,* supra, 287 F3d at 1130]

[17:249] ***PRACTICE POINTER—Arguments pro and con for lifetime front pay:*** Plaintiffs may argue for lifetime front pay based on a factual finding that, but for the defendant employer's unlawful act, employment with

defendant would have continued until plaintiff's retirement or death. In such case, lifetime front pay, *reduced to a present value and subject to estimated future mitigation,* establishes the value of what plaintiff would have received "but for" wrongful termination.

Employers will argue in response that lifetime or extended duration front pay awards violate traditional damage mitigation principles (*see* ¶*17:236*); and that quite apart from mitigation of damages, front pay awards for extended future periods are *speculative* and violate statutes limiting contract damages. [Civ.C. §3301 ("No damages can be recovered for a breach of contract which are not clearly ascertainable both in their nature and origin"); and Civ.C. §3359 ("Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered")]

(4) [17:250] **Job promotion cases:** Where plaintiff suffers discrimination in the context of a promotion, front pay ends "at the time of the first unimpeded promotional opportunity." [*Alexander v. City of Milwaukee* (7th Cir. 2007) 474 F3d 437, 452]

[17:251-254] *Reserved.*

(5) **Application**

- [17:255] Employee was 43 years old with an expected working life of 22 years to normal retirement age of 65. Her salary at the time she was discriminated against was $71,500; but a new employer would pay only between $50,000-60,000. If her career had not been cut short by employer's discrimination, she had a potential for promotion to $94,000, plus cash bonuses, stock bonuses and stock options. The difference between what she earned at the time she was discriminated against (without even considering the pay cut she would have to take on leaving) and what she could have earned over the balance of her expected work life exceeded $2 million. [See *Passantino v. Johnson & Johnson Consumer Products, Inc.* (9th Cir. 2000) 212 F3d 493, 512—upholding $2 million front pay award under Title VII]
- [17:255.1] Plaintiff left his first job and went to work for Defendant, relying on Defendant's fraudulent promise of higher compensation. When paid less

than promised, Plaintiff complained and was fired. He eventually found a third job but it paid less than he was earning at his first job. In a promissory fraud suit against Defendant, Plaintiff recovered front pay equal to the difference between the amount he was earning on his third (current) job and the pay and benefits an economic expert testified he would have received had he remained at his first job until age 61—a period of about *14 years*. These damages were *not speculative or remote* because his first boss testified he was "sad to see him go and would have rehired him except for the company's strict no-rehire policy." [*Helmer v. Bingham Toyota Isuzu* (2005) 129 CA4th 1121, 1128-1131, 29 CR3d 136, 141-144]

Comment: Although his first employer was "sad to see him go and would have rehired him," the plaintiff in *Helmer* was apparently an at-will employee and had no definite expectation he would work for that employer for 14 years. It is unclear therefore on what basis plaintiff's expert concluded he would work there until age 61.

[17:255.2] *Reserved.*

- [17:255.3] Plaintiff quit his at-will job to accept a position with Defendant, but before he arrived, Defendant withdrew its employment offer. Plaintiff could recover on a promissory estoppel theory the wages he would have received at his at-will job. However, front pay for 16 years until his intended retirement was deemed "*too speculative*" because "plaintiff had no definite expectation of continued employment" at his former job for any particular period of time. [*Toscano v. Greene Music* (2004) 124 CA4th 685, 694-697, 21 CR3d 732, 738-741 (remanded for new trial on front pay); *see* ¶*17:273*]

- [17:256] Other cases have limited front pay awards based on findings that plaintiff's employment was *not likely to continue* or that plaintiff was *likely to find a replacement job* within a reasonable period of time. [See *Williams v. Pharmacia, Inc.* (7th Cir. 1998) 137 F3d 944, 953—former employee's front pay award appropriately limited to one year in employment discrimination action, where she would have lost her position by then in any event because of a merger; *Dominic v. Consolidated Edison Co. of New York, Inc.* (2nd Cir. 1987) 822 F2d 1249, 1258—2 years is reasonable time for 48-year-old executive to find comparable position; *Rabago-Alvarez v. Dart Indus., Inc.* (1976) 55 CA3d 91, 97, 127 CR 222, 225-226—4 years of damages permitted

following termination; *Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 CA4th 359, 388, 33 CR3d 644, 666—jury award of 10 years' front pay reduced where employee testified he planned to leave job in 5 years]

[17:257-259] *Reserved.*

[17:260] ***PRACTICE POINTER:*** "Front pay" claims usually engender a battle of experts. Plaintiffs call economists to project the compensation and benefits (including retirement benefits) plaintiffs would have received "but for" the discharge, minus the compensation and benefits to be received from alternative employment. Such projections, if accepted by the jury, can support large awards.

To rebut such testimony, employers usually call experts to attack the calculations of plaintiff's experts, including the underlying assumption that plaintiff would have remained employed indefinitely.

[17:261-269] *Reserved.*

d. **Defenses to "front pay" claims**

(1) [17:270] **Unconditional offer of reinstatement:** Reinstatement, rather than front pay, is the preferred remedy in discrimination cases (*see* ¶*17:46*). Thus, in a discriminatory discharge case, where reinstatement is feasible, the employer's unconditional offer of reinstatement may be a defense to any front pay claim. [See *Ford Motor Co. v. EEOC* (1982) 458 US 219, 241, 102 S.Ct. 3057, 3070 (addressing backpay liability); *Jernigan v. Dalton Mgmt. Co., LLC* (SD NY 2011) 819 F.Supp.2d 282, 292—employee who declined unconditional offer of reinstatement may not be able to recover front pay; but see *Abuan v. Level 3 Communications, Inc.* (10th Cir. 2003) 353 F3d 1158, 1176—reinstatement may not be viable option where, e.g., "an employer's extreme hostility renders a productive and amicable working relationship impossible" or where "the employer-employee relationship has been irreparably damaged by animosity caused by the lawsuit" (internal quotes omitted)]

(2) [17:271] **Enough time for plaintiff to find comparable employment:** Front pay is generally limited to the period of time reasonably necessary for plaintiff to secure alternative comparable employment. [See *Goss v. Exxon Office Systems Co.* (3rd Cir. 1984) 747 F2d 885, 889-891—upholding front pay award of 4 months to cover expected period of job loss; *Berndt v. Kaiser Aluminum & Chem. Sales, Inc.* (3rd Cir. 1986) 789 F2d 253, 255, 261—upholding front pay award of 6 months]

[17:272] ***PRACTICE POINTER:*** Age discrimination plaintiffs may claim front pay until retirement age, arguing that they will be unable to find comparable work due to their age.

The defendant employer may counter by presenting evidence of comparable available employment and, depending on plaintiff's age, empirical data or expert testimony showing that persons of plaintiff's age succeed in finding employment within statistically foreseeable periods of time.

(3) [17:273] **Speculative:** Front pay awards for lengthy time periods may be challenged as being inherently speculative: "The longer a proposed front pay period, the more speculative the damages become." [*Peyton v. DiMario* (DC Cir. 2002) 287 F3d 1121, 1128 (internal quotes omitted); *Rodgers v. Fisher Body Div., General Motors Corp.* (6th Cir. 1984) 739 F2d 1102, 1106-1107—front pay award that included projected income for 13 years reversed as "extremely speculative"; *Toscano v. Greene Music* (2004) 124 CA4th 685, 695-697, 21 CR3d 732, 739-741 (*discussed at ¶17:255.3*); see also *Atkins v. City of Los Angeles* (2017) 8 CA5th 696, 742-743, 214 CR3d 113, 150-151—reversing and remanding future economic damages award as speculative where plaintiffs "failed to provide critical factual support for their expert's assumptions"]

(a) [17:274] **Statutes:** "No damages can be recovered for a breach of contract which are not *clearly ascertainable* in both their nature and origin." [Civ.C. §3301 (emphasis added)]

Moreover, "damages must, in all cases, be *reasonable*." [Civ.C. §3359 (emphasis added)]

(b) [17:275] **FEHC interpretation:** Decisions from the California Fair Employment and Housing Commission (which was eliminated effective 1/1/13, *see ¶7:1031 ff., 7:1050 ff.*) similarly limit damages for purported future pay losses. [See *Department of Fair Employment & Housing v. Centennial Bancorp, FEHC* (1987) Precedent Decision No. 87-03—rejecting claim for 20 years of projected compensation losses in favor of 2-year front pay award ("at best, a front pay award of one to two years could be justified"); *Department of Fair Employment & Housing v. Smitty's Coffee Shop, FEHC* (1984) Precedent Decision No. 84-25 (noting that "less paternalistic approach" than that taken by federal courts is that front pay may be limited to "fixed period," such as a year or two, at employee's option)]

(4) [17:276] **"After-acquired" evidence justifying termination:** Where, after termination, the employer discovers the employee had engaged in wrongdoing justifying termination, "*neither reinstatement nor front pay* is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds." [See *McKennon v. Nashville Banner Publishing Co.* (1995) 513 US 352, 362, 115 S.Ct. 879, 886 (emphasis added); *and* ¶*17:470 ff.*]

(5) [17:277] **Unclean hands:** Front pay is an equitable remedy and thus subject to the equitable defense of unclean hands. [*Fogg v. Gonzales* (DC Cir. 2007) 492 F3d 447, 456—front pay denied to former U.S. deputy marshal who misrepresented himself as a deputy marshal on his website and in testimony before Congress]

[17:278-279] *Reserved.*

e. [17:280] **Additional award to cover negative tax consequences of lump-sum front pay award?** Although there is some authority for enhancing backpay awards for the added tax burden of receiving a lump-sum award (¶*17:215*), there is very little authority for increasing a front pay award to reflect the added tax burden of receiving payment in a single year.

- [17:280.1] *Argument favoring award:* According to one court, the argument for an enhanced award "is particularly compelling in the case of front pay, since the plaintiff has already had his front pay recovery reduced to present value, on the assumption that he can now invest the money and receive a yearly return equal to his lost wages. However, if the plaintiff must pay a higher tax on the present value of his earnings, this leaves less for investment." [*O'Neill v. Sears, Roebuck & Co.* (ED PA 2000) 108 F.Supp.2d 443, 447; see also *Eshelman v. Agere Systems, Inc.* (3rd Cir. 2009) 554 F3d 426, 441-443—compensating prevailing employee for his or her increased tax burden as a result of lump-sum award will, in appropriate cases, "help to make a victim whole" (but noting that a prevailing plaintiff in a discrimination case is not "presumptively entitled to an additional award to offset tax consequences above the amount to which she would otherwise be entitled")]
- [17:280.2] *Argument against award:* Employers argue that an increased award for tax liability is a windfall for the plaintiff because the lump-sum payment eliminates future risks such as job loss, not included in the calculation of the present value of the future payment stream plaintiff supposedly would have received.

[17:281-289] *Reserved.*

C. EXTRACONTRACTUAL COMPENSATORY DAMAGES (TORT AND STATUTORY)

1. [17:290] **General Considerations:** Breach of contract allows recovery of only such damages as were *foreseeable* at the time the contract was entered into (see Civ.C. §3300—damages "which, in the ordinary course of things, would be likely to result" from the breach). Extracontractual damages—for tortious conduct or statutory violations—are not so limited.

   Under the *tort* measure of damages, plaintiff may recover "the amount which will compensate for all the detriment proximately caused thereby, *whether it could have been anticipated or not*." [Civ.C. §3333 (emphasis added)]

   Similarly, in Title VII cases, courts may fashion remedies that provide "the most complete relief possible" to victims of workplace discrimination. The Act "requires that persons aggrieved by the . . . unlawful employment practice be, so far as possible, restored to the position where they would have been were it not for the unlawful discrimination." [*Albemarle Paper Co. v. Moody* (1975) 422 US 405, 421, 95 S.Ct. 2362, 2373 (internal quotes omitted)]

   a. [17:291] **Types of damages recoverable:** Extracontractual damages in employment litigation may include:

      (1) [17:292] **Backpay:** *See discussion at ¶17:135 ff.*

      (2) [17:293] **Front pay:** *See discussion at ¶17:220 ff.*

      (3) [17:294] **Emotional distress, mental suffering, etc.:** *See discussion at ¶17:320 ff.*

      [17:294.1-294.4] *Reserved.*

      (4) [17:294.5] **Other pecuniary damages:** Pecuniary losses recoverable in Title VII cases "include, for example, moving expenses, job search expenses, medical expenses, psychiatric expenses, physical therapy expenses, and *other quantifiable out-of-pocket expenses that are incurred as a result* of the discriminatory conduct." [EEOC Decision No. 915.002 (1992 WL 189089, *4) (emphasis added)]

      Similar relief is also available in FEHA cases. [See *Frank v. County of Los Angeles* (2007) 149 CA4th 805, 817, 57 CR3d 430, 440, fn. 3—California courts look to pertinent Title VII precedents when applying comparable FEHA provisions]

      The extent of future pecuniary losses is a question of fact. [*Zhu v. United States Atty. Gen.* (11th Cir. 2013) 703 F3d 1303, 1311]

      In appropriate cases, pecuniary damages recoverable by the victim of a Title VII violation may include:

      - [17:294.6] *Lost future earnings* due to impaired earning capacity resulting from his or her discriminatory

discharge (e.g., injury to employee's professional standing, character, and reputation). [*Williams v. Pharmacia, Inc.* (7th Cir. 1998) 137 F3d 944, 952-953; *see discussion at ¶17:228*]

- [17:294.7] Compensation for *extra commuting time and cost* incurred as a result of plaintiff having to drive a longer distance to his or her new job. [*Van Horn v. Specialized Support Services, Inc.* (SD IA 2003) 241 F.Supp.2d 994, 1014-1015]
- [17:294.8] Compensation for *lost fringe benefits*, including:
  - — the cost of *continuing insurance coverage* equal to the coverage received through plaintiff's former employer (including reimbursement for COBRA payments);
  - — the value of *vacation and sick day*s plaintiff would have received at his or her former employer (calculated by taking the difference between the number of vacation and sick days plaintiff would have received at his or her former employer and the number of those days plaintiff is receiving at his or her subsequent employer(s), multiplying by the agreed-upon value of each day of leave);
  - — the value of employer *contributions to plaintiff's §401(k) plan* until he or she became eligible for the subsequent employer's retirement plan. [See *Rivera v. Baccarat, Inc.* (SD NY 1999) 34 F.Supp.2d 870, 875-877]
- [17:294.9] *Additional income taxes* the employee will have to pay because lump-sum recovery of front and backpay in a single year increased his or her tax bracket. [See *O'Neill v. Sears, Roebuck & Co.* (ED PA 2000) 108 F.Supp.2d 443, 447; *and discussion at ¶17:215, 17:280 ff.*]

b. [17:295] **Limitations on extracontractual damages:** Several important limitations exist on tort and statutory damages:

(1) [17:296] **Statutory damages caps (Title VII and ADA):** The total that may be awarded *to each plaintiff* in Title VII and ADA cases for compensatory *and punitive* damages may not exceed:
- — $50,000 in the case of an employer with 15 to 100 employees;
- — $100,000 in the case of an employer with 101 to 200 employees;
- — $200,000 in the case of an employer with 201 to 500 employees; and
- — $300,000 in the case of an employer with 501 or more employees. [42 USC §1981a(b)(3)(A)-(D)]

Backpay and front pay are *not* treated as "compensatory damages" and thus are not subject to these damages caps. [*Pollard v. E.I. du Pont de Nemours & Co.* (2001) 532 US 843, 848, 121 S.Ct. 1946, 1949; *Johnson v. Spencer Press of Maine, Inc.* (1st Cir. 2004) 364 F3d 368, 378 (Title VII); *Pals v. Schepel Buick & GMC Truck, Inc.* (7th Cir. 2000) 220 F3d 495, 499 (ADA)]

Cross-refer: See detailed discussion at ¶9:1470 ff. (ADA).

(2) [17:297] **Proximate causation:** Although foreseeability is not required (¶*17:290*), it must be shown in each case that the particular damages claimed would not have been suffered "but for" the employer's tortious conduct or statutory violation, and that there was no intervening, superseding cause. *See discussion at ¶17:95 ff.*

- [17:298] Plaintiff could not maintain an action for intentional infliction of emotional distress against her former employer where uncontroverted evidence indicated that the proximate cause of her emotional distress was a serious automobile accident, rather than the employer's conduct. [*Green v. American Broadcasting Cos., Inc.* (D DC 1986) 647 F.Supp. 1359, 1363-1364]

(3) [17:299] **Employee's duty to mitigate:** The employee's duty to mitigate damages applies to extracontractual damages as well as contract damages. Thus, a tortfeasor need not compensate a victim for damages the victim could have avoided with reasonable effort. However, Title VII claimants have no duty to mitigate emotional damages. [*EEOC v. Fred Meyer Stores, Inc.* (D OR 2013) 954 F.Supp.2d 1104, 1128; *see discussion at ¶17:490 ff.*]

(4) [17:300] **No tort claim based on same facts as contract claim:** Only *contract remedies* are available in actions based on alleged breach of an express or implied employment contract. [See *Foley v. Interactive Data Corp.* (1988) 47 C3d 654, 699, 254 CR 211, 239]

Plaintiffs may not evade this limitation on available remedies by affixing "tort labels" to conduct actionable as a breach of contract. I.e., causes of action for intentional infliction of emotional distress, fraud, defamation, etc. may not be sustained where *based on the same underlying facts* that give rise to alleged breach of contract claims (e.g., employer terminated plaintiff without just cause). [*Soules v. Cadam, Inc.* (1991) 2 CA4th 390, 404, 3 CR2d 6, 14 (disapproved on other grounds by *Turner v. Anheuser-Busch, Inc.* (1994) 7 C4th 1238, 32 CR2d 223)]

(a) [17:301] **No tort recovery where contract claim fails:** The same rule applies *a fortiori* where the contract claim fails (e.g., because employment was terminable at employer's will). Employer conduct that is not a breach of contract may not be made actionable as a tort (i.e., there is no tort remedy for "bad faith" breach of contract). [See *Foley v. Interactive Data Corp.*, supra, 47 C3d at 699, 254 CR at 239]

[17:302-314] *Reserved.*

c. [17:315] **Nominal damages:** Nominal damages are appropriately awarded where a plaintiff proves a Title VII violation, even if the plaintiff does not prove actual damages. [*Barber v. T.D. Williamson, Inc.* (10th Cir. 2001) 254 F3d 1223, 1227]

(1) [17:316] **Compare—ADA claims:** To recover nominal (or compensatory) damages under the ADA, plaintiff must show the employer engaged in unlawful *intentional* discrimination that resulted in tangible *injury* to the employee (42 USC §1981a(a)(2)). A mere technical violation (e.g., asking a job applicant a prohibited question in violation of 42 USC §12112(d)(2)(A)) is not enough; plaintiff must show proof of intentional discrimination and resulting harm. [*Griffin v. Steeltek, Inc.* (10th Cir. 2001) 261 F3d 1026, 1028-1029]

[17:317-319] *Reserved.*

2. [17:320] **Emotional Distress Damages:** In appropriate cases, an employer may be held liable for emotional distress, mental anguish, and other "psychic" injury an employee suffers as a result of employer wrongdoing. Although "less susceptible of precise measurement than more tangible pecuniary losses or physical injuries would be, [emotional distress] is no less real or worthy of compensation." [*Agarwal v. Johnson* (1979) 25 C3d 932, 953, 160 CR 141, 154 (disapproved on other grounds by *White v. Ultramar, Inc.* (1999) 21 C4th 563, 88 CR2d 19)]

Thus, for example, in a sexual harassment case, plaintiff may claim symptoms such as headaches, dizziness, vomiting, diarrhea, weight loss, sleep disturbance, teeth grinding, a facial twitch, crying spells, depression and loss of enjoyment of life. Such "psychic" injuries need not be permanent. [*Bihun v. AT&T Information Systems, Inc.* (1993) 13 CA4th 976, 986, 16 CR2d 787, 791 (disapproved on other grounds by *Lakin v. Watkins Associated Indus.* (1993) 6 C4th 644, 25 CR2d 109)]

To recover for future emotional distress, plaintiff must prove mental suffering is *reasonably certain to occur* in the future. [See *Bihun v. AT&T Information Systems, Inc.,* supra, 13 CA4th at 995, 16 CR2d at 797]

For certain tort claims, however, a showing of "severe" emotional distress is required (*see* ¶*17:325*).

a. [17:321] **Claims supporting recovery:** Compensatory damages for emotional distress may be recovered for a variety of employment-related torts or pursuant to specific statutory authority.

Compare—breach of contract: Conduct that is simply a breach of contract (e.g., normal employment termination) will not support an award of emotional distress damages, even if it was foreseeable that the breach was likely to cause such damages. [See *Erlich v. Menezes* (1999) 21 C4th 543, 552, 87 CR2d 886, 892; *and* ¶*17:121*]

(1) [17:322] **Common law tort claims:** The following tort claims may support an award of emotional distress damages in employment litigation:

(a) [17:323] **Wrongful termination in violation of public policy:** [See *Tameny v. Atlantic Richfield Co.* (1980) 27 C3d 167, 177-178, 164 CR 839, 845-846; *and discussion of this tort at* ¶*5:40 ff.*]

(b) [17:324] **Intentional infliction of emotional distress:** [See *Agarwal v. Johnson*, supra, 25 C3d at 946, 160 CR at 149; *and discussion of this tort at* ¶*5:350 ff.*]

1) [17:325] **"Severe" emotional distress required:** This tort requires a showing of "severe" emotional distress: "Severe emotional distress means . . . emotional distress of such substantial quantity or enduring quality that no reasonable [person] in a civilized society should be expected to endure it." [*Fletcher v. Western Nat'l Life Ins. Co.* (1970) 10 CA3d 376, 397, 89 CR 78, 90 (internal quotes omitted) (insurance case); *McKenna v. Permanente Med. Group, Inc.* (ED CA 2012) 894 F.Supp.2d 1258, 1274-1275—claim of severe emotional distress not shown by "sweeping references to 'anguish, embarrassment, anxiety, nervousness, humiliation, worry, . . . and shame with no facts to support such symptoms or conditions"; see also CACI 1604; BAJI 12.73]

[17:325.1] ***PRACTICE POINTER:*** Before asserting an intentional infliction of emotional distress claim, consider carefully that it may provide the defense with grounds to require plaintiff to undergo an independent mental examination (CCP §2032.010 et seq.). Plaintiff's counsel may want to confirm in writing the reasons for or against including the cause of action and plaintiff's decision on the matter.

(c) [17:326] **Negligence for infliction of emotional distress:** [See *Kelly v. General Tel. Co.* (1982) 136 CA3d 278, 286, 186 CR 184, 187-188; *McKenna v. Permanente Med. Group, Inc.*, supra, 894 F.Supp.2d at 1275-1276; *and discussion at ¶5:430 ff.*]

(d) [17:327] **Defamation:** [See *Agarwal v. Johnson*, supra, 25 C3d at 944-945, 160 CR at 148-149; *and discussion of this tort at ¶5:470 ff.*]

(e) [17:328] **Fraud or misrepresentation:** [See *Lazar v. Sup.Ct. (Rykoff-Sexton, Inc.)* (1996) 12 C4th 631, 638-639, 49 CR2d 377, 381; *and discussion of this tort at ¶5:665 ff.*]

(f) [17:329] **Limitation—Workers' Compensation Act preemption:** The Workers' Compensation Act provides the "exclusive remedy" for work-related injuries (see Lab.C. §3602). This exclusivity bars claims for emotional distress resulting from employer conduct that was "within the compensation bargain" (e.g., resulting from termination, demotions, job criticism, etc.). [*Shoemaker v. Myers* (1990) 52 C3d 1, 7, 276 CR 303, 305; *Fermino v. Fedco, Inc.* (1994) 7 C4th 701, 30 CR2d 18; *see detailed discussion at ¶15:505 ff.*]

[17:330-334] *Reserved.*

(2) [17:335] **Statutory bases:** Damages for emotional distress may be recovered under both state and federal anti-discrimination statutes:

(a) [17:336] **Fair Employment and Housing Act (FEHA):** Compensatory damages, including emotional distress damages, are recoverable in civil actions for FEHA violations. [See *State Personnel Bd. v. Fair Employment & Housing Comm'n* (1985) 39 C3d 422, 434, 217 CR 16, 23; *Taylor v. Trees, Inc.* (ED CA 2014) 58 F.Supp.3d 1092, 1103 (applying Calif. law)]

1) [17:337] **No cap on damages:** Unlike Title VII and the ADA (*see ¶17:296*), the FEHA has no cap on damages in civil actions.

[17:338] *Reserved.*

(b) [17:339] **Section 1981:** An individual who prevails on a civil rights cause of action under 42 USC §1981 may recover damages for emotional distress. [*Johnson v. Railway Express Agency, Inc.* (1975) 421 US 454, 459-460, 95 S.Ct. 1716, 1720—racial discrimination; see *Zhang v. American Gem Seafoods, Inc.* (9th Cir. 2003) 339 F3d 1020, 1040] (Section 1981 claims are discussed at ¶*7:1270 ff.*)

(c) [17:340] **Title VII:** For a violation of Title VII of the Civil Rights Act of 1964 (42 USC §2000 et seq.), the court may award emotional distress and other compensatory damages in cases of "unlawful intentional discrimination" (but *not* in cases of disparate impact or where the party can otherwise recover under §1981). [42 USC §1981a(a)(1)-(2)]

Compensatory damages include damages "for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." [42 USC §1981a(b)(3)] (Title VII claims are discussed in detail in *Ch. 7, Employment Discrimination—In General*.)

(d) [17:341] **Americans with Disabilities Act (ADA):** The provisions of the Civil Rights Act authorizing emotional distress damages also apply to the Americans with Disabilities Act (42 USC §12112 et seq.). [42 USC §1981a(a)(2)] (ADA claims are discussed in detail in *Ch. 9, Disability Discrimination*.)

Neither emotional distress nor other compensatory damages may be recovered, however, if the employer demonstrates that it made a good faith effort reasonably to accommodate plaintiff's disability. [42 USC §1981a(a)(3)]

(e) [17:342] **Compare—Age Discrimination in Employment Act (ADEA):** The enhanced remedy provisions of the Civil Rights Act do not apply to actions under the Age Discrimination in Employment Act (ADEA, 29 USC §621 et seq.). Thus, emotional distress and other compensatory damages (e.g., for pain and suffering) are *not* available under the ADEA. [*Naton v. Bank of Calif.* (9th Cir. 1981) 649 F2d 691, 698-699 (collecting cases); *Collazo v. Nicholson* (1st Cir. 2008) 535 F3d 41, 45; *see* ¶*8:657.5*] (ADEA claims are discussed in detail in *Ch. 8, Age Discrimination.*)

1) [17:342.1] **Compare—split over emotional distress recovery in ADEA *retaliation* claims:** The circuits are split on whether emotional distress damages are recoverable in cases alleging *retaliation* in violation of the ADEA. [See *Vaughan v. Anderson Regional Med. Ctr.* (5th Cir. 2017) 849 F3d 588, 591-594 (acknowledging circuit split; collecting cases)—ADEA not a basis for "general compensatory damages for pain and suffering"; but see *Moskowitz v. Trustees of Purdue Univ.* (7th Cir. 1993) 5 F3d 279, 284—amendment to FLSA "appears

to make clear that Congress meant to enlarge remedies available for such misconduct beyond those standardly available for FLSA (and ADEA) violations" (parentheses in original)]

(f) [17:342.2] **FLSA retaliation claims:** An employee may recover for emotional injury resulting from retaliation in violation of the FLSA. [*Pineda v. JTCH Apartments, L.L.C.* (5th Cir. 2016) 843 F3d 1062, 1066—"the FLSA's broad authorization of 'legal and equitable relief' encompasses compensation for emotional injuries suffered by an employee on account of employer retaliation"; *see* ¶*8:657.5*]

(3) [17:343] **Objective evidence required?** Courts disagree whether "objective evidence" of emotional distress is required to support an emotional distress damages award:

- [17:344] Several courts hold that because emotional distress damages are "essentially subjective," they may be proved by plaintiff's testimony alone, observations by others or appropriate inference from circumstances. [See *Zhang v. American Gem Seafoods, Inc.* (9th Cir. 2003) 339 F3d 1020, 1040 (collecting cases); *Harper v. City of Los Angeles* (9th Cir. 2008) 533 F3d 1010, 1029; see also *Carey v. Piphus* (1978) 435 US 247, 264, 98 S.Ct. 1042, 1052, fn. 20]
- [17:345] Other courts hold that, while a plaintiff's testimony alone can support an emotional distress damages claim, the testimony "must establish that the plaintiff suffered demonstrable emotional distress, which must be sufficiently articulated . . . The testimony cannot rely on conclusory statements that the plaintiff suffered emotional distress or the mere fact that the plaintiff was wronged . . . Rather, it must indicate with specificity how the plaintiff's alleged distress manifested itself." [*Bryant v. Aiken Regional Med. Ctrs. Inc.* (4th Cir. 2003) 333 F3d 536, 546-547 (internal quotes, citations and brackets omitted)]

[17:346-349] *Reserved.*

b. [17:350] **Measure of damages for emotional distress:** There is no precise standard for measuring damages from emotional distress. Instead, jurors are instructed to "use your judgment to decide a reasonable amount based on the evidence and your common sense." Emotional distress includes "suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame" that plaintiff *has suffered* and *is "reasonably certain to suffer" in the future*. [See CACI 1604, 3905A; also see BAJI 12.88]

(1) [17:351] **Effect:** The effect is that the jury (trier of fact) determines whether to award damages for emotional distress and the amount of any award: "(I)t is the members of the jury who . . . are in the best position to assess the degree of the harm suffered and to fix a monetary amount as just compensation therefor." [*Agarwal v. Johnson* (1979) 25 C3d 932, 953, 160 CR 141, 154 (disapproved on other grounds by *White v. Ultramar, Inc.* (1999) 21 C4th 563, 88 CR2d 19); see *Webner v. Titan Distribution, Inc.* (8th Cir. 2001) 267 F3d 828, 836-837 (discrimination claim under ADA)]

(2) [17:351.1] **Severity of physical symptoms affects award amount:** A jury's award of past noneconomic damages may be reversed by an appellate court in the absence of evidence that plaintiff's symptoms were particularly severe. [See *Briley v. City of West Covina* (2021) 66 CA5th 119, 141-142, 281 CR3d 59, 79-80 (reversing past noneconomic damages award of $2 million that amounted to more than $1,700 per day for covered period where plaintiff's physical symptoms were limited to distress and unspecified sleep-related issues)]

(3) [17:352] **Separate awards for separate wrongs:** Plaintiffs may not receive a double recovery for the same harm. But a plaintiff asserting related state and federal claims may recover emotional distress damage awards on each claim if it compensates for a *separate wrong*. [*Moysis v. DTG Datanet* (8th Cir. 2002) 278 F3d 819, 828—ADA award compensated for emotional distress arising from *fact* of termination, while award for intentional infliction of emotional distress under state law compensated for distress arising from *manner* of termination; see also *Flores v. City of Westminster* (9th Cir. 2017) 873 F3d 739, 751-752—emotional distress award for plaintiff against one defendant did not automatically overlap with award of such damages under different statutes against different defendants, both awards upheld where they can be satisfactorily explained to avoid double recovery]

[17:353-354] *Reserved.*

c. [17:355] **Effect of plaintiff's death on recovery:** Under California law, where plaintiff dies before final adjudication of his or her claim, the action may be prosecuted by decedent's estate or successor in interest (see CCP §§377.11, 377.21); and damages suffered by the decedent (including punitive damages) remain recoverable *except* damages for decedent's "*pain, suffering or disfigurement*" (including emotional distress). [CCP §377.34; *County of Los Angeles v. Sup.Ct. (Schonert)* (1999) 21 C4th 292, 295-296, 87 CR2d 441, 443-444]

(1) [17:356] **Compare—effect on federal claim filed in federal court:** There are no federal statutes governing whether a lawsuit survives the plaintiff's death or, if it does, what damages the personal representative of plaintiff's estate can recover in the survival action. Federal courts therefore are directed to apply the statutes and case law of the forum state (California) "so long as not inconsistent with the Constitution and laws of the United States." [42 USC §1988]

California's denial of predeath emotional distress damages in survival actions is not inconsistent with federal law, and hence remains the rule in federal civil rights actions brought in *state or federal court* in California. [*County of Los Angeles v. Sup.Ct. (Schonert)*, supra, 21 C4th at 297-309, 87 CR2d at 444-453]

But federal district courts in California have split as to whether CCP §377.34 is a bar to recovery for pain and suffering in California in §1983 actions. [See *Morales v. City of Delano* (ED CA 2012) 852 F.Supp.2d 1253, 1278-1279 (collecting cases)—claim for pain and suffering does not survive; compare *Williams v. City of Oakland* (ND CA 1996) 915 F.Supp. 1074, 1077—predeath pain and suffering damages are "at the very heart" of federal civil rights action and hence are recoverable in federal court; *Garcia v. Whitehead* (CD CA 1997) 961 F.Supp. 230, 233—recovery for decedent's pain and suffering allowed in federal court]

[17:357-359] *Reserved.*

D. PUNITIVE DAMAGES

[17:360] Punitive damages are designed to punish the defendant and to deter others from similar conduct. Where legally authorized, punitive damages are recoverable in addition to compensatory damages:

— "Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct . . . The latter, which have been described as 'quasi-criminal' . . . operate as 'private fines' intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation." [*Cooper Indus., Inc. v. Leatherman Tool Group, Inc.* (2001) 532 US 424, 432, 121 S.Ct. 1678, 1683; see *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 US 408, 416, 123 S.Ct. 1513, 1519; *Exxon Shipping Co. v. Baker* (2008) 554 US 471, 492-493, 128 S.Ct. 2605, 2621]

Discretionary: Even when punitive damages are recoverable (*see ¶17:361 ff.*), the award is always discretionary. Plaintiffs have no "right" to pu-

nitive damages. Plaintiffs are presumptively made whole by the compensatory damages award. [See *State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 419, 123 S.Ct. at 1521; *Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP* (2003) 30 C4th 1037, 1051, 135 CR2d 46, 56]

1. [17:361] **Claims Supporting Punitive Damages Awards:** Punitive damages may be awarded in *common law tort actions* (¶*17:362 ff.*) and on certain statutory claims, including:
   - — California's Fair Employment and Housing Act (*see* ¶*17:385*);
   - — California Labor Code provisions codifying preexisting common law torts (*see* ¶*17:383*);
   - — 42 USC §1981 (*see* ¶*17:387*);
   - — Title VII (malice or reckless indifference required; *see* ¶*17:388 ff.*);
   - — Americans with Disabilities Act (intentional discrimination claims only; *see* ¶*17:405*);
   - — Fair Labor Standards Act (retaliation claims only; *see* ¶*17:430*);
   - — Rehabilitation Act of 1973 (*see* ¶*9:1992*).

   Cross-refer: Constitutional limitations on punitive damage awards are discussed at ¶*17:446 ff.*

   a. [17:362] **Common law tort actions:** In tort actions, where defendant is shown "by *clear and convincing evidence*" to have acted with "oppression, fraud or malice," plaintiff may recover, in addition to compensatory damages, "damages for the sake of example and by way of punishing the defendant." [Civ.C. §3294(a) (emphasis added)]

      (1) [17:363] **"Clear and convincing" evidence:** "Clear and convincing" evidence means evidence of such convincing force that it demonstrates *a high probability of the truth* of the facts of which it is offered as proof (as opposed to the preponderance of evidence standard, which means more likely than not). [See CACI 201]

      (2) [17:364] **"Oppression, fraud or malice":** These terms are stated in the disjunctive ("or") so that a punitive damage case is made out if any one of these types of conduct is proved. [See Civ.C. §3294(c)]

         (a) [17:364.1] **"Malice" defined:** "Malice" means either:
            - — *defendant intended to cause injury* to plaintiff; or
            - — defendant's conduct was "*despicable*" and carried on with a *willful and conscious disregard* of the rights and safety of others. [Civ.C. §3294(c)(1); see CACI 3940, 3941, 3943-3948]

            "Conscious disregard" means the defendant must have "*actual knowledge* of the risk of harm it is creating

and, in the face of that knowledge, fail to take steps it knows will reduce or eliminate the risk of harm." [*Pacific Gas & Elec. Co. v. Sup.Ct. (Abi-Habib)* (2018) 24 CA5th 1150, 1159, 235 CR3d 228, 236 (emphasis in original; internal quotes omitted)]

(b) [17:364.2] **"Oppression" defined:** "Oppression" is "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." [Civ.C. §3294(c)(2)]

(c) [17:364.3] **"Despicable conduct" defined:** "Despicable conduct" is conduct that is "so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people." [*Scott v. Phoenix Schools, Inc.* (2009) 175 CA4th 702, 715, 96 CR3d 159, 170 (internal quotes omitted)—conduct having "the character of outrage frequently associated with crime"]

[17:364.4] *Reserved.*

(d) **Application**

- [17:364.5] Employer's *fabricating evidence* to justify discharging employee would constitute clear and convincing evidence of a "willful and conscious disregard" for employee's rights. [*Brandon v. Rite Aid Corp., Inc.* (ED CA 2006) 408 F.Supp.2d 964, 982]
- [17:364.6] Substantial evidence supported finding that managing agent acted with malice or oppression when he allowed an employee suffering severe back pain to leave work under the belief he was on medical leave, then claimed the employee's absence was a knowing refusal to be interviewed regarding an investigation into employee's alleged use of company resources related to his outside business. The jury could reasonably infer the supervisor concocted the grounds for termination to retaliate against the employee for employee's prior complaints to the supervisor. [*Colucci v. T-Mobile USA, Inc.* (2020) 48 CA5th 442, 455, 262 CR3d 50, 60-61]

[17:364.7-364.9] *Reserved.*

- [17:364.10] *Compare:* A breach of fiduciary duty alone, without "malice, fraud or oppression," does *not* permit an award of punitive damages. [See *Scott v. Phoenix Schools, Inc.*, supra, 175 CA4th at 715, 96 CR3d at 170]
- [17:364.11] Wrongful termination, without more, will not sustain a finding of "malice" or "oppression."

Firing an employee is not such "despicable conduct" that would support an award of punitive damages; nor does it show a "conscious disregard" of plaintiff's interests. [*Scott v. Phoenix Schools, Inc.*, supra, 175 CA4th at 716, 96 CR3d at 170—teacher fired for refusing to violate state laws limiting class size]

- [17:364.12] Employer's managers failed to assist employee in establishing eligibility for FMLA leave for her "panic disorder." Employer's failure was *not* "despicable" conduct because employee never requested FMLA leave for this purpose (although she had taken FMLA leave for other reasons), and employer was not on notice of her need for such leave. [*Roby v. McKesson Corp.* (2009) 47 C4th 686, 716, 101 CR3d 773, 796—"managerial malfeasance" did not rise to level of oppressive, fraudulent, or malicious conduct that justifies punitive damages]

(3) [17:365] **Employer liability based on acts of agents or employees:** Under California law, an agent's or employee's acts in the course and scope of employment are attributed to the employer for purposes of tort liability under the doctrine of respondeat superior. On the other hand, that an agent or employee acted with "oppression, fraud or malice" toward plaintiff is *not* alone enough to render the employer liable for punitive damages. [See Civ.C. §3294(b)]

Punitive damages may be imposed upon an employer for acts of an employee or agent only if the employer (or if the employer is a corporation, an *officer, director or managing agent* of the corporation):

- Had *advance knowledge* that the agent or employee was *likely to inflict injury* on others and employed him or her with *conscious disregard* for the rights or safety of others; or
- *Authorized or ratified* the agent's or employee's wrongful acts; or
- Was *personally guilty* of "oppression, fraud or malice" toward plaintiff. [See Civ.C. §3294(b); CACI 3943-3948; BAJI 14.73; see *Flores v. Autozone West, Inc.* (2008) 161 CA4th 373, 386, 74 CR3d 178, 188]

Not vicarious liability: Civil Code §3294(b) imposes punitive damages liability where the corporate employer *itself* acted egregiously or knowingly failed to act in connection with its wrongdoing employee. The employer is not punished for the employee's wrongful act but rather

for *its own* wrongful conduct. [*White v. Ultramar, Inc.* (1999) 21 C4th 563, 571-572, 88 CR2d 19, 25-26; see also *CRST, Inc. v. Sup.Ct. (Lennig)* (2017) 11 CA5th 1255, 1264-1265, 218 CR3d 664, 672-673—employer's admission of vicarious liability for *employee's tort* does not bar punitive damages claim against employer for its own negligent hiring, supervision and retention of employee]

(a) [17:366] **"Managing agent":** "Managing agent" includes only those corporate employees vested with *substantial discretionary authority* over decisions that ultimately determine corporate policy *regarding the matter* as to which punitive damages are sought. The scope of authority is a question of fact in each case. [*White v. Ultramar, Inc.*, supra, 21 C4th at 566-567, 88 CR2d at 22; see *Gelfo v. Lockheed Martin Corp.* (2006) 140 CA4th 34, 63, 43 CR3d 874, 897—question of law where facts undisputed; and CACI 3943-3948]

"[D]iscretionary authority over . . . corporate policy [refers to] . . . formal policies that affect a substantial portion of the company and that are the *type likely to come to the attention of corporate leadership*. It is this sort of broad authority that justifies punishing an entire company for an otherwise isolated act of oppression, fraud, or malice." [*Roby v. McKesson Corp.* (2009) 47 C4th 686, 714, 101 CR3d 773, 795 (emphasis added)]

1) [17:367] **Authority to hire and fire not enough:** The mere ability to hire and fire others is generally not enough to make a supervisory employee a corporate employer's "managing agent" for punitive damages purposes. But supervisors may be so classified if they have broad discretionary authority over decisions that ultimately determine corporate policy regarding the matter in question. [*White v. Ultramar, Inc.*, supra, 21 C4th at 566-567, 88 CR2d at 22; *Roby v. McKesson Corp.*, supra, 47 C4th at 715, 101 CR3d at 795—where employer had 20,000 employees, supervisor of 4 employees at local distribution center did not have type of authority to make her a "managing agent"]

2) **Application**

- [17:368] A "zone manager" responsible for managing eight retail stores and 65 employees was held to be a "managing agent" in a wrongful termination case because her

superiors had delegated to her most of the responsibility for running these stores. She thus made significant decisions affecting company policy regarding these stores, exposing the company to punitive damages liability based on her wrongfully terminating an employee. [*White v. Ultramar, Inc.*, supra, 21 C4th at 576, 88 CR2d at 29]

- [17:368.1] A corporate vice president who was responsible for day-to-day operations and strategy was found to be the corporation's managing agent. The fact that he had authority to relocate and punish district managers, and that his acts were not repudiated by the board of directors, supported the finding that he was a managing agent. [*Wysinger v. Automobile Club of Southern Calif.* (2007) 157 CA4th 413, 428-429, 69 CR3d 1, 13]
- [17:368.2] Employee complained to a mid-level manager that Employee was being harassed by Supervisor. Employee's complaint to the mid-level manager (who was assumed to be a "managing agent") was sufficient evidence to support the jury's inference that Employer was aware of Supervisor's harassment of Employee. That Employer thereafter continued to employ Supervisor as Employee's supervisor without taking any corrective measures indicates "conscious disregard of the rights or safety of others" (Civ.C. §3294(b)), thus warranting punitive damages. [*Roby v. McKesson Corp.*, supra, 47 C4th at 715, 101 CR3d at 795]
- [17:369] But a corporation that owned a chain of retail stores was not subject to punitive damages based on tortious acts of a "loss prevention supervisor" at one of its stores. He was not a managing agent because he was subordinate to the store manager and his discretionary authority was limited to detaining and prosecuting shoplifters (i.e., he had no authority over corporate policies or rules of general application). [*Cruz v. HomeBase* (2000) 83 CA4th 160, 168, 99 CR2d 435, 440]
- [17:370] Supervisor was the highest-ranking person in the employer's Southern California offices and had immediate and

direct control over the plaintiff, including authority to terminate her employment. Nevertheless, he was *not* a "managing agent" within the meaning of Civ.C. §3294 because he did not have authority to change or set *corporate* policy established at employer's headquarters. [*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 CA4th 397, 421, 27 CR2d 457, 501; see also *Myers v. Trendwest Resorts, Inc.* (2007) 148 CA4th 1403, 1437, 56 CR3d 501, 527]

- [17:371] Project Manager was responsible for overseeing and managing a $170 million project, with over 100 on-site employees. His duties included interfacing with project stakeholders, contract administration, general operations and personnel oversight (including hiring, supervision and firing), and making sure the project was completed according to the contract. Absent evidence that the project was an "insignificant part" of Employer's business, a trier of fact could reasonably conclude that Project Manager "exercised substantial discretionary authority over significant aspects of [Employer's] business" and was therefore a managing agent. [*Davis v. Kiewit Pac. Co.* (2013) 220 CA4th 358, 370-371, 162 CR3d 805, 815-816 (reversing summary adjudication for employer on punitive damages claim)]
- [17:372] District manager responsible for managing nine retail stores and 100 employees was a managing agent where he had independent, final authority to hire and fire employees, substantial discretionary authority over daily store operations, could create ad hoc policies, and decided to terminate plaintiff without following the company's official policy requiring progressive discipline. [*Colucci v. T-Mobile USA, Inc.* (2020) 48 CA5th 442, 452, 454, 262 CR3d 50, 58-60]

[17:373-374] *Reserved.*

3) [17:375] **Effect of employer policy forbidding discrimination?** The California Supreme Court has suggested that an employer's *written policy* specifically forbidding the discrimination or other unlawful conduct a managerial agent commits "may operate to limit corporate liability for pu-

nitive damages, *as long as the employer implements* the written policy in good faith." [*White v. Ultramar, Inc.* (1999) 21 C4th 563, 568, 88 CR2d 19, 23, fn. 2 (emphasis added)]

In effect, what the company *does* to prevent illegal discrimination is more important than what it simply says in a stated or written policy.

