2021 LABOR & EMPLOYMENT MID-YEAR BRIEFING

HansonBridgett

WEBINAR | WEDNESDAY, JUNE 9, 2021

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HANSON BRIDGETT LABOR & EMPLOYMENT MID-YEAR

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If you wish to review any particular case in detail, please contact your Hanson Bridgett Labor & Employment attorney. Thank you.

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HANSON BRIDGETT LABOR & EMPLOYMENT MID-YEAR

Agenda

9:00 a.m. – 9:05 a.m.	Introduction and Welcome Remarks
9:05 a.m. – 9:55 a.m.	Mid-Year Employment Case Updates & New Laws
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10:00 a.m. – 10:45 a.m.	Reopening Your Workplace Part I – Navigating Vaccination and Accomodation Issues
10:45 a.m. – 10:50 a.m.	Break
10:50 a.m. – 11:55 a.m.	Reopening Your Workplace Part II – Tax and Wage & Hour Issues Related to Remote Workers; Cal/OSHA Compliance
11:55 a.m. – 12:00 p.m.	Closing

HANSON BRIDGETT LABOR & EMPLOYMENT MID-YEAR

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2021 MID-YEAR LABOR & EMPLOYMENT BRIEFING

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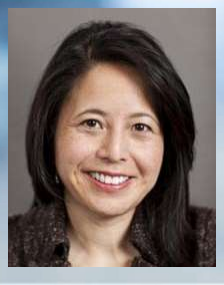
Session #1

MID-YEAR EMPLOYMENT CASE UPDATES & NEW LAWS



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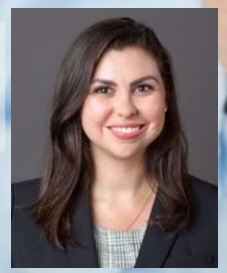

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Didn't We Just Turn The Corner on 2021: What More Could Possibly Happen To Employers In These Past Few Months?

- 2/25/2021: *Donohue v. AMN Servs., LLC* decision issued (Cal. Supreme Court)
- 3/19/2021: Governor signs SB 95 (new 2021 COVID-19 Supplemental Paid Sick Leave)
- 4/16/2021: Governor signs SB 93 (Right to Recall for hospitality industry)
- 4/26/2021: *Oakland POA v. City of Oakland* decision issued (1st Appellate District)
- 5/18/2021: *Ferra v. Loews* oral argument (Cal. Supreme Court)
- 5/28/2021: *Magadia v. Wal-Mart Assoc., Inc.* decision issued (Ninth Circuit)
- 7/1/2021: Minimum Wage Increases
- Pending legislation to track (ranging from hazard pay to police reform)

And of course in the middle of all this….

- Vaccination & re-opening guidelines are issued, and counties pass vaccine-related ordinances

Stay tuned for Session 2!

So What Do Employers Really Need to Know?

Session 1 will cover:

- Minimum wage increases effective 7/1/2021 & reminder on salary basis test
- Key wage-and-hour case developments
- SB 93: Right to Recall for hospitality industry – forecast of broader legislation?
- SB 95: New 2021 COVID-19 Supplemental Paid Sick Leave
- Pending legislation to track
- Notable police reform bill & pre-interrogation discovery

Minimum Wage Increases Effective July 1, 2021

- **Alameda:** $15.00/hour (future increase 7/1/2022)
- **Berkeley:** $16.32/hour
- **Emeryville**: $17.13/hour
- **Fremont**: $15.25/hour (≥ 26 employees); $15.00/hour (≤ 25 employees)
- **Los Angeles**: $15.00 (large and small employers, with future increase 7/1/2022) [City of L.A. & County of L.A.]
- **Malibu**: $15.00 (large and small employers, with future increase 7/1/2022)
- **Milpitas**: $15.65/hour
- **Novato**: $15.24/hour (≥ 100 employees); $15.00/hour (26-99 employees); $14.00/hour (1-25 employees)
- **Pasadena**: $15.00 (large and small employers, with future increase 7/1/2022)
- **San Francisco**: $16.32/hour
- **South S.F.**: $15.25/hour
- **San Leandro**: $15.00/hour
- **Santa Monica**: $15.00/hour (large and small employers, with future increase 7/1/2022)
- **Santa Rosa**: $15.20/hour

Reminder: Statewide Minimum Wage

CA Statewide Minimum Wage eff. 1/1/2021

- $14.00/hour (≥ 26 employees)

  $58,240 annual salary threshold for salary basis test on overtime exemption

- $13.00/hour (≤ 25 employees)

  $54,080 annual salary threshold for salary basis test on overtime exemption

- CA state salary basis test:
  - Requires exempt employee to "earn a monthly salary equivalent to no less than two times the state minimum wage for full time employment." (Labor Code §515(a))
  - In addition to meeting job duties test ("primarily engaged in" exempt job duties)

Key Wage-and-Hour Case Developments

Donohue v. AMN Servs., LLC, 11 Cal.5th 58 (2021)

- Holding: Employers cannot use rounding method for meal periods.
- Actual Impact: Supreme Court suggested a reexamination of rounding as a timekeeping practice, despite *See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889 (2012)
- Double Impact: Supreme Court further concluded that time records suggesting non-compliant meal periods create a rebuttable presumption of a violation

What's the Takeaway?

- Audit and reevaluate any rounding practices
- Adopt documentation practices and procedures to rebut the presumption of meal period violations

- *Ferra v. Loews Hollywood Hotel, LLC,* 40 Cal.App.5th 1239 (2019), *review granted*, 257 Cal.Rptr.3d 591 (1/22/2020)
- 5/18/2021 oral argument Cal. Supreme Court
  - Are meal and rest break premiums under Labor Code § 226.7 owed at base pay or at "regular rate of pay" used for OT?

Magadia v. Wal-Mart Assoc., Inc., 2021 WL 2176584 (9th Cir. 5/28/2021): PAGA/Class action

- Ninth Circuit ***reverses*** $100M award
- Plaintiff had no standing to bring PAGA claim because suffered no meal break violation
- Wage statements found compliant

SB 93: Right to Recall for Certain Enterprises
[Labor Code §2810.8]

Right to recall for pandemic-related layoffs
- Effective 4/16/2021 until 12/31/2024
- Applies to certain "enterprises" defined as: Hotel, private club, event center, airport hospitality operation, airport service provider, or the provision of building service to office, retail, or other commercial buildings
- Any CBA waiver must be explicitly set forth in clear and unambiguous terms

- Must offer "laid -off employees" all available positions based on preference system
- Division of Labor Standards Enforcement has exclusive jurisdiction to enforce statute

- "Laid-off employee" means:
  - Employed for ≥ 6 months in the 12 months preceding January 1, 2020
  - Most recent separation was due to "a reason related to the COVID-19 pandemic, including a public health directive, government shutdown order, lack of business, a reduction in force, or other economic, nondisciplinary reason due to the COVID-19 pandemic"
- Deemed qualified if employee held the same or similar position at time of layoff
  - Employee has 5 business days to accept/decline
- If more than one employee entitled to a position, the employer must offer the position to the employee with the greatest length of service based on date of hire

Pending Legislation to Watch Out For

- AB 995: Bill to Expand Paid Sick Days
  - Proposed bill would increase paid sick days from 24 hrs. (3 days) to 40 hrs. (5 days)
  - Proposed bill would increase accrual cap from
    48 hrs. (6 days) to 80 hrs. (10 days)

- AB 95: Bill to Provide Bereavement Leave
  - Proposed bill would require employers with ≥ 25 employees to grant request of up to 10 business days of unpaid bereavement leave and
    up to 3 business days for < 25 employees
  - For death of a spouse, child, parent, sibling, grandparent, grandchild or domestic partner

Bill ordered to "inactive file" as of 6/3/2021:

- AB 650: Bill to Establish COVID-19 Hazard Pay Retention Bonus for Health Care
  - Proposed bill would require health care employers (i.e., covered by Wage Order 5) to pay hazard pay retention bonuses to health care employees
  - Proposed bonus payments to be made 4X in calendar year 2022 (once per quarter)
  - Proposed bonuses range from $1,000 to $2,500 to each employee for each bonus payment

2021 COVID-19 Supplemental Paid Sick Leave

SB 95 [Labor Code §§ 248.2 and 248.3]

- Effective 3/19/2021 but retroactive to 1/1/2021
- Provides employees with 80 ***additional*** hours of paid sick leave for qualifying COVID-19 related reasons
- Part time employees are entitled to pro rata leave
- Covers employers (public and private) with 25+ employees
- Paystub and posting requirements

COVID-19 Supplemental Paid Sick Leave (continued)

Qualifying reasons for leave:

- Caring for self
- Caring for a child when school or place of care is closed or unavailable due to COVID-19
- Caring for a family member
- Vaccine-related reasons

Certification of reason for leave:

- Employers cannot deny leave based on lack of documentation
- Employees may take leave upon oral or written request

COVID-19 Supplemental Paid Sick Leave (continued)

Retroactive Pay:

- May be applied retroactively to leaves taken after January 1, 2021
- Retroactive pay only required where covered employee makes a request
- Employers may need to reinstate paid sick leave or PTO

Interaction With Other Benefits:

- Employers cannot require employee to exhaust other benefits first
- Prior benefit payments may offset employer's obligations
- Cal/OSHA exclusion pay

Pay Rate:

- Subject to max cap of $511/day and $5,110 total

Law Enforcement Case Update and New Laws:

- *Police Reform – Senate Bill 2*

- Seeks to modify the Tom Bane Civil Rights Act (1987 - Civil Code §52.1) and limit officers' ability to assert qualified immunity as a defense for their actions
  - Qualified immunity permits government officials from being held personally liable for constitutional violations in federal cases
  - Could lead to more police misconduct cases winding up in state court
  - Could increase potential liability for public entities with law enforcement agencies as they would be liable for acts by police offers who committed a physical act of coercion, threat, or intimidation
  - Specific Intent vs. General Intent
    - Amendment to law would create a General Intent standard in that the mere act alone would be sufficient to establish liability, irrespective of the officer's intent
    - Would also open the door for wrongful death suits to be brought under the Bane Act

Law Enforcement Case Update and New Laws:

- *Police Reform – Senate Bill 2 (continued)*

- Seeks to establish Statewide Certifying Commission for Law Enforcement licensing
- Would create Peace Officers Standards Accountability Division (State IA)
  - Records from revocation of a peace officer's certification public and require retention for 30 years
  - Powerful oversight commission would be comprised of the following:
    - 2 current or former peace officers appointed
    - 4 members of the public with no peace officer experience (Non-profit, academic or community-based organizations related to peace officer misconduct)
    - 2 members of the public who have survived unlawful force by peace officer or who survived family members killed by law enforcement through unlawful force
    - 1 attorney who is not former peace officer, with experience involving oversight of peace officers

Law Enforcement Case Update and New Laws:

- *Police Reform – Senate Bill 2 (continued)*

- Second time version of this bill sought to be passed in California
- Last summer **SB 731** (Senator Steven Bradford – Gardena)
  - Sought to strip troubled officers of ability to keep badge, and allowing for personal financial responsibility if officer sued. Also sought powerful citizens oversight commission to evaluate officers' actions.
  - Same author of **SB 2**. Did not pass as time expired on August 31, 2020 before bill could return to Senate Floor for a concurrence vote.

Case Update re POBRA (Gov. Code §§3300 et seq.) –

Oakland Police Officers' Association (POA) v. City of Oakland, 63 Cal App 5th 503
Court of Appeal, First District, Division One (Decided and Certified for Publication - April 26, 2021)

- Case involves the ability of Peace Officers to access investigation materials under §3303(g) prior to being subjected to interrogation for potential misconduct
- 1990 CA SC Decision in ***Pasadena POA v. City of Pasadena*** 51 Cal.3d 564 initially made it clear that peace officers were not entitled to pre-interrogation discovery
- **Gov. Code §3303(g)** provides that before a peace officer sits for interrogation, they "shall be entitled to a transcribed copy of any notes made by a stenographer **or to any reports or complaints made by investigators or other persons**, except by those which are deemed by the investigating agency to be confidential."
- *Pasadena POA* clear bright line rule = no pre-interrogation discovery rights

Santa Ana POA v. City of Santa Ana

(2017)13 Cal.App.5th 317

- Court of Appeal, Fourth District, Division 3, decision throws a wrench in *Pasadena POA* bright line rule by holding that Peace Officers would be entitled to any reports created by investigating agency if an officer is subjected to a second interrogation

Oakland POA v. City of Oakland

63 Cal App 5th 503 (April 26, 2021) - First Appellate District Division One

- Officers initially investigated re citizen complaint of an illegal search and cleared by agency
- Community Police Review Agency (CPRA) oversight conducts subsequent follow up investigation and union seeks all reports from initial investigation citing *Santa Ana* decision
- Request denied and officers re-interviewed
- CPRA finds that search was conducted illegally and that officers were dishonest and worked in concert to conceal illegal search
- Court here goes against holding in *Santa Ana* and finds disclosure before second interview not required
- "Indeed, mandating such discovery prior to the subsequent interrogation of an officer could severely hamper the agency's investigation, and therefore undermine the public's confidence in the integrity of the law enforcement agency."

Stay Tuned…

- Deadline for petition for review of *Oakland POA* decision runs June 7, 2021
- Kudos to Hanson Bridgett's own Adam Hofmann for his excellent work for City of Oakland in the case

Session #2

REOPENING YOUR WORKPLACE PART I - NAVIGATING VACCINATION & ACCOMMODATION ISSUES

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COVID-19 Vaccination Mandates in the Workplace

- EEOC guidance permits employers to mandate vaccines
  - Absent disparate impact
  - So long as the requirement is job-related and consistent with business necessity
    - Such as a safety-related standard requiring vaccination
- Caveats:
  - Employees with disabilities (including pregnancy) affecting their ability to be vaccinated must be provided with **reasonable accommodation** unless there is an **undue hardship**
    - Employer must determine whether the unvaccinated employee poses a direct threat to self or others that cannot be eliminated without reasonable accommodation
  - Employees with sincerely held religious beliefs affecting their ability to be vaccinated must be provided with **reasonable accommodation** unless there is an **undue hardship**

COVID-19 Vaccination Mandates in the Workplace (continued)

- The process of determining a reasonable accommodation must be interactive
- In the case of a disability accommodation, process may require obtaining medical information concerning the disability
- Possible reasonable accommodations for those who cannot be vaccinated:

• Face masks • Social distancing • Modified shifts • Frequent COVID-19 testing	• Improved ventilation • Telecommuting • Reassignment

COVID-19 Vaccination Mandates in the Workplace (continued)

- Undue hardship – disability accommodation:
  - Significant difficulty or expense
- Undue hardship – religious accommodation:
  - More than minimal cost or burden
  - This is an easier standard to meet
- In reviewing undue hardship under either standard, employer may consider:
  - The proportion of employees in the workplace who are partially or fully vaccinated
  - The extent of employee contact with non-employees with unknown vaccination status
- Employer also may rely on CDC recommendations

COVID-19 Vaccinations in the Workplace

- Employees' vaccination status must be maintained as confidential medical information
  - Documentation must be kept confidential and stored separately from personnel file
- Employers may not disclose if an employee is receiving a reasonable accommodation
- Employers administering mandatory vaccines directly have additional obligations
  - Pre-vaccination screening questions are likely to elicit information about a disability
- California's Confidentiality of Medical Information Act (CMIA) also prevents employers from disclosing employee medical information

Individual County Health Orders

- Employers must also review County Health Orders in **each county** in which they operate as counties are aggressively pushing for everyone to be vaccinated.

One example:

- **Santa Clara County - May 18, 2021 - Applicability.** All individuals, businesses, and other entities in the County are ordered to comply with the applicable provisions of this Order. For clarity, individuals who do not currently reside in the County must comply with all applicable requirements of the Order when they are in the County.
- **Employer must keep records of non-vaccinated employees**

Individual County Health Orders (continued)

- Activities Encouraged to Occur Outdoors
- Mandatory Reporting Regarding Personnel Contracting COVID-19
- Ascertainment of Vaccination Status
- Mandatory Rules for Personnel Not Fully Vaccinated

Los Angeles County Emergency Ordinance – Paid Leave to Get Vaccinated

- **Effective May 18, 2021, but retroactive to January 1, 2021 and remains in effect until August 31, 2021.**
- Concern that employees had already used up the SB 95 80 hours
- Employee must first exhaust SB 95
- Benefit is in addition to CA Mandatory Sick Leave
- Does not apply to federal, state, or local government agencies
- Collective Bargaining Exception

Los Angeles County Emergency Ordinance – Paid Leave to Get Vaccinated

- "County" - the unincorporated areas of the County of Los Angeles.
- "COVID-19 Vaccine Leave" - time an Employee is receiving each COVID-19 vaccine injection, as described in Section 8.205.030. This paid leave includes time spent for an Employee to travel to and from a COVID-19 vaccine appointment, to receive the COVID-19 vaccine injection, and to recover from any symptoms related to receiving the COVID-19 vaccine that prevent the Employee from being able to work or telework.

Los Angeles County Emergency Ordinance (continued)

- How Much Leave?
  - A Full-Time Employee is entitled to use up to four hours of paid leave per injection to receive the COVID-19 vaccine.
  - "Full Time Employee" means: An Employee who the Employer considers to work full time; or an Employee who worked or was scheduled to work, on average, at least 40 hours per week for the Employer in the two weeks preceding the date the Employee took COVID-19 Vaccine Leave.

Los Angeles County Emergency Ordinance (continued)

- How Much Leave?
  - A Part-Time Employee is entitled to paid leave to receive the COVID-19 vaccine at the following rate: the prorated amount of four hours per injection based on their normally scheduled work hours over the two-week period preceding the injection.
  - “Part Time Employee" means:
    - An Employee who an Employee who is not a Full-Time

Los Angeles County Emergency Ordinance (continued)

- **Notice and Record Keeping: Presumption of Violation**. "There shall be a rebuttable presumption that an Employer violated this Chapter if an allegation is made concerning an Employee's entitlement to COVID-19 Vaccine Leave under this Chapter and an Employer does not comply with the requirements of this Section to maintain or retain payroll records, or does not allow the DCBA reasonable access to such records."
- **Posting requirement** – poster obtained through the Los Angeles County Department of Consumer and Business Affairs

Mandatory Vaccine Lawsuits

California Educators For Medical Freedom, Et Al, V. Austin Beutner, In His Individual Capacity And In His Official Capacity As Superintendent Of The Los Angeles Unified School District, And Linda Del Cuteo, In Her Individual Capacity And In Her Official Capacity As The Director Of Human Resources For The Los Angeles (Case No.: 21-cv-02388) (May 24, 2021)

Employer had mandatory vaccination program.

Mandatory Vaccine Lawsuits (continued)

Lawsuit based upon:

"The statute granting the FDA the power to authorize a medical product for emergency use requires that the person being administered the unapproved product be advised of his or her right to refuse administration of the product. *See* 21 U.S.C. § 360bbb-3(e)(1)(A) ("Section 360bbb-3").

- right to avoid the imposition of human experimentation is fundamental

Mandatory Vaccine Lawsuits (continued)

Isaac Legarreta v. Fernando Macias, Doña Ana County Manager, and other County Officials - No.: 2:21-cv-00179 ANE

- Corrections officer at the Doña Ana County Detention Center filed a lawsuit in federal district court when his employer issued a "Mandatory COVID-19 Vaccination Directive" requiring him to receive a COVID-19 vaccine as a condition of ongoing employment.
- He refused and received a write-up and sued seeking damages and an injunction alleging retaliation and constitutional claims.

COVID-19 Vaccinations in the Workplace - Pay Obligations

- Employer-mandated vaccine
  - Employees must be compensated for time spent obtaining vaccine
  - Employees must be reimbursed for expenses incurred obtaining vaccine
- Whether employer-mandated or not
  - Employees are entitled to COVID-19 Supplemental Paid Sick Leave for:
    - Time spent obtaining vaccine
    - Time spent recovering from side effects of vaccine

COVID-19 Information and the California Consumer Privacy Act (CCPA)

- CCPA – Covered Employers
  - Gross annual revenue of at least $25M or
  - Annually buy, receive or sell personal information of at least 50K Californians or
  - Derive 50% or more of revenue from selling California consumers' personal information
- Covered Employers must provide notice to employees, applicants and contractors of
  - Personal information collected for employment, recruitment or contracting purposes and the purpose of the collection of personal information
- Notice must be provided prior to collecting such information
- Notices should include personal health information being collected
    - Symptom screening
    - Temperature checks
    - Vaccination status

AB 327 (Pending) – and Questionable

- ***CHAPTER 3.28. Prohibitions on COVID-19 Vaccination Status Disclosure Requirements: New***
- (a) State agencies, local governments, and any other governmental authority shall not adopt or enforce any order, ordinance, policy, regulation, rule, or similar measure that requires an individual to provide as a condition of receiving any service or entering any place, documentation regarding the individual's vaccination status for any COVID-19 vaccine administered under an emergency use authorization.
- (b) Any public or private entity that receives or is awarded state funds through any means, including, but not limited to, grants, contracts, or loans, shall not require a member of the public to provide, as a condition of receipt of any service or entrance to any place, documentation regarding the person's vaccination status for any COVID-19 vaccine administered under an emergency use authorization.

Session #3

REOPENING YOUR WORKPLACE PART II - TAX AND WAGE & HOUR ISSUES FOR REMOTE WORKERS; CAL/OSHA COMPLIANCE

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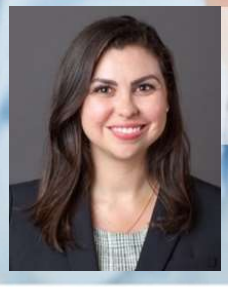

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TAX ISSUES FOR REMOTE WORKERS

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Future of Remote Work Arrangements

- COVID-19 as an accelerator toward remote working arrangements
- Employee expectations for flexibility post-pandemic
  - Majority of workers indicate preference to work remotely at least once a week
  - Potential war for talent
- Tax-related challenges to consider
  - Administrative capacity (e.g., payroll system configuration)
  - Operational compliance
  - Monitoring state and international tax law developments

Remote Work: In-State (Work From Home)

- Local payroll taxes may apply as a result of telecommuting
  - Employer may need to withhold city and/or county level taxes
  - Employees regularly working from home may trigger other local requirements
  - Example: Employers must comply with the San Francisco Healthcare Security Ordinance (HCSO) in any calendar quarter if they:
    - Employ one or more workers within the city and county of San Francisco,
    - Must obtain a San Francisco business registration, and
    - Have 20 or more persons* performing work at any location as a for-profit business

      *(50 or more for non-profit organizations)

Impact of Out-of-State Remote Workers

- Expiration of temporary COVID-19 relief for out-of-state workers
  - Variety of state responses (if any) to ease tax implications of work-from-home arrangements due to the COVID-19 pandemic and related government orders
  - Most limited in duration and narrow in scope (i.e. not applicable to arrangements that are permanent or unrelated to the pandemic)
- Return to default "boots-on-the-ground" principles for employers
  - Nexus in out-of-state jurisdictions for tax purposes
  - Personal income tax withholding obligations
  - Other payroll tax contributions and reporting requirements (unemployment insurance, disability, etc.)

State Level Corporate Tax Obligations

- For a state to impose tax, there must be a threshold of contact (known as "nexus") between the state and the taxpayer.
  - Minimum connection/activity to the state required under the U.S. Constitution
- Allowing employees to work from another state, even on a temporary basis, can establish a presence sufficient to trigger nexus for corporate tax reporting and liability for the employer in that jurisdiction (as well as SOS filings).
- The majority of state tax agencies (37 states) recently confirmed that having **even one employee** working within the state for non-solicitation activities may trigger nexus for an out-of-state corporation.
  - Even if telecommuters perform only back-office administrative functions, 34 states confirmed it would create nexus in that jurisdiction

State Personal Income Tax Withholding

- Most states impose a personal income tax.
  - Currently only nine states do not impose personal income taxes on wages
- In general, personal income tax withholding in the state applies where the services are physically performed, as well as the employee's resident home state (if different).
  - Establishing permanent tax residency out-of-state and nonresident return filing
  - Exception for reciprocal agreement between the resident and nonresident states
    - No reciprocity in CA; exemption from AZ withholding for CA residents
- Employers are required to obtain tax identification numbers and remit and report taxes for each state in which it has a withholding obligation.

State Personal Income Tax Withholding (continued)

- No uniformity among the states on nonresident withholding
- 24 states require employers to withhold/register **on the first day of work** in the state (i.e. no *de minimis* threshold by wages or time)
- A handful of states provide wage-based thresholds.
  - CA, ID, MN, OK, OR, WI
- The remaining states provide for short waiting periods.
- Currently, only four states allow employees to work within the state for 30 or more days before the employer is subject to withholding.
  - AZ, HI, IL, WV

Other State Payroll Tax Implications

- Beyond withholding on wages, remote work out-of-state may introduce other employer reporting and contribution obligations.
  - Unemployment insurance, disability insurance, workers compensation, etc.
  - Other state-specific payroll taxes may also apply. E.g., Washington has no personal income tax but requires employers to comply with the state's paid family & medical leave insurance law by collecting and remitting premiums.
  - In addition, effective January 1, 2022, employers in Washington must withhold a long-term care tax from employee's wages (unless the employee opts out due to benefits under a qualifying policy or annuity).
- Lack of uniformity across borders makes a one-size-fits-all approach to multi-state compliance impossible.

Taxes in Non-U.S. Jurisdiction

- Similar nexus principles apply for an employer's tax obligations outside the U.S.
- The "permanent establishment" test determines whether a business has sufficient activity/presence in another territory to create a taxable presence in that other territory from a tax perspective.
- "Permanent establishment" can be created inadvertently by having:
  - A fixed place to carry on business (subject to specific exemptions),
  - A dependent agent acting on its behalf and exercising authority to bind the enterprise, or
  - Services performed through one or more individuals over a defined period, under certain double tax treaties.
- If unmanaged, non-U.S. presence raises potential unfunded tax liabilities, payroll reporting obligations, penalties/interest charges, complex and time-consuming audits, immigration issues for employees, restated financials, etc.

Remote Work Policy (INSERT POLL)

- Q: Does your organization have a policy for tracking employee mobility?
  - Yes, my organization has a clear policy and system for employees to self-report where they are working, even on a temporary basis.
  - No, my organization has communicated general expectations about remote work but does not have a overall policy or system in place for employee tracking.
  - No, my organization's approach to remote work is still in progress.
  - Unknown/not applicable.

Compliance and Risk Management

- Tax exposure attributable to remote workers often remains unidentified among employers.
  - Organizations often have unreliable self-reporting data from employees.
    - Surveys indicate that only one-third of employees who have worked outside their home state or country during the pandemic reported all those days to HR.
- Payroll tax noncompliance is one of the most identified issues during audits.
- Exposure for noncompliance may include:
  - Underpaid taxes (employer and employee)
  - Monetary penalties
  - Criminal liability for willful failures

Best Practices

- Establish a written policy on remote work arrangements
  - Set clear expectations on procedures and level of flexibility
  - Require employees to provide sufficient information on work location, even if temporary
  - Cover business travel and work-related cost reimbursement
  - Update existing policies (i.e. security, equipment use, etc.) to reflect remote work
- Assess sufficiency of current payroll system capabilities and update as needed
- File business registrations and annual reports with Secretary of State, as necessary
- Obtain the necessary tax identification numbers in the jurisdictions in which you have tax obligations
- Regularly evaluate tax obligations at organization level (U.S. income or sales tax nexus, state apportionment factors, permanent establishment outside the U.S., etc.)

WAGE & HOUR ISSUES FOR REMOTE WORKERS

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Wage & Hour Issues for Remote Workers

- Not everyone is coming back . . . as of May 17, 2021
  - Nearly as many working remotely in 2021 as was true for much of 2020.
  - Percentage working remotely exceeds 80% in some white-collar occupations.
  - Four in 10 white-collar workers prefer remote work.
  - Thirty-five percent of all full-time employees say that, if given the choice, they would continue working remotely as much as possible.
  - Twenty-six percent want to continue working from home as much as possible because they prefer it.

"Seven in 10 U.S. White-Collar Workers Still Working Remotely" - Gallup, May 17, 2021

Wage & Hour Issues for Remote Workers (continued)

Remote Work Policies and Issues:

A refresher – as employers should have in place already policies addressing -

- Meal and rest breaks
- Advanced written authorization from supervisors for overtime
- Set Schedules
- Prohibition of “off-the-clock” work (i.e. no weekend work checking emails, etc.)
- Reimbursement of work – related expenses (voluntary vs. mandatory remote work)

Wage & Hour Issues for Remote Workers (continued)

Remote Work Policies and Issues:

- Employees working in different states or areas from the main office:
  - A non-exempt employee is entitled to the minimum wage of the jurisdiction where the work is performing the work and is otherwise entitled to whatever other wage and hour laws apply in that state or local jurisdiction (paid sick leave, etc.).
  - An exempt employee may need a salary increase to remain exempt (for example, your employee working in a FLSA only state has relocated to California during the pandemic)
  - Possible reimbursement of travel time from the employee's home.
  - Tax issues abound.

Wage & Hour Issues for Remote Workers (continued)

An interesting read:

- Boston Consulting Group: Decoding Global Ways of Working - survey of 209,000 people's preferences and current practices in 190 countries in October and November of 2020.
- The Netherlands and the United Kingdom are neck-in-neck leaders in remote workers.

CAL/OSHA COMPLIANCE

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Cal/OSHA Developments

- On June 3, the Standards Board voted to approve substantial revisions to the ETS.
- Expect additional revisions to more closely align the ETS with public health guidance.
- The now-adopted revisions are headed to the Office of Administrative Law for final approval and likely to take effect on or before June 13.

Key Revisions to the ETS

- Definition of “fully vaccinated”
- Face Coverings
  - Redefines “face covering”
  - Face covering requirements for vaccinated and unvaccinated employees
- Provision of Respirators
  - All employees who are not fully vaccinated shall be provided respirators for voluntary use to employees working indoors or at Outdoor Mega Events
  - Employers must ensure employees are provided with a respirator of the correct size
  - Employees must be trained on how to properly wear the respirator provided, how to perform a seal check, and the fact that facial hair interferes with a seal

Key Revisions to the ETS (continued)

- Physical Distancing
  - No immediate exception for vaccinated individuals
  - Until July 31, 2021, employees must remain separated from others by at least six (6) feet when working indoors or at Outdoor Mega Events
  - Exceptions
- Employee COVID-19 Testing
  - Employer-provided testing for individuals with “close contact exposure” who are not fully vaccinated (even if there is no indication that the exposure was work related)
  - Exceptions

Key Revisions to the ETS (continued)

- Notice
  - Employers must continue to provide written notice to all employees at the worksite who may have been exposed (personal service, email, text) and must do so within one day of when the employer knew or *should have known* about the COVID case.
  - Allows for verbal notice
- Exclusion from the Workplace
  - Requires that employees who test positive for COVID-19 be excluded from the workplace for at least 10 days, *even if the employee is fully vaccinated.*
  - Employees who had close contact exposure must be excluded from the workplace until return to work criteria is met **except:**
    - Employees who were fully vaccinated before the close contact and who do not develop COVID-19 symptoms; and
    - COVID-19 cases who returned to work and have remained free of COVID-19 symptoms for 90 days after the initial onset of COVID-19 symptoms or, for COVID-19 cases who never developed COVID-19 symptoms, for 90 days after the first positive test.
- Other Engineering Controls
  - Requirement to install “cleanable solid participations” prior to July 31, 2021

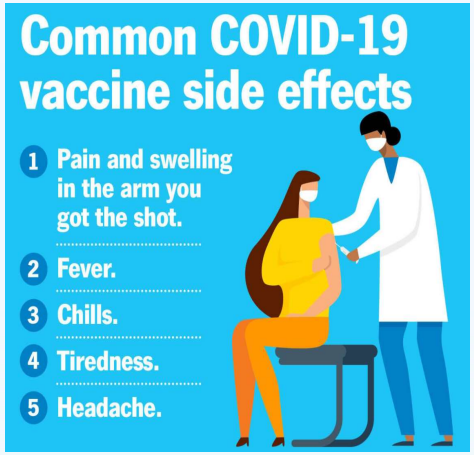
Multiple COVID-19 Infections

- Focus on “exposed group” as opposed to “exposed workplace”
- The employer shall make COVID-19 testing available at no cost (during paid time) to its employees within the exposed group
- Exceptions:
  - Employees who were not present at the workplace during the relevant 14-day period
  - Employees who were fully vaccinated before section 3205.1 became applicable ***and*** who do not have COVID-19 symptoms; and
  - For COVID-19 cases who did not develop COVID-19 symptoms after returning to work pursuant to subsections 3205(c)(11)(A) or (B), no testing is required for 90 days after the initial onset of COVID-19 symptoms or, for COVID-19 cases who never developed symptoms, 90 days after the first positive test.

OSHA Guidance on Vaccine Reactions

Are adverse reactions to the COVID-19 vaccine recordable on the OSHA recordkeeping log?

- OSHA has now revoked earlier guidance and stated that it will not enforce recording requirements to require any employers to record worker side effects from COVID-19 vaccination through May 2022 and will reevaluate the agency's position at that time.
- **Cal/OSHA has not issued guidance in this area.**



The Private Attorney General Act (PAGA) and Cal/OSHA

- Potential PAGA claims related to COVID safety in the workplace
- Labor Code sections related to workplace safety:
  - 6310– Retaliation prohibited
  - 6400(a) – Every employer shall furnish employment and a place of
  - employment that is safe and healthful for the employees therein.
  - 6401 – Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful. Every employer shall do every other thing reasonably necessary to protect the life, safety, and health of employees.
  - 6402 – No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe and healthful.

Sargent v. Board of Trustees of the California State University

- This is one of the first published decisions involving a PAGA claim for civil penalties premised on alleged violations of the California OSH Act.
- The Court concluded that public entity employers could be liable for civil penalties under PAGA, but only if the statute upon which the employee was suing itself provided for the recovery of civil penalties under Labor Code § 2699(a).

Live Q&A

- Submit a question using the ***Q&A*** engagement tool
- Share your comments about the event under ***Evaluation***
- Remember to download your certificate under the ***Certification*** tool
- The webinar recording will be sent to you via email within one day of the webinar

Thank you for joining our 2021 Mid-Year Labor Briefing!

Reference Materials

Session 1:

1. *Donohue v. AMN Services*, LLC, 11 Cal.5th 58 (2021)

2. *Ferra v. Loews Hollywood Hotel, LLC*, 40 Cal.App.5th 1239, review granted, 257 Cal. Rptr.3d 591 (1/22/2020)

3. *Magadia v. Wal-Mart Assoc., Inc.*, WL 2176584 (9th Cir. May 28, 2021)

4. Senate Bill No. 93: Right to Recall for Certain Enterprises (Labor Code §2810.8)

5. Senate Bill No. 95: COVID-19 Supplemental Paid Sick Leave (Labor Code §§ 248.2, 248.3)

6. California Department of Industrial Relations: 2021 COVID-19 Supplemental Paid Sick Leave FAQs

7. *Oakland Police Officers' Association (POA), et al., v. City of Oakland*, 63 Cal App 5th 503 (2021)

Session 2:

1. California Department of Public Health: COVID-19 Public Health Recommendations for Fully Vaccinated People

2. County of Santa Clara: Certification of Vaccination Status Form

3. County of Santa Clara: Order of the Health Officer Establishing Focused Safety Measures to Protect the Community from COVID-19

4. County of Santa Clara – Mandatory Directive: Use of Face Covering

Reference Materials

Session 2 (continued)

5. County of Santa Clara – Mandatory Directive: Unvaccinated Personnel

6. County of Los Angeles County: Emergency Ordinance RE: Sick Leave for Vaccine

7. *California Educators for Medical Feedrom, Et Al, v. Austin Beutner, Linda Del Cueto, Los Angeles,* Case No.: 21-cv-02388

8. *Isaac Legarreta v. Fernando Macias, Doña Ana County Manager, and other County Officials*, No.: 2:21-cv-00179 ANE

Session 3:

1. California Occupational Safety and Health Standards Board – COVID-19 Prevention Emergency Readoption

KeyCite Yellow Flag - Negative Treatment
Distinguished by Bebber v. Dignity Health, E.D.Cal., March 30, 2021

11 Cal.5th 58
Supreme Court of California.

Kennedy DONOHUE, Plaintiff and Appellant,
v.
AMN SERVICES, LLC, Defendant and Respondent.

S253677
|
February 25, 2021

Synopsis
Background: Nurse recruiter for healthcare staffing company filed putative class action against her employer, alleging it denied employees compliant meal periods, improperly rounded time records for meal periods, and failed to pay premium wages for noncompliant meal periods. The Superior Court, San Diego County, No. 37-2014-00012605-CU-OE-CTL, Joel M. Pressman, J., granted employer summary judgment. Nurse recruiter appealed. The Fourth District Court of Appeal, Irion, J., 29 Cal.App.5th 1068, affirmed. Nurse recruiter appealed.

Holdings: The Supreme Court, Liu, J., held that:

[1] practice of rounding time punches for employee meal periods is not consistent with purpose of Labor Code provision providing for premium pay for shortened or missed meal periods, disapproving *Silva v. See's Candy Shops, Inc.*, 7 Cal.App.5th 235, 253-254, 212 Cal.Rptr.3d 514 and *Serrano v. Aerotek, Inc.*, 21 Cal.App.5th 773, 230 Cal.Rptr.3d 802, and

[2] genuine issue of material fact as to whether rounding policy properly accounted for missed or shortened meal periods precluded summary judgment on claim for failure to pay premium wages.

Reversed and remanded with instructions.

West Headnotes (17)

[1] Labor and Employment Meal or break periods

Federal Fair Labor Standards Act (FLSA) does not require employers to provide meal periods to employees. Fair Labor Standards Act of 1938 § 1, 29 U.S.C.A. § 201 et seq.

[2] Labor and Employment Orders

Industrial Welfare Commission (IWC) is state agency empowered to promulgate wage orders, which are legislative regulations specifying minimum requirements with respect to wages, hours, and working conditions.

[3] Labor and Employment Construction and operation

Industrial Welfare Commission's (IWC) wage orders are to be accorded same dignity as statutes; they are presumptively valid legislative regulations of employment relationship, regulations that must be given independent effect separate and apart from any statutory enactments.

[4] Labor and Employment Construction and operation

When construing the Labor Code and Industrial Welfare Commission (IWC) wage orders, court adopts construction that best gives effect to the purpose of the Legislature and the IWC, which is to protect employees.

[5] **Labor and Employment**Meal or break periods

Under Labor Code section governing meal periods for professional and clerical employees, there is no meal period violation if employee voluntarily chooses to work during meal period after employer has relieved employee of all duty. Cal. Lab. Code § 512(a).

1 Cases that cite this headnote

[6] **Labor and Employment**Meal or break periods

An employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks. Cal. Lab. Code § 512(a).

1 Cases that cite this headnote

[7] **Labor and Employment**Meal or break periods

Even an employer's minor infringement of an employee's meal period triggers the premium pay obligation under Labor Code section governing meal periods for professional and clerical employees. Cal. Lab. Code § 226.7(c).

1 Cases that cite this headnote

[8] **Labor and Employment**Meal or break periods

An employer is liable for infringement of an employee's meal period, as will trigger premium pay obligation under Labor Code section governing meal periods for professional and clerical employees, if it knew or reasonably should have known that employee working through authorized meal period. Cal. Lab. Code § 226.7(c).

2 Cases that cite this headnote

[9] **Labor and Employment**Meal or break periods

An employer's practice of rounding time punches for employee meal periods is inconsistent with the purpose of Labor Code section governing meal periods for professional and clerical employees and corresponding Industrial Welfare Commission (IWC) wage orders; Labor Code and wage orders, which provide that employees are entitled to a 30 minute meal period after five hours of work, a second 30 minute meal period after ten hours of work, and premium pay for missed and shortened meals, are concerned with small amounts of time, small rounding errors can amount to significant infringement of employees' right to meal periods, and even relatively minor infringements on meal periods can cause substantial burdens to employees; disapproving *Silva v. See's Candy Shops, Inc.*, 7 Cal.App.5th 235, 253-254, 212 Cal.Rptr.3d 514 and *Serrano v. Aerotek, Inc.*, 21 Cal.App.5th 773, 230 Cal.Rptr.3d 802. Cal. Lab. Code §§ 512, 512(a).

1 Cases that cite this headnote

[10] **Labor and Employment**Meal or break periods

The regulatory scheme that encompasses Labor Code section governing meal periods for professional and clerical employees is concerned with small amounts of time. Cal. Lab. Code § 512(a).

[11] **Labor and Employment**🔑Meal or break periods

In general, premium pay for an employee's missed or shortened meal periods serves the dual purposes of compensating employees for their injuries and incentivizing employers to comply with labor standards. Cal. Lab. Code § 226.7(c).

[12] **Labor and Employment**🔑Meal or break periods

Under Labor Code section providing for premium pay for an employee's missed meal period, employees receive one additional hour of pay whether employer provides a shortened meal period or no meal period at all. Cal. Lab. Code § 226.7(c).

2 Cases that cite this headnote

[13] **Labor and Employment**🔑Meal or break periods

Meal period provisions in Labor Code are not aimed at protecting or providing employees' wages; instead, they are primarily concerned with ensuring the health and welfare of employees by requiring that employers provide meal periods as mandated by the Industrial Welfare Commission (IWC). Cal. Lab. Code § 512(a).

[14] **Labor and Employment**🔑Strict or liberal construction

Because the laws authorizing the regulation of wages, hours, and working conditions are remedial in nature, courts construe these provisions liberally, with an eye to promoting the worker protections they were intended to provide.

[15] **Labor and Employment**🔑Meal or break periods
Labor and Employment🔑Waiver and estoppel
Labor and Employment🔑Working time

An employer's assertion that an employee waived a meal period, and thus is not entitled to compensation under Labor Code section providing for premium pay for missed or shortened meal periods, is not an element that employee must disprove as part of her case-in-chief on claim for wage loss; instead, the assertion is an affirmative defense, and burden is on employer, as party asserting waiver, to plead and prove it. Cal. Lab. Code § 512(a).

[16] **Judgment**🔑Labor and employment

If time records show missed, short, or delayed meal periods with no indication of proper compensation to employee, then a rebuttable presumption of meal period violations arises on motion for summary judgment; employer can rebut presumption by presenting evidence that employees were compensated for noncompliant meal periods or that they had in fact been provided compliant meal periods during which they chose to work. Cal. Lab. Code § 512(a).

[17] **Judgment**🔑Employees, cases involving

Genuine issue of material fact as to whether employer's rounding policy properly accounted for employees' meal periods that were shortened or delayed based on actual time punches precluded summary judgment on employees'

class action claim against employer for failure to pay premium wages for noncompliant meal periods. Cal. Lab. Code § 512(a).

Witkin Library Reference: 3 Witkin, Summary of Cal. Law (11th ed. 2017) Agency and Employment, § 390 [Meal and Rest or Recovery Periods; In General.]

****663 ***424** Fourth Appellate District, Division One, D071865, San Diego County Superior Court, 37-2014-00012605-CU-OE-CTL, Joel M. Pressman, Judge

Attorneys and Law Firms

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Opinion

Opinion of the Court by Liu, J.

******1 *61** Under California law, employers must generally provide employees with one 30-minute meal period that begins no later than the end of the fifth hour of work and another 30-minute meal period that begins no later than the end of the tenth hour of work. (Lab. Code, § 512, subd. (a); Industrial Welfare Commission (IWC) wage order No. 4-2001, § 11(A) (Wage Order No. 4).) If an employer does not provide an employee with a compliant meal period, then "the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal ... period is not provided." (Lab. Code, § 226.7, subd. (c); Wage Order No. 4, § 11(B).)

****664** In this case, we decide two questions of law relating to meal periods. First, we hold that employers cannot engage in the practice of rounding time punches — that is, adjusting the hours that an employee has actually worked to the nearest preset time increment — in the meal period context. The meal period provisions are designed to prevent even minor infringements on meal period requirements, and rounding is incompatible with that objective. Second, we hold that time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations, including at the summary judgment stage.

*****425** In light of our holdings, we reverse the Court of Appeal's judgment and remand the matter to permit either party to bring a new summary adjudication motion as to the meal period claim. (See *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, 23, 31–32, 50 Cal.Rptr.3d 597, 145 P.3d 472 (*TRB Investments*).) The remand offers the parties the opportunity to present evidence and arguments bearing on the question of liability in light of our analysis here.

***62 I.**

Defendant AMN Services, LLC (AMN) is a healthcare services and staffing company that recruits nurses for temporary contract assignments. Between September 2012 and February 2014, plaintiff Kennedy Donohue worked as a nurse recruiter at AMN's San Diego offices. In that role, Donohue did not have predetermined shifts but was expected to work eight hours per day. Per AMN's company policy, nurse recruiters were provided with 30-minute meal periods beginning no later than the end of the fifth hour of work. AMN's policy and trainings emphasized that the meal period was an "uninterrupted 30 minute" break, during which employees were "relieved of all job duties," were "free to leave the office site," and "control[led] the time." The policy also specified that supervisors should not "*impede* or *discourage* team members from taking their break."

Until April 2015, AMN used an electronic timekeeping system called Team Time to track its employees' compensable time. Employees used their work desktop computers to punch in and out of Team Time, including at the beginning of the day, at the beginning of lunch, at the end of lunch, and at the end of the day. Employees could also ask to manually adjust any inaccurate time punches — for example, if they forgot to clock out for lunch or if they worked when they were clocked out. For purposes of calculating work time and compensation, Team Time rounded the time punches to the nearest 10-minute increment. For example, if an employee clocked out for lunch at 11:02 a.m. and clocked in after lunch at 11:25 a.m., Team Time would have recorded the time punches as 11:00 a.m. and 11:30 a.m. Although the actual meal period was 23 minutes, Team Time would have recorded the meal period as 30 minutes. Similarly, if an employee clocked in for work at 6:59 a.m. and clocked out for lunch at 12:04 p.m., Team Time would have rounded the time punches to 7:00 a.m. and 12:00 p.m. In that case, the actual meal period started after five hours and five minutes of work, but Team Time would have recorded the meal period as starting after exactly five hours of work.

******2** AMN also used Team Time to manage potentially noncompliant meal periods. Before September 2012, whenever Team Time records showed a missed meal period, a meal period shorter than 30 minutes, or a meal period taken after five hours of work, AMN assumed there had been a meal period violation and paid the employee a premium wage. In September 2012, AMN added a feature to Team Time to comply with the meal period requirements articulated in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 139 Cal.Rptr.3d 315, 273 P.3d 513 (*Brinker*): When an employee recorded a missed, short, or delayed meal period, a dropdown menu would appear on Team Time. The dropdown menu prompted the employee to ***63** choose one of three options: (1) "I was provided an opportunity to take a 30 min break before the end of my 5th hour of work but chose not to"; (2) "I was provided an opportunity to take a 30 min break before the end of my 5th hour of work but *****426** chose to take a shorter/later break"; (3) "I was not provided an opportunity to take a 30 min ****665** break before the end of my 5th hour of work." The employee was required to choose an option before submitting his or her timesheet at the end of the pay period. If the employee chose the first or second option, then AMN assumed the employee was provided with a compliant meal period but voluntarily chose not to take one, and the employee did not receive premium pay for a meal period violation. If the employee chose the third option, then AMN assumed there had been a meal period violation and paid the employee a premium wage. In addition, at the end of each biweekly pay period, employees were required to sign a certification statement: "By submitting this timesheet, I am certifying that I have reviewed the time entries I made and confirm they are true and accurate. I am also confirming that ... I was provided the opportunity to take all meal breaks to which I was entitled, or, if not, I have reported on this timesheet that I was not provided the opportunity to take all such meal breaks ...."

AMN relied on the rounded time punches generated by Team Time to determine whether a meal period was short or delayed. Consider the example above, where a 23-minute lunch starting at 11:02 a.m. and ending at 11:25 a.m. was recorded on Team Time as a 30-minute lunch starting at 11:00 a.m. and ending at 11:30 a.m. Before September 2012, AMN would not have paid a premium wage for this lunch because it would have appeared as a full 30-minute meal period in the Team Time records. Similarly, after September 2012, the dropdown menu would not have been triggered for this lunch because it would have appeared as a compliant meal period on Team Time. In other words, Team Time would not have prompted the employee taking the lunch to indicate whether there had been a meal period violation.

In April 2014, Donohue filed a class action lawsuit against AMN. Donohue alleged various wage and hour violations, including the meal period claim at issue here. In October 2015, the trial court certified a class of all nonexempt California nurse recruiters who were employed by AMN between April 23, 2010 and April 26, 2015 with respect to the meal period claim. April 26, 2015 marks the end of the class period because on that date AMN switched to a timekeeping system that does not round time entries.

In November 2016, Donohue filed a motion for summary adjudication. As to the meal period claim, Donohue argued that AMN denied its employees compliant meal periods, improperly rounded time records for meal periods using Team Time, and failed to pay premium wages for noncompliant meal periods. To support the motion, Donohue submitted her testimony that AMN ***64** had an office culture that discouraged employees from taking full and timely lunches. Donohue also provided a declaration from an expert witness, a statistics professor. According to the expert, the use of Team Time resulted in the denial of premium wages for 40,110 short lunches and 6,651 delayed lunches during the class period, which totaled $802,077.08. The expert calculated the number of noncompliant lunches for which no premium wages were paid by comparing the rounded time records for meal

periods to the actual time records. For example, the expert would have counted a 23-minute lunch starting at 11:02 a.m. and ending at 11:25 a.m., recorded on Team Time as a 30-minute lunch starting at 11:00 a.m. and ending at 11:30 a.m., as an uncompensated short lunch.

AMN filed a cross-motion for summary judgment or, in the alternative, summary adjudication. As to the meal period claim, AMN contended that it did not have a *****427** uniform policy or practice of denying employees compliant meal periods. It also argued that Donohue did not plead in the operative complaint that AMN's rounding policy resulted in meal period violations. AMN submitted the declarations of 40 class members in support of its motion. Thirty of the nurse recruiters stated that they "always" or "usually" took lunches that were at least 30 minutes long. Other recruiters said that they only "sometimes" took 30-minute lunches but that it was their choice to forgo a full lunch on the other days. No declarant stated that a supervisor had tried to discourage him or her from taking a full or timely meal period.

******3** AMN also submitted a declaration from its expert witness, a labor economist and statistician. The expert explained that because ****666** AMN's rounding policy sometimes rounded meal period times up and sometimes down, AMN sometimes paid employees for a few extra minutes they did not work and sometimes did not pay them for a few minutes that they did work. Unlike Donohue's expert, AMN's expert did not account for meal period premium wages that would have been paid based on actual meal period times. According to the expert, AMN's practice of rounding meal period times evened out over time and actually resulted in the overcompensation of the class by 85 work hours. The expert also stated that based on the nurse recruiters' actual time punches, the average length of a meal period during the class period was 45.6 minutes.

The trial court granted AMN's motion for summary judgment and denied Donohue's motion for summary adjudication, including on the meal period claim. The court concluded there was insufficient evidence that AMN had a policy or practice of denying employees compliant meal periods. According to the court, AMN's meal period policy complied with California law, and its practice of rounding the time punches for meal periods was proper. The court said that even if no case has ever applied rounding to meal periods, "the ***65** rationale behind allowing rounding for work time would be the same for meal break time." According to the court, AMN's rounding policy fairly compensated employees over time, and there was insufficient evidence that supervisors at AMN prevented employees from taking compliant meal periods.

The Court of Appeal affirmed and generally agreed with the trial court's reasoning as to the meal period claim. The court decided that it was proper for AMN to round time punches for meal periods. (*Donohue v. AMN Services, LLC* (2018) 29 Cal.App.5th 1068, 1086–1092, 241 Cal.Rptr.3d 111 (*Donohue*).) According to the court, the plain text of Labor Code section 512 and Wage Order No. 4, which govern meal periods, does not prohibit rounding. (*Donohue*, at p. 1087, 241 Cal.Rptr.3d 111.) The court explained that rounding " 'is a practical method for calculating worktime and can be a neutral calculation tool for providing full payment to employees' " and that no case law suggests rounding does not apply to meal periods. (*Id.* at p. 1090, 241 Cal.Rptr.3d 111.) The court rejected Donohue's argument that rounding meal period time punches " 'would quickly eviscerate employee[s'] statutory right to full 30 minute meal periods.' " (*Ibid.*)

The court also concluded that AMN's rounding policy was neutral on its face and as applied, as required by California law. (*Donohue, supra*, 29 Cal.App.5th at pp. 1083–1086, 241 Cal.Rptr.3d 111.) The court agreed with AMN that the rounding policy fully compensated employees over time and actually resulted in the overcompensation of the class as a whole. (*Id.* at p. 1084, 241 Cal.Rptr.3d 111.) The court rejected *****428** Donohue's argument that the rounding policy did not properly pay employees premium wages for meal period violations. (*Id.* at p. 1090, 241 Cal.Rptr.3d 111.) According to the court, "the neutrality of a rounding policy does not depend on the frequency of penalties." (*Ibid.*)

In addition, the court rejected Donohue's argument that time records showing missing, short, or delayed meal periods give rise to a rebuttable presumption of meal period violations. (*Donohue, supra*, 29 Cal.App.5th at pp. 1087–1088, 241 Cal.Rptr.3d 111.) In the court's view, this rebuttable presumption applies only at the class certification stage, not at the summary judgment stage. (*Ibid.*) Finally, the court considered Donohue's testimony that AMN's office culture discouraged employees from taking full and timely lunches. (*Id.* at p. 1091, 241 Cal.Rptr.3d 111.) The court noted that Donohue never indicated a meal period violation on Team Time and always certified that her timesheet was accurate. (*Ibid.*) Thus, the court concluded, her testimony was insufficient to raise a triable issue of material fact as to the meal period claim.

******4** We granted review to address two questions of law relating to the meal period claim: whether an employer

may properly round time punches for meal periods, and whether time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations.

****667 *66 II.**

We first examine whether the practice of rounding time punches, which was developed for the purpose of calculating wages, can be properly applied to the meal period context. To be clear, the question is not whether AMN's rounding policy resulted in the proper compensation of employees for all time worked. Donohue does not dispute that the rounding policy overcompensated the class by 85 work hours, as AMN's expert concluded, when considering only compensation for time worked. Instead, the issue is whether AMN's rounding policy resulted in the proper payment of premium wages for meal period violations. AMN's claim that it overpaid the class based on time worked does not address this issue.

AMN, for its part, does not argue that any meal periods rounded to 30 minutes are per se lawful. Rather, it argues that the undisputed evidence shows that no meal period violations occurred for which premium wages were not paid. AMN asserts that this evidence, regardless of its use of rounding, supports judgment on the meal period claim. But because AMN asserted that rounding applies to meal periods as an affirmative defense and because the trial court certified a meal period class on the basis of this question, the issue of rounding is properly before us.

[1] [2]The issue arises solely under state law because the federal Fair Labor Standards Act of 1938 (29 U.S.C. § 201 et seq.) does not require employers to provide meal periods to employees. (*Mitchell v. JCG Industries, Inc.* (7th Cir. 2014) 745 F.3d 837, 840.) In California, "wage and hour claims are today governed by two complementary and occasionally overlapping sources of authority: the provisions of the Labor Code, enacted by the Legislature, and a series of 18 wage orders, adopted by the IWC." (*Brinker, supra*, 53 Cal.4th at p. 1026, 139 Cal.Rptr.3d 315, 273 P.3d 513.) "The IWC is the state agency empowered to promulgate wage orders, which are legislative regulations specifying minimum requirements with respect to wages, hours, and working conditions." (*Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 262, fn. 5, 211 Cal.Rptr.3d 634, 385 P.3d 823 (*ABM Security*).)

*****429** [3] [4]"The IWC's wage orders are to be accorded the same dignity as statutes. They are 'presumptively valid' legislative regulations of the employment relationship [citation], regulations that must be given 'independent effect' separate and apart from any statutory enactments [citation]." (*Brinker, supra*, 53 Cal.4th at p. 1027, 139 Cal.Rptr.3d 315, 273 P.3d 513.) "When construing the Labor Code and wage orders, we adopt the construction that best gives effect to the purpose of the Legislature and the IWC. [Citations.] Time and again, we have characterized that purpose as the protection of employees—particularly given the extent of legislative concern about working conditions, wages, and hours when the ***67** Legislature enacted key portions of the Labor Code. [Citations.] In furtherance of that purpose, we liberally construe the Labor Code and wage orders to favor the protection of employees." (*ABM Security, supra*, 2 Cal.5th at p. 262, 211 Cal.Rptr.3d 634, 385 P.3d 823.)

Wage Order No. 4, which applies to professional, clerical, mechanical, and similar occupations, applies to the certified class of AMN nurse recruiters here. (Wage Order No. 4, § 2(O).) This wage order and the relevant statute provide: "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes .... Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked." (Wage Order No. 4, § 11(A); accord, Lab. Code, § 512, subd. (a) ["An employer shall not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes .... An employer shall not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes ...."].)

******5** [5] [6]This means that employers must generally provide "a first meal period [of at least 30 minutes] no later than the end of an employee's fifth hour of work, and a second meal period [of at least 30 minutes] no later ****668** than the end of an employee's 10th hour of work." (*Brinker, supra*, 53 Cal.4th at p. 1041, 139 Cal.Rptr.3d 315, 273 P.3d 513.) In *Brinker*, we clarified that an "employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. ... [¶] ... [T]he employer is not obligated to police meal breaks and ensure no work thereafter is performed." (*Id.* at p. 1040, 139 Cal.Rptr.3d 315, 273 P.3d 513.) There is no meal period violation if an employee voluntarily chooses to work during a meal period after the employer has relieved the employee of all duty. (*Id.* at pp. 1040–1041, 139

Cal.Rptr.3d 315, 273 P.3d 513.) The voluntariness of an employee's choice matters because "an employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks." (*Id.* at p. 1040, 139 Cal.Rptr.3d 315, 273 P.3d 513.)

[7] [8]If an employer does not provide an employee with a compliant meal period, then the employer must provide the employee with premium pay for the violation. Specifically, the relevant wage order and statute provide: "If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided." (Wage Order No. 4, § 11(B); accord, *****430** Lab. Code, § 226.7, subd. (c) ["If an employer fails to provide an employee a meal ... period in accordance with a state law, including, but not ***68** limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission ... the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal ... period is not provided."].) Under this provision, even a minor infringement of the meal period triggers the premium pay obligation. In addition to providing premium pay, the employer must compensate the employee for any time worked during the meal period if "it 'knew or reasonably should have known that the worker was working through the authorized meal period.' " (*Brinker*, *supra*, 53 Cal.4th at p. 1040, fn. 19, 139 Cal.Rptr.3d 315, 273 P.3d 513.) To avoid liability, an employer must provide its employees with full and timely meal periods whenever those meal periods are required.

[9]The practice of rounding time punches for meal periods is inconsistent with the purpose of the Labor Code provisions and the IWC wage order. The text of Labor Code section 512 and Wage Order No. 4 sets precise time requirements for meal periods. Each meal period must be "not less than 30 minutes," and no employee shall work "more than five hours per day" or "more than 10 hours per day" without being provided with a meal period. (Lab. Code, § 512, subd. (a); accord, Wage Order No. 4, § 11(A) ["No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes ...."]; see *Brinker*, *supra*, 53 Cal.4th at p. 1041, 139 Cal.Rptr.3d 315, 273 P.3d 513.) These provisions speak directly to the calculation of time for meal period purposes.

[10]The precision of the time requirements set out in Labor Code section 512 and Wage Order No. 4 — "not less than 30 minutes" and "five hours per day" or "ten hours per day" — is at odds with the imprecise calculations that rounding involves. The regulatory scheme that encompasses the meal period provisions is concerned with small amounts of time. (*Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 844, 235 Cal.Rptr.3d 820, 421 P.3d 1114 (*Troester*).) For example, we have "requir[ed] strict adherence to" the Labor Code's requirement that employees receive two daily 10-minute rest periods and "scrupulously guarded against encroachments on" these periods. (*Ibid.*) The same vigilance is warranted here. Given the relatively short length of a 30-minute meal period, the potential incursion that might result from rounding is significant. (See *Kaanaana v. Barrett Business Services, Inc.* (2018) 29 Cal.App.5th 778, 801, 240 Cal.Rptr.3d 636 (*Kaanaana*) [" 'On a 30-minute break, time is scarce' " and " '[w]hen time is scarce, minutes count.' "], review granted Feb. 27, 2019, S253458.)

******6 **669** Consider, for example, an employee who is provided with a 21-minute lunch from 12:04 p.m. to 12:25 p.m. Under AMN's timekeeping system, which rounded time punches to the nearest 10-minute increment, the lunch would have been recorded as a 30-minute lunch from 12:00 p.m. to 12:30 ***69** p.m. In that scenario, an employee would have lost nine of the 30 minutes — or almost a third of the time — to which he or she was entitled, and Team Time would not have flagged the lunch as a meal period violation. Small rounding errors can amount to a significant infringement on an employee's right to a 30-minute meal period.

[11] [12]The premium pay structure under Labor Code section 226.7 and Wage Order No. 4 confirms that rounding is *****431** inappropriate in the meal period context. In general, premium pay serves the dual purposes of compensating employees for their injuries and incentivizing employers to comply with labor standards. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1110, 56 Cal.Rptr.3d 880, 155 P.3d 284 (*Murphy*).) In the meal period context, an employee receives the full amount of premium pay — one additional hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided — regardless of the extent of the violation. (Lab. Code, § 226.7, subd. (c); Wage Order No. 4, § 11(B).) In other words, whether an employer provides a shortened meal period or no meal period at all, the employee receives one additional hour of pay.

The premise of this approach is that even relatively minor infringements on meal periods can cause substantial burdens to the employee. Forcing employees to work

through their meal periods not only causes economic burdens in the form of extra work but also noneconomic burdens on the employees' health, safety, and well-being. (*Murphy, supra*, 40 Cal.4th at p. 1113, 56 Cal.Rptr.3d 880, 155 P.3d 284.) Employees denied compliant meal periods "face greater risk of work-related accidents and increased stress" and lose valuable time "free from employer control that is often needed to be able to accomplish important personal tasks." (*Ibid.*) Shortening or delaying a meal period by even a few minutes may exacerbate risks associated with stress or fatigue, especially for workers who are on their feet most of the day or who perform manual labor or repetitive tasks. Further, within a 30-minute timeframe, a few minutes can make a significant difference when it comes to eating an unhurried meal, scheduling a doctor's appointment, giving instructions to a babysitter, refreshing oneself with a cup of coffee, or simply resting before going back to work.

By requiring premium pay for any violation, no matter how minor, the structure makes clear that employers must provide compliant meal periods whenever such a period is triggered. This corroborates the conclusion that rounding is improper here. A premium pay scheme that discourages employers from infringing on meal periods by even a few minutes cannot be reconciled with a policy that counts those minutes as negligible rounding errors.

***70** Legislative history supports this understanding. "Meal and rest periods have long been viewed as part of the remedial worker protection framework. ... Concerned with the health and welfare of employees, the IWC issued wage orders mandating the provision of meal and rest periods in 1916 and 1932, respectively. ... The wage orders required meal and rest periods after specified hours of work. The only remedy available to employees, however, was injunctive relief aimed at preventing future abuse. In 2000, due to a lack of employer compliance, the IWC added a pay remedy to the wage orders, providing that employers who fail to provide a meal or rest period 'shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day' that the period is not provided." (*Murphy, supra*, 40 Cal.4th at pp. 1105–1106, 56 Cal.Rptr.3d 880, 155 P.3d 284, citations omitted.) Around the same time, the Legislature "wrote into statute various guarantees that previously had been left to the IWC, including meal break guarantees." (*Brinker, supra*, 53 Cal.4th at pp. 1037–1038, 139 Cal.Rptr.3d 315, 273 P.3d 513.)

******7** [13]The legislative history indicates that the meal period provisions are not "aimed at protecting or providing employees' wages. ****670** Instead, [they are] primarily concerned with ensuring the health and *****432** welfare of employees by requiring that employers provide meal ... periods as mandated by the IWC." (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1255, 140 Cal.Rptr.3d 173, 274 P.3d 1160.) As Donohue argues, the health and safety concerns underlying these provisions distinguish the meal period context from the wage calculation context, in which the practice of rounding time punches was developed. For purposes of calculating wages, counting slightly fewer minutes one day can be made up by counting a few more minutes another day. But the same is not true for meal periods. Under the applicable statute and wage order, a shorter or delayed meal period one day cannot be offset by a longer or earlier meal period another day. The premium pay scheme reflects the Legislature's and the IWC's determination that infringements on meal period requirements threaten employees' health and safety whenever they occur (*Murphy, supra*, 40 Cal.4th at p. 1113, 56 Cal.Rptr.3d 880, 155 P.3d 284; *Kaanaana, supra*, 29 Cal.App.5th at p. 801, 240 Cal.Rptr.3d 636, rev.gr.), and the scheme was enacted to address inadequate employer compliance (*Murphy*, at pp. 1105–1106, 56 Cal.Rptr.3d 880, 155 P.3d 284). Rounding policies are at odds with the requirement that employers pay the full premium wage for meal period violations. When the actual times that an employee must work during a day reveal a meal period violation, the violation cannot be papered over by rounding.

[14]This understanding also comports with the remedial purpose of the Labor Code and wage orders. "Because the laws authorizing the regulation of wages, hours, and working conditions are remedial in nature, courts construe these provisions liberally, with an eye to promoting the worker protections they were intended to provide." (*Prachasaisoradej v. Ralphs Grocery Co., Inc.* (2007) 42 Cal.4th 217, 227, 64 Cal.Rptr.3d 407, 165 P.3d 133.) As we have ***71** explained, rounding is incompatible with promoting strict adherence to the safeguards for workers' health, safety, and well-being that meal periods are intended to provide.

The Court of Appeal here relied on *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 148 Cal.Rptr.3d 690 (*See's Candy I*). *See's Candy I* concluded that employers may use rounded time punches to calculate regular and overtime wages if the rounding policy is neutral on its face and as applied. (*Id.* at p. 907, 148 Cal.Rptr.3d 690.) That court consulted a federal regulation under the Fair Labor Standards Act of 1938 that addresses rounding practices. (29 C.F.R. § 785.48(b) (2020).) The regulation, first promulgated in 1961, states: "It has been found that in some industries, particularly

where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." (*Ibid.*)

Federal courts had interpreted the regulation to permit rounding policies as long as they "on average, favor[ ] neither overpayment nor underpayment" and do not " 'consistently result[ ] in a failure to pay employees for time worked.' " (*Alonzo v. Maximus, Inc.* (C.D.Cal. 2011) 832 F.Supp.2d 1122, 1126.) Conversely, rounding policies violate the regulation if they *****433** "systematically undercompensate employees" (*id.* at pp. 1126–1127), such as when the rounding policy "encompasses only rounding down" (*Eyles v. Uline, Inc.* (N.D.Tex., Sept. 4, 2009, No. 4:08-CV-577-A) 2009 WL 2868447, p. *4).

The *See's Candy I* court observed that the Division of Labor Standards Enforcement (DLSE), the agency that enforces California's labor laws, had adopted the federal regulation in its manual. (*See's Candy I, supra*, 210 Cal.App.4th at p. 902, 148 Cal.Rptr.3d 690; see *ibid.* [DLSE Manual is not binding but may be considered for its persuasive value].) The court then concluded it was appropriate to adopt the federal regulatory ****671** standard: "Assuming a rounding-over-time policy is neutral, both facially and as applied, the practice is proper under California law because its net effect is to permit employers to efficiently calculate hours worked without imposing any burden on employees." (*See's Candy I, supra*, 210 Cal.App.4th at p. 903, 148 Cal.Rptr.3d 690.) The court observed that employers across the country have long used rounding and it would be unreasonable to prevent California employers from doing the same. (*Ibid.*) The court held that an employer is entitled to use a rounding policy if it "is fair and neutral on its face and 'it is used in such a manner that it will not ***72** result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.' " (*Id.* at p. 907, 148 Cal.Rptr.3d 690.)

******8** The *See's Candy I* court believed this rounding standard is consistent with Labor Code section 204, subdivision (a), which provides: "All wages ... earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays." According to the court, the focus of section 204 is on the timing of wage payments, not the way those wages are calculated. (*See's Candy I, supra*, 210 Cal.App.4th at pp. 904–905, 148 Cal.Rptr.3d 690.) In addition, the court observed that the phrase "all wages" does not necessarily refer to an amount calculated on the basis of unrounded time punches. (*Id.* at p. 905, 148 Cal.Rptr.3d 690 ["Fundamentally, the question whether *all* wages have been paid is different from the issue of how an employer calculates the number of hours worked and thus *what wages are owed*. Section 204 does not address the measurement issue."].) Thus, the court concluded, the phrase "all wages" in section 204 does not bar the practice of rounding time punches.

Further, *See's Candy I* held that rounding is consistent with Labor Code section 510, subdivision (a), which provides: "Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek ... shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee." The court said the provision "sets the multiplier for the rate at which '[a]ny' overtime work must be paid" and "has nothing to do with rounding or calculating time." (*See's Candy I, supra*, 210 Cal.App.4th at p. 905, 148 Cal.Rptr.3d 690.) The court also rejected the argument that rounding can never be neutral because California law requires the compensation rate to increase after eight hours of work a day. (*Id.* at pp. 905–906, 148 Cal.Rptr.3d 690.) Ultimately, the court said, whether California's overtime rules render a rounding policy unfair is a factual, not legal, issue. (*Id.* at p. 906, 148 Cal.Rptr.3d 690.)

Since *See's Candy I* was decided, state and federal courts have applied its standard to determine whether various rounding policies are valid under California law. (See, e.g., *****434** *David v. Queen of Valley Medical Center* (2020) 51 Cal.App.5th 653, 664, 264 Cal.Rptr.3d 279; *AHMC Healthcare, Inc. v. Superior Court* (2018) 24 Cal.App.5th 1014, 1027–1028, 234 Cal.Rptr.3d 804; *Utne v. Home Depot U.S.A., Inc.* (2017) (N.D.Cal. Dec. 4, 2017, No. 16-cv-01854-RS), 2017 WL 5991863, pp. *2–*3.) This court has never decided the validity of the rounding standard articulated in *See's Candy I*, and we are not asked to do so here.

But even assuming the validity of *See's Candy I*, a rounding policy in the meal period context does not comport with its neutrality standard. As noted, failing to provide employees with full and timely meal periods burdens their ***73** health, safety, and well-being by aggravating risks associated with stress or fatigue. By

deeming delayed or shortened meal breaks as "timely" and "complete" when they are not, a rounding policy erodes the health and safety protections that the meal period requirements are intended to achieve. (See *Murphy*, *supra*, 40 Cal.4th at p. 1113, 56 Cal.Rptr.3d 880, 155 P.3d 284.) Moreover, in articulating its standard, *See's Candy I* reasoned that the rounding policy " 'averages out' " and "employees are fully compensated 'over a period of time.' " (*See's Candy I*, *supra*, 210 Cal.App.4th at p. 901, 148 Cal.Rptr.3d 690.) In the meal period context, however, there is an asymmetry between the treatment of rounded-up minutes (i.e., time not worked that is compensated ****672** with regular pay) and the treatment of rounded-down minutes (i.e., time worked that may trigger premium pay).

As noted, under AMN's policy, a 21-minute lunch from 12:04 p.m. to 12:25 p.m. would be recorded as a 30-minute lunch from 12:00 p.m. to 12:30 p.m. Meanwhile, a 38-minute lunch from 11:55 a.m. to 12:33 p.m. would be recorded as a 30-minute lunch from 12:00 p.m. to 12:30 p.m. This means that the rounding policy, while never triggering premium pay for compliant meal periods, does not always trigger premium pay for noncompliant meal periods. The same concern applies to the timing of meal periods; the policy never triggers premium pay for early or on-time meal periods, but it does not always trigger premium pay for meal periods that are improperly delayed.

******9** AMN argues that its rounding policy was neutral over time because it sometimes paid employees for a few extra minutes that they did not work and sometimes did not pay them for a few minutes that they did work. AMN asserts that the policy slightly overcompensated the class as a whole. But this argument does not properly account for the underpayment of premium pay. It is true that in the 38-minute lunch example above, the rounding policy would count the extra eight minutes of lunch as work time and would trigger regular pay for those eight minutes. But in the 21-minute lunch example, the rounding policy does not trigger the "one additional hour of [regular] pay" (Lab. Code, § 226.7, subd. (c); Wage Order No. 4, § 11(B)) that the employee is owed. In this respect, the rounding policy is not neutral. It never provides employees with premium pay when such pay is not owed, but it does not always trigger premium pay when such pay is owed.

We recognize that rounding was developed as a means of "efficiently calculat[ing] hours worked" and wages owed to employees (*See's Candy I*, *supra*, 210 Cal.App.4th at p. 903, 148 Cal.Rptr.3d 690) and is useful "in some industries, particularly where time clocks are used" (29 C.F.R. § 785.48(b) (2020)). But technological advances may help employers to track time more precisely, and "employers are in a better position than employees to devise alternatives." (*Troester*, *supra*, 5 Cal.5th at p. 848, 235 Cal.Rptr.3d 820, 421 P.3d 1114.) *****435** In this case, AMN was already using an electronic timekeeping system, Team Time, that recorded employees' unrounded time punches. The system could have kept track of potentially ***74** noncompliant meal periods using those unrounded time punches instead of rounding the punches to the nearest 10-minute increment. As Donohue observes, Team Time actually had to take the extra step of converting the unrounded time punches to rounded ones; it is not clear what efficiencies were gained from this practice. AMN eventually switched to a new timekeeping system that does not round time punches after this lawsuit was filed. As technology continues to evolve, the practical advantages of rounding policies may diminish further.

III.

We now consider whether time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations at summary judgment. We hold they do.

This rebuttable presumption was first discussed in Justice Werdegar's concurrence in *Brinker*: "Employers covered by Industrial Welfare Commission (IWC) wage order No. 5-2001 (Cal. Code Regs., tit. 8, § 11050) have an obligation both to relieve their employees for at least one meal period for shifts over five hours (*id.*, subd. 11(A)) *and* to record having done so (*id.*, subd. 7(A)(3) ['Meal periods ... shall also be recorded.']). If an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided. This is consistent with the policy underlying the meal period recording requirement, which was inserted in the IWC's various wage orders to permit enforcement. (See, e.g., IWC board for wage order No. 7-63 meeting mins. (Dec. 14–15, 1966) pp. 4–5 [rejecting proposal to eliminate the meal period recording requirement because 'without the recording of all in-and-out time, including meal periods, the enforcement staff would be unable to adequately investigate and enforce' a wage order's meal period provisions].) An ****673** employer's assertion that it did relieve the employee of duty, but the employee waived the opportunity to have a work-free break, is not an element that a plaintiff must disprove as part of the plaintiff's case-in-chief. Rather, ... the assertion is an affirmative defense, and thus the burden is on the

employer, as the party asserting waiver, to plead and prove it." (*Brinker, supra*, 53 Cal.4th at pp. 1052–1053, 139 Cal.Rptr.3d 315, 273 P.3d 513 (conc. opn. of Werdegar, J.).)

Justice Werdegar added: "As the Division of Labor Standards Enforcement (DLSE) has explained, even under the less restrictive wage order applicable to agricultural employees, if 'a meal period is not taken by the employee, the burden is on the employer to show that the agricultural employee had been advised of his or her legal right to take a meal period and has knowingly and voluntarily decided not to take the meal period. Again, we emphasize, the burden is on the employer.' (Dept. Industrial Relations, DLSE Opn. Letter ***75** No. 2003.08.13 (Aug. 13, 2003) p. 2 [interpreting IWC wage order No. 14 (Cal. Code Regs., tit. 8, § 11140)].) To place the burden elsewhere would offer an employer an incentive to avoid its recording duty and a potential windfall from the failure to record meal periods. Both the United States Supreme Court and the courts of this state have rejected such an approach. (See *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 686–688, 66 S.Ct. 1187, 90 L.Ed. 1515 [where an employer is subject to a recordkeeping requirement, the burden shifts to that employer to rebut *****436** employee proof of monies owed once a prima facie case has been made]; *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1536, fn. 11, 87 Cal.Rptr.3d 518 [refusing to allow an employer to use any shortcomings in its records to resist employee wage claims]; *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 961, 35 Cal.Rptr.3d 243 [' "[W]here the employer has failed to keep records required by statute, the consequences for such failure should fall on the employer, not the employee." '].)" (*Brinker, supra*, 53 Cal.4th at p. 1053, fn. 1, 139 Cal.Rptr.3d 315, 273 P.3d 513 (conc. opn. of Werdegar, J.).)

******10** The term "waiver," as Justice Werdegar used it, should not be confused with the "waived" meal period that Labor Code section 512, subdivision (a), authorizes only under limited circumstances. We understand an employee's "waiver" in this context in the colloquial sense that the employee chose to work when he or she was not required. We do not suggest that employees have the unilateral option — without regard for the waiver requirements in Labor Code section 512, subdivision (a) — to waive their employer's obligation to relieve them from duty and from employer control for a 30-minute meal period within the required timeframe. (See *Brinker, supra*, 53 Cal.4th at pp. 1039–1040 & fn. 19, 139 Cal.Rptr.3d 315, 273 P.3d 513.)

After *Brinker*, various Courts of Appeal have cited approvingly to Justice Werdegar's analysis of the rebuttable presumption issue. (See, e.g., *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 527, 241 Cal.Rptr.3d 647; *ABM Industries Overtime Cases* (2017) 19 Cal.App.5th 277, 311, 227 Cal.Rptr.3d 445; *Lubin v. Wackenhut Corp.* (2016) 5 Cal.App.5th 926, 951, 210 Cal.Rptr.3d 215; *Safeway, Inc. v. Superior Court* (2015) 238 Cal.App.4th 1138, 1159–1160, 190 Cal.Rptr.3d 131; *Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129, 1144–1145, 150 Cal.Rptr.3d 268.) We now adopt her discussion of the rebuttable presumption in full.

[15]As Justice Werdegar explained, an employer's assertion that an employee waived a meal period "is not an element that a plaintiff must disprove as part of the plaintiff's case-in-chief." (*Brinker, supra*, 53 Cal.4th at p. 1053, 139 Cal.Rptr.3d 315, 273 P.3d 513 (conc. opn. of Werdegar, J.).) Instead, the assertion is "an affirmative defense," and "the burden is on the employer, as the party asserting waiver, to plead and ***76** prove it." (*Ibid.*) The "plaintiff's case-in-chief" and the "affirmative defense" refer to the merits of the case. Contrary to AMN's argument, the presumption goes to the question of liability and applies at the summary judgment stage, not just at the class certification stage.

Moreover, AMN is incorrect that the presumption applies only to records showing ****674** missed meal periods; the presumption applies to records showing short and delayed meal periods as well. Providing employees with short or delayed meal periods is just as much a violation of the meal period provisions as failing to provide employees with a meal period at all.

The rationale underlying the rebuttable presumption supports these conclusions. The presumption derives from an employer's duty to maintain accurate records of meal periods. (*Brinker, supra*, 53 Cal.4th at p. 1053, 139 Cal.Rptr.3d 315, 273 P.3d 513 (conc. opn. of Werdegar, J.); Wage Order No. 4, § 7(A)(3) ["Every employer shall keep accurate information with respect to each employee .... [¶] ... [¶] ... Meal periods ... shall also be recorded."].) It is important that employers keep accurate records so that enforcement agencies can " 'adequately investigate and enforce' a wage order's meal period provisions." *****437** (*Brinker*, at p. 1053, 139 Cal.Rptr.3d 315, 273 P.3d 513 (conc. opn. of Werdegar, J.).) Because time records are required to be accurate, it makes sense to apply a rebuttable presumption of liability when records show noncompliant meal periods. If the records are accurate, then the records reflect an employer's true liability; applying the presumption would not adversely

affect an employer that has complied with meal period requirements and has maintained accurate records. If the records are incomplete or inaccurate — for example, the records do not clearly indicate whether the employee chose to work during meal periods despite bona fide relief from duty — then the employer can offer evidence to rebut the presumption. It is appropriate to place the burden on the employer to plead and prove, as an affirmative defense, that it genuinely relieved employees from duty during meal periods. (*Ibid.*) "To place the burden elsewhere would offer an employer an incentive to avoid its recording duty and a potential windfall from the failure to record meal periods." (*Id.* at p. 1053, fn. 1, 139 Cal.Rptr.3d 315, 273 P.3d 513.) " ' "[W]here the employer has failed to keep records required by statute, the consequences for such failure should fall on the employer, not the employee." ' " (*Ibid.*)

******11** In addition, we reject AMN's argument that applying the presumption at the summary judgment stage would eviscerate the rule that employers need not police meal periods. In *Brinker*, we said that an "employer satisfies [meal period] obligation[s] if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. ... [¶] ... [T]he employer is not obligated to police meal breaks and ensure no work thereafter is performed. Bona fide relief from duty ***77** and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay ...." (*Brinker, supra*, 53 Cal.4th at pp. 1040–1041, 139 Cal.Rptr.3d 315, 273 P.3d 513.) In AMN's view, applying the presumption at the summary judgment stage means that time records showing missed, short, or delayed meal periods create "automatic liability" for employers. According to AMN, this would leave employers with two options for avoiding liability: Employers could monitor every meal period and ensure no work is performed, or employers could eliminate flexible meal period policies and punish employees for choosing to work during scheduled meal periods. AMN says both options are inconsistent with *Brinker*, which does not require employers to police meal periods and allows employees to voluntarily work during meal periods.