Conversely, one case states an employer's *failure* to have a written policy specifically forbidding sexual harassment or discrimination does *not* itself show "oppression, fraud or malice" to create punitive damages liability. [*Mathieu v. Norrell Corp.* (2004) 115 CA4th 1174, 1190-1191, 10 CR3d 52, 64-65 (dictum)]

(b) [17:376] **Knowledge that one employee likely to injure another:** An employer may be subject to punitive damages if it has advance knowledge that one of its employees is likely to sexually harass others and fails to take reasonable steps to prevent such conduct. Its failure to act demonstrates "conscious disregard" for the rights and safety of the persons harassed. This liability is not vicarious; the award is based on the employer's *own* wrongful conduct. [*Weeks v. Baker & McKenzie* (1998) 63 CA4th 1128, 1159, 74 CR2d 510, 529]

[17:376.1-376.4] *Reserved.*

1) [17:376.5] **Advance knowledge:** It must appear that the employer had advance knowledge of the employee's *propensity to perform the type of act* committed against the plaintiff. [See *Flores v. Autozone West, Inc.* (2008) 161 CA4th 373, 385-386, 74 CR3d 178, 187—employer's knowledge that employee had inappropriately raised his voice to a customer did not constitute advance knowledge that employee would *physically assault* another customer 3 years later]

(c) [17:377] **"Clear and convincing" standard of proof:** The "clear and convincing" standard of proof required for recovery of punitive damages under Civ.C. §3294(a) (¶*17:363*) also applies to an employer's punitive damages liability for wrongful acts of agents and employees under §3294(b). Thus, "clear and convincing" evidence is required of:

— the employer's advance knowledge of the employee's unfitness and conscious disregard for the safety of others; or

— the employer's *authorization or ratification* of the employee's wrongful acts;

— and, where a corporate employer is involved, the employee's status as an "officer, director or managing agent." [See Civ.C. §3294(b); *Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 CA4th 1640, 1644, 3 CR3d 258, 261]

[17:378-382] *Reserved.*

b. [17:383] **Labor Code violations:** Where the Labor Code merely *codifies a preexisting* common law cause of action, "all forms of relief granted to civil litigants generally, including appropriate punitive damages, are available unless a contrary legislative intent appears." [*Brewer v. Premier Golf Properties* (2008) 168 CA4th 1243, 1252, 86 CR3d 225, 232 (internal quotes omitted)]

But where the Labor Code *creates new rights* and obligations not previously existing in the common law, the express statutory remedy is generally the *exclusive remedy* available for statutory violations. [*Brewer v. Premier Golf Properties*, supra, 168 CA4th at 1252, 86 CR3d at 232—Labor Code provides *exclusive* remedy (no punitive damages) for pay stub and minimum wage violations, and for meal and rest break violations; see *Voris v. Lampert* (2019) 7 C5th 1141, 1162-1163, 250 CR3d 779, 797 (declining to supplement existing remedies for wage nonpayment with common law conversion remedy); compare *Mathews v. Happy Valley Conference Ctr., Inc.* (2019) 43 CA5th 236, 267, 256 CR3d 497, 524—remedy in Lab.C. §1102.5 whistleblower statute not exclusive since it states penalties specified therein for violation are in *addition* to other penalties, and thus, punitive damages are available]

[17:384] *Reserved.*

c. [17:385] **Fair Employment and Housing Act (FEHA):** Punitive damages may be awarded in civil actions for FEHA violations. [*Commodore Home Systems, Inc. v. Sup.Ct. (Brown)* (1982) 32 C3d 211, 221, 185 CR 270, 276; *Myers v. Trendwest Resorts, Inc.* (2007) 148 CA4th 1403, 1435-1436, 56 CR3d 501, 525-526; *Colucci v. T-Mobile USA, Inc.* (2020) 48 CA5th 442, 458-459, 262 CR3d 50, 63-64]

Such awards are based on the standards set forth in Civ.C. §3294 (including the requirement of "clear and convincing evidence"); *see* ¶*17:362 ff.* [*Weeks v. Baker & McKenzie* (1998) 63 CA4th 1128, 1147-1148, 74 CR2d 510, 521]

[17:386] *Reserved.*

d. **Federal anti-discrimination statutes**

(1) [17:387] **42 USC §1981:** Punitive damages are available under the Civil Rights Act against private parties for discriminatory acts that impair the civil rights of another. [42 USC §1981a(c); *Johnson v. Railway Express Agency,*

Inc. (1975) 421 US 454, 461, 95 S.Ct. 1716, 1721—remedies available under Title VII and under 42 USC §1981 are separate, distinct and independent]

(2) [17:388] **Title VII, ADA:** Punitive damages are also available under Title VII and the ADA where "the respondent engaged in a discriminatory practice or discriminatory practices with *malice or with reckless indifference* to the federally protected rights of an aggrieved individual." [See 42 USC §1981a(b)(1) (emphasis added)]

Punitive damages may be awarded only for *intentional discrimination*, and not for an employment practice that is unlawful because of its disparate impact. [42 USC §1981a(a)(1)]

Plaintiff in a Title VII case must prove his or her entitlement to punitive damages by a *preponderance of the evidence*. [*White v. Burlington Northern & Santa Fe Ry. Co.* (6th Cir. 2004) 364 F3d 789, 805-808 (collecting Title VII cases expressly rejecting "clear and convincing evidence" standard of proof); *Stender v. Lucky Stores, Inc.* (ND CA 1992) 803 F.Supp. 259, 324]

(a) [17:389] **Damages caps:** The statutory limits on ADA and Title VII damages awards (based on number of employees, *see* ¶*9:1470, 17:296*) apply to both compensatory and punitive damages. [42 USC §1981a(b)(3)(A)-(D)]

1) [17:390] **Effect of joining other claims:** Where other claims are joined on which no damages cap exists, an award of punitive damages exceeding the Title VII cap will be attributed to those other claims. [See *Pavon v. Swift Transp. Co., Inc.* (9th Cir. 1999) 192 F3d 902, 910; *Passantino v. Johnson & Johnson* (9th Cir. 2000) 212 F3d 493, 510; *Rodriguez-Torres v. Caribbean Forms Manufacturer, Inc.* (1st Cir. 2005) 399 F3d 52, 65-66]

The same rule applies where a capped ADA claim is joined with a corresponding uncapped state law claim. [*Gagliardo v. Connaught Labs., Inc.* (3rd Cir. 2002) 311 F3d 565, 570-572—such apportionment allows verdict winner to get maximum amount of legally available jury award]

[17:391-393] *Reserved.*

(b) [17:394] **Intentional vs. disparate impact discrimination:** Punitive damage awards are allowed only in cases of "intentional discrimination"—i.e., cases that do not rely on the "disparate impact" theory of discrimination. [42 USC §1981a(a)(1); *Kolstad*

v. American Dental Ass'n (1999) 527 US 526, 534, 119 S.Ct. 2118, 2124; see also *Zhang v. American Gem Seafoods, Inc.* (9th Cir. 2003) 339 F3d 1020, 1041; *Fine v. Ryan Int'l Airlines* (7th Cir. 2002) 305 F3d 746, 755]

(c) [17:395] **"Malice" or "reckless indifference" required:** Not every instance of intentional discrimination justifies a Title VII or ADA punitive damage award. It must be shown that the employer acted with "malice" or "reckless indifference" to the *employee's federally protected rights*. [42 USC §1981a(b)(1); *Kolstad v. American Dental Ass'n*, supra, 527 US at 536, 119 S.Ct. at 2125]

1) [17:396] **Awareness of illegality:** Thus, "malice" and "reckless indifference" pertain to the employer's knowledge that it may be acting in violation of federal law: "(A)n employer must at least discriminate in the face of a *perceived risk* that its actions will violate federal law to be liable in punitive damages." [*Kolstad v. American Dental Ass'n*, supra, 527 US at 536, 119 S.Ct. at 2125 (emphasis added); *Bryant v. Aiken Regional Med. Ctrs., Inc.* (4th Cir. 2003) 333 F3d 536, 548]

a) [17:397] **Comment:** Plaintiffs may argue that this proof requirement allows plaintiff to introduce evidence of risks the employer "perceived"; e.g., training given to managers and supervisors.

Defendant employers may argue that such evidence should be permitted only where the employer offers proof of good faith affirmative steps taken to avoid harm, and then only where the evidence of internal training would support a reasonable inference that the employer's representative charged with misconduct received such training.

b) **Application**

- [17:397.1] Manager's acknowledgment that he had *received training* in "hiring practices and equal opportunity" permitted an inference that he was aware his acts violated Title VII. [*Zimmermann v. Associates First Capital Corp.* (2nd Cir. 2001) 251 F3d 376, 385]
- [17:397.2] Managers' description of coworker's remarks as "inappropriate,"

"incorrect" and/or "offensive" permitted inference that managers understood such comments might be *illegal*. [*Hertzberg v. SRAM Corp.* (7th Cir. 2001) 261 F3d 651, 662]

- [17:397.3] Employer's written policies, posted on bulletin boards throughout the workplace, specifically prohibited sexual harassment. This and other factors (e.g., supervisors' memos to management warning of detriment caused by fellow supervisor's inappropriate sexual comments) showed Employer "was fully aware of Title VII's prohibitions against sexual harassment." [*Chavez v. Thomas & Betts Corp.* (10th Cir. 2005) 396 F3d 1088, 1097-1099 (overruled on other grounds as recognized by *Metzler v. Federal Home Loan Bank of Topeka* (10th Cir. 2006) 464 F3d 1164, 1171, fn. 2)]

c) [17:398] **Evidence negating malice or indifference:** Evidence explaining *why* the employer acted as it did may be relevant both to its state of mind and the size of any appropriate punitive award. [*EEOC v. Indiana Bell Tel. Co., Inc.* (7th Cir. 2001) 256 F3d 516, 524 (en banc)—terms of CBA and employer's experience in prior grievance arbitrations were relevant to explain employer's delay in firing alleged sexual harasser (negating inference that delay reflected "reckless indifference" to risk to female employees)]

2) [17:399] **Egregious and outrageous misconduct not required:** An employer's conduct need not be independently egregious to support a Title VII punitive damages award. But proof of the employer's egregious misconduct may serve as evidence supporting an inference of the employer's "malicious" or "reckless" state of mind. [*Kolstad v. American Dental Ass'n*, supra, 527 US at 538, 119 S.Ct. at 2126; *Zhang v. American Gem Seafoods, Inc.* (9th Cir. 2003) 339 F3d 1020, 1041]

- [17:399.1] Unmarried female Employee suffered pregnancy discrimination in violation of Title VII. Evidence showed Employer was "recklessly indifferent" to her federal rights because it *viewed her unwed pregnancy*

with contempt and failed to respond to problems she had reported. [*Caudle v. Bristow Optical Co., Inc.* (9th Cir. 2000) 224 F3d 1014, 1027]

- [17:400] *Compare:* Night shift Employee suffering from insomnia and depression asked for transfer to an available day shift job, as her therapist recommended. Employer's failure to accommodate her disability violated the ADA but did *not* demonstrate the "reckless indifference" required for punitive damages. It only "amounted to negligence" because Employer misunderstood Employee's difficulties and incorrectly believed she was not disabled. [*Gile v. United Airlines, Inc.* (7th Cir. 2000) 213 F3d 365, 375-376]

[17:401-404] *Reserved.*

(d) [17:405] **Limitation under ADA—effect of "good faith" effort to comply:** Punitive damages may not be recovered under the ADA if the employer made a reasonable "good faith" effort to comply with the ADA and accommodate plaintiff's disability. [42 USC §1981a(a)(3)]

1) [17:406] **Comment:** If the employer raises this as a defense, plaintiffs may seek discovery on the employer's efforts to comply with the ADA, including information about any other discrimination charges or settlements with other plaintiffs.

Employers may argue that its response to other ADA claimants through other supervisors is irrelevant and not discoverable because the subject matter of the litigation is the employer's response, through particular supervisors or other representatives, to the plaintiff's particular situation.

[17:406.1-406.4] *Reserved.*

2) [17:406.5] **Compare—not recoverable on ADA retaliation claims:** 42 USC §1981a(a)(2) authorizes compensatory and punitive damages awards on specific ADA claims *other than* retaliation. As a result, most cases hold *neither compensatory nor punitive damages* are recoverable on claims alleging retaliation in violation of the ADA. [*Alvarado v. Cajun Operating Co.* (9th Cir. 2009) 588 F3d 1261, 1268-1269—no recovery because "ADA retaliation is not on the list"; *Kramer v. Banc of America Secur., LLC* (7th Cir. 2004) 355 F3d 961, 966 (same); but

see *Edwards v. Brookhaven Science Assocs., LLC* (ED NY 2005) 390 F.Supp.2d 225, 236—court can award *compensatory* damages on ADA retaliation claims; *Bennett v. Board of Ed. of Washington County Joint Vocational School Dist.* (SD OH 2011) 2011 WL 4753414, *1 (noting 6th Circuit has not resolved issue); *Infantolino v. Joint Industry Bd. of Elec. Industry* (ED NY 2008) 582 F.Supp.2d 351, 362 (same re 2nd Circuit)]

(e) [17:407] **Employer's vicarious liability:** Common law agency principles apply in determining an employer's vicarious liability for punitive damages under Title VII. Thus, punitive damages may be based on misconduct by agents or employees if:

— the employer *authorized or ratified* its agent's act;

— the employer acted *recklessly in employing* the agent; or

— the misconduct was committed by a "*managerial* employee" acting within the "scope of employment" . . . *unless* such misconduct was *contrary* to the employer's good faith efforts to comply with Title VII. [*Kolstad v. American Dental Ass'n* (1999) 527 US 526, 542-543, 119 S.Ct. 2118, 2128; see also *Bryant v. Aiken Regional Med. Ctrs., Inc.* (4th Cir. 2003) 333 F3d 536, 548]

• [17:407.1] *Includes claims under ADA:* Several circuits have applied the *Kolstad* vicarious liability analysis to claims for punitive damages under the ADA. [See *EEOC v. Wal-Mart Stores, Inc.* (10th Cir. 1999) 187 F3d 1241, 1247; *EEOC v. Federal Express Corp.* (4th Cir. 2008) 513 F3d 360, 371-372; *EEOC v. AutoZone, Inc.* (7th Cir. 2013) 707 F3d 824, 836-837]

1) [17:408] **"Managerial" employees:** Whether the agent was acting in a "managerial capacity" is a fact-intensive inquiry that depends on "the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished." [*Kolstad v. American Dental Ass'n*, supra, 527 US at 543, 119 S.Ct. at 2128 (internal quotes omitted); see *Bryant v. Aiken Regional Med. Ctrs., Inc.*, supra, 333 F3d at 548, fn. 4—hospital's Director of Surgical Services, Director of Human Resources, and manager in charge of nurse hiring, all qualified as "man-

agerial agents" under *Kolstad*; *Bains LLC v. Arco Products Co., Div. of Atlantic Richfield Co.* (9th Cir. 2005) 405 F3d 764, 776-777]

2) [17:408.1] **Supervisor ratifying harassment by subordinate:** An employer may be held vicariously liable for punitive damages where a supervisor backs up an employee's racially motivated conduct instead of protecting the victim from the employee, "even if the supervisor's motivation was non-racial such as loyalty to his subordinates or a desire to avoid conflict within the company." [See *Bains LLC v. Arco Products Co., Div. of Atlantic Richfield Co.*, supra, 405 F3d at 773-774]

3) [17:409] **"Scope of employment":** Acts are within the agent's "scope of employment" if of the kind he or she was hired to perform, occur substantially within the authorized time and space limits, and if motivated at least in part by a purpose to serve the employer. [*Kolstad v. American Dental Ass'n*, supra, 527 US at 527, 119 S.Ct. at 2121]

[17:409.1-409.4] *Reserved.*

4) [17:409.5] **Integrated enterprise (affiliated corporations):** Several circuits use the "integrated enterprise" test (common management, integrated operations, centralized control, common ownership; *see* ¶*7:48 ff.*) to charge a parent corporation with Title VII vicarious liability for discriminatory acts by a subsidiary. [*Vance v. Union Planters Corp.* (5th Cir. 2002) 279 F3d 295, 300-301—focus is "almost exclusively" on "which entity made the final decisions regarding employment matters relating to the person claiming discrimination"; *Romano v. U-Haul Int'l* (1st Cir. 2000) 233 F3d 655, 665 (collecting cases)]

[17:409.6] ***PRACTICE POINTER:*** Under Title VII and the ADA, the amount of recoverable damages depends on the size of the employer (42 USC §1981a(b)(3); *see* ¶*17:296*). Thus, if the facts support the argument, plaintiffs seeking higher damages should attempt to demonstrate that a parent corporation was responsible for the alleged discrimination. [*Vance v. Union Planters Corp.*, supra, 279 F3d at 300-301]

5) [17:410] **Effect of "good faith" employer efforts to comply:** An employer who has undertaken good faith efforts at Title VII compliance cannot be said to be acting in reckless disregard of federally-protected rights. Thus, the employer's *adoption and* good faith *implementation* of a *written policy* against workplace discrimination may shield it from punitive damages liability for discriminatory acts by its managers. [See *Kolstad v. American Dental Ass'n,* supra, 527 US at 544, 119 S.Ct. at 2129; *Bryant v. Aiken Regional Med. Ctrs., Inc.*, supra, 333 F3d at 548-549—defendant's "widespread antidiscrimination efforts" of implementing written policies and training programs precluded punitive damages against employer; see also *Davey v. Lockheed Martin Corp.* (10th Cir. 2002) 301 F3d 1204, 1209]

[17:410.1] ***PRACTICE POINTER:*** This rule creates a potential for conflict between employers and their managers and may require *separate legal representation* for the individual manager or supervisor (even if the employer pays the cost involved; *see* ¶*2:155*).

a) [17:411] **Policy should contain bypass mechanism:** An anti-harassment policy requiring employees to report incidents of sexual harassment to their manager should contain a bypass mechanism where their manager is the harasser (*see* ¶*10:340*).

Even absent such a provision, however, the policy *and its implementation* (e.g., training seminars) may protect the employer from punitive damages liability because "common sense should have led [employee] to report the harassment to someone superior to [harasser] in the chain of command." [*Cooke v. Stefani Mgmt. Services, Inc.* (7th Cir. 2001) 250 F3d 564, 569]

b) [17:412] **Written policy alone not enough:** Mere posting of an antidiscrimination policy is not enough. The employer must follow up with a real effort to *train* managers and others in the chain of corporate command on how to comply with federal antidiscrimination laws and must *enforce* compliance by appropriate action. [*Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F3d 794,

810-811; *EEOC v. Management Hospitality of Racine, Inc.* (7th Cir. 2012) 666 F3d 422, 434-435; see *Fischer v. United Parcel Service, Inc.* (6th Cir. 2010) 390 Fed.Appx. 465, 473-474—where employer failed to address plaintiff's discrimination complaints, written policy alone did not support finding of "good faith" efforts; *Bains LLC v. Arco Products Co., Div. of Atlantic Richfield Co.* (9th Cir. 2005) 405 F3d 764, 773-774; *EEOC v. Wal-Mart Stores, Inc.* (10th Cir. 1999) 187 F3d 1241, 1249]

c) [17:413] **Burden of proof on employer:** Most courts hold this "good faith" effort is an affirmative defense for which the employer (defendant) bears the burden of proof. [See *Passantino v. Johnson & Johnson Consumer Products, Inc.* (9th Cir. 2000) 212 F3d 493, 516; *Romano v. U-Haul Int'l* (1st Cir. 2000) 233 F3d 655, 670; *Zimmermann v. Associates First Capital Corp.* (2nd Cir. 2001) 251 F3d 376, 385; *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.* (5th Cir. 1999) 188 F3d 278, 286; but see *Davey v. Lockheed Martin Corp.*, supra, 301 F3d at 1209—finding it "unclear" which party bears burden of proof on good-faith-compliance issue]

d) [17:413.1] **Mitigation of damages by *postoccurrence* remedial efforts:** A court may, in its *discretion*, allow evidence of the employer's remedial conduct following discovery of prohibited workplace discrimination, to mitigate the employer's liability for punitive damages. [*Swinton v. Potomac Corp.*, supra, 270 F3d at 814]

Such evidence may be admissible where the employer undertook *appropriate* remedial measures *promptly upon discovery* of the discriminatory conduct. [*Swinton v. Potomac Corp.*, supra, 270 F3d at 815—it is then up to the jury to decide if employer's efforts were mere "window dressing"]

On the other hand, such evidence may be excluded where the remedial measures were minor and undertaken well after plaintiff filed an EEOC complaint and/or a lawsuit ("too little, too late"). [*Swinton v. Potomac Corp.*, supra, 270 F3d at 815]

6) [17:414] **Compare—managerial employees as employer's "proxy":** A corporate employer may be *directly liable* for discriminatory acts by corporate directors and management-level officers or employees:

a) [17:415] **Senior management:** Where a senior-level employee commits malicious or reckless discriminatory conduct, courts may impute the conduct to the employer, in which case the employer faces direct, rather than vicarious, punitive damages liability. [See *Kolstad v. American Dental Ass'n* (1999) 527 US 526, 546, 119 S.Ct. 2118, 2130]

On a direct liability theory, the employer cannot raise the "good faith" efforts defense (¶*17:410*) to negate punitive damages. Thus, the issue is whether the employee "occupies a sufficiently high position" in the employer's "management hierarchy" for his or her actions "to be imputed automatically to the employer." [*Townsend v. Benjamin Enterprises, Inc.* (2nd Cir. 2012) 679 F3d 41, 53; see *Ackel v. National Communications, Inc.* (5th Cir. 2003) 339 F3d 376, 383-384; *Passantino v. Johnson & Johnson Consumer Products, Inc.* (9th Cir. 2000) 212 F3d 493, 517; *EEOC v. Exel, Inc.* (11th Cir. 2018) 884 F3d 1326, 1332—imputation was improper where alleged harasser was 1 of 329 General Managers and oversaw only 0.1% of employees in North America]

b) [17:416] **Supervisor designated by company to remedy harassment:** Even a relatively low-level supervisor may be an employer's "proxy" if he or she was *responsible under company policy* for *receiving and acting upon discrimination* complaints and failed to take remedial action in response to the offensive conduct. This is so even where the supervisor did not actually perpetrate the conduct. [*Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F3d 794, 810, 818]

c) [17:417] **Supervisor supporting harassment by subordinate:** An employer may be held vicariously liable for punitive damages where a supervisor backs up a racist employee's racially-motivated conduct instead of protecting the victim from the em-

ployee . . . "even if the supervisor's motivation was non-racial, such as loyalty to his subordinates or a desire to avoid conflict within the company." [See *Bains LLC v. Arco Products Co., Div. of Atlantic Richfield Co.* (9th Cir. 2005) 405 F3d 764, 773-774]

[17:418-422] *Reserved.*

(3) [17:423] **ADEA:** The scope of recoverable damages under the ADEA includes:

— liquidated (double) damages for "willful violations"; and

— "such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter . . ." [29 USC §626(b) (held unconstitutional on other grounds by *Kimel v. Florida Bd. of Regents* (2000) 528 US 62, 120 S.Ct. 631)]

(a) [17:424] **Liquidated damages:** The liquidated damages provision is intended to be punitive in nature and is therefore available only if "the employer . . . knew or showed *reckless disregard* for the matter of whether its conduct was prohibited by the ADEA." [*Trans World Airlines, Inc. v. Thurston* (1985) 469 US 111, 126, 105 S.Ct. 613, 624; see *Brooks v. Hilton Casinos Inc.* (9th Cir. 1992) 959 F2d 757, 767—backpay must be doubled for willful violation of ADEA]

But plaintiff need not show outrageous or egregious conduct to obtain liquidated damages. [*Kolstad v. American Dental Ass'n*, supra, 527 US at 536, 119 S.Ct. at 2125; *Hazen Paper Co. v. Biggins* (1993) 507 US 604, 616-617, 113 S.Ct. 1701, 1709-1710]

1) [17:424.1] **Example:** Employing a general manager who did not know age discrimination in employment is illegal was such an "extraordinary mistake" as to permit the jury to infer the employer's "reckless disregard" of ADEA. [*Mathis v. Phillips Chevrolet, Inc.* (7th Cir. 2001) 269 F3d 771, 778; see *Miller v. Raytheon Co.* (5th Cir. 2013) 716 F3d 138, 146 (affirming finding of "willfulness")—following facially neutral reduction in force procedures does not necessarily insulate employer from finding of willful ADEA violation where circumstantial evidence establishes inference of age discrimination]

2) [17:424.2] **Mandatory nature of award:** Most courts hold that liquidated damages are "mandatory" if the jury finds a willful violation of the ADEA.

[See *West v. Nabors Drilling USA, Inc.* (5th Cir. 2003) 330 F3d 379, 394; but see *Greene v. Safeway Stores, Inc.* (10th Cir. 2000) 210 F3d 1237, 1246—"front pay" not subject to mandatory doubling]

3) [17:424.3] **Not subject to Title VII/ADA damages caps:** The caps on compensatory and punitive damage caps applicable in Title VII and ADA cases (¶*17:296*) do not apply to ADEA liquidated damages. Moreover, in appropriate cases, ADEA liquidated damages may be awarded *in addition to* punitive damages awarded under Title VII and the ADA. [See *Abuan v. Level 3 Communications, Inc.* (10th Cir. 2003) 353 F3d 1158, 1170]

4) [17:424.4] **Limitation re municipal defendants:** Where statutes protect public entity employers from punitive damages liability, those employers may also be immune from liquidated damages liability because such damages are "punitive in nature." [*Cross v. New York City Transit Auth.* (2nd Cir. 2005) 417 F3d 241, 254]

(b) [17:425] **No other punitive damages:** Notwithstanding the apparent breadth of the ADEA's remedial language ("such legal or equitable relief as may be appropriate"), the Act does *not* authorize punitive damages awards: "The provisions for liquidated damages for willful violation of the Act and its silence as to punitive damages . . . [indicate] that the omission of any reference thereto was intentional." [*Dean v. American Secur. Ins. Co.* (5th Cir. 1977) 559 F2d 1036, 1039]

(4) [17:426] **FLSA:** The Fair Labor Standards Act provides the following remedies in addition to recovery of wages due:

(a) [17:427] **Liquidated damages:** Liquidated damages (twice the unpaid minimum wages) are *mandatory* for FLSA violations *unless* the court finds that the defendant employer acted in "good faith" and "reasonably believed" its conduct was consistent with the law. [29 USC §216(b); see also 29 USC §260]

1) [17:428] **Burden on employer:** The employer bears the burden of proving both its good faith and reasonable belief. [*Shea v. Galaxie Lumber & Const. Co., Ltd.* (7th Cir. 1998) 152 F3d 729, 733—employer cannot avoid doubling by showing that lower-level employees were responsible for violation; *Stokes v. BWXT Pantex, L.L.C.*

(5th Cir. 2011) 424 Fed.Appx. 324, 326-327 (characterizing employer's burden as "substantial"); see *Davila v. Menendez* (11th Cir. 2013) 717 F3d 1179, 1186—liquidated damages must be awarded if "employer fails to prove that he acted with both subjective and objective good faith"]

2) [17:429] **Presumption favoring employee:** Doubling is the norm, not the exception; a strong presumption exists in favor of doubling. [*Shea v. Galaxie Lumber & Const. Co., Ltd.*, supra, 152 F3d at 733]

(b) [17:430] **Remedies for retaliation:** For violation of the FLSA anti-retaliation provision (29 USC §215(a)(3)), an employer shall be liable for "*such legal or equitable relief as may be appropriate . . .* including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages." [29 USC §216(b) (emphasis added); but see *Perez v. Z Frank Oldsmobile, Inc.* (7th Cir. 2000) 223 F3d 617, 622 (dictum noting that "retaliation claims are not covered by the double-damages rule" in 29 USC §216(b))]

1) [17:431] **Punitive damages?** Courts are split on whether the FLSA's broad remedial language (¶*17:430*) authorizes a punitive damages award against an employer who retaliates against an employee for exercising his or her FLSA rights. [See *Travis v. Gary Comm. Mental Health Ctr., Inc.* (7th Cir. 1990) 921 F2d 108, 111-112 (upholding punitive damages for retaliatory discharge under FLSA); *Jones v. Amerihealth Caritas* (ED PA 2015) 95 F.Supp.3d 807, 818—punitive damages serve as deterrence against retaliation under FLSA; compare *Snapp v. Unlimited Concepts, Inc.* (11th Cir. 2000) 208 F3d 928, 933—no punitive damages because statute is intended to compensate employee, not penalize employer]

Cross-refer: See further discussion of FLSA remedies at ¶11:20 ff.

(5) [17:432] **FMLA:** Liquidated damages are also available under the Family and Medical Leave Act. [See 29 USC §2617(a)(1)(A)(iii)]

[17:432.1-432.4] *Reserved.*

(6) [17:432.5] **Rehabilitation Act of 1973:** Punitive damages are not available under §504 of the Rehabilitation Act. [*Barnes v. Gorman* (2002) 536 US 181, 189-190, 122 S.Ct. 2097, 2103; *Mark H. v. Lemahieu* (9th Cir. 2008) 513 F3d 922, 930]

e. [17:433] **Compensatory damages ("actual damages") required for punitive damage award?** State and federal law may differ on whether compensatory damages are a prerequisite to an award of punitive damages:

(1) [17:434] **Under California law:** Civ.C. §3294(a) authorizes an award of punitive damages "in addition to the actual damages." Punitive damages therefore are not recoverable "independent of a showing which would entitle the plaintiff to an award of actual damages." [*Mother Cobb's Chicken Turnovers, Inc. v. Fox* (1937) 10 C2d 203, 206, 73 P2d 1185, 1186; *Kizer v. County of San Mateo* (1991) 53 C3d 139, 147, 279 CR 318, 322—"actual damages are an absolute predicate for an award of punitive damages"]

(a) [17:435] **"Actual damages" broadly construed:** The Civ.C. §3294(a) requirement of "actual damages" as a prerequisite to a punitive damages award has been broadly construed to include:

— *nominal damages*;
— restitution;
— an offset; and
— damages presumed by law (e.g., from publications held defamatory per se). [See *Berkley v. Dowds* (2007) 152 CA4th 518, 532, 61 CR3d 304, 316 (collecting cases)]

(b) [17:436] **Damage *award* essential?** A number of cases require that any award of exemplary damages be accompanied by an actual *award* of compensatory damages (even nominal damages). Thus, a jury award of "$0.00" compensatory damages *precludes* a punitive damages award. [*State of California v. Altus Finance, S.A.* (9th Cir. 2008) 540 F3d 992, 1001 (applying Calif. law)—allowing punitive damages "if the jury awards $1, but no punitive damages if the jury awards nothing, may seem harsh"; see also *Cheung v. Daley* (1995) 35 CA4th 1673, 1675-1676, 42 CR2d 164, 166]

Other cases, however, hold an award of compensatory damages is *not necessary*; plaintiff need only prove that he or she *suffered harm* as a result of defendant's tortious act. [See *Topanga Corp. v. Gentile* (1967) 249 CA2d 681, 691-692, 58 CR 713, 719—because plaintiff was "indeed damaged" by defendant's fraud,

"the fact that plaintiffs were not given a grant of monetary damages of a certain amount is not determinative"; *Wayte v. Rollins Int'l, Inc.* (1985) 169 CA3d 1, 16, 215 CR 59, 68; *Gagnon v. Continental Cas. Co.* (1989) 211 CA3d 1598, 1603, 260 CR 305, 307, fn. 5; see also CACI 3940(b) (referring to plaintiff's "harm")]

Still other cases allow punitive damages where there is an award of compensatory damages *or its equivalent*, such as restitution, an offset, damages presumed by law or nominal damages. [*Berkley v. Dowds*, supra, 152 CA4th at 530, 61 CR3d at 314]

(2) [17:437] **Under federal law:** Federal courts are split in several ways on whether punitive damages may be awarded without a compensatory damages award:

(a) [17:438] **View that punitive damages award improper:** Some courts flatly hold that a punitive damages award cannot stand without compensatory damages. [*People Helpers Found., Inc. v. City of Richmond, Va.* (4th Cir. 1993) 12 F3d 1321, 1327; *Azimi v. Jordan's Meats, Inc.* (1st Cir. 2006) 456 F3d 228, 237]

(b) [17:439] **View allowing punitives if constitutional right violated:** Other courts hold that punitive damages may be awarded without a compensatory or nominal damages award only where there has been a violation of constitutional rights. [See *Louisiana ACORN Fair Housing v. LeBlanc* (5th Cir. 2000) 211 F3d 298, 303; *Alexander v. Riga* (3rd Cir. 2000) 208 F3d 419, 430; *Searles v. Van Bebber* (10th Cir. 2001) 251 F3d 869, 880-881]

(c) [17:440] **View allowing punitive damages if wage loss shown:** Still other courts hold that punitive damages may be awarded under 42 USC §1981a(b)(1) if there is an award of backpay because backpay awards serve a purpose similar to compensatory damage awards. [*Provencher v. CVS Pharmacy, Div. of Melville Corp.* (1st Cir. 1998) 145 F3d 5, 11-12 (overruling on other grounds recognized by *Crowley v. L.L. Bean, Inc.* (1st Cir. 2002) 303 F3d 387); *Corti v. Storage Tech. Corp.* (4th Cir. 2002) 304 F3d 336, 343; *Hennessy v. Penril Datacomm Networks, Inc.* (7th Cir. 1995) 69 F3d 1344, 1352; *EEOC v. W & O, Inc.* (11th Cir. 2000) 213 F3d 600, 615]

Similarly, punitive damages may be awarded where only front pay is awarded. [*Salitros v. Chrysler Corp.* (8th Cir. 2002) 306 F3d 562, 575]

(d) [17:441] **View allowing punitives to stand alone:** The most liberal position permits a 42 USC §1981a(b)(1) punitive damages award *without* compensatory damages or backpay. [*Timm v. Progressive Steel Treating, Inc.* (7th Cir. 1998) 137 F3d 1008, 1010; *Cush-Crawford v. Adchem Corp.* (2nd Cir. 2001) 271 F3d 352, 357—in Title VII cases, "the statutory maxima capping punitive damage awards strongly undermine the concerns that underlie the reluctance to award punitive damages without proof of actual harm"; *Abner v. Kansas City Southern R.R. Co.* (5th Cir. 2008) 513 F3d 154, 165—"Because the award of actual or punitive damages is capped under Title VII, we do not require a ceremonial anchor of nominal damages to tie to a punitive damages award"]

1) [17:442] **Limitation—due process:** But the ratio between compensatory and punitive damages may be important for *due process* purposes; *see ¶17:451.20 ff.*

[17:443-444] *Reserved.*

2. [17:445] **Amount Determined by Trier of Fact; Reasonable Relation to Injury or Harm:** California law currently provides no fixed standards as to the amount of punitive damages. Rather, the jury must be instructed to consider:
— the *reprehensibility* of defendant's conduct;
— the amount of punitive damages that will have a *deterrent effect* on defendant in light of defendant's *financial condition;* and
— that the punitive damages award must bear a *reasonable relation to the injury, harm or damages suffered by plaintiff.* [See *Neal v. Farmers Ins. Exch.* (1978) 21 C3d 910, 925, 928, 148 CR 389, 397, 399; *Adams v. Murakami* (1991) 54 C3d 105, 111-112, 284 CR 318, 320-321]

Subject to these guidelines and *federal constitutional standards* (*see ¶17:446 ff.*), the award amount is left to the jury's sound discretion, exercised *without passion or prejudice*. [See also CACI 3942, 3943, 3945, 3947, 3949—"There is no fixed standard for determining the amount of punitive damages and you are not required to award any punitive damages"; BAJI 14.71(3), 14.72.2]

a. [17:445.1] **Appellate court's power to modify:** Federal appellate courts may modify an excessive punitive damages award by reducing it to the maximum amount constitutionally permissible. [See *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.* (9th Cir. 2002) 285 F3d 1146, 1152]

California appellate courts may also reduce an excessive award to the maximum constitutionally permitted; or order reversal of the judgment and a new trial unless *plaintiff consents* to

a corresponding reduction in the judgment. [See *Notrica v. State Comp. Ins. Fund* (1999) 70 CA4th 911, 952-953, 83 CR2d 89, 117-118]

[17:445.2-445.4] *Reserved.*

3. [17:445.5] **Statutory Penalty as Limitation?** Ordinarily, recovery of a statutory penalty (e.g., treble damages) for a particular wrongful act does *not* preclude recovery of punitive damages in a tort action based on the same act where the necessary malice or oppression is shown. [*Greenberg v. Western Turf Ass'n* (1903) 140 C 357, 364, 73 P 1050, 1052; see *Marshall v. Brown* (1983) 141 CA3d 408, 418-419, 190 CR 392, 399]

   But the result is different where the statute violated is viewed as having a *punitive purpose,* to deter violations and encourage private enforcement. A penalty awarded under such statutes *precludes* recovery of punitive damages in a tort action based on the same conduct. Plaintiff must *elect prior to entry of judgment* whether "to have judgment entered in an amount which reflects either the statutory trebling, or the compensatory and punitive damages." [*Marshall v. Brown,* supra, 141 CA3d at 419, 190 CR at 400—statutory treble damages under Lab.C. §1054 (for improper use of employee's fingerprints or photograph) barred punitive damage award against employer based on the same misconduct; see *Shore v. Gurnett* (2004) 122 CA4th 166, 174, 18 CR3d 583, 589]

4. [17:446] **Constitutional Limitations:** Several constitutional challenges have been raised to large punitive damages awards:

   a. [17:447] **"Excessive Fines" Clause:** The "Excessive Fines Clause" of the Eighth Amendment applies only to government-imposed penalties. It does not directly apply to a punitive damages award in a civil case between private parties. [*Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.* (1989) 492 US 257, 262-276, 109 S.Ct. 2909, 2913-2920]

      However, the Fourteenth Amendment Due Process Clause imposes substantive limits on the states' discretion (¶*17:450 ff.*), making the Eighth Amendment's prohibition against "excessive" fines applicable to the states and prohibiting them from imposing "grossly excessive" punishments on tortfeasors. [*Cooper Indus., Inc. v. Leatherman Tool Group, Inc.* (2001) 532 US 424, 433-434, 121 S.Ct. 1678, 1684]

   b. [17:448] **Procedural due process requirements:** The Fourteenth Amendment Due Process Clause requires that "meaningful and adequate" postverdict review of punitive damages awards be available both in the trial court and by subsequent appellate review. [*Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 US 1, 20, 111 S.Ct. 1032, 1043; *BMW of North America, Inc. v. Gore* (1996) 517 US 559, 574-575, 116 S.Ct. 1589, 1598-1599; *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 US 408, 418, 123 S.Ct. 1513, 1520-1521]

(1) [17:449] **De novo standard for appellate review:** Where a punitive damages award is challenged on appeal as "grossly excessive," a *constitutional issue* is raised (because substantive due process limits such awards; *see ¶17:450 ff.*). Because the meaning of "grossly excessive" cannot be articulated with precision, *de novo* appellate review of the constitutional principle is necessary to maintain control of, and to clarify, the governing legal principles. The appellate court, however, must defer to findings of fact unless they are clearly erroneous. [*Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, supra, 532 US at 436, 121 S.Ct. at 1685]

Compare—compensatory damages: Compensatory damages awards raise no constitutional issue and therefore are subject to the more deferential abuse of discretion standard of review. [*Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, supra, 532 US at 437, 121 S.Ct. at 1686]

c. [17:450] **Substantive due process:** The Fourteenth Amendment Due Process Clause also imposes a *substantive limit* on the amount of punitive damages awards. Although no bright line exists, a "general concern of reasonableness properly enters into the constitutional calculus"; "grossly excessive" awards are prohibited. [*BMW of North America, Inc. v. Gore* (1996) 517 US 559, 574-575, 116 S.Ct. 1589, 1598-1599; *Honda Motor Co., Ltd. v. Oberg* (1994) 512 US 415, 420, 114 S.Ct. 2331, 2335; see *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 US 408, 417, 123 S.Ct. 1513, 1519—grossly excessive awards further "no legitimate purpose" and constitute "an arbitrary deprivation of property"]

The Fourteenth Amendment's due process constraints apply to the amount of punitive damages awarded in state court. [*Roby v. McKesson Corp.* (2009) 47 C4th 686, 712, 101 CR3d 773, 793; *Colucci v. T-Mobile USA, Inc.* (2020) 48 CA5th 442, 456-460, 262 CR3d 50, 62-64—punitive damages awarded for FEHA violation reduced to 1.5 times compensatory damages]

This limitation incorporates the Eighth Amendment's prohibition against "excessive" fines, thus prohibiting "grossly excessive" punishments against tortfeasors. [*Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, supra, 532 US at 433-434, 121 S.Ct. at 1684; *State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 416-417, 123 S.Ct. at 1519-1520]

(1) [17:451] **Indicia of reasonableness:** The following "guideposts" or "indicia of reasonableness" determine whether a punitive damages award is "grossly excessive":

— the *reprehensibility of defendant's conduct* (the severity of the offense—"perhaps the most important" guidepost);

— the *ratio between the amount of punitive damages awarded and the harm actually suffered* or potential harm likely to result from defendant's conduct (recognizing that higher ratios may be proper where, for example, a particularly egregious act has resulted in only a small amount of economic damage, or the damage is hard to detect or measure); and

— *sanctions for comparable misconduct* (civil or criminal fines and penalties in comparable cases). [*BMW of North America, Inc. v. Gore*, supra, 517 US at 574-575, 116 S.Ct. at 1598-1599; *State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 418, 123 S.Ct. at 1520]

(a) [17:451.1] **Degree of reprehensibility:** A plaintiff is presumed to have been made whole by compensatory damages, "so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is *so reprehensible as to warrant the imposition of further sanctions* to achieve punishment or deterrence." [*State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 419, 123 S.Ct. at 1521 (emphasis added); *BMW of North America, Inc. v. Gore*, supra, 517 US at 575, 116 S.Ct. at 1599]

1) [17:451.1a] **Each defendant considered separately:** Where punitive damages are sought against several defendants (e.g., in respondeat superior cases), the reprehensibility of each must be evaluated separately. [*Bell v. Clackamas County* (9th Cir. 2003) 341 F3d 858, 867—reprehensibility of each defendant's misconduct must be determined "individually, as opposed to *en grosse*"]

2) [17:451.2] **Factors considered:** The U.S. Supreme Court has instructed courts to determine the reprehensibility of a defendant's conduct by considering whether:

— the harm caused was physical as opposed to economic;

— the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;

— the target of the conduct had financial vulnerability;

— the conduct involved repeated actions or was an isolated incident; and

— the harm was the result of intentional malice, trickery or deceit, or mere accident. [*State Farm Mut. Auto. Ins. Co. v. Campbell,* supra,

538 US at 419, 123 S.Ct. at 1521; *Roby v. McKesson Corp.* (2009) 47 C4th 686, 713, 101 CR3d 773, 793-794]

That any one of these factors weighs in favor of plaintiff does *not necessarily* justify a punitive damages award. But absence of *all* of them "renders any award suspect." [*State Farm Mut. Auto. Ins. Co. v. Campbell,* supra, 538 US at 419, 123 S.Ct. at 1521]

a) [17:451.3] **Type of wrongdoing:** Some wrongs are more blameworthy and deserving of greater punishment than others. E.g., wrongs involving violence are more reprehensible than nonviolent wrongs; trickery and deceit are more reprehensible than the omission of a material fact or mere negligence. [*BMW of North America, Inc. v. Gore*, supra, 517 US at 575, 579, 116 S.Ct. at 1599, 1601]

Evidence showing a company policy or practice of discrimination can support a sizable punitive damages award. [See *Emmel v. Coca-Cola Bottling Co. of Chicago* (7th Cir. 1996) 95 F3d 627, 637-638]

[17:451.4] *Reserved.*

b) **Type of injury**

1/ [17:451.5] **Physical harm:** The nature and seriousness of physical injury determine reprehensibility. Lesser punishment is justified when the bulk of the harm is in the nature of *emotional* injury, rather than threats to life and limb. [*Gober v. Ralphs Grocery Co.* (2006) 137 CA4th 204, 220, 40 CR3d 92, 105—employer's failure to deal with harasser's earlier misbehavior subjected plaintiffs to potential physical harm, creating "modest degree of reprehensibility"; *Roby v. McKesson Corp.* (2009) 47 C4th 686, 713, 101 CR3d 773, 793—Employer's discrimination and harassment affected Employee's mental health and evidenced indifference to or reckless disregard for her health and safety; *Colucci v. T-Mobile USA, Inc.* (2020) 48 CA5th 442, 457, 262 CR3d 50, 62-63—harm that negatively impacted plaintiff's emotional and mental health treated as "physical" rather than purely economic in evaluating degree of reprehensibility]

2/ [17:451.6] **Economic harm:** *Purely economic harm* may warrant less punishment than harm to the health or safety of individuals (*see ¶17:451.5*). [*BMW of North America, Inc. v. Gore*, supra, 517 US at 576, 116 S.Ct. at 1599]

[17:451.7] But economic harm *resulting from intentional discrimination* has been held to be "a different kind of harm, a serious affront to personal liberty . . . Freedom from discrimination on the basis of race or ethnicity is a fundamental human right . . . and the intentional deprivation of that freedom is highly reprehensible conduct." [*Zhang v. American Gem Seafoods, Inc.* (9th Cir. 2003) 339 F3d 1020, 1043; see *Arizona v. ASARCO LLC* (9th Cir. 2014) 773 F3d 1050, 1059 (en banc)—"the deterrence aim of punitive damages awards" supports "a significant award" in order to "discourage future misconduct" in violation of antidiscrimination laws]

[17:451.8] Additionally, economic harm caused to *financially vulnerable plaintiffs* may result in a higher punitive damages award. [*Gober v. Ralphs Grocery Co., supra,* 137 CA4th at 220, 40 CR3d at 105; see *Roby v. McKesson Corp.*, supra, 47 C4th at 713, 101 CR3d at 793—low-level employee who quickly depleted her savings and lost her medical insurance as a result of her termination had "financial vulnerability"]

[17:451.9] *Reserved.*

c) [17:451.10] **Isolated vs. repeated wrongdoing:** Also relevant is whether defendant has repeatedly engaged in the prohibited conduct: "(A) recidivist may be punished more severely than a first offender . . ." [*BMW of North America, Inc. v. Gore,* supra, 517 US at 576, 116 S.Ct. at 1599; *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 US 408, 419, 123 S.Ct. 1513, 1521; *Philip Morris USA v. Williams* (2007) 549 US 346, 358, 127 S.Ct. 1057, 1066; see *Johnson v. Ford Motor Co.* (2005) 35 C4th 1191, 1206, 29 CR3d 401, 413, fn. 6—repeat offenders may be subject to

increased punishment as "stiffened penalty for the last crime"; *Roby v. McKesson Corp.,* supra, 47 C4th at 717, 101 CR3d at 798—even though employee was subject to series of discriminatory actions and repeated harassment, evidence established that mid-level management was aware of only single instance where her supervisor's conduct was linked to medical condition]

1/ [17:451.10a] **Similarity of misconduct:** The only conduct relevant in assessing reprehensibility, however, is conduct *similar to that which harmed the plaintiff:* "[I]n the context of civil actions courts must ensure the conduct in question replicates the prior transgressions." [*State Farm Mut. Auto. Ins. Co. v. Campbell,* supra, 538 US at 423, 123 S.Ct. at 1523—evidence of defendant's misconduct involved dissimilar conduct, out-of-state conduct and conduct that was lawful where it occurred]

d) [17:451.11] **In-state vs. out-of-state conduct:** At least with respect to *economic* wrongdoing, a punitive damages award must relate to conduct occurring within the state. The penalty must be supported by the forum state's interest in protecting its own consumers and economy. Therefore, a punitive damages award may not be based on defendant's *lawful* conduct outside the state that impacts only nonresidents. [*BMW of North America, Inc. v. Gore*, supra, 517 US at 574, 116 S.Ct. at 1597; *State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 421, 123 S.Ct. at 1522]

For the same reason, the forum state does not generally have a legitimate concern in imposing punitive damages to punish a defendant for *unlawful* acts committed outside its jurisdiction. [*State Farm Mut. Auto. Ins. Co. v. Campbell,* supra, 538 US at 422, 123 S.Ct. at 1523—federalism allows each state alone to "determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction"]

1/ [17:451.12] **Compare—out-of-state conduct admissible to prove culpability of in-state conduct:** However, out-of-state conduct may be admissible to prove the deliberateness and culpability of defendant's actions within the forum state, if that conduct has a sufficient "nexus to the specific harm suffered by the plaintiff." [*State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 421-422, 123 S.Ct. at 1522-1523—appropriate limiting jury instruction required]

[17:451.13-451.14] *Reserved.*

3) [17:451.15] **Compare—harm to others not considered:** Punitive damages may be awarded only for conduct that harmed the plaintiff, not for harm inflicted on other persons who are not parties to the suit: "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . ." [*State Farm Mut. Auto. Ins. Co. v. Campbell,* supra, 538 US at 423, 123 S.Ct. at 1523; see also *Philip Morris USA v. Williams* (2007) 549 US 346, 354, 127 S.Ct. 1057, 1063]

a) [17:451.16] **No disgorgement of ill-gotten profits obtained from others:** Defendant may be ordered to disgorge ill-gotten gains obtained f*rom the plaintiff*. But due process forbids a punitive damages award based on profits made through similar torts against *other individuals:* "An award of disgorgement of all profits from a group of transactions similar to that which harmed the plaintiff (but not defined through the procedural limits of a class action) is therefore likely to be *disproportionate to the individual plaintiff's compensatory award*." [*Johnson v. Ford Motor Co.* (2005) 35 C4th 1191, 1210, 29 CR3d 401, 416 (parentheses in original; emphasis added)]

[17:451.17-451.19] *Reserved.*

(b) [17:451.20] **Ratio to compensatory damages:** The second, and perhaps most commonly cited, guidepost is that the punitive damages award must bear a *reasonable relationship* to the actual harm already inflicted on plaintiff and any harm likely to result from defendant's conduct. [*BMW of North America, Inc. v. Gore*, supra, 517 US at 581, 116 S.Ct. at 1602]

1) [17:451.20a] **Total compensatory damages considered:** The "actual harm" inflicted refers to the *total compensatory* tort damages—including both economic damages (such as lost wages) and noneconomic damages (such as emotional distress). [See *State Farm Mut. Auto. Ins. Co. v. Campbell,* supra, 538 US at 426, 123 S.Ct. at 1524; *Pavon v. Swift Transp. Co., Inc.* (9th Cir. 1999) 192 F3d 902, 909-910 (Title VII racial harassment and wrongful termination case); see also *Bardis v. Oates* (2004) 119 CA4th 1, 17-18, 14 CR3d 89, 101—compensatory damages for purpose of punitive damages calculation included prejudgment interest but not attorney fees and costs (non-employment law case)]

a) [17:451.20b] **"Uncompensated damages":** In unique cases, "uncompensated" emotional distress damages may be considered to determine the constitutionality of the ratio of punitive damages to total damages. [See *Rubio v. CIA Wheel Group* (2021) 63 CA5th 82, 92-93, 277 CR3d 450, 461-463—although plaintiff passed away during litigation and was unable, by law, to recover emotional distress damages, appellate court permitted consideration of such uncompensated damages plaintiff likely would have been awarded had plaintiff lived]

2) [17:451.20c] **Potential harm to plaintiff also considered:** It is also appropriate to consider the harm "the defendant's conduct would have caused to its intended victim *if the wrongful plan had succeeded"* in assessing the punitive damages to harm ratio. [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 US 443, 460, 113 S.Ct. 2711, 2721 (emphasis added)]

a) [17:451.20d] **Foreseeability as limitation:** But potential harm that was *not a foreseeable result* of defendant's tortious conduct toward plaintiff is not a proper consideration in assessing punitive damages. [See *Simon*

v. San Paolo U.S. Holding Co., Inc. (2005) 35 C4th 1159, 1177-1178, 29 CR3d 379, 391-392—where defendant fraudulently misrepresented its willingness to sell certain property to plaintiff, the loss of $400,000 profit plaintiff might have made on resale was *not* a foreseeable result of the fraud because *plaintiff had no enforceable right* to purchase the property]

3) [17:451.21] **No bright line; reasonableness as key:** There is no mathematical bright line as to what is a constitutionally acceptable ratio between compensatory and punitive damages. Rather, a "general concern of reasonableness properly enters into the constitutional calculus." [*BMW of North America, Inc. v. Gore*, supra, 517 US at 582-583, 116 S.Ct. at 1602—"breathtaking 500 to 1 ratio must surely raise a suspicious judicial eyebrow"]

Even so, few awards exceeding a *single-digit ratio* between punitive and compensatory damages will be held to satisfy due process. [*State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 425-426, 123 S.Ct. at 1524—145 to 1 ratio clearly violated due process]

This has been interpreted to establish a *presumption:* Ratios "significantly greater than nine or 10 to one are *suspect* and, absent special justification (by, for example, *extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages*), cannot survive appellate scrutiny under the due process clause." [*Simon v. San Paolo U.S. Holding Co., Inc.*, supra, 35 C4th at 1182, 29 CR3d at 395 (emphasis added)]

a) [17:451.22] **Four-to-one in "usual" case?** Although it did not adopt a bright line ratio, the U.S. Supreme Court has stated an award of more than four-to-one "might be close to the line of constitutional impropriety." [*State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 425, 123 S.Ct. at 1524; see *Wysinger v. Automobile Club of Southern Calif.* (2007) 157 CA4th 413, 429, 69 CR3d 1, 13—punitive award less than 4 times compensatory damages "falls within the range of multipliers that are commonly used to achieve the goals of punitive damages"]

[17:451.23-451.24] *Reserved.*

b) [17:451.25] **One-to-one ratio where large compensatory damages award:** When compensatory damages are *substantial*, a lesser ratio, perhaps one-to-one, may "reach the outermost limit of the due process guarantee." [*State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 425, 123 S.Ct. at 1524; see *Simon v. San Paolo U.S. Holding Co., Inc.*, supra, 35 C4th at 1182-1183, 29 CR3d at 395-396—punitive damages award reduced to 10 times relatively small compensatory damages award; *Lompe v. Sunridge Partners, LLC* (10th Cir. 2016) 818 F3d 1041, 1070—11.5-to-1 ratio reduced to one-to-one where compensatory damages award was "substantial"]

1/ [17:451.26] **Particularly where compensatory damages include emotional distress:** The one-to-one ratio may be even more appropriate where compensatory damages include a large amount for emotional distress because such an award *may contain a punitive element:* "[T]here is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both." [*State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 426, 123 S.Ct. at 1525 (internal quotes omitted); see also *Colucci v. T-Mobile USA, Inc.* (2020) 48 CA5th 442, 458-459, 262 CR3d 50, 63-64—punitive damages award reduced to 1.5 times compensatory damages where "substantial majority" of $1 million compensatory award was for noneconomic harm/emotional distress]

[17:451.27-451.29] *Reserved.*

4) [17:451.30] **Factors justifying higher than normal ratio:** A higher than normal ratio may be constitutionally permissible where:

— a particularly egregious act has resulted in only a small amount of economic damage; or

— the injury is hard to detect or measure; or

— the monetary value of noneconomic harm is hard to determine. [*BMW of North America, Inc. v. Gore*, supra, 517 US at 582, 116 S.Ct. at 1602]

a) [17:451.31] **Defendant's wealth:** *See* ¶*17:452 ff.*

b) [17:451.32] **Cases involving physical harm:** A higher ratio may be justified where defendant deliberately or recklessly caused physical injury. [See *Boeken v. Philip Morris Inc.* (2005) 127 CA4th 1640, 1691-1692, 26 CR3d 638, 678]

5) [17:451.33] **Effect of damages caps on ratio guidepost:** According to a Ninth Circuit decision, the "ratio analysis" between compensatory and punitive damages "has little applicability" if damages are statutorily capped at a relatively low amount (as in Title VII and ADA cases, *see* ¶*17:296*), since the statutory cap already provides protection against excessive awards. [*Arizona v. ASARCO LLC* (9th Cir. 2014) 773 F3d 1050, 1057, 1060 (en banc); see also *Lust v. Sealy, Inc.* (7th Cir. 2004) 383 F3d 580, 590—"the ratio of punitive to compensatory damages . . . ceases to be an issue of constitutional dignity" in such cases; *Romano v. U-Haul Int'l* (1st Cir. 2000) 233 F3d 655, 673—a "statutory scheme identifying the prohibited conduct as well as the potential range of financial penalties goes far in assuring that [an employer's] due process rights have not been violated"]

[17:451.34] *Reserved.*

(c) [17:451.35] **Sanctions for comparable misconduct:** The final guidepost is the comparison between the punitive damages award and *civil or criminal penalties* that could be imposed for comparable misconduct. [*BMW of North America, Inc. v. Gore*, supra, 517 US at 572-573, 116 S.Ct. at 1597-1598; see *Roby v. McKesson Corp.* (2009) 47 C4th 686, 718, 101 CR3d 773, 798—$15 million punitive damages award violated due process where maximum fine for FEHA violation was $150,000]

1) [17:451.35a] **Civil fines:** Reviewing courts should use as a constitutional benchmark any *realistically available* civil penalty for defendant's conduct toward the plaintiff, but not speculative or hypothetical "doomsday" penalties. [See *State Farm Mut. Auto. Ins. Co. v. Campbell,* supra, 538 US at 428, 123 S.Ct. at 1526—where most flagrant civil penalty under state law was $10,000, multi-million dollar punitive damages award could not be supported by speculation about defendant's

potential loss of its business license, disgorgement of profits, and possible imprisonment based on dissimilar conduct toward others]

Under California law, a $2,500 civil penalty may be assessed for "any unlawful, unfair or fraudulent business act or practice" (see Bus. & Prof.C. §§17200, 17206(a)). Where ongoing wrongful conduct is involved, each act may be punished as a separate violation, calling for a separate $2,500 penalty. [See *Boeken v. Philip Morris Inc.* (2005) 127 CA4th 1640, 1699, 26 CR3d 638, 683-684]

2) [17:451.36] **Effect of no comparable civil penalties:** When there is no civil penalty authorized or imposed for the conduct at issue, the court may disregard this guidepost. [*Contreras-Velazquez v. Family Health Centers of San Diego, Inc.* (2021) 62 CA5th 88, 110-111, 276 CR3d 358, 378]

The court may consider punitive damages "caps" under analogous statutes (e.g., Title VII's $300,000 cap on punitive damages). Rationale: Such caps represent a "legislative judgment similar to the imposition of a civil fine." [*Zhang v. American Gem Seafoods, Inc.* (9th Cir. 2003) 339 F3d 1020, 1045 (applying Title VII damages cap to 42 USC §1981 claim); see *EEOC v. AutoZone, Inc.* (7th Cir. 2013) 707 F3d 824, 840 (applying Title VII damages cap to ADA claim)—"We recognize that this statutory cap suggests that an award of damages at the capped maximum is not outlandish"]

Courts also look to comparable *criminal* penalties. However, criminal penalties are more probative of the "seriousness" of defendant's conduct than of the appropriate dollar amount of the award. [*State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 428, 123 S.Ct. at 1526]

(2) [17:452] **Defendant's wealth as factor:** Evidence of defendant's wealth or net worth does not make up for lack of evidence of other factors, such as reprehensibility (¶*17:451.1 ff.*). "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." [*State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 428, 123 S.Ct. at 1525; *BMW of North America, Inc. v. Gore*, supra, 517 US at 585, 116 S.Ct. at 1604; see *Roby v. McKesson Corp.* (2009) 47 C4th 686, 719, 101 CR3d 773, 798—punitive damages

award must not punish defendant "simply for being wealthy"]

Nevertheless, states may levy punitive damages awards that serve important state interests, such as providing a *meaningful deterrent* against misconduct by wealthy corporations and other persons. Thus, a court may give "some consideration" to defendant's financial condition. [*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 C4th 1159, 1186, 29 CR3d 379, 398; see *State Farm Mut. Auto. Ins. Co. v. Campbell*, supra—consideration of defendant's wealth not "unlawful or inappropriate"]

(a) [17:452.1] **May affect permissible ratio:** The California Supreme Court has noted that in some cases, defendant's financial condition may combine with *high reprehensibility* and a low compensatory damages award to justify an "extraordinary ratio" between compensatory and punitive damages. [*Simon v. San Paolo U.S. Holding Co., Inc.*, supra, 35 C4th at 1186, 29 CR3d at 398]

Conversely, in other cases, "especially those involving substantial compensatory awards," the level of deterrence may be satisfied by imposing a smaller ratio of punitive damages. State interests in punishment and deterrence must yield to federal constitutional limits, because even wealthy defendants are entitled to due process. [*Simon v. San Paolo U.S. Holding Co., Inc.*, supra, 35 C4th at 1185-1187, 29 CR3d at 398-399; see *Bardis v. Oates* (2004) 119 CA4th 1, 25-26, 14 CR3d 89, 108—9-to-1 ratio awarded because proposed lesser sum (4-to-1 ratio) less than 1% of D's net worth ("tantamount to a slap on the wrist")]

[17:452.2-452.4] *Reserved.*

(b) [17:452.5] **Burden on plaintiff:** Plaintiff's failure to produce "meaningful evidence" of defendant's financial condition or ability to pay ordinarily precludes an award of punitive damages as to that defendant. [*Kelly v. Haag* (2006) 145 CA4th 910, 917-918, 52 CR3d 126, 130]

However, where defendant has failed to offer evidence of its financial condition, the jury is entitled to make *inferences* about "ability to pay" based on any limited evidence provided. [*Green v. Laibco, LLC* (2011) 192 CA4th 441, 453, 121 CR3d 415, 424—"even if the record were completely devoid of any meaningful evidence of defendant's financial condition . . . any deficiency may be laid at the door of

defendant" if its witness "purported to be both ignorant of his company's financial condition and unable to read its financial statements" (emphasis and internal quotes omitted)]

(c) [17:452.6] **"Meaningful evidence" need only demonstrate defendants' ability to pay award:** "Meaningful evidence" does not necessarily require evidence of the amount or measure of a defendant's net worth. A jury may assess defendant's financial condition based on the mere "evidence of defendant's profit . . . for the . . . most recent 12-month period, and evidence of defendant's positive net worth," even if there is no "evidence of the amount or measure of defendant's net worth" or any indication whether defendant has "substantial assets, or whether it was instead saddled with large debts." [*Green v. Laibco, LLC*, supra, 192 CA4th at 452, 121 CR3d at 424 (internal quotes omitted)]

(3) **Application—U.S. Supreme Court cases**

- [17:453] In *Haslip* (¶*17:448*), the U.S. Supreme Court held a punitive damages award that was approximately four times the compensatory award was "close to the line" but did not contravene due process. [*Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 US 1, 23, 111 S.Ct. 1032, 1046]
- [17:454] Later, the Court upheld a $10 million punitive damages award that was 526 times the amount of the compensatory damages but less than 10 times the potential harm that would have ensued if the tortious plan had succeeded. [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 US 443, 454, 113 S.Ct. 2711, 2718]
- [17:455] In *BMW of North America*, supra, the U.S. Supreme Court held that a $2 million punitive damages award was "grossly excessive" because:
  — the harm inflicted was *purely economic* (no physical injuries) and did not involve deliberate misconduct;
  — it was a "breathtaking" 500 times the amount of actual harm plaintiff suffered; and
  — the award was substantially greater than the maximum statutory fine ($2,000) available for such conduct. [*BMW of North America, Inc. v. Gore*, supra, 517 US at 583, 116 S.Ct. at 1602]
- [17:455.1] In *Campbell*, supra, the U.S. Supreme Court reversed a $145 million punitive damages award against a liability insurer whose bad faith failure to settle for the insured's policy limits resulted in $1

million emotional distress damages. Neither the degree of reprehensibility nor the ratio of compensatory to punitive damages satisfied due process. Also, the trial court had erroneously admitted evidence of defendant's out-of-state conduct so that the insurer was being punished improperly for its nationwide policies. [*State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 428-429, 123 S.Ct. at 1526]

(4) **Application—other cases**

(a) **Employment cases**

- [17:456] In a sexual harassment case in which several employees sued their supervisor and their corporate employer, a punitive damages award of an approximate 54-to-one punitive to compensatory damages ratio was reduced on remand to a six-to-one ratio as the "absolute constitutional maximum that could possibly be awarded under these particular facts." [*Gober v. Ralphs Grocery Co.* (2006) 137 CA4th 204, 223, 40 CR3d 92, 107-108]

  [17:456.1-456.4] *Reserved.*

- [17:456.5] A one-to-one ratio of punitive to compensatory damages was the maximum constitutionally permissible in a FEHA wrongful discharge case where:
  - — Employer's conduct was on the low end of the "reprehensibility" scale (its wrongdoing consisted of a one-time decision to adopt an attendance policy requiring 24-hour advance notice of absences, and a single failure to take corrective measures in response to Employee's complaint of harassment by her supervisor); and
  - — the jury awarded $1.9 million compensatory damages, which included a "substantial" amount for pain and suffering, thereby suggesting an element of punishment; and
  - — the jury's $15 million verdict vastly exceeded the comparable civil fine available under the FEHA. [*Roby v. McKesson Corp.* (2009) 47 C4th 686, 717-720, 101 CR3d 773, 797-799]

(b) **Nonemployment cases**

- [17:457] A $1.7 million punitive damages award in a promissory fraud case was reduced to $50,000 (a 10-to-one ratio of punitive to compensatory damages). [*Simon v. San Paolo U.S. Holding*

Co., Inc. (2005) 35 C4th 1159, 1188, 29 CR3d 379, 400]

- [17:457.1] A $10 million punitive damages award in a fraud case involving a defective used car was clearly excessive (a 56-to-one ratio to compensatory damages), but the lower court was ordered to reconsider defendant's recidivism (*see* ¶*17:451.10*) in determining a proper award. [*Johnson v. Ford Motor Co.* (2005) 35 C4th 1191, 1213, 29 CR3d 401, 418-419]

  On remand, the lower court *increased* the punitive damages award to $175,000 (just less than a 10-to-one punitive to compensatory damages ratio). [*Johnson v. Ford Motor Co.* (2005) 135 CA4th 137, 150, 37 CR3d 283, 294-295]

- [17:457.2] In a racial discrimination case involving $50,000 in compensatory damages, a $5 million punitive damages award was reduced to between $300,000 and $450,000. [*Bains LLC v. Arco Products Co., Div. of Atlantic Richfield Co.* (9th Cir. 2005) 405 F3d 764, 776]

☞[17:458] ***PRACTICE POINTER:*** Although *Campbell* and single-digit awards is the conventional wisdom, attorneys seeking or defending against punitive damage awards should base their arguments on the *specific and unique facts in the record,* framed by awards made in published cases as establishing the high and low watermarks (i.e., what has been upheld and what has been reduced).

[17:459] *Reserved.*

d. [17:460] **Compare—California "passion or prejudice" standard:** Under California law, a punitive damages award may be set aside only where it is "so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice." [*Adams v. Murakami* (1991) 54 C3d 105, 118, 284 CR 318, 326, fn. 9 (internal quotes omitted)]

(1) [17:461] **Constitutionality?** It is presently unclear whether California's "passion or prejudice" standard satisfies the heightened standard of review for punitive damages awards required by the Fourteenth Amendment Due Process Clause (¶*17:449*).

(2) [17:462] **Measurement?** No precise formula exists for determining when a punitive damages award is so large as to suggest "passion or prejudice." [See *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 CA3d 381, 388, 202 CR 204, 208-209]

But at least two justices of the California Supreme Court have proposed a rule that punitive damages should "rarely" exceed compensatory damages by more than a 3-to-1 ratio "and then only in the most egregious circumstances." [See *Lane v. Hughes Aircraft Co.* (2000) 22 C4th 405, 420, 93 CR2d 60, 71 (J. Brown concur.opn., joined by J. Chin)]

[17:463-464] *Reserved.*

e. [17:465] **Other constitutional challenges?** Employers may continue to challenge large punitive damage awards on other constitutional grounds, including:

- Vagueness of jury instructions under which punitive damages awarded (see Justice O'Connor's dissent in *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 US 1, 63, 111 S.Ct. 1032, 1067);
- First Amendment grounds in defamation cases (i.e., chilling effect on freedom of speech); and
- Eighth Amendment ("Excessive Fines") grounds where the *government* is the plaintiff.

5. [17:466] **Liability of Successor Corporation?** The courts have not adopted a uniform test to determine whether a successor corporation can be subjected to punitive damages liability arising from intentional acts of a predecessor corporation. Among the factors justifying imposition of liability are:
   — the successor entity is a *mere continuation* of the predecessor (see *In re Related Asbestos Cases* (ND CA 1983) 566 F.Supp. 818, 823);
   — the predecessor entity makes up a *significant and identifiable part* of the successor entity (see *Certain Underwriters at Lloyd's of London v. Pacific Southwest Airlines* (CD CA 1992) 786 F.Supp. 867, 870); and
   — the *form of the transaction* results in a *de facto merger* (see *Marks v. Minnesota Mining & Mfg. Co.* (1986) 187 CA3d 1429, 1436-1438, 232 CR 594, 598-599). [*Certain Underwriters at Lloyd's of London v. Pacific Southwest Airlines*, supra, 786 F.Supp. at 870 (collecting cases)]

Compare: An employer's successor is liable for any wages, damages, and penalties owed to its workforce pursuant to a final judgment under certain circumstances. [Lab.C. §200.3; *see* ¶*11:1489*]

[17:467-469] *Reserved.*

E. AFTER-ACQUIRED EVIDENCE OF EMPLOYEE MISCONDUCT AS LIMITATION ON DAMAGES

1. [17:470] **In General:** The after-acquired-evidence doctrine comes into play only after an employer's discriminatory conduct has been established or conceded. The employer may raise as a defense that it *did not learn of an employee's wrongdoing or misrepresentations*

until after the employee's allegedly wrongful termination, and that the wrongdoing was of such severity that it *would have justified* termination had the employer known of these facts at the time of termination. [*McKennon v. Nashville Banner Publishing Co.* (1995) 513 US 352, 362-363, 115 S.Ct. 879, 886-887]

Cross-refer: The after-acquired evidence defense is discussed further at ¶*16:615 ff.*

a. [17:470.1] **Generally limits damages, not liability:** After-acquired evidence is generally not a complete bar to an employer's liability for unlawful employment practices. However, it may limit the type and extent of relief available to a prevailing employee. [See *McKennon v. Nashville Banner Publishing Co.*, supra, 513 US at 356-359, 115 S.Ct. at 884-886 (ADEA case); *Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F3d 1057, 1070-1072 & fn. 15 (Title VII case); *Rooney v. Koch Air, LLC* (7th Cir. 2005) 410 F3d 376, 382 (ADA case); *Wallace v. Dunn Const. Co., Inc.* (11th Cir. 1995) 62 F3d 374, 378 (Equal Pay Act case); *Salas v. Sierra Chem. Co.* (2014) 59 C4th 407, 414, 173 CR3d 689, 693 (FEHA case) (resolving split of authority whether defense completely bars liability or merely limits remedies); *Horne v. District Council 16 Int'l Union of Painters & Allied Trades* (2015) 234 CA4th 524, 541, 183 CR3d 879, 892 (FEHA case)—after-acquired evidence that disqualified applicant from labor union position not a complete bar to applicant's discrimination suit]

b. [17:470.2] **California cases:** California courts have generally followed federal precedents regarding after-acquired evidence. After-acquired evidence is treated as an equitable defense related to the traditional defense of "unclean hands" (*see* ¶*16:570 ff.*) and is available as a defense to legal, equitable and statutory claims. [See *Salas v. Sierra Chem. Co.*, supra, 59 C4th at 428-431, 173 CR3d at 704-707; *Horne v. District Council 16 Int'l Union of Painters & Allied Trades*, supra, 234 CA4th at 539-541, 183 CR3d at 890-892]

c. [17:470.3] **Preponderance of evidence standard of proof:** To establish the after-acquired evidence defense, the employer has the burden of proving by a preponderance of the evidence that it would have terminated the employee for misconduct based on the employer's actual practices. [*O'Day v. McDonnell Douglas Helicopter Co.* (9th Cir. 1996) 79 F3d 756, 761—*rejecting* argument that clear and convincing evidence required]

d. [17:470.4] **Compare—EEOC charges filed:** If EEOC charges are filed, EEOC investigators look at the following factors to see whether the employer can use the after-acquired evidence defense:
   — whether the employee's misconduct was criminal in nature;
   — whether the employee's misconduct affected the integrity of the employer's business; and

— whether the employer's adverse action was "reasonable and justifiable" in light of the gravity of the employee's misconduct. [EEOC Enforcement Guidance N-915.002 12/14/95 (EEOC Compliance Manual §604)]

e. [17:470.5] **Compare—after-acquired evidence to establish ADA plaintiff not "qualified individual":** An employer may use after-acquired evidence that the employee was not a qualified individual under the ADA, even if the employer did not know the employee was unqualified at the time of the adverse employment action. Under EEOC regulations and interpretive guidance, the employee must be a qualified individual *at the time of the event*. Thus, a plaintiff who failed to satisfy the job's prerequisites cannot be considered "qualified" within the meaning of the ADA unless plaintiff shows the prerequisite itself is discriminatory. Because the ADA and regulations/guidance are couched in terms of the employee's *qualifications*, the employer's subjective knowledge is irrelevant. [*Anthony v. Trax Int'l Corp.* (9th Cir. 2020) 955 F3d 1123, 1127-1129, 1134—after-acquired evidence that plaintiff did not have bachelor's degree required for technical writer position established she was not "qualified individual" under ADA at time of termination]

2. [17:471] **Wrongdoing Sufficient for Discharge:** The employee's misconduct must be "of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." [*McKennon v. Nashville Banner Publishing Co.*, supra, 513 US at 362, 115 S.Ct. at 886-887—after filing ADEA suit, employer discovered that employee had copied confidential employer documents and taken them home "for protection"; see *Rivera v. NIBCO, Inc.*, supra, 364 F3d at 1072—discovery re discharged plaintiffs' immigration status properly denied because employer failed to prove it would actually have fired them had it known that they were undocumented]

a. [17:472] **Legal justification not required:** It need not be shown that the employer would have been legally *justified* in terminating the employee on the basis of the after-acquired evidence. It is enough that the employer *would have made the decision to do so* had it known the facts: "Proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made." [*McKennon v. Nashville Banner Publishing Co.*, supra, 513 US at 360, 115 S.Ct. at 885 (ellipses in original; internal quotes omitted); *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 CA4th 1156, 1174, 104 CR2d 95, 108; see also *Travers v. Flight Services & Systems, Inc.* (1st Cir. 2015) 808 F3d 525, 539—permissive written policy that act "may" lead to termination insufficient by itself to cut off damages because doctrine requires evidence that employee's misconduct "*would have* led to termination" (emphasis added)]

b. [17:473] **Types of conduct:** For purposes of the after-acquired-evidence defense, employee wrongdoing that may result in discharge generally falls into one of two categories:

- *Résumé fraud* (e.g., material misrepresentations on a résumé or job application) (see *Rivera v. NIBCO, Inc.*, supra, 364 F3d at 1072 (suggesting employer may limit liability to employees who misrepresent their immigration status if employer can prove it would not have hired undocumented aliens); compare *Salas v. Sierra Chem. Co.* (2014) 59 C4th 407, 431, 173 CR3d 689, 706-707 (finding triable issue of fact based on evidence that "employer deliberately chose to look the other way when put on notice of employees' unauthorized [immigration] status"); or
- *Post-hire, on-the-job misconduct* (e.g., stealing confidential employer data). [*Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 CA4th 620, 632, 41 CR2d 329, 335; see *Thompson v. Tracor Flight Systems, Inc.*, supra, 86 CA4th at 1173, 104 CR2d at 107]

[17:474] *Reserved.*

3. [17:475] **Types of Remedies Limited:** Although not an absolute bar to liability, after-acquired evidence of employee wrongdoing may limit otherwise available remedies; i.e., as a result of the employee's wrongdoing, the employer has "corresponding equities" that must be taken into account in determining appropriate remedies on a case-by-case basis. [*McKennon v. Nashville Banner Publishing Co.* (1995) 513 US 352, 362, 115 S.Ct. 879, 886; *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 CA4th 833, 843, 77 CR2d 12, 18; see *Salas v. Sierra Chem. Co.* (2014) 59 C4th 407, 430-431, 173 CR3d 689, 706—employee's remedies should not include reinstatement, promotion or lost wages after employer's post-hiring discovery of employee's status as undocumented worker]

a. [17:476] **No reinstatement or front pay:** As a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy: "It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds." [*McKennon v. Nashville Banner Publishing Co.*, supra, 513 US at 361, 115 S.Ct. at 886]

(1) [17:476.1] ***Post*-termination misconduct as bar to front pay?** Some cases hold *post*-termination misconduct that renders the employee *ineligible for reinstatement* is ground to deny a front pay award. For example, where a criminal record would disqualify plaintiff from employment, a post-termination conviction would be ground to deny front pay: "Simple common sense tells us that it would be inequitable to award her front pay in lieu of reinstatement where she had rendered herself actually unable

to be reinstated." [*Sellers v. Mineta* (8th Cir. 2004) 358 F3d 1058, 1063-1064; see also *Medlock v. Ortho Biotech, Inc.* (10th Cir. 1999) 164 F3d 545, 554-555 (recognizing "possibility that in appropriate circumstances the logic of *McKennon* may permit certain limitations on relief based on post-termination conduct")]

Other courts hold an employer may *not* use post-termination misconduct to limit damages caused by its own discriminatory (or other wrongful) acts. The after-acquired-evidence doctrine "presupposes that there was an employer-employee relationship *at the time the misconduct occurred*." [*Ryder v. Westinghouse Elec. Corp.* (WD PA 1995) 879 F.Supp. 534, 537 (emphasis added); *Sigmon v. Parker Chapin Flattau & Klimpl* (SD NY 1995) 901 F.Supp. 667, 682-683]

b. [17:477] **Backpay awards:** The proper measure of backpay must give proper recognition to the fact that an unlawful discrimination has occurred that must be deterred and compensated without undue infringement upon the employer's rights and prerogatives. Liability for backpay must be adjusted to take into account the employer's lawful prerogatives arising from the employee's wrongdoing:

- First, backpay may be calculated from the date of the unlawful discharge *to the date the new information was discovered;*
- Then, the court may also consider "*extraordinary equitable circumstances* that affect the legitimate interests of either party." [*McKennon v. Nashville Banner Publishing Co.*, supra, 513 US at 361, 115 S.Ct. at 886 (emphasis added)]

(1) [17:478] **Comment:** Defendant employers may argue that where plaintiff actively *concealed* the after-acquired evidence, backpay should be cut off at the point the concealed misconduct took place, not at later discovery. Moreover, where the misconduct was committed by a corporate officer or other high-ranking individual with a *fiduciary duty* to the employer, any backpay should be cut off when the breach of fiduciary duty occurred, whether concealed or not. [See *Bancroft-Whitney Co. v. Glen* (1966) 64 C2d 327, 345, 49 CR 825, 838-839 (recognizing duty "to protect the interests of the corporation committed to his charge"); *J.C. Peacock, Inc. v. Hasko* (1961) 196 CA2d 353, 358, 16 CR 518, 522—employee who breaches fiduciary duty to employer "forfeits his right to compensation for his services" following breach, without need for employer to show harm resulting from breach]

c. [17:479] **After-acquired evidence no limit on other remedies:** After-acquired evidence does not limit other damages recoverable for unlawful discrimination, such as attorney fees, costs and punitive damages. [See *Wehr v. Ryan's Family Steak Houses, Inc.* (6th Cir. 1995) 49 F3d 1150, 1153—after-acquired evidence did not preclude award of attorney fees; *Miller v. Beneficial Mgmt. Corp.* (D NJ 1994) 855 F.Supp. 691, 716—after-acquired evidence does not limit *punitive damages* or damages for *emotional suffering*]

[17:480-489] *Reserved.*

F. MITIGATION OF DAMAGES (AVOIDABLE CONSEQUENCES DOCTRINE)

1. [17:490] **Doctrine:** In civil actions generally, the right to recover damages is qualified by the common law doctrine of avoidable consequences. Under this doctrine, "a person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure." [*State Dept. of Health Services v. Sup.Ct. (McGinnis)* (2003) 31 C4th 1026, 1043, 6 CR3d 441, 451; *Mize-Kurzman v. Marin Comm. College Dist.* (2012) 202 CA4th 832, 871, 136 CR3d 259, 291 (citing text); *see* ¶*10:360*]

   a. [17:491] **Limits damages, not liability:** The doctrine limits the *amount* of damages recoverable; it is not a defense to liability or the existence of a cause of action. [*State Dept. of Health Services v. Sup.Ct. (McGinnis)*, supra, 31 C4th at 1045, 6 CR3d at 452-453; *see* ¶*10:361*]

   b. [17:492] **Contract or tort damages:** The doctrine applies both in contract and tort actions, including workplace torts. [*State Dept. of Health Services v. Sup.Ct. (McGinnis)*, supra, 31 C4th at 1043, 6 CR3d at 451; *Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 C3d 176, 181-182, 89 CR 737, 740]

   c. [17:493] **Under Title VII:** In computing backpay awardable against an employer for violating federal equal employment opportunity laws, "[i]nterim earnings or amounts *earnable with reasonable diligence* by the person or persons discriminated against shall operate to *reduce* the back pay otherwise allowable." [42 USC §2000e-5(g)(1) (emphasis added)]

   The doctrine applies equally to recovery of front pay: "A Title VII claimant seeking either back pay or front pay damages has a duty to mitigate those damages by exercising reasonable diligence to locate other suitable employment and maintain a suitable job once it is located." [*Excel Corp. v. Bosley* (8th Cir. 1999) 165 F3d 635, 639; *see also* ¶*17:236*]

   However, "Title VII claimants do not have a duty to mitigate emotional damages." [*EEOC v. Fred Meyer Stores, Inc.* (D OR 2013) 954 F.Supp.2d 1104, 1128]

   d. [17:494] **Under FEHA:** An employer sued for sexual harassment under the FEHA may assert the doctrine as a

defense. If successful, the employer will avoid liability for damages the employee "could have prevented with reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment." [*Rosenfeld v. Abraham Joshua Heschel Day School, Inc.* (2014) 226 CA4th 886, 900-901, 172 CR3d 465, 477-478 (internal quotes omitted)]

(1) [17:494.1] **Elements:** To establish the defense, the employer must prove:
- — "the employer took reasonable steps to prevent and correct workplace sexual harassment";
- — "the employee unreasonably failed to use the preventive and corrective measures that the employer provided"; and
- — "reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered." [*Rosenfeld v. Abraham Joshua Heschel Day School, Inc.*, supra, 226 CA4th at 901, 172 CR3d at 477-478]

2. [17:495] **Employer's Burden of Proof:** In employment cases, the burden is on the defendant employer to show:
- — that *"comparable" or* "*substantially similar"* employment was available to the plaintiff employee;
- — that plaintiff *failed to use "reasonable efforts"* to obtain and retain such employment throughout the period for which backpay (or front pay) is sought; and
- — the *amount the employee earned* or with reasonable efforts might have earned from other employment. [See *Parker v. Twentieth Century-Fox Film Corp.*, supra, 3 C3d at 181-182, 89 CR at 740 (under common law); *Teutscher v. Woodson* (9th Cir 2016) 835 F3d 936, 948 (under ERISA and California law); *Broadnax v. City of New Haven* (2nd Cir. 2005) 415 F3d 265, 270 (under Title VII); *Anastasio v. Schering Corp.* (3rd Cir. 1988) 838 F2d 701, 708 (backpay and front pay under ADEA); *Hope v. California Youth Auth.* (2005) 134 CA4th 577, 595, 36 CR3d 154, 168 (under FEHA)]

[17:495.1] ***PRACTICE POINTERS:*** Defense counsel may serve a *subpoena duces tecum* on plaintiff's new employer to obtain records relating to plaintiff's present employment (e.g., job application, personnel file, time cards, etc.). These records will establish plaintiff's present earnings and other payroll information. They may also provide other information relevant to plaintiff's lawsuit (e.g., to discover what plaintiff said on his or her job application about his or her former employment).

This is a controversial area because job applicants sometimes exaggerate or falsify their qualifications and experience, which

may cast doubt on the credibility of their claims. To avoid this, plaintiff's counsel should consider moving to limit discovery of the new employer's personnel records to plaintiff's payroll information and object to discovery of other information on relevancy and privacy grounds.

a. [17:496] **Exception where plaintiff fails to seek employment?** There is a circuit split of authority whether the employer must prove the availability of substantially comparable employment when the former employee has made no effort to secure a new job. In some circuits, once the employer proves the employee did not attempt to find work, it is relieved of that burden. [See *Quint v. A.E. Staley Mfg. Co.* (1st Cir. 1999) 172 F3d 1, 16 (collecting cases); *Greenway v. Buffalo Hilton Hotel* (2nd Cir. 1998) 143 F3d 47, 54; *Sellers v. Delgado College* (5th Cir. 1990) 902 F2d 1189, 1193]

- *Rationale:* "An employer should not be saddled by a requirement that it show other suitable employment in fact existed—the threat being that if it does not, the employee will be found to have mitigated his damages—when the employee, who is capable of finding replacement work, failed to pursue employment at all." [*Greenway v. Buffalo Hilton Hotel*, supra, 143 F3d at 54]

However, other circuits, including the Ninth Circuit, have required the employer to prove the availability of substantially equivalent jobs even when the former employee failed to make reasonable efforts to look for work. [See *Odima v. Westin Tucson Hotel* (9th Cir. 1995) 53 F3d 1484, 1497; see also *Booker v. Taylor Milk Co., Inc.* (3rd Cir. 1995) 64 F3d 860, 866; *Rasimas v. Michigan Dept. of Mental Health* (6th Cir. 1983) 714 F2d 614, 624; *Hutchison v. Amateur Electronic Supply, Inc.* (7th Cir. 1994) 42 F3d 1037, 1044]

3. [17:497] **Availability of "Comparable" Employment:** The employer must prove the availability to plaintiff of employment that was "comparable" or "substantially similar" to the terminated employment. [*Cassino v. Reichhold Chemicals, Inc.* (9th Cir. 1987) 817 F2d 1338, 1345]

- "[B]efore projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that *the other employment was comparable, or substantially similar*, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages." [*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 C3d 176, 182, 89 CR 737, 740 (emphasis added); *Hope v. California Youth Auth.* (2005) 134 CA4th 577, 595, 36 CR3d 154, 168]
- "[T]he unemployed or underemployed claimant need not go

into another line of work, accept a demotion, or take a demeaning position." [*Ford Motor Co. v. EEOC* (1982) 458 US 219, 231, 102 S.Ct. 3057, 3065 & fn. 16—discharged plaintiff need not accept a "demeaning position" or one that is "substantially more onerous than his previous position"]

There is a split of authority in federal courts, however, whether the employer must prove the existence of alternative comparable employment when plaintiff made no effort at all to obtain work (*see* ¶*17:496*).

a. [17:498] **Factors considered—in general:** Substantially equivalent employment "affords *virtually identical* promotional opportunities, compensation, job responsibilities, working conditions and status as the position from which [plaintiff] has been terminated." [*Sellers v. Delgado College* (5th Cir. 1990) 902 F2d 1189, 1193 (emphasis added)]

b. [17:499] **Application:** A plaintiff does not violate the mitigation duty in refusing a job that is either "different from or inferior to" the terminated job:

- [17:500] Actress agreed to perform as a dancer and singer in a motion picture musical to be filmed in Los Angeles. Studio decided not to proceed with the musical and offered her instead a straight dramatic role in a western to be filmed in Australia. By "no stretch of the imagination" was this "substantially similar" employment. [*Parker v. Twentieth Century-Fox Film Corp.*, supra, 3 C3d at 183, 89 CR at 742]
- [17:501] Actress' original contract gave her the right to approve director and screenplay. She was offered instead a contract that eliminated that right. This proposal was an offer of "inferior employment" that she need not accept. [*Parker v. Twentieth Century-Fox Film Corp.*, supra, 3 C3d at 184, 89 CR at 742]
- [17:502] A job offer that requires work every weekend is "inferior" to one that does not, even if the pay is the same. [*EEOC v. Exxon Shipping Co.* (5th Cir. 1984) 745 F2d 967, 979-980—terms and conditions of employment, including hours and days employee is required to work, "are relevant factors that inform the inquiry into job equivalence and the reasonableness of the refusal of a job offer"]

[17:503-514] *Reserved.*

4. [17:515] **Same Geographical Area:** Plaintiffs may properly refuse employment that is inconveniently located or unreasonably distant. [See *Cunningham v. Retail Clerks Union* (1983) 149 CA3d 296, 307, 196 CR 769, 775—plaintiff need not accept a job that would require her to rent another place to live, move away from the community where she lived for 25 years, and bear other financial

burdens; see also *NLRB v. Westin Hotel* (6th Cir. 1985) 758 F2d 1126, 1130—employee need not seek employment in city 25 miles from home and requiring commute by car that she could not afford]

a. **Application**

- [17:515.1] Television investigative reporter was discharged in violation of the ADEA. He made telephone calls and sent letters to other television stations in his city but did not attempt to find a comparable job on the national market because he did not wish to relocate his family. His failure to look for a similar job out of state did not mean that he had not made a reasonable effort to mitigate damages. [*Minshall v. McGraw Hill Broadcasting Co., Inc.* (10th Cir. 2003) 323 F3d 1273, 1287]

- [17:515.2] Plaintiff was laid off from his job as a maintenance planner at employer's cement plant, allegedly because of his race. After being unable to find work for eight months, plaintiff took a job as a plant supervisor at another cement plant located two to three hours from his home. Plaintiff rented a room closer to the plant and was only able to see his family on weekends. A jury could reasonably find that the new job was "inferior" to plaintiff's original job because of the burden placed on plaintiff by the location of the new job, and thus could properly decline to use plaintiff's new wages to mitigate his wrongful termination damages. [*Villacorta v. Cemex Cement, Inc.* (2013) 221 CA4th 1425, 1432-1433, 165 CR3d 441, 446-447 (rejecting contrary federal authority as unpersuasive); but see *Martinez v. Rite Aid Corp.* (2021) 63 CA5th 958, 973-974, 278 CR3d 310, 321-322 (disagreeing with *Villacorta* and concluding "actual earnings" must be offset from lost earnings awards where plaintiff accepts inferior position)]

b. [17:516] **Different rule for executives?** Geographical considerations may be less of a factor for executives or professionals whose employers *routinely relocate* their top employees. In such cases, a wrongfully discharged plaintiff's failure to accept a job offer solely because it requires moving to a different location may constitute a failure to mitigate damages. [*Hopkins v. Price Waterhouse* (D DC 1990) 737 F.Supp. 1202, 1213-1214, aff'd on other grounds (DC Cir. 1990) 920 F2d 967—managerial employee wrongfully discharged by national accounting firm must consider jobs out of the area because national firms routinely ask and expect managers to transfer offices]

5. [17:517] **"Reasonable Effort" Required to Find and Retain Comparable Job:** A wrongfully discharged employee need make only a "reasonable effort" to find comparable employment. The burden is not onerous and does not mandate that plaintiff be successful in finding such employment. [*Mathieu v. Gopher News*

Co. (8th Cir. 2001) 273 F3d 769, 784; *NLRB v. Westin Hotel*, supra, 758 F2d at 1130]

"[A] claimant is not, under the law, entitled to back-pay to the extent that she (1) *fails to remain in the labor market* during the period for which back-pay is claimed, (2) refuses to accept substantially equivalent employment, (3) fails to search diligently for alternative work, or (4) voluntarily quits alternative employment." [*J.H. Rutter Rex Mfg. Co., Inc. v. NLRB* (5th Cir. 1973) 473 F2d 223, 241 (emphasis added)]

a. [17:517.1] **Factual vs. legal issue:** Whether an employee used reasonable diligence to obtain comparable employment is a question of *fact* (on which the employer has the burden of proof, *see* ¶*17:495*). However, where the facts are undisputed and permit only one conclusion, the issue is one of *law*. [*West v. Bechtel Corp.* (2002) 96 CA4th 966, 985, 117 CR2d 647, 662—employee who declined comparable employment failed as matter of law to mitigate damages; *Ortiz v. Bank of America Nat'l Trust & Sav. Ass'n* (9th Cir. 1987) 852 F2d 383, 387 (applying Calif. law)]

b. [17:518] **Relevant factors:** The "reasonableness" of plaintiff's effort to obtain comparable employment "should be evaluated in light of the individual's background and experience and the relevant job market." [*NLRB v. Westin Hotel*, supra, 758 F2d at 1130]

At least one circuit has held that personal reasons for refusing reinstatement, such as a spouse's illness or an unwillingness to work for a particular supervisor, are *not* reasonable grounds for the refusal. [*Giandonato v. Sybron Corp.* (10th Cir. 1986) 804 F2d 120, 124-125]

c. [17:519] **"Reasonable" efforts suffice:** Wrongfully discharged workers are not held to the highest standard of diligence in their efforts to secure comparable employment. Reasonable diligence requires only an *ongoing, good faith* effort. [*Minshall v. McGraw Hill Broadcasting Co., Inc.*, supra, 323 F3d at 1287]

The reasonableness of plaintiff's efforts "must be judged in light of the situation existing at the time and not with the benefit of hindsight." [*State Dept. of Health Services v. Sup.Ct. (McGinnis)* (2003) 31 C4th 1026, 1043-1044, 6 CR3d 441, 451-452]

(1) [17:520] **Reasonable number of applications:** Merely going through the motions of a job search by contacting a few potential employers is not enough. [See *NLRB v. Mercy Peninsula Ambulance Service, Inc.* (9th Cir. 1979) 589 F2d 1014, 1018—average of 3 attempts per month over 9-month period not reasonable diligence; *Sellers v. Delgado College* (5th Cir. 1990) 902 F2d 1189, 1195—average of less than one job application per month over 3-year period is insufficient response to large number of advertisements for substantially equivalent jobs]

(2) [17:521] **Qualified for job applied for:** Applying for jobs for which plaintiff was clearly *not qualified* by training or experience does not constitute reasonable diligence to find comparable employment. [See *Sellers v. Delgado College*, supra, 902 F2d at 1195]

(3) [17:522] **Compare—effect of discharge on reemployment prospects:** A failure to apply for certain jobs may not be unreasonable where it is shown that the wrongful discharge has limited plaintiff's reemployment prospects.