[16]AMN misunderstands how the rebuttable presumption operates at the summary judgment stage. Applying the presumption does not mean that time records showing missed, short, or delayed meal periods result in "automatic liability" for employers. If time records show missed, short, or delayed meal periods with no indication of proper compensation, then a rebuttable presumption arises. Employers can rebut the presumption by presenting evidence that employees were compensated for noncompliant meal periods or that they had in fact been provided compliant meal periods during which they chose to work. "Representative testimony, surveys, and statistical analysis," ****675** along with other types of evidence, "are available as tools to render manageable determinations of the extent of liability." (*Brinker, supra*, 53 Cal.4th at p. 1054, 139 Cal.Rptr.3d 315, 273 P.3d 513 (conc. opn. of Werdegar, J.).) *****438** Altogether, this evidence presented at summary judgment may reveal that there are no triable issues of material fact. The rebuttable presumption does not require employers to police meal periods. Instead, it requires employers to give employees a mechanism for recording their meal periods and to ensure that employees use the mechanism properly.

The court in *Silva v. See's Candy Shops, Inc.* (2016) 7 Cal.App.5th 235, 253–254, 212 Cal.Rptr.3d 514 (*See's Candy II*) concluded that the rebuttable presumption is inapplicable when reviewing a motion for summary judgment as opposed to a motion for class certification. Similarly, the court in *Serrano v. Aerotek, Inc.* (2018) 21 Cal.App.5th 773, 230 Cal.Rptr.3d 802 "specifically reject[ed] [the plaintiff's] contention that 'time records show[ing] late and missed meal periods creat[ed] a presumption of violations,' " even though that plaintiff's time records had shown "that on several days on which she worked more than six hours, she took her meal breaks more than five hours after beginning work or, in a couple of instances, did not take a meal break at all." (*Id.* at pp. 781, 778, 230 Cal.Rptr.3d 802.) We disapprove *Silva v. See's Candy Shops, Inc.*, *supra*, 7 Cal.App.5th 235, 212 Cal.Rptr.3d 514, and *Serrano v. Aerotek, Inc.*, *supra*, 21 Cal.App.5th 773, 230 Cal.Rptr.3d 802, to the extent they are inconsistent with this opinion.

***78** We reiterate the rules set forth in *Brinker*: An employer is liable only if it does not provide an employee with the opportunity to take a compliant meal period. The employer is not liable if the employee chooses to take a short or delayed meal period or no meal period at all. The employer is not required to police meal periods to make sure no work is performed. Instead, the employer's duty is to ensure that it provides the employee with bona fide relief from duty and that this is accurately reflected in the employer's time records. Otherwise, the employer must pay the employee premium wages for any noncompliant meal period. (See *Brinker, supra*, 53 Cal.4th at pp. 1040–1041, 139 Cal.Rptr.3d 315, 273 P.3d 513.) If time records show noncompliant meal periods, then a rebuttable presumption of liability arises. This

presumption applies at the summary judgment stage, and the employer may rebut the presumption with evidence of bona fide relief from duty or proper compensation. Employers may use a timekeeping system like Team Time to track meal period violations as long as the system does not round time punches. Team Time included a dropdown menu for employees to indicate whether they were provided a compliant meal period but chose to work, and the system triggered premium pay for any missed, short, or delayed meal periods due to the employer's noncompliance. Thus, Team Time would have ensured accurate tracking of meal period violations if it had simply omitted rounding.

IV.

******12** We now apply our holdings to the facts of this case. We conclude that AMN improperly used rounded time punches to track potentially noncompliant meal periods. Before September 2012, when Team Time records showed a missed meal period or a meal period that was shorter than 30 minutes or taken after five hours of work, AMN assumed a meal period violation and paid the employee a premium wage. This system may have resulted in some overcompensation because AMN gave employees premium pay regardless of whether they voluntarily chose to work during an off-duty meal period. But this system did not properly account for meal periods that were short or delayed based on actual time *****439** punches but did not appear as short or delayed under the rounding policy. AMN would be liable for premium pay for any instances in which employees did not voluntarily choose to shorten or delay those meal periods.

After September 2012, when an employee recorded a missed, short, or delayed meal period, a dropdown menu appeared on Team Time. The dropdown menu prompted the employee to choose one of three options: (1) "I was provided an opportunity to take a 30 min break before the end of my 5th hour of ****676** work but chose not to"; (2) "I was provided an opportunity to take a 30 min ***79** break before the end of my 5th hour of work but chose to take a shorter/later break"; (3) "I was not provided an opportunity to take a 30 min break before the end of my 5th hour of work." This system also did not properly account for meal periods that were short or delayed based on unrounded as opposed to rounded time punches. The dropdown menu did not appear for such meal periods. If any of those meal periods were not voluntarily shortened or delayed, then AMN would be liable for premium pay.

[17]The Court of Appeal reached the opposite conclusion as to the rounding policy before and after September 2012 and ruled in favor of AMN. We reverse the Court of Appeal's judgment as to the meal period claim and remand with directions to remand the matter to the trial court to permit either party to file a new summary adjudication motion as to the meal period claim. (See *TRB Investments, supra*, 40 Cal.4th at pp. 23, 31–32, 50 Cal.Rptr.3d 597, 145 P.3d 472.) Because the parties did not have the benefit of this decision when litigating the defendant's summary judgment motion and the plaintiff's summary adjudication motion, they should now be afforded another opportunity to present relevant evidence concerning AMN's compliance with *Brinker*. As to the meal periods that are short or delayed based on unrounded time punches and for which no premium wages were paid, did the employees voluntarily choose to take short or delayed meal periods? On remand, the parties will have the opportunity to present evidence bearing on this question.

We provide some guidance on how the rebuttable presumption should be applied on remand in light of the usual summary adjudication standards. According to Donohue's expert witness, AMN's time records showed 40,110 short meal periods and 6,651 delayed meal periods for which premium wages were not paid; these meal periods did not show up as short or delayed in AMN's timekeeping system because of rounding. The introduction of these time records by either party would trigger the rebuttable presumption. If AMN renews its motion for summary adjudication, it must satisfy the initial burden of production and make a prima facie showing that "one or more elements of the cause of action ... cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) To satisfy this burden, AMN could try to establish the defense that it genuinely relieved employees from duty during meal periods. Specifically, to rebut the presumption of noncompliance arising from the time records, AMN would need to provide evidence that employees voluntarily chose to work during off-duty meal periods that appear in time records to be short or delayed based on unrounded time punches. If AMN satisfies this burden, then the burden of production shifts to Donohue "to show that a triable issue of one or more material facts exists as to the cause of action or a defense." (*Ibid.*) But the ultimate burden of persuasion remains with the defendant to show that no genuine *****440** issue of material fact exists and that it is entitled to judgment as a matter of law.

******13 *80** Conversely, when a plaintiff moves for summary adjudication, the plaintiff meets "his or her burden of showing that there is no defense to a cause of

action" if the plaintiff "prove[s] each element of the cause of action entitling the party to judgment on the cause of action." (Code Civ. Proc., § 437c, subd. (p)(1).) Donohue can satisfy that burden by using time records to raise a rebuttable presumption of meal period violations. Once the plaintiff meets that burden, the burden shifts to the defendant "to show that a triable issue of one or more material facts exists as to the cause of action or a defense." (*Ibid.*) But the plaintiff bears the ultimate burden of persuasion to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. The parties may present new evidence and arguments to address these issues on remand.

According to AMN, it has already established that the time records do not raise a rebuttable presumption of meal period violations. AMN argues that Donohue never used Team Time's dropdown menu to indicate that she was not provided with a compliant meal period, which suggests that she was never denied a compliant meal period. But because ****677** the dropdown menu was triggered by rounded time punches, this evidence does not encompass all meal periods that were short or delayed based on actual time punches. Thus, AMN cannot rely on this evidence to prove that there were no meal period violations.

AMN also contends that the biweekly certifications signed by Donohue and other class members show that there were no meal period violations. Those certifications stated: "I was provided the opportunity to take all meal breaks to which I was entitled, or, if not, I have reported on this timesheet that I was not provided the opportunity to take all such meal breaks." Donohue argues that AMN cannot rely on the certifications to prove that there were no meal period violations. Because the Team Time dropdown menu was triggered by rounded time punches, the system did not flag meal periods that were short or delayed based on unrounded as opposed to rounded time punches. As a result, Donohue contends, employees would not have known about the potentially noncompliant meal periods that Team Time did not flag unless they kept their own time records. According to Donohue, Team Time thus led to the systematic underreporting of noncompliant meal periods and caused the biweekly certifications to be inaccurate. In addition, Donohue argues that the significance of the certifications should be discounted because employees had to sign them to get paid.

We leave these issues for the parties and the trial court to address on remand. We note that if, as Donohue contends, employees would not have known about potentially noncompliant meal periods that Team Time did not flag unless they kept their own time records, then the certifications would be ***81** inaccurate and cannot be used to prove that there were no meal period violations. It is the employer's duty to maintain accurate time records; the law does not expect or require employees to keep their own time records to uncover potential meal period violations. (Wage Order No. 4, § 7(A)(3).)

CONCLUSION

We reverse the judgment of the Court of Appeal with directions to remand to the trial court for further proceedings consistent with this opinion.

We Concur:

CANTIL-SAKAUYE, C. J.

CORRIGAN, J.

CUÉLLAR, J.

KRUGER, J.

GROBAN, J.

HOFFSTADT, J.*

All Citations

11 Cal.5th 58, 481 P.3d 661, 275 Cal.Rptr.3d 422, 2021 WL 728871, 171 Lab.Cas. P 62,107, 2021 Wage & Hour Cas.2d (BNA) 66,417, 21 Cal. Daily Op. Serv. 1900, 2021 Daily Journal D.A.R. 1797

Footnotes

* Associate Justice of the Court of Appeal, Second Appellate District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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KeyCite Yellow Flag - Negative Treatment
Review Granted, see Cal. Rules of Court 8.1105 and 8.1115 Ferra v. Loews Hollywood Hotel, Cal., January 22, 2020

40 Cal.App.5th 1239
Review Granted
Court of Appeal, Second District, Division 3, California.

Jessica **FERRA** et al., Plaintiffs and Appellants,
v.
LOEWS HOLLYWOOD HOTEL, LLC, Defendant and Respondent.

B283218
|
Filed 10/9/2019

Synopsis
Background: Hourly employees brought putative class action against hotel for alleged underpayment of meal and rest period premiums and underpayments caused by "rounding" of hours worked. The Superior Court, Los Angeles County, No. BC586176, Kenneth R. Freeman, J., granted hotel's motions for summary adjudication and summary judgment on stipulated facts. Employees appealed.

Holdings: The Court of Appeal, Egerton, J., held that:

[1] as a matter of first impression, "regular rate of compensation" for purposes of meal, rest, and recovery periods was not equivalent to "regular rate of pay" for overtime purposes;

[2] rounding policy was facially neutral; and

[3] records showing underpayment of small majority of employees during time window were insufficient to demonstrate systematic underpayment.

Affirmed.

Edmon, P.J., filed opinion concurring in part and dissenting in part.

West Headnotes (18)

[1] **Labor and Employment**👉Damages and Amount of Recovery

The additional hour of pay required as a remedy for a violation of an employer's statutory obligation to provide meal, rest, or recovery periods is a "premium wage." Cal. Lab. Code § 226.7(c); Cal. Code Regs. tit. 8, § 11050 subds. (11)(B), 12(B).

[2] **Labor and Employment**👉Waiting, resting, or sleeping time
Labor and Employment👉Meal or break periods

The Labor Code provision applying to mandated meal, rest, or recovery periods provides the only compensation for an employer's failure to provide an employee with paid rest periods and meal periods. Cal. Lab. Code § 226.7.

[3] **Labor and Employment**👉Overtime pay in general

The extra amount a worker must be paid, on top of normal pay, because certain work qualifies as overtime is called a "premium." Cal. Lab. Code § 510.

[4] **Labor and Employment**👉Regular rate

In the overtime context, an employee's "regular rate of pay" is not the same as the employee's

"straight time rate," that is, his or her normal hourly wage rate: "regular rate of pay," which can change from pay period to pay period, includes adjustments to the straight time rate, reflecting, among other things, shift differentials and the per-hour value of any nonhourly compensation the employee has earned. Cal. Lab. Code § 510.

2 Cases that cite this headnote

[5] **Labor and Employment**Construction and operation

Wage orders are quasi-legislative regulations and are construed in accordance with the ordinary principles of statutory interpretation.

[6] **Labor and Employment**Construction and operation
StatutesSuperfluousness

Courts should avoid a construction of a wage order or statute that renders any part meaningless, inoperative, or superfluous.

1 Cases that cite this headnote

[7] **Labor and Employment**Purpose and construction in general

Statutes governing conditions of employment are to be construed broadly in favor of protecting employees.

[8] **Statutes**Extrinsic Aids to Construction

Only when a statute's language is ambiguous or susceptible of more than one reasonable interpretation may the court turn to extrinsic aids to assist in interpretation.

[9] **Statutes**Similarity or difference

Where different words or phrases are used in the same connection in different parts of a statute, it is presumed the legislature intended a different meaning.

2 Cases that cite this headnote

[10] **Labor and Employment**Waiting, resting, or sleeping time
Labor and Employment Meal or break periods

"Regular rate of compensation," as used in statute and wage order requiring an employer to pay one additional hour of pay at an employee's regular rate of compensation as remedy for failure to provide a mandatory meal, rest, or recovery period, was not equivalent to "regular rate of pay," as used in overtime statute, and, thus, did not include adjustments to normal hourly wage rate based on, for example, shift differentials and nonhourly compensation; legislature presumably intended different things when it used different terms in enacting meal, rest, and, recovery statute and overtime statute at the same time, and equating the two terms would elide different purposes between statutes, namely, compensating employees for loss of benefits versus paying for extra work. Cal. Lab. Code §§ 226.7, 510.

1 Cases that cite this headnote

[11] **Labor and Employment**Overtime pay in general

The central purpose of overtime pay is to pay

employees wages for time spent working.

[12] **Statutes**Other Statutes

If the Legislature carefully employs a term in one statute and deletes it from another, it must be presumed to have acted deliberately.

[13] **Courts**Decisions of United States Courts as Authority in State Courts
CourtsOperation and effect in general

Although not binding precedent, a state court may consider relevant, unpublished federal district court opinions as persuasive.

[14] **Labor and Employment**Working Time

Employer's policy of rounding hourly employee's time punches to the nearest quarter hour was neutral on its face, where time rounding took place without regard to whether employer or employee would benefit from rounding up or down, and employer had grace period policy providing that employees would not be tardy if they clocked in before the end of a six-minute grace period.

1 Cases that cite this headnote

[15] **Labor and Employment**Working Time

An employer is entitled to use a rounding policy if the rounding policy is fair and neutral on its face and if it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

2 Cases that cite this headnote

[16] **Labor and Employment**Working Time

If an employer's rounding practice does not permit both upward and downward rounding, then the system is not neutral and will result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked; such an arrangement presumably does not average out.

1 Cases that cite this headnote

[17] **Labor and Employment**Working time

Records showing that, for sample of hourly hotel employees over specific time period, paid time for small majority of employees was reduced due to employer's facially neutral practice of rounding time worked to nearest quarter hour were insufficient to show that rounding policy systematically undercompensated employees; fluctuations in over- or under-payment of individual employees in a particular time window were to be expected in rounding systems.

1 Cases that cite this headnote

[18] **Labor and Employment**Working Time

A fair and neutral time rounding policy does not require that hourly employees be overcompensated, and a system can be fair or neutral even where a small majority loses compensation.

Witkin Library Reference: 3 Witkin, Summary of Cal. Law (11th ed. 2017) Agency and Employment, § 390 [Meal and Rest or

Recovery Periods; In General.]

1 Cases that cite this headnote

****800** APPEAL from a judgment of the Superior Court of Los Angeles County, Kenneth R. Freeman, Judge. Affirmed. Los Angeles County Super. Ct. No. BC586176.

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Opinion

EGERTON, J.

***1243** Does "regular rate of compensation" for calculating meal or rest break premium payments mean the same thing as "regular rate of pay" for calculating overtime premium payments, and does facially neutral "rounding" of employee work time systematically undercompensate Jessica **Ferra** and a class of employees of Loews Hollywood Hotel, LLC (Loews)? We agree with the trial court that the phrases have different meanings, and Loews's facially neutral rounding policy does not systematically undercompensate Loews employees.

BACKGROUND

On October 7, 2015, **Ferra** filed a first amended complaint against Loews on behalf of herself and three alleged classes of hourly Loews employees extending as far back as June 26, 2011. Among other causes of action, **Ferra** alleged Loews improperly calculated her premium payment when Loews failed to provide her with statutorily required meal and/or rest breaks, in violation of Labor Code section 226.7,[1] and Loews underpaid **Ferra** by unlawfully "shaving or rounding time from the hours worked by **Ferra**."

The parties stipulated that **Ferra** worked as a bartender for Loews from June 16, 2012 to May 12, 2014, and Loews paid (and continued to pay) meal and rest period premiums to hourly employees at ****801** their base rate of compensation (their hourly wage), without including an additional amount based on incentive compensation such as nondiscretionary bonuses. The trial court ordered that, on those stipulated facts, it would summarily adjudicate under Code of Civil Procedure section 437c, subdivision (t) "[w]hether meal and rest period premium payments paid to employees pursuant to ***1244** Labor Code § 226.7 must be paid at employees' 'regular rate of compensation,' i.e. their regular hourly wage, or at their 'regular rate of pay,' " and if it concluded the premium must be at the "regular rate of pay," whether section 226.7 was void for vagueness under the due process clause of the federal Constitution.

After briefing and a hearing, on February 6, 2017, the trial court issued an order granting the motion for summary adjudication, concluding: "[T]he terms 'regular rate of compensation' and 'regular rate of pay' are not interchangeable.... [R]est and meal period premiums under § 226.7 need only be paid at the base hourly rate. As is consistent with the legislative history of §§ 226.7 and 510, it is apparent that the terms in both statutes are different, and have different purposes. [¶] ... [¶] [M]eal and rest period premium payments paid to employees pursuant to Labor Code § 226.7 must be paid at employees' 'regular rate of compensation,' i.e., their regular hourly wage, and not at their 'regular rate of pay.' " Loews's due process claim therefore was moot.

Loews also filed a motion for summary judgment on **Ferra's** remaining causes of action, arguing that Loews's "rounding" policy and practice did not result in underpayment of hourly employees, and any alleged underpayments were de minimis. After briefing and a

hearing, on April 24, 2017, the trial court issued an order granting summary judgment, concluding that on the undisputed facts, "Loews's [rounding] policy *is* neutral on its face and as applied" and did not "fail[ ] to compensate the employees for hours worked." The trial court declined to address as unnecessary Loews's alternative argument that any underpayments were de minimis.

The court granted in full Loews's motion for summary judgment. Judgment was entered May 11, 2017, Loews served notice of entry of judgment on May 19, 2017, and **Ferra** filed this timely appeal from the summary adjudication and summary judgment.

DISCUSSION

If after an independent review of the record and the applicable law, we agree with the trial court that undisputed facts show there is no triable issue of material fact and Loews, as the moving party, was entitled to judgment as a matter of law, we must affirm the trial court's grant of summary adjudication and summary judgment. (Code Civ. Proc., § 437c, subds. (c), (t); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

*1245 1. *"Regular rate of compensation" means the employee's base hourly wage*

[1] [2]Section 226.7, subdivision (c) states: "If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law..., the employer shall pay the employee one additional hour of pay at the employee's *regular rate of compensation* for each workday that the meal or rest or recovery period is not provided." (Italics added.) The Industrial Welfare Commission (IWC) Wage Order that applies to Loews and its employees also states that if an employer fails to provide an employee a meal or rest period, "the employer shall pay the employee one ****802** (1) hour of pay at the employee's *regular rate of compensation* for each workday that the [meal or rest] period is not provided." (IWC Wage Order No. 5-2001, subds. 11(B), 12(B) (Cal. Code Regs., tit. 8, § 11050, subds. 11(B), 12(B)), italics added.) This additional hour is a "premium wage." (*Esparza v. Safeway, Inc.* (2019) 36 Cal.App.5th 42, 52, 247 Cal.Rptr.3d 875.) The wage orders entitle employees "to an unpaid 30-minute, duty-free meal period after working for five hours and a paid 10-minute rest period per four hours of work. (Cal. Code Regs., tit. 8, § 11070, subds. 11, 12.) If denied two paid rest periods in an eight-hour workday, an employee essentially performs 20 minutes of 'free' work, i.e., the employee receives the same amount of compensation for working through the rest periods that the employee would have received had he or she been permitted to take the rest periods. An employee forced to forgo his or her meal period similarly loses a benefit to which the law entitles him or her. While the employee is paid for the 30 minutes of work, the employee has been deprived of the right to be free of the employer's control during the meal period. [Citations.] Section 226.7 provides the only compensation for these injuries." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1104, 56 Cal.Rptr.3d 880, 155 P.3d 284) (*Murphy*).)

[3] [4]Section 510, the statute governing overtime, states in subdivision (a): "Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the *regular rate of pay* for an employee," and "[a]ny work in excess of 12 hours in one day ... [and] any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice *the regular rate of pay* of an employee." (Italics added.) The overtime provisions in Wage Order No. 5-2001, subdivision 3(A) mirror the statutory language, stating that overtime work must be compensated at either one and one-half times or double "the employee's *regular rate of pay* for all hours worked." (Italics added.) "[T]he extra amount a worker must be paid, on top of normal pay, because certain work qualifies as overtime" is also called a premium. ***1246** (*Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 550, 229 Cal.Rptr.3d 347, 411 P.3d 528.) In the overtime context, "[s]ignificantly, an employee's 'regular rate of pay' for purposes of Labor Code section 510 and the IWC wage orders is not the same as the employee's straight time rate (i.e., his or her normal hourly wage rate). Regular rate of pay, which can change from pay period to pay period, includes adjustments to the straight time rate, reflecting, among other things, shift differentials and the per-hour value of any nonhourly compensation the employee has earned." (*Id.* at p. 554, 229 Cal.Rptr.3d 347, 411 P.3d 528.)

California case law does not define the meaning of "regular rate of compensation" in section 226.7, subdivision (c) and Wage Order No. 5-2001, subdivisions 11(B) and 12(B), which address rest and meal periods. The trial court agreed with Loews that "regular rate of compensation" means the additional hour premium is

calculated as one hour of the employee's base hourly wage. On appeal, **Ferra** argues "regular rate of compensation" means the same as "regular rate of pay," so the premium must be calculated as an additional hour at the employee's base hourly wage, plus an additional amount based on her nondiscretionary quarterly bonus. We agree with the trial court and with Loews, however, that the statutory terms "regular rate of ****803** pay" and "regular rate of compensation" are not synonymous, and the premium for missed meal and rest periods is the employee's base hourly wage.

a. ***The statutes' plain language differentiates "regular rate of compensation" from "regular rate of pay"***

[5] [6] [7] [8]The basic principle of statutory construction is "that we must look first to the words of the statute, 'because they generally provide the most reliable indicator of legislative intent.' " (*Murphy, supra*, 40 Cal.4th at p. 1103, 56 Cal.Rptr.3d 880, 155 P.3d 284.) We must "give[ ] significance to every word, phrase, sentence and part of an act." (*Flowmaster, Inc. v. Superior Court* (1993) 16 Cal.App.4th 1019, 1028, 20 Cal.Rptr.2d 666.) " 'Wage orders are quasi-legislative regulations and are construed in accordance with the ordinary principles of statutory interpretation.' " (*Vaquero v. Stoneledge Furniture, LLC* (2017) 9 Cal.App.5th 98, 107, 214 Cal.Rptr.3d 661.) We should avoid a construction of the wage order or statute that renders any part meaningless, inoperative, or superfluous. (*Ibid.*; *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22, 276 Cal.Rptr. 303, 801 P.2d 1054.) "[S]tatutes governing conditions of employment are to be construed broadly in favor of protecting employees. [Citations.] Only when the statute's language is ambiguous or susceptible of more than one ***1247** reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation." (*Murphy*, at p. 1103, 56 Cal.Rptr.3d 880, 155 P.3d 284.)[2]

[9]"Where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117, 81 Cal.Rptr.2d 471, 969 P.2d 564.)

[10]**Ferra** argues that the two phrases have the same meaning because both include the words "regular rate." **Ferra** thus urges us to construe only the phrase "regular rate," as used in the Labor Code and the federal Fair Labor Standards Act (FLSA), 29 United States Code section 201 et seq., and to disregard the additional language because "pay" and "compensation" are interchangeable.[3] But that would render meaningless the Legislature's choice to use "of compensation" in one statute and "of pay" in the other. If the Legislature had intended meal and rest break premiums to be calculated the same way as overtime premiums, it would not have used "regular rate of compensation" when setting premiums for missed meal and rest breaks, and "regular rate of pay" when setting premiums for overtime work. We assume the Legislature intended different meanings when it did not simply use "regular rate," but added different qualifiers in the statutes and wage orders establishing premiums for overtime and for missed meal and rest periods.

****804** [11] [12]**Ferra** also points out that sections 226.7 and 510 were both enacted in 2000, and both used "regular rate"; but the legislative decision to add "of compensation" to the first statute, and "of pay" to the second, works against **Ferra's** argument that the words do not matter, because surely the Legislature meant something different when it used different language in two statutes enacted at the same time.[4] "[I]f the ***1248** Legislature carefully employs a term in one statute and deletes it from another, it must be presumed to have acted deliberately." (*Ferguson v. Workers' Comp. Appeals Bd.* (1995) 33 Cal.App.4th 1613, 1621, 39 Cal.Rptr.2d 806; see *Murphy, supra*, 40 Cal.4th at p. 1108, 56 Cal.Rptr.3d 880, 155 P.3d 284 ["That the Legislature chose to eliminate penalty language in section 226.7 while retaining the use of the word in other provisions of [Assem.] Bill No. 2509 is further evidence that the Legislature did not intend section 226.7 to constitute a penalty."])

b. ***Legislative history does not compel the conclusion that "regular rate of compensation" and "regular rate of pay" are synonymous and interchangeable***

Although we do not believe the statutes' use of different definitions for the different premiums is ambiguous, we note that **Ferra's** resort to the legislative history does not require us to conclude that "regular rate of compensation" is the same as "regular rate of pay." **Ferra** acknowledges the legislative history does not define the two phrases, but points to the regulatory history of the wage order revisions in which the IWC adopted the hour premium for rest and meal period violations, quoting the use in *Murphy, supra*, 40 Cal.4th 1094, 56 Cal.Rptr.3d 880, 155 P.3d 284, of a commissioner's statement at a "June 30, 2000 hearing at which the IWC adopted the 'hour of pay' remedy." (*Id.* at pp. 1109-1110, 56 Cal.Rptr.3d 880, 155 P.3d 284.) The commissioner stated: " 'This [meal and

rest pay provision applies to] an employer who says, "You do not get lunch today, you do not get your rest break, you must work now." That is—that is the intent.... And, of course, the courts have long construed overtime as a penalty, in effect, on employers for working people more than full—you know, that is how it's been construed, as more than the—the daily normal workday. It is viewed as a penalty and a disincentive in order to encourage employers not to. *So, it is in the same authority that we provide overtime pay that we provide this extra hour of pay.*' " (*Id.* at p. 1110, 56 Cal.Rptr.3d 880, 155 P.3d 284.)

While **Ferra** argues that this means the hour premium for meal and rest break violations should be calculated like overtime pay, *Murphy* used the commissioner's ****805** statement to differentiate the two payments, pointing out that although the IWC used the word " 'penalty' " at times to refer to meal and rest period payments, "the Legislature's occasional description of the meal and rest period remedy as a 'penalty' in the legislative history should be ***1249** informed by the way in which the IWC was using the word; namely, that like overtime pay, the meal and rest period remedy has a corollary disincentive aspect in addition to its central *compensatory* purpose. [¶] We conclude that the administrative and legislative history of the statute indicates that, whatever incidental behavior-shaping purpose section 226.7 serves, the Legislature intended section 226.7 first and foremost to *compensate* employees for their injuries." (*Murphy, supra*, 40 Cal.4th at pp. 1110-1111, 56 Cal.Rptr.3d 880, 155 P.3d 284, fn. omitted, italics added.) Section 226.7 's " 'additional hour of pay' ... is a premium wage intended to compensate employees, not a penalty." (*Murphy*, at p. 1114, 56 Cal.Rptr.3d 880, 155 P.3d 284.)[5] *Murphy* recognized that the occasional use of "penalty" in the legislative history did not require the court to conclude that section 226.7 was intended to be a penalty, noting that "the Legislature chose to eliminate penalty language in section 226.7 while retaining the use of the word in other provisions ... [which] is further evidence that the Legislature did not intend section 226.7 to constitute a penalty." (*Murphy*, at p. 1108, 56 Cal.Rptr.3d 880, 155 P.3d 284.) Here, the occasional equating of the purpose of providing overtime premiums with the premiums for missed meal and rest breaks does not require us to conclude that the premiums must be calculated identically, especially in light of the Legislature's choice to use "regular rate of compensation" in section 226.7 and "regular rate of pay" in section 550.[6]

It is the Legislature's choice to use different phrases that must be construed to mean that the statutes mean different things. **Ferra** and amicus California Employment Lawyers Association point out a few occasions on which the Division of Labor Standards Enforcement used the phrases interchangeably, but the Legislature and the statutes did not, and it is the Legislature's choice of different descriptions of the premiums that governs our analysis. While in common parlance "pay" and "compensation" are sometimes used interchangeably, the Legislature did not do so in choosing the language of the statutes.

c. *Persuasive federal opinions favor construing the phrases differently*

[13]No published California case distinguishes "regular rate of compensation" as it applies to missed meal and rest periods from "regular rate of pay" for overtime purposes. We therefore look to "analytically sound" reasoning in ***1250** federal opinions, and "[a]lthough not binding precedent on our court, we may consider relevant, unpublished federal district court opinions as persuasive." (*Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1432, fn. 6, 119 Cal.Rptr.3d 513.)

****806** A number of federal district courts have concluded that the use of "regular rate of compensation" in section 226.7 means that the premium for missed meal periods must be paid at the regular rate of compensation (the base hourly rate), rather than at the regular rate of pay applicable to overtime premiums. In *Bradescu v. Hillstone Restaurant Group, Inc.* (C.D.Cal., Sept. 18, 2014, SACV No. 13-1289-GW) 2014 WL 5312546, 2014 U.S. Dist. Lexis 150978 (*Bradescu*), the court agreed with the defendant that "payment of any meal period premium at Plaintiff's regular rate of *compensation*—as opposed to her regular rate of *pay*—was appropriate" under section 226.7, subdivision (c), and Wage Order No. 5-2001, subdivision 11(B). (*Bradescu*, at *14.) "[T]here is no authority supporting the view that 'regular rate of compensation,' for purposes of meal period compensation, is to be interpreted the same way as 'regular rate of pay' is for purposes of overtime compensation. The Court consequently agrees with [defendant] that the legislature's choice of different language is meaningful, in the absence of authority to the contrary, and therefore rules in [defendant's] favor on this point." (*Id.*, at *——, 2014 U.S. Dist. Lexis 150978 at *22.) In *Wert v. United States Bancorp* (S.D.Cal., Dec. 18, 2014, No. 13-cv-3130-BAS) 2014 U.S. Dist. Lexis 175735 (*Wert*), the court agreed with *Bradescu*, that the use of different language in the meal period and overtime statutes was meaningful: "The plain language of §§ 226.7 and 510 does not suggest that the phrase[ ] 'regular rate of

compensation' is synonymous to and may be used interchangeably with 'regular rate of pay.' " (*Wert*, at *10.) In denying the plaintiff's motion for reconsideration, the court reiterated: "[T]he legislature's choice of different language is meaningful, and ... the relief under § 226.7 is not necessarily or logically the same as the relief under § 510 insofar as the 'regular rate' language is involved." (*Wert v. U.S. Bancorp* (S.D.Cal., June 9, 2015, No. 13-cv-3130-BAS) 2015 U.S. Dist. Lexis 74523, at *7; see *Van v. Language Line Services, Inc.* (N.D.Cal., June 6, 2016, No. 14-CV-03791-LHK) 2016 U.S. Dist. Lexis 73510, at *54.)

Two years later, *Brum v. Marketsource, Inc.* (E.D.Cal., June 19, 2017, No. 2:17-cv-241-JAM-EFB) 2017 WL 2633414, 2017 U.S. Dist. Lexis 94079 (*Brum*) agreed with *Wert* and *Bradescu* and rejected the reasoning in *Studley v. Alliance Healthcare Services, Inc.* (C.D.Cal., July 26, 2012, SACV No. 10-00067-CJC) 2012 U.S. Dist. Lexis 190964 (*Studley*, discussed below). *Brum* acknowledged the plaintiff's argument that California cases have used "regular rate of pay" and "regular rate of compensation" interchangeably, but pointed out that none of these cases addresses the difference between the two terms as they appear in the statutes. (*Brum at* *—— – ——, 2017 U.S. Dist. Lexis 94079 at *13-14.) ***1251** More recently, in *Frausto v. Bank of America* (N.D.Cal., Aug. 2, 2018, No. 18-cv-01983-MEJ) 2018 WL 3659251, 2018 U.S. Dist. Lexis 130220, the plaintiff alleged that her premiums for missed meal periods "were inadequate because they were only based on her straight time rate, not her regular rate of pay that includes all bonuses earned." (*Id.* at *12.) The court cited *Bradescu*, *Brum*, and *Wert* to conclude "there is no legally tenable argument that section 226.7 payments should be paid at the 'regular rate' used for overtime purposes," as section 226.7 " 'uses the employee's rate of compensation.' " (*Frausto* at *——, 2018 U.S. Dist. Lexis 130220 at *14.)

As **Ferra** points out, *Studley* reached a different result, reasoning that premiums for missed meal periods were like overtime pay, and like the overtime statute, section 226.7 used the term "regular rate." *Studley* ****807** concluded that "regular rate of compensation" in section 226.7 and "regular rate of pay" in section 510 should be interpreted the same, because "the operative word or phrase in each section is not 'compensation' or 'pay' but rather 'regular rate,' " and the meanings of "compensation" and "pay" were essentially identical. (*Studley*, *supra*, 2012 U.S. Dist. Lexis 190964, at *14 & fn. 4.)

Two later cases agree. In *Ibarra v. Wells Fargo Bank, N.A.* (C.D.Cal., May 8, 2018, CV No. 17-4344-PA) 2018 U.S. Dist. Lexis 78513 (*Ibarra*), the court declined to compare the language of section 226.7 to section 510. The employees were mortgage consultants whose "normal compensation was not comprised solely or even primarily of pay calculated at an hourly rate," "the hourly pay was stated to be only an advance on commissions," and the employees "could receive compensation based on commissions such that the hourly rate was essentially irrelevant." (*Ibarra*, at *7.) Under those circumstances, "[t]he Court is not persuaded that the 'regular rate of compensation' for all class members *should* be an hourly rate that did not actually determine the compensation received by most of the class members."[7] (*Id.* at *7-8, italics added.) The court acknowledged the cases finding significant the language "regular rate of compensation" in section 226.7 and "regular rate of pay" in section 510, but agreed with *Studley*, that the operative language in both statutes was "regular rate." (*Ibarra*, at *9-10.) Legislative history did not clearly support either side, and interpreting section 226.7 to require premiums at more than the base hourly rate comported with construing the labor laws in favor of worker protection. (*Ibarra*, at *12-14.) One recent district court opinion, ***1252** *Magadia v. Wal-Mart Associates, Inc.* (2019) 384 F.Supp.3d 1058 (*Magadia*) required Wal-Mart to factor in a nondiscretionary quarterly bonus in calculating the "regular rate of compensation" under section 226.7, noting it had adopted *Ibarra*'s conclusion that the regular rate of compensation included the base rate of compensation and other forms of qualifying compensation. (*Magadia*, at pp. 1077-1078.)[8]

Most recently, and just after we heard oral argument in this case, the court in *Valdez v. Fairway Independent Mortgage Corporation* (S.D.Cal., July 26, 2019, No. 18-cv-2748-CAB-KSC), 2019 WL 3406912 [2019 U.S. Dist. Lexis 126013] (*Valdez*) stated: "The Court does not agree with the reasoning behind cases Defendant relies on that find the two terms interchangeable, as those cases either narrowly construed such a finding to the specific circumstances of that case or rejected the difference in language without explanation. [Citations.]" (*Id.*, 2019 WL 3406912 at *5, 2019 U.S. Dist. Lexis 126013 at *14, citing *Ibarra*, *supra*, 2018 U.S. Dist. Lexis 78513, at *11 and *Magadia*, *supra*, 384 F.Supp.3d at pp. 1077-1078.) "The Court is more persuaded by the reasoning behind the cases acknowledging the distinction between the two terms and Plaintiff's assertion that the overwhelming weight of authority supports the position that 'regular rate of compensation' is not synonymous with 'regular rate of pay.' [Citations.]" (****808** *Valdez*, 2019 WL 3406912 at *5, 2019 U.S. Dist. Lexis 126013 at *14-15, citing *Wert*, *supra*, U.S. Dist. Lexis 175735, at *10-11; *Frausto*, *supra*, 2018 WL 3659251, at *——, 2018 U.S. Dist. Lexis 130220, at *14; *Murphy*, *supra*, 40 Cal.4th at p.

1113, 56 Cal.Rptr.3d 880, 155 P.3d 284; and *Brum, supra*, 2017 WL 2633414, at *—— – ——, 2017 U.S. Dist. Lexis 94079, at *13-14.) "Having considered both positions, the Court agrees with Plaintiff's assertion that 'regular rate of compensation' is not equivalent to 'regular rate of pay' and likewise finds the legislature's distinction of the two terms significant." (*Valdez*, 2019 WL 3406912 at *5, 2019 U.S. Dist. Lexis 126013 at *15.)

We conclude that equating "regular rate of pay" and "regular rate of compensation" would elide the difference between requiring an employer to pay overtime for the time an employee spends working more than 40 hours a week, which pays the employee for extra work, and requiring an employer to pay a premium for missed meal and rest hour periods, which compensates an employee for the loss of a benefit. We agree with the dissent that the statutes are to be construed in favor of protecting employees. Requiring employers to compensate employees with a full extra hour at their base hourly rate for working through a 30-minute meal period, or for working through a 10-minute rest break, provides a premium that favors the protection of employees.

1253 2. *Loews's rounding policy and practice is lawful

Ferra and other Loews hourly employees clocked in and out of work using an electronic timekeeping system which automatically rounded time entries either up or down to the nearest quarter-hour. In addition, the Loews Attendance Policy stated: "A seven (7) minute grace period, prior to the beginning of a shift, and a six (6) minute grace period, after the scheduled start time, is incorporated into the timekeeping system and provides the team member with a degree of flexibility when clocking in. A team member who clocks in after the (6) six minute grace period is considered tardy for work."