- [17:523] It was not unreasonable for a cocktail waitress who had been wrongfully discharged from the Westin Hotel not to seek a similar job in other local hotels since she was *apprehensive about being refused employment* because of being discharged by Westin. Nor need she have sought a job in non-hotel cocktail lounges that were not of comparable quality, nor in Detroit, which would have required a commute by car that she could not afford. [*NLRB v. Westin Hotel*, supra, 758 F2d at 1130]
- [17:524] Plaintiff's failure to obtain a new job until more than a year-and-a-half after his wrongful discharge was not unreasonable "[g]iven *the effect of the discharge on [his] work record* and the employment market at the time." [*Muldrew v. Anheuser-Busch, Inc.* (8th Cir. 1984) 728 F2d 989, 992 (emphasis added)]
- [17:525] Plaintiff's decision not to pursue comparable employment as a car salesperson was reasonable where her former employer had threatened to "blackball" her in the car business and there were few other women in that business locally. [*Wheeler v. Snyder Buick, Inc.* (7th Cir. 1986) 794 F2d 1228, 1234]

[17:526-529] *Reserved.*

d. [17:530] **Employee "ready, willing and able" to return to work:** The employee's duty to exercise due diligence to obtain and retain comparable employment is a *continuing* obligation throughout the entire period for which plaintiff seeks backpay: "An employee cannot recover for a willful loss of earnings and thus such things as a failure to remain in the labor market, a refusal to accept or quitting other employment, and a failure to diligently search for work will preclude recovery." [*Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 CA4th 1376, 1386, 28 CR2d 30, 36; *Sangster v. United Air Lines, Inc.* (9th Cir. 1980) 633 F2d 864, 868]

(1) [17:531] **Effect of delay in seeking reemployment:** Prolonged periods of inactivity in seeking a new job may support a finding that plaintiff failed to mitigate damages.

- [17:532] Flight attendant remained idle for eight years after voluntarily quitting her job because of unlawful discrimination. Her unwillingness to seek a job with other airlines was *not* justified by her claim that her position with United was unique because, given her seniority, she could adapt her schedule to her pilot-husband's while being assigned to the same geographic area. [*Sangster v. United Air Lines, Inc.*, supra, 633 F2d at 868]
- [17:532.1] Where the plaintiff employee fails to exercise reasonable diligence to obtain employment over a period of time so long that his or her marketability is essentially destroyed, courts may not award backpay beyond that point even if plaintiff begins to exercise diligence. [*Sellers v. Delgado College* (5th Cir. 1990) 902 F2d 1189, 1196]
- [17:533] *Compare:* Plaintiff's taking a three-week vacation after she was wrongfully discharged did not constitute inadequate mitigation where she had three weeks of vacation pay due. [*Jacobson v. Pitman-Moore, Inc.* (D MN 1984) 582 F.Supp. 169, 178]

(2) [17:534] **Effect of illness or disability while unemployed:** In California, a wrongfully discharged employee's illness or disability does not bar recovery from the employer of wages lost during the period of the illness or disability. [*Mayer v. Multistate Legal Studies, Inc.* (1997) 52 CA4th 1428, 1434, 61 CR2d 336, 339]

The result may be different in federal court. The Ninth and Eleventh Circuits recognize that, "absent unusual circumstances," plaintiffs may not recover backpay for periods in which they are unavailable for comparable work, even if due to a disability. [*Canova v. NLRB* (9th Cir. 1983) 708 F2d 1498, 1505; *Lathem v. Department of Children & Youth Services* (11th Cir. 1999) 172 F3d 786, 794—"courts exclude periods where a plaintiff is unavailable to work, such as periods of disability, from the back pay award"; compare *Whatley v. Skaggs Cos., Inc.* (10th Cir. 1983) 707 F2d 1129, 1138 (upholding award of backpay even for period during which plaintiff was disabled and receiving disability benefits)]

However, where plaintiff 's disability is *caused by defendant's discriminatory conduct*, the mitigation requirement does not apply, and backpay may be awarded. [*Lathem v.*

Department of Children & Youth Services, supra, 172 F3d at 794]

[17:535-536] *Reserved.*

(3) [17:537] **Effect of pregnancy?** Courts disagree whether a backpay award should be reduced to reflect periods during which plaintiff could not work because of pregnancy or maternity:

- [17:538] Some courts deny backpay awards for periods during which plaintiff's pregnancy rendered her unable to work. [See *Beck v. Quiktrip Corp.* (D KS 1981) 27 FEP 776, aff'd (10th Cir. 1983) 708 F2d 532—no backpay for 6 weeks' maternity leave]
- [17:539] Other courts refuse to limit recovery of backpay, reasoning that pregnant women do not voluntarily remove themselves from the labor market. [See *Harper v. Thiokol Chem. Corp.* (5th Cir. 1980) 619 F2d 489, 493—where plaintiff did not become pregnant until at least 6 months after her wrongful discharge, and had made serious efforts to obtain employment, it was proper to award backpay for 10-month period during which she could not work because of pregnancy; *EEOC v. Service News Co.* (4th Cir. 1990) 898 F2d 958, 963—plaintiff's "inaction was justifiably based upon her belief in the futility of further efforts during her pregnancy"]

(4) [17:540] **Effect of retirement and disability benefits:** Under California law, the availability of retirement benefits cannot be considered to mitigate damages due to the collateral source rule. [*Mize-Kurzman v. Marin Comm. College Dist.* (2012) 202 CA4th 832, 877, 136 CR3d 259, 297]

This same logic may apply to disability benefits, but that is not yet certain. [See *Mize-Kurzman v. Marin Comm. College Dist.*, supra, 202 CA4th at 876-877, 136 CR3d at 296-297]

[17:541-544] *Reserved.*

(5) [17:545] **Effect of imprisonment:** Where the employer has not offered to reinstate a wrongfully discharged employee, the employer's liability for backpay is not affected by the employee's imprisonment on unrelated charges. The employer, being in breach of its duty to offer reinstatement, may not take advantage of the "fortuitous circumstance" that the employee is unable to work while in jail: "The wrongful discharge of and persistence in refusal to reinstate respondent was the legal cause of respondent's failure to perform the duties of his position from the day he was discharged until the

day he was reinstated." [*Carroll v. Civil Service Comm'n* (1973) 31 CA3d 561, 567, 107 CR 557, 560] (Any earnings in jail, however, are a legitimate offset to backpay liability.)

(a) [17:546] **Compare—reinstatement offered:** The result is different, of course, where the employee was offered reinstatement before being imprisoned. In that event, the employer "would then have been in a position to claim mitigation after (employee) had had a reasonable opportunity to accept the offer of reinstatement but was unable or unwilling to do so." [*Carroll v. Civil Service Comm'n*, supra, 31 CA3d at 567, 107 CR at 560; *see* ¶*17:96*]

(6) [17:547] **Effect of attending school:** Wrongfully discharged plaintiffs may argue that they do not fail to mitigate damages merely because they return to school (full time or part time); i.e., *as long as they continue a diligent search* for comparable employment and appear willing to leave school to accept such employment, their return to school does not affect the right to backpay. [*Dailey v. Societe Generale* (2nd Cir. 1997) 108 F3d 451, 457, fn. 1; *Miller v. AT & T Corp.* (4th Cir. 2001) 250 F3d 820, 838; *Killian v. Yorozu Automotive Tenn., Inc.* (6th Cir. 2006) 454 F3d 549, 556—"we cannot fault her for embarking upon a new career when there were no comparable positions available in her old one"]

Comment: There is no known case in point under California law. It is to be noted, however, that the California Workers' Compensation Board has denied workers' compensation benefits where injured workers returned to school.

(a) **Application**

- [17:547.1] Plaintiff could recoup backpay where he sought employment for one year after discharge before enrolling in school and continued to be employed part-time after enrollment. [*Brady v. Thurston Motor Lines, Inc.* (4th Cir. 1985) 753 F2d 1269, 1275]
- [17:547.2] Backpay was properly awarded where plaintiff enrolled in school part-time but continued her efforts to seek alternative employment. [*Gaddy v. Abex Corp.* (7th Cir. 1989) 884 F2d 312, 319]
- [17:547.3] *Compare:* A district court did not abuse its discretion in not including period plaintiff attended school in backpay award because plaintiff had "effectively removed herself from the employment market" by attending school full-time. [*Washington v. Kroger Co.* (8th Cir. 1982) 671

F2d 1072, 1079 (but rejecting notion that any plaintiff who chooses to go to school full time is prevented from recouping backpay)]

(b) [17:548] **Compare—job search abandoned to enhance earning potential:** The result is different, however, where plaintiff voluntarily withdraws from an *active job market* because he or she believes *ultimate earning potential will be enhanced* with the benefit of further education: "(W)hen an employee opts to attend school, curtailing present earning capacity in order to reap greater future earnings, a back pay award for the period while attending school . . . would be like receiving a double benefit." [*Taylor v. Safeway Stores, Inc*. (10th Cir. 1975) 524 F2d 263, 267-268 (superseded by statute on other grounds as recognized by *Ruckelshaus v. Sierra Club* (1983) 363 US 680, 103 S.Ct. 3274); *Miller v. Marsh* (11th Cir. 1985) 766 F2d 490, 492—full-time law student found unavailable for other employment while pursuing law degree; *Currieri v. City of Roseville* (1975) 50 CA3d 499, 506-507, 123 CR 314, 318-319]

(7) [17:549] **Effect of starting own business:** Where a wrongfully discharged employee starts a business, it is a question of fact whether such self-employment constitutes a failure to mitigate damages so as to terminate the employer's backpay obligation. [*Smith v. Great American Restaurants, Inc*. (7th Cir. 1992) 969 F2d 430, 438; *Carden v. Westinghouse Electric Corp*. (3rd Cir. 1988) 850 F2d 996, 1005—self-employed person is "employed" for purposes of mitigating damages where establishing own business is reasonable alternative to finding comparable employment]

If the self-employment is a "reasonable effort" to mitigate damages, an award of backpay may be offset by *either* the profits of the enterprise or the reasonable value of the services rendered. [*Armstrong v. Index Journal Co.* (4th Cir. 1981) 647 F2d 441, 449—backpay award reduced by "the reasonable value of [plaintiff's] services for which she did not receive any specific salary"; compare *Gaworski v. ITT Comm'l Fin. Corp.* (8th Cir. 1994) 17 F3d 1104, 1111—self-employment income that could have been earned even if plaintiff remained in his or her full-time job should not be offset from backpay award; *NLRB v. Jackson Hosp. Corp*. (6th Cir. 2009) 557 F3d 301, 309—profits from business plaintiff owned during time of employment should not reduce backpay award]

On the other hand, once the employee realizes the business is unsuccessful, the duty to mitigate damages requires him or her to resume the search for other

employment. [*Hansard v. Pepsi-Cola Metro. Bottling Co., Inc.* (5th Cir. 1989) 865 F2d 1461, 1468; *see* ¶*17:553*]

- [17:550] After making reasonable efforts to secure another job, Employee obtained a realtor's license and entered the real estate business. Nothing indicated his decision was not bona fide. Because he earned substantially less in his new occupation than he had previously earned, a backpay award for the difference in earnings was proper. [*Cline v. Roadway Express, Inc.* (4th Cir. 1982) 689 F2d 481, 489]
- [17:551] A wrongfully-discharged television reporter made unsuccessful efforts to locate comparable positions. He then obtained employment to teach media training, but quit that job approximately one year later to work as a self-employed media trainer. Doing so did not constitute a failure to mitigate damages as a matter of law. [*Minshall v. McGraw Hill Broadcasting Co., Inc.* (10th Cir. 2003) 323 F3d 1273, 1287-1288]
- [17:552] *Compare:* After Police Officer was wrongfully discharged, he went into business for himself selling equipment used by law enforcement personnel. The business failed. He was *not* entitled to backpay for the period of time he was self-employed because he had *voluntarily removed himself from the job market* for the type of employment for which he was trained. His undertaking to learn and develop a different means of livelihood was *not* a "reasonable effort" to obtain comparable employment. [*Johnson v. Memphis Police Dept.* (WD TN 1989) 713 F.Supp. 244, 249]
- [17:553] Plaintiff's part-time endeavor running a booth at a flea market did not constitute a reasonable attempt at mitigation. It merely involved selling goods from his home, never yielded a profit, and did not detract from his ability to seek alternative work. Therefore, he could not collect backpay during this period. [*Hansard v. Pepsi-Cola Metro. Bottling Co., Inc.* (5th Cir. 1989) 865 F2d 1461, 1468]

[17:554] *Reserved.*

(8) [17:555] **Effect of accepting inferior job:** Accepting an inferior job does *not* waive plaintiff's right to decline such employment in the future and seek to hold the defendant employer liable for the full salary lost. By "lowering their sights" and accepting what appears to be the best job available, employees do all that the law requires by way of mitigation. [*J.H. Rutter Rex Mfg. Co., Inc. v. NLRB* (5th Cir. 1973) 473 F2d 223, 242; *Rabago-Alvarez v. Dart Indus., Inc.* (1976) 55 CA3d 91, 99, 127

CR 222, 227; see also *Brady v. Thurston Motor Lines, Inc.* (4th Cir. 1985) 753 F2d 1269, 1274—where a "Title VII claimant has exercised reasonable diligence to find similar employment, has been unable to do so, and then accepts a lower paying job," duty to mitigate does not require claimant to continue searching for higher paid employment]

(a) [17:556] **Damages reduced by actual earnings?** State and federal courts disagree whether net earnings from an inferior job can reduce the backpay to which plaintiff is entitled. [See *Priest v. Rotary* (ND CA 1986) 634 F.Supp. 571, 580—under federal law, accepting part-time employment did not waive employee's right to backpay but reduced recoverable damages; compare *Villacorta v. Cemex Cement, Inc.* (2013) 221 CA4th 1425, 1432-1433, 165 CR3d 441, 446-447 (expressly rejecting federal approach)—under state law, "wages actually earned at an inferior job need not be used to mitigate damages because doing so would result in senselessly penalizing an employee who, either because of an honest desire to work or a lack of financial resources, is willing to take whatever employment he can find" (internal quotes omitted); but see *Martinez v. Rite Aid Corp.* (2021) 63 CA5th 958, 973-974, 278 CR3d 310, 321-322 (*discussed at ¶17:515.2*)]

[17:557] ***PRACTICE POINTER FOR EMPLOYERS:*** Employers may wish to argue that the state law approach is contrary to the public policy favoring reemployment and would permit unreasonable damage awards in contravention of Civ.C. §3359 ("Damages must, in all cases, be reasonable . . .").

(9) [17:558] **Effect of employee's failure to sustain subsequent employment:** Damages from the wrongful discharge cease when an employee obtains and retains comparable subsequent employment. Damages from the original termination do not resume where the employee is terminated from the subsequent employment without fault. [*Alexander v. Community Hosp. of Long Beach* (2020) 46 CA5th 238, 266-267, 259 CR3d 340, 366-367—damages from wrongful discharge ceased when nurses obtained comparable subsequent employment for one year despite being terminated from subsequent employment after being arrested for alleged conduct that was part of basis for original discharge; see *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 CA4th 1495, 1502-1503, 44 CR2d 565, 568 (implying plaintiff's damages may

have been mitigated if subsequent termination was beyond plaintiff's control)]

[17:559-569] *Reserved.*

G. COSTS

1. [17:570] **Under California Law:** The "prevailing party" in an action may claim costs of suit *as a matter of right* under California law. [CCP §1032—"prevailing party" entitled to recover costs "in any action or proceeding" and includes party with "net monetary recovery"; see *deSaulles v. Community Hosp. of Monterey Peninsula* (2016) 62 C4th 1140, 1144, 1156, 202 CR3d 429, 431, 441—plaintiff who voluntarily dismisses action after entering into monetary settlement is "prevailing party" for purposes of CCP §1032(a)(4); *Ajaxo, Inc. v. E*Trade Fin'l Corp.* (2020) 48 CA5th 129, 201-203, 261 CR3d 583, 640-642—"net monetary recovery" "in any action" does not include previous, final, fully satisfied judgment; see also Gov.C. §12965(c)(6)—reasonable attorney fees and costs may be awarded to prevailing party in FEHA actions; ¶*17:572 ff.*]

   A superior court in an unlimited civil case (CCP §88) may deny costs (including awardable attorney fees) where the damages recovered could have been obtained in a limited civil case (CCP §85); or where the recovery in a limited civil case could have been obtained in a small claims court. [CCP §1033(a), (b); see *Chavez v. City of Los Angeles* (2010) 47 C4th 970, 976, 104 CR3d 710, 715—court had discretion to deny fees in FEHA action where plaintiff recovered only $11,500 (less than half the $25,000 jurisdictional limit for a limited civil case); *see also* ¶*17:648.10*]

   Cross-refer: For detailed discussion of this topic, see Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 17.

   a. [17:571] **Matters recoverable:** CCP §1033.5 specifies the items allowable as costs of suit, including filing, motion and jury fees; service of process fees; cost of depositions, etc.; and "[a]ttorney's fees, when authorized by . . . [c]ontract, [s]tatute, [or] [l]aw." [CCP §1033.5(a)(10)]

      Expert witness fees are *not* recoverable as court costs "except when expressly authorized by law" (CCP §1033.5(b)(1)). One such statutory exception is offers of judgment or settlement under CCP §998, which authorizes the award of expert witness fees against a party who rejects a CCP §998 offer and fails to recover more than the offer at trial. *See* ¶*17:649.20 ff.*

      (1) [17:572] **FEHA actions—attorney fees and expert witness fees recoverable:** In actions brought under the FEHA, the court, in its discretion and subject to the limitation below (¶*17:572.1*), may award to the prevailing party "reasonable attorney's fees and costs, *including expert witness fees* . . ." [Gov.C. §12965(c)(6) (emphasis added); see *Anthony v. City of Los Angeles* (2008) 166

CA4th 1011, 1017, 83 CR3d 306, 310 (affirming award of expert witness fees)]

(a) [17:572.1] **Limitation—costs, attorney fees and expert witness fees by defendant in FEHA action:** Effective January 1, 2019, a prevailing defendant in an FEHA action may recover costs and fees (including expert costs and fees) only if the court finds that the plaintiff's action was "frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so," regardless of whether the plaintiff rejected a statutory offer to compromise under CCP §998. [Gov.C. §12965(c)(6); *Patterson v. Sup.Ct. (Charter Communications, Inc.)* (2021) 70 CA5th 473, 487, 285 CR3d 420, 430]

For litigation initiated prior to 2019, courts are split as to whether CCP §998 applies to nonfrivolous FEHA actions. [See *Huerta v. Kava Holdings, Inc.* (2018) 29 CA5th 74, 76, 240 CR3d 72, 74—nonfrivolous FEHA cases predating amendment to §12965(b) (now §12965(c)), effective January 1, 2019, do not differentiate between treatment of ordinary costs, attorney fees, and expert witness fees; *Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (2018) 19 CA5th 525, 552, 228 CR3d 120, 139—CCP §998 did not allow employer defendants to recover expert witness fees in connection with FEHA claims; but see *Martinez v. Eatlite One, Inc.* (2018) 27 CA5th 1181, 1185-1186, 238 CR3d 747, 749-750 (remanding to trial court, after considering CCP §998, to enter amended post-judgment order awarding "only pre-offer costs and attorney fees to plaintiff, post-offer costs to defendant, and any expert witness fees the court determines to award in its discretion to defendant")]

(b) [17:572.2] **DFEH eligible for prevailing party attorney/expert witness fees:** The FEHA expressly authorizes an award of prevailing party attorney and expert witness fees to the DFEH in civil actions brought by the DFEH (*see ¶7:1050 ff. for further discussion and limitations*). [See Gov.C. §12965(c)(6)]

(2) [17:573] **Contract actions—expert witness fees not recoverable under contract provision for "fees and costs":** In light of the general prohibition against inclusion of expert witness fees within a costs award (¶*17:571*), such fees are not recoverable as costs under a *contract* provision for "fees and costs" to the prevailing party. Such a provision may not be read to include nonstatutory costs. [*Robert L. Cloud & Assocs., Inc. v. Mikesell* (1999) 69 CA4th 1141, 1154, 82 CR2d 143, 150]

(3) [17:574] **Expert witness fees not recoverable in action brought on private attorney general theory:** CCP §1021.5, California's "private attorney general" statute, expressly provides that the court may award *attorney fees* to the prevailing party when an action results in the enforcement of an important right affecting the public interest if a significant benefit has been conferred on the general public. The statute has no similar provision with respect to *expert witness fees*. Because §1021.5 does not authorize an award of such fees, they are not recoverable as costs. [*Olson v. Automobile Club of Southern Calif.* (2008) 42 C4th 1142, 1148, 74 CR3d 81, 84 (disapproving *Beasley v. Wells Fargo Bank* (1991) 235 CA3d 1407, 1 CR2d 459)]

[17:575-584] *Reserved.*

2. [17:585] **Under Federal Law:** Under federal law, the prevailing party may claim statutory costs under normal cost provisions. [FRCP 54(d)(1); *Taniguchi v. Kan Pac. Saipan, Ltd.* (2012) 566 US 560, 565, 132 S.Ct. 1997, 2001—Rule 54(d)(1) "gives courts the discretion to award costs to prevailing parties"]

However, where plaintiff does not accept a Rule 68 offer of judgment and then fails to obtain a "more favorable" verdict, the plaintiff must pay the defendant's post-offer costs. [FRCP 68]

Cross-refer: For a detailed discussion of costs recovery in federal court, see Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Ch. 19.

a. [17:585.1] **Presumption favoring prevailing party costs award:** Courts have interpreted Rule 54(d)(1) as creating a *presumption in favor of awarding costs* to the prevailing party; ultimately, however, the decision lies within the trial court's discretion. [*Marx v. General Revenue Corp.* (2013) 568 US 371, 375-376, 133 S.Ct. 1166, 1172-1173 (not an employment case); *Berkla v. Corel Corp.* (9th Cir. 2002) 302 F3d 909, 921; *Weeks v. Samsung Heavy Indus. Co., Ltd.* (7th Cir. 1997) 126 F3d 926, 945]

"Generally, only misconduct by the prevailing party worthy of a penalty or the losing party's inability to pay will suffice to justify denying costs." [*Weeks v. Samsung Heavy Indus. Co., Ltd.*, supra, 126 F3d at 945; see *Association of Mexican-American Educators ("AMAE") v. State of Calif.* (9th Cir. 2000) 231 F3d 572, 592—in civil rights action, denial of prevailing party costs is proper based on losing party's inability to pay, prevailing party's misconduct and potential chilling effect of imposing costs on future litigants]

b. [17:586] **Limitation in diversity actions:** In diversity actions, if plaintiff recovers *less than $75,000* (exclusive of interest and costs), "the district court may deny costs to the plaintiff

and, in addition, *may impose* costs on the plaintiff." [28 USC §1332(b) (emphasis added); see *Perlman v. Zell* (7th Cir. 1999) 185 F3d 850, 859—"if the outcome shows that the case did not belong in federal court, then costs may be denied or shifted"]

(1) [17:586.1] **Compare—federal question actions:** Where jurisdiction is based on federal question rather than diversity, the court may not deny costs based on plaintiff's failure to recover at least $75,000. [*Berkla v. Corel Corp.*, supra, 302 F3d at 921]

c. [17:586.2] **Prevailing party determination:** A "prevailing party" for purposes of entitlement to a costs award "is one who has been awarded some relief by the court." [*Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources* (2001) 532 US 598, 603, 121 S.Ct. 1835, 1839]

d. [17:587] **Items allowable generally:** Recoverable "costs" under Rule 54(d) are defined generally by 28 USC §1920—clerk's filing fees, fees for service of summons and complaint, fees for service of subpoenas, witness fees, etc. (see also 28 USC §1821—witness per diem and mileage fees). [See *Taniguchi v. Kan Pac. Saipan, Ltd.* (2012) 566 US 560, 565, 132 S.Ct. 1997, 2001]

The discretion granted by Rule 54(d)(1) to award or deny prevailing party costs is *not* "a separate source of power to tax as costs expenses not enumerated in §1920." [*Taniguchi v. Kan Pac. Saipan, Ltd.*, supra, 566 US at 565, 132 S.Ct. at 2001 (internal quotes omitted)]

(1) [17:588] **Compare—expert witness fees:** Expert witness fees are *not* among the cost items allowed by statute, and hence are generally *not* recoverable as costs (except where a specific statute allows for their recovery, or the expert is appointed by court order). [See 28 USC §1920(6); see also *Rimini Street, Inc. v. Oracle USA, Inc.* (2019) 586 US ___, ___, 139 S.Ct. 873, 877—absent "express authority, courts may not award litigation expenses" beyond those specified in §§1821 and 1920]

e. [17:589] **Federal Civil Rights Act actions:** In actions under 42 USC §1981, or for *intentional* employment discrimination under §1981a, the court has *discretion* to award "a reasonable attorney's fee as part of the costs . . . [and] may include expert fees *as part of the attorney's fee*." [42 USC §1988(b), (c) (emphasis added)]

This authorization permits recovery as part of an attorney fee award of those out-of-pocket expenses that *would normally be charged to a fee-paying client* and not built into the attorney's hourly rate. [See *Missouri v. Jenkins by Agyei* (1989) 491 US 274, 288, 109 S.Ct. 2463, 2471; *Harris v. Marhoefer* (9th Cir. 1994) 24 F3d 16, 19]

(1) [17:590] **Includes items not allowable as court costs:** Certain items not otherwise recoverable as court costs under FRCP 54(d) (*see* ¶*17:587*) may be recovered as part of the "attorney's fee," including:

— investigator's fees,
— photocopying,
— computer-assisted legal research,
— long-distance telephone charges, and
— paralegal fees,

as long as these are billed to the client in the ordinary course of business. [*Harris v. Marhoefer,* supra, 24 F3d at 19-20; *Missouri v. Jenkins by Agyei,* supra, 491 US at 288, 109 S.Ct. at 2471—paralegal work may be billed at market rate rather than at cost where this is the prevailing practice in relevant market]

(2) [17:591] **Expert witness fees:** The court also has discretion to include expert witness fees as part of the attorney fee award in actions brought pursuant to Title VII and the ADA (42 USC §§2000e-5(k), 12117(a)) and §1981 of the Civil Rights Act. [42 USC §1988(c); see *Harris v. Marhoefer,* supra, 24 F3d at 20 (upholding fee award to expert witness who aided in deposing opposing party's expert); *Lovell v. Chandler* (9th Cir. 2002) 303 F3d 1039, 1058 (ADA case); *EEOC v. Peoplemark, Inc.* (6th Cir. 2013) 732 F3d 584, 593-594 (Title VII action)]

(a) [17:592] **Compare—ADEA, FLSA:** According to federal courts, there is no express statutory authority in the ADEA or the FLSA to award expert witness fees for other than court-appointed expert witnesses. [*Tyler v. Union Oil Co. of Calif.* (5th Cir. 2002) 304 F3d 379, 405—no error in refusing to award plaintiff expert witness fees under FLSA; *James v. Sears, Roebuck & Co, Inc.* (10th Cir. 1994) 21 F3d 989, 996-997—expert witness fees not recoverable under ADEA; see *Quiles v. Parent* (2018) 28 CA5th 1000, 1010, 239 CR3d 664, 671—federal law applies to determine what type of costs are recoverable by prevailing party in FLSA action filed in state court]

[17:593-599] *Reserved.*

H. ATTORNEY FEES

1. Authority for Fee Awards

a. [17:600] **Under federal law:** Court authority to award attorney fees under federal law depends on the nature of the action:

(1) [17:601] **Discretionary fee awards:** A court has *discretion* to award reasonable attorney fees and costs to the *prevailing party* (other than the United States or EEOC) in actions under:

— Title VII (42 USC §2000e-5(k));
— Section 1981 of the Civil Rights Act (42 USC §1988);
— the ADA (42 USC §12205); and
— ERISA (29 USC §1132(g)).

(a) [17:602] **Award belongs to client, not attorney:** The prevailing party, not the attorney, is eligible for fees under these statutes, and the attorney lacks standing to pursue the award on his or her own behalf. However, after the client exercises the right to receive fees, the attorney may seek payment from the client. [*Evans v. Jeff D.* (1986) 475 US 717, 730, 106 S.Ct. 1531, 1539, fn. 19; *Astrue v. Ratliff* (2010) 560 US 586, 593, 130 S.Ct. 2521, 2526—"The fact that the statute awards to the prevailing party fees in which her attorney may have a beneficial interest or a contractual right does not establish that the statute 'awards' the fees directly to the attorney"; *Pony v. County of Los Angeles* (9th Cir. 2006) 433 F3d 1138, 1142 (fees under 42 USC §1988)]

1) [17:602.1] **Compare—fee awards under California FEHA:** Unless attorney and client have agreed otherwise, fee awards under the FEHA belong to the *attorney*, not the client. *See discussion at ¶17:649.30.*

(b) [17:602.2] **No effect on client's fee obligation:** The federal fee-shifting statutes (¶*17:601*) do *not* affect the enforceability of a fee agreement between plaintiff and his or her attorney. The statutes control "what the losing defendant must pay [the prevailing plaintiff], not what the prevailing plaintiff must pay his lawyer." [*Venegas v. Mitchell* (1990) 495 US 82, 90, 110 S.Ct. 1679, 1684 (42 USC §1988 fee award); *Gobert v. Williams* (5th Cir. 2003) 323 F3d 1099, 1100—Title VII fee award to plaintiff did not bar attorney's enforcement of 35% contingent fee provision in retainer agreement]

Likewise, case law regarding the *amount* of fees due under the fee-shifting statutes (¶*17:685 ff.*) does *not* apply to determine the reasonableness of the amount payable under a contingency fee agreement. [*Gobert v. Williams*, supra, 323 F3d at 1100]

(2) [17:603] **Mandatory fee awards:** Some federal statutes *mandate* an award to prevailing plaintiffs:

(a) [17:604] **ADEA, FLSA:** The Age Discrimination in Employment Act (ADEA) incorporates selected provisions of the Fair Labor Standards Act (FLSA), including those pertaining to attorney fee awards. An award of attorney fees is *mandatory* (rather than

discretionary) to a successful *plaintiff* (rather than to the "prevailing party"). [See 29 USC §626(b) (held unconstitutional on other grounds by *Kimel v. Florida Bd. of Regents* (2000) 528 US 62, 120 S.Ct. 631), incorporating FLSA attorney fees provision, 29 USC §216(b)]

1) [17:605] **Compare—prevailing defendants:** In general, a prevailing defendant in an ADEA case may *not* be awarded attorney fees absent a showing of bad faith on the part of the plaintiff. [*Mach v. Will County Sheriff* (7th Cir. 2009) 580 F3d 495, 501; *Turlington v. Atlanta Gas Light Co.* (11th Cir. 1998) 135 F3d 1428, 1437; but see *Richardson v. Alaska Airlines, Inc.* (9th Cir. 1984) 750 F2d 763, 767—"Congress limited the award of attorney's fees to the successful plaintiff-employee . . . carefully to foreclose the possibility of the recovery of attorney's fees by an employer who has successfully defended himself against an accusation of age discrimination"]

2) [17:606] **Compare—prevailing party fee award under EAJA:** Under the Equal Access to Justice Act (EAJA), prevailing party attorney fees "shall" be awarded against the U.S. government in civil actions brought by or against the U.S. (other than cases "sounding in tort"), unless the position of the United States was "substantially justified" or "special circumstances" make an award "unjust." [28 USC §2412(d); *Astrue v. Ratliff* (2010) 560 US 586, 589, 130 S.Ct. 2521, 2524; see *EEOC v. Hendrix College* (8th Cir. 1995) 53 F3d 209, 211 (recognizing court's inherent power to award fees against U.S. where EEOC acted "in bad faith, vexatiously, wantonly, or for oppressive reasons")]

   a) [17:606.1] **Limitation—case otherwise subject to statutory fee-shifting:** The EAJA mandatory fee-shifting provision (¶*17:606*) does not apply "when another provision of federal law provides for the recovery of attorneys' fees against the government in a given case." [*EEOC v. Great Steaks, Inc.* (4th Cir. 2012) 667 F3d 510, 520-521—prevailing defendant in Title VII suit not entitled to EAJA award because Title VII allows prevailing parties to collect attorney fees from government; compare *EEOC v. Clay Printing Co.* (4th Cir. 1994) 13 F3d 813, 817 (allowing prevailing

defendant to collect attorney fees from EEOC in action under ADEA, which lacks specific fee-shifting provision)]

(b) [17:607] **FMLA:** The Family and Medical Leave Act (FMLA) states that if plaintiff recovers *judgment*, the court "shall . . . allow a reasonable attorney's fee . . . to be paid by the defendant." [29 USC §2617(a)(3)]

This language *mandates* an award of fees when plaintiff wins a judgment in any amount, even for nominal damages. [*McDonnell v. Miller Oil Co., Inc.* (4th Cir. 1998) 134 F3d 638, 640; compare *Franzen v. Ellis Corp.* (7th Cir. 2008) 543 F3d 420, 430—although jury found defendant to have violated FMLA, no damages were awarded because FMLA only authorizes fees for judgment, not verdict]

1) [17:608] **Amount discretionary:** Although an award is mandatory, the court may adjust the amount to reflect the *degree* of plaintiff's success. [*McDonnell v. Miller Oil Co., Inc.,* supra, 134 F3d at 640]

(3) [17:609] **Standards governing fee awards:** Different standards govern "prevailing party" fee awards to plaintiffs and defendants under federal civil rights statutes. These differing standards reflect the policy of encouraging private litigation to enforce important civil rights. [*Christiansburg Garment Co. v. EEOC* (1978) 434 US 412, 422, 98 S.Ct. 694, 701, fn. 20]

These standards apply in employment discrimination cases. [See *Harris v. Maricopa County Sup.Ct.* (9th Cir. 2011) 631 F3d 963, 971 (Title VII case); *Hawkins v. 1115 Legal Service Care* (2nd Cir. 1998) 163 F3d 684, 694-695 (same); *Roepsch v. Bentsen* (ED WI 1994) 846 F.Supp. 1363, 1370 (ADEA case)]

(a) [17:610] **Prevailing plaintiffs:** A prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust" (*see ¶17:635 ff.*). [*Newman v. Piggie Park Enterprises* (1968) 390 US 400, 401, 88 S.Ct. 964, 966; *Hensley v. Eckerhart* (1983) 461 US 424, 429, 103 S.Ct. 1933, 1937; see *Barrios v. California Interscholastic Federation* (9th Cir. 2002) 277 F3d 1128, 1134 (same standard in ADA actions); *EEOC v. Great Steaks, Inc.* (4th Cir. 2012) 667 F3d 510, 516—Title VII's fee-shifting provision "promotes the vigorous enforcement of Title VII by making it easier for plaintiffs of limited means to bring meritorious actions"]

1) [17:611] **Rationale:** "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest . . ." [*Newman v. Piggie Park Enterprises*, supra, 390 US at 402, 88 S.Ct. at 966; see *EEOC v. Great Steaks, Inc.*, supra, 667 F3d at 516—Title VII fee-shifting provision "promotes vigorous enforcement of Title VII by making it easier for plaintiffs of limited means to bring meritorious actions"]

2) [17:612] **Pro se litigants ineligible:** The U.S. Supreme Court has held that pro se litigants, including pro se attorney litigants, are not entitled to a fee award in federal civil rights actions under 42 USC §1988. [*Kay v. Ehrler* (1991) 499 US 432, 437-438, 111 S.Ct. 1435, 1437-1438]

Rationale: Section 1988 fee-shifting is designed to enable plaintiffs to obtain competent counsel to ensure effective prosecution of meritorious claims. That policy is best served by a rule creating the incentive to retain counsel in every case. [*Kay v. Ehrler*, supra, 499 US at 437-438, 111 S.Ct. at 1437-1438; *Hannon v. Chater* (ND CA 1995) 900 F.Supp. 1276, 1284, fn. 23]

[17:612.1-612.4] *Reserved.*

3) [17:612.5] **Includes private attorneys in EEOC proceedings:** Employees represented by private attorneys in Title VII proceedings before the EEOC may recover attorney fees if they prevail. [See *New York Gaslight Club, Inc. v. Carey* (1980) 447 US 54, 66, 100 S.Ct. 2024, 2032]

If dissatisfied with the amount awarded by the EEOC, the employees may file an independent action in federal court in an effort to obtain a larger award. [*Porter v. Winter* (9th Cir. 2010) 603 F3d 1113, 1115]

(b) [17:613] **Prevailing defendants:** In contrast, a *prevailing defendant* is entitled to fees only if plaintiff's lawsuit "was unreasonable, frivolous, or vexatious" or "plaintiff continued to litigate after it clearly became so." [*Christiansburg Garment Co. v. EEOC* (1978) 434 US 412, 421, 98 S.Ct. 694, 700 (Title VII action); *Summers v. A. Teichert & Son, Inc.* (9th Cir. 1997) 127 F3d 1150, 1154 (same standard in ADA actions)]

Same rule applies to expert witness fees: The same "frivolous, unreasonable, or groundless" requirement applies to an award of expert witness fees against

the plaintiff. [*American Federation of State, County & Mun. Employees, AFL-CIO v. County of Nassau* (2nd Cir. 1996) 96 F3d 644, 646]

1) [17:614] **Adverse judgment alone not sufficient:** An action is *not* unreasonable or groundless simply because plaintiff ultimately lost: "Even when the law or the facts appear questionable or unfavorable at the outset, a plaintiff may have an entirely reasonable ground for bringing the suit." [*Christiansburg Garment Co. v. EEOC,* supra, 434 US at 421, 98 S.Ct. at 700; see also *Tutor-Saliba Corp. v. City of Hailey* (9th Cir. 2006) 452 F3d 1055, 1060 (not an employment case); *Quintana v. Jenne* (11th Cir. 2005) 414 F3d 1306, 1310-1312—fees could be awarded under Title VII for defending against one frivolous claim but not for defending against another claim that, while unsuccessful, was not frivolous]

   a) [17:614.1] **Lack of merit discovered after suit filed:** If a case has merit when filed but subsequent litigation reveals the claim is "frivolous, unreasonable or groundless," defendant may be awarded fees from the time it became unreasonable for plaintiff to continue to litigate the claim. [*EEOC v. Peoplemark, Inc.* (6th Cir. 2013) 732 F3d 584, 591-592—fee award warranted where EEOC continued to litigate after discovery revealed nonexistence of alleged employment policy on which claim was based]

2) [17:615] **Court discretion to deny fees:** Notwithstanding a finding of frivolousness, the district court retains discretion to deny or reduce fee requests after considering all the nuances of a particular case. [*Thomas v. City of Tacoma* (9th Cir. 2005) 410 F3d 644, 650-651]

3) [17:616] **Effect of joining frivolous and nonfrivolous claims:** A partial award of attorney fees and costs is permissible when frivolous and nonfrivolous claims are joined in the same action but the frivolous claims are *distinct.* The court must weigh and assess the amount of fees attributable to the frivolous claim. [*Tutor-Saliba Corp. v. City of Hailey*, supra, 452 F3d at 1063-1064; *Quintana v. Jenne* (11th Cir. 2005) 414 F3d 1306, 1312; *Ward v. Hickey* (1st Cir. 1993) 996 F2d 448, 455-456]

   An award of fees in such instances is proper only if "the fees requested would not have accrued

but for the frivolous claim." Federal courts will not grant a partial fee award when the interrelated frivolous and nonfrivolous claims are not sufficiently distinct. [*Fox v. Vice* (2011) 563 US 826, 839, 131 S.Ct. 2205, 2216-2217; see *EEOC v. CRST Van Expedited, Inc.* (8th Cir. 2019) 944 F3d 750, 760—fee award that excluded frivolous claims was not based on mathematical precision but flexible and commonsense application of *Fox*; see also *Harris v. Maricopa County Sup.Ct.* (9th Cir. 2011) 631 F3d 963, 971—"pro-rata allocation of general fees between claims for which a fee award is appropriate and claims for which such an award is not appropriate, based solely on the number of claims, is impermissible"]

[17:617-619] *Reserved.*

(4) [17:620] **Determining whether plaintiff is "prevailing" party:** Plaintiffs "prevail" when actual relief on the merits of their claim *materially alters the parties' legal relationship* in a way that directly benefits plaintiffs. [*Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources* (2001) 532 US 598, 603-604, 121 S.Ct. 1835, 1839-1840]