[14] [15] [16]"In California, the rule is that an employer is entitled to use a rounding policy 'if the rounding policy is fair and neutral on its face and "it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." ' " (*Donohue v. AMN Services, LLC* (2018) 29 Cal.App.5th 1068, 1083, 241 Cal.Rptr.3d 111, quoting *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 907, 148 Cal.Rptr.3d 690 (*See's*).) In this case, Loews's "policy is neutral on its face. It 'rounds all employee time punches to the nearest quarter-hour without an eye towards whether the employer or the employee is benefitting from the rounding.' " (*AHMC Healthcare, Inc. v. Superior Court* (2018) 24 Cal.App.5th 1014, 1027, 234 Cal.Rptr.3d 804 (*AHMC*), quoting *Corbin v. Time Warner Entertainment-Advance/Newhouse Partnership* (9th Cir. 2016) 821 F.3d 1069, 1078-1079 (*Corbin*).) "Employers use rounding policies to calculate wages efficiently; sometimes, in any given period, employees come out ahead and sometimes they come out behind, but the policy is meant to average out *in the long-term*. If an employer's rounding practice does not permit both upward and downward rounding, then the system is not neutral and 'will ... result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.' [Citation.] Such an arrangement '[p]resumably' does not 'average[ ] out.' " (*Corbin, supra*, 821 F.3d at p. 1077.) And ****809** the grace period policy means that if the clock shows the employee clocked in before the end of the six-minute grace period, the employee is not considered tardy.

Although **Ferra** challenges the accuracy of the data before the trial court, she also claims the data shows the rounding policy was not neutral as applied.[9] **Ferra's** time records showed she lost time by rounding in 55.1 ***1254** percent of her shifts, gained time in 22.8 percent, and the remaining shifts were not affected by rounding, during the relevant time period (June 17, 2012 through April 29, 2014). For a sample group of Loews employees, in 54.6 percent of shifts paid time was reduced, paid time was added in 26.4 percent of shifts, and the remaining shifts were not affected by rounding, during the relevant time period (June 2012 through December 2015). The rounding data did not break down the time gained or lost by employee (except for **Ferra**, whose time was analyzed separately).

[17]This is not sufficient to show that the rounding policy " 'systematically undercompensate[s] employees.' " (*See's, supra*, 210 Cal.App.4th at pp. 901-902, 148 Cal.Rptr.3d 690.) Although in *See's* the majority of employees were overcompensated, *See*'s does not "stand[ ] for the proposition that a rounding policy is unlawful where a bare majority of employees lose compensation." (*AHMC, supra*, 24 Cal.App.5th at p. 1024, 234 Cal.Rptr.3d 804.) *AHMC* described two unpublished federal district court opinions involving quarter-hour rounding systems which "concluded that the fact that a slight majority of employees lost time over a defined period was not sufficient to invalidate an otherwise neutral rounding practice." (*Ibid.*) The first case showed that 53 percent of employees lost time over a five-year period, and the second showed that 55.8 percent of employees (including the plaintiff) suffered minor losses over a three-year period. (*Id.* at pp. 1025-1026, 234 Cal.Rptr.3d 804.) Both courts concluded that summary judgment in favor of the

employer was nevertheless appropriate. (*Ibid.*) " '[R]ounding contemplates the possibility that in any given time period, some employees will have net overcompensation and some will have net undercompensation. Given the expected fluctuations with respect to individual employees, shifting the time window even slightly could flip the figures.' " (*Id.* at p. 1025, 234 Cal.Rptr.3d 804; *Utne v. Home Depot U.S.A., Inc.* (N.D.Cal., Dec. 4, 2017, No. 16-cv-01854-RS) 2017 WL 5991863, at *—— – ——, 2017 U.S. Dist. Lexis 199184 at *11-12 (*Utne*).) "Although the data analyzed here—from October 22, 2012 to September 1, 2015—did not average out to 0, Defendant's expert calculations are sufficient to establish that the practice does not systematically undercompensate ****810** employees over time." (*Boone v. PrimeFlight Aviation Services, Inc.* (E.D.N.Y., Feb. 20, 2018, No. 15-CV-6077-JMA-ARL), 2018 WL 1189338, 2018 U.S. Dist. Lexis 28000, at *28.)

***1255** [18]We agree with the trial court that Loews's rounding policy does not systematically undercompensate its employees over time.[10] As *AHMC* states, a "fair and neutral" rounding policy does not require that employees be overcompensated, and a system can be fair or neutral even where a small majority loses compensation. (*AHMC, supra*, 24 Cal.App.5th at p. 1024, 234 Cal.Rptr.3d 804.) **Ferra** did not demonstrate that Loews's rounding policy systematically undercompensated employees over time.

DISPOSITION

The judgment is affirmed. Costs are awarded to respondent Loews Hollywood Hotel, LLC.

I concur:

LAVIN, J.

EDMON, P.J., Concurring and Dissenting.

I agree that Loews's policy of rounding time entries up or down to the nearest quarter hour is lawful. However, I respectfully disagree with the majority's conclusion that "regular rate of compensation" as used in Labor Code [1] section 226.7 means an employee's base hourly rate. Instead, I would conclude that "regular rate of compensation" has the same meaning as "regular rate of pay," and thus that it includes nondiscretionary bonuses "[that] are a normal and regular part of [an employee's] income." (*Walling v. Harnischfeger Corp.* (1945) 325 U.S. 427, 432, 65 S.Ct. 1246, 89 L.Ed. 1711.)

1. Interpretive principles

"In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272, 105 Cal.Rptr.2d 457, 19 P.3d 1196.) 'We begin by examining the statutory language, giving the words their usual and ordinary meaning.' (*Ibid.*; *People v. Lawrence* (2000) 24 Cal.4th 219, 230, 99 Cal.Rptr.2d 570, 6 P.3d 228.) If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. (*Day v. City of Fontana, supra*, 25 Cal.4th at p. 272, 105 Cal.Rptr.2d 457, 19 P.3d 1196; *People v. Lawrence, supra*, 24 Cal.4th at pp. 230–231, 99 Cal.Rptr.2d 570, 6 P.3d 228.) If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. (*Day v. City of Fontana, supra*, 25 Cal.4th at p. 272, 105 Cal.Rptr.2d 457, 19 P.3d 1196.) In such cases, we ' " 'select the ***1256** construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' " ' (*Ibid.*)" (*Estate of Griswold* (2001) 25 Cal.4th 904, 910–911, 108 Cal.Rptr.2d 165, 24 P.3d 1191.)

****811** Contrary to the majority (maj. opn. *ante*, at p. 804), I believe "regular rate of compensation" is ambiguous because it is susceptible of more than one interpretation. (See *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1163, 72 Cal.Rptr.3d 624, 177 P.3d 232 [statutory language is ambiguous if it " 'permits more than one reasonable interpretation' "].) The plain meaning of "compensation" is "payment, remuneration," and the plain meaning of "regular" is "constituted, conducted, scheduled." (Merriam-Webster's 11th Collegiate Dict. (2008) p. 253, col. 2, p. 1048, col. 1.) On its face, therefore, "regular rate of compensation" could mean *either* an hourly rate plus incentive/bonus pay *or* an hourly rate alone. I therefore would conclude that resort to extrinsic sources and principles of statutory construction is necessary to determine legislative intent.

As discussed below, I find three principles of statutory

construction relevant to interpreting section 226.7. First, the state's labor laws are to be liberally construed in favor of worker protection. Second, courts must presume the Legislature was aware of judicial construction of existing law and intended the same construction to apply to related laws with identical or substantially similar language. And third, where statutes use synonymous words or phrases interchangeably, those words or phrases should be understood to have the same meaning. Each of these interpretive principles leads to the same conclusion: that "regular rate of compensation" and "regular rate of pay" are synonymous, and thus that section 226.7 should be interpreted consistently with section 510.

2. Liberal construction of labor laws in favor of worker protection

Our Supreme Court has directed that to determine the Legislature's intent in enacting wage and hour legislation, our analysis must be guided by "[t]wo overarching interpretive principles." (*Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 561, 229 Cal.Rptr.3d 347, 411 P.3d 528 (*Alvarado*).) First, the obligation to pay meal and rest break premiums reflects a state policy that meal and rest periods are essential to worker health and safety. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1105, 56 Cal.Rptr.3d 880, 155 P.3d 284.) Second, "the state's labor laws are to be liberally construed in favor of worker protection." (*Alvarado, supra*, 4 Cal.5th at p. 562, 229 Cal.Rptr.3d 347, 411 P.3d 528; see also *ZB, N.A. v. Superior Court of San Diego County* (2019) 8 Cal.5th 175, 189, 252 Cal.Rptr.3d 228, 448 P.3d 239 ["Because statutes governing ***1257** employment conditions tend to have remedial purposes, we 'liberally construe' them 'to favor the protection of employees.' "].) Therefore, in deciding whether to factor a nondiscretionary bonus into an employee's meal and rest break premium, "we are obligated to prefer an interpretation that discourages employers from [depriving employees of meal and rest breaks], and that favors the protection of the employee's interests." (*Alvarado*, at p. 562, 229 Cal.Rptr.3d 347, 411 P.3d 528.)

Interpreting "regular rate of compensation" to include nondiscretionary bonuses unquestionably encourages compliance with meal and rest break requirements because it raises the cost to employers of noncompliance. Accordingly, the presumptions in favor of worker protection and enforcement of meal and rest break requirements weigh strongly in favor of construing section 226.7 consistently with section 510.

3. Consistent construction of similar statutory language on the same or analogous subjects

" 'Where ... legislation has been judicially construed and a subsequent statute ****812** on the same or an analogous subject uses identical or substantially similar language, we may presume that the Legislature intended the same construction, unless a contrary intent clearly appears.' (*Estate of Griswold*[, *supra*,] 25 Cal.4th [at pp.] 915–916, 108 Cal.Rptr.2d 165, 24 P.3d 1191.)" (*Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 785, 55 Cal.Rptr.3d 112, 152 P.3d 416.) In other words, "[w]e presume the Legislature 'was aware of existing related laws' when it enacted [section 226.7], and that it 'intended to maintain a consistent body of rules.' (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 199, 96 Cal.Rptr.2d 463, 999 P.2d 686.) We also presume the Legislature was aware of judicial construction of those laws and that it intended the same construction to apply to related laws with identical or substantially similar language. (*Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 785, 55 Cal.Rptr.3d 112, 152 P.3d 416.)" (*In re R.G.* (2019) 35 Cal.App.5th 141, 146, 247 Cal.Rptr.3d 24.)

When the Legislature adopted section 226.7 in 2000, it did so against the backdrop of longstanding federal law that defined overtime pay in terms of an employee's "*regular rate*," and existing state law that defined overtime pay in terms of an employee's "*regular rate of pay*." Both phrases had been repeatedly construed to include nondiscretionary bonuses and incentives, in addition to base hourly pay. The historical use of these terms is essential to understanding the Legislature's intent in adopting section 226.7, and thus I summarize that use in some detail here.

1258** ***a. Historical use of "regular rate" in federal and state overtime provisions

i. The Fair Labor Standards Act

As adopted in 1938, section 7(a) of the federal Fair Labor Standards Act (FLSA), 29 U.S.C. section 201 et seq., required employers to compensate employees for all hours in excess of 40 at one and one-half times the " '*regular rate* at which he is employed.' " (*149 Madison Ave. Corporation v. Asselta* (1947) 331 U.S. 199, 200, fn. 1, 67 S.Ct. 1178, 91 L.Ed. 1432, italics added.)

The FLSA initially did not define "regular rate," and litigation over the meaning of the phrase ensued almost immediately. In 1944, the Supreme Court held that " 'regular rate' ... mean[s] the hourly rate *actually paid* for the normal, non-overtime workweek." (*Walling v. Helmerich & Payne, Inc.* 1944, 323 U.S. 37, 40, 65 S.Ct. 11, 89 L.Ed. 29, italics added; see also *Walling v. Youngerman-Reynolds Hardwood Co.* (1945) 325 U.S. 419, 424–425, 65 S.Ct. 1242, 89 L.Ed. 1705, italics added ["The regular rate by its very nature must reflect *all payments* which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact"].) The following year, the court held that "regular rate" necessarily included not only the base hourly rate, but also nondiscretionary bonuses.[2] It explained: ****813** "Those who receive incentive bonuses in addition to their guaranteed base pay clearly receive a greater *regular rate* than the minimum base rate.... The conclusion that only the minimum hourly rate constitutes the regular rate opens an easy path for evading the plain design of § 7(a). We cannot sanction such a patent disregard of statutory duties." (*Walling v. Harnischfeger Corp., supra*, 325 U.S. at pp. 431–432, 65 S.Ct. 1246, italics added.)[3]

***1259** By the 1950's, Congress had amended FLSA section 7(a) to include a definition of "regular rate" consistent with that articulated by the Supreme Court, as follows: "As used in this section the 'regular rate' at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee." (See *Mitchell v. Adams* (5th Cir. 1956) 230 F.2d 527, 532, fn. 10.)

Although the FLSA has been amended many times, the statute in its current form continues to require overtime pay as a multiple of an employee's "regular rate," and to define "regular rate" as "*all remuneration* for employment paid to, or on behalf of, the employee," subject to exceptions not relevant here. (29 U.S.C., § 207, subds. (a)(1), (e), italics added.) Federal courts interpreting this section have consistently held that "regular rate" includes, among other things, nondiscretionary bonuses and incentives. (E.g., *Local 246 Utility Workers Union of America v. Southern California Edison Co.* (9th Cir. 1996) 83 F.3d 292 [supplemental payments to disabled workers were part of the employees' "regular rate"]; *Featsent v. City of Youngstown* (6th Cir. 1995) 70 F.3d 900, 904 [shift differentials and hazardous duty pay may not be excluded from the "regular rate"]; *Reich v. Interstate Brands Corp.* (7th Cir. 1995) 57 F.3d 574, 577 [bonus must be included in the "regular rate" unless it is entirely discretionary with the employer].)[4]

****814 *1260** ***ii. Pre-2000 Wage Orders***

In 1913, the California Legislature established the Industrial Welfare Commission (IWC), to which it delegated authority for setting minimum wages, maximum hours, and working conditions. (*Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 263, 211 Cal.Rptr.3d 634, 385 P.3d 823 (*Augustus*).) The IWC began issuing industry- and occupation-specific wage orders in 1916.[5]

California's current wage orders are closely modeled after section 7(a)(1) of the FLSA. (*Alcala v. Western Ag Enterprises* (1986) 182 Cal.App.3d 546, 550, 227 Cal.Rptr. 453.) From the early twentieth century, the IWC's wage orders required employers to pay employees premium wages for overtime work (*California Grape, etc. League v. Industrial Welfare Com.* (1969) 268 Cal.App.2d 692, 703, 74 Cal.Rptr. 313), and by at least 1968, wage orders defined the overtime premium with reference to an employee's "*regular rate of pay*." (See *Rivera v. Division of Industrial Welfare* (1968) 265 Cal.App.2d 576, 598, fn. 35, 71 Cal.Rptr. 739, italics added [employees could not be employed "more than eight (8) hours in any one day nor more than (5) days in any one week unless the employee receives one and one-half (1½) times her *regular rate of pay* for all work over forty (40) hours or the sixth (6th) day"].)

Although the California wage orders added a modifier to the federal definition—referring to an employee's "regular rate *of pay*," rather than his or her "regular rate"—California authorities consistently have concluded the two phrases are synonymous. Significantly, the Division of Labor Standards Enforcement (DLSE), the state agency that enforces wage and hour laws (*Ward v. Tilly's, Inc.* (2019) 31 Cal.App.5th 1167, 1176, 243 Cal.Rptr.3d 461), has said that "the failure of the IWC to

define the term 'regular rate' indicates the [IWC's] intent that in determining what payments are to be included in or excluded from the calculation of the regular rate of pay, California will adhere to the standards adopted by the U.S. Department of Labor to the extent that those standards are consistent with California law." (Dept. of Industrial Relations, DLSE, Chief Counsel H. Thomas Cadell, Jr., ***1261** Opn. Letter No. 2001-01-29, Calculation of Regular Rate of Pay (Jan. 29, 2003) p. 2, fn. 1.) And, as specifically relevant in the present case, the DLSE has drawn on federal authorities to conclude that "regular rate of pay," like "regular rate," includes nondiscretionary bonuses and incentives. ****815** (Dept. of Industrial Relations, DLSE, Chief Counsel H. Thomas Cadell, Jr., Opn. Letter No. 1991-03-06, Calculation of Regular Rate of Pay (Mar. 6, 1991) p. 1; see also *Huntington Memorial Hospital v. Superior Court* (2005) 131 Cal.App.4th 893, 902–903, 32 Cal.Rptr.3d 373 (*Huntington Memorial*) [citing advice letter].)[6]

b. Current law

i. Wage Order 5-2001

The IWC adopted wage orders in their current forms in 2000. Consistent with prior versions, Wage Order No. 5-2001, which governs the present case (see *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1018, 139 Cal.Rptr.3d 315, 273 P.3d 513), provides that an employer is obligated to pay an overtime premium for work in excess of eight hours in a day, 40 hours in a week, or for any work at all on a seventh consecutive day. (Wage Order No. 5-2001, subd. 3, Cal. Code Regs., tit. 8, § 11050, subd. 3(A)(1).) Such work must be compensated at 1.5 times the employee's "regular rate of pay," or double the "regular rate of pay" if the employee works in excess of 12 hours in a day or in excess of eight hours on a seventh consecutive working day. (Cal. Code Regs., tit. 8, § 11050, subd. 3(A)(1)(b).)

Wage Order 5-2001 also included, for the first time, a provision requiring premium pay for employees deprived of the ten-minute rest breaks or 30-minute meal breaks required by statute. Specifically, Wage Order No. 5-2001 provides that an employer who does not allow an employee a rest ***1262** period or meal period "shall pay the employee one (1) hour of pay at the employee's *regular rate of compensation*" for each workday the rest period or meal period is not provided. (Cal. Code Regs., tit. 8, § 11050, subds. 11(B), 12(B), italics added.)

Although the IWC thus used slightly different language to describe the premiums due for overtime work and for missed meal and rest breaks ("*regular rate of pay*" versus "*regular rate of compensation*"), nothing in the regulatory history suggests the IWC intended the two phrases to have different meanings. Indeed, the regulatory history suggests exactly the opposite. In its explanation of the basis for adopting meal and rest break premiums, the IWC said: "During its review ..., the IWC heard testimony and received correspondence regarding the lack of employer compliance with the meal and rest period requirements of its wage orders. The IWC therefore added a provision to this section that requires an employer to pay an employee one additional hour of pay at the employee's *regular rate of pay* for each ****816** work day that a meal period is not provided." (IWC Statement As to the Basis, p. 20, italics added, <https://www.dir.ca.gov/iwc/statementbasis.htm> [as of Oct. 9, 2019], archived at <https://perma.cc/CN6U-HF8P>.) In other words, the IWC itself appears not to have distinguished between the phrases "regular rate of pay" and "regular rate of compensation"—a telling indicator that it intended these phrases to be applied interchangeably.

ii. Sections 510 and 226.7

At about the same time the IWC enacted wage orders in their current forms, the Legislature added provisions governing overtime premiums and meal and rest break premiums to the Labor Code by adopting sections 510 and 226.7. *Like the analogous provisions of the wage orders*, section 510 requires overtime pay to be calculated on the basis of an employee's "*regular rate of pay*," and section 226.7 requires meal and rest break premiums to be calculated on the basis of an employee's "*regular rate of compensation*."[7] Section 510 does not define "regular rate of pay," and section 226.7 does not define "regular rate of compensation."

***1263** Nothing in the legislative history of these enactments suggests that the Legislature intended "regular rate of pay," as used in section 510, and "regular rate of compensation," as used in section 226.7, to have different meanings. To the contrary, the legislative committee reports describe the proposed meal and rest break premiums—which in every version of the bill were based on an employee's "regular *rate of compensation*"[8]—in terms of rates of *pay* or *wages*. For example, the Senate

Committee on Industrial Relations described an early version of the bill as requiring employers to pay an amount "twice the *hourly rate of pay*" (Sen. Com. on Industrial Relations, Analysis of Assem. Bill No. 2509 (1999–2000 Reg. Sess.) as amended June 26, 2000, p. 5, italics added); the Senate Judiciary Committee described the bill as creating employer liability for "twice the employee's *average hourly pay*" (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2509 (1999–2000 Reg. Sess.) as amended Aug. 7, 2000, p. 8, italics added); and the Senate Rules Committee said failure to provide meal and rest periods would subject an employer to paying a worker an additional "hour *of wages*" (Sen. Com. on Rules, Analysis of Assem. Bill No. 2509 (1999–2000 Reg. Sess.) as amended Aug. 25, 2000, p. 4, italics added). Similarly, ****817** the legislative reports describing the overtime pay provisions of section 510 refer in places to an employee's rate of "*compensation*." (E.g., Bill Analysis, Assem. Bill No. 60 (1999–2000 Reg. Sess.) as amended July 1, 1999, p. 3, italics added [under existing law, wage orders require "the payment of time-and-one-half *compensation* for work exceeding eight hours per day, 40 hours per week"]; Sen. Com. on Industrial Relations, Analysis of Assem. Bill No. 60 (1999–2000 Reg. Sess.) as amended May 27, 1999 [same].)

iii. Judicial interpretations of section 510

Like the DLSE, state courts have drawn on federal authorities interpreting the FLSA to inform their understanding of "regular rate of pay" within the meaning of the wage orders and section 510. (E.g., *Kao v. Holiday* (2017) 12 Cal.App.5th 947, 960, fn. 5, 219 Cal.Rptr.3d 580 ["California adheres to ***1264** federal standards for calculating the regular rate of pay to the extent those standards are consistent with state law"]; *Huntington Memorial, supra*, 131 Cal.App.4th at p. 903, 32 Cal.Rptr.3d 373 ["federal authorities ... provide useful guidance in applying" section 510]; *Advanced-Tech Security Services v. Superior Court* (2008) 163 Cal.App.4th 700, 707, 77 Cal.Rptr.3d 757 [adopting federal definition of "regular rate" for purposes of determining that "regular rate of pay" does not include premium holiday pay: " 'Our Supreme Court has "frequently referred to such federal precedent in interpreting parallel language in state labor legislation" ' "]; *Alcala v. Western Ag Enterprises* (1986) 182 Cal.App.3d 546, 550, 227 Cal.Rptr. 453, fn. omitted ["California's wage orders are closely modeled after (although they do not duplicate), section 7(a)(1) of the Fair Labor Standards Act of 1938. (29 U.S.C. § 207 (a)(1).) It has been held that when California's laws are patterned on federal statutes, federal cases construing those federal statutes may be looked to for persuasive guidance."].)

Last year, our Supreme Court concluded that, like an employee's "regular rate" for purposes of the FLSA, an employee's "regular rate of pay" for purposes of section 510 "*is not the same as the employee's straight time rate* (i.e., his or her normal hourly wage rate)." (*Alvarado, supra*, 4 Cal.5th at p. 554, 229 Cal.Rptr.3d 347, 411 P.3d 528, italics added.) Instead, the "[r]egular rate of pay, which can change from pay period to pay period, includes adjustments to the straight time rate, reflecting, among other things, shift differentials and the per-hour value of any nonhourly compensation the employee has earned." (*Ibid.*)

c. Analysis

When the Legislature adopted section 226.7 in 2000, it for the first time required employers to pay a premium to employees who were not permitted to take statutory meal and rest breaks. But while the premium pay requirement was new, the statutory language used to describe it was not. Instead, as I have described, in adopting section 226.7 the Legislature used a phrase—"regular rate"—that long had been part of the labor law lexicon, and which had, through many years of judicial interpretation, become a term of art. The Legislature did so, moreover, without indicating an intention to deviate from the well-understood meaning of "regular rate." Under these circumstances, I believe the Legislature's use of "regular rate" indicates its intent that meal and rest break premiums should be calculated on the basis of an employee's base hourly rate *plus bonuses*—i.e., the employee's "regular rate"—*not* the base hourly rate alone.

****818** It is undoubtedly true, as the majority notes, that section 226.7 uses a modifier ("of compensation") that does not appear in federal or state overtime provisions, and further that established rules of statutory construction suggest that courts should attempt to give meaning to every word in a statute to avoid ***1265** rendering language surplusage. (E.g., *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1097, 184 Cal.Rptr.3d 643, 343 P.3d 834 [courts should avoid "interpretations that render any language surplusage"].) But although a construction that renders part of a statute surplusage generally should be avoided, " 'this rule is not absolute and "the rule against surplusage will be applied

only if it results in a *reasonable* reading of the legislation" [citation].' (*Park Medical Pharmacy v. San Diego Orthopedic Associates Medical Group, Inc.* (2002) 99 Cal.App.4th 247, 254, fn. 5, 120 Cal.Rptr.2d 858; see *Sturgeon v. County of Los Angeles* (2015) 242 Cal.App.4th 1437, 1448, 195 Cal.Rptr.3d 909 ['[T]he canon against surplusage is not absolute.'].)" (*MCI Communications Services, Inc. v. California Dept. of Tax & Fee Administration* (2018) 28 Cal.App.5th 635, 650, 239 Cal.Rptr.3d 241.)

Here, attributing controlling significance to the modifier "of compensation" leads to an entirely *unreasonable* conclusion—namely, that the Legislature used the phrase "regular rate" in section 226.7 without intending the meaning "regular rate" had acquired over the course of more than 60 years. To paraphrase our Supreme Court, I find it " 'highly unlikely that the Legislature would make such a significant change [in the meaning of "regular rate"] without so much as a passing reference to what it was doing. The Legislature "does not, one might say, hide elephants in mouseholes." ' " (*Jones v. Lodge at Torrey Pines Partnership, supra*, 42 Cal.4th at p. 1171, 72 Cal.Rptr.3d 624, 177 P.3d 232.)

I find the majority's analysis particularly unpersuasive in light of the nearly simultaneous enactment of sections 510 and 226.7. Reduced to its essentials, the majority's reasoning is as follows. In 1999, "regular rate" was widely understood to mean base hourly rate *plus bonuses*. Although the Legislature modified the federal language when it adopted section 510, the Legislature intended "regular rate of pay" to have the same meaning as "regular rate." But although the Legislature modified the federal language in a similar (although not identical) manner when it adopted section 226.7, it intended an entirely different meaning—and although it nowhere articulated that intended meaning, it expected parties and the courts to infer the meaning by its use of the word "compensation," rather than "pay." I am not persuaded.

The majority urges that the Legislature's use of "regular rate" in section 226.7 was not a departure from established law because it added a qualifier—"*of compensation*"—that does not appear in the FLSA. While it is true that "of compensation" is not present in the FLSA, neither is "of pay." Nonetheless, our Supreme Court has held that, like "regular rate," "regular rate of pay" "includes adjustments to straight time rate, reflecting, among other things, shift differentials and the per-hour value of any nonhourly compensation the employee has earned." (*Alvarado, supra*, 4 Cal.5th at p. 554, 229 Cal.Rptr.3d 347, 411 P.3d 528.) I would reach the same conclusion with regard to "regular rate of compensation."

1266** ***4. The Labor Code uses "pay" and "compensation" interchangeably

Although courts sometimes attach significance to the Legislature's use of different words or phrases in related statutes, ****819** where statutes appear to use synonymous words or phrases interchangeably, courts have not hesitated to attribute the same meanings to them. (See, e.g., *People v. Frahs* (2018) 27 Cal.App.5th 784, 793, fn. 3, 238 Cal.Rptr.3d 483, review granted Dec. 27, 2018, S252220 [defendant "attempts to draw a distinction between 'deadly weapon' and 'instrument,' but the terms are used interchangeably within the statute"]; *Vector Resources, Inc. v. Baker* (2015) 237 Cal.App.4th 46, 55, 187 Cal.Rptr.3d 574 ["The italicized words in Labor Code section 1773 show that the terms 'determine' and 'fix' are used interchangeably and have the same meaning in the statute"]; *Alcala v. City of Corcoran* (2007) 147 Cal.App.4th 666, 672, 53 Cal.Rptr.3d 908 [attributing same meaning to statute's use of "public agency" and "public entity": "Unless the two terms are read interchangeably, the statute makes no sense"]; *International Assn. of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959, 976, 129 Cal.Rptr. 68 ["We perceive no basis for distinguishing between the term 'consultation in good faith,' as used in [Government Code] section 3507, and the 'meet and confer in good faith' process defined in [Government Code] section 3505"]; *Midstate Theatres, Inc. v. County of Stanislaus* (1976) 55 Cal.App.3d 864, 872, 128 Cal.Rptr. 54 ["Applicants argue that the statute uses the words [advise and represent] interchangeably and that in popular usage no valid distinction can be drawn between them. There is merit in this contention"]; see also *People v. Johnson* (2015) 61 Cal.4th 674, 692, 189 Cal.Rptr.3d 794, 352 P.3d 366 ["Because 'term' and 'sentence' have been used interchangeably, and 'term' clearly has more than one meaning in the statute, we cannot be confident that 'sentence' has a consistent meaning throughout the statute. In any event, the presumption that a term has an identical meaning throughout a statute 'is rebuttable if there are contrary indications of legislative intent.' "].)

As the Supreme Court has noted, the Legislature "has frequently used the words 'pay' or 'compensation' in the Labor Code as synonyms." (*Murphy v. Kenneth Cole Productions, Inc., supra*, 40 Cal.4th at pp. 1103–1104 & fn. 6, 56 Cal.Rptr.3d 880, 155 P.3d 284.) This is not

surprising, as "pay" and "compensation" are synonymous as a matter of common parlance. Webster's dictionary defines "compensation" as "payment, remuneration" (Merriam-Webster's 11th Collegiate Dict. (2008) p. 253, col. 1), and it defines "pay" as "something paid for a purpose and esp. as a salary or wage; remuneration" (*id*., p. 910, col. 2). "Pay," "compensate," and "remunerate" are identified as synonyms. (*Id*. at p. 910, col. 2.)

The Legislature's interchangeable use of "pay" and "compensation" is evident throughout the Labor Code generally, as well in those provisions of ***1267** the Labor Code that describe overtime and meal and rest break premiums specifically. For example, with regard to meal and rest breaks, section 226.7 requires an employer to "*pay*" an employee deprived of a meal or rest break for an additional hour at the employee's "regular *rate of compensation*." (§ 226.7, subd. (c), italics added.) The very next section sets out a limited alternative to this requirement for nonexempt employees holding safety-sensitive positions at a petroleum facility—namely, that if such an employee is required to interrupt his or her rest period to address an emergency, an additional rest period shall be provided or the employer shall pay the employee "one hour of pay at the employee's regular *rate of pay*." (§ 226.75, subd. (b), italics added.) Had the Legislature intended the meal and rest break premium for employees at petroleum facilities to be calculated differently than other meal and rest break ****820** premiums, it presumably would have said so explicitly.

Similarly, with regard to overtime, section 510 provides that employees who work more than eight hours per day shall be "*compensated*" at the rate of one and one-half times "the regular *rate of pay*." (§ 510, subd. (a), italics added.) The sections that immediately follow provide that in some circumstances employees may work alternative workweek schedules (four 10-hour days) without being entitled to "payment ... of an overtime *rate of compensation*," and that the IWC "may establish exemptions from the requirement that an overtime *rate of compensation* be paid" for certain categories of employees. (§§ 511, subd. (a), 515, subd. (a), italics added.) And, section 204.3 provides that, as an alternative to overtime pay, an employee may receive compensating time off at a rate either of not less than one and one-half hours for each hour of employment for which overtime compensation is required or, if an hour of employment "would otherwise be compensable at a rate of more than one and one-half times the employee's *regular rate of compensation*, then the employee may receive compensating time off commensurate with the higher rate." (§ 204.3, subd. (a); see also § 751.8, subds. (a)–(b), italics added [smelters and other underground workers may work more than eight hours in a 24-hour period "if the employee is paid at the overtime *rate of pay* for hours worked in excess of that employee's regularly scheduled shift," but all work performed in any workday in excess of the scheduled hours established by an agreement in excess of 40 hours in a workweek shall be compensated "at one and one-half times the employee's *regular rate of compensation*"].)

In short, the Legislature uses "pay" and "compensation" interchangeably throughout the Labor Code, including in provisions that describe the overtime and meal and rest break premiums. I would conclude, therefore, that the principle that the same meaning should be attributed to substantially similar language in related statutes (*Moran v. Murtaugh Miller Meyer & Nelson, LLP, supra*, 40 Cal.4th at p. 785, 55 Cal.Rptr.3d 112, 152 P.3d 416) supports the conclusion that the Legislature ***1268** intended "regular rate of compensation" to have the same meaning as "regular rate" and "regular rate of pay."

5. The majority's reliance on a single canon of construction is unpersuasive

The majority's conclusion that "regular rate of compensation" means an employee's base hourly rate is grounded almost entirely on a single canon of statutory construction—that " '[w]here different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning.' " (Maj. opn. *ante*, at p. 803, citing *Briggs v. Eden Council for Hope & Opportunity* (1991) 19 Cal.4th 1106, 1117, 81 Cal.Rptr.2d 471, 969 P.2d 564.) But while canons of statutory construction are intended to "provide guidance in interpreting a statute," they are " ' " 'merely aids to ascertaining probable legislative intent.' [Citation.] No single canon of statutory construction is an infallible guide to correct interpretation in all circumstances." "[The canons] are tools to assist in interpretation, not the formula that always determines it." ' " (*City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, 1294, 211 Cal.Rptr.3d 287; see also *Stone v. Superior Court* (1982) 31 Cal.3d 503, 521, fn. 10, 183 Cal.Rptr. 647, 646 P.2d 809 [principles of construction "are merely aids to ascertaining probable legislative intent."].) Accordingly, a court must " ' "be careful lest invocation of a canon cause it to lose sight of ****821** its objective to ascertain the Legislature's intent." " (*People v. Superior Court (Cooper)* (2003) 114 Cal.App.4th 713, 720, 7 Cal.Rptr.3d 862.)

In the present case, I believe the majority's reliance on a single canon of construction has led it to a conclusion the Legislature did not intend, and that the canon does not support. As a logical matter, if the canon applies, it may suggest what section 226.7 does *not* mean, but it cannot give insight into what the statute *does* mean. In other words, if the canon applies, it might suggest that "regular rate of compensation" does not mean the same thing as "regular rate of pay"—but it does not lead logically to the conclusion that "regular rate of compensation" means straight hourly rate.[9]

1269 *6. Conclusion

The majority's analysis assumes that when the Legislature adopted sections 226.7 and 510, it intended parties and the courts to understand—in the absence of any clarifying language in the statute or legislative history—that "*regular rate of pay*" has the same meaning as "*regular rate*," but "*regular rate of compensation*" means something different. I cannot conclude that the Legislature "would have silently, or at best obscurely, decided so important ... a public policy matter and created a significant departure from the existing law." (*In re Christian S.* (1994) 7 Cal.4th 768, 782, 30 Cal.Rptr.2d 33, 872 P.2d 574.) Instead, I would conclude that when the Legislature used the phrase "regular rate" in section 226.7, it intended the phrase to mean what it has always meant: guaranteed hourly wages *plus* "bonuses [that] are a normal and regular part of [an employee's] income." (*Walling v. Harnischfeger Corp.*, *supra*, 325 U.S. at p. 432, 65 S.Ct. 1246.)

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Footnotes

1 Unless otherwise indicated, all subsequent statutory citations are to the Labor Code.

2 *Murphy* concluded that the remedy provided in section 226.7 was a premium wage, not a penalty. (*Murphy*, *supra*, 40 Cal.4th at p. 1102, 56 Cal.Rptr.3d 880, 155 P.3d 284.)

3 For example, **Ferra** cites *Walling v. Hardwood Co.* (1945) 325 U.S. 419, 424, 65 S.Ct. 1242, 89 L.Ed. 1705, for its use of "regular rate of compensation," but, there, the Court construed federal overtime provisions, and was not quoting statutory language. (See *Walling v. Harnischfeger Corp.* (1945) 325 U.S. 427, 430, 65 S.Ct. 1246, 89 L.Ed. 1711 [same]; *Local 246 Util. Workers Un. v. Southern Cal. Edison* (9th Cir. 1996) 83 F.3d 292, 295 [same].) **Ferra** also cites 29 United States Code section 207(e), the federal overtime statute, for its definition of "regular rate," and associated federal regulations. Again, these federal authorities do not answer the question of what "regular rate *of compensation*" means in section 226.7.

4 " 'Pay' is defined as 'money [given] in return for goods or services rendered.' (American Heritage Dict. (4th ed. 2000) p. 1291.)" (*Murphy*, *supra*, 40 Cal.4th at p 1104, 56 Cal.Rptr.3d 880, 155 P.3d 284.) "Compensation" is defined as "[s]omething, such as money, given or received as payment or reparation, as for a service or loss." (American Heritage Dict., *supra*, at p. 376.) When an employee misses a meal period or a rest period, he "loses a benefit to which the law entitles him or her. While the employee is paid for the 30 minutes of work, the employee has been deprived of the right to be free of the employer's control during the meal period. [Citations.] Section 226.7 provides the only compensation for these injuries." (*Murphy*, at p. 1104, 56 Cal.Rptr.3d 880, 155 P.3d 284.) The "central purpose" of overtime pay is to pay employees wages for time spent working. (*Id.* at p. 1109, 56 Cal.Rptr.3d 880, 155 P.3d 284.) A section 226.7 action, however, is "not an action brought for nonpayment of wages; it is an action brought for nonprovision of meal or rest breaks." (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1257, 140 Cal.Rptr.3d 173, 274 P.3d 1160.)

5 The court also noted that judicial references to overtime pay as a "penalty" did not transform overtime pay into a penalty for the purpose of the statute of limitations. (*Murphy*, *supra*, 40 Cal.4th at p. 1109, 56 Cal.Rptr.3d 880, 155 P.3d 284.)

6 Assembly Bill No. 60 (1999-2000 Reg. Sess.), which amended the overtime statute, used the phrase "regular rate of pay" eight times, including in its amendment to section 510 (Stats. 1999, ch. 134), without ever using "regular rate of

compensation"; Assembly Bill No. 2509 (1999-2000 Reg. Sess.) section 7, which added section 226.7, does not use "regular rate of pay."

7 Using the hourly rate to calculate the premiums would result in class-wide damages of $24,472,114.36, and calculating the premiums by including all forms of compensation, including commissions and other nondiscretionary pay, more than quadrupled the damage award to $97,284,817.91. (*Ibarra*, *supra*, 2018 U.S. Dist. Lexis 78513, at *5 & fn. 3.) **Ferra** does not argue that Loews's compensation system would result in similarly disparate damages.

8 Both *Ibarra* and *Magadia* have been appealed to the Ninth Circuit Court of Appeals.

9 Loews's expert analyzed data provided to her by Loews from punch records for **Ferra**, and for a sample of Loews employees (sorted by last names). **Ferra** calls the employee group "seemingly randomly selected members of the [Loews] work force." **Ferra** claims the data "did not provide evidence of the number of employees hurt overall by rounding as opposed to the number benefitted overall by rounding, nor did it break down the differences between beginning of shift and end of shift rounding." Nevertheless, **Ferra** argues on appeal that the data "clearly establish that the work force is harmed by rounding" and "proved systematic under-compensation." **Ferra** also used the data in her first amended complaint to allege that during approximately 50 percent of her and the class's workweeks, she and the Loews employees were not paid for all time worked. Her opposition to the motion for summary judgment relied heavily on the data (which she included as undisputed facts), and in granting summary judgment the trial court stated, "Loews' evidence is undisputed with respect to how the rounding policy and grace period actually operated." We therefore rely on the expert's declaration and supporting exhibits.

10 Like the trial court, we therefore do not address the de minimis argument Loews made in its motion for summary judgment. (See *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 848, 235 Cal.Rptr.3d 820, 421 P.3d 1114) [California has not incorporated the de minimis rule in the FLSA and California de minimis law does not apply to rounding policy violations].)

1 All subsequent undesignated statutory references are to the Labor Code.

2 The court provided the following example: "An incentive worker is assigned a basic rate of $1 an hour and works 50 hours a week on 15 'time studied' jobs that have each been given a 'price' of $5. He completes the 15 jobs in the 50 hours. He receives $50 basic pay plus $25 incentive pay (the difference between the base pay and 15 job prices). In addition, the worker receives $5 extra for the 10 overtime hours. This is computed on the basis of 50% of the $1 base rate, or 50 cents an hour premium. Actually, however, this worker receives compensation during the week at the actual rate of $1.50 an hour ($75 divided by 50 hours) and the overtime premium should be computed on that basis, giving the worker a premium of 75 cents an hour or $7.50 for the 10 overtime hours." (*Walling v. Harnischfeger Corp.*, *supra*, 325 U.S. at p. 431, fn. 3, 65 S.Ct. 1246.)