Compare—ERISA cases: A more liberal standard applies in ERISA cases; fees may be awarded to whichever party achieved "*some degree of success* on the merits." [*Hardt v. Reliance Standard Life Ins. Co.* (2010) 560 US 242, 245, 130 S.Ct. 2149, 2152 (emphasis added); see also *Micha v. Sun Life Assur. of Canada, Inc.* (9th Cir. 2017) 874 F3d 1052, 1057—in awarding fees in ERISA case, court must consider "the full course of the litigation" rather than focusing exclusively on prior appeal]

Compare—prevailing defendant in Title VII cases: "[A] favorable ruling on the merits is not a necessary predicate to find that a defendant has prevailed." [*CRST Van Expedited, Inc. v. EEOC* (2016) 578 US 419, 421, 432-433, 136 S.Ct. 1642, 1646, 1651-1652—employer was "prevailing party" under Title VII's attorney fee provision although dismissal was based on EEOC's failure to satisfy presuit investigation and conciliation obligations rather than on merits]

Compare—prevailing party on appeal in 42 USC §1988 cases: Because a court "may award fees only for work 'expended in pursuit of the ultimate result achieved' " in an action alleging violations of 42 USC §1988, a court may decline to award attorney fees for preparing a never-filed answering brief, even though plaintiffs prevailed on a motion to dismiss the appeal. [*Melendres v. Maricopa*

County (9th Cir. 2018) 878 F3d 1214, 1216 (internal citation omitted)]

(a) [17:620.1] **Court-ordered relief required:** Plaintiff secures a "material alteration of the parties' legal relationship" where plaintiff "has prevailed on the merits of at least *some* of his claims." [*Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources,* supra, 532 US at 603, 121 S.Ct. at 1839 (emphasis added)]

1) [17:621] **Judgment or consent decree:** The relief may be in the form of a judgment on the merits or a settlement enforced through a consent decree. [*Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, supra, 532 US at 604, 121 S.Ct. at 1840; see *Smyth ex rel. Smyth v. Rivero* (4th Cir. 2002) 282 F3d 268, 276-277—in §1983 civil rights case, grant of preliminary injunction insufficient to render plaintiff "prevailing party"]

2) [17:622] **Private settlement insufficient:** But a private settlement alone does not make plaintiff the "prevailing" party: "Private settlements do not entail the judicial approval and oversight involved in consent decrees." [*Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, supra, 532 US at 604, 121 S.Ct. at 1840, fn. 7; but see *Barrios v. California Interscholastic Federation* (9th Cir. 2002) 277 F3d 1128, 1134-1135 & fn. 5—ADA plaintiff "prevails" by entering into legally enforceable settlement (contrary language in *Buckhannon* treated as dictum)]

3) [17:623] **Voluntary change insufficient:** Nor do plaintiffs "prevail" where their lawsuit simply acted as a "catalyst" for a voluntary change in defendant's conduct. [*Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, supra, 532 US at 605, 121 S.Ct. at 1840; compare *Fast v. Cash Depot, Ltd.* (7th Cir. 2019) 931 F3d 636, 640-641 (rejecting *Buckhannon*'s "prevailing party" analysis for FLSA claims and denying plaintiff's attorney fees where defendant voluntarily paid overtime wages and liquidated damages because, despite summary judgment order confirming defendant owed wages, court never entered judgment favorable to plaintiff and FLSA requires favorable judgment)]

4) [17:624] **Temporary injunction:** A party obtaining a preliminary injunction may qualify

as a prevailing party even where the preliminary injunction does not become permanent, so long as it is not dissolved for lack of entitlement. However, where a party secures a preliminary injunction, then loses *on the merits* as the case proceeds and has judgment entered against it, the party is not a prevailing party. [*Watson v. County of Riverside* (9th Cir. 2002) 300 F3d 1092, 1096]

(b) [17:625] **Effect of "prevailing" on some claims and not others:** Plaintiff is the "prevailing party" if he or she succeeds "on *any* significant issue in litigation which achieves *some of the benefit* the parties sought in bringing suit." [*Hensley v. Eckerhart* (1983) 461 US 424, 433, 103 S.Ct. 1933, 1939 (emphasis added)]

Where plaintiff succeeds on some claims and not others, the court must determine whether the successful and unsuccessful claims are *related* (i.e., a common core of facts based on related legal theories). [*Hensley v. Eckerhart*, supra, 461 US at 434, 103 S.Ct. at 1940]

- If the claims were *distinctly different*, no fees may be awarded for time spent on unsuccessful claims;
- If the claims were *related,* fees must reflect the *overall level of success* achieved; i.e., full compensation for all hours spent may be excessive where only "partial or limited" relief was obtained. [*Thomas v. City of Tacoma* (9th Cir. 2005) 410 F3d 644, 649-650; *Schwarz v. Secretary of Health & Human Services* (9th Cir. 1995) 73 F3d 895, 902; see also *Harman v. City & County of San Francisco* (2006) 136 CA4th 1279, 1307-1308, 39 CR3d 589, 610]

[17:625.1-625.4] *Reserved.*

1) [17:625.5] **Related state and federal claims:** Plaintiffs who assert related state and federal claims and win on both are entitled to a fee award under the federal statute even if the jury awards *damages only on the state law claim.* It is enough that the operative facts were determined in plaintiff's favor on the federal claim. [See *Hall v. Western Production Co.* (10th Cir. 1993) 988 F2d 1050, 1055-1057—plaintiff prevailed both on breach of contract and ADEA claims but jury awarded zero damages on ADEA claim and substantial damages on breach of contract claim]

But if plaintiffs *lose* on the federal claim, the fact that they win on a related state law claim should not support a fee award under the federal statute. [See *Mateyko v. Felix* (9th Cir. 1990) 924 F2d 824, 828—plaintiff who lost §1983 civil rights action but won state law battery claim could *not* recover attorney fees under 42 USC §1988; see also *McFadden v. Villa* (2001) 93 CA4th 235, 237, 241-242, 113 CR2d 80, 81, 84-85]

On the other hand, when plaintiffs are only *partially successful* on the state claim, an apportionment of a fee award between the state and federal claim is *not* necessarily required if:

— the claims are "virtually interchangeable";

— there was no "gross disproportion" in the time expended by counsel on the two claims; and

— only a small percentage of the total hours expended on the entire matter was attributable to the state claim. [*El-Hakem v. BJY Inc.* (9th Cir. 2005) 415 F3d 1068, 1075-1076—no apportionment made where partially successful state law wage claim required little more in way of factual development or legal analysis than that required for federal discrimination claim; *see also* ¶*17:710*]

(c) [17:626] **Effect of nominal damages:** Although a plaintiff who recovers only nominal damages is the "prevailing party" in a technical sense, that determination does not end the inquiry. "It remains for the district court to determine what fee is 'reasonable.' " The "most critical factor" in making that determination is "the degree of success obtained." [*Hensley v. Eckerhart* (1983) 461 US 424, 433, 436, 103 S.Ct. 1933, 1939, 1941 (fee award under Civil Rights Attorney's Fees Awards Act, 42 USC §1988); *Farrar v. Hobby* (1992) 506 US 103, 114-115, 113 S.Ct. 566, 574-575 (same)]

1) [17:627] **Solely monetary claims:** When the *sole* purpose of a civil rights claim is recovery of damages, an award of nominal damages indicates failure to prove actual, compensable injury. In such cases, "the only reasonable fee is usually no fee at all." [*Farrar v. Hobby*, supra, 506 US at 115, 113 S.Ct. at 575; see *Aponte v. City of Chicago* (7th Cir. 2013) 728 F3d 724, 727—*Farrar* analysis applicable where damages award, though more than nominal, was "minimal" compared to amount sought]

2) [17:628] **Claims seeking other relief:** But the result is different where the suit achieves significant results despite a nominal damages award: "If the lawsuit achieved other tangible results—such as sparking a change in policy or establishing a finding of fact with potential collateral estoppel effects—such results will, in combination with an enforceable judgment for a nominal sum, support an award of fees." [*Wilcox v. City of Reno* (9th Cir. 1994) 42 F3d 550, 555—$66,535 fee award upheld although plaintiff recovered only $1 in damages in police brutality action against City, because litigation precipitated City's discipline of officer and modification of its use of force policy]

- [17:629] As stated by another court, a nominal damages recovery precludes an attorney fee award "*only* when the action serves no public purpose." [*Gudenkauf v. Stauffer Communications, Inc.* (10th Cir. 1998) 158 F3d 1074, 1078 (emphasis in original)]

(d) [17:630] **Mixed-motives cases:** Where illegal discrimination was only one of several reasons motivating the employer's action, and the other reasons are lawful (e.g., poor job performance by employee), the court has *discretion* to award attorney fees "directly attributable" to the pursuit of the unlawful employment practice claim. [See 42 USC §2000e-5(g)(2)(B)(i)]

Effect: The employer's success in its mixed-motives defense avoids liability for damages but does not necessarily bar an award of attorney fees. That matter is left to the district court's discretion. [*Norris v. Sysco Corp.* (9th Cir. 1999) 191 F3d 1043, 1051—plaintiff who was denied promotion in part because of her gender could not recover damages for Title VII violation because there were other lawful reasons for employer's action; but court still had *discretion* to award her fees]

- [17:631] Some cases state a fee award to plaintiff is proper whenever impermissible discrimination was *a* factor in discharge: "(A) fee award is the only form of redress available to make the victim whole for *vindicating society's interest* in a discrimination-free workplace." [*Gudenkauf v. Stauffer Communications, Inc.,* supra, 158 F3d at 1078, 1082 (emphasis added); *Forrest v. Stinson Seafood Co.* (D ME 1998) 990 F.Supp. 41, 45—plaintiff who was denied employment in part because of her gender could recover at-

torney fees because her lawsuit was of *significant public service* in opening careers closed to women]

- [17:632] But more courts consider the relationship between the fees and the *degree* of plaintiff's success (utilizing the "proportionality" test espoused by the U.S. Supreme Court in *Farrar v. Hobby,* ¶*17:626*). Thus, fees may be denied where "relief to the plaintiff is otherwise trivial and the lawsuit promotes few public goals." [*Sheppard v. Riverview Nursing Ctr., Inc.* (4th Cir. 1996) 88 F3d 1332, 1336; see *Norris v. Sysco Corp.*, supra, 191 F3d at 1051-1052]

- [17:633] Attorney fee awards have been held improper in *dual motive retaliation* cases because a finding of dual motives exonerates the employer (*see* ¶*5:1665 ff.*). [*Garner v. Missouri Dept. of Mental Health* (8th Cir. 2006) 439 F3d 958, 961]

[17:634] *Reserved.*

(5) [17:635] **"Special circumstances" justifying denial of fees?** Because an attorney fee award is *discretionary* under both Title VII and §1988, it may be denied where "special circumstances exist that would make an award unjust." [See *Hensley v. Eckerhart* (1983) 461 US 424, 430, 103 S.Ct. 1933, 1937 (internal quotes omitted)]

(a) [17:636] **Narrowly circumscribed:** A fee award is intended to encourage injured individuals to seek judicial relief. Thus, the discretion to deny a fee award to a prevailing plaintiff on the ground that "special circumstances" render the award "unjust" has been narrowly circumscribed. [*De Jesús Nazario v. Morris Rodríguez* (1st Cir. 2009) 554 F3d 196, 200—"special circumstances" permitting outright denial of fee award "are few and far between"; see *Vasquez v. Rackauckas* (9th Cir. 2013) 734 F3d 1025, 1055—defendant has burden of proving "special circumstances" warranting denial of fees and "defendant's showing must be a strong one" (internal quotes omitted)]

Fee awards have consistently been upheld against claims that "special circumstances" make the award unjust. [See *New York Gaslight Club, Inc. v. Carey* (1980) 447 US 54, 70, 100 S.Ct. 2024, 2034, fn. 9—fee award upheld although plaintiffs were represented without charge by public interest group; *Barlow-Gresham Union High School Dist. No. 2 v. Mitchell* (9th Cir. 1991) 940 F2d 1280, 1286—fee award upheld although defendant was willing to enter

into early settlement; see also *National Ass'n for Advancement of Colored People v. Town of East Haven* (2nd Cir. 2001) 259 F3d 113, 118-121—abuse of discretion for court to deny fees on speculative ground that plaintiff could have achieved its objectives without filing suit]

(b) [17:637] **Particularized findings required:** Upon finding that special circumstances warrant the denial of fees in a civil rights action, the trial court must support its decision "with particularized findings of fact and conclusions of law identifying the special circumstances and explaining why an award would be inappropriate." [*De Jesús Nazario v. Morris Rodríguez* (1st Cir. 2009) 554 F3d 196, 200-201 (internal quotes omitted)]

1) [17:638] **"Special circumstances":** The following have been identified as "special circumstances" justifying the denial of a fee award:
   — "outrageous" or "inexcusable" litigation conduct by plaintiff or plaintiff's counsel;
   — other "bad faith or obdurate conduct";
   — "unjust hardship" resulting from the grant or denial of fee shifting. [*De Jesús Nazario v. Morris Rodríguez*, supra, 554 F3d at 200-201 (collecting cases)]

[17:639-644] *Reserved.*

b. [17:645] **Under California law:** Under California law, attorney fees are recoverable from the opposing party only as specifically provided by *statute* or *contract*. [See CCP §1021]

(1) [17:646] **FEHA:** Courts have discretion to award fees and costs to the prevailing party in FEHA actions, except "a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so," even where the plaintiff rejected a statutory offer to compromise under CCP §998. [Gov.C. §12965(c)(6)]

California courts have relied upon federal cases interpreting Title VII and the ADEA in determining the standards governing FEHA fee recoveries. [See *Linsley v. Twentieth Century Fox Film Corp.* (1999) 75 CA4th 762, 766, 89 CR2d 429, 431]

(a) [17:646.1] **Contractual waiver unenforceable:** An employee's right to attorney fees under the FEHA cannot be waived. Thus, a provision in an arbitration agreement requiring the parties to bear their own attorney fees regardless of the type of action brought

is unconscionable and unenforceable with respect to FEHA actions. [*Serpa v. California Surety Investigations, Inc.* (2013) 215 CA4th 695, 710, 155 CR3d 506, 517]

(b) [17:647] **Standards for prevailing plaintiff fees/costs award:** Although the statute states that the court "may" award fees, a prevailing plaintiff is *entitled to* fees "absent circumstances that would render the award unjust." [*Stephens v. Coldwell Banker Comm'l Group, Inc.* (1988) 199 CA3d 1394, 1406, 245 CR 606, 613 (disapproved on other grounds by *White v. Ultramar, Inc.* (1999) 21 C4th 563, 88 CR2d 19); *Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 CA4th 359, 394, 33 CR3d 644, 671]

1) [17:648] **Absent judgment or consent decree?** Some cases state fee awards to plaintiffs are proper where the employee's lawsuit was a "catalyst" motivating the employer to provide the relief sought voluntarily. [See *Westside Comm. for Independent Living, Inc. v. Obledo* (1983) 33 C3d 348, 353, 188 CR 873, 876]

[17:648.1-648.4] *Reserved.*

2) [17:648.5] **Effect of mixed-motives defense:** Where defendant's adverse employment action was motivated by both discriminatory and nondiscriminatory reasons, a plaintiff may be eligible for an award of reasonable attorney fees and costs if discrimination was a *substantial motivating factor*. [*Harris v. City of Santa Monica* (2013) 56 C4th 203, 235, 152 CR3d 392, 415]

However, such an award is discretionary. [See *Bustos v. Global P.E.T., Inc.* (2017) 19 CA5th 558, 563, 227 CR3d 205, 208 (affirming trial court's discretion in denying fee award because "*Harris* does not require the trial court to award attorney fees to any plaintiff who proves discrimination was a substantial motivating factor of an adverse employment decision")]

Compare—federal rule: In Title VII cases, where the employer proves it would have taken the same action in the absence of the impermissible motivating factor, federal courts have discretion to award a prevailing plaintiff those fees and costs "directly attributable" to the pursuit of the unlawful discrimination claim. [42 USC §2000e-5(g)(2)(B); see *Norris v. Sysco Corp.* (9th Cir.

1999) 191 F3d 1043, 1051; *and discussion at* ¶*17:630 ff.*]

[17:648.6-648.9] *Reserved.*

3) [17:648.10] **Where damages could have been recovered in limited civil case:** A superior court in an unlimited civil case (CCP §88) may deny costs (including awardable attorney fees) where the damages recovered could have been obtained in a limited civil case (CCP §85); or where the recovery in a limited civil case could have been obtained in a small claims court. [CCP §1033(a), (b); see *Chavez v. City of Los Angeles* (2010) 47 C4th 970, 976, 104 CR3d 710, 715—court had discretion to deny fees to plaintiff who prevailed on FEHA claim but recovered only $11,500, less than half the jurisdictional limit for a limited civil case ($25,000)]

Deadline for fee motions: The deadline to file a motion for fees depends on the case's jurisdictional classification (60 days for unlimited civil cases and 30 days for limited civil cases). [CRC 3.1702(b)(1); *Stratton v. Beck* (2017) 9 CA5th 483, 491, 215 CR3d 150, 155-156]

Cross-refer: "Unlimited civil cases and "limited civil cases" are discussed in Weil & Brown et al., *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 3.

[17:648.11-648.14] *Reserved.*

4) [17:648.15] **Not where case "over-lawyered":** The FEHA authorizes only *reasonable* fee awards. Thus, fees may be limited where "there is no way on earth this case justified the hours purportedly billed by [plaintiff's] lawyers." [See *Harrington v. Payroll Entertainment Services, Inc.* (2008) 160 CA4th 589, 594, 72 CR3d 922, 925]

(c) [17:649] **Standards for prevailing defendant fees/ costs award:** In contrast, a prevailing defendant is entitled to fees and costs, including expert witness fees, under the FEHA only if "the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so," notwithstanding CCP §998. [Gov.C. §12965(c)(6); *Cummings v. Benco Building Services* (1992) 11 CA4th 1383, 1389-1390, 15 CR2d 53, 57 (adopting standards set forth by U.S. Supreme Court in *Christiansburg Garment Co. v. EEOC*, *see* ¶*17:613*)]

The same standard applies to a prevailing defendant's recovery of ordinary costs of suit under the FEHA. [See *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 C4th 97, 99-100, 186 CR3d 826, 827-828—costs allowable to prevailing FEHA defendant only if "plaintiff brought or continued litigating the action without an objective basis for believing it had potential merit"]

Moreover, whether plaintiff's claim was so groundless as to warrant a fee award must be evaluated with respect to the entire complaint, not just the FEHA cause of action. [*Jersey v. John Muir Med. Ctr.* (2002) 97 CA4th 814, 832, 118 CR2d 807, 821]

1) [17:649.1] **Compare—attorney fees and costs under CCP §998:** Normally, under CCP §998, a defendant who prevails after the plaintiff fails to accept a statutory offer to compromise may recover its post-offer attorney fees and costs (including expert witness fees) if otherwise recoverable by statute or contract. However, effective January 1, 2019, even where a plaintiff fails to accept a statutory offer to compromise under CCP §998, a prevailing defendant in an FEHA action may recover costs and fees (including expert costs and fees) *only* if the court finds that the plaintiff's action was "frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so." [Gov.C. §12965(c)(6)]

   For litigation that predates application of amended Gov.C. §12965(b), now renumbered as §12965(c)(6), courts are split as to whether CCP §998 applies to nonfrivolous FEHA actions. [See *Huerta v. Kava Holdings, Inc.* (2018) 29 CA5th 74, 76, 240 CR3d 72, 74—nonfrivolous FEHA cases predating §12965(b) 2019 amendment do not differentiate between treatment of ordinary costs, attorney fees, and expert witness fees; *Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (2018) 19 CA5th 525, 552, 228 CR3d 120, 139—CCP §998 did not allow employer defendants to recover expert witness fees in connection with FEHA claims; but see *Martinez v. Eatlite One, Inc.* (2018) 27 CA5th 1181, 1185-1186, 238 CR3d 747, 749-750 (remanding to trial court after considering CCP §998 to enter amended post-judgment order awarding "only pre-offer costs and attorney fees to plaintiff, post-offer costs to defendant, and any expert

witness fees the court determines to award in its discretion to defendant")]

a) [17:649.2] **Court must consider plaintiff's ability to pay?** Because Gov.C. §12965(c)(6) is silent on the subject, it is possible that the plaintiff's ability to pay must still be considered before awarding attorney fees in favor of the defendant in a FEHA action. [*Villanueva v. City of Colton* (2008) 160 CA4th 1188, 1203, 73 CR3d 343, 356 (decided under prior numbering of statute)—$40,000 fee award to City upheld where City Employee earning $25 per hour *failed to offer any evidence* of inability to pay]

[17:649.3-649.4] *Reserved.*

2) [17:649.5] **Lack of merit discovered after suit filed:** Where plaintiff discovers the weakness of his or her claims *after* filing suit (e.g., during discovery), *continuation* of the suit may be deemed "frivolous, unreasonable or groundless." In such cases, a FEHA fee award to prevailing defendants is proper *from the time plaintiff was aware* of facts demonstrating the absence of discrimination. [See *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 CA4th 859, 873, 110 CR2d 903, 913, citing *Moss v. Associated Press* (CD CA 1996) 956 F.Supp. 891, 894 (applying Calif. law); *EEOC v. United Parcel Service, Inc.* (9th Cir. 2005) 424 F3d 1060, 1078 (applying Calif. law)]

3) [17:649.6] **Written findings required:** To ensure the public policy served by FEHA actions is not thwarted, the trial court must issue written findings showing why plaintiff's discrimination claim was "frivolous, unreasonable or groundless." Failure to make such findings is reversible error. [*Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro*, supra, 91 CA4th at 868, 110 CR2d at 909-910; *Jersey v. John Muir Med. Ctr.*, supra, 97 CA4th at 831, 118 CR2d at 820-821; compare *Robert v. Stanford Univ.* (2014) 224 CA4th 67, 72, 168 CR3d 539, 542-543 (declining to address validity of written findings requirement)]

a) [17:649.7] **Effect of failure to make written findings?** There is a split of authority as to the effect of a trial court's failure to make written findings. Some courts have held that such failure *mandates reversal* of the award

(unless no award could possibly be justified). [*Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro*, supra, 91 CA4th at 867-868, 110 CR2d at 909-910; *Jersey v. John Muir Med. Ctr.*, supra, 97 CA4th at 831, 118 CR2d at 820-821]

But a more recent case holds that the automatic reversal rule "cannot withstand scrutiny" in light of California Constitution Art. VI, §13 and CCP §475, which require prejudice as a precondition to reversal. Thus, "[i]f the record affirmatively indicates that the court applied the correct standards, the court's failure to put its findings into writing does not itself justify reversal." [*Robert v. Stanford Univ.*, supra, 224 CA4th at 72, 168 CR3d at 543—fee award affirmed based on trial court's express *oral* findings]

[17:649.8-649.9] *Reserved.*

4) **Application**

- [17:649.10] An employment discrimination action was "frivolous, unreasonable and groundless" where plaintiff pursued the action after executing a valid release of all claims arising from employment. [*Linsley v. Twentieth Century Fox Film Corp.* (1999) 75 CA4th 762, 766, 89 CR2d 429, 431]
- [17:649.11] The fact that plaintiff's case survived a motion for summary judgment and a motion for nonsuit does not necessarily preclude awarding fees to the employer. The evidence at trial may nevertheless disclose the frivolity of the claims. [See *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro*, supra, 91 CA4th at 866, 110 CR2d at 908]
- [17:649.12] The fact that plaintiff's witnesses are not credible does *not* itself show the claim is frivolous. An "airtight" claim is not a prerequisite to bringing suit. [See *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro*, supra, 91 CA4th at 872, 110 CR2d at 912]
- [17:649.13] Where plaintiff's pregnancy discrimination claim was supported by independent and expert testimony as well as her own testimony (although she ultimately

lost), the mere fact that plaintiff was impeached at trial with respect to one matter (date of job assignments) did not show her FEHA claim was frivolous. [*Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro*, supra, 91 CA4th at 873, 110 CR2d at 913]

- [17:649.14] On the other hand, a fee award to prevailing defendants may be supported by proof of fabricated evidence or "blatant perjury" as to the *essential facts* on which the FEHA claim was based (i.e., plaintiff lied about what occurred to her). [*Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 CA4th 1211, 1229-1230, 88 CR2d 732, 745]
- [17:649.15] Employees' failure to adequately plead an alter ego theory of liability against a corporation and its sole shareholder in an age discrimination case did not warrant an attorney fees award to defendants because the actions, while inadequately pled, were "not completely groundless, frivolous, unreasonable or without foundation." [*Leek v. Cooper* (2011) 194 CA4th 399, 420-421, 125 CR3d 56, 73]

[17:649.16-649.19] *Reserved.*

(d) [17:649.20] **Effect of employer's pretrial settlement offer (CCP §998):** Notwithstanding CCP §998, a defendant employer in a FEHA action "shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so." [Gov.C. §12965(c)(6)]

For litigation initiated prior to the 2019 amendment to Gov.C. §12965(b), now §12965(c)(6), courts are split as to whether CCP §998 applies to nonfrivolous FEHA actions. [See *Huerta v. Kava Holdings, Inc.* (2018) 29 CA5th 74, 76, 240 CR3d 72, 74—nonfrivolous FEHA cases predating §12965(b) 2019 amendment do not differentiate between treatment of ordinary costs, attorney fees, and expert witness fees; *Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (2018) 19 CA5th 525, 552, 228 CR3d 120, 139—CCP §998 did not allow employer defendants to recover expert witness fees in connection with FEHA claims; but see *Martinez v. Eatlite One, Inc.* (2018) 27 CA5th 1181, 1185-1186, 238 CR3d 747,

749-750 (remanding to trial court after considering CCP §998 to enter amended post-judgment order awarding "only pre-offer costs and attorney fees to plaintiff, post-offer costs to defendant, and any expert witness fees the court determines to award in its discretion to defendant")]

Cross-refer: CCP §998 is discussed in detail in Weil & Brown et al., *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 12 Part II; and in Haning, Flahavan, Cheng & Wright, *Cal. Prac. Guide: Personal Injury* (TRG), Ch. 4.

[17:649.21-649.25] *Reserved.*

1) [17:649.26] **Costs award "scaled" downward in FEHA actions?** It is unclear whether Gov.C. §12965(c)(6) remains "entirely appropriate and indeed necessary for trial courts" in FEHA actions "to 'scale' those awards downward to a figure that will not unduly pressure modest- or low-income plaintiffs into accepting unreasonable offers." [*Seever v. Copley Press, Inc.* (2006) 141 CA4th 1550, 1562, 47 CR3d 206, 214 (decided under prior numbering of statute); *Holman v. Altana Pharma US, Inc.* (2010) 186 CA4th 262, 284, 111 CR3d 554, 572]

[17:649.27-649.29] *Reserved.*

(e) [17:649.30] **Fee award belongs to attorney, not party:** Although Gov.C. §12965(c)(6) authorizes fees "to the prevailing party," as between the prevailing party and his or her attorney, an FEHA fee award belongs to the attorney unless the parties have agreed otherwise. [*Flannery v. Prentice* (2001) 26 C4th 572, 577, 110 CR2d 809, 813—plaintiff who recovered $250,000 verdict for employer's FEHA violations was not entitled to any portion of $1 million fee award; *Hernandez v. Siegel* (2014) 230 CA4th 165, 175, 178 CR3d 417, 424—absent contrary agreement, interest on fee award also belongs to attorney]

Compare—Title VII fee awards: The rule is contra under Title VII; fee awards belong to the client, not the attorney (*see ¶17:602*).

(2) [17:650] **"Private attorney general" doctrine (CCP §1021.5):** California courts have equitable power to award fees in private actions when:

— the litigation results in "enforcement of an important right affecting the *public interest*";

— a significant benefit (whether or not pecuniary) has been conferred on the general public or a *large class* of persons;

— the *financial burden* of private enforcement makes a fee award appropriate; and
— *justice requires* that such fees be paid by defendant rather than out of any recovery in the litigation. [CCP §1021.5; see *Press v. Lucky Stores, Inc.* (1983) 34 C3d 311, 318-319, 193 CR 900, 903-904—not limited to plaintiffs who prevail in "landmark" cases]

(a) [17:651] **Not in employment litigation generally:** Fees may not be awarded under CCP §1021.5 where the primary effect of the employment litigation is *to advance or vindicate the plaintiff's personal economic interest* (as opposed to enforcing a right affecting the public interest). [*Weeks v. Baker & McKenzie* (1998) 63 CA4th 1128, 1170, 74 CR2d 510, 536-537; *Flannery v. California Highway Patrol* (1998) 61 CA4th 629, 635, 71 CR2d 632, 635-636; *Shaw v. City of Sacramento* (9th Cir. 2001) 250 F3d 1289, 1295 (applying Calif. law)]

(b) [17:652] **Compare:** But §1021.5 awards have been upheld in a few cases involving *governmental* employers:

- [17:653] A §1021.5 fee award was proper to California Public Utilities Commission employees who won an age discrimination suit against the agency. The court found their victory would deter the PUC and other state agencies from discriminating in the future. [*Crommie v. State of Calif., Pub. Utilities Comm'n* (ND CA 1994) 840 F.Supp. 719, 722, aff'd (9th Cir. 1995) 67 F3d 1470; see also *Jabola v. Pasadena Redevelop. Agency* (1981) 125 CA3d 931, 936, 178 CR 452, 454 (disapproved on other grounds by *Cranston v. City of Richmond* (1985) 40 C3d 755, 221 CR 779)—same]

(c) [17:654] **Fee award belongs to attorney, not prevailing party:** As with FEHA fee awards (¶*17:649.30*), as between attorney and client, a CCP §1021.5 fee award belongs to the attorney for whose services the fees were awarded unless the parties have agreed otherwise. [*Flannery v. Prentice* (2001) 26 C4th 572, 590, 110 CR2d 809, 823; *Lindelli v. Town of San Anselmo* (2006) 139 CA4th 1499, 1509-1510, 43 CR3d 707, 715-716]

(d) [17:655] **Compare—attorney fees pursuant to California's Private Attorney General Act:** In addition, an employee who prevails in an action under California's Private Attorneys General Act (PAGA, Lab.C. §2698 et seq.) is entitled to an award of rea-

sonable attorney fees and costs, including certain filing fees. [Lab.C. §2699(g)(1); *Atempa v. Pedrazzani* (2018) 27 CA5th 809, 830, 238 CR3d 465, 482; *see* ¶*17:835*]

[17:656-660] *Reserved.*

(3) [17:661] **Wage claim actions:** A successful plaintiff in a civil action to recover unpaid wages or other forms of employee compensation is entitled to recover his or her attorney fees. [Lab.C. §§98.2(c), 218.5, 1194(a); see *Winterrowd v. American Gen. Annuity Ins. Co.* (9th Cir. 2009) 556 F3d 815, 820]

A prevailing plaintiff in an action "for the recovery of wages for labor performed" is entitled to attorney fees not exceeding 20% of the amount recovered where the amount of the demand, exclusive of interest, is less than $300. [CCP §1031]

However, more specific fee provisions, such as Lab.C. §1194, take precedence over CCP §1031 and do not so limit a fee award even where the wages demanded are less than $300. [*Moreno v. Bassi* (2021) 65 CA5th 244, 258, 279 CR3d 840, 849-850]

[17:661.1-661.4] *Reserved.*

(a) [17:661.5] **Includes salaried employees:** The Lab.C. §218.5 attorney fees provision applies to nonhourly employees, including salaried corporate executives. [*On-Line Power, Inc. v. Mazur* (2007) 149 CA4th 1079, 1085-1086, 57 CR3d 698, 702-703]

(b) [17:662] **Does not include wage claim proceedings before Labor Commissioner:** A wage claim proceeding before the Labor Commissioner is not a "civil action" within the meaning of Lab.C. §1194. Therefore, an employee may not recover attorney fees incurred in such proceedings from the employer. [*Sampson v. Parking Service 2000 Com, Inc.* (2004) 117 CA4th 212, 223, 11 CR3d 595, 604; see *Bell v. Farmers Ins. Exch.* (2004) 115 CA4th 715, 746, 9 CR3d 544, 570]

(c) [17:662.1] **Compare—fees on review of adverse ruling by Labor Commissioner:** If either party seeks judicial review of the Labor Commissioner's ruling on the wage claim, the court may order the unsuccessful party to pay reasonable attorney fees to the "successful" party on the appeal. The employee is "successful" if he or she recovers any amount greater than zero. [Lab.C. §98.2(c); *see* ¶*11:1425 ff.*]

Rationale: The legislative purpose of §98.2 is to create a *disincentive* to appeal the Labor Commissioner's

decision, thus discouraging meritless appeals. [*Arias v. Kardoulias* (2012) 207 CA4th 1429, 1438, 144 CR3d 599, 605]

1) [17:662.2] **May include award to Labor Commissioner representing indigent employees:** Where the employer appeals the Labor Commissioner's ruling on a wage claim, indigent employees may ask the Labor Commissioner to represent them on the appeal (see Lab.C. §98.4(a)). If the employer's appeal is "unsuccessful," the court may award attorney fees to the Labor Commissioner. [Lab.C. §98.2(c); see *Lolley v. Campbell* (2002) 28 C4th 367, 375-376, 121 CR2d 571, 576-577; *and* ¶*11:1480*]

2) [17:662.3] **Requires trial on merits:** Lab.C. §98.2(c)'s one-way fee-shifting provision does not apply unless and until there has been a trial de novo in superior court on the wage claim. Dismissal of the appeal on procedural grounds does *not* support a fee award. [*Arias v. Kardoulias*, supra, 207 CA4th at 1438-1439, 144 CR3d at 605-606—employer not entitled to fee award where employee's appeal dismissed as untimely; compare *Cardinal Care Mgmt., LLC v. Afable* (2020) 47 CA5th 1011, 1025-1026, 261 CR3d 353, 364-365—employees entitled to fees where employer's appeal of Labor Commissioner's decision dismissed for failure to post required undertaking or obtain waiver; *Royal Pac. Funding Corp. v. Arneson* (2015) 239 CA4th 1275, 1280-1281, 191 CR3d 687, 690-691—employee who prevailed in administrative hearing may recover attorney fees incurred to defend employer's aborted appeal]

(d) [17:662.4] **Attorney fees payable to attorney absent contrary agreement:** Attorney fees awarded under Lab.C. §1194(a) (and §226(e), ¶*17:815.2*), in excess of fees already paid to the attorney by the client, should be made payable to the attorney rather than the client in the absence of an agreement to the contrary. [*Henry M. Lee Law Corp. v. Sup.Ct. (Chang)* (2012) 204 CA4th 1375, 1388, 139 CR3d 712, 722]

(e) [17:662.5] **Limitation—claims for failure to provide meal, rest, and recovery breaks under Lab.C. §226.7:** Neither Lab.C. §1194 nor Lab.C. §218.5 authorizes an award of attorney fees to a party who prevails on a claim for failure to provide meal, rest or recovery periods under Lab.C. §226.7. [*Kirby v.*

Immoos Fire Protection, Inc. (2012) 53 C4th 1244, 1248, 140 CR3d 173, 174 (predating 1/1/14 addition of "recovery period" to statute)]

(f) [17:662.6] **Compare—prevailing defendant awards:** Some wage claim statutes authorize a fee award only to the prevailing *plaintiff* (e.g., Lab.C. §1194, applicable to claims for minimum wage or overtime compensation). However, in an action for nonpayment of wages, fringe benefits or health and welfare or pension fund contributions, the *prevailing employer* may be awarded fees provided *it requested fees* upon initiation of the action *and* the court finds the *employee brought the action in bad faith.* [Lab.C. §218.5; see *USS-POSCO Indus. v. Case* (2016) 244 CA4th 197, 215-216, 197 CR3d 791, 806-807—attorney fee award overturned where trial court failed to apply newer version of §218.5]

Even if a statutory fee award is not available, a prevailing defendant is entitled to recover its ordinary costs of suit under CCP §1032. [*Plancich v. United Parcel Service, Inc.* (2011) 198 CA4th 308, 313-314, 129 CR3d 484, 487]

(g) [17:662.7] **Compare—different prevailing parties under separate statutes in same action:** Both the employer and employee may be prevailing parties entitled to attorney fees when there are two fee-shifting statutes involved in one action. [*Sharif v. Mehusa, Inc.* (2015) 241 CA4th 185, 194, 193 CR3d 644, 650—where former employee was prevailing party entitled to attorney fees on Equal Pay Act claim and former employer was prevailing party entitled to attorney fees on unpaid wage claim, there were two different prevailing parties under separate statutes in same action]

(4) [17:663] **Contractual provisions:** Attorney fee awards may also be authorized by contract (e.g., the employment agreement). By statute, a one-sided attorney fee provision operates reciprocally: i.e., if the contract gives one party (the employer) the right to recover attorney fees in actions arising out of the contract, the other (the employee) is entitled to fees upon prevailing in the action. [See Civ.C. §1717]

An award under Civ.C. §1717, however, is limited to fees incurred to "enforce that contract." No award can be made under §1717 for fees incurred in connection with *tort* claims (e.g., wrongful discharge in violation of public policy). [*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 CA4th 1127, 1162, 69 CR3d 445, 471]

(a) [17:663.1] **Effect of claiming fees if employee loses:** Where the employee claims a contract allows fees and *loses*, the employer may be entitled to recover fees from the employee if the employer proves the contract actually provides such a remedy. However, it is unlikely that the employee's allegation of a contractual right to attorney fees, in and of itself, estops the employee from challenging the employer's alleged contractual basis for such a fees award. [See *Hart v. Clear Recon Corp.* (2018) 27 CA5th 322, 330-331, 237 CR3d 907, 914 (finding contrary holding in *International Billing Services, Inc. v. Emigh* (2000) 84 CA4th 1175, 1191, 101 CR2d 532, 543, is no longer good law)]

(b) [17:663.2] **Effect of voluntary dismissal:** "Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of a case, there shall be no prevailing party for purposes of [Civ.C. §1717]. Thus, '[w]hen a plaintiff files a complaint containing causes of action within the scope of [Civ.C. §1717] (that is, causes of action sounding in contract and based on a contract containing an attorney fee provision), and the plaintiff thereafter voluntarily dismisses the action, [Civ.C. §1717] bars the defendant from recovering attorney fees incurred in defending those causes of action, *even though the contract on its own terms authorizes recovery of those fees*.' " [*CDF Firefighters v. Maldonado* (2012) 200 CA4th 158, 164, 132 CR3d 544, 548 (emphasis in original) (quoting *Santisas v. Goodin* (1998) 17 C4th 599, 617, 71 CR2d 830, 842); see *Shapira v. Lifetech Resources, LLC* (2018) 22 CA5th 429, 432, 231 CR3d 483, 484—no prevailing party even where plaintiff dismisses lawsuit with prejudice pursuant to CCP §581(e) after trial commences]

1) [17:663.3] **Compare—voluntary dismissal of one cause of action based on distinct contractual obligation:** Voluntary dismissal of one of two separate and distinct causes of action that are based on two distinct obligations in the same contract does not bar recovery of attorney fees on the remaining claim under Civ.C. §1717. [*CDF Firefighters v. Maldonado*, supra, 200 CA4th at 165, 132 CR3d at 544]

(c) [17:664] **Limitation—collective bargaining agreements governed by LMRA:** Where a fee award is sought and authorized under a collective bargaining agreement (CBA), Civ.C. §1717 is *preempted* by the Labor Management Relations Act. Federal labor

policy demanding *uniformity* in interpreting CBAs would be defeated by applying 50 different state laws on the issue of attorney fees. [*Roy Allan Slurry Seal v. Laborers Int'l Union of North America Hwy. & Street Stripers/Road & Street Slurry Local Union 1184, AFL-CIO* (9th Cir. 2001) 241 F3d 1142, 1146]

Cross-refer: Fee awards under contractual attorney fees provisions are discussed in Weil & Brown et al., *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 1.

(5) [17:665] **Effect of joinder of causes of action not allowing fee recovery:** When a cause of action for which attorney fees are provided by statute is joined with other causes for which attorney fees are *not* permitted, attorney fees are recoverable *only on the statutory cause of action*. [*Akins v. Enterprise Rent-A-Car Co. of San Francisco* (2000) 79 CA4th 1127, 1133-1134, 94 CR2d 448, 452-453]

This generally requires the trial court to *apportion* the fees so that the losing party is required to pay only for such fees as were incurred in prosecuting or defending the *statutory action*. [See *Bell v. Vista Unified School Dist.* (2000) 82 CA4th 672, 687, 98 CR2d 263, 273 (nonemployment law case); *El Escorial Owners' Ass'n v. DLC Plastering, Inc*. (2007) 154 CA4th 1337, 1365, 65 CR3d 524, 547—"court may apportion fees even where the issues are connected, related or intertwined"]

However, apportionment is not required when the claims for relief are so *intertwined* that it would be impracticable, if not impossible, to separate the attorney's time into compensable and noncompensable units. [*Akins v. Enterprise Rent-A-Car Co. of San Francisco*, supra, 79 CA4th at 1133, 94 CR2d at 452; *Cruz v. Fusion Buffet, Inc* (2020) 57 CA5th 221, 236, 271 CR3d 269, 280-281—no apportionment for non-fee-shifting claims where meal and rest break claims and wage claims required analysis and consideration of hours worked by employee]

(a) [17:666] **Discretionary:** Apportionment of fees in such cases rests within the trial court's sound discretion; its exercise of discretion is abused only when its ruling "exceeds the bounds of reason, all of the circumstances before it being considered." [*Bell v. Vista Unified School Dist.*, supra, 82 CA4th at 687, 98 CR2d at 273 (internal quotes omitted); see *Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (2018) 19 CA5th 525, 545-547, 228 CR3d 120, 134-136—trial court erred by awarding attorney fees on wage claim without determining whether claim

was frivolous, but did not abuse its discretion in refusing to award attorney fees on FEHA claim]

(b) [17:666.1] **Unfair competition claims based on discrimination or harassment:** In an action alleging discrimination or sexual harassment as an unfair business practice in violation of Bus. & Prof.C. §17200, attorney fees are not awardable unless plaintiff alleges and proves a violation of a separate law or contract that allows recovery of such fees. [See *People ex rel. City of Santa Monica v. Gabriel* (2010) 186 CA4th 882, 889-891, 112 CR3d 574, 579-581]

[17:667] ***PRACTICE POINTER FOR PLAINTIFFS:*** Plaintiffs' counsel should always record their time contemporaneously and should, from the outset, record their time separately per plaintiff (when representing more than one individual) and per claim (where alleging claims under more than one statute that allows for the recovery of attorney fees and/or a mix of claims that do and do not allow for recovery of attorney fees). This practice should help alleviate problems in any subsequent fee application should not every plaintiff and/or every claim prevail.

[17:668-669] *Reserved.*

c. [17:670] **Interim fee awards?** Because of the financial drain of protracted litigation, plaintiffs sometimes seek an interim award of attorney fees—i.e., fees before the case is completed. Whether such an award is authorized depends on the nature of plaintiff's claims.

(1) [17:671] **Civil rights cases:** Courts have discretion under the federal Civil Rights Attorney's Fees Awards Act (42 USC §1988) to award interim attorney fees. Such an award may be considered upon entry of *any order that determines substantial rights* of the parties. [*Hanrahan v. Hampton* (1980) 446 US 754, 756-757, 100 S.Ct. 1987, 1989; see *Bradley v. School Bd. of City of Richmond* (1974) 416 US 696, 723, 94 S.Ct. 2006, 2022, fn. 28 (school desegregation litigation)]

(a) [17:671.1] **Standard:** Several courts have interpreted these precedents to mean that a district court has the power to award such fees once plaintiff obtains *substantial relief that cannot be revised by further proceedings*. [See *Dupuy v. Samuels* (7th Cir. 2005) 423 F3d 714, 719—"once a plaintiff obtains substantive relief that is not defeasible by further proceedings, he can seek interim fees and the district court has the power to award them"; *Taylor v. Westly* (9th Cir.

2008) 525 F3d 1288, 1290—"failure to award interim fees would create a considerable risk of starving out plaintiffs with what we have already determined to be good claims"; *García-Rubiera v. Fortuño* (1st Cir. 2013) 727 F3d 102, 114-115—interim award appropriate where plaintiffs prevailed on substantial issue and "ruling is no longer subject" to judicial revision]

(2) [17:672] **Rehabilitation Act:** The attorney fees provision of the Rehabilitation Act, "like the analogous provision of the Civil Rights Act," has been liberally construed to permit an interim fee award when plaintiff has prevailed on "significant legal principles affecting the substantive rights of the parties." [*Mantolete v. Bolger* (9th Cir. 1986) 791 F2d 784, 787-788—disabled plaintiff who established new legal standards strengthening protection of Rehabilitation Act entitled to interim fee award even though issue of whether she was improperly denied job on basis of disability remained to be decided]

(3) [17:673] **Compare—not under Title VII:** But interim fee awards in Title VII cases are awardable only to parties who have "prevailed" on the merits of their claims; interim fee awards are generally *improper.* [*Grubbs v. Butz* (DC Cir. 1976) 548 F2d 973, 975-976—no interim fees under Title VII; *Sperling v. United States* (3rd Cir. 1975) 515 F2d 465, 485—same]

(4) [17:674] **Compare—not under state law generally:** Most California statutes do *not* authorize interim fee awards. Fee awards are an element of "costs" awardable only upon a final judgment. [See Civ.C. §1717; CCP §1033.5(a)(10); *Bell v. Farmers Ins. Exch.* (2001) 87 CA4th 805, 833, 105 CR2d 59, 79—reversing interim fee award under Lab.C. §1194 as not authorized by that statute]

(a) [17:675] **"Private attorney general" statute (CCP §1021.5):** However, an exception is recognized for fee claims under CCP §1021.5, which authorizes fee awards for litigation enforcing important rights in the *public interest* (¶*17:650*). Case law supports interim attorney fee awards in such cases. [See *Laurel Heights Improvement Ass'n v. Regents of Univ. of Calif.* (1988) 47 C3d 376, 428, 253 CR 426, 454-455]

[17:676-684] *Reserved.*

2. [17:685] **Determining Amount of Award:** The most widely accepted approach for determining a "reasonable" fee award is the "lodestar" method—i.e., multiplying the *number of hours reasonably expended* on the litigation by a *reasonable hourly rate*. [See *Pennsylvania v. Delaware Valley Citizens' Council for Clean*

Air (1986) 478 US 546, 564, 106 S.Ct. 3088, 3097-3098; *Perdue v. Kenny A. ex rel. Winn* (2010) 559 US 542, 546, 130 S.Ct. 1662, 1669] (This figure is then subject to upward or downward adjustment; *see* ¶*17:705 ff.*)

The U.S. Supreme Court has described the "lodestar" method as the "guiding light" of "fee-shifting jurisprudence," and has "established a 'strong presumption' that the lodestar represents the 'reasonable' fee." [*City of Burlington v. Dague* (1992) 505 US 557, 562, 112 S.Ct. 2638, 2641; see *Perdue v. Kenny A. ex rel. Winn*, supra, 559 US at 546, 130 S.Ct. at 1669]

The "lodestar" method generally applies in all cases in which an award of fees is statutorily authorized to a "prevailing party" (e.g., 42 USC §2000e-5(k) (Title VII); 42 USC §1988 (Civil Rights Attorney's Fees Awards Act); 42 USC §12205 (ADA)) or to a party who has achieved some degree of success on the merits (e.g., 29 USC §1132(g)(1) (ERISA)). [See *Hensley v. Eckerhart* (1983) 461 US 424, 433, 103 S.Ct. 1933, 1939, fn. 7 (applying "lodestar" method to "prevailing party" award under 42 USC §1988); *McElwaine v. US West, Inc.* (9th Cir. 1999) 176 F3d 1167, 1173 (applying "lodestar" method to award under 29 USC §1132(g)(1)); *Glaviano v. Sacramento City Unified School Dist.* (2018) 22 CA5th 744, 748, 231 CR3d 849, 850-851 (applying "lodestar" method to award under Ed.C. §44944)]

a. [17:686] **"Lodestar" calculation:** The lodestar figure is calculated using the *reasonable rate* for comparable legal services in the local community for noncontingent litigation of the same type, multiplied by the *reasonable number of hours spent* on the case. [*Ketchum v. Moses* (2001) 24 C4th 1122, 1131-1132, 104 CR2d 377, 384; *Nichols v. City of Taft* (2007) 155 CA4th 1233, 1242-1243, 66 CR3d 680, 687]

It is irrelevant to the "lodestar" calculation whether the parties' fee agreement contemplates a fixed hourly rate or a contingency fee. [See *Blanchard v. Bergeron* (1989) 489 US 87, 93, 109 S.Ct. 939, 944—contingency fee agreement not a cap on attorney fee award; *Pickett v. Sheridan Health Care Ctr.* (7th Cir. 2011) 664 F3d 632, 639-640—"In reviewing a fee petition, a district court is tasked only with examining whether the rate and hours requested are reasonable; the total amount that the attorney stands to recover must not influence this determination"]

(1) [17:687] **Reasonable hours:** The number of hours reasonably worked is determined by looking at the time reasonably spent on a matter, including time spent drafting and revising pleadings, meeting with clients, preparing the case for trial, and handling an appeal. [See *Hensley v. Eckerhart*, supra, 461 US at 430, 103 S.Ct. at 1938, fn. 4; *Serrano v. Priest* (1977) 20 C3d 25, 48-49, 141 CR 315, 328, fn. 23]

- [17:687.1] Hours may be unreasonable due to an attorney's "personal embroilment" in the matter and incivility. [*Karton v. Ari Design & Const., Inc.* (2021) 61 CA5th 734, 746-747, 276 CR3d 46, 54-55]
- [17:688] Reasonable hours may also include *fee-related services*—i.e., time spent preparing and litigating the fee application. [*Hemmings v. Tidyman's Inc.* (9th Cir. 2002) 285 F3d 1174, 1200; *Serrano v. Unruh* (1982) 32 C3d 621, 639, 186 CR 754, 766]
- [17:689] Reasonable hours may include time spent by *more than one attorney* on a particular issue or task, provided there is no duplication of effort. If there is duplication, the court may reduce the total hours claimed accordingly. [*Davis v. City & County of San Francisco* (9th Cir. 1992) 976 F2d 1536, 1544 (modified on other grounds at 984 F2d 345); *Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 CA4th 359, 396, 33 CR3d 644, 673—not necessary that plaintiffs have 3 attorneys present for much of the trial and 2 attorneys for many of the depositions]
- [17:690] Time spent by *paralegals and law clerks* (billed at market rate; *see* ¶*17:697*) may be included where the prevailing practice in the community is for attorneys to bill *separately* for paralegal and law clerk services. [*Missouri v. Jenkins by Agyei* (1989) 491 US 274, 286, 109 S.Ct. 2463, 2471; *United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir. 1990) 896 F2d 403, 407; *Guinn v. Dotson* (1994) 23 CA4th 262, 269, 28 CR2d 409, 414]

(2) [17:691] **Reasonable rate:** In determining a reasonable rate for the attorney's services, courts usually consider:

— the prevailing rate charged by attorneys of similar skill and experience for comparable legal services in the community;

— the nature of the work performed; and

— the attorney's customary billing rates. [See *Serrano v. Unruh* (1982) 32 C3d 621, 643, 186 CR 754, 769; *Kerr v. Screen Extras Guild, Inc.* (9th Cir. 1975) 526 F2d 67, 69 (abrogation on other grounds recognized by *Stetson v. Grissom* (2016) 821 F3d 1157); *Bihun v. AT&T Information Systems, Inc.* (1993) 13 CA4th 976, 997, 16 CR2d 787, 798 (disapproved on other grounds by *Lakin v. Watkins Associated Indus.* (1993) 6 C4th 644, 664, 25 CR2d 109, 122)]

(a) [17:692] **When measured:** Most courts look to rates at the time of the prevailing party's fee ap-

plication rather than rates charged at the time the litigation began. [*Gates v. Deukmejian* (9th Cir. 1992) 987 F2d 1392, 1406]

(b) [17:693] **Different rates for different attorneys:** Where several attorneys file a joint petition for fees, the court may find it necessary to use different rates for the different attorneys. [*Municipal Court v. Bloodgood* (1982) 137 CA3d 29, 47, 186 CR 807, 817]

1) [17:693.1] **Compare—blended rates:** Blended rates account for different billing rates of partners and associates by averaging the two and may be appropriate in circumstances where it is unclear who was responsible for performing certain tasks. [*McDonald ex rel. Prendergast v. Pension Plan of NYSA-ILA Pension Trust Fund* (2nd Cir. 2006) 450 F3d 91, 98-99 (recognizing rule but rejecting use of blended rate to calculate solo practitioner's reasonable hourly rate)]

(c) [17:694] **Different rates for different activities:** The "reasonable rate" for the hours spent may depend on the activity involved; e.g., different rates for in-court and out-of-court legal work may be appropriate. [See *Municipal Court v. Bloodgood*, supra, 137 CA3d at 47, 186 CR at 817; *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.* (3rd Cir. 1973) 487 F2d 161, 167]

(d) [17:695] **Contingency fee attorneys:** Market rates charged by attorneys of comparable skill and experience should be used to calculate fees even for attorneys who handle cases on a contingency basis and have no billing rate. [See *Blanchard v. Bergeron* (1989) 489 US 87, 96, 109 S.Ct. 939, 946—"contingent-fee model . . . is inappropriate for the determination of fees under §1988"]

(e) [17:696] **Out-of-town rates where plaintiff unable to retain local counsel:** The comparison is usually made to the billable rates of attorneys "in the community" (*see* ¶*17:691*). However, where plaintiffs have made a good faith effort to find local counsel and have been unsuccessful, they may retain an attorney from another area (frequently a major city) having higher hourly rates; and such out-of-town counsel is not limited to fees determined at local rates. [*Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 CA4th 359, 398-399, 33 CR3d 644, 674-675; see also *Caldera v. Department of Corrections & Rehabilitation* (2020) 48 CA5th 601, 612, 261 CR3d 835, 843—fee award for out-of-town

counsel based on counsel's "home" market hourly rate; compare *Nichols v. City of Taft* (2007) 155 CA4th 1233, 1243-1244, 66 CR3d 680, 688—plaintiff failed to prove inability to obtain local counsel]

(f) [17:697] **May include separately billed paralegal services:** At least in Civil Rights Act cases, "reasonable" prevailing party attorney fees (42 USC §1988) may include a market rate award for *separately billed* paralegal services. "(I)f the prevailing practice in a given community were to bill paralegal time separately at market rates, fees awarded the attorney at market rates for attorney time would not be fully compensatory if the court refused to compensate hours billed by paralegals or did so only at 'cost.' " [*Missouri v. Jenkins by Agyei* (1989) 491 US 274, 286-288, 109 S.Ct. 2463, 2471]

1) [17:698] **Unpaid law clerk services compensable:** Compensation for unpaid law clerks is permissible under 42 USC §1988. [*Parsons v. Ryan* (9th Cir. 2020) 949 F3d 443, 467-468]

[17:699-704] *Reserved.*

b. [17:705] **Adjustments to "lodestar" amount:** Under both California and federal law, the court may enhance or reduce the lodestar amount to determine an appropriate fee award. [*Perdue v. Kenny A. ex rel. Winn* (2010) 559 US 542, 554-555, 130 S.Ct. 1662, 1674—courts may consider factors not accounted for by the lodestar calculation in enhancing or reducing fee award; *Hensley v. Eckerhart* (1983) 461 US 424, 434, 103 S.Ct. 1933, 1940; *Press v. Lucky Stores, Inc.* (1983) 34 C3d 311, 321-322, 193 CR 900, 906]

But federal and state laws *differ* somewhat on the factors that courts may consider in adjusting the lodestar amount. [See *Weeks v. Baker & McKenzie* (1998) 63 CA4th 1128, 1173, 74 CR2d 510, 539—"an upward or downward adjustment from the lodestar figure will be far more common under California law than under federal law"; compare *Perdue v. Kenny A. ex rel. Winn*, supra, 559 US at 554, 130 S.Ct. at 1673—"strong presumption" that lodestar figure is reasonable, which "may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee"]

(1) [17:706] **Contingency fee risk:** Attorneys representing plaintiffs in employment cases usually work on a contingency fee basis. There is thus no set hourly rate chargeable to the client.

- [17:707] California courts may consider the contingency fee risk as a factor to *enhance* the lodestar

amount where deemed appropriate to attract attorneys to cases of significant public interest and to compensate for the risk of loss and delay in payment inherent in contingency fee cases. [*Serrano v. Priest* (1977) 20 C3d 25, 48, 141 CR 315, 327 (not an employment case); *Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 CA4th 359, 395, 33 CR3d 644, 672]

- [17:708] Federal courts do *not* enhance the lodestar amount for contingency. [*City of Burlington v. Dague* (1992) 505 US 557, 567, 112 S.Ct. 2638, 2643-2644]

  — [17:708.1] Nevertheless, the court has discretion to compensate a contingency fee attorney for *delay in payment* by adding a prime rate enhancement (*see ¶17:714*). [See *Welch v. Metropolitan Life Ins. Co.* (9th Cir. 2007) 480 F3d 942, 947]

(2) [17:709] **Successful result:** California courts arguably may consider a lodestar enhancement to reflect a law firm's role in the success of the litigation. [See *Serrano v. Priest*, supra, 20 C3d at 49, 141 CR at 328]

Federal courts recognize that an enhanced award may be justified in cases of "exceptional success." But the lodestar amount is *presumed to be* the reasonable fee; and "results obtained" are generally subsumed within other factors used to calculate a reasonable fee. [*Blum v. Stenson* (1984) 465 US 886, 900, 104 S.Ct. 1541, 1549-1550]

(3) **Effect of limited success**

(a) [17:710] **Federal law:** Under federal law, the prevailing party's *degree of success* is "the most critical factor" in determining the reasonableness of a fee award. Thus, where plaintiff achieves only partial or limited success, an award based on the number of hours spent multiplied by a reasonable hourly rate may be excessive, and some reduction from the lodestar amount may be required. [*Hensley v. Eckerhart* (1983) 461 US 424, 436, 103 S.Ct. 1933, 1941 (fee award under Civil Rights Attorney's Fees Awards Act, 42 USC §1988); *Harman v. City & County of San Francisco* (2006) 136 CA4th 1279, 1312-1316, 39 CR3d 589, 613-617 (42 USC §1983 action)—lodestar may be reduced to reflect limited relief obtained in comparison to scope of litigation as whole; but see *Padgett v. Loventhal* (9th Cir. 2013) 706 F3d 1205, 1209—even though claim was minimally successful and mixed result obtained, trial court's reduction of lodestar from $3.2 million to $500,000 remanded

where trial court failed to explain its reasoning or calculations; compare *Ventura v. ABM Indus. Inc.* (2012) 212 CA4th 258, 275, 150 CR3d 861—reduced fee award upheld where trial court had explained its decision in detail]

On the other hand, if plaintiff has obtained *excellent results*, his or her attorney should recover a fully compensatory fee. Normally, this will encompass all hours reasonably expended on the litigation. In these circumstances, the fee award "*should not be reduced* simply because the plaintiff failed to prevail on every contention raised in the lawsuit." [*Hensley v. Eckerhart,* supra, 461 US at 435, 103 S.Ct. at 1940 (emphasis added)]

- [17:710.1] Plaintiff sued former employer for retaliatory discharge, sexual harassment and sex discrimination. Although plaintiff prevailed on the retaliation claim only, she was considered "fully successful" because she received all the monetary relief she could have gotten had she won on every claim. Nonetheless, the district court's reduction of plaintiff's award by 10 percent, an apparent reflection of "its view that counsel wasted time pursuing less promising theories of liability," was not an abuse of discretion. [*Fine v. Ryan Int'l Airlines* (7th Cir. 2002) 305 F3d 746, 756-757]

(b) [17:711] **California law:** Plaintiffs may argue that California law does not favor such reductions and that an attorney who successfully litigates an FEHA case should ordinarily receive full compensation for every hour spent litigating the claim: "Only in the unusual case in which there are special circumstances which [render] such an award . . . *unjust* does California FEHA law permit a lodestar reduction for results obtained." [*Beaty v. BET Holdings, Inc.* (9th Cir. 2000) 222 F3d 607, 612 (brackets in original; emphasis added; internal quotes omitted) (applying Calif. law); see *Vo v. Las Virgenes Mun. Water Dist.* (2000) 79 CA4th 440, 446, 94 CR2d 143, 148—lodestar fee award of $470,000 proper despite recovery of less than $40,000 on harassment claim and failure to prove other discrimination and retaliation claims; *Muniz v. United Parcel Service, Inc.* (9th Cir. 2013) 738 F3d 214, 227 (applying Calif. law) (affirming district court's refusal in FEHA case to reduce fee award of $696,162.78 to reflect plaintiff's limited success in obtaining verdict of $27,280 on one claim and failing to prevail on two others)]

Employment discrimination cases usually involve several claims *arising from the same set of facts*. "Where a lawsuit consists of related claims, and the plaintiff has won substantial relief, a trial court has discretion to award all or substantially all of the plaintiff's fees even if the court did not adopt each contention raised." [*Wysinger v. Automobile Club of Southern Calif.* (2007) 157 CA4th 413, 431, 69 CR3d 1, 15 (internal quotes omitted)]

- [17:711.1] A lodestar fee award should not be reduced simply because plaintiff fails to prevail on every issue in the lawsuit. [*Feminist Women's Health Ctr. v. Blythe* (1995) 32 CA4th 1641, 1674, 39 CR2d 189, 207-208, fn. 8; see also *Cordero-Sacks v. Housing Auth. of City of Los Angeles* (2011) 200 CA4th 1267, 1285-1286, 134 CR3d 883, 898 (affirming award of full lodestar amount)]

[17:711.2-711.4] *Reserved.*

(c) [17:711.5] **Compare—successful result but limited damages:** Because damages awards do not fully reflect the *public* benefit advanced by civil rights litigation, reasonable attorney fees *need not be* proportionate to an award of money damages. [See *City of Riverside v. Rivera* (1986) 477 US 561, 576, 106 S.Ct. 2686, 2695]

Thus, where *successful* litigation exposes conduct that the civil rights statutes were enacted to deter, "a trial court does not abuse its discretion simply by awarding fees in an amount higher, *even very much higher*, than the damages awarded." [*Harman v. City & County of San Francisco* (2007) 158 CA4th 407, 428, 69 CR3d 750, 769-770 (emphasis added)—fee award exceeding $1 million where only $30,300 compensatory damages recovered was not abuse of discretion in action under 42 USC §1983]

It is not uncommon for attorney fees to exceed compensatory damages in FEHA cases: "Gov.C. §12965 fees are intended to provide fair compensation to the attorneys involved in the litigation at hand and encourage litigation of claims that in the public interest merit litigation." [*Flannery v. Prentice* (2001) 26 C4th 572, 584, 110 CR2d 809, 868]

(4) [17:712] **Superior representation:** California courts arguably may consider "the novelty and difficulty" of the litigation and the skill displayed in presenting the case in enhancing or reducing the lodestar amount. [See *Serrano v. Priest*, supra, 20 C3d at 49, 141 CR at 328; *Kern River Pub. Access Committee v. City of Bakersfield* (1985) 170 CA3d 1205, 1228, 217 CR 125, 139]

Federal courts hold that the quality of representation is reflected in the attorney's hourly rate and should not be a factor in adjusting the lodestar amount. In rare cases, however, a plaintiff may obtain an enhancement by showing that the quality of service rendered was superior compared to the hourly rate charged. [See *Blum v. Stenson* (1984) 465 US 886, 899, 104 S.Ct. 1541, 1549; *Perdue v. Kenny A. ex rel. Winn* (2010) 559 US 542, 554, 130 S.Ct. 1662, 1674]

(a) [17:712.1] **Superior results not determinative:** Under federal law, "superior results are relevant only to the extent it can be shown that they are the result of superior attorney performance." [*Perdue v. Kenny A. ex rel. Winn*, supra, 559 US at 554, 130 S.Ct. at 1674]

(b) [17:712.2] **Lodestar calculation generally sufficient:** The circumstances in which superior attorney performance is not adequately taken into account in the lodestar calculation are "rare" and "exceptional." [*Perdue v. Kenny A. ex rel. Winn*, supra, 559 US at 554, 130 S.Ct. at 1674]

(c) [17:712.3] **Exceptions:** The following are examples of the "rare" circumstances in which the lodestar method is inadequate:

— the hourly rate used in calculating the lodestar does not reflect the attorney's true worth (e.g., where the hourly rate takes into account only a single factor such as years in practice; a young attorney's "brilliant insights and critical maneuvers sometimes matter far more than hours worked or years of experience");

— the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted; and

— extraordinary circumstances result in an exceptional delay in the payment of fees (*see* ¶*17:714*). [*Perdue v. Kenny A. ex rel. Winn*, supra, 559 US at 554-556, 130 S.Ct. at 1674-1675]

(5) [17:713] **Difficulty of case:** Although the rule in California is unclear, federal courts may *not* enhance the lodestar amount based on the difficulty of establishing the merits of a case, because that *difficulty is already reflected in the lodestar amount* "either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so." [*City of Burlington v. Dague* (1992) 505 US 557, 562, 112 S.Ct. 2638, 2641]

(6) [17:714] **Delay in receiving fees:** Both federal and California courts may enhance the lodestar amount to

account for long delay in payment of fees; e.g., a wrongful termination case that spans years before the attorney can collect fees. [*Perdue v. Kenny A. ex rel. Winn*, supra, 559 US at 556, 130 S.Ct. at 1674-1675—enhancement appropriate only when "extraordinary circumstances" involve "exceptional delay"; *Downey Cares v. Downey Comm. Develop. Comm'n* (1987) 196 CA3d 983, 997, 242 CR 272, 281]

On the other hand, if the lodestar calculation is based on *current* hourly rates, rather than lower rates in effect when the services were rendered, "the harm resulting from delay in payment may be largely reduced or eliminated," and no enhancement would be warranted. [See *Copeland v. Marshall* (DC Cir. 1980) 641 F2d 880, 893, fn. 23]

(7) [17:715] **Preclusion of other employment:** California courts may consider counsel's preclusion from accepting other employment as a factor in enhancing the lodestar amount. [*Serrano v. Priest,* supra, 20 C3d at 49, 141 CR at 328]

But this is not one of the factors listed in *Perdue* (¶*17:705 ff.*) that federal courts may consider as the basis for a lodestar enhancement.

[17:716-719] *Reserved.*

c. [17:720] **Effect of nominal damages recovery:** The U.S. Supreme Court has stated that when a plaintiff recovers only nominal damages *because of failure to prove an essential element of the claim* (such as actual, compensable injury), "the only reasonable attorney's fee is usually no fee at all." [*Farrar v. Hobby* (1992) 506 US 103, 115, 113 S.Ct. 566, 575]

But plaintiffs will argue that a concurring opinion in *Farrar* states two other factors should also be considered:

— first, the *significance of the legal issue* on which plaintiff claims to have prevailed; and

— second, the *accomplishment of some public goal*. [*Farrar v. Hobby*, supra, 506 US at 121-122, 113 S.Ct. at 578-579 (J. O'Connor concur.opn.)]

Later federal cases have adopted this concurring opinion and thus may uphold fee awards to plaintiff's counsel based on either of these factors although only nominal damages were recovered by plaintiff. [*Barber v. T.D. Williamson, Inc.* (10th Cir. 2001) 254 F3d 1223, 1230-1231; *Wilcox v. City of Reno* (9th Cir. 1994) 42 F3d 550, 555—a *public purpose* would be served if plaintiff's suit achieved "tangible results—such as sparking a change in policy or establishing a finding of fact with potential collateral estoppel effects"]

3. [17:721] **Proof Considerations:** The party seeking an attorney fees award normally bears the burden of submitting evidence of

"the hours worked and the rates claimed." [*Webb v. Board of Ed. of Dyer County, Tenn.* (1985) 471 US 234, 242, 105 S.Ct. 1923, 1928]

That party also has the burden to prove that the rate charged is in line with the "prevailing market rate of the relevant community." [*Carson v. Billings Police Dept.* (9th Cir. 2006) 470 F3d 889, 891]

Likewise, a party seeking *enhancement* of the lodestar calculation (¶*17:705 ff.*) "has the burden of identifying a factor that the lodestar does not adequately take into account and proving with specificity that an enhanced fee is justified." [*Perdue v. Kenny A. ex rel. Winn* (2010) 559 US 542, 546, 130 S.Ct. 1662, 1669]

a. [17:722] **Court discretion:** A fee request ordinarily should be documented in detail. Nonetheless, the absence of complete time records and billing statements does not affect the trial court's power to make its own evaluation of the reasonable value of the work done in light of the nature of the case. [See *Weber v. Langholz* (1995) 39 CA4th 1578, 1587, 46 CR2d 677, 683; *Taylor v. Nabors Drilling USA, LP* (2014) 222 CA4th 1228, 1249-1250, 166 CR3d 676, 694—trial court's failure to specify factors considered in selecting multiplier does not compel reversal (appellate court presumes trial court "considered all appropriate factors in selecting a multiplier and applying it to the lodestar figure")]

However, federal district courts must "show their work when calculating attorney's fees." [*Padgett v. Loventhal* (9th Cir. 2013) 706 F3d 1205, 1209]

[17:723-724] *Reserved.*

I. INTEREST

1. Prejudgment Interest

a. [17:725] **Under federal law:** Generally, federal courts have *discretion* to award plaintiff prejudgment interest in a civil rights action. [See *West Virginia v. United States* (1987) 479 US 305, 310, 107 S.Ct. 702, 706—prejudgment interest is "an element of complete compensation"; *Loeffler v. Frank* (1988) 486 US 549, 558, 108 S.Ct. 1965, 1971—Title VII authorizes court to award prejudgment interest as part of backpay remedy in suits against private employers; *Domingo v. New England Fish Co.* (9th Cir. 1984) 727 F2d 1429, 1446 (modified on other grounds, 742 F2d 520)—prejudgment interest properly refused where amount of backpay was not readily determinable and court evaluated many subjective factors in determining amount of damages; *Criswell v. Western Airlines, Inc.* (9th Cir. 1983) 709 F2d 544, 556-557—upholding prejudgment interest under ADEA on portion of damages representing actual loss, but not liquidated damages]

Compare—award mandatory under FMLA: Under the FMLA, an employer "shall be liable" for prejudgment interest on the

amount of "any wages, salary, employment benefits, or other compensation denied or lost to [an employee] by reason of the [FMLA] violation." [29 USC §2617(a)(1)(A); see *Hite v. Vermeer Mfg. Co.* (8th Cir. 2006) 446 F3d 858, 869; *Dotson v. Pfizer, Inc*. (4th Cir. 2009) 558 F3d 284, 301; *and* ¶*12:1354*]

In federal court, a plaintiff's postjudgment motion for discretionary prejudgment interest is governed by FRCP 59(e) and must be filed within 28 days after entry of the judgment. [*Tru-Art Sign Co., Inc. v. Local 137 Sheet Metal Workers Int'l Ass'n* (2nd Cir. 2017) 852 F3d 217, 220-221—time begins to run from entry of original judgment, not amended judgment, unless Rule 59(e) motion bears some relationship to alteration of original judgment]

(1) [17:725.1] **Calculation on backpay awards:** Prejudgment interest on backpay awards is calculated from the date the employee sustains monetary injury. The plaintiff suffers monetary injury *incrementally* as each pay period passes. Thus, prejudgment interest should be calculated *from the date of each pay period* to the date of judgment. [*Reed v. Mineta* (10th Cir. 2006) 438 F3d 1063, 1066-1067]

[17:725.2-725.9] *Reserved.*

(2) [17:725.10] **Where liquidated damages awarded?** Courts disagree whether prejudgment interest is recoverable where statutory liquidated damages have been awarded (e.g., under the FLSA):

- [17:725.11] Some circuits hold that where liquidated damages have been awarded, an award of prejudgment interest would constitute an *impermissible double recovery*. [*Uphoff v. Elegant Bath, Ltd.* (7th Cir. 1999) 176 F3d 399, 406; see *Miller v. Raytheon Co.* (5th Cir. 2013) 716 F3d 138, 148, fn. 6—"In an ADEA case where liquidated damages are awarded, a court may not award prejudgment interest on . . . the liquidated damage award"]
- [17:725.12] Other courts hold liquidated damages and prejudgment interest serve *different purposes,* and therefore *both* may be awarded in the same case. [*Criswell v. Western Airlines, Inc.* (9th Cir. 1983) 709 F2d 544, 556-557; *Starceski v. Westinghouse Elec. Corp.* (3rd Cir. 1995) 54 F3d 1089, 1101-1102]

[17:725.13-725.14] *Reserved.*

(3) [17:725.15] **Not on punitive damages:** Allowing prejudgment interest on punitive damages would only serve to further punish defendant when the jury has already determined the amount necessary to sufficiently punish defendant. [See *Fine v. Ryan Int'l Airlines* (7th Cir. 2002)

305 F3d 746, 757 (dictum because plaintiff did not seek interest on punitive damages and defendant belatedly raised the issue)]

(4) [17:726] **Interest rates:** Unless a statute provides otherwise, the court may utilize various rates, including:

- [17:727] The IRS adjusted "prime rate." [*EEOC v. O'Grady* (7th Cir. 1988) 857 F2d 383, 391-392—awarding prejudgment interest at IRS adjusted prime rate instead of state's postjudgment rate not an abuse of discretion; see *Priest v. Rotary* (ND CA 1986) 634 F.Supp. 571, 585—IRS adjusted "prime" rate (90% of average prime for year in which calendar quarter occurs) applied to Title VII claim]
- [17:728] The forum state's statutory rate ("legal rate of interest"). [*Gelof v. Papineau* (D DE 1986) 648 F.Supp. 912, 929, aff'd in part and vacated in part (3rd Cir. 1987) 829 F2d 452; compare *Thomas v. iStar Fin'l, Inc.* (2nd Cir. 2010) 652 F3d 141, 150—federal interest rate appropriate where judgment based on both federal and state law "with respect to which no distinction is drawn"]
- [17:729] The postjudgment interest rate under 28 USC §1961 (¶*17:750*), which focuses on the T-bill rate payable when the judgment was entered. [*Golden State Transit Corp. v. City of Los Angeles* (CD CA 1991) 773 F.Supp. 204, 218—52 week T-Bill rate adjusted on a monthly basis and compounded annually; *Hogan v. General Elec. Co.* (ND NY 2001) 144 F.Supp.2d 138, 141; *Metz v. Transit Mix, Inc.* (ND IN 1988) 692 F.Supp. 987, 990—court resolved parties' dispute over rate applicable to prejudgment by reference to postjudgment rate]
- [17:730] Some courts refine the previous approach by looking to the T-bill rate at the end of each year covered by the award rather than at the date of judgment. [*O'Neill v. Sears, Roebuck & Co.* (ED PA 2000) 108 F.Supp.2d 443, 446]

b. [17:731] **Under California law:** Whether under California law, an award of prejudgment interest is discretionary or due as a matter of right depends on whether the amount of damages is sufficiently "certain":

(1) [17:732] **Damages "certain or capable of being made certain by calculation":** If plaintiff's recoverable damages are "certain or capable of being made certain by calculation," plaintiff is *entitled* as a matter of law to prejudgment interest from the date the right to recover vested. [Civ.C. §3287(a); *Roodenburg v. Pavestone Co., L.P.* (2009)

171 CA4th 185, 190, 89 CR3d 558, 562 (not an employment case)—test is whether "defendant actually knows the amount owed or from reasonably available information could . . . have computed that amount"; but see *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 C4th 381, 395, 97 CR3d 464, 475 (not an employment case)—§3287(a) not applicable where claim asserted under statute that *implicitly precludes* award of prejudgment interest]

(a) [17:733] **Backpay awards:** An action to recover backpay is an action for damages within the meaning of §3287(a). Interest is recoverable on each salary or pension payment from the date it was due. [*Currie v. Workers' Comp. Appeals Bd.* (2001) 24 C4th 1109, 1115, 104 CR2d 392, 397-398]

The statute also applies to backpay awards by administrative agencies (e.g., FEHC or WCAB). [*Currie v. Workers' Comp. Appeals Bd.*, supra, 24 C4th at 1115, 104 CR2d at 397-398—backpay WCAB award under Lab.C. §132a (prohibiting discrimination against employee seeking workers' comp benefits)]

"[W]ithout prejudgment interest the backpay remedy may lose a significant portion of its value, and the employee left less than fully reimburse[d] . . . for his or her lost wages." [*Currie v. Workers' Comp. Appeals Bd.,* supra, 24 C4th at 1117, 104 CR2d at 399 (internal quotes omitted)]

(2) [17:734] **Compare—unliquidated contractual claims:** If the claim is based upon a cause of action in contract where the claim is unliquidated, the court has *discretion* to award plaintiff prejudgment interest, but from a date no earlier than the date the action was filed. [Civ.C. §3287(b); see *North Oakland Med. Clinic v. Rogers* (1998) 65 CA4th 824, 829, 76 CR2d 743, 746 (not an employment case)]

(3) [17:735] **Compare—jury award where "oppression, fraud or malice" shown:** In *noncontract* actions (i.e., tort claims), "and in every case of oppression, fraud, or malice," prejudgment interest may be given in the *discretion of the jury*. [Civ.C. §3288]

However, Civ.C. §3288 prejudgment interest is available *only* on that portion of the award representing *economic* damages. [*Greater Westchester Homeowners Ass'n v. City of Los Angeles* (1979) 26 C3d 86, 102-103, 160 CR 733, 741]

(4) [17:736] **Interest rate (contract claims):** Unless the contract specifies a different rate, the interest rate for *causes of action based on contract* is 10% per year after

a breach. [Civ.C. §3289(b); see *Bell v. Farmers Ins. Exch.* (2006) 135 CA4th 1138, 1150, 38 CR3d 306, 315]

(a) [17:736.1] **Compare—claims related to lost ERISA benefits (ERISA preemption):** Civ.C. §3289(b) (¶*17:736*) is preempted by ERISA with regard to the rate of prejudgment interest on awards related to lost ERISA benefits (pensions or health, life or disability insurance, etc.). Even if the award is rendered by a state court, prejudgment interest is calculated at either the federal bank discount rate or the rate specified in 28 USC §1961. [*Roden v. AmerisourceBergen Corp.* (2010) 186 CA4th 620, 626, 656-657, 113 CR3d 20, 27, 50-51]

(b) [17:736.2] **Interest on claims for unpaid meal and rest break premiums?** In an action for unpaid meal and rest break premiums (permitted under Lab.C. §226.7), one court declined to apply the 10 percent interest rate contemplated by Lab.C. §218.6 for interest due on unpaid wages. The court concluded that an action for unpaid meal and rest breaks is not an action for unpaid wages. It therefore applied the default interest rate of seven percent permitted by Civ.C. §3287. [See *Naranjo v. Spectrum Security Services, Inc.* (2019) 40 CA5th 444, 475-476, 253 CR3d 248, 272, rev.grntd. 1/2/20 (Case No. S258966), cited for persuasive value pursuant to CRC 8.1115]

(5) [17:737] **Effect of defendant's refusal of CCP §998 offer in personal injury cases:** In personal injury actions, if defendant refuses a pretrial settlement offer that complies with CCP §998 and fails to obtain a "more favorable" judgment at trial, prejudgment interest accrues at the rate of 10% per year from the date of the CCP §998 offer. [Civ.C. §3291; see *Cadio v. Metalclad Insulation Corp.* (2009) 172 CA4th 1040, 1042, 91 CR3d 653, 654 (not an employment case)]

- [17:738] An action for sexual harassment in the workplace under the Fair Employment and Housing Act is an action for personal injury within the meaning of Civ.C. §3291. [*Lakin v. Watkins Associated Indus.* (1993) 6 C4th 644, 657, 25 CR2d 109, 117]
- [17:739] *Emotional distress* is personal injury for purposes of Civ.C. §3291. [*Lakin v. Watkins Associated Indus.*, supra, 6 C4th at 657, 25 CR2d at 117, fn. 8]
- [17:740] *Compare—wrongful termination actions:* Civ.C. §3291 does *not* apply to a tortious wrongful termination claim because it primarily involves the infringement of *property* rights, not personal injury,

even where the wrongful termination caused plaintiff to sustain extensive personal injuries. [*Holmes v. General Dynamics Corp.* (1993) 17 CA4th 1418, 1435-1437, 22 CR2d 172, 183-184]

[17:741-749] *Reserved.*

2. **Postjudgment Interest**

a. [17:750] **Under federal law:** Federal law requires postjudgment interest to be paid on any money judgment at a rate equal to the coupon issue yield equivalent of the average accepted auction price of U.S. Treasury bills over the last 52 weeks immediately before the date of the judgment. [See 28 USC §1961; *O'Neill v. Sears, Roebuck & Co.* (ED PA 2000) 108 F.Supp.2d 443, 445, 448; see also *Van Asdale v. International Game Tech.* (9th Cir. 2014) 763 F3d 1089, 1093—§1961 applies to award of back wages in Sarbanes-Oxley whistleblower action "because there is nothing within the Sarbanes-Oxley Act that says otherwise"]

b. [17:751] **Under California law:** The interest rate on a money judgment rendered in any state court is 10% per year on the principal amount of the unsatisfied portion of the judgment. [CCP §685.010(a)]

(1) [17:752] **Applies to postjudgment interest on ERISA benefit awards:** In state court cases involving lost ERISA benefits, awardable postjudgment interest (unlike prejudgment interest, ¶*17:736.1*) is determined under *state law*. The state (not the federal) statutory interest rate applies because postjudgment interest (unlike prejudgment interest) does not affect the size of the ERISA benefit award. [*Roden v. AmerisourceBergen Corp.* (2010) 186 CA4th 620, 626, 659, 113 CR3d 20, 27, 52]

(2) [17:753] **Applies to postjudgment interest on costs and fee award:** In addition to the damages award, postjudgment interest also accrues on any "costs (including attorney fees) to which the prevailing party may be entitled . . ." [*Hernandez v. Siegel* (2014) 230 CA4th 165, 171, 178 CR3d 417, 421 (internal quotes omitted)]

(3) [17:754] **Accrual date:** Interest on costs and attorney fees begins to accrue on the date the court enters a money judgment establishing a party's entitlement to recover funds. [*Felczer v. Apple Inc.* (2021) 63 CA5th 406, 416-418, 277 CR3d 727, 733-734—interest on costs began accruing on date of judgment but interest on attorney fees award did not begin accruing until court granted attorney fees motion]

[17:755-759] *Reserved.*

J. CIVIL PENALTIES (LABOR CODE PRIVATE ATTORNEYS GENERAL ACT) (PAGA)

1. [17:760] **In General:** The California Labor and Workforce Development Agency (LWDA) is authorized to assess and collect civil penalties for certain violations of the Labor Code. Because the LWDA and its constituent departments and divisions are unable to prosecute employers for every Labor Code violation, the Legislature enacted the "Labor Code Private Attorneys General Act of 2004" (PAGA), which allows employees to initiate a civil action against their employers. [See Lab.C. §2698; *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 C4th 348, 379, 173 CR3d 289, 309-312; *Franco v. Athens Disposal Co., Inc.* (2009) 171 CA4th 1277, 1301, 90 CR3d 539, 557 (citing text) (abrogation on other grounds recognized by *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 C4th 348, 173 CR3d 289)]

   The aggrieved employee generally retains only 25% of any civil penalty recovery. The remaining 75% goes to the LWDA for education and enforcement purposes (*see* ¶*17:830*). [*Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup.Ct. (First Transit, Inc.)* (2009) 46 C4th 993, 95 CR3d 605]

   Where there is more than one aggrieved employee, the allocated 25% must be distributed among all of the aggrieved employees rather than just the employee bringing the action. [*Moorer v. Noble L.A. Events, Inc.* (2019) 32 CA5th 736, 742, 244 CR3d 219, 224]

   a. [17:760.1] **Individual liability:** In a PAGA action alleging Labor Code violations of nonpayment of wages, an individual other than the corporate employer may be found liable for penalties even where there has been no showing to pierce the corporate veil or otherwise apply the alter ego doctrine. [*Atempa v. Pedrazzani* (2018) 27 CA5th 809, 816, 238 CR3d 465, 470-471—owner, president, secretary, and director of aggrieved employees' employer was liable for penalties under Lab.C. §§558(a) and 1197.1(a) as "other person" who caused overtime pay and wage violations]

   b. [17:761] **Not exclusive remedy:** PAGA does not limit the employee's right to pursue other remedies available under state or federal law "either separately or concurrently with an action taken under this part." [Lab.C. §2699(g)(1); *Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)* (2005) 134 CA4th 365, 375, 36 CR3d 31, 38 (disapproved on other grounds by *ZB, N.A. v. Sup.Ct. (Lawson)* (2019) 8 C5th 175, 252 CR3d 228)]

   c. [17:762] **PAGA not applicable to penalties recoverable directly by employees:** PAGA applies only to civil penalties previously enforceable only by the State's labor law enforcement agencies. It does not affect or apply to actions for statutory penalties recoverable directly by employees (e.g., Lab.C. §203 "waiting time" penalties against employers who

willfully fail to pay wages owed to terminated employees; *see* ¶*11:1458 ff.*). [*Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)*, supra, 134 CA4th at 377, 36 CR3d at 39; *see discussion at* ¶*17:810 ff.*]

d. [17:763] **No PAGA private right of action to *directly* enforce IWC Wage Order:** "Although PAGA actions can serve to *indirectly* enforce certain wage order provisions by enforcing *statutes* that require compliance with wage orders . . ., the PAGA does not create any private right of action to *directly* enforce *a wage order.*" [*Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 CA4th 1112, 1132, 138 CR3d 130, 147 (emphasis in original) (citing *Bright v. 99 Only Stores* (2010) 189 CA4th 1472, 1478, 118 CR3d 723, 728-730) (disapproved on other grounds by *ZB, N.A. v. Sup.Ct. (Lawson)* (2019) 8 C5th 175, 252 CR3d 228)—"Only the Legislature, through enactment of a statute, can create a private right of action to directly enforce an administrative regulation, such as a wage order"]

However, actions may be pursued under PAGA for violations of California Lab.C. §1198 for "conditions of labor" prohibited by an IWC Wage Order. [*Home Depot U.S.A., Inc. v. Sup.Ct. (Harris)* (2010) 191 CA4th 210, 223-224, 120 CR3d 166, 175-176]

[17:764] *Reserved.*

e. **Exclusions from Act**

(1) [17:765] **Posting, notice, reporting and filing violations:** No action lies under PAGA for violating a "posting, notice, agency reporting, or filing requirement" of the Labor Code *except mandatory payroll or workplace injury* reporting. [Lab.C. §2699(g)(2)]

[17:766-769] *Reserved.*

(2) [17:770] **Workers' compensation penalties:** No action lies under PAGA to recover administrative and civil penalties in connection with workers' compensation proceedings. [Lab.C. §2699(m)]

(3) [17:771] **California Labor and Workplace Development Agency:** No civil penalty is recoverable where the alleged violation is the California Labor and Workplace Development Agency's failure to act. [Lab.C. §2699(f)(3)]

f. [17:772] **Statute of limitations:** PAGA actions have a one-year statute of limitations. [CCP §340(a); *Esparza v. Safeway, Inc.* (2019) 36 CA5th 42, 59, 247 CR3d 875, 890—PAGA claim was untimely where LWDA notice was filed more than one year after meal period violations]

[17:773-774] *Reserved.*

2. [17:775] **Who May Maintain Action:** An "aggrieved employee" may maintain a civil action to recover civil penalties for Labor Code

violations "on behalf of himself or herself *and* other current or former employees against whom one or more of the alleged violations was committed." [Lab.C. §2699(g)(1) (emphasis added)]

a. [17:776] **"Aggrieved employee":** "Aggrieved employee" means anyone who was employed by the alleged violator and against whom one or more of the alleged violations was committed. [Lab.C. §2699(c); see *Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup.Ct. (First Transit, Inc.)* (2009) 46 C4th 993, 1004-1005, 95 CR3d 605, 613—labor unions lack standing to sue under PAGA even if their members are "aggrieved employees"; see also *Williams v. Sup.Ct. (Pinkerton Governmental Services, Inc.)* (2015) 237 CA4th 642, 649, 188 CR3d 83, 88—single representative PAGA claim cannot be split into arbitrable individual claim and nonarbitrable representative claim, including determination of whether representative employee is "aggrieved employee"; *Perez v. U-Haul Co. of Calif.* (2016) 3 CA5th 408, 420-421, 207 CR3d 605, 613-614 (same)]

An employee maintains "aggrieved employee" standing for purposes of pursuing a PAGA action even where the employee settles the employee's own claims for individual relief since PAGA lawsuits are representative actions not "dependent on the maintenance of an individual claim." [*Kim v. Reins Int'l Calif., Inc.* (2020) 9 C5th 73, 84, 259 CR3d 769, 776—"Legislature defined PAGA standing in terms of violations, not injury"]

Likewise, the fact that individual claims may be time-barred does not nullify alleged Labor Code violations nor strip a plaintiff of standing to pursue PAGA remedies. [*Johnson v. Maxim Healthcare Services, Inc.* (2021) 66 CA5th 924, 930, 281 CR3d 478, 482]

b. [17:777] **Representative action:** Any suit under PAGA is a representative action. Plaintiff must sue "on behalf of himself or herself and other current or former employees" injured by the employer's violations. [Lab.C. §2699(g)(1)]

(1) [17:777a] **Recovery for violations affecting other aggrieved employees:** An aggrieved employee who was affected by at least one Labor Code violation may seek PAGA penalties for different violations that affected other employees. [*Huff v. Securitas Security Services USA, Inc.* (2018) 23 CA5th 745, 761, 233 CR3d 502, 513]

(2) [17:777.1] **Class action not mandatory:** Although PAGA actions *may* be brought as class actions, that is not mandatory; i.e., plaintiff may maintain a representative suit under PAGA *without satisfying class action requirements* (*see ¶19:771a, 19:795.5*). [*Arias v. Sup.Ct. (Angelo Dairy)* (2009) 46 C4th 969, 981-982, 95 CR3d

588, 596-597; see also *Franco v. Arakelian Enterprises, Inc.* (2015) 234 CA4th 947, 962, 184 CR3d 501, 513—PAGA representative action "is not a class action, but rather is a type of qui tam action"]

[17:777.2] ***PRACTICE POINTER:*** It may be easier for plaintiffs to sue under PAGA but recovery is *limited* to *civil penalties* for Labor Code violations.