3 In so concluding, the court rejected the employer's contention that incentive bonuses were not part of the "regular rate" because they could not be calculated or paid contemporaneously. The court explained: "[Employer] also points to the fact that the incentive bonuses are often not determined or paid until weeks or even months after the semi-monthly pay-days, due to the nature of the 'priced' jobs. But [FLSA] Section 7(a) does not require the impossible. If the correct overtime compensation cannot be determined until some time after the regular pay period the employer is not thereby excused from making the proper computation and payment. [FLSA] Section 7(a) requires only that the employees receive a 50% premium as soon as convenient or practicable under the circumstances." (*Walling v. Harnischfeger Corp.*, *supra*, 325 U.S. at pp. 432–433, 65 S.Ct. 1246.)

4 Interestingly, federal courts interpreting the FLSA section 7(a) have frequently described "regular rate" as an employee's "regular rate *of compensation*." (E.g., *Walling v. Youngerman-Reynolds Hardwood Co.*, *supra*, 325 U.S. at p. 424, 65 S.Ct. 1242 ["The keystone of § 7(a) is the *regular rate of compensation*. On that depends the amount of overtime payments which are necessary to effectuate the statutory purposes," italics added]; *Walling v. Harnischfeger Corp.*, *supra*, 325 U.S. at p. 430, 65 S.Ct. 1246 [in determining whether employer properly calculated overtime pay under FLSA, "[o]ur attention here is focused upon a determination of the *regular rate of compensation* at which the incentive workers are employed," italics added]; *United States Department of Labor v. Fire & Safety Investigation Consulting Services, LLC* (4th Cir. 2019) 915 F.3d 277, 280–281 ["To determine whether [employer's] payment scheme violated the FLSA, we must first decide what constitutes the *'regular rate' of compensation* actually paid to the Consultants, as that rate establishes the proper overtime compensation due," italics added]; *Local 246 Utility Workers Union of America v. Southern California Edison Co.* (9th Cir. 1996) 83 F.3d 292, 295 ["Employees working overtime must be compensated at not less than one-and-one-half times the *regular rate of compensation*. 29 U.S.C. §

207(a)(1)," italics added]; *Walling v. Garlock Packing Co*. (2d Cir. 1947) 159 F.2d 44, 46 ["It is urged upon us ... that there is no relationship between the bonus or premium paid and the amount produced or the time worked by the employee, and therefore that the bonus is not part of the *regular rate of compensation*. But this argument is not convincing," italics added].)

5 The IWC has promulgated 18 wage orders: Twelve of them cover specific industries, four cover certain occupations, one is a general minimum wage order, and one applies to industries and occupations not covered by, and all employees not specifically exempted in, the wage orders in effect in 1997. (*Huntington Memorial*, *supra*, 131 Cal.App.4th at p. 902, 32 Cal.Rptr.3d 373.) Although the Legislature defunded the IWC in 2004, its wage orders remain in effect. (*Mendiola v. CPS Security Solutions, Inc*. (2015) 60 Cal.4th 833, 838, fn. 6, 182 Cal.Rptr.3d 124, 340 P.3d 355.) In California, wage orders "are constitutionally-authorized, quasi-legislative regulations that have the force of law." (*Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, 914, fn. 3, 232 Cal.Rptr.3d 1, 416 P.3d 1, citing Cal. Const., art. XIV, § 1; §§ 1173, 1178, 1178.5, 1182, 1185; *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 700–703, 166 Cal.Rptr. 331, 613 P.2d 579.)

6 In a March 1991 opinion letter, the DLSE considered whether "sporadic incentive bonus payments made to employees for the performance of work ancillary to their primary duties" were part of the "regular rate of pay" for purposes of determining overtime pay. The DLSE responded that the "answer, under both federal and California law, is, yes." It explained: "The enforcement of the California overtime requirements follow[s] federal precedent where applicable and where the federal precedent is patterned on language which is similar in intent to the California law.... [¶] Bonus payments, with certain exceptions [fn. omitted], are included in the calculation of overtime. Bonuses based on incentive must be calculated into the employee's wages to determine the 'regular rate of pay.' " (Dept. of Industrial Relations, DLSE, Chief Counsel H. Thomas Cadell, Jr., Opn. Letter No. 1991-03-06, Calculation of Regular Rate of Pay (Mar. 6, 1991) p. 1; see also *Huntington Memorial*, *supra*, 131 Cal.App.4th at pp. 902–903, 32 Cal.Rptr.3d 373 [citing opinion letter].) The DLSE similarly opined several years later, advising that "as with federal law," a bonus based on a piece rate "must be figured into the formula for determining the 'regular rate of pay.' " (Dept. of Industrial Relations, DLSE, Chief Counsel H. Thomas Cadell, Jr., Opn. Letter No. 1994-06-17, Regular Rate of Pay (June 17, 1994) p. 2.)

7 Section 510, subdivision (a) provides: "Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee."
Section 226.7, subdivision (c) provides: "If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided."

8 See, e.g., Senate Amendment to Assembly Bill No. 2509 (1999–2000 Reg. Sess.) June 26, 2000, section 12; Senate Amendment to Assembly Bill No. 2509 (1999–2000 Reg. Sess.) August 7, 2000, section 10; Senate Amendment to Assembly Bill No. 2509 (1999–2000 Reg. Sess.) August 25, 2000, section 7.

9 Indeed, because elsewhere the Labor Code refers to an hourly wage as "straight time" or "base hourly rate," a consistent application of the interpretive principle on which the majority relies would lead to the conclusion that "regular rate of compensation" cannot mean a straight hourly rate. (E.g., § 1773.1, italics added [per diem wages: "Credits for employer payments also shall not reduce the obligation to pay the *hourly straight time* or overtime wages found to be prevailing."]; § 1773.8, italics added ["An increased employer payment contribution that results in a lower taxable wage shall not be considered a violation of the applicable prevailing wage determination so long as all of the following conditions are met: ... (b) The increased employer payment and *hourly straight time* and overtime wage combined are no less than the general prevailing rate of per diem wages."]; § 204.11, italics added ["For any employee who is licensed pursuant to the Barbering and Cosmetology Act ..., wages that are paid to that employee for providing services for which such a license is required, when paid as a percentage or a flat sum portion of the sums paid to the employer by the client recipient of such service, and for selling goods, constitute commissions, provided that the employee is paid, in every pay period in which hours are worked, a *regular base hourly rate* of at least two times the state minimum wage rate."].)

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United States Court of Appeals, Ninth Circuit.

Roderick MAGADIA, individually and on behalf of all those similarly situated, Plaintiff-Appellee,

v.

WAL-MART ASSOCIATES, INC., a Delaware corporation; Walmart Inc., a Delaware corporation, Defendants-Appellants.

No. 19-16184
|
Argued and Submitted November 19, 2020 Pasadena, California
|
Filed May 28, 2021

Appeal from the United States District Court for the Northern District of California, Lucy H. Koh, District Judge, Presiding, D.C. No. 5:17-cv-00062-LHK

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Before: Consuelo M. Callahan and Patrick J. Bumatay, Circuit Judges, and Gregory A. Presnell,* District Judge.

OPINION

BUMATAY, Circuit Judge:

***2** Roderick Magadia worked sales for Walmart for eight years. After the company let him go, Magadia filed a class action suit against Wal-Mart Associates, Inc., and Walmart, Inc., (collectively, "Walmart"), alleging three violations of California Labor Code's wage-statement and meal-break requirements. First, Magadia alleged that Walmart didn't provide adequate pay rate information on its wage statements. *See* Cal. Lab. Code § 226(a)(9). Next, he claimed that Walmart failed to furnish the pay-period dates with his last paycheck. *See id*. § 226(a)(6). Finally, he asserted that Walmart didn't pay adequate compensation for missed meal breaks. *See id*. § 226.7(c). Magadia sought penalties for these claims under California's Private Attorneys General Act ("PAGA"), which authorizes an aggrieved employee to recover penalties for Labor Code violations on behalf of the government and other employees. *See id.* § 2699.

The district court at first certified classes corresponding to each of Magadia's three claims. After summary judgment and a bench trial, the district court found that Magadia in fact suffered no meal-break violation and decertified that class. Even so, the district court allowed Magadia to still seek PAGA penalties on that claim based on violations incurred by other Walmart employees. The district court then ruled against Walmart on the three claims and awarded Magadia and the two remaining classes over $100 million in damages and penalties.

On appeal, we hold that Magadia lacked standing to bring the meal-break claim because he did not suffer injury himself. As for the two wage-statement claims, we hold that Magadia had

standing but conclude that Walmart did not breach California law.

I.

Walmart pays its employees and issues wage statements every two weeks. Walmart also voluntarily offers quarterly "MyShare" bonuses to high-performing employees. Walmart reports these quarterly bonuses on qualifying employees' wage statements as "MYSHARE INCT."

Besides the bonus itself, California law requires Walmart to adjust the rate of overtime pay it awards employees to account for these bonuses. *See* Cal. Lab. Code § 510. That's because California considers an employee's bonus to be part of the employee's "regular rate of pay" when calculating overtime rates. *See Alvarado v. Dart Container Corp. of Cal.*, 4 Cal. 5th 542, 554, 229 Cal.Rptr.3d 347, 411 P.3d 528 (2018). Thus, if a Walmart employee receives a MyShare bonus and worked overtime during that quarter, the employee must receive an adjusted overtime pay because of that MyShare bonus. Walmart calculates this adjusted overtime pay using a formula that includes the number of hours the employee worked each pay period of the quarter and the employee's overtime rate.[1] Walmart lists this adjusted overtime pay on its employee's wage statement as "OVERTIME/INCT." Walmart's OVERTIME/INCT item appears as a lump sum on the wage statement issued at the end of the quarter, with no corresponding "hourly rate" or "hours worked."

***3** California law separately provides that when "an employer discharges an employee," the employee's wages are due "immediately." Cal. Lab. Code § 201(a). In compliance with the law, Walmart issues a final paycheck at the time of an employee's termination, along with a "Statement of Final Pay." The Statement of Final Pay does not include the "dates of the period for which the employee is paid." *See id*. § 226(a)(6). But Walmart separately provides the employee a final wage statement at the end of the semimonthly pay period that lists the required dates.

California law also requires employers to provide employees "a meal period of not less than 30 minutes" every five hours. *Id.* § 512(a). If employers fail to provide this meal break, they must pay their employees "one additional hour of pay at the employee's regular rate of compensation." *Id.* § 226.7(c). Walmart paid its employees whenever it failed to provide them with a compliant meal break. But when calculating its employees' "regular rate of compensation" for meal-break violations, Walmart relied on the employees' hourly rate and did not factor in the MyShare adjustment to overtime rates.

Magadia worked as a sales associate at Walmart from 2008 to 2016. In late 2016, Walmart fired Magadia and provided him with his final paycheck and a Statement of Final Pay. At the end of his last pay period with the company, Walmart also provided Magadia with his final wage statement. Magadia then filed a putative class action against Walmart in state court, alleging three California Labor Code violations: (1) that Walmart's wage statements violated Labor Code § 226(a)(9) because its adjusted overtime pay does not include hourly rates of pay or hours worked; (2) that Walmart violated § 226(a)(6) by failing to list the pay-period start and end dates in its Statements of Final Pay; and (3) that Walmart's meal-break payments violated § 226.7 because it did not account for MyShare bonuses when compensating employees. Magadia also sought penalties for all three claims under PAGA. *See* Cal. Lab. Code § 2698 *et seq*. Walmart removed the case to federal court. *See* 28 U.S.C. § 1332(d)(2).

After removal, the district court certified a class for each of Magadia's three claims. The district court later granted Magadia partial summary judgment on his two wage-statement claims and held a three-day bench trial on all three claims. The district court ultimately ruled for Magadia on his two wage-statement claims, holding that Walmart violated both § 226(a)(9) and § 226(a)(6). On the remaining meal-break claim, the district court found that Magadia did not establish that he personally suffered any meal-break violation. The district court held that, since Magadia failed to show that Walmart denied him meal breaks required under California law, his claims were not typical of the claims or defenses of the class. *See* Fed. R. Civ. P. 23(a)(3). As a result, the district court decertified the class based on that claim and denied Magadia's individual claim under § 226.7. Still, the district court permitted Magadia to recover PAGA penalties on the claim because Magadia had established that *other* Walmart employees had sustained meal-break violations.

The district court then awarded Magadia $101,947,700 for the three claims: $96 million award for the adjusted-overtime-rate claim ($48 million in statutory damages and another $48 million in PAGA penalties); $5.8 million in PAGA penalties for the final-wage-statement claim; and $70,000 in PAGA penalties for the meal-break claim.

***4** On appeal, we review findings of fact for clear error and conclusions of law de novo. *OneBeacon Ins. Co. v. Haas Indus., Inc.*, 634 F.3d 1092, 1096 (9th Cir. 2011).

II.

Before we turn to the merits of his claims, we must ensure that Magadia has Article III standing. To meet the "irreducible constitutional minimum" of standing, a plaintiff must have (1) suffered an "injury in fact," (2) that is "fairly traceable" to the challenged conduct, and (3) will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). To show an injury in fact, the plaintiff "must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1548, 194 L.Ed.2d 635 (2016) (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130). For an injury to be concrete, it "must actually exist." *Id.* Standing must "persist throughout all stages of [the] litigation." *Hollingsworth v. Perry*, 570 U.S. 693, 705, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013).

A.

1.

We start by considering whether Magadia has standing to bring a PAGA claim for the meal-break violations. Although the district court found that he did not suffer a meal-break injury himself, Magadia insists he has standing to pursue this claim because PAGA is a *qui tam* statute. Of course, with no individualized harm, Magadia cannot establish traditional Article III standing. *See Lujan*, 504 U.S. at 560 & n.1, 112 S.Ct. 2130.

But *qui tam* actions are a "well-established exception" to the traditional Article III analysis. *Spokeo*, 136 S. Ct. at 1552 n.* (Thomas, J., concurring) (simplified); *see Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 769 n.1, 774–76, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (discussing *qui tam*'s historical pedigree and concluding that the False Claims Act ("FCA") was a *qui tam* statute). *Qui tam* is short for "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," meaning he "who pursues this action on our Lord the King's behalf as well as his own." *Vermont Agency*, 529 U.S. at 768 n.1, 120 S.Ct. 1858. A *qui tam* statute permits private plaintiffs, known as relators, "to sue in the government's name for the violation of a public right." *Spokeo*, 136 S. Ct. at 1552 n.* (Thomas, J., concurring).

Qui tam standing for uninjured plaintiffs flows from an assignment theory. *Vermont Agency*, 529 U.S. at 773–74, 120 S.Ct. 1858. The Court has recognized that an "adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Id.* at 773, 120 S.Ct. 1858. In a *qui tam* action, the government partially assigns its claims to the relator, "who then may sue based upon [the government's] injury." *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993). In other words, a "*qui tam* action is for a redress" of the government's injury, and "it is the government's injury that confers standing upon the private person." *Stalley v. Methodist Healthcare*, 517 F.3d 911, 917 (6th Cir. 2008). Thus, the Court has concluded that a non-injured relator has standing when the statute "effect[ed] a partial assignment of the Government's damages claim." *Vermont Agency*, 529 U.S. at 773, 120 S.Ct. 1858.

***5** Outside the narrow "exception" of *qui tam* actions, however, the Supreme Court has expressed skepticism that "mere authorization to represent a third party's interests is sufficient to confer Article III standing on private parties with no injury of their own." *Hollingsworth*, 570 U.S. at 710, 133 S.Ct. 2652. After all, States "have no power directly to enlarge or contract federal jurisdiction." *Fiedler v. Clark*, 714 F.2d 77, 80 (9th Cir. 1983) (per curiam) (simplified). Ultimately, "standing in federal court is a question of federal law, not state law." *Hollingsworth*, 570 U.S. at 715, 133 S.Ct. 2652.

Though the California Supreme Court has categorized PAGA as "a type of *qui tam* action," *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 360, 173 Cal.Rptr.3d 289, 327 P.3d 129 (2014), we must look beyond the mere label attached to the statute and scrutinize the nature of the claim itself. Historically, common-law courts have required an individualized showing of injury before permitting a private plaintiff to vindicate "public rights"—rights involving duties owed "to the whole community, considered as a community, in its social aggregate capacity." *Spokeo*, 136 S. Ct. at 1553 (Thomas, J., concurring) (quoting 4 William Blackstone, Commentaries *5). And in the modern era, the Court has rejected several attempts by States to bypass the individualized-injury requirement of Article III by

authorizing private plaintiffs to represent the States' interests. *See, e.g.*, *Hollingsworth*, 570 U.S. at 707–13, 133 S.Ct. 2652.

With that in mind, we examine "historical practice" to determine whether a harm "has traditionally been regarded as a basis for a lawsuit." *Spokeo*, 136 S. Ct. at 1549. A purported *qui tam* statute must hew closely to the traditional scope of a *qui tam* action for an uninjured plaintiff to maintain suit under Article III. *Cf. Vermont Agency*, 529 U.S. at 774, 120 S.Ct. 1858 ("[T]he Constitution established that judicial power could come into play only in matters that were the traditional concern of the courts at Westminster[.]" (simplified)). So long as PAGA claims satisfy the traditional criteria for a *qui tam* action, Magadia may pursue his meal-break claim.

2.

On close inspection, PAGA has several features consistent with traditional *qui tam* actions—yet many that are not. Foremost among the similarities, PAGA operates as an assignment from California to a relator-type plaintiff. A PAGA plaintiff serves as a "proxy or agent of the state's labor law enforcements agencies" and represents the "same legal right and interest as state labor law enforcement agencies." *Iskanian*, 59 Cal. 4th at 380, 173 Cal.Rptr.3d 289, 327 P.3d 129 (simplified). As part of that assignment, PAGA authorizes an aggrieved employee to recover a "civil penalty" that could have otherwise been "assessed and collected by" California's Labor & Workforce Development Agency ("LWDA"). Cal. Lab. Code § 2699(a).

Also consistent with traditional *qui tam* actions, PAGA requires private-party plaintiffs to "share a monetary judgment with the government[,] ... with the government receiving the lion's share." *Methodist Healthcare*, 517 F.3d at 918. The FCA, for example, designates 25% of the judgment to the relator, with the rest remitted to the Federal government. 31 U.S.C. § 3730(d)(1), (2). Similarly, a PAGA plaintiff must give the "lion's share" (75%) of the civil penalties recovered to the LWDA with the remainder distributed among "aggrieved employees." Cal. Lab. Code § 2699(i).

And just like *qui tam* statutes, PAGA permits the government to dictate whether a private plaintiff may bring a claim in the first place. For example, FCA relators must first present the government with their proposed complaint and related materials before they can start an action against a defendant; at that point the government may consider whether to "intervene and proceed with the action" in the relator's place. 31 U.S.C. § 3730(b)(1)–(3). If the government elects to intervene, it will "take over the action," and the prosecution of the case will "be conducted by the Government," not the would-be plaintiff. *Id.* § 3730(b)(4). Likewise, a putative PAGA plaintiff must give written notice of the alleged Labor Code violation to the LWDA before suing. *See* Cal. Lab. Code § 2699.3(a). A PAGA suit can begin only after the LWDA provides notice that "it does not intend to investigate the alleged violation" in the plaintiff's notice or if the LWDA doesn't respond within 65 days. Cal. Lab. Code § 2699.3(a)(2)(A). But if, after investigating the violation, the LWDA decides to issue a citation to the employer, "the employee may not commence" a civil action under PAGA. *Id.* § 2699.3(b)(2)(A)(i).

***6** Despite these similarities, however, PAGA differs in significant respects from traditional *qui tam* statutes. First, PAGA explicitly involves the interests of others besides California and the plaintiff employee—it also implicates the interests of nonparty aggrieved employees. By its text, PAGA authorizes an "aggrieved employee" to bring a civil action "on behalf of himself or herself and *other current or former employees*." Cal. Lab. Code § 2699(a) (emphasis added).[2] And PAGA requires that "a portion of the penalty goes not only to the citizen bringing the suit but *to all employees affected* by the Labor Code violation." *Iskanian*, 59 Cal. 4th at 382, 173 Cal.Rptr.3d 289, 327 P.3d 129 (emphasis added); *see* Cal Lab. Code § 2699(i).[3] Finally, a judgment under PAGA binds California, the plaintiff, *and* the nonparty employees from seeking additional penalties under the statute. *Iskanian*, 59 Cal. 4th at 381, 173 Cal.Rptr.3d 289, 327 P.3d 129.[4] PAGA therefore creates an interest in penalties, not only for California and the plaintiff employee, but for nonparty employees as well.

This feature is atypical (if not wholly unique) for *qui tam* statutes.[5] It conflicts with *qui tam*'s underlying assignment theory—that the real interest is the government's, which the government assigns to a private citizen to prosecute on its behalf. *Cf. Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 522 (8th Cir. 2007) ("A 'private' right is different from a public right and *qui tam* cases exist to vindicate public rights." (simplified)). And it conflicts with Article III's core principle that each plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Indeed, California courts have themselves recognized that PAGA's

peculiar feature makes it an "except[ion]" to the "traditional criteria" of *qui tam* actions. *Iskanian*, 59 Cal. 4th at 382, 173 Cal.Rptr.3d 289, 327 P.3d 129; *see also Moorer v. Noble L.A. Events, Inc.*, 32 Cal. App. 5th 736, 742, 244 Cal.Rptr.3d 219 (2019) (rejecting plaintiff's argument that, since PAGA is a type of *qui tam* action, the entire 25% of the civil penalties not allocated to the government should go to the aggrieved employee who brings the PAGA suit). While California may be *a* "real party in interest," *Iskanian*, 59 Cal. 4th at 387, 173 Cal.Rptr.3d 289, 327 P.3d 129, a PAGA suit also implicates the interests of other third parties.

***7** Second, a traditional *qui tam* action acts only as "a *partial* assignment" of the Government's claim. *Vermont Agency*, 529 U.S. at 773, 120 S.Ct. 1858 (emphasis added). The government remains the real party in interest throughout the litigation and "may take complete control of the case if it wishes." *U.S. ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994). Under the FCA, for instance, the federal government can intervene in a suit, can settle over the objections of the relator, and must give its consent before a relator can have the case dismissed. 31 U.S.C. § 3730(b)–(f). These "significant procedural controls" ensure that the government maintains "substantial authority over the action." *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc*., 524 F.3d 1229, 1234 (11th Cir. 2008). So even if the government partially assigns a claim to a relator, "it retains a significant role in the way the action is conducted." *Methodist Healthcare*, 517 F.3d at 918.

In contrast, PAGA represents a permanent, *full* assignment of California's interest to the aggrieved employee. True enough, PAGA gives California the right of first refusal in a PAGA action. An aggrieved employee can only sue if California declines to investigate or penalize an alleged violation; and California's issuance of a citation precludes any employees from bringing a PAGA action for the same violation. Cal. Lab. Code §§ 2699(h), 2699.3(b)(2)(A)(i). But once California elects not to issue a citation, the State has no authority under PAGA to intervene in a case brought by an aggrieved employee. *See Iskanian*, 59 Cal. 4th at 389–90, 173 Cal.Rptr.3d 289, 327 P.3d 129 (acknowledging that PAGA "authoriz[es] financially interested private citizens to prosecute claims on the state's behalf without governmental supervision"). PAGA thus lacks the "procedural controls" necessary to ensure that California —not the aggrieved employee (the named party in PAGA suits)—retains "substantial authority" over the case. *See Orlando Reg'l Healthcare*, 524 F.3d at 1234.

Consistent with a *full* assignment, an aggrieved employee's PAGA judgment precludes California from citing the employer for the same violation. *See Iskanian*, 59 Cal. 4th at 381, 173 Cal.Rptr.3d 289, 327 P.3d 129. In that way, PAGA prevents California from intervening in a suit brought by the aggrieved employee, yet still binds the State to whatever judgment results. A complete assignment to this degree—an anomaly among modern *qui tam* statutes—undermines the notion that the aggrieved employee is solely stepping into the shoes of the State rather than also vindicating the interests of other aggrieved employees.

3.

Our precedent also shows the lack of standing here. We have ruled that an uninjured party has no Article III standing to sue under another California private attorney general statute involving unfair business practices. *See Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1002 (9th Cir. 2001) (citing Cal. Bus. & Prof. Code § 17204). In *Lee*, we held that the statute did not confer standing on a party who had not "actually been injured by the defendant's challenged conduct," even though the law permitted any person to sue on behalf of California. *Id*. at 1001–02; *see also Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1022 (9th Cir. 2004) ("Even if Cal. Bus. & Prof. Code § 17204 permits a plaintiff to pursue injunctive relief in California state courts as a private attorney general even though he or she currently suffers no individualized injury as a result of a defendant's conduct," the plaintiff must show the requisite injury to establish Article III standing.); *Fiedler*, 714 F.2d at 79–80 (rejecting Article III standing when uninjured plaintiff claimed to be "suing as a private Attorney General on behalf of citizens of Hawaii rather than as a private citizen").[6]

***8** Several circuit courts have likewise concluded that comparable statutes are not *qui tam* for purposes of Article III, based on the same features we identify in PAGA. *See, e.g.*, *Orlando Reg'l Healthcare*, 524 F.3d at 1233–34 (holding that the Medicare Secondary Payer Act "differs materially" from a *qui tam* action partly because it "provides to the government none of the procedural safeguards to manage or direct an action" traditionally afforded); *Methodist Healthcare*, 517 F.3d at 918 (same); *United Seniors Ass'n, Inc. v. Philip Morris USA*, 500 F.3d 19, 24 (1st Cir. 2007) (same); *Woods v. Empire Health Choice, Inc.*, 574 F.3d 92, 97–98 (2d Cir.2009) (same); *Brintley v. Aeroquip Credit Union*, 936 F.3d 489, 494–95 (6th

Cir. 2019) (holding that a "private attorneys general" suit is not necessarily "entitled to special solicitude in an Article III standing analysis").

***

Altogether, PAGA's features diverge from *Vermont Agency*'s assignment theory of *qui tam* injury, and they depart from the traditional criteria of *qui tam* statutes. As a result, we hold that Magadia lacks standing to bring a PAGA claim for Walmart's meal-break violations since he himself did not suffer injury.[7] We remand Magadia's meal-break claim to the district court with instructions to return it to state court. *See Lee*, 260 F.3d at 1008.

B.

Next, we consider whether Magadia has standing to bring his two wage-statement claims under Labor Code § 226(a). That provision requires employers to accurately furnish certain itemized information on its employees' wage statements. Cal. Lab. Code § 226(a). Walmart disputes that a violation of § 226(a) creates a cognizable Article III injury here. We hold that it does.

The hallmark of an Article III injury is that it is concrete and particularized. Although we often think of "tangible" injuries as the basis of this jurisdictional requirement, the Supreme Court has confirmed that "intangible injuries can nevertheless be concrete." *Spokeo*, 136 S. Ct. at 1549. The omission of statutorily required information can constitute a distinct, concrete injury.[8] At the same time, not "every minor inaccuracy reported in violation of [a statute] will 'cause real harm or present any material risk of real harm.' " *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1116 (9th Cir. 2017) ("*Spokeo II*") (quoting *Spokeo*, 136 S. Ct. at 1550) (simplified).

To determine whether the violation of a statute constitutes a concrete harm, we engage in a two-part inquiry. We first consider "whether the statutory provisions at issue were established to protect ... concrete interests (as opposed to purely procedural rights)." *Id.* at 1113. If so, we then assess "whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests." *Id.*

First, we believe § 226(a) protects employees' concrete interest in receiving accurate information about their wages in their pay statements. An employer violates the statute if it "fails to provide accurate and complete information" required by § 226(a), and if "the employee cannot promptly and easily determine [that information] from the wage statement alone." Cal. Lab. Code § 226(e)(2)(B). Section 226(a) 's procedural guarantees therefore protect an employee's non-abstract interest in being "adequately informed of [the] compensation received" during the pay period. *Soto v. Motel 6 Operating, L.P.*, 4 Cal. App. 5th 385, 392, 208 Cal.Rptr.3d 618 (2016) (simplified). As a result, Walmart's failure to disclose statutorily required information on Magadia's wage documents, if true, violates a "concrete interest." *Spokeo II*, 867 F.3d at 1113 (simplified).

***9** Second, Magadia sufficiently alleges that Walmart's § 226(a) violations—depriving him of accurate itemized wage statements—presented a "material risk of harm" to his "interest" in the statutorily guaranteed information. *See Spokeo II*, 867 F.3d at 1113. Even when a statute "has accorded procedural rights to protect a concrete interest, a plaintiff may fail to demonstrate concrete injury where violation of the procedure at issue presents no material risk of harm to that underlying interest." *Strubel v. Comenity Bank*, 842 F.3d 181, 190 (2d Cir. 2016). That is because a "procedural violation of an informational entitlement does not by itself suffice to keep a claim in federal court." *Brintley*, 936 F.3d at 493. The plaintiff must further "allege at least that the information had some relevance to *her*." *Id.*

While Walmart claims that Magadia was not harmed because it did not underpay him, the lack of the required information runs the risk of leaving him and other employees unable to determine whether that is true. As Walmart's own witnesses confirmed, without the mandated information, employees could not tell from their wage statements how the company calculated their wages or which dates the paystub covered—precisely the sort of "real harm[ ]" that § 226(a) is "designed to prevent." *See Spokeo II*, 867 F.3d at 1115; Cal. Lab. Code § 226(e)(2)(B). Even if Walmart pays its employees every penny owed, those employees suffer a real risk of harm if they cannot access the information required by § 226(a). *See Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1135 (9th Cir. 2016) ("[I]nformational injury need not result in direct pecuniary loss.").[9]

We therefore hold that Magadia has standing to bring his two claims under Labor Code § 226(a). For the same reason, we also conclude that other class members who can establish § 226(a) injuries have standing to collect damages. *See*

Ramirez v. TransUnion LLC, 951 F.3d 1008, 1017 (9th Cir. 2020) (holding that all class members "must satisfy the requirements of Article III standing at the final stage of a money damages suit when class members are to be awarded individual monetary damages").

III.

We turn, finally, to the merits of Magadia's two claims under California's wage statement statute. Cal. Lab. Code § 226(a). To recover damages under the law, Magadia must prove that he "suffer[ed] injury as a result of a knowing and intentional failure by an employer to comply with the statute." *Price v. Starbucks Corp.*, 192 Cal. App. 4th 1136, 1142, 122 Cal.Rptr.3d 174 (2011) (citing Cal. Lab. Code § 226(a), (e)). The district court determined that Magadia proved that Walmart violated the statute. We disagree.

A.

First, we conclude that the wage statement law did not require Walmart to list the "rate" of the MyShare overtime adjustment on employees' wage statements. The law requires an itemized statement with "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee." Cal. Lab. Code § 226(a)(9). The district court held that the wage statements didn't comply with the law because they didn't include the "hourly rates" and "hours worked" associated with the MyShare overtime adjustment. This was error.

***10** Walmart did not violate the wage statement law because there was no "hourly rate[ ] in effect during the pay period" for the MyShare overtime adjustment. Walmart paid its employees every two weeks and provided a paystub at the end of each semimonthly pay period. At the end of a quarter (encompassing six pay periods), Walmart awarded a MyShare bonus to its employees based on performance, sales, profits, and store standards *from the entire quarter*. California law considers that bonus part of the employees' base rate of pay, which in turn requires Walmart to make an after-the-fact adjustment to overtime pay. *See* Cal. Lab. Code § 510 (requiring employers to pay 1.5 times the "regular rate of pay" for overtime). To do so, Walmart must retroactively calculate the difference between the employees' overtime pay rate over the quarter and the employees' overtime rate as if the MyShare bonus had been paid as part of the base rate of pay. After calculating the required overtime pay adjustment, Walmart reported both the MyShare bonus and the adjusted overtime pay as lump sums on the wage statements at the end of each quarter.

Under these facts, the MyShare overtime adjustment is no ordinary overtime pay with a corresponding hourly rate. It is a non-discretionary, after-the-fact adjustment to compensation based on the overtime hours worked and the average of overtime rates[10] over a quarter (or six pay periods). As a recent California court recognized with a similar bonus scheme, the supposed "hourly rate" for the adjusted overtime pay "is a fictional hourly rate calculated after the pay period closes in order to comply with the Labor Code section on overtime"—"[i]t appears as part of the calculation for an overtime bonus and then disappears, perhaps never to be seen again." *Morales v. Bridgestone Retail Operations, LLC*, No. G057043, 2020 WL 1164120, at *1 (Cal. Ct. App. Mar. 11, 2020) (unpublished); *see also Canales v. Wells Fargo Bank, N.A.*, 23 Cal. App. 5th 1262, 234 Cal.Rptr.3d 816 (2018) (unpublished)[11] (Because "[t]he OverTimePay Override was an adjustment to the overtime payment due to an employee, based on bonuses earned by the employee for work performed during prior pay period ... there were no applicable hourly rates in effect during the pay period which defendant was required to include in the wage statement.").[12]

As a result, we do not consider the calculation to be an "hourly rate in effect during the pay period." Cal. Lab. Code § 226(a)(9). The term "in effect" is defined as "[t]he state or fact of being operative or in force."[13] And the word "during" means "[t]hroughout the whole continuance of," or "in the time of."[14] So to be "in effect during the pay period," the hourly rate must have been "operative" or "in force" "throughout the whole continuance of" or "in the time of" the pay period in the wage statement. It does not apply to an artificial, after-the-fact rate calculated based on overtime hours and rates from preceding pay periods that did not even exist during the time of the pay period covered by the wage statement. *See Morales*, 2020 WL 1164120, at *5 ("The hourly rate for the overtime premium is not in effect during the pay period."); *Canales*, 23 Cal. App. 5th 1262, 234 Cal.Rptr.3d 816 (same).

This reading is confirmed by § 226(a)(9) 's second requirement: that the employer must list the "corresponding number of hours worked at each hourly rate." During the last two-week pay period of the quarter, but before Walmart generates the MyShare bonus, an employee works under his

or her ordinary overtime hourly rate, which must be reported in the employee's paystub. At the end of the quarter, if the employee receives a MyShare bonus and its required overtime adjustment, then Walmart must also calculate the overtime adjustment rate. But at no time during the preceding two-week pay period did the employee work under that overtime rate because it's calculated *after* the close of the pay period based on the *preceding six pay periods* of work. For example, Magadia's overtime adjustment "rate" was apparently about $.20 per hour. Yet there was no pay period in which Magadia ever worked overtime at an hourly rate of $.20. As this illustrates, Magadia's reading of the statute would lead to the anomalous result of having a wage statement listing an "hourly rate" but with zero "number of hours worked" at that rate.

***11** In sum, because Walmart must retroactively calculate the MyShare overtime adjustment based on work from six prior periods, we do not consider it an hourly rate "in effect" during the pay period for purposes of § 226(a)(9). Walmart complied with the wage statement law here.

B.

Next, we hold that Walmart's Statements of Final Pay do not violate the wage statement statute. The law requires employers to furnish employees "semimonthly *or* at the time of each payment of wages" with "an accurate itemized statement in writing showing ... the inclusive dates of the period for which the employee is paid." Cal. Lab. Code § 226(a)(6) (emphasis added). Section 226(a)(6) 's use of the disjunctive affords employers the option of furnishing the pay statement *either* semimonthly *or* at the time of each wage payment. Employers are thus authorized to issue a pay statement at either time of their choosing. *See Canales*, 23 Cal. App. 5th at 1271–72, 234 Cal.Rptr.3d 816 (published) ("The plain meaning of the statute indicates the Legislature specifically intended a choice for employers as to when to furnish the wage statement."). So long as "an employer furnishes an employee's wage statement before or by the semimonthly deadline, the employer is in compliance" with § 226(a)(6). *Id.* at 1271, 234 Cal.Rptr.3d 816. Walmart complied with this provision.

Magadia insists that Walmart violated the law by not including the "dates of the period for which the employee is paid" on his Statement of Final Pay, which he received along with his final paycheck when he was terminated in the middle of a pay period. But Walmart furnished the required pay-period dates to Magadia and other terminated employees in their final wage statements at the end of the next semimonthly pay period. By the plain meaning of the statute, Walmart had the option of furnishing the required wage statement in this way and thus Walmart complied with the law.[15]

IV.

For these reasons, we **VACATE** the district court's judgment and award of damages on the Labor Code § 226.7 claim and **REMAND** with instructions to further remand it to state court. We also **REVERSE** the judgment and award of damages on the Labor Code § 226(a) claims and **REMAND** with instructions to enter judgment for Walmart.

All Citations

--- F.3d ----, 2021 WL 2176584

Footnotes

* The Honorable Gregory A. Presnell, United States District Judge for the Middle District of Florida, sitting by designation.

1 In particular, to calculate the adjusted overtime pay, Walmart adds together all the overtime hours an employee worked over the quarter, prorates the MyShare bonus to account for the total overtime hours worked that quarter, and then adjusts upward the overtime hourly rate for overtime already paid based on the prorated MyShare bonus.

2 By contrast, an FCA relator must sue in the name of the United States, *see* 31 U.S.C. § 3730(b)(1), which designates that the government is *the* real party in interest, *Methodist Healthcare*, 517 F.3d at 918.

3 *See also Canela v. Costco Wholesale Corp.*, 971 F.3d 845, 852 n.3 (9th Cir. 2020) (PAGA's monetary judgment "is not awarded exclusively to the employee who files the suit" but is rather "allocated among the aggrieved employees."); *Williams v. Superior Court*, 3 Cal. 5th 531, 545, 220 Cal.Rptr.3d 472, 398 P.3d 69 (2017) (PAGA "deputiz[es] employees harmed by labor violations to sue on behalf of the state and collect penalties, to be shared with the state and other affected employees."); *Arias v. Superior Court*, 46 Cal. 4th 969, 986, 95 Cal.Rptr.3d 588, 209 P.3d 923 (2009) ("[T]here remain situations in which nonparty aggrieved employees may profit from a judgment in an action brought under [PAGA].").

4 The PAGA action, however, does not prevent nonparty aggrieved employees from seeking "other remedies under state or federal law." *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir. 2014).

5 For example, none of the other modern *qui tam* statutes mentioned in *Vermont Agency* authorize suits on behalf of non-parties or involve payments to non-parties. *See* 529 U.S. at 769 n.1, 120 S.Ct. 1858 (citing 25 U.S.C. § 81, 26 U.S.C. § 201, 35 U.S.C. § 292(b)); *see also* Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275, 296–97 & n. 105–06 (1989) (listing early American *qui tam* statutes, which limited recovery to the relator and the government).

6 Although we have acknowledged that PAGA is a "type" or "form" of *qui tam*, we have never decided whether it confers Article III standing on uninjured employees. *See, e.g.*, *Porter v. Nabors Drilling USA, L.P.*, 854 F.3d 1057, 1061 (9th Cir. 2017) (holding that PAGA is a "type of *qui tam*" for purposes of an automatic stay in bankruptcy); *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 439 (9th Cir. 2015) (holding that the Federal Arbitration Act did not preempt PAGA because it is a "form of *qui tam*" action); *Baumann*, 747 F.3d at 1124 (holding that PAGA is not a class action but "a civil enforcement action filed on behalf of and for the benefit of the state").

7 Because Magadia doesn't having standing to bring a PAGA action on behalf of employees who personally suffered a meal-break injury, we do not decide whether Walmart violated § 226.7(c).

8 *See FEC v. Akins*, 524 U.S. 11, 21, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998) ("[A] plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute."); *Envt'l Def. Fund v. EPA*, 922 F.3d 446, 452 (D.C. Cir. 2019) ("The law is settled that a denial of access to information qualifies as an injury in fact" when disclosure of that information is required by statute.); *Hajro v. U.S. Citizenship & Immigr. Servs.*, 811 F.3d 1086, 1102–05 (9th Cir. 2016) (holding that informational injuries under FOIA satisfy Article III's "injury-in-fact" requirement).

9 Walmart alternatively argues that California, unlike Congress, cannot confer Article III standing based on a procedural violation. Again, we disagree. A legislature "has the power to create new interests, the invasion of which may confer standing" so long as "the requirements of Art. III [are] met." *Diamond v. Charles*, 476 U.S. 54, 66 n.17, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986). Walmart seeks to distinguish between injuries born of state law and those born of federal law. But we have held that "state law can create interests that support standing in federal courts." *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 599 (9th Cir. 2020) (quoting *Cantrell v. City of Long Beach*, 241 F.3d 674, 684 (9th Cir. 2001)).