(3) [17:777.3] **Compare—actions under Unfair Competition Law:** Any suit under California's Unfair Competition Law (Bus. & Prof.C. §17200 et seq.) seeking relief on behalf of others must be brought as a class action (*see ¶19:811*). [*Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup.Ct. (First Transit, Inc.)*, supra, 46 C4th at 1005, 95 CR3d at 614]

c. [17:778] **Nonassignable:** Because the right to recover a statutory penalty is nonassignable, an aggrieved employee cannot assign a claim for statutory penalties under PAGA. [*Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup.Ct. (First Transit, Inc.)*, supra, 46 C4th at 1003, 95 CR3d at 612—nonassignable to labor union]

d. [17:779] **Agreement prohibiting PAGA action unenforceable:** An agreement prohibiting employees from seeking civil penalties on behalf of other employees under PAGA is unenforceable because it "is contrary to public policy." [*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 C4th 348, 360, 173 CR3d 289, 294—Federal Arbitration Act does not preempt state law prohibiting waiver of PAGA representative actions in employment contracts because a PAGA claim "lies outside the FAA's coverage"; *Securitas Security Services USA, Inc. v. Sup.Ct. (Edwards)* (2015) 234 CA4th 1109, 1121-1122, 184 CR3d 568, 578-579—PAGA waiver still void as contrary to public policy despite clause allowing employees to opt out of arbitration agreement without penalty; *Williams v. Sup.Ct. (Pinkerton Governmental Services, Inc.)* (2015) 237 CA4th 642, 648-649, 188 CR3d 83, 87-88—employee's waiver of right to assert representative PAGA claim was unenforceable, and employee's PAGA action could not be split into arbitrable individual claim and nonarbitrable representative claim; *see further discussion at ¶18:552.10 ff.*]

[17:779.1-779.4] *Reserved.*

e. [17:779.5] **Res judicata limitation:** An aggrieved employee who was a class member in a previous wage-and-hour class action that did not seek PAGA penalties may be barred by res judicata from maintaining a subsequent action seeking those penalties. [See *Villacres v. ABM Indus. Inc.* (2010) 189 CA4th 562, 569, 583-585, 117 CR3d 398, 404, 415-416; *Robinson v. Southern Counties Oil Co.* (2020) 53 CA5th 476, 483, 267 CR3d 633, 638]

3. [17:780] **Prerequisites to Civil Action:** A civil action under §2699 may not be commenced (or a pending action amended to include a §2699 claim) until the following requirements have been met:

   a. [17:781] **Written notice to employer and State:** The aggrieved employee must give written notice by *certified mail* to the employer and by *online filing* with the Labor and Workforce Development Agency ("Agency") specifying the Labor Code provisions violated, "including the facts and theories to support the alleged violation." [Lab.C. §2699.3(a)(1); *Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)* (2005) 134 CA4th 365, 370, 375, 36 CR3d 31, 34, 37 (disapproved on other grounds by *ZB, N.A. v. Sup.Ct. (Lawson)* (2019) 8 C5th 175, 252 CR3d 228)—notice allows Agency to act first on more serious violations, such as wage and hour violations, and gives employers opportunity to cure less serious violations]

   Failure to plead compliance with this prelawsuit notice requirement is *fatal* to claims for civil penalties under Lab.C. §2699.5. [*Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)*, supra, 134 CA4th at 381-382, 36 CR3d at 43]

   [17:781.1] ***PRACTICE POINTER FOR PLAINTIFFS:*** Failure to comply with PAGA's prelawsuit notice requirement does not affect plaintiff's right to *other remedies* for Labor Code violations (e.g., statutory penalties recoverable directly by employees). [See *Lloyd v. County of Los Angeles* (2009) 172 CA4th 320, 331-332, 90 CR3d 872, 881]

   (1) [17:781.2] **Notice requirement:** The notice must contain sufficient information, such as facts, theories, and the specific Labor Code provisions alleged to have been violated, to give the Agency an adequate opportunity to decide whether to allocate resources to investigate the claim. [*Khan v. Dunn-Edwards Corp.* (2018) 19 CA5th 804, 809, 228 CR3d 90, 94—notice was insufficient where it referred only to employee's individual claims and not to claims on behalf of other employees]

   However, the notice carries no heightened pleading standard, and the plaintiff need only allege the "facts and theories" sufficient to notify the defendant and the Agency of "the general basis for this claim." [*Rojas-Cifuentes v. Sup.Ct. (American Modular Systems, Inc.)* (2020) 58 CA5th 1051, 1059-1060, 273 CR3d 76, 82-83]

   (2) [17:781.3] **Statute of limitations not tolled by deficient notice:** A deficient notice does not toll the one-year statute of limitations. [*Brown v. Ralphs Grocery Co.* (2018) 28 CA5th 824, 840-841, 239 CR3d 519, 531-532]

   b. [17:782] **Agency action:** If the Agency does *not* intend to investigate the alleged violation, it must so notify the ag-

grieved employee and the employer by certified mail within 60 days after the employee's notice was postmarked. The aggrieved employee may file a §2699 action upon receipt of the Agency's notice; or if the Agency *fails to provide notice*, within *65 days* after the employee's notice was postmarked. [Lab.C. §2699.3(a)(2)(A)]

If the Agency *intends* to investigate the alleged violation, it must so notify the aggrieved employee and the employer within 65 days after the employee's notice was postmarked. It then has up to 180 days (i.e., 120 days plus an available 60-day extension with the requisite notice) to issue a citation. [Lab.C. §2699.3(a)(2)(B)]

(1) [17:783] **Effect of citation:** No private action may be commenced by an aggrieved employee where the Agency cites the employer for the same violations, or initiates wage collection proceedings under Lab.C. §98.3, within the time limits prescribed by statute (¶*17:782*). [Lab.C. §2699(h)]

(2) [17:784] **Effect of no citation:** If the Agency decides not to issue a citation, it must notify the aggrieved employee and employer within five days after the 180-day period (i.e., within 250 days after the employee's notice was postmarked; *see* ¶*17:782*). If the Agency fails to provide timely notice, the aggrieved employee may file suit under §2699 at the end of the prescribed period. [Lab.C. §2699.3(a)(2)(B)]

[17:785-789] *Reserved.*

c. [17:790] **Compare—workplace safety violations:** Where the alleged Labor Code violations relate to occupational health and safety standards (Lab.C. §6300 et seq.), a copy of the aggrieved employee's notice must also be filed online with the Division of Occupational Safety and Health ("Division"). The Division must then inspect or investigate the alleged violation as required by law (*see* ¶*13:371 ff.*). [Lab.C. §2699.3(b)(1)]

(1) [17:791] **Effect of citation:** Issuance of a citation bars any private action under §2699. [Lab.C. §2699.3(b)(2)(A)(i)]

(2) [17:792] **Effect of failure to issue citation:** The time for completion of investigation is governed by Lab.C. §6317 (*see* ¶*13:431 ff.*). At the end of that period, if the Division fails to issue a citation, the aggrieved employee may challenge that decision in court. But if the court finds a citation should have issued and orders the Division to do so, no action can be maintained under §2699. [Lab.C. §2699.3(b)(2)(A)(ii)]

(3) [17:793] **Effect of failure to inspect or investigate:** If the Division fails to inspect or investigate the alleged violation, the aggrieved employee may commence an action under §2699, *except* where the Division has already entered into an agreement with the employer to abate the violation or ameliorate the condition in question. [Lab.C. §2699.3(b)(2)(B) & (b)(3)(B)]

[17:794-799] *Reserved.*

d. [17:800] **Compare—unspecified violations subject to "cure":** Most of the important Labor Code provisions governing compensation, working hours, and employee rights and privileges, as well as workplace safety violations covered by Lab.C. §6300 (¶*17:790*), are *not subject to "cure."* [See Lab.C. §2699.3(c) (exempting more than 100 Labor Code provisions listed in Lab.C. §§2699.5 and 6300 et seq.)]

With regard to other, unspecified Labor Code violations, however, the employer has the right to "cure" the violation and thereby preclude a §2699 civil action. [Lab.C. §2699.3(c)]

Examples of violations thus subject to "cure" include:

— Lab.C. §515 (classification of employees as exempt from overtime pay requirements);

— Lab.C. §6401.7 (failure to adopt injury and illness prevention program).

(1) [17:801] **"Cure":** "Cure" means the employer abates each violation alleged in the aggrieved employee's notice (¶*17:781*), is in compliance with the Labor Code provisions specified in that notice *and the employee is made whole.* [Lab.C. §2699(d)]

(a) [17:801.1] **Compare—wage statement violations:** Certain wage statement violations will be considered cured only upon a showing that the employer has provided a fully-compliant wage statement to each aggrieved employee for each pay period for the three-year period before the date of the employee's notice of the violation. [Lab.C. §2699(d)]

(2) [17:802] **Time limit:** The employer may cure the alleged violation within 33 days after the employee's notice is postmarked. [Lab.C. §2699.3(c)(2)(A)]

(3) [17:803] **Written notice required:** The employer must give written notice by certified mail to the employee and by online filing with the Agency within the 33-day period that the alleged violation has been cured, including a description of the action taken. [Lab.C. §2699.3(c)(2)(A)]

(4) [17:804] **Limitation:** An employer may not avail itself of the notice and "cure" provisions more than three times in a 12-month period for the same violations, regardless of the location of the worksite. [Lab.C. §2699.3(c)(2)(B)(i)]

(a) [17:804.1] **Compare—wage statement violations:** Where the alleged Labor Code violations relate to certain wage statement requirements (Lab.C. §226), an employer has the right to cure the same violations only once in a 12-month period. [Lab.C. §2699.3(c)(2)(B)(ii)]

(5) [17:805] **Employee may dispute "cure":** If the aggrieved employee disputes that the alleged violation has been cured, he or she must provide written notice to the employer and Labor and Workforce Development Agency specifying the facts. The Agency then has 17 days to review the employer's actions to cure the alleged violation and notify the employee and employer of its finding by certified mail; and may grant an additional three business days to cure the violation. [Lab.C. §2699.3(c)(3)]

If the Agency determines the employer has not cured the alleged violation or if the Agency fails to act or to provide timely notice, the employee may proceed with a §2699 action. [Lab.C. §2699.3(c)(3)]

If the Agency determines the violation has been cured but the employee still disagrees, the employee may appeal the determination to the superior court. [Lab.C. §2699.3(c)(3)]

[17:806-809] *Reserved.*

4. [17:810] **Penalties Recoverable:** The Labor Code Private Attorneys General Act's prerequisites to suit (¶*17:780*) apply only where plaintiff seeks recovery of a "civil penalty *to be assessed and collected by" the Labor Commissioner* (Lab.C. §2699(a)) for violation of one of the provisions listed in Lab.C. §2699.5 (Lab.C. §2699.3). [*Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)* (2005) 134 CA4th 365, 378, 36 CR3d 31, 40 (disapproved on other grounds by *ZB, N.A. v. Sup.Ct. (Lawson)* (2019) 8 C5th 175, 252 CR3d 228); *Dunlap v. Sup.Ct. (Bank of America, N.A.)* (2006) 142 CA4th 330, 340, 47 CR3d 614, 620-621]

One must "distinguish between a request for statutory penalties provided by the Labor Code for employer wage-and-hour violations, which were recoverable directly by employees well before the [Private Attorneys General Act] became part of the Labor Code, and a demand for 'civil penalties,' *previously enforceable only by the State's labor law enforcement agencies."* [*Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)*, supra, 134 CA4th at 377, 36 CR3d at 39 (emphasis added)]

a. [17:811] **Penalties previously recoverable by Labor Commissioner subject to Act:** Civil penalties previously recoverable only by the Labor Commissioner are specified in Lab.C. §225.5, which provides that an employer who unlawfully withholds wages is subject to a civil penalty in an enforcement action

initiated by the Labor Commissioner in the sum of $100 per employee for the initial violation and $200 per employee for subsequent or willful violations. [See *Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)*, supra, 134 CA4th at 377, 36 CR3d at 39]

(1) [17:812] **Violations for which no penalty specified:** For Labor Code violations for which no civil penalty is specified, a civil penalty (assessable and collectible by the Labor Commissioner) is imposed as follows: $100 for each aggrieved employee per pay period for the initial violation, $200 for subsequent violations. [Lab.C. §2699(f)(2)]

(a) [17:813] **Wage Order mandating "suitable seating" enforceable under PAGA:** A claim for civil penalties exists under Lab.C. §2699 when an employer violates the "suitable seating requirement" contained in Wage Order No. 7-2001, because the failure to provide suitable seating is unlawful under Lab.C. §1198, and §1198 contains no civil penalties for violations of the "suitable seating requirement." [*Bright v. 99 Only Stores* (2010) 189 CA4th 1472, 1478, 118 CR3d 723, 727-728, 730; *Home Depot U.S.A., Inc. v. Sup.Ct. (Harris)* (2010) 191 CA4th 210, 222-223, 120 CR3d 166, 174-175]

[17:814] *Reserved.*

b. [17:815] **Penalties previously recoverable by employees not subject to Act:** The Act's prerequisites to suit *do not apply* in actions for statutory penalties that were recoverable directly by the employee before the Act. This includes many wage and hour violations:

(1) [17:815.1] **"Waiting-time" penalties:** Lab.C. §203 obligates an employer who willfully fails to pay wages due an employee who is discharged or quits to pay the employee, in addition to the unpaid wages, a penalty equal to the employee's daily wages for each day, not exceeding 30 days, that the wages are unpaid (*see* ¶*11:1458*). [See *Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)*, supra, 134 CA4th at 377, 36 CR3d at 39]

(2) [17:815.2] **Pay stub penalties:** Lab.C. §226(e) obligates an employer who fails to maintain employment records in accordance with Lab.C. §226(a) (*see* ¶*11:445*) to pay the employee $100 per pay period up to a maximum of $4,000. [See *Dunlap v. Sup.Ct. (Bank of America, N.A.)* (2006) 142 CA4th 330, 335, 47 CR3d 614, 617]

(a) [17:815.2a] **No need to establish injury:** An employee may recover civil penalties for violation of Lab.C. §226(a), pursuant to Lab.C. §2699(f), without establishing injury as set forth in Lab.C. §226(e). [See *McKenzie v. Federal Express Corp.* (CD CA

2011) 765 F.Supp.2d 1222, 1231-1232; *Lopez v. Friant & Assocs., LLC* (2017) 15 CA5th 773, 787-788, 224 CR3d 1, 10-11]

(3) [17:815.3] **Meal, rest, and recovery period penalties:** Lab.C. §226.7(c) obligates an employer who fails to provide mandated meal, rest or recovery periods to pay each employee one additional hour of pay for each work day that the meal, rest or recovery period is not provided (¶*11:831.5, 11:861.1*). [See *Dunlap v. Sup.Ct. (Bank of America, N.A.)*, supra, 142 CA4th at 335, 47 CR3d at 617 (predating 1/1/14 addition of "recovery period" to statute)]

(4) [17:816] **Unpaid wages not a "civil penalty":** Lab.C. §558 permits the Labor Commissioner to recover civil penalties "in addition to an amount sufficient to recover unpaid wages." The unpaid wages, which are payable to the employee, are not a "civil penalty" recoverable in a PAGA action but instead constitute compensatory relief. [*ZB, N.A. v. Sup.Ct. (Lawson)* (2019) 8 C5th 175, 182, 197, 252 CR3d 228, 231, 244]

[17:817-819] *Reserved.*

5. [17:820] **Penalties Discretionary:** Whenever the Labor Code gives the Labor Commissioner discretion to assess a civil penalty, the court has the same discretion. [Lab.C. §2699(e)(1)]

   a. [17:821] **Lesser amount proper:** The court may award less than the maximum penalty authorized if, under the facts and circumstances of the case, a greater amount would be "unjust, arbitrary and oppressive, or confiscatory." [Lab.C. §2699(e)(2)]

   [17:822-824] *Reserved.*

6. [17:825] **Settlements Subject to Court Approval:** A superior court must review and approve any penalties sought as part of a proposed settlement agreement pursuant to §2699. [Lab.C. §2699(*l*)]

   a. [17:826] **Compare—workplace safety violations:** Where the alleged Labor Code violations relate to occupational health and safety standards (Lab.C. §6300 et seq.), a copy of the proposed settlement must be mailed to the Division of Occupational Safety and Health, and the Division's views must be accorded appropriate weight. The court must ensure that the settlement of alleged violations is "at least as effective as the protections or remedies provided by state and federal law or regulation for the alleged violation." [Lab.C. §2699.3(b)(4)]

   [17:827-829] *Reserved.*

7. [17:830] **Sharing of Recovery:** Penalties recovered by aggrieved employees must be distributed as follows:
   — 75% to the Labor and Workforce Development Agency "for

education of employers and employees about their rights and responsibilities under this Code"; and

— 25% to the aggrieved employees. [Lab.C. §2699(i); see *Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)* (2005) 134 CA4th 365, 370, 36 CR3d 31, 33-34]

a. [17:831] **Exception:** Plaintiffs do not share in the $500 penalty imposed where there were no employees at the time of violation. The penalty must be distributed *entirely* to the Labor and Workforce Development Agency. [Lab.C. §2699(j)]

[17:832] ***PRACTICE POINTER:*** Where a class of plaintiffs and their counsel are to recover greater sums on other claims, distributing the entire penalty to the State of California (even if no governmental entity participates in the case) may be a prudent way to expedite court approval of the settlement. [See *Ontiveros v. Zamora* (ED CA 2014) 303 FRD 356, 371, 376—approving settlement of class and PAGA claims where the entire "civil penalties of $40,000" were distributed to the State of California even though "(n)o government entity participated in this case"]

[17:833-834] *Reserved.*

8. [17:835] **Attorney Fees and Costs Award:** A prevailing employee is entitled to an award of reasonable attorney fees and costs incurred in the action. [Lab.C. §2699(g)(1)]

9. [17:836] **Collateral Estoppel Effect:** Because an aggrieved employee's action under PAGA functions as a substitute for an action by the government itself, a judgment is binding not only on the plaintiff but also on government agencies and *any other aggrieved employee not a party to the proceeding*. Thus, nonparty employees *cannot* sue to recover additional *civil penalties* for the same Labor Code violations (but may sue for damages or other remedies for the same violations). [*Arias v. Sup.Ct. (Angelo Dairy)* (2009) 46 C4th 969, 986, 95 CR3d 588, 600]

[17:837-849] *Reserved.*

K. TAX TREATMENT OF JUDGMENTS AND SETTLEMENTS IN EMPLOYMENT ACTIONS

1. [17:850] **In General:** Plaintiffs must report as gross income for federal income tax purposes any portion of a judgment or settlement that represents income (e.g., wages). [See 26 USC §61(a)—"income from whatever source derived"]

However, payments received "*on account of* personal physical injuries or physical sickness" are exempt income (not taxable). [26 USC §104(a)(2) (emphasis added)]

Damages recovered from employment-related disputes generally are *not* for "personal physical injuries or physical sickness"; thus, most payments made pursuant to settlement or a judgment

in employment cases are taxable income. [See IRS Office of Chief Counsel Memorandum (Oct. 22, 2008), designated as Program Manager's Technical Advice 2009-035 and hereafter referred to as "PMTA 2009-035"—describing treatment of employment-related settlement payments made by IRS to its employees and former employees (PMTA 2009-035 does not constitute formal guidance on which taxpayers may rely, but does indicate IRS thinking on the subject matter)]

[17:851] ***PRACTICE POINTER FOR EMPLOYERS:*** Employers should be wary of attempts by plaintiff's counsel to allocate any portion of a settlement in an employment law case to claims of "physical injury or sickness." The IRS may challenge unreasonable allocations and the *employer will be responsible for the tax* if the challenge is successful. There must be actual physical injuries for there to be any allocation of the settlement to excludable physical injury compensation. Under the "origin of the claim" doctrine, the plaintiff's pleadings must support the allocation of a portion of the damages to actual physical injury.

Employers may try to protect themselves by including a provision in the settlement agreement obligating the employee to indemnify them from any tax liability incurred as a result of such allocations; but enforcing the indemnity may be costly and the employee may not have sufficient assets to cover the tax liability. Moreover, the employer remains legally responsible for the income tax withholding and FICA taxes in the event of a successful IRS challenge. It is worth noting that the ultimate tax savings from allocating settlement amounts to nonwage claims is typically limited to the FICA tax, state disability insurance tax and unemployment insurance tax.

In cases in which the settlement will be allocated between lost wages and emotional distress (¶*17:865 ff.*), the settlement agreement should state that the wage payment will be reported on a W-2 and that the emotional distress payment will be reported on a Form 1099-MISC in Box 3 "other income." Where no W-2 or IRS Form 1099 will be issued, the settlement agreement should so state. Emotional distress is not considered a physical injury and the emotional damages are not excludable from income under 26 USC §104(a)(2). Emotional distress damages, however, are not "wages" and are not subject to W-2 reporting or withholding.

[17:852] ***PRACTICE POINTER FOR EMPLOYEES:*** Where there is a legitimate basis to claim part of the settlement is for "physical injury or sickness," the employee's counsel must be careful not to characterize such an allocation as "emotional distress damages" in the settlement. Language that a settlement payment is for alleged emotional distress

damages (noneconomic) may pose a virtually insurmountable hurdle in proving damages expressly allocated as "emotional distress damages" (a term of art in the Tax Code for a type of damage that is taxable) were in reality for "physical injury or sickness." (See *Doyle v. Commissioner of Internal Revenue*, TC Memo 2019-8—settlement agreement stating employer agreed to pay employee $250,000 as settlement for alleged emotional distress damages was enough to find payment was for emotional distress)

Where an employer insists on a "tax indemnity" clause in its favor as a condition to any employee-preferred allocation of the settlement proceeds, the employee should be careful not to agree to a clause that states the employee is responsible for "all taxes." Most settlements have a wage allocation, and there is generally no dispute that the employer is responsible for the employer-side taxes on the wage payment. An overly broad indemnity clause could make the employee responsible to indemnify for any underpayment of the employer-side taxes on the allocated wage payment. The employee may want to add that the employee is responsible and will indemnify for all taxes due "other than any employer-side taxes due on the payment allocated as wages."

[17:853-854] *Reserved.*

2. [17:855] **When Income Exclusion Permissible:** Exclusion under 26 USC §104(a)(2) is warranted only when the amount in question was:
   — received through the prosecution of an action, or a settlement entered into in lieu of prosecution of an action, *based upon tort or tort-type rights;* and
   — paid on account of personal injuries or sickness. [*Commissioner of Internal Revenue v. Schleier* (1995) 515 US 323, 337, 115 S.Ct. 2159, 2167 (decided under prior version of statute); see *Lindsey v. Commissioner of Internal Revenue* (8th Cir. 2005) 422 F3d 684, 688—taxpayer can satisfy second prerequisite only by establishing "direct causal link" between damages and physical injury or physical sickness]

   a. [17:856] **Personal physical injuries and physical sickness:** Except for amounts allocated to punitive damages (*see ¶17:873*), any amount paid by an employer to a current or former employee (or to his/her attorney) "on account of personal physical injuries or sickness," including any amount paid for emotional distress *caused by* such injuries/sickness or for attorneys in connection with litigating the claim, is *not income* to the employee. [26 USC §104(a)(2); 26 CFR §1.104-1(c)(1)]

   The employee need not report this amount as income on his or her tax return, and the employer should not apply any withholdings to this amount.

(1) [17:857] **What constitutes personal physical injuries or sickness:** Personal physical injuries may be evidenced by observable or documented bodily harm. "The term 'personal physical injuries' is not defined in either §104(a)(2) or the legislative history of the 1996 Act. However, we believe that direct unwanted or uninvited physical contacts resulting in observable bodily harms such as bruises, cuts, swelling, and bleeding are personal physical injuries under §104(a)(2)." [IRS Priv.Ltr.Rul. 200041022 (Oct. 13, 2000) (internal citation omitted) (referring to legal dictionary definition of "physical injury" as "bodily harm or hurt, excluding mental distress, fright, or emotional disturbance")]

b. [17:858] **Damages for emotional distress:** Amounts allocated to emotional distress are taxable income to plaintiff. "(E)motional distress shall not be treated as a physical injury or physical sickness" for purposes of the exclusion under 26 USC §104(a)(2). [26 USC §104(a), penultimate sent.; see also *Rivera v. Baker West, Inc.* (9th Cir. 2005) 430 F3d 1253, 1256]

California Rev. & Tax.C. §17131 adopts by reference federal law governing taxability of income. Therefore, emotional distress damages are probably taxable as ordinary income for California income tax purposes as well.

(1) [17:859] **Associated physical symptoms insufficient to avoid taxability:** Taxable "emotional distress" damages include damages for associated physical symptoms such as insomnia, headaches and stomach disorders resulting from the emotional distress. [See *Lindsey v. Commissioner of Internal Revenue* (8th Cir. 2005) 422 F3d 684, 688-—damages for "hypertension and stress-related symptoms, including periodic impotency, insomnia, fatigue, occasional indigestion, and urinary incontinence" taxable as related to emotional distress where taxpayer failed to establish "direct causal link" to physical sickness]

(2) [17:860] **Compare—medical expenses for emotional distress:** Damages recovered for medical expenses in *treating* emotional distress are *excluded* from taxable income. [See 26 USC §104(a), last sent.; 26 CFR §1.104-1(c)(1); but see *Espinoza v. Commissioner of Internal Revenue* (5th Cir. 2011) 636 F3d 747, 750-751 & fn. 3 (expressly not reaching issue of whether amounts received for medical care or treatment for physical manifestations of emotional distress and noting it one of first impression in circuit courts); *see also* ¶*17:911*]

c. [17:861] **Damages for assault, battery or sexual harassment:** Unless there is some kind of observable bodily harm, the IRS and courts usually find that damages recovered for assault and battery are not exempt income. [See IRS Priv.Ltr.Rul. 200041022 (July 17, 2000)—settlement received by female

employee for sexual harassment not excludable because there was no "observable bodily harm," but damages received from assault that required medical treatment were excludable; *Shaltz v. Commissioner of Internal Revenue*, TC Memo 2003-173—sexual harassment recovery taxable because damages recovered for mental anguish, humiliation, embarrassment, loss of benefits and other economic advantages of employment did not constitute personal physical injury or physical sickness; see also *Shelton v. Commissioner of Internal Revenue*, TC Memo 2009-116—plaintiff's claim that she was "not the same person physically" as a result of sexual harassment did not satisfy §104(a)(2)'s excludability requirement because settlement proceeds did not compensate her "for that physical injury"]

[17:861.1-861.4] *Reserved.*

(1) [17:861.5] **Compare—"hush money" related to sexual harassment or sexual abuse claims:** Before December 22, 2017, employers could deduct settlement payments made in sexual harassment or sexual abuse cases, including payments for related attorney fees, as business expenses on their state and federal income tax returns. As of December 22, 2017, the Tax Cuts and Jobs Act prevents employers from deducting such payments on their federal income tax returns unless the payment was made prior to December 22, 2017, or the payment is not subject to a nondisclosure agreement. [26 USC §162(q)]

d. [17:862] **Damages for defamation:** Payments received for defamation are taxable income; injury to one's reputation is not a "personal physical injury" within the meaning of 26 USC §104(a)(2) (¶*17:855*). [See *Polone v. Commissioner of Internal Revenue* (9th Cir. 2007) 505 F3d 966, 969-970]

[17:863-864] *Reserved.*

e. [17:865] **Wages:** Wages routinely constitute taxable income subject to withholding (e.g., for Social Security, Medicare, or State Disability Insurance). The term "wages" includes: amounts paid by an employer to settle a current or former employee's claim for backpay, front pay, unpaid wages or salaries, bonuses, or commissions, premium pay for missed meal/rest breaks and/or severance pay (see Lab.C. §226.7). [26 USC §3121(a) (defining "wages" as "all remuneration for employment" with listed exceptions); *Social Security Bd. v. Nierotko* (1946) 327 US 358, 364, 66 S.Ct. 637, 641—backpay is "remuneration" and therefore "wages"; *Rivera v. Baker West, Inc.* (9th Cir. 2005) 430 F3d 1253, 1259 (collecting cases)—all settlement payments designed to approximate recovery for lost wages and other economic harms, arising out of employment relationship, are "wages"; *Cifuentes v. Costco Wholesale Corp.* (2015) 238 CA4th 65, 77, 189 CR3d 104, 112—"Under prevailing federal decisional law, an award of back or front pay arises

from the employer-employee relationship, and therefore qualifies as wages, even though the plaintiff is no longer employed and the award is not for actual services performed"; and see IRS Office of Chief Counsel Memorandum No. 201522004 (May 29, 2015) (cannot be used or cited as precedent)—meal and rest period premiums under Lab.C. §226.7 are wages for tax purposes, but waiting time penalty under Lab.C. §203 is not; but see *Lisec v. United Airlines, Inc.* (1992) 10 CA4th 1500, 1507, 11 CR2d 689, 693—compensatory damages for wrongful termination not "wages" where damages were for breach of employment contract, not services already performed, and employees not reinstated and did not seek backpay or front pay since there was no ongoing employment relationship]

[17:865.1] ***PRACTICE POINTER:*** Litigants should exercise caution about relying on *Lisec*, supra. The opinion does not cite or discuss contrary federal cases on what is basically an issue of federal tax law. [See *Cifuentes v. Costco Wholesale Corp.* (2015) 238 CA4th 65, 69, 76, 78, 189 CR3d 104, 106, 112, 113 (citing text)]

(1) [17:866] **Severance pay:** Unless plaintiff can prove severance payments were made on account of (i.e., directly linked to) personal injury or physical illness, the payments are includible in plaintiff's taxable income and subject to normal payroll and withholding requirements. [26 CFR §31.3401(a)-1(b)(4)—"Any payments made by an employer to an employee on account of dismissal, that is, involuntary separation" constitute wages; see *Abrahamsen v. United States* (Fed. Cir. 2000) 228 F3d 1360, 1364-1365—"wages" need not be compensation for services actually rendered]

(a) [17:867] **"SUB" payments:** Supplemental unemployment compensation benefits ("SUB" payments) that are paid as part of a severance package are taxable wages under the Federal Insurance Contributions Act ((FICA); 26 USC §3101 et seq.). [*United States v. Quality Stores, Inc.* (2014) 572 US 141, 143, 134 S.Ct. 1395, 1398—FICA "instructs that" SUBs be treated as if wages; compare *CSX Corp. v. United States* (Fed. Cir. 2008) 518 F3d 1328, 1352—not all SUB payments qualify for exclusion under FICA]

[17:868-869] *Reserved.*

(2) [17:870] **Backpay:** Backpay is taxable income. [*Commissioner of Internal Revenue v. Schleier* (1995) 515 US 323, 336, 115 S.Ct. 2159, 2167; *Cifuentes v. Costco Wholesale Corp.* (2015) 238 CA4th 65, 68, 189 CR3d

104, 105, 112-113—employers required "to withhold payroll taxes for all 'wages' arising from the employer-employee relationship," including an award of backpay "after that relationship has terminated"; see *BNSF Ry. Co. v. Loos* (2019) __ US __, __, 139 S. Ct. 893, 900—damages awarded to railroad employee for lost wages under Federal Employers Liability Act for on-the-job injury were functionally equivalent to backpay, qualified as "compensation," and were therefore taxable under Railroad Retirement Tax Act]

(a) [17:871] **Taxable in year of receipt:** Backpay is attributed to the year in which it was paid, not to the year to which it relates. [See *United States v. Cleveland Indians Baseball Co.* (2001) 532 US 200, 220, 121 S.Ct. 1433, 1445; *Eshelman v. Agere Systems, Inc.* (3rd Cir. 2009) 554 F3d 426, 441]

(3) [17:872] **Front pay:** Front pay constitutes wages for FICA and income tax withholding purposes and therefore is included in plaintiff's gross income and subject to withholding in the year in which it was paid, not the year to which it relates. [*Noel v. New York State Office of Mental Health Central N.Y. Psychiatric Ctr.* (2nd Cir. 2012) 697 F3d 209, 213-214; *Cifuentes v. Costco Wholesale Corp.*, supra, 238 CA4th at 71, 189 CR3d at 107-108—employer that fails to withhold payroll taxes from front pay or backpay award subject to penalties; compare *Commissioner of Internal Revenue v. Schleier*, supra, 515 US at 329-330, 115 S.Ct. at 2164 (noting in dicta that recovery of lost wages may be excludible as being "on account of personal injury" where lost wages resulted from time taxpayer was out of work due to injuries arising from an automobile accident)]

f. [17:873] **Punitive damages:** Punitive damages are taxable income to the recipient. The 26 USC §104(a)(2) exclusion for "physical injury or physical sickness" expressly states it *does not apply* to punitive damages. [See *O'Gilvie v. United States* (1996) 519 US 79, 81, 117 S.Ct. 452, 454—punitive damages in tort suit held taxable]

Punitive damages are not wages, however, and therefore are not subject to payroll taxes. [See Rev.Rul. 72-268, 1972-1 CB 313—late payment penalties paid pursuant to Fair Labor Standards Act not wages and thus not subject to payroll taxes]

g. [17:874] **Interest:** Prejudgment and postjudgment interest received as part of a damages award for personal injury is taxable as ordinary income to plaintiff (but it is not subject to payroll taxes). [See *Rozpad v. Commissioner of Internal Revenue* (1st Cir. 1998) 154 F3d 1, 5-6 (prejudgment interest); *Chamberlain ex rel. Chamberlain v. United States* (5th Cir.

2005) 401 F3d 335, 344 (same); *Francisco v. United States* (3rd Cir. 2001) 267 F3d 303, 316—prejudgment and post-judgment interest taxable "in the same way"]

[17:875-879] *Reserved.*

h. [17:880] **Attorney fees:** The portion of a settlement or judgment paid to a plaintiff's attorney (as statutory fees or under a contingent fee agreement) represents taxable income to the plaintiff: "(A)s a general rule, when a litigant's recovery constitutes income, the litigant's income includes the portion of the recovery paid to the attorney as a contingent fee." [*Commissioner of Internal Revenue v. Banks* (2005) 543 US 426, 430, 125 S.Ct. 826, 829; see *Biehl v. Commissioner of Internal Revenue* (9th Cir. 2003) 351 F3d 982, 985-986—attorney fees paid by former employer in settlement of wrongful termination suit includible in employee's gross income]

(1) [17:881] **General exceptions:** There are some general exceptions to this rule. For example, amounts allocated to attorney fees are *not* income to the employee if the underlying claim was for physical injuries or sickness or when the case was brought on the employee's behalf by a third party (such as a labor organization). [See IRS Priv.Ltr.Rul. 200518017 (May 6, 2005)]

(a) [17:882] **Compare—nontaxable awards or settlements:** If an award or settlement constitutes tax-exempt income under 26 USC §104(a)(2), the entire amount is excluded from gross income, including any portion of the payment the recipient uses to pay his or her attorney. [See PMTA 2009-035 (Oct. 22, 2008)]

(b) [17:883] **Compare—attorney fees in class actions:** Legal fees paid directly out of a settlement fund to counsel in a class action are not income to the class member if the class action was an opt-out class action, and the class member did not have a separate retainer agreement or contingency fee arrangement with counsel. [See IRS Priv.Ltr.Rul. 200518017 (May 6, 2005)]

(c) [17:884] **Compare—federal employment taxes:** According to the IRS, an amount *expressly allocated to attorney fees* in an employment-related settlement is not subject to tax withholding because it does not constitute "wages." However, if neither the court nor settlement documents allocate a specific amount to attorney fees, *the full amount of the settlement* is income to the employee and "wages" for federal employment tax purposes. [Rev.Rul. 80-364, 1980-2 CB 294; see *Hemelt v. United States* (4th Cir. 1997) 122 F3d 204, 210]

[17:884.1-884.4] *Reserved.*

[17:884.5] ***PRACTICE POINTER:*** Unless one of the exceptions applies, the employee should include the attorney fee amount in "gross income" on his/her tax return, the employer should not take any withholding from that amount, and the employer should report the payment to the IRS on a Form 1099-MISC for the employee and another 1099-MISC for the attorney (for the same amount) at the appropriate time.

(2) [17:885] **Possible attorney fee deductions:** As a general rule, the employee may be able to claim the amount of attorney fees paid pursuant to a settlement agreement as a deduction, sometimes above the line and sometimes as a miscellaneous itemized deduction. However, attorney fees may not be deductible if paid after Dec. 22, 2017 in settlement of a claim for sexual harassment or sexual abuse in which there is a nondisclosure agreement (*see* ¶*17:861.5*).

(a) [17:886] **Above-the-line deductions:** Although attorney fees are considered taxable income as an initial matter, a claimant may take an "above the line" deduction for attorney fees and costs incurred "in connection with any action involving a claim of unlawful discrimination," which is defined broadly to include:

— various federal *anti-discrimination statutes* (including specific provisions of the ADA, ADEA, WARN Act, FMLA, etc.) (26 USC §§62(a)(20), 62(e) (defining "unlawful discrimination"));

— any federal whistleblower statute (26 USC §62(a)(21)); and

— any federal, state or local law "providing for the enforcement of civil rights" or "*regulating any aspect of the employment relationship*, including claims for wages, compensation, or benefits, or prohibiting the discharge of an employee, the discrimination against an employee, or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted by law." [26 USC §62(e)(18) (emphasis added)]

(b) [17:887] **Below-the-line deductions:** Employees who receive attorney fees in settlement of claims brought under an employment statute not listed above (*see* ¶*17:886*) may be able to deduct the fees as miscellaneous itemized deductions. [See 26 USC §67.2]

[17:888] ***PRACTICE POINTER:*** When attorney fees are paid pursuant to a settlement agreement, it is prudent to consider specifying in the agreement the amount that is being characterized as attorney fees and reimbursable costs attributable to the particular cause(s) of action. If attorney fees are not specifically allocated in the agreement, the payments of fees made in settlement of wage-based claims may be considered wages.

[17:889] *Reserved.*

3. [17:890] **Need for Detailed Allocation of Settlement Amounts:** Where the parties fail to allocate payments in a settlement agreement, and the tax reporting is later challenged, the IRS and the courts will examine the intent of the payor, based on the facts and circumstances of the case. [See *Rivera v. Baker West, Inc.* (9th Cir. 2005) 430 F3d 1253, 1257; *Pipitone v. United States* (7th Cir. 1999) 180 F3d 859, 864—payor intent "the most important factor"; *Guidry v. Commissioner of Internal Revenue* (1994) 67 TC Memo 2507—court refused to find settlement nontaxable because settlement agreement silent as to payor's intent]

   a. [17:891] **Parties' allocation not conclusive:** Although the IRS and courts will give deference to allocations in settlement agreements, they will look beyond the stated reasons if there is evidence the parties intended the payments to be for a purpose other than the stated reason. [*Certain Underwriters at Lloyd's, London v. Oryx Energy Co*. (5th Cir. 2000) 203 F3d 898, 901—IRS, as an outsider to the settlement, may attempt to show allocation a sham despite parties' unequivocal allocation in settlement agreement]

[17:892] ***PRACTICE POINTER:*** Normally, payments on a settlement or judgment in an employment case are fully taxable to the employee. Nonetheless, it is essential for both employers and claimants to make clear allocations of payments to particular claims, and to include clear provisions concerning the tax withholding and reporting for each allocated payment. The parties should decide before making a settlement or judgment payment which amounts should be treated as:

- *wages,* which require the employer to withhold income and employment taxes, and which are reported on a Form W-2; or
- *non-wages*, such as emotional distress damages, which do not require the employer to withhold income or employment taxes, and which are reported on a Form 1099-MISC.
- *non-wages,* in the less common scenario where damages arise from "physical injuries or physical sickness."

[17:893-894] *Reserved.*

4. [17:895] **Tax Withholding Requirements:** Amounts paid in employment-related disputes (whether by settlement or by court judgment), as well as severance amounts (¶*17:865*), are subject to *income and employment tax* withholding by the employer if:
   — the payee is a current *or former* employee; *and*
   — the amount being paid constitutes "wages" for federal income and employment tax purposes. [See 26 USC §3402(a); see also *Rivera v. Baker West, Inc.* (9th Cir. 2005) 430 F3d 1253, 1259; compare *Newhouse v. McCormick & Co., Inc.* (8th Cir. 1998) 157 F3d 582, 587—front pay and backpay to job applicant not wages arising out of employment relationship, so prospective employer had no duty to withhold taxes]

   a. [17:896] **Compare—contra authority re former employees:** A California state court has held that withholding is *not* required for payments "not made within the context of an ongoing employment relationship." The withholding statutes "do not place upon a former employer the obligation to withhold taxes from an award of damages paid to a former employee not for services already performed but for breach of the employment contract." [*Lisec v. United Airlines, Inc.* (1992) 10 CA4th 1500, 1507, 11 CR2d 689, 693]

      [17:897] ***PRACTICE POINTER:*** Employers should not rely on *Lisec*, supra. The opinion does not cite or mention contrary federal cases on what is basically an issue of federal tax law. [See *Cifuentes v. Costco Wholesale Corp.* (2015) 238 CA4th 65, 69, 76, 78, 189 CR3d 104, 106, 112, 113 (citing text)]

   b. [17:898] **"Wages" for withholding purposes:** Any part of a settlement or judgment that is considered compensation for lost income (i.e., backpay, severance, front pay, unpaid overtime compensation) constitutes "wages" and is subject to tax withholding. [*Gerbec v. United States* (6th Cir. 1999) 164 F3d 1015, 1026—"wages" includes "certain compensation in the employer-employee relationship for which no actual services were performed," such as *backpay and front pay* awards; *Cifuentes v. Costco Wholesale Corp.* (2015) 238 CA4th 65, 77, 189 CR3d 104, 112; see also IRS Office of Chief Counsel Memorandum No. 201522004 (May 29, 2015) (cannot be used or cited as precedent)—meal and rest period premiums under Lab.C. §226.7 are wages for tax purposes; PMTA 2009-035 (Oct. 22, 2008)]

   c. [17:899] **Penalties for failing to withhold taxes:** The employer is liable for withholding and payment of income taxes and FICA on "wages" (including the employee's portion), regardless of the terms in the settlement agreement. Civil penalties and interest apply. [See 26 USC §§6651(a), 6656, 6662, 6663, 6672]

      Willful failure to collect and account for payroll taxes is punishable as a *felony*. [See 26 USC §7202; see also *United States*

v. Easterday (9th Cir. 2009) 564 F3d 1004, 1007—affirming conviction for willful failure to pay employees' payroll taxes]

[17:900-904] *Reserved.*

5. [17:905] **Tax Reporting Requirements:** There are different tax-reporting requirements for wages, nonwage income, income that is not exempt, and attorney fees.

   a. [17:906] **Wages:** Settlement payments characterized as "wages" must be reported by the employer to the employee and to the IRS on a *Form W-2*—e.g., backpay, front pay, severance pay, and unpaid overtime and minimum wages. [PMTA 2009-035 (Oct. 22, 2008)]

   b. [17:907] **Nonwage income:** Any portion of settlement or judgment payment that is income, but does not constitute "wages" is subject to reporting under 26 USC §6041 on *Form 1099-MISC*. [PMTA 2009-035 (Oct. 22, 2008)]

   This applies to compensatory damages *not* paid on account of "personal physical injuries or sickness" (e.g., emotional distress); punitive and liquidated damages; *attorney fees* (*see* ¶*17:908*); interest; and costs.

   c. [17:908] **Exempt income:** Reporting is not required for whatever portion of a settlement or judgment is paid on account of physical injury or sickness and thus excludible from gross income under §104(a)(2). [PMTA 2009-035 (Oct. 22, 2008)]

   d. [17:909] **Reporting attorney fees awards:** If an attorney fees award is designated in a settlement or judgment paid *to the employee*, the employer must treat the attorney fees as *nonwage income* to the employee and report the amount on Form 1099-MISC. On the other hand, if the attorney fee portion of the settlement is *not clearly allocated* to attorney fees, it should be treated as "wages" reportable on Form W-2. [PMTA 2009-035 (Oct. 22, 2008)]

   Where an attorney fees award is paid *directly to the attorney* separately from the portion of the settlement payable to the employee, the employer should report the payment to the attorney or law firm named as sole, joint or alternative payee on the check. [Treas.Reg. §1.6045-5]

   Where an attorney fees award is included in a *single settlement check* that includes the amount due the employee, and the check is drawn payable to the attorney alone, or jointly to the employee and the attorney, the *entire amount is reportable to both the attorney and the employee*, even though the attorney is only taxed on the attorney fee portion; *see* ¶*17:882*.

    [17:910] ***PRACTICE POINTER:*** Double reporting of the attorney fees amount cannot be avoided because that amount is taxable income to both the employee

and the attorney regardless of how (or to whom) it is paid (although the employee may be eligible for an offsetting deduction for such amount in many cases). The problem can be avoided by paying the claimant's portion of the settlement amount *separately* to the claimant, rather than both the claimant and the attorney in a single check.

6. [17:911] **Medicare Reporting and Reimbursement:** Under the Medicare Secondary Payer Act (42 USC §1395y(b)) and its accompanying regulations, the Centers for Medicare and Medicaid Services (CMS) may have an obligation to seek reimbursement of conditional payments made by the Medicare program for items and services relating to injuries sustained by the plaintiff. If the plaintiff is or was enrolled in Medicare, the defendant *must report the settlement to the CMS* (even if the defendant does not agree that the evidence actually establishes liability for injuries allegedly sustained by plaintiff). The parties to any such settlement are required to consider Medicare's interests with regard to the settlement of the medical portion of the claim. CMS can (and often will) pursue recovery from anyone (including counsel) who receives payment, directly or indirectly, from a settlement resolving medical liability where the burden is improperly shifted to Medicare.