10 Since an employee's overtime pay rate may fluctuate throughout a quarter, Walmart needed to consider the average overtime rate in calculating the overtime adjustment. That Walmart must base the overtime adjustment on an *average* of overtime rates from the quarter is more evidence that the adjustment is not an "hourly rate[ ] in effect during the pay period."

11 Available at: https://caselaw.findlaw.com/ca-court-of-appeal/1896937.html.

12 Although these decisions are unpublished with no precedential value, we may still consider them to interpret California law. *See Emps. Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1220 n.8 (9th Cir. 2003).

13 *In Effect*, Oxford English Dictionary Online, tinyurl.com/4f6t8ppt.

14 *During*, Oxford English Dictionary Online, tinyurl.com/tw6mvf3s.

15 Since we conclude that Walmart didn't violate § 226(a), we do not decide whether Magadia satisfied the other elements of his claim. We likewise do not decide whether the district court awarded excessive penalties under PAGA.

Senate Bill No. 93

CHAPTER 16

An act to add and repeal Section 2810.8 of the Labor Code, relating to employment, and making an appropriation therefor, to take effect immediately, bill related to the budget.

[Approved by Governor April 16, 2021. Filed with Secretary of State April 16, 2021.]

LEGISLATIVE COUNSEL'S DIGEST

SB 93, Committee on Budget and Fiscal Review. Employment: rehiring and retention: displaced workers: COVID-19 pandemic.

Existing law governs employment relations, defines the contract of employment, and establishes the obligations of employers to their employees.

This bill would, until December 31, 2024, require an employer, as defined, to offer its laid-off employees specified information about job positions that become available for which the laid-off employees are qualified, and to offer positions to those laid-off employees based on a preference system, in accordance with specified timelines and procedures. The bill would define the term "laid-off employee" to mean any employee who was employed by the employer for 6 months or more in the 12 months preceding January 1, 2020, and whose most recent separation from active service was due to a reason related to the COVID-19 pandemic, including a public health directive, government shutdown order, lack of business, a reduction in force, or other economic, nondisciplinary reason related to the COVID-19 pandemic. The bill would require an employer to keep records for 3 years, including records of communications regarding the offers. The bill would require an employer that declines to recall a laid-off employee on the grounds of lack of qualifications and instead hires someone other than a laid-off employee to provide the laid-off employee a written notice within 30 days including specified reasons for the decision, and other information on those hired.

This bill would, until December 31, 2024, prohibit an employer from refusing to employ, terminating, reducing compensation, or taking other adverse action against any laid-off employee for seeking to enforce their rights under these provisions. The bill would establish specified methods by which these provisions may be enforced, including authorizing an employee to file a complaint with the Division of Labor Standards Enforcement against the employer for specified relief, including hiring and reinstatement rights and awarding of back pay, as well as a civil penalty. The bill would authorize the Division of Labor Standards Enforcement to promulgate and enforce rules and regulations, and issue determinations and

interpretations concerning these provisions. The bill would prohibit the imposition of criminal penalties for a violation of these provisions.

This bill would appropriate $6,000,000 and make available through June 30, 2025, from the Labor and Workforce Development Fund to the Labor Commissioner for staffing resources to implement and enforce the provisions related to the rehiring and retention of workers displaced due to the COVID-19 pandemic.

This bill would declare that it is to take effect immediately as a bill providing for appropriations related to the Budget Bill.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 2810.8 is added to the Labor Code, to read:

2810.8. (a) For purposes of this section, the following definitions apply:

(1) "Airport" means any area of land or water used or intended for landing or takeoff of aircraft including appurtenant area used or intended for airport buildings, facilities, as well as rights of way together with the buildings and facilities within the State of California, excluding any military base or federally operated facility.

(2) "Airport hospitality operation" means a business that prepares, delivers, inspects, or provides any other service in connection with the preparation of food or beverage for aircraft crew or passengers at an airport, or that provides food and beverage, retail, or other consumer goods or services to the public at an airport. The term airport hospitality operation does not include an air carrier certificated by the Federal Aviation Administration.

(3) "Airport service provider" means a business that performs, under contract with a passenger air carrier, airport facility management, or airport authority, functions on the property of the airport that are directly related to the air transportation of persons, property, or mail, including, but not limited to, the loading and unloading of property on aircraft, assistance to passengers under Part 382 (commencing with Section 382.1) of Title 14 of the Code of Federal Regulations, security, airport ticketing and check-in functions, ground-handling of aircraft, aircraft cleaning and sanitization functions, and waste removal. The term "airport service provider" does not include an air carrier certificated by the Federal Aviation Administration.

(4) "Building service" means janitorial, building maintenance, or security services.

(5) "Employee" means any individual who in a particular week performs at least two hours of work for an employer.

(6) "Employer" means any person, including a corporate officer or executive, who directly or indirectly or through an agent or any other person, including through the services of a temporary service or staffing agency or similar entity, owns or operates an enterprise and employs or exercises control over the wages, hours, or working conditions of any employee.

"Employer" also means the successor employer as set forth under paragraph (6) of subdivision (b).

(7) "Enterprise" means a hotel, private club, event center, airport hospitality operation, airport service provider, or the provision of building service to office, retail, or other commercial buildings.

(8) "Event center" means a publicly or privately owned structure of more than 50,000 square feet or 1,000 seats that is used for the purposes of public performances, sporting events, business meetings, or similar events, and includes concert halls, stadiums, sports arenas, racetracks, coliseums, and convention centers. The term "event center" also includes any contracted, leased, or sublet premises connected to or operated in conjunction with the event center's purpose, including food preparation facilities, concessions, retail stores, restaurants, bars, and structured parking facilities.

(9) "Hotel" means a residential building that is designated or used for lodging and other related services for the public, and containing 50 or more guest rooms, or suites of rooms (adjoining rooms do not constitute a suite of rooms). "Hotel" also includes any contracted, leased, or sublet premises connected to or operated in conjunction with the building's purpose, or providing services at the building. The number of guest rooms, or suites of rooms, shall be calculated based on the room count on the opening of the hotel or on December 31, 2019, whichever is greater.

(10) "Laid-off employee" means any employee who was employed by the employer for 6 months or more in the 12 months preceding January 1, 2020, and whose most recent separation from active service was due to a reason related to the COVID-19 pandemic, including a public health directive, government shutdown order, lack of business, a reduction in force, or other economic, nondisciplinary reason due to the COVID-19 pandemic.

(11) "Length of service" means the total of all periods of time during which an employee has been in active service with the employer, based on the employee's date of hire, including periods of time when the employee was on leave or on vacation.

(12) "Person" means an individual, corporation, partnership, limited partnership, limited liability partnership, limited liability company, business trust, estate, trust, association, joint venture, agency, instrumentality, or any other legal or commercial entity, whether domestic or foreign.

(13) "Private club" means a private, membership-based business or nonprofit organization that operates a building or complex of buildings containing at least 50 guest rooms or suites of rooms that are offered as overnight lodging to members. The number of guest rooms or suites of rooms shall be calculated based on the room count on the opening of the private club or on December 31, 2019, whichever is greater.

(b) (1) Within five business days of establishing a position, an employer shall offer its laid-off employees in writing, either by hand or to their last known physical address, and by email and text message to the extent the employer possesses such information, all job positions that become available after the effective date of this section for which the laid-off employees are qualified. A laid-off employee is qualified for a position if the employee

held the same or similar position at the enterprise at the time of the employee's most recent layoff with the employer.

(2) The employer shall offer positions to laid-off employees in an order of preference subject to paragraph (1) and this paragraph. If more than one employee is entitled to preference for a position, the employer shall offer the position to the laid-off employee with the greatest length of service based on the employee's date of hire for the enterprise.

(3) A laid-off employee who is offered a position pursuant to this section shall be given at least five business days, from the date of receipt, in which to accept or decline the offer. A "business day" is any day except Saturday, Sunday, or any official state holiday. An employer may make simultaneous, conditional offers of employment to laid-off employees, with a final offer of employment conditioned on application of the preference system set forth in paragraph (2).

(4) An employer must retain the following records for at least three years, measured from the date of the written notice regarding the layoff, for each laid-off employee: the employee's full legal name; the employee's job classification at the time of separation from employment; the employee's date of hire; the employee's last known address of residence; the employee's last known email address; the employee's last known telephone number; and a copy of the written notices regarding the layoff provided to the employee and all records of communications between the employer and the employee concerning offers of employment made to the employee pursuant to this section.

(5) An employer that declines to recall a laid-off employee on the grounds of lack of qualifications and instead hires someone other than a laid-off employee shall provide the laid-off employee a written notice within 30 days including the length of service with the employer of those hired in lieu of that recall, along with all reasons for the decision.

(6) This section also applies in any of the following circumstances:

(A) The ownership of the employer changed after the separation from employment of a laid-off employee but the enterprise is conducting the same or similar operations as before the COVID-19 state of emergency.

(B) The form of organization of the employer changed after the COVID-19 state of emergency.

(C) Substantially all of the assets of the employer were acquired by another entity that conducts the same or similar operations using substantially the same assets.

(D) The employer relocates the operations at which a laid-off employee was employed before the COVID-19 state of emergency to a different location.

(c) No employer shall refuse to employ, terminate, reduce in compensation, or otherwise take any adverse action against any laid-off employee as defined in subdivision (a) for seeking to enforce their rights under this section, for participating in proceedings related to this section, opposing any practice proscribed by this section, or otherwise asserting rights under this section. This subdivision shall also apply to any employee

or laid-off employee who mistakenly, but in good faith, alleges noncompliance with this section.

(d) The Division of Labor Standards Enforcement shall have exclusive jurisdiction to enforce this section. This section may be enforced only as follows:

(1) A laid off employee may file a complaint with the Division of Labor Standards Enforcement for violations of this section and may be awarded any or all of the following, as appropriate:

(A) Hiring and reinstatement rights pursuant to this section.

(B) Front pay or back pay for each day during which the violation continues, which shall be calculated at a rate of compensation not less than the highest of any of the following rates:

(i) The average regular rate of pay received by the laid-off employee during the last three years of that employee's employment in the same occupation classification.

(ii) The most recent regular rate received by the laid-off employee while employed by the employer.

(iii) The regular rate received by an employee occupying the position in place of the laid-off employee that should have been employed.

(C) Value of the benefits the laid-off employee would have received under the employer's benefit plan.

(2) No criminal penalties shall be imposed for violation of this section.

(3) Any employer, agent of the employer, or other person who violates or causes to be violated the provisions of this section shall be subject to a civil penalty of one hundred dollars ($100) for each employee whose rights under these provisions are violated and an additional sum payable as liquidated damages in the amount of five hundred dollars ($500), per employee, for each day the rights of an employee under this section are violated and continuing until such time as the violation is cured, which shall be recovered by the Labor Commissioner, deposited into the Labor and Workforce Development Fund, and paid to the employee as compensatory damages.

(4) The Labor Commissioner shall enforce this section, including investigating an alleged violation and ordering appropriate temporary relief to mitigate the violation pending the completion of a full investigation or hearing, through the procedures set forth in Section 98.3, 98.7, 98.74, or 1197.1, including by issuance of a citation against an employer who violates this section and by filing a civil action. If a citation is issued, the procedures for issuing, contesting, and enforcing judgments for citations and civil penalties issued by the Labor Commissioner shall be the same as those set out in Section 98.74 or 1197.1, as appropriate.

(5) In an action brought by the Labor Commissioner for enforcement of this section, the court may issue preliminary and permanent injunctive relief to vindicate the rights of employees.

(6) In an administrative or civil action brought under this section, the Labor Commissioner or court, as the case may be, shall award interest on

all amounts due and unpaid at the rate of interest specified in subdivision (b) of Section 3289 of the Civil Code.

(7) The remedies, penalties, and procedures provided under this section are cumulative.

(e) The Division of Labor Standards Enforcement may promulgate and enforce rules and regulations, and issue determinations and interpretations, consistent with and necessary for the implementation of this section. Those rules and regulations, determinations, and interpretations shall have the force of law and may be relied upon by employers, employees, and other persons to determine their rights and responsibilities under this section.

(f) Nothing in this section shall prohibit a local government agency from enacting ordinances that impose greater standards than, or establish additional enforcement provisions to, those prescribed by this section. This section shall not be construed to limit a discharged employee or eligible employee's right to bring a common law cause of action for wrongful termination.

(g) All of the provisions of this section, or any part of this section, may be waived in a valid collective bargaining agreement, but only if the waiver is explicitly set forth in that agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute or be permitted as a waiver of all or any part of the provisions of this section.

(h) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(i) This section shall remain in effect only until December 31, 2024, and as of that date is repealed.

SEC. 2. The sum of six million dollars ($6,000,000) is hereby appropriated and available through June 30, 2025, from the Labor and Workforce Development Fund to the Labor Commissioner for staffing resources to implement and enforce the provisions related to the rehiring and retention of workers displaced due to the COVID-19 pandemic as described in Section 2810.8 of the Labor Code.

SEC. 3. This act is a bill providing for appropriations related to the Budget Bill within the meaning of subdivision (e) of Section 12 of Article IV of the California Constitution, has been identified as related to the budget in the Budget Bill, and shall take effect immediately.

O

Senate Bill No. 95

CHAPTER 13

An act to add Sections 248.2 and 248.3 to the Labor Code, relating to employment, and making an appropriation therefor, to take effect immediately, bill related to the budget.

[Approved by Governor March 19, 2021. Filed with Secretary of State March 19, 2021.]

LEGISLATIVE COUNSEL'S DIGEST

SB 95, Skinner. Employment: COVID-19: supplemental paid sick leave.

Existing law, the Healthy Workplaces, Healthy Families Act of 2014, entitles an employee who works in California for the same employer for 30 or more days within a year from the commencement of employment to paid sick days. Under existing law, an employee accrues paid sick days at a rate of not less than one hour per every 30 hours worked, subject to certain use, accrual, and yearly carryover limitations. Existing law requires the Labor Commissioner to enforce the act and provides for procedures, including investigation and hearing, and for remedies and penalties.

Existing law, until December 31, 2020, provided for COVID-19 food sector supplemental paid sick leave for food sector workers and required a hiring entity to provide COVID-19 food sector supplemental paid sick leave, as described, to each food sector worker unable to work due to specified reasons relating to COVID-19. Existing law also established, until December 31, 2020, COVID-19 supplemental paid sick leave for covered workers, including certain persons employed by private businesses of 500 or more employees or persons employed as certain types of health care providers or emergency responders by public or private entities.

This bill would provide for COVID-19 supplemental paid sick leave for covered employees, as defined, who are unable to work or telework due to certain reasons related to COVID-19, including that the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. The bill would entitle a covered employee to 80 hours of COVID-19 supplemental paid sick leave if that employee either works full time or was scheduled to work, on average, at least 40 hours per week for the employer in the 2 weeks preceding the date the covered employee took COVID-19 supplemental paid sick leave. The bill would provide a different calculation for supplemental paid sick leave for a covered employee who is a firefighter subject to certain work schedule requirements and for a covered employee working fewer or variable hours, as specified. The bill would provide that the total number of hours of COVID-19 supplemental paid sick leave to which a covered employee is entitled to under these

provisions is in addition to any paid sick leave available under the act, as specified.

This bill would set the compensation rate for a nonexempt covered employee at the highest of the covered employee's regular rate of pay for the pay period in which the supplemental paid sick leave is taken, the state minimum wage, or the local minimum wage to which the covered employee is entitled, up to certain daily and aggregate total maximum payment limits and subject to specified federal law increases. The bill would prohibit an employer from requiring a covered employee to use other paid or unpaid leave, paid time off, or vacation time provided by the employer to the covered employee before that employee uses COVID-19 supplemental paid leave or in lieu thereof, except in certain circumstances in which the employer provides another supplemental benefit for leave for COVID-19, as prescribed. The bill would require the Labor Commissioner to enforce these COVID-19 supplemental paid sick leave provisions, as provided. The bill would also require the Labor Commissioner to make publicly available a model notice relating to COVID-19 supplemental paid sick leave.

This bill would also provide for COVID-19 supplemental paid sick leave for specified in-home supportive service providers and personal waiver care service providers, as defined, who are unable to work or telework due to certain reasons related to COVID-19. Under the bill, a provider would be entitled to COVID-19 supplemental paid leave if, among other reasons, the provider is subject to a quarantine or isolation period related to COVID-19 pursuant to an order or guidelines of the State Department of Public Health, the federal Centers for Disease Control and Prevention, or a local health officer, or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. The bill would entitle a provider to up to 80 hours of COVID-19 supplemental paid leave, if the provider worked or was scheduled to work, on average, at least 40 hours per week, as specified, or met certain other work conditions. The bill would set the compensation rate for this supplemental paid sick leave, as specified. The bill would authorize the State Department of Social Services and the State Department of Health Care Services to implement, interpret, or make these provisions specific by means of all-county letters or similar instructions, without taking any regulatory action.

The bill would make these requirements, with respect to covered employees, in-home supportive service providers, and personal waiver care service providers, to provide COVID-19 supplemental paid sick leave take effect 10 days after the date of enactment of the bill and would apply these provisions retroactively to January 1, 2021, as specified. The bill would provide that the requirement to provide COVID-19 supplemental paid sick leave would apply until September 30, 2021, as specified.

This bill would appropriate $100,000 from the General Fund to the Labor Commissioner for staffing resources to implement and enforce these provisions.

This bill would declare that it is to take effect immediately as a bill providing for appropriations related to the Budget Bill.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 248.2 is added to the Labor Code, to read:

248.2. (a) As used in this section:

(1) "COVID-19 supplemental paid sick leave" means supplemental paid sick leave provided pursuant to this section.

(2) "Employer" means an employer, as defined in subdivision (b) of Section 245.5, that employs more than 25 employees.

(3) "Covered employee" means an employee who is unable to work or telework for an employer because of a reason listed under paragraph (1) of subdivision (b).

(4) "Firefighter" means an active firefighting member of any of the following:

(A) A fire department of a city, county, city and county, district, or other public or municipal corporation or political subdivision.

(B) A fire department of the University of California and the California State University.

(C) The Department of Forestry and Fire Protection.

(D) A county forestry or firefighting department or unit.

(E) A fire department that serves a United States Department of Defense installation and whose firefighters are certified by the United States Department of Defense as meeting its standards for firefighters.

(F) A fire department that serves a National Aeronautics and Space Administration installation and that adheres to training standards established in accordance with Article 4 (commencing with Section 13155) of Chapter 1 of Part 2 of Division 12 of the Health and Safety Code.

(G) A fire department that provides fire protection to a commercial airport regulated by the Federal Aviation Administration (FAA) under Part 139 (commencing with Section 139.1) of Subchapter G of Chapter 1 of Title 14 of the Federal Code of Regulations whose firefighters are trained and certified by the State Fire Marshal as meeting the standards of Fire Control 5 and Section 139.319 of Title 14 of the Federal Code of Regulations.

(H) Fire and rescue services coordinators who work for the Office of Emergency Services. For purposes of this clause, "fire and rescue services coordinators" means coordinators with any of the following job classifications: coordinator, senior coordinator, or chief coordinator.

(b) A covered employee shall be entitled to COVID-19 supplemental paid sick leave as follows:

(1) An employer shall provide COVID-19 supplemental paid sick leave to each covered employee if that covered employee is unable to work or telework due to any of the following reasons:

(A) The covered employee is subject to a quarantine or isolation period related to COVID-19 as defined by an order or guidelines of the State Department of Public Health, the federal Centers for Disease Control and

Prevention, or a local health officer who has jurisdiction over the workplace. If the covered employee is subject to more than one of the foregoing, the covered employee shall be permitted to use COVID-19 supplemental paid sick leave for the minimum quarantine or isolation period under the order or guidelines that provides for the longest such minimum period.

(B) The covered employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

(C) The covered employee is attending an appointment to receive a vaccine for protection against contracting COVID-19.

(D) The covered employee is experiencing symptoms related to a COVID-19 vaccine that prevent the employee from being able to work or telework.

(E) The covered employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

(F) The covered employee is caring for a family member, as defined in subdivision (c) of Section 245.5, who is subject to an order or guidelines described in subparagraph (A) or who has been advised to self-quarantine, as described in subparagraph (B).

(G) The covered employee is caring for a child, as defined in subdivision (c) of Section 245.5, whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19 on the premises.

(2) A covered employee shall be entitled to the following number of hours of COVID-19 supplemental paid sick leave:

(A) A covered employee is entitled to 80 hours of COVID-19 supplemental paid sick leave, if the covered employee satisfies either of the following criteria:

(i) The employer considers the covered employee to work full time.

(ii) The covered employee worked or was scheduled to work, on average, at least 40 hours per week for the employer in the two weeks preceding the date the covered employee took COVID-19 supplemental paid sick leave.

(B) Notwithstanding subparagraph (A), a covered employee who is a firefighter who was scheduled to work more than 80 hours for the employer in the two weeks preceding the date the covered employee took COVID-19 supplemental paid sick leave is entitled to an amount of COVID-19 supplemental paid sick leave equal to the total number of hours that the covered employee was scheduled to work for the employer in those two preceding weeks.

(C) A covered employee who does not satisfy the criteria in subparagraph (A) or subparagraph (B) is entitled to an amount of COVID-19 supplemental paid sick leave as follows:

(i) If the covered employee has a normal weekly schedule, the total number of hours the covered employee is normally scheduled to work for the employer over two weeks.

(ii) If the covered employee works a variable number of hours, 14 times the average number of hours the covered employee worked each day for the employer in the six months preceding the date the covered employee took COVID-19 supplemental paid sick leave. If the covered employee has

worked for the employer over a period of fewer than six months but more than 14 days, this calculation shall instead be made over the entire period the covered employee has worked for the employer.

(iii) If the covered employee works a variable number of hours and has worked for the employer over a period of 14 days or fewer, the total number of hours the covered employee has worked for that employer.

(D) The total number of hours of COVID-19 supplemental paid sick leave to which a covered employee is entitled pursuant to subparagraph (A), (B), or (C) shall be in addition to any paid sick leave that may be available to the covered employee under Section 246.

(E) A covered employee may determine how many hours of COVID-19 supplemental paid sick leave to use, up to the total number of hours to which the covered employee is entitled pursuant to subparagraph (A), (B), or (C) of this paragraph. The employer shall make COVID-19 supplemental paid sick leave available for immediate use by the covered employee, upon the oral or written request of the covered employee to the employer.

(F) An employer is not required to provide a covered employee more than the total number of hours of COVID-19 supplemental paid sick leave to which the covered employee is entitled pursuant to subparagraph (A), (B), or (C) of this paragraph.

(3) (A) Each hour of COVID-19 supplemental paid sick leave shall be compensated at a rate equal to the following:

(i) For nonexempt covered employees, by the highest of the following:

(I) Calculated in the same manner as the regular rate of pay for the workweek in which the covered employee uses COVID-19 supplemental paid sick leave, whether or not the employee actually works overtime in that workweek.

(II) Calculated by dividing the covered employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.

(III) The state minimum wage.

(IV) The local minimum wage to which the covered employee is entitled.

(ii) COVID-19 supplemental paid sick leave for exempt covered employees shall be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

(B) Notwithstanding subparagraph (A), a covered employee who is entitled to an amount of COVID-19 supplemental paid sick leave under subparagraph (B) of paragraph (2), shall be compensated for each hour of COVID-19 supplemental paid sick leave at the regular rate of pay to which the covered employee would be entitled as if the covered employee had been scheduled to work those hours, pursuant to existing law or an applicable collective bargaining agreement.

(C) Notwithstanding subparagraph (A) or (B), an employer shall not be required to pay more than five hundred eleven dollars ($511) per day and five thousand one hundred ten dollars ($5,110) in the aggregate to a covered employee for COVID-19 supplemental paid sick leave taken by the covered employee unless federal legislation is enacted that increases these amounts

beyond the amounts that were included in the Emergency Paid Sick Leave Act established by the federal Families First Coronavirus Response Act (Public Law 116-127), in which case the new federal dollar amounts shall apply to this section as of the date the new amounts are applicable under the federal law. Nothing in this subparagraph shall prevent a covered employee who has reached the maximum amounts, as set forth herein, from choosing to utilize other paid leave that is available to the covered employee in order to fully compensate the covered employee for leave taken.

(4) An employer shall not require a covered employee to use any other paid or unpaid leave, paid time off, or vacation time provided by the employer to the covered employee before the covered employee uses COVID-19 supplemental paid sick leave or in lieu of COVID-19 supplemental paid sick leave.

(5) Notwithstanding any other provision in this section, in order to satisfy the requirement to maintain an employee's earnings when an employee is excluded from the workplace due to COVID-19 exposure under the Cal-OSHA COVID-19 Emergency Temporary Standards at Sections 3205 through 3205.4, inclusive, of Title 8 of the California Code of Regulations or the Cal-OSHA Aerosol Transmissible Diseases Standard at Section 5199 of Title 8 of the California Code of Regulations, an employer may require a covered employee to first exhaust their COVID-19 supplemental paid sick leave under this section.

(c) Notwithstanding subdivision (b), if an employer pays a covered employee another supplemental benefit for leave taken on or after January 1, 2021, that is payable for the reasons listed in paragraph (1) of subdivision (b) and that compensates the covered employee in an amount equal to or greater than the amount of compensation for COVID-19 supplemental paid sick leave to which the covered employee is entitled as set forth under paragraph (3) of subdivision (b), then the employer may count the hours of the other paid benefit or leave towards the total number of hours of COVID-19 supplemental paid sick leave that the employer is required to provide to the covered employee under paragraph (2) of subdivision (b). For purposes of the foregoing, the other supplemental benefit for leave taken that may be counted does not include paid sick leave to which the covered employee is entitled under Section 246, subdivision (e) of Section 248, or subdivision (f) of Section 248.1 but may include paid leave provided by the employer pursuant to any federal or local law in effect or that became effective on or after January 1, 2021, if the paid leave is provided to the covered employee under that law for any of the same reasons set forth in paragraph (1) of subdivision (b).

(d) In addition to other remedies as may be provided by the laws of this state or its subdivisions, including, but not limited to, the remedies available to redress any unlawful business practice under Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code, the Labor Commissioner shall enforce this section. For purposes of enforcement and to implement COVID-19 supplemental paid sick leave, this section shall apply as follows:

(1) The Labor Commissioner shall enforce this section as if COVID-19 supplemental paid sick leave constitutes "paid sick days," "paid sick leave," or "sick leave" under subdivisions (i) and (n) of Section 246, subdivisions (b) and (c) of Section 246.5, Section 247, Section 247.5, and Section 248.5.

(2) For purposes of the enforcement of subdivision (i) of Section 246 as it relates to this section:

(A) COVID-19 supplemental paid sick leave shall be set forth separately from paid sick days.

(B) The requirement in subdivision (i) of Section 246 is not enforceable until the next full pay period following the date that this section takes effect.

(C) When covered employees have schedules described in clauses (ii) and (iii) of subparagraph (C) of paragraph (2) of subdivision (b), an employer may meet the requirement of subdivision (i) of Section 246 for such covered employees by doing an initial calculation of COVID-19 supplemental paid sick leave available and indicating "(variable)" next to that calculation. This, however, does not exempt an employer from providing a covered employee an updated calculation when such a covered employee requests to use COVID-19 supplemental paid sick leave or requests relevant records under Section 247.5.

(3) Section 249 applies to COVID-19 supplemental paid sick leave.

(4) By seven days after the date of enactment of this section, the Labor Commissioner shall make publicly available a model notice for purposes of Section 247. Only for purposes of COVID-19 supplemental paid sick leave, if an employer's covered employees do not frequent a workplace, the employer may satisfy the notice requirement of subdivision (a) of Section 247 by disseminating notice through electronic means, such as by electronic mail.

(e) (1) The requirement to provide COVID-19 supplemental paid sick leave as set forth in this section shall take effect 10 days after the date of enactment of this section, at which time the requirements shall apply retroactively to January 1, 2021.

(2) The requirement to provide COVID-19 supplemental paid sick leave as set forth in this section applies retroactively to January 1, 2021, in order to protect the economic well-being of covered employees who took leave for the reasons listed in paragraph (1) of subdivision (b) beginning on or after January 1, 2021, when the requirements in Sections 248, 248.1, and the Emergency Paid Sick Leave Act established by the federal Families First Coronavirus Response Act (Public Law 116-127) expired, and before the effective date of this section.

(A) For any such leave taken, if the employer did not compensate the covered employee in an amount equal to or greater than the amount of compensation for COVID-19 supplemental paid sick leave to which the covered employee is entitled as set forth under paragraph (3) of subdivision (b), then upon the oral or written request of the employee, the employer shall provide the covered employee with a retroactive payment that provides for such compensation.

(B) For any such retroactive payment, the number of hours of leave corresponding to the amount of the retroactive payment shall count towards the total number of hours of COVID-19 supplemental paid sick leave that the employer is required to provide to the covered employee under paragraph (2) of subdivision (b).

(C) This retroactive payment shall be paid on or before the payday for the next full pay period after the oral or written request of the covered employee. The retroactive payment shall be reflected on the written notice required by subparagraph (B) of paragraph (2) of subdivision (d) for the corresponding pay period.

(D) The requirement to provide a retroactive payment under this subdivision is in addition to the requirements in subdivision (e) of Section 248 and subdivision (f) of Section 248.1 that a covered employee taking COVID-19 food sector supplemental paid sick leave or COVID-19 supplemental paid sick leave at the time of the expiration of those sections shall be permitted to take the full amount of such supplemental paid sick leave to which that covered employee otherwise would have been entitled under those sections.

(f) The requirement to provide COVID-19 supplemental paid sick leave as set forth in this section shall remain in effect through September 30, 2021, except that a covered employee taking COVID-19 supplemental paid sick leave at the time of the expiration of this section shall be permitted to take the full amount of COVID-19 supplemental paid sick leave to which the covered employee otherwise would have been entitled under this section.

(g) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(h) The provisions of this section shall not apply to providers of in-home supportive services under Section 14132.95, 14132.952, or 14132.956 of, or Article 7 (commencing with Section 12300) of Chapter 3 of Part 3 of Division 9 of, the Welfare and Institutions Code, or waiver personal care services pursuant to Section 14132.97 of the Welfare and Institutions Code.

SEC. 2. Section 248.3 is added to the Labor Code, to read:

248.3. (a) As used in this section:

(1) "COVID-19 supplemental paid sick leave" means supplemental paid sick leave provided pursuant to this section.

(2) "Provider" or "providers" means a provider of in-home supportive services under Section 14132.95, 14132.952, or 14132.956 of, or Article 7 (commencing with Section 12300) of Chapter 3 of Part 3 of Division 9 of, the Welfare and Institutions Code, or waiver personal care services pursuant to Section 14132.97 of the Welfare and Institutions Code.

(3) "Work" or "worked" means providing authorized in-home supportive services under Section 14132.95, 14132.952, or 14132.956 of, or Article 7 (commencing with Section 12300) of Chapter 3 of Part 3 of Division 9 of, the Welfare and Institutions Code, or waiver personal care services pursuant

to Section 14132.97 of the Welfare and Institutions Code, to an eligible recipient.

(b) A provider shall be entitled to COVID-19 supplemental paid sick leave as follows:

(1) COVID-19 supplemental paid sick leave shall be available to a provider if that provider is unable to work due to any of the following reasons:

(A) The provider is subject to a quarantine or isolation period related to COVID-19 as defined by an order or guidelines of the State Department of Public Health, the federal Centers for Disease Control and Prevention, or a local health officer who has jurisdiction over the workplace. If the provider is subject to more than one of the foregoing, the provider shall be permitted to use COVID-19 supplemental paid sick leave for the minimum quarantine or isolation period under the order or guidelines that provides for the longest minimum period.

(B) The provider has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

(C) The provider is attending an appointment to receive a vaccine for protection against contracting COVID-19.

(D) The provider is experiencing symptoms related to a COVID-19 vaccine that prevents the provider from being able to work.

(E) The provider is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

(F) The provider is caring for a family member, as defined in subdivision (c) of Section 245.5, who is subject to an order or guidelines described in subparagraph (A) or who has been advised to self-quarantine, as described in subparagraph (B).

(G) The provider is caring for a child, as defined in subdivision (c) of Section 245.5, whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19 on the premises.

(2) A provider shall be entitled to the following number of hours of COVID-19 supplemental paid sick leave:

(A) A provider is entitled to 80 hours of COVID-19 supplemental paid sick leave if the provider worked or was scheduled to work, on average, at least 40 hours per week in the two weeks preceding the date the provider took COVID-19 supplemental paid sick leave.

(B) A provider who does not satisfy the criteria in subparagraph (A) is entitled to an amount of COVID-19 supplemental paid sick leave as follows, up to a maximum of 80 hours of COVID-19 supplemental paid sick leave:

(i) If the provider has a regular weekly schedule, the total number of hours the provider is normally scheduled to work over two weeks.

(ii) If the provider works a variable number of hours, 14 times the average number of hours the provider worked each day for the employer in the six months preceding the date the provider took COVID-19 supplemental paid sick leave. If the provider has worked over a period of fewer than six months but more than 14 days, this calculation shall instead be made over the entire period the provider has worked.

(iii) If the provider works a variable number of hours and has worked over a period of 14 days or fewer, the total number of hours the provider has worked.

(C) The total number of hours of COVID-19 supplemental paid sick leave to which a provider is entitled pursuant to subparagraph (A) or (B) shall be determined on the first day that the provider uses COVID-19 supplemental paid sick leave under this section and shall be in addition to any paid sick leave that may be available to the provider under Section 246.

(D) A provider may determine how many hours of COVID-19 supplemental paid sick leave to use, up to the total number of hours to which the provider is entitled pursuant to subparagraph (A) or (B). The COVID-19 supplemental paid sick leave is available for immediate use by the provider, and the provider shall inform the recipient of the need to take sick leave and submit a sick leave claim to the county consistent with established procedures in that county.

(E) A provider is not entitled to more than the total number of hours of COVID-19 supplemental paid sick leave to which the provider is entitled pursuant to subparagraph (A) or (B).

(3) Each hour of COVID-19 supplemental paid sick leave shall be compensated at the regular rate of pay to which the provider would be entitled if the provider had been scheduled to work those hours pursuant to existing law or an applicable collective bargaining agreement.

(4) A provider shall not be required to use any other paid or unpaid leave before the provider uses COVID-19 supplemental paid sick leave or in lieu of COVID-19 supplemental paid sick leave.

(c) Notwithstanding subdivision (b), if a provider takes paid leave on or after April 1, 2021, that is payable for the reasons listed in paragraph (1) of subdivision (b) that compensates the provider in an amount equal to or greater than the amount of compensation for COVID-19 supplemental paid sick leave to which the provider is entitled as set forth under paragraph (3) of subdivision (b), the hours of the other paid benefit or leave may be counted towards the total number of hours of COVID-19 supplemental paid sick leave to which the provider is entitled under paragraph (2) of subdivision (b). For purposes of the foregoing, the other supplemental benefit for leave taken that may be counted does not include paid sick leave to which the provider may be entitled to under Section 246, but may include paid leave provided by any federal or local law that becomes effective on or after April 1, 2021, if the paid leave is provided to the provider under that law for any of the same reasons set forth in paragraph (1) of subdivision (b).

(d) (1) The entitlement to COVID-19 supplemental paid sick leave as set forth in this section shall take effect 10 days after the date of enactment of this section, at which time the entitlements shall apply retroactively to January 1, 2021.

(2) The entitlement to COVID-19 supplemental paid sick leave as set forth in this section applies retroactively to January 1, 2021.

(A) For any such leave taken, if the provider was not compensated in an amount equal to or greater than the amount of compensation for COVID-19

supplemental paid sick leave to which the provider is entitled as set forth under paragraph (3) of subdivision (b), then the provider shall be entitled to a retroactive payment that provides for such compensation.

(B) For any such retroactive payment, the number of hours of leave corresponding to the amount of the retroactive payment shall count towards the total number of hours of COVID-19 supplemental paid sick leave that the provider is entitled to under paragraph (2) of subdivision (b).

(C) The COVID-19 supplemental paid sick leave provided under this section is in addition to any unused sick leave benefits put in place by the federal Family First Coronavirus Response Act (Public Law 116-127), which a provider may still use until March 31, 2021.

(e) The entitlement to COVID-19 supplemental paid sick leave as set forth in this section shall remain in effect through September 30, 2021, except that a provider taking COVID-19 supplemental paid sick leave at the time of the expiration of this section shall be permitted to take the full amount of COVID-19 supplemental paid sick leave to which the provider otherwise would have been entitled under this section.

(f) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(g) Notwithstanding the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code), the State Department of Social Services and the State Department of Health Care Services may implement, interpret, or make specific this section by means of all-county letters or similar instructions, without taking any regulatory action.

SEC. 3. The sum of $100,000 is hereby appropriated from the General Fund to the Labor Commissioner for staffing resources to implement and enforce the provisions related to the COVID-19 supplemental paid sick leave in this act.

SEC. 4. This act is a bill providing for appropriations related to the Budget Bill within the meaning of subdivision (e) of Section 12 of Article IV of the California Constitution, has been identified as related to the budget in the Budget Bill, and shall take effect immediately.

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2021 COVID-19 Supplemental Paid Sick Leave FAQs español

dir.ca.gov/dlse/COVID19Resources/FAQ-for-SPSL-2021.html

(Labor Code Section 248.2)

Coverage

1. Which employers are covered by the new 2021 COVID-19 Supplemental Paid Sick Leave law?

All employers, public or private, with 26 or more employees are covered, including those with collective bargaining agreements.

2. Which employees are covered by this new law?

Covered employees are those who cannot work or telework due to the reasons listed below in FAQ 4. Under the 2021 COVID-19 Supplemental Paid Sick Leave law, covered employees are entitled to paid sick leave that is **in addition to** leave that was provided under previous laws which expired on December 31, 2020. See FAQ 25 for more information on these other laws (the federal Families First Coronavirus Response Act and the 2020 COVID-19 Supplemental Paid Sick Leave laws).

3. Does COVID-19 Supplemental Paid Sick Leave apply to independent contractors?

No. Unlike 2020 COVID-19 Supplemental Paid Sick Leave for food sector workers (Labor Code Section 248), 2021 COVID-19 Supplemental Paid Sick Leave does not apply to independent contractors. However, any worker who has been misclassified as an independent contractor but is in fact an employee, and otherwise qualifies under the new law, is entitled to 2021 COVID-19 Supplemental Paid Sick Leave.

Reasons for Taking Leave

4. What are the circumstances that allow a covered employee to take 2021 COVID-19 Supplemental Paid Sick Leave?

The covered employee must be unable to work or telework due to any one of the following reasons:

- **Caring for Yourself:** The covered employee is subject to a quarantine or isolation period related to COVID-19 (see note below), or has been advised by a healthcare provider to quarantine due to COVID-19, or is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- **Caring for a Family Member:** The covered employee is caring for a family member who is either subject to a quarantine or isolation period related to COVID-19 (see note below) or has been advised by a healthcare provider to quarantine due to COVID-19, or the employee is caring for a child whose school or place of care is closed or unavailable due to COVID-19 on the premises.
- **Vaccine-Related:** The covered employee is attending a vaccine appointment or cannot work or telework due to vaccine-related side effects.

NOTE: The quarantine or isolation period related to COVID-19 is the period defined by an order or guidelines of the California Department of Public Health, the federal Centers for Disease Control and Prevention, or a local health officer with jurisdiction over the workplace.

5. What does it mean for a child's school or place of care to be closed or unavailable due to COVID-19 on the premises?

This means that a child's classroom in school or place of care has been closed after concern that a person who had been present on the school or daycare premises on or after January 1, 2021, was exposed to, or had contracted, COVID-19. This does not include caring for a child whose school or daycare was closed before January 1, 2021. If the school or daycare was closed on or after January 1, 2021, it must have been due to a closure, or partial closure, making the care unavailable due to COVID-19 on the premises.

6. Is a covered employee eligible for 2021 COVID-19 Supplemental Paid Sick Leave if someone with whom the covered employee lives is exposed, experiences symptoms, or is diagnosed with COVID-19?

A covered employee is eligible for COVID-19 Supplemental Paid Sick Leave if the employee is caring for a family member whom a medical professional has recommended to stay home due to COVID-19, or caring for a family member who is subject to a COVID-19 related quarantine or isolation period as defined by an order or guidelines of the California Department of Public Health, the federal Centers for Disease Control and Prevention, or a local health officer with jurisdiction over the family member's workplace.

7. Does being subject to a general stay-at-home order mean that a covered employee is "subject to a quarantine or isolation period related to COVID-19 as defined by an order or guidelines of the California Department of Public Health, the federal Centers for Disease Control and Prevention, or a local health officer with jurisdiction over the workplace"?

No. The order or guidelines must be specific to the covered employee's circumstances. A general stay-at-home order would not count. For example, guidelines or an order of a local health officer that directs individuals who live with someone who has COVID-19 to quarantine themselves would satisfy the eligibility requirement for taking 2021 COVID-19 Supplemental Paid Sick Leave.

Start Date and End Date

8. What time period does 2021 COVID-19 Supplemental Paid Sick Leave Cover?

January 1, 2021 through September 30, 2021. Although the law was signed on March 19, 2021, the requirement for an employer to provide 2021 COVID-19 Supplemental Paid Sick Leave does not start until March 29, 2021. Beginning on March 29, the requirement to provide 2021 COVID-19 Supplemental Paid Sick Leave goes back to January 1, 2021, which means that covered employees who took **qualifying leave between January 1, 2021 and March 28, 2021**, can request payment for that leave if it was not paid by the employer in the amount that is required under this law.

- FAQ 10 below describes how a covered employee may request this "retroactive" payment.
- FAQs 12-15 below describe how many hours of 2021 COVID-19 Supplemental Paid Sick Leave that covered employees can take, and how much they must be paid for taking this leave.

The requirement to provide 2021 COVID-19 Supplemental Paid Sick Leave will end on September 30, 2021. If the law expires while a covered employee is taking this leave, the employee can finish taking the amount of 2021 COVID-19 Supplemental Paid Sick Leave they are entitled to receive.

9. When must an employer begin paying COVID-19 Supplemental Paid Sick Leave to covered employees?

Employers have a 10-day grace period after the signing of the law to begin providing 2021 COVID-19 Supplemental Paid Sick Leave. This means that employers are required to provide this leave beginning on March 29, 2021.

Starting on March 29 when employers must begin providing 2021 COVID-19 Supplemental Paid Sick Leave, the requirement to provide this leave goes back to January 1, 2021. This means that covered employees who took **qualifying leave between January 1, 2021 and March 28, 2021,** can request payment for that leave if it was not paid by the employer in the amount that is required under this law.

- FAQ 10 below describes when an employer must provide this "retroactive" payment.

- FAQs 12-15 below describe how many hours of 2021 COVID-19 Supplemental Paid Sick Leave that a covered employee can take, and how much an employer must pay the employee for taking this leave.

For 2021 COVID-19 Supplemental Paid Sick Leave taken by a covered employee **on or after March 29, 2021**, the employer must provide payment no later than the payday for the next regular payroll period after the sick leave was taken.

Requesting Leave from An Employer

10. When does an employer have to make the 2021 COVID-19 Supplemental Paid Sick Leave available to a covered employee?
Immediately upon the oral or written request of the covered employee to the employer.

11. How does a covered employee request "retroactive" 2021 COVID-19 Supplemental Paid Sick Leave for leave taken between January 1, 2021 and March 28, 2021?

If the covered employee took leave between January 1, 2021 and March 28, 2021, for one of the qualifying reasons under this new law (see FAQ 4), but was not paid for this leave in the amount required under this law (see FAQs 12-15), then the covered employee has the right to ask the employer for a "retroactive" payment equal to the amount required.

The requirement to provide "retroactive" 2021 COVID-19 Supplemental Paid Sick Leave does not start until March 29, 2021. This "retroactive" payment is only required if the covered employee makes an oral or written request to be paid for leave that qualifies (as described above).
For example, if a covered employee had to take two hours off for a vaccine appointment on February 15, 2021, the employee can make an oral or written request to the employer to be paid for that time off in February, since it is a qualifying reason for taking 2021 COVID-19 Supplemental Paid Sick Leave. The oral or written request must be made on or after March 29, 2021. A request made before March 29 does not count. If an employee is unable to make the request themselves or has difficulty locating an employer to provide proper notice, they may contact the Labor Commissioner's Office, which may be able to provide assistance.

After the employee makes the request, the employer will have until the payday for the next full pay period to pay the "retroactive" 2021 COVID-19 Supplemental Paid Sick Leave. On that payday, the employer must also provide accurate notice on the itemized wage statement of how many 2021 COVID-19 Supplemental Paid Sick leave hours remain available to the covered employee.

12. In the absence of any information that a covered employee is not requesting 2021 COVID-19 Supplemental Paid Sick Leave for a valid purpose, can an employer require certification from a health care provider before allowing a covered employee to take the leave?

No. An employer may not deny a worker 2021 COVID-19 Supplemental Paid Sick Leave based solely on a lack of certification from a health care provider. A covered employee is entitled to take 2021 COVID-19 Supplemental Paid Sick Leave immediately upon the covered employee's oral or written request. The leave is not conditioned on medical certification.

Although an employer cannot deny 2021 COVID-19 Supplemental Paid Sick Leave solely for lack of a medical certification, it may be reasonable in certain circumstances to ask for documentation before paying the sick leave when the employer has other information indicating that the covered employee is not requesting 2021 COVID-19 Supplemental Paid Sick leave for a valid purpose. In any such claim, the reasonableness of the parties' actions will undoubtedly come into play.

For example, if a covered employee informs an employer that the covered employee is subject to a local quarantine order or recommendation, has to stay home, and qualifies for 2021 COVID-19 supplemental paid sick leave, but the employer subsequently learns that the covered employee was out at a park, the employer could reasonably request documentation.

Calculating Leave

13. How much 2021 COVID-19 Supplemental Paid Sick Leave is a full-time covered employee entitled to receive?

A covered employee who is considered full-time or who worked or was scheduled to work an average of at least 40 hours per week in the two weeks before the leave is taken is entitled to 80 hours of COVID-19 Supplemental Paid Sick Leave.

14. If I am an active firefighter, am I limited to 80 hours of 2021 COVID-19 Supplemental Paid Sick Leave?

No. Under this law, active firefighters who were scheduled to work more than 80 hours in the two weeks before the leave is taken, can take as many hours as they were scheduled, but the law limits the amount paid to the maximum of $511 per day or $5,110 in total.

15. How do you calculate the leave entitlement for a part-time covered employee who does not have a set schedule?

Below are the two methods to calculate the entitlement for part-time covered employees.

Part-Time Covered Employees with Variable Schedules Who Have Worked For an Employer Over a Period of More Than 14 Days.
For such a part-time covered employee who works variable hours, the covered employee may take fourteen times the average number of hours the covered employee worked each day for the employer in the six months preceding the date the covered employee took 2021 COVID-19 Supplemental Paid Sick Leave. If the part-time covered employee has worked for the employer for fewer than six months, this calculation would be done over the entire period that the covered employee has worked for the employer. If the variable schedule calculation results in an average work schedule of at least 40 hours per week, the variable-scheduled covered employee would be considered full time and entitled to 80 hours of leave because the laws require the employer to pay 80 hours of 2021 COVID-19 Supplemental Paid Sick Leave to a covered employee it properly considers full time, but does not require payment for more than 80 hours.

In calculating the average number of hours worked by a part-time covered employee with a variable schedule over the past six months, the figure is determined based on the total number of days in the 6-month period, not just the number of days worked. Below is an example using a 6-month period that contains a total of 182 days (26 weeks):

Total Number of Hours Worked During 6-Month Period	520 hours
Total Number of Days in 6-Month Period	182 days
Average Number of Hours Worked Each Day in 6-Month Period	520 hours ÷ 182 days = 2.857 hours
2021 COVID-19 Supplemental Paid Sick Leave Entitlement	2.857 x 14 = 40 hours

Part-Time Covered Employees with Variable Schedules Who Have Worked For an Employer for a Period of 14 Days or Fewer.
A covered employee who is newly hired (*i.e.*, hired 14 days or less) and works variable hours will be entitled to the number of 2021 COVID-19 Supplemental Paid Sick Leave hours that they have worked in the preceding two weeks.

Below is an example of the calculation where such a new covered employee has worked for a total of two days—one day for 1 hour and a second day for 6 hours over the past two weeks:

Total Number of Hours Worked During the Two-Week Period	7 hours
Total Number of Days in a Two-Week Period	14 days

Average Number of Hours Worked Each Day in the Two-Week Period	7 hours ÷ 14 days =.5 hours
2021 COVID-19 Supplemental Paid Sick Leave Entitlement	.5 hours x 14 =7 hours

16. How much must a covered employee be paid for 2021 COVID-19 Supplemental Paid Sick Leave that the employee is entitled to receive?

For each hour of 2021 COVID-19 Supplemental Paid Sick Leave that a non-exempt covered employee is entitled to receive, the employee must be paid the highest of the following:

- The employee's regular rate of pay for the workweek in which the leave is taken
- A rate calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment
- The State minimum wage
- The local minimum wage

2021 COVID-19 Supplemental Paid Sick Leave for exempt covered employees must be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

An employer is not required to pay more than $511 per day and $5,110 in the aggregate to a covered employee for 2021 COVID-19 Supplemental Paid Sick Leave taken by the covered employee, but the covered employee may utilize other paid leave that may be available in order to receive what they would normally earn if the cap is reached.

Credits

17. If an employer makes a "retroactive" payment as requested by the covered employee (see FAQ 10) on or after March 29, 2021 to a covered employee for leave taken before the date the 2021 COVID-19 Supplemental Paid Sick Leave law becomes effective, then does the employer receive any credit towards the requirement to provide 2021 COVID-19 Supplemental Paid Sick Leave?

Yes, the number of hours of leave corresponding to the amount of the retroactive payment counts toward the total number of hours of 2021 COVID-19 Supplemental Paid Sick Leave that the employer is required to provide to the covered employee (see FAQs 12-14), under the following circumstances:

- The retroactive payment is for leave taken by the covered employee between January 1, 2021 and March 28, 2021
- The leave taken by the covered employee was for one of the qualifying reasons under the 2021 COVID-19 Supplemental Paid Sick Leave law (see FAQ 4), and

- The retroactive payment by the employer pays the covered employee the amount required under the 2021 COVID-19 Supplemental Paid Sick Leave law (see FAQs 12-15).

18. If an employer voluntarily pays another supplemental benefit for COVID-19 related sick leave, including for leave that was taken before the 2021 COVID-19 Supplemental Paid Sick Leave law became effective, then may the employer receive a credit toward the requirements in the new 2021 COVID-19 Supplemental Paid Sick Leave law?

Yes, as long as the payment meets the requirements in the law. For example, an employer may have already voluntarily provided a covered employee with other COVID-19 related paid sick leave between January 1, 2021, and March 28, 2021. For an employer to receive a credit for those sick leave hours that the employer voluntarily paid, the following must apply:

- The leave taken by the covered employee and paid by the employer must have been for one of the qualifying reasons under the 2021 COVID-19 Supplemental Paid Sick Leave Law (see FAQ 4);
- To pay for this other supplemental benefit, the employer did not require the covered employee to use any other paid leave or paid time off available to the employee under a policy that is not specific to COVID-19, or vacation time; and
- The employer paid for the leave taken at a rate equal to or greater than what is required under the 2021 COVID-19 Supplemental Paid Sick Leave law (see FAQs 12-15).
- If the employer paid for the leave taken at a lesser rate than what is required under the 2021 COVID-19 Supplemental Paid Sick Leave law, then the employer may voluntarily make a retroactive payment to make up the difference between what was paid and what is required under the 2021 COVID-19 Supplemental Paid Sick Leave law, or must make the payment if a covered employee makes a written or oral request for it on or after March 29, 2021. If the employer chooses to voluntarily make a retroactive payment, the employer must make the decision whether or not to seek the credit and make payment to the worker on the pay day for the first full pay period after March 29, 2021. This is because the employer must provide accurate notice on the itemized wage statement or separate writing of how many 2021 COVID-19 Supplemental Paid Sick leave hours remain available to the worker on the pay day for the first full pay period after March 29, 2021. The employer therefore must pay to the worker the shortfall between what was paid and what is required by the California 2021 COVID-19 Supplemental Paid Sick Leave law by that pay day. If an employee requests the retroactive pay differential, the retroactive payment must then be made by the payday for the next full pay period after the employee makes the request.

19. Can an employer count the COVID-19-related supplemental paid sick leave provided pursuant to a local paid sick leave ordinance toward 2021 COVID-19 Supplemental Paid Sick Leave under California law?

Yes. For example, if an employer provides a full-time covered employee 40 hours of COVID-19-relatedsupplemental paid sick leave pursuant to a local ordinance, those 40 hours would count toward the employer's obligations under the 2021 COVID-19 Supplemental Paid Sick Leave law, so long as the leave provided is for a reason listed under the 2021 COVID-19 Supplemental Paid Sick Leave law and is at least at the same rate of pay as this law requires.

20. If a local law requires COVID-19 supplemental paid sick leave to be paid at a rate different from that required under California law, which rate must an employer use?

California law sets minimum requirements for 2021 COVID-19 Supplemental Paid Sick Leave and does not override local requirements for such leave. Thus, if an employer must provide COVID-19-related supplemental paid sick leave pursuant to a local law (and intends for that sick leave to count toward the requirements of California law), the employer must provide leave at a rate of pay that would ensure compliance with both the local law and California law, which would be the higher of the rates required. If an employer is uncertain as to how to calculate pay under a local ordinance, the employer should contact the relevant local jurisdiction for guidance.

Record-keeping and Paystubs

21. Should 2021 COVID-19 Supplemental Paid Sick Leave be listed separately from regular Paid Sick Leave on the itemized paystub or separate writing at the time wages are paid?

Yes. The 2021 COVID-19 Supplemental Paid Sick Leave law is clear that the obligation to provide COVID-19 Supplemental Paid Sick Leave is in addition to regular paid sick leave. The itemized wage statement or separate writing requirement ensures covered employees understand how many separate hours they have available for 2021 COVID-specific sick leave. For example, consider a full-time covered employee who has used all of the covered employee's regular paid sick leave but is entitled to 80 hours of 2021 COVID-19 Supplemental Paid Sick Leave. If an itemized wage statement specifies that there are 0 hours of paid sick leave and 80 hours of 2021 COVID-19 Supplemental Paid Sick Leave available, the covered employee would be on notice that they lack available paid sick leave for non-COVID-related absences. On the other hand, if the itemized wage statement simply said 80 hours of paid sick leave available without differentiating between paid sick leave and 2021 COVID-19 Supplemental Paid Sick Leave, a covered employee might take paid sick leave for non-COVID related reasons without realizing that there were no sick leave hours available.

In addition, Labor Code Section 247.5 requires that records be kept for a three-year period on regular paid sick days and 2021 COVID-19 Supplemental Paid Sick days accrued and used, and that the records be made available to the Labor Commissioner or employee upon request.

22. How should an employer calculate and list 2021 COVID-19 Supplemental Paid Sick Leave on paystubs for part-time variable scheduled covered employees?

An employer with variable-scheduled part-time covered employees will have to calculate the amount of COVID-19 Supplemental Paid Sick Leave available based on when a covered employee requests it. The employer gets a credit for any 2021 COVID-19 Supplemental Paid Sick Leave that was already provided; if a covered employee is owed additional hours of 2021 COVID-19 Supplemental Paid Sick Leave under a new schedule, the covered employee therefore only receives the balance between what was available under the original schedule and any additional 2021 COVID-19 Supplemental Paid Sick Leave hours under the new schedule.

For the itemized wage statement or separate writing requirement, employers who have a variable-scheduled covered employee would be required to calculate the initial amount of 2021 COVID-19 Supplemental Paid Sick Leave available and put (variable) next to it on the itemized wage statement or separate writing.

Enforcement

23. What notice must employers provide to covered employees about 2021 COVID-19 Supplemental Paid Sick Leave under California law?

Under California law, employers are required to display the required poster in a conspicuous place that contains information about 2021 COVID-19 Supplemental Paid Sick Leave.

If an employer's covered employees do not frequent a workplace, the employer may satisfy the notice requirement by disseminating notice through electronic means.

24. Where can a covered employee file a claim if the covered employee was not allowed to use or was not paid for 2021 COVID-19 Supplemental Paid Sick Leave?

The covered employee may file a claim or a report of a labor law violation with the Labor Commissioner's Office, the state agency charged with enforcement.

25. What rights does a covered employee have if the covered employee suffers retaliation, like getting fired, for using paid sick leave under local, state or federal law?

Covered employees using or attempting to exercise their rights to 2021 COVID-19 Supplemental Paid Sick Leave, including both the right to paid leave and other rights such as timely payment and written notice of available leave, are protected from retaliation under Labor Code section 246.5(c). In addition, other labor laws enforced by the Labor

Commissioner may protect covered employees from retaliation in this situation. Covered employees should seek assistance from the Labor Commissioner's Office if they have questions about retaliation or want to file a retaliation complaint.

Relation to Other Laws

26. Is 2021 COVID-19 Supplemental Paid Sick Leave different than the COVID-related paid sick leave that employers provided under the federal Families First Coronavirus Response Act (FFCRA) or the California COVID-19 Supplemental Paid Sick Leave laws in 2020?

Yes. Both the FFCRA emergency paid sick leave and the 2020 California Supplemental Paid Sick Leave laws expired on December 31, 2020. The new 2021 COVID-19 Supplemental Paid Sick Leave law allows covered employees to take up to an additional 80 hours of COVID-19 related sick leave.

For more information on the 2020 California Paid Sick Leave laws, which generally required COVID-19 related Supplemental Paid Sick Leave for employers with 500 or more employees and healthcare and emergency responder employees excluded from the FFCRA, please view our FAQs on paid sick leave. Additional information on the FFCRA emergency paid sick leave law, which generally required COVID-19 related paid leave for employers with less than 500 employees and public employers, is posted on the federal Department of Labor FAQs. **Federal law currently provides tax credits** for employers with less than 500 employees who provide COVID-19 related paid sick leave voluntarily. More information on the tax credits is available on the Internal Revenue Service FAQs.

27. Can an employer require that an employee use 2021 COVID-19 Supplemental Paid Sick Leave when they have excluded an employee for workplace exposure to COVID-19?

Yes. When an employee is excluded by their employer and entitled to exclusion pay (Exclusion Pay FAQ link), an employer may require the use of 2021 COVID-19 Supplemental Paid Sick Leave before providing exclusion pay.

28. Can an employer use state disability insurance (SDI) to meet its obligation to provide COVID-19 Supplemental Paid Sick Leave?

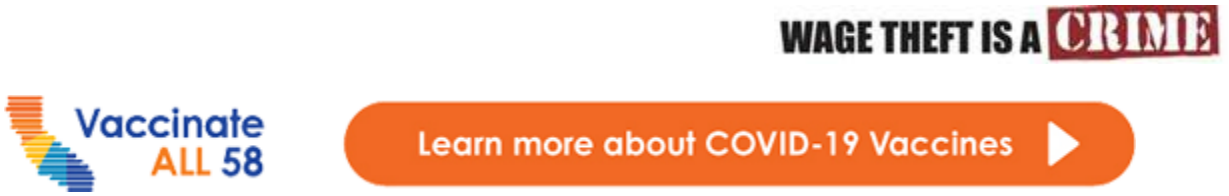
No. Employers subject to the COVID-19 Supplemental Paid Sick Leave under California law cannot require covered employees to use SDI before or in lieu of 2021 COVID-19 Supplemental Paid Sick Leave.

A covered employee may apply, however, for SDI after taking the 2021 COVID-19 Supplemental Paid Sick Leave to which the covered employee is entitled. The Employment Development Department (EDD) administers SDI, which provides benefits that are

approximately 60-70 percent of wages for eligible employees who are unable to work because they are sick or subject to an isolation or quarantine order or guideline. More information on SDI is posted on EDD's website.

April 2021

Labor Commissioner's Office



63 Cal.App.5th 503
Court of Appeal, First District, Division 1, California.

OAKLAND POLICE OFFICERS' ASSOCIATION, et al.,
Plaintiffs and Respondents,
v.
CITY OF OAKLAND,
Defendant and Appellant.

A158662
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Filed 4/26/2021
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As Modified on Denial of Rehearing 5/13/2021

Synopsis

Background: Police officers and their union filed petition for writ of mandate alleging that city's community police review agency (CPRA) violated officers' rights under Public Safety Officers Procedural Bill of Rights Act (POBRA) by refusing to disclose reports and complaints prior to holding supplemental interrogations in connection with its investigation of purported officer misconduct. The Superior Court, Alameda County, No. RG19002328, Frank Roesch, J., granted petition, and city appealed.

[Holding:] The Court of Appeal, Sanchez, J., held that POBRA did not require CPRA to provide officers with confidential reports and complaints prior to holding supplemental interrogations.

Vacated and remanded.

West Headnotes (11)

[1] **Municipal Corporations** Proceedings to remove in general

Public Employment Law enforcement personnel

Public Safety Officers Procedural Bill of Rights Act (POBRA) did not require city's community police review agency (CPRA) to provide police officers under investigation for misconduct with confidential reports and complaints prior to holding supplemental interrogations. Cal. Gov't Code § 3303(g).

[2] **Mandamus** Scope and extent in general

On appeal from order granting mandamus relief, Court of Appeal is not bound by trial court's interpretation of statutory or decisional law, but reviews such questions of law de novo.

[3] **Statutes** Intent

Fundamental rule of statutory construction is that court should ascertain legislature's intent so as to effectuate law's purpose.

[4] **Statutes** Construction based on multiple factors

Because statutory language is generally most reliable indicator of legislative intent, courts first examine words themselves, giving them their usual and ordinary meaning and construing them in context.

[5] **Statutes** Statute as a Whole; Relation of Parts to Whole and to One Another

Statutes Subject or purpose

In construing statute, court is required to read statute's provisions as a whole and to harmonize statutes or statutory sections relating to same subject, both internally and with each other, to extent possible.

[6] **Statutes** Construction based on multiple factors

Statutes Unintended or unreasonable results; absurdity

Statutes must be construed so as to give reasonable and common-sense construction consistent with apparent purpose and intention of lawmakers, a construction that is practical rather

than technical, and will lead to wise policy rather than mischief or absurdity.

[7] **Statutes** Purpose

Statutes Policy behind or supporting statute

Statutes Construction in View of Effects, Consequences, or Results

In interpreting statute, courts may consider consequences that might flow from particular interpretation and must construe statute with view to promoting rather than defeating its general purpose and policy behind it.

[8] **Statutes** Extrinsic Aids to Construction

Statutes Plain, literal, or clear meaning; ambiguity

When statute's language permits more than one reasonable interpretation, court looks to variety of extrinsic aids, including ostensible objects to be achieved, evils to be remedied, legislative history, public policy, contemporaneous administrative construction, and statutory scheme of which statute is part.

[9] **Municipal Corporations** Proceedings to remove in general

Public Employment Law enforcement personnel

Public Safety Officers Procedural Bill of Rights Act (POBRA) entitles police officer to nonconfidential stenographer's notes, reports, and complaints when officer is under disciplinary investigation and subjected to interrogation that could lead to punitive action, that is, at some point during investigation. Cal. Gov't Code § 3303(g).

[10] **Municipal Corporations** Proceedings to remove in general

Public Employment Law enforcement personnel

Officer's rights under Public Safety Officers Procedural Bill of Rights Act (POBRA) provisions governing disclosure of and response to adverse comments in police files do not extend to review of materials temporarily deemed confidential by agency for purposes of active investigation. Cal. Gov't Code §§ 3303, 3305, 3306.

[11] **Municipal Corporations** Proceedings to remove in general

Public Employment Law enforcement personnel

Timing of post-interrogation disclosure of notes, complaints, and reports against peace officer pursuant to Public Safety Officers Procedural Bill of Rights Act (POBRA) is guided by investigating agency's exercise of its discretion to designate certain materials as confidential in furtherance of its investigative objectives and to release nonconfidential materials upon request of officer under investigation. Cal. Gov't Code § 3303(g).

Witkin Library Reference: 8 Witkin, Summary of Cal. Law (11th ed. 2017) Constitutional Law, § 1080 [Interrogation and Investigation; In General.]

***752** Alameda County Superior Court, The Honorable Frank Roesch (Alameda County Super. Ct. No. RG19002328)

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Angeles County Police Chief's Association as Amicus Curiae on behalf of Defendant and Appellant.

Opinion

SANCHEZ, J.

This appeal concerns the meaning of certain requirements described in section 3303, subdivision (g) of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code,[1] § 3300 et seq., POBRA), mandating the disclosure of complaints, reports, and other materials to a peace officer under investigation for misconduct. In December 2017, a citizen filed a complaint against officers from the Oakland Police Department (Department), alleging that the officers violated the citizen's rights in various ways while conducting a mental health welfare check. Following an internal investigation, the Department cleared the officers of misconduct. The Oakland Community Police Review Agency (CPRA), a civilian oversight agency with independent authority to investigate claims of police misconduct, conducted its own investigation.

Before the CPRA's formal interrogation of the officers, counsel for the officers demanded copies of all "reports and complaints" prepared or compiled by investigators pursuant to section 3303, subdivision (g). The CPRA refused to disclose these materials. Based on its investigation, the CPRA determined that officers knowingly violated the complainant's civil rights by entering the residence and seizing property without a warrant, and then actively concealed this violation from investigators.

The officers and their police union filed a petition for writ of mandate alleging that the City of Oakland (City) violated their procedural rights by refusing to disclose reports and complaints prior to holding the supplemental interrogations. The Fourth District Court of Appeal previously considered the same issue in *Santa Ana Police Officers' Association v. City of Santa Ana* (2017) 13 Cal.App.5th 317, 328, 219 Cal.Rptr.3d 919 (*City of Santa Ana*), holding that POBRA requires the disclosure of such materials after an initial interrogation and " 'prior to any further interrogation.' " Feeling constrained by *City of Santa Ana*, the trial court below granted the petition ***753** and ordered the City to disregard the interrogation testimony in any current or future disciplinary proceedings against the officers.

[1] We conclude that mandatory disclosure of complaints and reports prior to any subsequent interrogation of an officer suspected of misconduct is inconsistent with the plain language of the statute and undermines a core objective under POBRA—maintaining the public's confidence in the effectiveness and integrity of law enforcement agencies by ensuring that internal investigations into officer misconduct are conducted promptly, thoroughly, and fairly. Under our reading of section 3303, subdivision (g), an investigating agency's disclosure obligations should instead be guided by whether the agency designates otherwise discoverable materials as confidential. While confidential materials may be withheld pending the investigation—and may not be used as the basis for disciplinary proceedings absent disclosure—nonconfidential material should be disclosed upon request. Accordingly, we reverse the judgment and remand the matter for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Investigation

A welfare check conducted by officers in December 2017 resulted in a citizen complaint alleging an unlawful search and seizure, excessive use of force, harassment, discrimination, and property damage. On the date in question, Officer Doe 1 and Officer Doe 2 responded to the citizen's residence after a report was made that the citizen had been drinking, was suicidal, and was armed with a firearm. Smelling alcohol on the citizen, the officers handcuffed and conducted a body search, confiscating a weapon. Officer Doe 2 then asked the citizen for permission to check if anyone was in the residence. The citizen consented, and Doe Officer 2 did a quick protective sweep, finding no one inside. While Officer Doe 1 placed the citizen in a patrol vehicle, Officer Doe 2 re-entered the residence. Officer Doe 2 then exited the residence and asked the citizen about the presence of a weapon. After the citizen refused to disclose the location of a weapon, Officer Doe 2 entered the residence for a third time, locating and confiscating a weapon.

Officer Doe 3, Officer Doe 4, and a fifth officer arrived after the citizen had been placed in the patrol vehicle. A mobile crisis team also arrived and placed the citizen on a psychiatric hold pursuant to Welfare and Institutions Code section 5150. After the citizen was transported, Officer Doe 1 prepared a search warrant and affidavit to search the residence in accordance with Welfare and Institutions Code section 8102.[2] The Doe Officers and an additional officer conducted a search of the residence and confiscated a number of items.

As part of the Department's investigation, internal affairs took the citizen's statement and reviewed existing body worn camera footage and relevant documents. The Doe Officers were separately interrogated by the Department in April and May of 2018. The Doe Officers were cleared of any wrongdoing by the Department in June 2018. However, investigators noted two areas of concern. First, Doe Officer 2 should have waited for a third officer to arrive before conducting a protective sweep of the house. Second, a ***754** search warrant should have been obtained prior to searching the citizen's residence and seizing a weapon. The Department recommended training for certain of the officers involved.

In September 2018, the CPRA notified each of the Doe Officers that they would be re-interviewed concerning the same December 2017 incident. Prior to these supplemental interrogations, counsel for the Doe Officers sought discovery of relevant reports and complaints under POBRA and the *City of Santa Ana* decision.[3] Although the CPRA agreed to provide recordings and transcribed notes from the prior interrogations conducted by the Department, it refused to produce any other materials and insisted that the Doe Officers either sit for further interrogations or face possible punitive action.

All four Doe Officers submitted to further interrogations in November 2018. Based in part on those interrogations, the CPRA found that the Doe Officers had violated the citizen's civil rights and recommended discipline. Specifically, the CPRA concluded that the Doe Officers knowingly violated the citizen's Fourth Amendment rights by re-entering the citizen's residence without a warrant or the existence of exigent circumstances. The CPRA also found that the Doe Officers gave misleading statements to investigators, omitted material details, and worked together in an attempt to conceal their misconduct. The agency sustained multiple findings of misconduct against certain Doe Officers and recommended that the Department implement a number of changes to its policies regarding searches and seizures.

B. Trial Court Proceedings

Oakland Police Officers' Association and the Doe Officers (collectively, petitioners) filed the instant action in January 2019, claiming that the City violated the officers' procedural rights by refusing to disclose all relevant "reports and complaints" prior to subsequent interrogations by the CPRA. Petitioners sought a writ of mandate ordering the City to comply with section 3303, subdivision (g), destroy any recordings of the unlawful interrogations, and cease any disciplinary proceedings against the Doe Officers. They further requested a declaration that the Doe Officers' statutory POBRA rights had been violated and sought civil penalties with respect to those violations.

While these proceedings were pending in the trial court, the parties agreed to the following stipulated facts:

(1) "The interviews of Officer Doe 1, on or about November 14, 2018, Officer Doe 2, on or about November 13, 2018, Officer Doe 3, on or about November 9, 2018, and Officer Doe 4, on or about November 13, 2018, were 'further interrogation[s]' under the meaning of Government Code section 330[3](g)."

(2) "Prior to these further interrogations, counsel for Officer Does 1 through 4, Justin Buffington, requested that [City] turn over reports and complaints as discussed within Government Code section 330[3](g) and *Santa Ana Police Officers Association v. City of Santa Ana* (2017) 13 Cal.App.5th 317 [219 Cal.Rptr.3d 919]."

(3) "Before those further interrogations, and at the time of Justin Buffington's requests for reports and complaints, the City was in possession of reports and/or complaints ***755** as discussed within Government [C]ode section 330[3](g)."

(4) "On November 5, 2018, Anthony Finnell sent an email to Justin Buffington and Joan Saupe, which stated, 'Upon the advice of counsel, the CPRA denies your requests for "reports and complaints" and will not produce said material. (See *Pasadena Police Officers Association v. City of Pasadena,* 51 Cal.3d 564, 273 Cal.Rptr. 584, 797 P.2d 608 (1990).)' Mr. Finnell's email also set a schedule for three officers to be interviewed and stated, 'Refusal to submit to the interviews may subject your clients to punitive action. (Gov. Code sec. 3303(e).)' "

(5) "On November 6, 2018, Mr. Buffington sent an email to Mr. Finnell, which stated, 'The *Pasadena* case only applies to pre-interrogation discovery, not post-interrogation discovery. In fact, the *Santa Ana* case harmonizes and relies on the *Pasadena* case in determining that officers are entitled to reports and complaints. Furthermore, the California Supreme Court declined to hear an appeal of the *Santa Ana* case, making it settled law. Unfortunately, I will be forced to litigate this matter in Alameda County Superior Court. Please be advised that reliance on the advice of counsel is not a valid defense.' "

After hearing, the trial court granted the writ petition, reasoning as follows: "The Court is bound by *Santa Ana*, which plainly holds that 'reports and complaints also must be produced "prior to any further interrogation." ' [Citation.] This holding is not inconsistent with the Supreme Court's holding in *Pasadena Police Officers' Association v. City of Pasadena* [hereafter '*Pasadena POA*'] (1990) 51 Cal.3d 564, 273 Cal.Rptr. 584, 797 P.2d 608, which addressed only whether notes and reports must be produced before the initial interrogation. The Court is bound by the holding in *Santa Ana*, notwithstanding the conflict between that case's holding and the Supreme Court's reasoning in *Pasadena POA* that 'granting discovery before interrogation could frustrate the effectiveness of any investigation, whether criminal or administrative' (*id*. at p. 578, 273 Cal.Rptr. 584, 797 P.2d 608) and would be 'contrary to sound investigative practices' (*id*. at p. 579, 273 Cal.Rptr. 584, 797 P.2d 608) [citation]." (Italics added.) In the resulting judgment and writ of mandate, the trial court ordered the City to comply with section 3303, subdivision (g), and "disregard, in any current or future proceedings, the interrogation testimony gathered from Doe Officers without prior compliance" with that statute as interpreted by *City of Santa Ana.* The court further ordered that the City could not "hold disciplinary hearings for Doe Officers until final judgment is entered in this matter, following either the expiration of [City's] time to appeal or issuance of a remittitur by the Court of Appeal."

This appeal followed. After briefing was completed, we granted a request by the League of California Cities and the Los Angeles County Police Chiefs' Association to file an amicus brief supporting the City's position.[4] Following oral argument in this matter, we requested supplemental briefing concerning the applicability of the confidentiality provision in section 3303, subdivision (g) to this appeal. With the parties' supplemental letter briefs now received, ***756** the matter is resubmitted and before us for decision.

DISCUSSION

[2] This appeal concerns the interpretation of disclosure requirements described in section 3303, subdivision (g), and in particular whether investigative reports or complaints must be disclosed to a peace officer under investigation for misconduct prior to any further interrogation of that officer. On an appeal from an order granting mandamus relief, we are not bound by the trial court's interpretation of statutory or decisional law. We review such questions of law de novo. (*Daugherty v. City and County of San Francisco* (2018) 24 Cal.App.5th 928, 944, 234 Cal.Rptr.3d 773 (*Daugherty*).)

I. Relevant Law

A. Public Safety Officers Procedural Bill of Rights Act

Initially enacted in 1976 (Stats. 1976, ch. 465, § 1, p. 1202), POBRA "sets forth a list of basic rights and protections which must be afforded all peace officers [citation] by the public entities which employ them. It is a catalogue of the minimum rights [citation] the Legislature deems necessary to secure stable employer-employee relations." (*Baggett v. Gates* (1982) 32 Cal.3d 128, 135, 185 Cal.Rptr. 232, 649 P.2d 874; *White v. County of Sacramento* (1982) 31 Cal.3d 676, 681, 183 Cal.Rptr. 520, 646 P.2d 191 [POBRA "is concerned primarily with affording individual police officers certain procedural rights during the course of proceedings which might lead to the imposition of penalties against them"].) "These procedural protections ... serve the legislative goal of stable employer-employee relations, for '[e]rroneous action can only foster disharmony, adversely affect discipline and morale in the workplace, and thus ultimately impair employer-employee relations and the effectiveness of law enforcement services.' " (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 584, 273 Cal.Rptr. 584, 797 P.2d 608 (*City of Pasadena*).)

Section 3303 "prescribes protections that apply when a peace officer is interrogated in the course of an administrative investigation that might subject the officer to punitive action, such as 'dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.' " (*City of Pasadena*, *supra*, 51 Cal.3d at p. 574, 273 Cal.Rptr. 584, 797 P.2d 608, quoting § 3303; see *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1283, 31 Cal.Rptr.3d 297 (*Gilbert*) [same].) "To ensure fair treatment of an officer during an internal affairs interrogation, section 3303 requires that the employing agency notify the officer to be interrogated of the identity of the interrogating officers (§ 3303, subd. (b)), and of 'the nature of the investigation prior to any interrogation' (§ 3303, subd. (c)). It also prohibits abusive interrogation techniques. (§ 3303, subds. (a) [interrogation to be conducted at a reasonable hour], (b) [no more than two interrogators], (d) [length of the interrogation session not to be unreasonable; subject must be allowed to attend to physical necessities], and (e) [no abusive language, promises or threats].) If the interrogation focuses on matters likely to result in punitive action against the peace officer, section 3303

allows the officer to designate a representative to be present at the interrogation, provided that the representative is not someone subject to the same investigation. (§ 3303, subd. (h) [now subd. (i)].) If criminal charges are contemplated, section 3303 requires immediate advisement of the so-called *Miranda* rights. (§ 3303, subd. (g) [now subd. (h)].)" (*City of Pasadena*, *supra*, 51 Cal.3d at p. 574, 273 Cal.Rptr. 584, 797 P.2d 608.)

***757** Balanced against the need to afford peace officers a fair process, these procedural safeguards also reflect the institutional and public importance of ensuring prompt, thorough, and impartial investigations of police misconduct claims. (*City of Pasadena*, *supra*, 51 Cal.3d at p. 572, 273 Cal.Rptr. 584, 797 P.2d 608; see also *Daugherty*, *supra*, 24 Cal.App.5th at p. 947, 234 Cal.Rptr.3d 773 [" 'The various procedural protections provided by POBRA "balance the public interest in maintaining the efficiency and integrity of the police force with the police officer's interest in receiving fair treatment." ' "].) As the Supreme Court explained more than forty years ago when it interpreted the same POBRA provision at issue in this appeal: "To keep the peace and enforce the law, a police department needs the confidence and cooperation of the community it serves. Even if not criminal in nature, acts of a police officer that tend to impair the public's trust in its police department can be harmful to the department's efficiency and morale. Thus, when allegations of officer misconduct are raised, it is essential that the department conduct a prompt, thorough, and fair investigation. Nothing can more swiftly destroy the community's confidence in its police force than its perception that concerns raised about an officer's honesty or integrity will go unheeded or will lead only to a superficial investigation." (*City of Pasadena*, *supra*, 51 Cal.3d at p. 568, 273 Cal.Rptr. 584, 797 P.2d 608.)

The Supreme Court has thus recognized that "[l]imitations on the rights of those employed in law enforcement have long been considered 'a necessary adjunct to the [employing] department's substantial interest in maintaining discipline, morale and uniformity[,]' " especially when "preservation of public confidence in the trustworthiness and integrity of its police force is at stake." (*City of Pasadena*, *supra*, 51 Cal.3d at p. 577, 273 Cal.Rptr. 584, 797 P.2d 608.) For example, POBRA requires officers to comply with administrative interrogations, and the refusal to sit for an interrogation or to answer questions may be grounds for punitive action. (*Id*. at p. 574, 273 Cal.Rptr. 584, 797 P.2d 608; see § 3303, subd. (e) ["an officer refusing to respond to questions or submit to interrogations shall be informed that failure to answer questions directly related to the investigation or interrogation may result in punitive action"].) With this background in mind, we review the Supreme Court's opinion in *City of Pasadena* and subsequent appellate decisions that have construed the POBRA provision at issue in this appeal —section 3303, subdivision (g).

B. Judicial Construction of Section 3303, Subdivision (g)

Subdivision (g) prescribes rules for the discovery of materials related to an interrogation of a peace officer for alleged misconduct. It provides as follows: "The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential. No notes or reports that are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation."

In *City of Pasadena*, the Supreme Court considered the "narrow issue" of whether ***758** subdivision (g) (then subdivision (f)) grants "preinterrogation discovery rights to a peace officer who is the subject of an internal affairs investigation." (*City of Pasadena*, *supra*, 51 Cal.3d at pp. 568-569, 273 Cal.Rptr. 584, 797 P.2d 608.) An investigator had interviewed Officer Ford during an internal affairs investigation into possible insubordination by Officer Diaz. When Officer Diaz appeared for a scheduled administrative interrogation, he argued that he was not required to answer any questions until he was given access to the notes from the Ford interview. The investigator refused to disclose the notes. (*Id.* at p. 570, 273 Cal.Rptr. 584, 797 P.2d 608.) Following a lawsuit by the officer, the trial court concluded that the statute required preinterrogation disclosure of "reports and complaints" such as the notes of the Ford interview. (*Id.* at p. 571, 273 Cal.Rptr. 584, 797 P.2d 608.) The court of appeal affirmed, concluding that a public safety officer who is the subject of an internal affairs investigation is entitled under POBRA to "copies of nonconfidential reports and complaints" prior to being interrogated. (*Ibid*.)