RESERVED

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

VIKING RIVER CRUISES, INC. *v*. MORIANA

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 20–1573. Argued March 30, 2022—Decided June 15, 2022

The question for decision is whether the Federal Arbitration Act, 9 U. S. C. §1 *et seq.*, preempts a rule of California law that invalidates contractual waivers of the right to assert representative claims under California's Labor Code Private Attorneys General Act of 2004, Cal. Lab. Code §2698 *et seq.* PAGA enlists employees as private attorneys general to enforce California labor law. By its terms, PAGA authorizes any "aggrieved employee" to initiate an action against a former employer "on behalf of himself or herself and other current or former employees" to obtain civil penalties that previously could have been recovered only by the State in an enforcement action brought by California's Labor and Workforce Development Agency (LWDA). California precedent holds that a PAGA suit is a "'representative action'" in which the employee plaintiff sues as an "'agent or proxy'" of the State. *Iskanian* v. *CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 380. California precedent also interprets the statute to contain what is effectively a rule of claim joinder—allowing a party to unite multiple claims against an opposing party in a single action. An employee with PAGA standing may "seek any civil penalties the state can, including penalties for violations involving employees other than the PAGA litigant herself." *ZB, N. A.* v. *Superior Court*, 8 Cal. 5th 175, 185.

Respondent Angie Moriana filed a PAGA action against her former employer Viking River Cruises, alleging a California Labor Code violation. She also asserted a wide array of other violations allegedly sustained by other Viking employees. Moriana's employment contract with Viking contained a mandatory arbitration agreement. Important here, that agreement contained both a "Class Action Waiver"—providing that the parties could not bring any dispute as a class, collective, or representative action under PAGA—and a severability clause—

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specifying that if the waiver was found invalid, such a dispute would presumptively be litigated in court. Under the severability clause, any "portion" of the waiver that remained valid would be "enforced in arbitration." Viking moved to compel arbitration of Moriana's individual PAGA claim and to dismiss her other PAGA claims. Applying California's *Iskanian* precedent, the California courts denied that motion, holding that categorical waivers of PAGA standing are contrary to California policy and that PAGA claims cannot be split into arbitrable "individual" claims and nonarbitrable "representative" claims. This Court granted certiorari to decide whether the FAA preempts the California rule.

Held: The FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate. Pp. 7–21.

(a) Based on the principle that "[a]rbitration is strictly 'a matter of consent,'" *Granite Rock Co.* v. *Teamsters,* 561 U. S. 287, 299, this Court has held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so," *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 684. Because class-action arbitration mandates procedural changes that are inconsistent with the individualized and informal mode of bilateral arbitration contemplated by the FAA, see *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 347, class procedures cannot be imposed by state law without presenting unwilling parties with an unacceptable choice between being compelled to arbitrate using such procedures and forgoing arbitration all together.

Viking contends that the Court's FAA precedents require enforcement of contractual provisions waiving the right to bring PAGA actions because PAGA creates a form of class or collective proceeding. If this is correct, *Iskanian*'s prohibition on PAGA waivers presents parties with an impermissible choice: Either arbitrate disputes using a form of class procedures, or do not arbitrate at all. Moriana maintains that any conflict between *Iskanian* and the FAA is illusory because PAGA creates nothing more than a substantive cause of action.

This Court disagrees with both characterizations of the statute. Moriana's premise that PAGA creates a unitary private cause of action is irreconcilable with the structure of the statute and the ordinary legal meaning of the word "claim." A PAGA action asserting multiple violations under California's Labor Code affecting a range of different employees does not constitute "a single claim" in even the broadest possible sense. Viking's position, on the other hand, elides important structural differences between PAGA actions and class actions. A class-action plaintiff can raise a multitude of claims because he or she

represents a multitude of absent individuals; a PAGA plaintiff, by contrast, represents a single principal, the LWDA, that has a multitude of claims. As a result, PAGA suits exhibit virtually none of the procedural characteristics of class actions.

This Court's FAA precedents treat bilateral arbitration as the prototype of the individualized and informal form of arbitration protected from undue state interference by the FAA. See, *e.g., Epic Systems Corp.* v. *Lewis*, 584 U. S. ___, ___. Viking posits that a proceeding is "bilateral" only if it involves two and only two parties and "is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc.* v. *Dukes,* 564 U. S. 338, 348. Thus, *Iskanian*'s prohibition on PAGA waivers is inconsistent with the FAA because PAGA creates an intrinsically representational form of action and *Iskanian* requires parties either to arbitrate in that format or forgo arbitration altogether.

This Court disagrees. Nothing in the FAA establishes a categorical rule mandating enforcement of waivers of standing to assert claims on behalf of absent principals. Non-class representative actions in which a single agent litigates on behalf of a single principal necessarily deviate from the strict ideal of bilateral dispute resolution posited by Viking, but this Court has never held that the FAA imposes a duty on States to render all forms of representative standing waivable by contract or that such suits deviate from the norm of bilateral arbitration. Unlike procedures distinctive to multiparty litigation, single-principal, single-agent representative actions are "bilateral" in two registers: They involve the rights of only the absent real party in interest and the defendant, and litigation need only be conducted by the agent-plaintiff and the defendant. Nothing in this Court's precedent suggests that in enacting the FAA, Congress intended to require States to reshape their agency law governing *who* can assert claims on behalf of *whom* to ensure that parties will never have to arbitrate disputes in a proceeding that deviates from bilateral arbitration in the strictest sense. Pp. 7–17.

(b) PAGA's built-in mechanism of claim joinder is in conflict with the FAA. *Iskanian*'s prohibition on contractual division of PAGA actions into constituent claims unduly circumscribes the freedom of parties to determine "the issues subject to arbitration" and "the rules by which they will arbitrate," *Lamps Plus, Inc.* v. *Varela*, 587 U. S. ____, ____, and does so in a way that violates the fundamental principle that "arbitration is a matter of consent," *Stolt-Nielsen*, 559 U. S., at 684. For that reason, state law cannot condition the enforceability of an agreement to arbitrate on the availability of a procedural mechanism that would permit a party to expand the scope of the anticipated arbitration by introducing claims that the parties did not jointly agree to arbitrate.

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A state rule imposing an expansive rule of joinder in the arbitral context would defeat the ability of parties to control which claims are subject to arbitration by permitting parties to superadd new claims to the proceeding, regardless of whether the agreement committed those claims to arbitration. When made compulsory by way of *Iskanian*, PAGA's joinder rule functions in exactly this way. The effect is to coerce parties into withholding PAGA claims from arbitration. *Iskanian*'s indivisibility rule effectively coerces parties to opt for a judicial forum rather than "forgo[ing] the procedural rigor and appellate review of the courts to realize the benefits of private dispute resolution." *Stolt-Nielsen*, 559 U. S., at 685. Pp. 17–19.

(c) Under this Courts holding, *Iskanian*'s prohibition on wholesale waivers of PAGA claims is not preempted by the FAA. But *Iskanian*'s rule that PAGA actions cannot be divided into individual and non-individual claims is preempted, so Viking was entitled to compel arbitration of Moriana's individual claim. PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding. And under PAGA's standing requirement, a plaintiff has standing to maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action. As a result, Moriana would lack statutory standing to maintain her non-individual claims in court, and the correct course was to dismiss her remaining claims. Pp. 20–21.

Reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which BREYER, SOTOMAYOR, KAGAN, and GORSUCH, JJ., joined, in which ROBERTS, C. J., joined as to Parts I and III, and in which KAVANAUGH and BARRETT, JJ., joined as to Part III. SOTOMAYOR, J., filed a concurring opinion. BARRETT, J., filed an opinion concurring in part and concurring in the judgment, in which KAVANAUGH, J., joined, and in which ROBERTS, C. J, joined as to all but the footnote. THOMAS, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 20–1573

VIKING RIVER CRUISES, INC., PETITIONER *v.* ANGIE MORIANA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

[June 15, 2022]

JUSTICE ALITO delivered the opinion of the Court.*

We granted certiorari in this case to decide whether the Federal Arbitration Act (FAA), 9 U. S. C. §1 *et seq.*, preempts a rule of California law that invalidates contractual waivers of the right to assert representative claims under California's Labor Code Private Attorneys General Act of 2004. Cal. Lab. Code Ann. §2698 *et seq.* (West 2022).

I

A

The California Legislature enacted the Labor Code Private Attorneys General Act (PAGA) to address a perceived deficit in the enforcement of the State's Labor Code. California's Labor and Workforce Development Agency (LWDA) had the authority to bring enforcement actions to impose civil penalties on employers for violations of many of the code's provisions. But the legislature believed the LWDA did not have sufficient resources to reach the appropriate level of compliance, and budgetary constraints made it im-

*THE CHIEF JUSTICE joins Parts I and III of this opinion.

possible to achieve an adequate level of financing. The legislature thus decided to enlist employees as private attorneys general to enforce California labor law, with the understanding that labor-law enforcement agencies were to retain primacy over private enforcement efforts.

By its terms, PAGA authorizes any "aggrieved employee" to initiate an action against a former employer "on behalf of himself or herself and other current or former employees" to obtain civil penalties that previously could have been recovered only by the State in an LWDA enforcement action. Cal. Lab. Code Ann. §2699(a). As the text of the statute indicates, PAGA limits statutory standing to "aggrieved employees"—a term defined to include "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." §2699(c). To bring suit, however, an employee must also exhaust administrative remedies. That entails providing notice to the employer and the LWDA of the violations alleged and the supporting facts and theories. §2699.3(a)(1)(A). If the LWDA fails to respond or initiate an investigation within a specified timeframe, the employee may bring suit. §2699.3(a)(2). In any successful PAGA action, the LWDA is entitled to 75 percent of the award. §2699(i). The remaining 25 percent is distributed among the employees affected by the violations at issue. *Ibid.*

California law characterizes PAGA as creating a "type of *qui tam* action,"[1] *Iskanian* v. *CLS Transp. Los Angeles,*

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[1] As we have explained, "*qui tam*" is the short form of the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*"—meaning "'who pursues this action on our Lord the King's behalf as well as his own.'" *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 768, n. 1(2000). *Qui tam* actions "appear to have originated around the end of the 13th century, when private individuals who had suffered injury began bringing actions in the royal courts on both their own and the Crown's behalf" and became more of a rarity as "royal courts began to extend jurisdiction to suits involving wholly private wrongs." *Id.,* at 774–775.

LLC, 59 Cal. 4th 348, 382, 327 P. 3d 129, 148 (2014). Although the statute's language suggests that an "aggrieved employee" sues "on behalf of himself or herself and other current or former employees," §2699(a), California precedent holds that a PAGA suit is a "'representative action'" in which the employee plaintiff sues as an "'agent or proxy'" of the State. *Id.*, at 380, 327 P. 3d, at 147 (quoting *Arias* v. *Superior Court*, 46 Cal. 4th 969, 986, 209 P. 3d 923, 933 (2009)).

As the California courts conceive of it, the State "is always the real party in interest in the suit." *Iskanian*, 59 Cal. 4th, at 382, 327 P. 3d, at 148.[2] The primary function of PAGA is to delegate a power to employees to assert "the same legal right and interest as state law enforcement agencies," *Arias*, 46 Cal. 4th, at 986, 209 P. 3d, at 933. In other words, the statute gives employees a right to assert

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[2] The extent to which PAGA plaintiffs truly act as agents of the State rather than complete assignees is disputed. See *Magadia* v. *Wal-Mart Assocs., Inc.*, 999 F. 3d 668, 677 (CA9 2021) (holding that PAGA "lacks the procedural controls necessary to ensure that California" retains "substantial authority over the case" (internal quotation marks omitted)). Agency requires control. See *Hollingsworth* v. *Perry*, 570 U. S. 693, 713 (2013). But apart from the exhaustion process, the statute does not feature any explicit control mechanisms, such as provisions authorizing the State to intervene or requiring its approval of settlements.

That said, California precedent strongly suggests that the State retains inherent authority to manage PAGA actions. There is no other obvious way to understand California precedent's description of the State as the "real party in interest." See generally 1A Cal. Jur. 3d Actions §31 (real-party-in-interest status is based on ownership and control over the cause of action). And a theory of total assignment appears inconsistent with the fact that employees have no assignable interest in a PAGA claim. See *Amalgamated Transit Union, Local 1756, AFL-CIO* v. *Superior Court of Los Angeles Cty.*, 46 Cal. 4th 993, 1002, 209 P. 3d 937, 943 (2009) (Amalgamated Transit); see also *Turrieta* v. *Lyft, Inc.*, 69 Cal. App. 5th 955, 972, 284 Cal. Rptr. 3d 767, 780 (2021) (The employee's "ability to file PAGA claims on behalf of the state does not convert the state's interest into their own or render them real parties in interest"). For purposes of this opinion, we assume that PAGA plaintiffs are agents.

the State's claims for civil penalties on a representative basis, but it does not create any private rights or private claims for relief. *Iskanian*, 59 Cal. 4th, at 381, 327 P. 3d, at 148; see also *Amalgamated Transit*, 46 Cal. 4th 993, 1002, 209 P. 3d 937, 943 (2009). The code provisions enforced through the statute establish public duties that are owed to the State, not private rights belonging to employees in their "individual capacities." *Iskanian*, 59 Cal. 4th, at 381, 327 P. 3d, at 147. Other, distinct provisions of the code create individual rights, and claims arising from violations of those rights are actionable through separate private causes of action for compensatory or statutory damages. *Id.,* at 381–382, 327 P. 3d, at 147–148; see also *Kim* v. *Reins Int'l California, Inc.*, 9 Cal. 5th 73, 86, 459 P. 3d 1123, 1130 (2020) ("[C]ivil penalties recovered on the state's behalf are intended to remediate present violations and deter future ones, not to redress employees' injuries" (internal quotation marks omitted; emphasis deleted)). And because PAGA actions are understood to involve the assertion of the government's claims on a derivative basis, the judgment issued in a PAGA action is binding on anyone "who would be bound by a judgment in an action brought by the government." *Arias*, 46 Cal. 4th, at 986, 209 P. 3d, at 933.

California precedent also interprets the statute to contain what is effectively a rule of claim joinder. Rules of claim joinder allow a party to unite multiple claims against an opposing party in a single action. See 6A C. Wright, H. Miller, & E. Cooper, Federal Practice and Procedure §1582 (3d ed. 2016) (Wright & Miller). PAGA standing has the same function. An employee with statutory standing may "seek any civil penalties the state can, including penalties for violations involving employees other than the PAGA litigant herself." *ZB, N. A.* v. *Superior Court*, 8 Cal. 5th 175, 185, 448 P. 3d 239, 243–244 (2019). An employee who alleges he or she suffered a single violation is entitled to use that violation as a gateway to assert a potentially limitless

number of other violations as predicates for liability. This mechanism radically expands the scope of PAGA actions. The default penalties set by PAGA are $100 for each aggrieved employee per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation. Cal. Lab. Code Ann. §2699(f)(2). Individually, these penalties are modest; but given PAGA's additive dimension, low-value claims may easily be welded together into high-value suits.

B

Petitioner Viking River Cruises, Inc. (Viking), is a company that offers ocean and river cruises around the world. When respondent Angie Moriana was hired by Viking as a sales representative, she executed an agreement to arbitrate any dispute arising out of her employment. The agreement contained a "Class Action Waiver" providing that in any arbitral proceeding, the parties could not bring any dispute as a class, collective, or representative PAGA action. It also contained a severability clause specifying that if the waiver was found invalid, any class, collective, representative, or PAGA action would presumptively be litigated in court. But under that severability clause, if any "portion" of the waiver remained valid, it would be "enforced in arbitration."

After leaving her position with Viking, Moriana filed a PAGA action against Viking in California court. Her complaint contained a claim that Viking had failed to provide her with her final wages within 72 hours, as required by §§101–102 of the California Labor Code. But the complaint also asserted a wide array of other code violations allegedly sustained by other Viking employees, including violations of provisions concerning the minimum wage, overtime, meal periods, rest periods, timing of pay, and pay statements. Viking moved to compel arbitration of Moriana's "individual" PAGA claim—here meaning the claim that

arose from the violation she suffered—and to dismiss her other PAGA claims. The trial court denied that motion, and the California Court of Appeal affirmed, holding that categorical waivers of PAGA standing are contrary to state policy and that PAGA claims cannot be split into arbitrable individual claims and nonarbitrable "representative" claims.

This ruling was dictated by the California Supreme Court's decision in *Iskanian*. In that case, the court held that pre-dispute agreements to waive the right to bring "representative" PAGA claims are invalid as a matter of public policy. What, precisely, this holding means requires some explanation. PAGA's unique features have prompted the development of an entire vocabulary unique to the statute, but the details, it seems, are still being worked out. An unfortunate feature of this lexicon is that it tends to use the word "representative" in two distinct ways, and each of those uses of the term "representative" is connected with one of *Iskanian*'s rules governing contractual waiver of PAGA claims.

In the first sense, PAGA actions are "representative" in that they are brought by employees acting as representatives—that is, as agents or proxies—of the State. But PAGA claims are also called "representative" when they are predicated on code violations sustained by other employees. In the first sense, "'*every* PAGA action is . . . representative'" and "[t]here is no individual component to a PAGA action," *Kim*, 9 Cal. 5th, at 87, 459 P. 3d, at 1131 (quoting *Iskanian*, 59 Cal. 4th, at 387, 327 P. 3d, at 151), because every PAGA claim is asserted in a representative capacity. But when the word "representative" is used in the second way, it makes sense to distinguish "individual" PAGA claims, which are premised on Labor Code violations actually sustained by the plaintiff, from "representative" (or perhaps quasi-representative) PAGA claims arising out of events involving other employees. For purposes of this

opinion, we will use "individual PAGA claim" to refer to claims based on code violations suffered by the plaintiff. And we will endeavor to be clear about how we are using the term "representative."

Iskanian's principal rule prohibits waivers of "representative" PAGA claims in the first sense. That is, it prevents parties from waiving *representative standing* to bring PAGA claims in a judicial or arbitral forum. But *Iskanian* also adopted a secondary rule that invalidates agreements to separately arbitrate or litigate "individual PAGA claims for Labor Code violations that an employee suffered," on the theory that resolving victim-specific claims in separate arbitrations does not serve the deterrent purpose of PAGA. 59 Cal. 4th, at 383, 327 P. 3d, at 149; see also *Kim*, 9 Cal. 5th, at 88, 459 P. 3d, at 1132 (noting that based on *Iskanian*, California courts have uniformly "rejected efforts to split PAGA claims into individual and representative components").

In this case, *Iskanian*'s principal prohibition required the lower courts to treat the representative-action waiver in the agreement between Moriana and Viking as invalid insofar as it was construed as a wholesale waiver of PAGA standing. The agreement's severability clause, however, allowed enforcement of any "portion" of the waiver that remained valid, so the agreement still would have permitted arbitration of Moriana's individual PAGA claim even if wholesale enforcement was impossible. But because California law prohibits division of a PAGA action into constituent claims, the state courts refused to compel arbitration of that claim as well. We granted certiorari, 595 U. S. ___ (2021), and now reverse.

II

The FAA was enacted in response to judicial hostility to arbitration. Section 2 of the statute makes arbitration agreements "valid, irrevocable, and enforceable, save upon

such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2.[3] As we have interpreted it, this provision contains two clauses: An enforcement mandate, which renders agreements to arbitrate enforceable as a matter of federal law, and a saving clause, which permits invalidation of arbitration clauses on grounds applicable to "any contract." See *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 339–340 (2011); *Epic Systems Corp.* v. *Lewis*, 584 U. S. ___, ___–___ (2018) (slip op., at 5–6). These clauses jointly establish "an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred Nursing Centers L. P.* v. *Clark*, 581 U. S. 246, 251 (2017) (quoting *Concepcion*, 563 U. S., at 339). Under that principle, the FAA "preempts any state rule discriminating on its face against arbitration—for example, a law 'prohibit[ing] outright the arbitration of a particular type of claim.'" *Kindred Nursing*, 581 U. S., at 251 (quoting *Concepcion*, 563 U. S., at 341).

But under our decisions, even rules that are generally applicable as a formal matter are not immune to preemption

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[3] As we have noted, common-law hostility to arbitration "manifested itself in a great variety of devices and formulas." *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 342 (2011) (internal quotation marks omitted). Two important devices were the doctrines of ouster and revocability, which, respectively, invalidated arbitration clauses as impermissible attempts to "oust" courts of their jurisdiction and permitted parties to revoke consent to arbitrate until the moment the arbitrator entered an award. See, *e.g., Kill* v. *Hollister*, 1 Wils. K. B. 129, 95 Eng. Rep. 532 (K. B. 1746); *Vynior's Case*, 77 Co. Rep. 80a, 77 Eng. Rep. 597 (K. B. 1609). Another was the rule barring specific performance as a remedy for breach of an arbitration clause. See 21 R. Lord, Williston on Contracts §57:2 (4th ed. 2017). Section 2 abrogated these doctrines by making arbitration agreements presumptively "valid," "irrevocable," and "enforceable."

by the FAA. See *Lamps Plus, Inc.* v. *Varela*, 587 U. S. ___, ___ (2019) (slip op., at 6); *Concepcion*, 563 U. S., at 343. Section 2's mandate protects a right to enforce arbitration agreements. That right would not be a right to *arbitrate* in any meaningful sense if generally applicable principles of state law could be used to transform "traditiona[l] individualized . . . arbitration" into the "litigation it was meant to displace" through the imposition of procedures at odds with arbitration's informal nature. *Epic Systems*, 584 U. S., at ___ (slip op., at 8). See also *Concepcion*, 563 U. S., at 351. And that right would not be a right to arbitrate based on an *agreement* if generally applicable law could be used to coercively impose arbitration in contravention of the "first principle" of our FAA jurisprudence: that "[a]rbitration is strictly 'a matter of consent.'" *Granite Rock Co.* v. *Teamsters*, 561 U. S. 287, 299 (2010) (quoting *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989)); see also *Lamps Plus*, 587 U. S., at ___ (slip op., at 7); *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 685 (2010).

Based on these principles, we have held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.*, at 684. See also *Lamps Plus*, 587 U. S., at ___ (slip op., at 1); *Epic Systems*, 584 U. S., at ___–___ (slip op., at 6–8); *Concepcion*, 563 U. S., at 347–348. The "'shift from bilateral arbitration to class-action arbitration'" mandates procedural changes that are inconsistent with the individualized and informal mode of arbitration contemplated by the FAA. *Id.*, at 347 (quoting *Stolt-Nielsen*, 559 U. S., at 686). As a result, class procedures cannot be imposed by state law without presenting unwilling parties with an unacceptable choice between being compelled to arbitrate using procedures at odds with arbitration's traditional form and forgoing arbitration altogether. Putting parties to that choice is inconsistent with the FAA.

Viking contends that these decisions require enforcement of contractual provisions waiving the right to bring PAGA actions because PAGA creates a form of class or collective proceeding. If this is correct, *Iskanian*'s prohibition on PAGA waivers presents parties with the same impermissible choice as the rules we have invalidated in our decisions concerning class- and collective-action waivers: Either arbitrate disputes using a form of class procedure, or do not arbitrate at all.

Moriana offers a very different characterization of the statute. As she sees it, any conflict between *Iskanian* and the FAA is illusory because PAGA creates nothing more than a substantive cause of action. The only thing that is distinctive about PAGA, she supposes, is that it allows employee plaintiffs to increase the available penalties that may be awarded in an action by proving additional predicate violations of the Labor Code. But that does not make a PAGA action a class action, because those violations are not distinct claims belonging to distinct individuals. Instead, they are predicates for expanded liability under a single cause of action. In Moriana's view, that means *Iskanian* invalidates waivers of substantive rights, and does not purport to invalidate anything that can meaningfully be described as an "arbitration agreement."[4]

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[4]Moriana declines to defend one of the *Iskanian* court's own bases for holding that the FAA does not mandate enforcement of PAGA waivers. The *Iskanian* court reasoned that a PAGA action lies outside the FAA's coverage entirely because §2 is limited to controversies "*arising out of*" the contract between the parties, 9 U. S. C. §2 (emphasis added), and a PAGA action "is not a dispute between an employer and an employee arising out of their contractual relationship," but "a dispute between an employer and the *state*." *Iskanian* v. *CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 387, 327 P. 3d 129, 151 (2014). We reject this argument. Although the terms of §2 limit the FAA's enforcement mandate to agreements to arbitrate controversies that "arise out of" the parties' contractual relationship, disputes resolved in PAGA actions satisfy this requirement. The contractual relationship between the parties is a but-for cause

We disagree with both characterizations of the statute. Moriana is correct that the FAA does not require courts to enforce contractual waivers of substantive rights and remedies. The FAA's mandate is to enforce "*arbitration agreements*." *Concepcion*, 563 U. S., at 344 (emphasis added). And as we have described it, an arbitration agreement is "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 519 (1974); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 633 (1985). An arbitration agreement thus does not alter or abridge substantive rights; it merely changes how those rights will be processed. And so we have said that "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral . . . forum.'" *Preston* v. *Ferrer*, 552 U. S. 346, 359 (2008) (quoting *Mitsubishi Motors Corp.*, 473 U. S., at 628).[5]

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of any justiciable legal controversy between the parties under PAGA, and "arising out of" language normally refers to a causal relationship. See, *e.g., Ford Motor Co.* v. *Montana Eighth Judicial Dist. Court*, 592 U. S. ___, ___ (2021) (slip op., at 8). And regardless of whether a PAGA action is in some sense also a dispute between an employer and the State, nothing in the FAA categorically exempts claims belonging to sovereigns from the scope of §2.

[5] In briefing before this Court, Viking argued that the principle that the FAA does not mandate enforcement of provisions waiving substantive rights is limited to federal statutes. This argument is erroneous. The basis of this principle is not anything unique about federal statutes. It is that the FAA requires only the enforcement of "provision[s]" to settle a controversy "by arbitration," §2, and not any provision that happens to appear in a contract that features an arbitration clause. That is why we mentioned this principle in *Preston*, which concerned claims arising under state law. See 552 U. S., at 360 (noting that under the agreement, a party "relinquishe[d] no substantive rights . . . California law may accord him").

But Moriana's premise that PAGA creates a unitary private cause of action is irreconcilable with the structure of the statute and the ordinary legal meaning of the word "claim." California courts interpret PAGA to provide employees with delegated authority to assert the State's claims on a representative basis, not an individual cause of action. See, *e.g.*, *Amalgamated Transit*, 46 Cal. 4th, at 1003, 209 P. 3d, at 943 (PAGA "is simply a procedural statute" that "does not create property rights or any other substantive rights"). And a PAGA action asserting multiple code violations affecting a range of different employees does not constitute "a single claim" in even the broadest possible sense, because the violations asserted need not even arise from a common "transaction" or "nucleus of operative facts." *Lucky Brand Dungarees, Inc.* v. *Marcel Fashions Group, Inc.*, 590 U. S. ___, ___ (2020) (slip op., at 6) (internal quotation marks omitted).[6]

Viking's position, on the other hand, elides important structural differences between PAGA actions and class actions that preclude any straightforward application of our precedents invalidating prohibitions on class-action waivers. Class-action procedure allows courts to use a representative plaintiff's individual claims as a basis to "adjudicate claims of multiple parties at once, instead of in separate suits," *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U. S. 393, 408 (2010). This, of course, requires the certification of a class. And because class judgments bind absentees with respect to their individual

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[6] California courts sometimes speak as though a PAGA action involves the assertion of "a single representative PAGA claim," *Williams* v. *Superior Court*, 237 Cal. App. 4th 642, 649, 188 Cal. Rptr. 3d 83, 87 (2015). But we are not required to take the labels affixed by state courts at face value in determining whether state law creates a scheme at odds with federal law. See, *e.g.*, *Carpenter* v. *Shaw*, 280 U. S. 363, 367–368 (1930). And in our view, this manner of speaking is another reflection of the still-embryonic character of the language that has grown up around PAGA.

claims for relief and are preclusive as to all claims the class could have brought, *Cooper* v. *Federal Reserve Bank of Richmond*, 467 U. S. 867, 874 (1984), "class representatives must at all times adequately represent absent class members, and absent [class] members must be afforded notice, an opportunity to be heard, and a right to opt out of the class." *Concepcion*, 563 U. S., at 349. And to "ensur[e] that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate," the adjudicator must decide questions of numerosity, commonality, typicality, and adequacy of representation. *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338, 349 (2011).

PAGA actions also permit the adjudication of multiple claims in a single suit, but their structure is entirely different. A class-action plaintiff can raise a multitude of claims because he or she represents a multitude of absent individuals; a PAGA plaintiff, by contrast, represents a single principal, the LWDA, that has a multitude of claims. As a result of this structural difference, PAGA suits exhibit virtually none of the procedural characteristics of class actions. The plaintiff does not represent a class of injured individuals, so there is no need for certification. PAGA judgments are binding only with respect to the State's claims, and are not binding on nonparty employees as to any individually held claims. *Arias*, 46 Cal. 4th, at 986, 209 P. 3d, at 933–934. This obviates the need to consider adequacy of representation, numerosity, commonality, or typicality. And although the statute gives other affected employees a future interest in the penalties awarded in an action, that interest does not make those employees "parties" in any of the senses in which absent class members are, see *Devlin* v. *Scardelletti*, 536 U. S. 1 (2002), or give those employees anything more than an inchoate interest in litigation proceeds. See *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens,* 529 U. S. 765, 773 (2000) (The "'right'" to a share

of the proceeds of a *qui tam* action "does not even fully materialize until the litigation is completed and the relator prevails").

Because PAGA actions do not adjudicate the individual claims of multiple absent third parties, they do not present the problems of notice, due process, and adequacy of representation that render class arbitration inconsistent with arbitration's traditionally individualized form. See *Concepcion*, 563 U. S., at 347–348. Of course, as a practical matter, PAGA actions *do* have something important in common with class actions. Because PAGA plaintiffs represent a principal with a potentially vast number of claims at its disposal, PAGA suits "greatly increas[e] risks to defendants." *Id.*, at 350. But our precedents do not hold that the FAA allows parties to contract out of *anything* that might amplify defense risks. Instead, our cases hold that States cannot coerce individuals into forgoing arbitration by taking the individualized and informal *procedures* characteristic of traditional arbitration off the table. Litigation risks are relevant to that inquiry because one way in which state law may coerce parties into forgoing their right to arbitrate is by conditioning that right on the use of a procedural format that makes arbitration artificially unattractive. The question, then, is whether PAGA contains any procedural mechanism at odds with arbitration's basic form.

Viking suggests an answer. Our FAA precedents treat bilateral arbitration as the prototype of the individualized and informal form of arbitration protected from undue state interference by the FAA. See *Epic Systems*, 584 U. S., at ___–___ (slip op., at 8–9); see also *American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. 228, 238 (2013); *Concepcion*, 563 U. S., at 347–349; *Stolt-Nielsen*, 559 U. S., at 685–686. Viking posits that a proceeding is "bilateral" in the relevant sense if—but only if—it involves two and only two parties and the arbitration "'is conducted by and on behalf of the individual named parties only.'" *Wal-Mart*, 564

U. S., at 348 (quoting *Califano* v. *Yamasaki*, 442 U. S. 682, 700–701 (1979)). PAGA actions necessarily deviate from this ideal because they involve litigation or arbitration on behalf of an absent principal. Viking thus suggests that *Iskanian*'s prohibition on PAGA waivers is inconsistent with the FAA because PAGA creates an intrinsically representational form of action and *Iskanian* requires parties either to arbitrate in that format or forgo arbitration altogether.

We disagree. Nothing in the FAA establishes a categorical rule mandating enforcement of waivers of standing to assert claims on behalf of absent principals. Non-class representative actions in which a single agent litigates on behalf of a single principal are part of the basic architecture of much of substantive law. Familiar examples include shareholder-derivative suits, wrongful-death actions, trustee actions, and suits on behalf of infants or incompetent persons. Single-agent, single-principal suits of this kind necessarily deviate from the strict ideal of bilateral dispute resolution posited by Viking. But we have never held that the FAA imposes a duty on States to render all forms of representative standing waivable by contract. Nor have we suggested that single-agent, single-principal representative suits are inconsistent the norm of bilateral arbitration as our precedents conceive of it. Instead, we have held that "the 'changes brought about by the shift from bilateral arbitration to *class-action arbitration*'" are too fundamental to be imposed on parties without their consent. *Concepcion*, 563 U. S., at 347–348 (quoting *Stolt-Nielsen*, 559 U. S., at 686; emphasis added). And we have held that §2's saving clause does not preserve defenses that would allow a party to declare "that a contract is unenforceable *just because it requires bilateral arbitration*." *Epic Systems*, 584 U. S., at ___ (slip op., at 9).

These principles do not mandate the enforcement of waiv-

ers of representative capacity as a categorical rule. Requiring parties to decide whether to arbitrate or litigate a single-agent, single-principal action does not produce a shift from a situation in which the arbitrator must "resolv[e] a single dispute between the parties to a single agreement" to one in which he or she must "resolv[e] many disputes between hundreds or perhaps even thousands of parties." *Stolt-Nielsen*, 559 U. S., at 686. And a proceeding in which two and only two parties arbitrate exclusively in their individual capacities is not the only thing one might mean by "bilateral arbitration." As we have said, "[t]he label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Devlin*, 536 U. S., at 10. Our precedents use the phrase "bilateral arbitration" in opposition to "class or collective" arbitration, and the problems we have identified in mandatory class arbitration arise from procedures characteristic of multiparty representative actions. *Epic Systems*, 584 U. S., at ___ (slip op., at 24); see also *Italian Colors*, 570 U. S., at 238; *Concepcion*, 563 U. S., at 347–349; *Stolt-Nielsen*, 559 U. S., at 685–686. Unlike these kinds of actions, single-principal, single-agent representative actions are "bilateral" in two registers: They involve the rights of only the absent real party in interest and the defendant, and litigation need only be conducted by the agent-plaintiff and the defendant. This degree of deviation from bilateral norms is not alien to traditional arbitral practice,[7] and our precedents have never suggested otherwise. See, e.g., *Marmet Health Care Center, Inc.* v. *Brown*, 565 U. S. 530 (2012) (*per curiam*) (invalidating rule categorically barring arbitration of wrongful-death actions).

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[7] For example, close corporations have included arbitration clauses in negotiated shareholder agreements for many decades. See, *e.g., In re Carl*, 263 App. Div. 887, 32 N. Y. S. 2d 410 (1942); *Lumsden* v. *Lumsden Bros. & Taylor Inc.*, 242 App. Div. 852, 257 N. Y. S. 221 (1934).

Nor does a rule prohibiting waiver of representative standing declare "that a contract is unenforceable *just because it requires bilateral arbitration*." *Epic Systems*, 584 U. S., at ___ (slip op., at 9). Indeed, if the term "bilateral arbitration" is used to mean "arbitration in an individual capacity between precisely two parties," a rule prohibiting representative-capacity waivers *cannot* invalidate agreements to arbitrate on a "bilateral" basis. An agreement that explicitly provided for "arbitration on a strictly bilateral basis" would, under that definition of the term "bilateral," categorically exclude representative-capacity claims from its coverage. Such claims, after all, necessarily involve the representation of an absent principal, and thus cannot be arbitrated in a strictly bilateral proceeding. A rule prohibiting waivers of representative standing would not *invalidate* any agreements that contracted for "bilateral arbitration" in Viking's sense—it would simply require parties to choose whether to litigate those claims or arbitrate them in a proceeding that is not bilateral in every conceivable sense. And while this consequence only follows because it is *impossible* to decide representative claims in an arbitration that is "bilateral" in every dimension, nothing in our precedent suggests that in enacting the FAA, Congress intended to require States to reshape their agency law to ensure that parties will never have to arbitrate in a proceeding that deviates from "bilateral arbitration" in the strictest sense. If there is a conflict between California's prohibition on PAGA waivers and the FAA, it must derive from a different source.

III

We think that such a conflict between PAGA's procedural structure and the FAA does exist, and that it derives from the statute's built-in mechanism of claim joinder. As we noted at the outset, that mechanism permits "aggrieved employees" to use the Labor Code violations they personally suffered as a basis to join to the action any claims that could

have been raised by the State in an enforcement proceeding. *Iskanian*'s secondary rule prohibits parties from contracting around this joinder device because it invalidates agreements to arbitrate only "individual PAGA claims for Labor Code violations that an employee suffered," 59 Cal. 4th, at 383, 327 P. 3d, at 149.

This prohibition on contractual division of PAGA actions into constituent claims unduly circumscribes the freedom of parties to determine "the issues subject to arbitration" and "the rules by which they will arbitrate," *Lamps Plus*, 587 U. S., at ___ (slip op., at 7), and does so in a way that violates the fundamental principle that "arbitration is a matter of consent," *Stolt-Nielsen*, 559 U. S., at 684. The most basic corollary of the principle that arbitration is a matter of consent is that "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration," *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 945 (1995). This means that parties cannot be coerced into arbitrating a claim, issue, or dispute "absent an affirmative 'contractual basis for concluding that the party *agreed* to do so.'" *Lamps Plus*, 587 U. S., at ___ (slip op., at 8) (quoting *Stolt-Nielsen*, 559 U. S., at 684); see also *Concepcion*, 563 U. S., at 347–348.

For that reason, state law cannot condition the enforceability of an arbitration agreement on the availability of a procedural mechanism that would permit a party to expand the scope of the arbitration by introducing claims that the parties did not jointly agree to arbitrate. Rules of claim joinder can function in precisely that way. Modern civil procedure dispenses with the formalities of the common-law approach to claim joinder in favor of almost-unqualified joinder. Wright & Miller §1581. Federal Rule of Civil Procedure 18(a), which permits a party to "join, as independent or alternative claims, as many claims as it has against an opposing party," is typical of the modern approach. But the FAA licenses contracting parties to depart from standard

rules "in favor of individualized arbitration procedures of their own design," so parties to an arbitration agreement are not required to follow the same approach. *Epic Systems*, 584 U. S., at ____ (slip op., at 14). And that is true even if bifurcated proceedings are an inevitable result. See, *e.g., Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 220–221 (1985); *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 103 (1983).

A state rule imposing an expansive rule of joinder in the arbitral context would defeat the ability of parties to control which claims are subject to arbitration. Such a rule would permit parties to superadd new claims to the proceeding, regardless of whether the agreement between them committed those claims to arbitration. Requiring arbitration procedures to include a joinder rule of that kind compels parties to either go along with an arbitration in which the range of issues under consideration is determined by coercion rather than consent, or else forgo arbitration altogether. Either way, the parties are coerced into giving up a right they enjoy under the FAA. See *Lamps Plus*, 587 U. S., at ___–___ (slip op., at 6–8); *Epic Systems*, 584 U. S., at ___–___ (slip op., at 5–9); *Concepcion*, 563 U. S., at 347–351; *Stolt-Nielsen*, 559 U. S., at 684–687.

When made compulsory by way of *Iskanian*, the joinder rule internal to PAGA functions in exactly this way. Under that rule, parties cannot agree to restrict the scope of an arbitration to disputes arising out of a particular "'"transaction"'" or "'common nucleus of facts.'" *Lucky Brand*, 590 U. S., at ___ (slip op., at 6). If the parties agree to arbitrate "individual" PAGA claims based on personally sustained violations, *Iskanian* allows the aggrieved employee to abrogate that agreement after the fact and demand either judicial proceedings or an arbitral proceeding that exceeds the scope jointly intended by the parties. The only way for parties to agree to arbitrate *one* of an employee's PAGA claims is to also "agree" to arbitrate *all other* PAGA claims in the

same arbitral proceeding.

The effect of *Iskanian*'s rule mandating this mechanism is to coerce parties into withholding PAGA claims from arbitration. Liberal rules of claim joinder presuppose a backdrop in which litigants assert their own claims and those of a limited class of other parties who are usually connected with the plaintiff by virtue of a distinctive legal relationship—such as that between shareholders and a corporation or between a parent and a minor child. PAGA departs from that norm by granting the power to enforce a subset of California public law to every employee in the State. This combination of standing to act on behalf of a sovereign and mandatory freeform joinder allows plaintiffs to unite a massive number of claims in a single-package suit. But as we have said, "[a]rbitration is poorly suited to the higher stakes" of massive-scale disputes of this kind. *Concepcion*, 563 U. S., at 350. The absence of "multilayered review" in arbitral proceedings "makes it more likely that errors will go uncorrected." *Ibid.* And suits featuring a vast number of claims entail the same "risk of 'in terrorem' settlements that class actions entail." *Ibid.* As a result, *Iskanian*'s indivisibility rule effectively coerces parties to opt for a judicial forum rather than "forgo[ing] the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution." *Stolt-Nielsen*, 559 U. S., at 685; see also *Concepcion*, 563 U. S., at 350–351. This result is incompatible with the FAA.

IV

We hold that the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate. This holding compels reversal in this case. The agreement between Viking and Moriana purported to waive "representative" PAGA claims. Under *Iskanian*, this provision was invalid if construed as a wholesale waiver of PAGA

claims. And under our holding, that aspect of *Iskanian* is not preempted by the FAA, so the agreement remains invalid insofar as it is interpreted in that manner. But the severability clause in the agreement provides that if the waiver provision is invalid in some respect, any "portion" of the waiver that remains valid must still be "enforced in arbitration." Based on this clause, Viking was entitled to enforce the agreement insofar as it mandated arbitration of Moriana's individual PAGA claim. The lower courts refused to do so based on the rule that PAGA actions cannot be divided into individual and non-individual claims. Under our holding, that rule is preempted, so Viking is entitled to compel arbitration of Moriana's individual claim.

The remaining question is what the lower courts should have done with Moriana's non-individual claims. Under our holding in this case, those claims may not be dismissed simply because they are "representative." *Iskanian*'s rule remains valid to that extent. But as we see it, PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding. Under PAGA's standing requirement, a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action. See Cal. Lab. Code Ann. §§2699(a), (c). When an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit. See *Kim*, 9 Cal. 5th, at 90, 459 P. 3d, at 1133 ("PAGA's standing requirement was meant to be a departure from the 'general public' . . . standing originally allowed" under other California statutes). As a result, Moriana lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims.

For these reasons, the judgment of the California Court of Appeal is reversed, and the case is remanded for further

proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 20–1573

VIKING RIVER CRUISES, INC., PETITIONER *v.* ANGIE MORIANA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

[June 15, 2022]

JUSTICE SOTOMAYOR, concurring.

I join the Court's opinion in full. The Court faithfully applies precedent to hold that California's anti-waiver rule for claims under the State's Labor Code Private Attorneys General Act of 2004 (PAGA) is pre-empted only "insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." *Ante,* at 20. In its analysis of the parties' contentions, the Court also details several important limitations on the pre-emptive effect of the Federal Arbitration Act (FAA). See *ante,* at 11–17. As a whole, the Court's opinion makes clear that California is not powerless to address its sovereign concern that it cannot adequately enforce its Labor Code without assistance from private attorneys general.

The Court concludes that the FAA poses no bar to the adjudication of respondent Angie Moriana's "non-individual" PAGA claims, but that PAGA itself "provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding." *Ante,* at 21. Thus, the Court reasons, based on available guidance from California courts, that Moriana lacks "statutory standing" under PAGA to litigate her "non-individual" claims separately in state court. *Ibid.* Of course, if this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last

word. Alternatively, if this Court's understanding is right, the California Legislature is free to modify the scope of statutory standing under PAGA within state and federal constitutional limits. With this understanding, I join the Court's opinion.

SUPREME COURT OF THE UNITED STATES

No. 20–1573

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ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

[June 15, 2022]

JUSTICE BARRETT, with whom JUSTICE KAVANAUGH joins, and with whom THE CHIEF JUSTICE joins except as to the footnote, concurring in part and concurring in the judgment.

I join Part III of the Court's opinion. I agree that reversal is required under our precedent because PAGA's procedure is akin to other aggregation devices that cannot be imposed on a party to an arbitration agreement. See, *e.g.*, *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662 (2010); *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333 (2011); *Epic Systems Corp.* v. *Lewis*, 584 U. S. ___ (2018); *Lamps Plus, Inc.* v. *Varela*, 587 U. S. ___ (2019). I would say nothing more than that. The discussion in Parts II and IV of the Court's opinion is unnecessary to the result, and much of it addresses disputed state-law questions as well as arguments not pressed or passed upon in this case.*

*The same is true of Part I.

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JUSTICE THOMAS, dissenting.

I continue to adhere to the view that the Federal Arbitration Act (FAA), 9 U. S. C. §1 *et seq*., does not apply to proceedings in state courts. See *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265, 285–297 (1995) (THOMAS, J., dissenting); see also *Kindred Nursing Centers L. P.* v. *Clark*, 581 U. S. 246, 257 (2017) (THOMAS, J., dissenting) (collecting cases). Accordingly, the FAA does not require California's courts to enforce an arbitration agreement that forbids an employee to invoke the State's Private Attorneys General Act. On that basis, I would affirm the judgment of the California Court of Appeal.