The Supreme Court reversed. It concluded that "in allowing an officer under administrative investigation access to reports and complaints, the Legislature intended the right to such access to arise after, rather than before, the officer's interrogation." (*City of Pasadena*, *supra*, 51 Cal.3d at p. 569, 273 Cal.Rptr. 584, 797 P.2d 608.) Looking first to the statutory language, the Court noted that subdivision (f) (now subdivision (g)) does not specify *when* an officer's entitlement to "reports and complaints" arises. (*Id.* at 575, 273 Cal.Rptr. 584, 797 P.2d 608.) It observed, however, that the provision also grants an officer access to any recording of the officer's interrogation, as well as to transcribed stenographer's notes memorializing the interrogation, both of which logically could only be provided after an interrogation. (*Id.* at pp. 575-576, 273 Cal.Rptr. 584, 797 P.2d 608.) Moreover, since "the Legislature placed the provision regarding disclosure of reports and complaints and the provision specifying entitlement to transcribed notes *in the same sentence* in subdivision [(g)]," the Court determined "that the Legislature must have intended the discovery rights in each instance to be coextensive, entitling the officer to copies of reports and complaints and transcribed stenographer's notes after the interrogation." (*Id.* at p. 576, 273 Cal.Rptr. 584, 797 P.2d 608.)

The Supreme Court further reasoned that when the Legislature has required that certain acts described in section 3303 be performed before the interrogation, it used the words " 'prior to.' " (*City of Pasadena*, *supra*, 51 Cal.3d at p. 576, 273 Cal.Rptr. 584, 797 P.2d 608; see, e.g., § 3303, subd. (c) "[[t]he public safety officer ... shall be informed of the nature of the interrogation *prior to* any interrogation"].) In contrast, "the words 'prior to' do not appear in that part of subdivision [(g)] requiring disclosure of reports and complaints." (*Ibid.*) "When the Legislature 'has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded.' " (*Ibid.*) Thus, the omission of the phrase "prior to" in the sentence mandating disclosure of reports and complaints indicated that the Legislature intended for such disclosures to occur *after* an interrogation. (*Ibid.*)

Buttressing the Supreme Court's textual analysis was its discussion of the legislative purpose underlying POBRA. The Supreme Court emphasized the Legislature's intent to strike a balance between safeguarding a peace officer's procedural rights and maintaining "public confidence in the trustworthiness and integrity of its police force" through prompt, thorough, and fair investigations of officer misconduct. ***759** (*City of Pasadena*, *supra*, 51 Cal.3d at pp. 572, 577, 273 Cal.Rptr. 584, 797 P.2d 608.) The Court explained that, while some of the rights afforded police officers under POBRA "resemble those available in a criminal investigation," POBRA also evinces "a recognition by the Legislature that a law enforcement agency should retain greater latitude when it investigates suspected officer misconduct than would be constitutionally permissible in a criminal investigation." (*Id.* at p. 577, 273 Cal.Rptr. 584, 797 P.2d 608; see also *ibid*. ["the Legislature looked to criminal procedure as a model for [POBRA] but then provided somewhat reduced protections"].) The Court concluded that disclosure of investigative reports and other materials before an interrogation was "not essential to the fundamental fairness of an internal affairs investigation" and, indeed, was "without precedent." (*Id.* at p. 578, 273 Cal.Rptr. 584, 797 P.2d 608.) In a criminal investigation, for example, the right to discovery "does not arise until charges have been filed and the suspect becomes an accused." (*Ibid.*) Moreover, granting discovery before interrogation "could frustrate the effectiveness of any investigation" (*ibid.*), "might color the recollection of the person to be questioned or lead that person to conform his or her version of an event to that given by witnesses already questioned" (*id.* at p. 579, 273 Cal.Rptr. 584, 797 P.2d 608), and "would be contrary to sound investigative practices." (*Ibid.*)

In sum, "entitlement to *preinterrogation* discovery is neither apparent from the language of subdivision [(g)] nor fundamental to the fairness of an internal affairs investigation." (*City of Pasadena*, *supra*, 51 Cal.3d at p. 579, 273 Cal.Rptr. 584, 797 P.2d 608.) Further, mandating such discovery "might jeopardize public confidence in the efficiency and integrity of its police force." (*Ibid.*) The Supreme Court thus held that "the Legislature intended subdivision [(g)] to require law enforcement agencies to disclose reports and complaints to an officer under an internal affairs investigation only *after* the officer's interrogation."[5] (*Ibid.*)

Following the *City of Pasadena* opinion, several appellate courts have addressed the scope of the "reports and complaints" disclosure requirement under section 3303, subdivision (g). In *San Diego Police Officers Assn. v. City of San Diego* (2002) 98 Cal.App.4th 779, 120 Cal.Rptr.2d 609 (*City of San Diego*), the Fourth District Court of Appeal concluded that reports and complaints subject to disclosure under this provision "include all materials that contain reports of or complaints concerning the misconduct that is the subject of the investigation," including tape-recorded interviews of witnesses and raw notes of investigators. (*Id.* at pp. 782-784,

120 Cal.Rptr.2d 609.) The appellate court reasoned that if "an accused officer is entitled to only the written complaints filed by third persons and the final written report prepared by investigators, but not to the underlying materials that might tend to show the complaints or reports were inaccurate, incomplete, or subject to impeachment for bias, the officer's ability to establish a defense at the administrative hearing could be hampered and the rights protected by [POBRA] undermined." (*Id.* at p. 784, 120 Cal.Rptr.2d 609.)

The Sixth District Court of Appeal disagreed with this view in ***760** *Gilbert*, *supra*, 130 Cal.App.4th 1264, 31 Cal.Rptr.3d 297. According to the *Gilbert* court, both "report" and "complaint" as used in the statute "suggest a more formal presentation than the raw or original source materials from which a report may be drawn." (*Id.* at p. 1286, 31 Cal.Rptr.3d 297.) In rejecting an officer's right to discovery of investigators' notes, the appellate court explained: "The only 'notes' to which such officer is expressly entitled under section 3303, subdivision (g), are the 'notes made by a stenographer,' who was implicitly present at the officer's interrogation. Fair treatment of such officer does not require that all the material amassed in the course of the investigation, such as raw notes, written communications, records obtained, and interviews conducted, be provided to the officer following the officer's interrogation." (*Id.* at pp. 1286-1287, 31 Cal.Rptr.3d 297; see also *Davis v. County of Fresno* (2018) 22 Cal.App.5th 1122, 1135-1138, 232 Cal.Rptr.3d 324, (*Davis*) [noting but declining to address split of authority on scope of "reports" and "complaints" under section 3303, subdivision (g)].)

Most recently, in *City of Santa Ana*, *supra*, 13 Cal.App.5th 317, 219 Cal.Rptr.3d 919, the Fourth District Court of Appeal considered the same question of statutory interpretation presented by this appeal. Two police officers were investigated for alleged misconduct which occurred during the execution of a search warrant at a marijuana dispensary. (*Id.* at pp. 321-322, 219 Cal.Rptr.3d 919.) Unbeknownst to the officers, hidden cameras had recorded them during the search. (*Id.* at p. 322, 219 Cal.Rptr.3d 919.) After certain portions of the recordings were released to the media by the dispensary owners, an investigation was initiated and both officers were interrogated. (*Id.* at pp. 322-323, 219 Cal.Rptr.3d 919.) Additional portions of the recordings were subsequently obtained, and the officers were notified that they would be re-interrogated concerning the newly acquired recordings. (*Id.* at p. 323, 219 Cal.Rptr.3d 919.) The officers' request for discovery materials prior to the second interrogations was rejected. (*Ibid.*) The officers then filed suit in superior court, alleging in part that the refusal to produce discovery under section 3303, subdivision (g) was a violation of POBRA.[6] (*Id.* at pp. 323, 326, 219 Cal.Rptr.3d 919.) The trial court sustained the city's demurrer without leave to amend with respect to both causes of action. (*Id.* at p. 323, 219 Cal.Rptr.3d 919.)

The appellate court reversed on the POBRA claim, noting that subdivision (g) of section 3303 "plainly states" with respect to any tape recording of the first interrogation that " 'the public safety officer shall have access to the tape ... prior to any further interrogation at a subsequent time.' " (*Id.* at p. 327, 219 Cal.Rptr.3d 919, italics omitted.) Since the police officers had not been provided these tape recordings, their complaint stated a cause of action under POBRA on this basis alone. (*Ibid.*)

As for the disclosure of reports and complaints, the appellate court acknowledged that section 3303, subdivision (g) " 'does not specify when an officer's entitlement to the reports and complaints arises.' " (*City of Santa Ana*, *supra*, 13 Cal.App.5th at p. 327, 219 Cal.Rptr.3d 919.) Citing *City of Pasadena*, the court noted that the Supreme Court had found that copies of tape recordings and transcribed notes of the first interrogation must necessarily be provided after the interrogation, ***761** the disclosure requirement for reports and complaints was located in the same sentence as the disclosure requirement for stenographer's notes, and the Court had remarked that the discovery rights to " 'copies of reports and complaints and transcribed stenographer's notes after the interrogation' " were " 'coextensive'." (*Id.* at p. 328, 219 Cal.Rptr.3d 919.) The appellate court thus concluded: "Because discovery rights to reports and complaints are coextensive with discovery rights to tape recordings of interrogations, and tapes recordings must be produced 'prior to any further interrogation,' then it follows that reports and complaints also must be produced 'prior to any further interrogation.' " (*Id.* at p. 328, 219 Cal.Rptr.3d 919.) We respectfully disagree with this analysis for the reasons set forth below.

II. Timing of Disclosures Mandated by Section 3303, Subdivision (g)

[3] **[4]** **[5]** " 'The fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law.' " (*Upland Police Officers Assn. v. City of Upland* (2003) 111

Cal.App.4th 1294, 1303, 4 Cal.Rptr.3d 629 (*City of Upland*).) "Because the statutory language is generally the most reliable indicator of legislative intent, we first examine the words themselves, giving them their usual and ordinary meaning and construing them in context." (*Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268, 121 Cal.Rptr.2d 203, 47 P.3d 1069, superseded by statute on other grounds as stated in *Bernard v. City of Oakland* (2012) 202 Cal.App.4th 1553, 1561 fn. 5, 136 Cal.Rptr.3d 578.) We are required to read a statute's provisions "as a whole" and to "harmoniz[e] 'statutes or statutory sections relating to the same subject ... both internally and with each other, to the extent possible.' " (*City of Pasadena*, *supra*, 51 Cal.3d at p. 575, 273 Cal.Rptr. 584, 797 P.2d 608.)

[6] [7] [8] " '[S]tatutes must be construed so as to give a reasonable and common-sense construction consistent with the apparent purpose and intention of the lawmakers —a construction that is practical rather than technical, and will lead to wise policy rather than mischief or absurdity. [Citation.] In approaching this task, the courts may consider the consequences which might flow from a particular interpretation and must construe the statute with a view to promoting rather than defeating its general purpose and the policy behind it.' " (*City of Upland*, *supra*, 111 Cal.App.4th at p. 1303, 4 Cal.Rptr.3d 629.) When " 'the language permits more than one reasonable interpretation, ... the court looks "to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." ' " (*S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 379, 46 Cal.Rptr.3d 380, 138 P.3d 713.)

A. Disclosure of Reports and Complaints Before a Subsequent Interrogation is Not Required by Plain Meaning of Subdivision (g)

Subdivision (g) of section 3303 permits the "complete interrogation of a public safety officer" to be recorded by the investigating agency as well as by the officer through a personal recording device. The provision then states: "If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy ***762** of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential."

There is only one express timing directive in this statutory language—namely, a police officer whose interrogation has been recorded must be granted access to that recording "if any further proceedings are contemplated or *prior to* any further interrogation at a subsequent time." (§ 3033, subd. (g), italics added; see *City of San Diego*, *supra*, 98 Cal.App.4th at p. 785, 120 Cal.Rptr.2d 609 [noting that "[t]he express mention in section 3303, subdivision (g) of the tape recording of an officer's interview covers the distinct mandate that requires *a single category of material* (any tape recording of the first interview of the accused officer) be provided *before* the officer may be re-interviewed," some italics added].) In contrast, the plain language of the statute "does not specify when an officer's entitlement to the reports and complaints arises." (*City of Pasadena*, *supra*, 51 Cal.3d at p. 575, 273 Cal.Rptr. 584, 797 P.2d 608; see also *Gilbert*, *supra*, 130 Cal.App.4th at pp. 1292-1293, 31 Cal.Rptr.3d 297 [same].)

The discovery obligation for the other three types of material—stenographer's notes, reports, and complaints—is contained in the next sentence and does not provide a time frame for disclosure. As the Supreme Court observed, the phrase "prior to" is absent from this sentence, a notable omission given that when the Legislature wanted certain acts described in section 3303 to take place before an interrogation, it used the words " 'prior to.' " (*City of Pasadena*, *supra*, 51 Cal.3d at p. 576, 273 Cal.Rptr. 584, 797 P.2d 608 ["When the Legislature 'has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded.' "].) Applying this statutory canon, it is apparent that the Legislature did not intend to establish a post-interrogation deadline for the disclosure of "reports or complaints" as it had in the preceding sentence for tape recordings "prior to any further interrogation." (§ 3303, subd. (g); see *City of San Diego*, *supra*, 98 Cal.App.4th at p. 785, 120 Cal.Rptr.2d 609 [opining that the maxim *expressio unius est exclusio alterius* "would support the claim that City need not provide [the other three] categories of materials *before* re-interviewing an officer"].)

City of Santa Ana concluded that because certain discovery materials (tape recordings and stenographer notes) can only be produced following an initial interrogation, all four types of materials should be treated in like manner and disclosed at the same time after the initial interrogation. (*City of Santa Ana*, *supra*, 13 Cal.App.5th at p. 328, 219 Cal.Rptr.3d 919.) The appellate court relied in particular on the Supreme Court's conclusion that discovery rights for these materials were "

'coextensive'." (*Ibid*.) In our view, however, the Supreme Court's characterization of these discovery obligations as "coextensive" pertained to the narrow issue before the Court —whether certain discovery materials must be disclosed prior to an initial interrogation when other materials logically cannot be. *City of Pasadena* should not be overread to mean that subdivision (g)'s discovery obligations following an initial interrogation were meant to operate in lockstep. A plain reading of the statute does not support this construction, and it ignores the Supreme Court's own analysis of the omitted phrase 'prior to' in that portion of subdivision (g) discussing the disclosure of "reports and complaints."

[9] The plain language of subdivision (g) thus establishes only that a police officer is entitled to nonconfidential stenographer's ***763** notes, reports, and complaints "[w]hen [the officer] is under investigation and subjected to interrogation ... that could lead to punitive action"—that is, at *some point* during the investigation. (See *City of Pasadena*, *supra*, 51 Cal.3d at p. 575, 273 Cal.Rptr. 584, 797 P.2d 608 [noting that subdivision (g) "defines only disclosure requirements incident to an *investigation*; it does not address an officer's entitlement to discovery in the event he or she is administratively *charged* with misconduct"].)

The question remains, when should such materials be discovered? One appellate court concluded that, since subdivision (g) "does not specify any time frame for disclosure," ... "a reasonable, post-interrogation time frame is implied." (*Gilbert*, *supra*, 130 Cal.App.4th at p. 1293, 31 Cal.Rptr.3d 297.) Another court opined that, while the statute supports the conclusion that only the tape recording of the first interview must be provided before an accused officer is re-interviewed, it does not support a claim that an agency "need *never* provide other types of materials to an accused officer." (*City of San Diego*, *supra*, 98 Cal.App.4th at p. 785, 120 Cal.Rptr.2d 609.) In its appellate briefing, the City contends that "the commencement of [a] formal disciplinary hearing[ ]" is a reasonable deadline to disclose "reports and complaints" against an officer, *i.e*., at the end of the agency's investigation. Amici curiae join in this view.

As we explain next, we conclude the statutory language and legislative history of subdivision (g) offer a different answer, one based on the investigating agency's statutory right to withhold certain materials it deems confidential from disclosure.[7]

B. Confidentiality as the Touchstone for Disclosure of Subdivision (g) Discovery Materials

Under the statute, an agency's disclosure obligations extend only to *nonconfidential* stenographer's notes, reports, and complaints. (§ 3303, subd. (g) ["The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, *except those which are deemed by the investigating agency to be confidential*," italics added]; see also *Gilbert*, *supra*, 130 Cal.App.4th at p. 1290, 31 Cal.Rptr.3d 297 [subdivision (g) "empowers the investigating agency to deem reports confidential and excepts items so designated from the agency's disclosure obligation"].) Moreover, the broad statutory language of subdivision (g) places no express restrictions on an investigating agency's power to designate stenographer's notes, reports, and complaints as confidential. (See *ibid.* [noting that nothing in subdivision (g) "limits an investigating agency's power to designate reports confidential to materials protected by statutory privilege"].) Thus, an investigating agency may deem such materials confidential if it finds that doing so satisfies a statutory basis for confidentiality (e.g., Evid. Code § 1040-1041), or if disclosure would otherwise interfere with an ongoing investigation.[8] Furthermore, ***764** nothing in section 3303 prohibits an agency from de-designating a record previously deemed confidential when the basis for confidentiality no longer exists, such as the end of the investigation or some other circumstance.

Under this construction of subdivision (g), and consistent with *City of Pasadena*, no materials identified in subdivision (g) must be disclosed prior to an initial interrogation of a peace officer. Thereafter, any tape recording made of the interrogation must be disclosed "if any further proceedings are contemplated or prior to any further interrogation at a subsequent time." (§ 3033, subd. (g).) Stenographer's notes, reports, and complaints should also be disclosed upon request unless the investigating agency designates any such material as confidential to protect the integrity of an ongoing investigation.

For example, there appears to be no reason why stenographer's notes related to a taped interrogation that was disclosed to the public safety officer would need to remain confidential from that officer. Here, the City disclosed the tapes and transcribed notes of the initial interrogations to each of the Doe Officers in this case upon request but cautioned that the materials could not be shared among the officers. It is

thus conceivable that an investigating agency might deem it necessary to withhold the recordings and stenographer's notes of other officer interrogations or witness interviews from an officer under investigation during an active investigation to preserve the confidentiality of those discussions. Reports and complaints might also be withheld if disclosure would reveal confidential sources or other sensitive information. If, however, punitive action is contemplated at the conclusion of an investigation, the agency must decide whether to de-designate and disclose any confidential materials to the officer or decline to bring misconduct charges on the basis of those materials. (See *Gilbert*, *supra*, 130 Cal.App.4th at pp. 1280, 1290, 31 Cal.Rptr.3d 297.)

Even if punitive action is not pursued at the end of an investigation, the designation of material as confidential carries other consequences. Under subdivision (g), "No notes or reports that are deemed to be confidential may be entered in the officer's personnel file." This provision suggests that "the employing department may not make adverse personnel decisions concerning the officer based on reports, or the portions thereof, deemed confidential and not made available to the officer." (*Gilbert*, *supra*, 130 Cal.App.4th at p. 1290, 31 Cal.Rptr.3d 297.) Other POBRA provisions support this view. (See § 3305 [adverse comment may not be added to peace officer's personnel file without review and acknowledgement by the officer]; § 3306 [affording officer thirty days to file written response to any adverse comment entered in personnel file].)

We are aware that prior cases have found a police officer's right to view adverse comments under section 3305 broadly applicable, even in the face of an assertion of confidentiality by the investigating agency. (See *County of Riverside v. Superior Court* (2002) 27 Cal.4th 793, 118 Cal.Rptr.2d 167, 42 P.3d 1034; ***765** *Sacramento Police Officers Assn. v. Venegas* (2002) 101 Cal.App.4th 916, 124 Cal.Rptr.2d 666; *Seligsohn v. Day* (2004) 121 Cal.App.4th 518, 16 Cal.Rptr.3d 909.) These cases are distinguishable because they arose in the context of police officers requesting access to investigative records and complaints under sections 3305 and 3306 *after* the investigations had ended and no further action was taken. Animating these court decisions was the unfairness in allowing law enforcement agencies to maintain undisclosed allegations in a separate confidential file with potential consequence for future personnel decisionmaking. (See *Riverside*, *supra*, 27 Cal.4th at pp. 796-797, 799, 118 Cal.Rptr.2d 167, 42 P.3d 1034.)

[10] That is not the situation here. For the confidentiality clause in subsection (g) of section 3303 to apply, an officer must be "under investigation and subjected to interrogation" (§ 3303), and must therefore be informed "of the nature of the investigation prior to any interrogation" (*id,* subd. (c)). To harmonize these provisions, we conclude that an officer's review and comment rights under sections 3305 and 3306 do not extend to review of materials temporarily deemed confidential by an agency under section 3303 for purposes of an active investigation. Nothing in this opinion is meant to absolve an investigating agency from compliance with those statutes once the investigatory period has ended.

C. Section 3303's Legislative History Supports This Construction

An examination of section 3303, subdivision (g)'s legislative history further confirms that the Legislature intended for the confidentiality provision to serve as a counterpoint to an agency's disclosure obligations. Balanced against the public safety officer's disclosure rights under subdivision (g) is the broad latitude given to an investigating agency to declare otherwise discoverable materials confidential so as to ensure the efficacy and integrity of police misconduct investigations.

As originally introduced on December 19, 1974, then-subdivision (f) of section 3303 provided in relevant part: "The complete interrogation of a public safety officer shall be recorded and there shall be no unrecorded questions or statements. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports made by investigators." (Assem. Bill No. 301 (1975-1976 Reg. Sess.) as introduced Dec. 19, 1974 at p. 3 (A.B. 301).) The bill as initially proposed broadly authorized the disclosure of stenographer's notes and investigator's reports to public safety officers under investigation, but it did not provide any basis for investigating agencies to protect the integrity of their investigations by withholding sensitive information.

Opposition to A.B. 301 focused on the bill's negative impact on internal affairs investigations. (See Rodney J. Blonien, Cal. Peace Officers' Assn. & Cal. District Attorneys' Assn. & Cal. State Sheriff's Assn., letter to Assemblyman Keysor, Apr. 18, 1975 [A.B. 301 "in its present form would significantly hinder law enforcement agencies in conducting internal affairs investigations and citizen complaints against

law enforcement officers. The constraints this bill imposes would be detrimental to the protection of society and to the law enforcement profession as a whole."]; Sen. Democratic Caucus, 3d. Reading File of Assem. Bill 301 (1975-1976 Reg. Session) as amended on June 4, 1975 [noting as arguments in opposition that the bill "inhibits law enforcement agency in ascertaining ***766** criminal violations of peace officers" and "may inhibit confidential sources reporting against police [by] allowing rights to any reports made by investigators"].) As the Assembly's Third Reading Report summarized: "This bill is opposed by most major law enforcement organizations largely because it imposes what many feel are excessive or unrealistic restrictions on law enforcements' ability to supervise and, when necessary, discipline its members." (A.B. 301, Assem. 3d Reading Report of bill as amended June 4, 1975.)

The proposed subdivision was then amended in August 1975 to mandate recording of interrogations only "where practical" and to limit disclosures to public safety officers as follows: "The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports made by investigators, *except those which are deemed by the agency to be confidential*. *No notes or reports which are deemed to be confidential may be entered in the officer's personnel file*." (A.B. 301, as amended Aug. 25, 1975 at p. 18.) A final amendment in August 1976 made recording of interrogations discretionary and expanded the materials subject to disclosure. As adopted, the subdivision read in relevant part: "The complete interrogation of a public safety officer *may* be recorded.... The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports *or complaints* made by investigators *or other persons*, except those which are deemed by the *investigating* agency to be confidential. No notes or reports which are deemed to be confidential may be entered in the officer's personnel file." (A.B. 301, as amended in conference Aug. 12, 1976 at p. 4.; see also Stats 1976, ch. 465, § 1.)

[11] As the legislative history demonstrates, by granting investigating agencies the authority to withhold confidential materials, the Legislature intended to strike a balance between a police officer's entitlement to relevant discovery and the agency's ability to supervise its employees effectively and to safeguard the integrity of its internal investigations. Indeed, even as the Legislature amended A.B. 301 to include the confidentiality provision, it added a further protection for peace officers by forbidding confidential materials to be entered into a personnel file. Thus, under our reading of subdivision (g), the timing of post-interrogation disclosure of notes, complaints, and reports against a peace officer is guided by an investigating agency's exercise of its discretion to designate certain materials as confidential in furtherance of its investigative objectives and to release nonconfidential materials upon request of the officer under investigation.[9]

D. Consistency With POBRA

As stated above, we must construe a statute " 'with a view to promoting rather than defeating its general purpose and the policy behind it.' " (*City of Upland*, *supra*, 111 Cal.App.4th at p. 1303, 4 Cal.Rptr.3d 629.) We reject a construction of ***767** section 3303, subdivision (g), which would automatically require disclosure of reports and complaints "prior to any further interrogation at a subsequent time." (§ 3303, subd. (g).) Such an interpretation is not required by the language of subdivision (g), and as we explain now, it undermines a core objective under POBRA of fostering public confidence in our law enforcement agencies. On the other hand, a reading of subdivision (g) which requires disclosure of nonconfidential materials upon request while permitting an investigating agency to withhold confidential materials during an investigation strikes the proper balance between "fundamental fairness for police officers" and "the necessity for internal affairs investigations to maintain the efficiency and integrity of the police force serving the community." (*City of Pasadena*, *supra*, 51 Cal.3d at p.572, 273 Cal.Rptr. 584, 797 P.2d 608.)

As *City of Pasadena* explained, while many of the protections in POBRA resemble those available in a criminal investigation, the Legislature recognized that investigating agencies must be afforded broad latitude when investigating suspected officer misconduct. (*City of Pasadena*, *supra*, 51 Cal.3d at p. 577, 273 Cal.Rptr. 584, 797 P.2d 608.) The Court concluded that preinterrogation discovery was "not essential to the fundamental fairness of an internal affairs investigation," and, indeed, was "without precedent." (*Id.* at p. 578, 273 Cal.Rptr. 584, 797 P.2d 608.) In this case, requiring the disclosure of reports and complaints during an active investigation of officer misconduct would similarly represent a significant expansion of police officers' POBRA rights as compared to the discovery rights afforded criminal defendants. (*Id.* at p. 577, 273 Cal.Rptr. 584, 797 P.2d 608.) And, like the Supreme Court in *City of Pasadena*, we see no reason such a broad reading of subdivision (g) would be

"essential to the fundamental fairness of an internal affairs investigation." (*Id.* at p. 578, 273 Cal.Rptr. 584, 797 P.2d 608.)

Indeed, mandating such discovery prior to the subsequent interrogation of an officer could severely hamper the agency's investigation, and therefore undermine the public's confidence in the integrity of the law enforcement agency. "Underlying every administrative inquiry into suspected officer misconduct is the obligation of the law enforcement agency to assure public confidence in the integrity of its officers. The purpose of the inquiry is to determine whether there is any truth to the allegations of misconduct made against an officer and, if so, whether to commence disciplinary proceedings." (*City of Pasadena*, *supra*, 51 Cal.3d at p. 578, 273 Cal.Rptr. 584, 797 P.2d 608.) Granting premature discovery during an investigation could "frustrate the effectiveness" of the investigation, thereby impairing "the reliability of such a determination and the effectiveness of the agency's efforts to police itself." (*Id.* at pp. 578-579, 273 Cal.Rptr. 584, 797 P.2d 608.)

For example, disclosures made before a subsequent interrogation "might color the recollection of the person to be questioned or lead that person to conform his or her version of an event to that given by witnesses already questioned." (*Id.* at p. 579, 273 Cal.Rptr. 584, 797 P.2d 608; see *Davis*, *supra*, 22 Cal.App.5th at p. 1134, 232 Cal.Rptr.3d 324 [noting preinterrogation disclosure "might hamper the investigation by allowing the officer being investigated to craft answers that fit or explained the evidence"].) In addition, "[d]uring an interrogation, investigators might want to use some of the information they have amassed to aid in eliciting truthful statements from the person they are questioning. Mandatory preinterrogation discovery would deprive investigators of this potentially effective tool." (***768** *City of Pasadena*, *supra*, 51 Cal.3d at p. 579, 273 Cal.Rptr. 584, 797 P.2d 608.) Simply put, disclosing "crucial information about an ongoing investigation" prior to interrogation "would be contrary to sound investigative practices." (*Ibid.*)

The Supreme Court's observations in *City of Pasadena* apply with equal force under the circumstances of this appeal. The CPRA is a civilian oversight agency with independent authority to investigate claims of police misconduct in the City of Oakland. (See generally, Oakland City Charter, § 604). As the City points out, "the CPRA's very existence is consonant with POBRA's purpose to improve the public's confidence in Oakland's police force." To require an independent investigative agency to disclose notes, reports or complaints in its possession before it can interrogate police officers itself would hamstring investigators by allowing officers to alter their testimony in light of the disclosures, casting doubt on the integrity and seriousness of the investigation.

Such concerns are magnified in situations, such as here, where the CPRA disagreed with the Department's internal investigation and found significant discrepancies in the testimony of the various Doe officers.[10] These alleged discrepancies may not have materialized, and other avenues of investigation left undeveloped, had the CPRA been required to disclose the requested materials under the rule announced by the *City of Santa Ana* court. The Supreme Court's admonition in *City of Pasadena* bears repeating: "Nothing can more swiftly destroy the community's confidence in its police force than its perception that concerns raised about an officer's honesty or integrity will go unheeded or will lead only to a superficial investigation." (*City of Pasadena*, *supra*, 51 Cal.3d at p. 568, 273 Cal.Rptr. 584, 797 P.2d 608.)

In sum, we conclude that requiring reports and complaints to be provided to a police officer under subdivision (g) of section 3303 "prior to any further interrogation" is inconsistent with the plain language of section 3303, subdivision (g), and undercuts a core purpose of POBRA of ensuring that investigations into officer misconduct are conducted with the seriousness, diligence, and fairness that is required of these positions of public trust. Instead, we conclude that tying the disclosure of reports and complaints to the confidential nature of these materials will protect the integrity and effectiveness of such investigations while allowing police officers prompt access to all materials to which they are entitled under section 3303, subdivision (g).

Constrained by the *City of Santa Ana* decision, the trial court below determined that the City was required to provide relevant reports and complaints to the Doe Officers "prior to any further interrogation at a subsequent time" (§ 3303, subd. (g)). In light of our disagreement with *City of Santa Ana*, we reverse the judgment below. The record indicates that the materials at issue were withheld " 'on advice of counsel.' " Therefore, it is unclear whether the City might have sought to withhold the requested materials for reasons of confidentiality under section 3303, subdivision (g).

On remand, the trial court shall determine whether the City had a basis for withholding otherwise discoverable reports

and complaints due to their confidential nature as that concept is explained herein. Petitioners must demonstrate that the City had a present duty under ***769** section 3303, subdivision (g), to disclose the requested materials to establish entitlement to mandamus relief. (See *Gilbert*, *supra*, 130 Cal.App.4th at p. 1291, 31 Cal.Rptr.3d 297.) Should disciplinary proceedings be commenced or resumed, the City may not make adverse personnel decisions concerning the Doe Officers based on any confidential materials, or the portions thereof, that have not been de-designated and made available to the Doe Officers.

DISPOSITION

The judgment and writ of mandate are vacated, and the matter is remanded to the trial court to fashion new relief consistent with this opinion. City is entitled to its costs on appeal.

We concur.

HUMES, P.J.

MARGULIES, J.

All Citations

63 Cal.App.5th 503, 277 Cal.Rptr.3d 750, 21 Cal. Daily Op. Serv. 3975, 2021 Daily Journal D.A.R. 3919

Footnotes

1 All statutory references are to the Government Code unless otherwise specified.

2 Welfare and Institutions Code section 8102 allows for the confiscation of any firearm or other deadly weapon from a person who has been detained for examination of his or her mental condition.

3 There is no dispute that the Doe Officers were all public safety officers for purposes of POBRA.

4 We granted a related request by amici curiae for judicial notice of the legislative history underlying section 3303 on that same date. (Evid. Code, §§ 452, subd. (c) & 459, subd.(a); see, e.g., *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 676, fn.8, 105 Cal.Rptr.3d 98.) The judicial notice requests by the parties filed February 6, 2020 and March 17, 2020—which were both deferred pending consideration of this appeal—are denied as unnecessary to our resolution of the case.

5 Because the high court concluded that preinterrogation disclosure was not required by subdivision (g), it declined to consider the agency's argument that the materials at issue were confidential because their disclosure prior to the interrogation "would impair the investigator's ability to evaluate the credibility of [the officer]." (*City of Pasadena*, *supra*, 51 Cal.3d at p. 580, 273 Cal.Rptr. 584, 797 P.2d 608.)

6 The officers also asserted a statutory privacy claim that the appellate court ultimately concluded was not cognizable. (*City of Santa Ana*, *supra*, 13 Cal.App.5th at pp. 324-326, 219 Cal.Rptr.3d 919.)

7 We recognize that a blanket rule permitting all notes, reports, and complaints to be held until the end of the investigation would be both predictable and convenient for investigating agencies. However, nothing in the statutory language supports this construction of section 3303, subdivision (g). Given the balance the Legislature was attempting to strike between a fair process for officers entitled to disclosable materials and a robust investigation, we see no basis for allowing an agency to withhold nonconfidential materials for reasons of convenience.

8 Related statutory provisions recognize the need for confidentiality of records to protect an ongoing investigation. (See, e.g., Pen. Code § 832.7, subd. (b)(7)(C) [delaying public disclosure of peace officer personnel records related to discharge of a firearm or use of force incident involving death or great bodily injury "until the investigating agency determines whether the use of force violated a law or agency policy"]; subd. (b)(1)(B) & (C) [limiting public disclosure of records regarding other incidents to those "in which a sustained finding was made by any law enforcement agency or oversight agency"].)

9 In supplemental briefing, petitioners contend that the confidentiality clause was added to address a concern raised by opponents of A.B. 301 who argued that the bill "may inhibit confidential sources reporting against police [by] allowing rights to any reports made by investigators." (Sen. Democratic Caucus, 3d Reading File Assem. Bill 301 (1975-1976 Reg. Session) as amended on June 4, 1975.) Petitioners thus argue that confidentiality should be limited to protecting confidential sources. This claim ignores the first sentence of the committee report which discusses more generalized opposition that the legislation as drafted "inhibits [a] law enforcement agency in ascertaining criminal violations of peace officers." (*Ibid.*) Nothing in the broad language of the statute or this legislative history suggests that the confidentiality clause was intended to operate so narrowly.

10 We express no opinion on the allegations made against the Doe Officers, who have not had an opportunity to contest any charges against them.

End of Document

Session 2: Item 1

TOMÁS J. ARAGÓN, M.D., Dr.P.H.
State Public Health Officer & Director

State of California—Health and Human Services Agency
California Department of Public Health

GAVIN NEWSOM
Governor

May 3, 2021

TO: All Californians

SUBJECT: COVID-19 Public Health Recommendations for Fully Vaccinated People

Updates as of May 3, 2021:

- Amended to reflect updated CDPH Face Coverings guidance and clarify that provisions related to the quarantine of fully vaccinated persons apply to non-healthcare workplaces and the Cal/OSHA COVID-19 Prevention Emergency Temporary Standards that apply to fully vaccinated persons.

On April 2, 2021, the Centers for Disease Control and Prevention (CDC) updated Interim Public Health Recommendations for Fully Vaccinated People and on April 27, 2021, the CDC updated Choosing Safer Activities. CDPH supports these updated guidance documents, and recommendations are summarized below. This guidance does not apply to healthcare settings.

Overview

Currently authorized vaccines in the United States are highly effective at protecting vaccinated people against symptomatic and severe COVID-19 and a growing body of evidence suggests that fully vaccinated people are less likely to have asymptomatic infection and potentially less likely to transmit SARS-CoV-2 to others. How long vaccine protection lasts and how much vaccines protect against emerging SARS-CoV-2 variants are still under investigation. Until more is known and vaccination coverage increases, prevention measures will continue to be necessary for all people, regardless of vaccination status.

Who is considered a fully vaccinated person?

For the purposes of this guidance, people are considered fully vaccinated for COVID-19: two weeks or more after they have received the second dose in a 2-dose series (Pfizer-BioNTech or Moderna), or two weeks or more after they have received a single-dose vaccine (Johnson and Johnson [J&J]/Janssen).*

Key Points

Fully vaccinated people can*:

- Spend time with other fully vaccinated people, including indoors, without wearing masks or physical distancing (outside a workplace setting).
- Spend time with unvaccinated people from a single household who are at low risk for severe COVID-19 disease indoors without wearing masks or physical distancing.
- Refrain from wearing face coverings outdoors except when attending crowded outdoor events, such as live performances, parades, fairs, festivals, sports events, or other similar settings.
- Refrain from quarantine and testing following a known exposure if asymptomatic[1].
    - Following a known exposure at work, fully vaccinated workers do not need to quarantine if asymptomatic.
    - In the workplace, employers subject to the Cal/OSHA COVID-19 Prevention Emergency Temporary Standards (ETS) must ensure that employees are following the current ETS face covering and testing requirements.

For now, fully vaccinated people should continue to:

- Take precautions in public including wearing a well-fitted mask indoors, and when attending crowded outdoor events, as described above.
    - Check CDPH guidance for face coverings for updates.
    - Follow CDPH's Guidance for Gatherings when gathering with people who are not vaccinated, groups with both vaccinated and unvaccinated people, and persons of unknown status. Maintain physical distancing and adhere to other prevention measures when visiting with unvaccinated people who are at increased risk for severe COVID-19 disease or who have an unvaccinated household member who is at increased risk for severe COVID-19 disease.
- Get tested if experiencing COVID-19 symptoms.
- If fully vaccinated people test positive for SARS-CoV-2, they should follow CDPH and local health department guidance regarding isolation and/or exclusion from high risk settings.
    - For workplace settings, employers should follow the exclusion provisions of the Cal/OSHA COVID-19 Emergency Temporary Standards.
- Follow CDC, local and state health department travel requirements and recommendations.

Refer to Addendum to Blueprint Activity & Business Tiers Chart – Tested and Fully Vaccinated Individuals and Sections for further industry and venue guidance related to tested negative and fully vaccinated individuals designated sections.

These recommendations apply to fully vaccinated people, and currently there is no duration limitation on these recommendations after individuals are fully vaccinated.

For additional information visit CDC's related Science Brief: Background Rationale and Evidence for Public Health Recommendations for Fully Vaccinated People

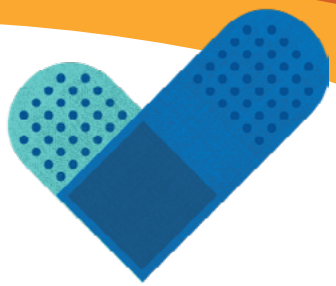
*This guidance applies to COVID-19 vaccines currently authorized for emergency use by the Food and Drug Administration: Pfizer-BioNTech, Moderna, and Johnson and Johnson [J&J]/ Janssen COVID-19 vaccines. Considerations for applying this guidance to vaccines that are not FDA-authorized include whether the vaccine

product has received emergency approval from the World Health Organization or authorization from a national regulatory agency. As additional vaccines are approved this guidance will be updated.

Orginally published April 15, 2021

California Department of Public Health
PO Box, 997377, MS 0500, Sacramento, CA 95899-7377
Department Website (cdph.ca.gov)

Certification of Vaccination Status



Employer/Business/Entity Name: _____

Employee First Name: _____

Employee Last Name: _____

Date of Birth: _____

Under the Health Officer's May 18, 2021 Order, all businesses and governmental entities in Santa Clara County are required to determine the COVID-19 vaccination status of their employees (as well as contractors, volunteers, and others who regularly work onsite). In light of this requirement, you must provide the information requested below.

Please note that you are required to provide accurate information about your vaccination status in response to the questions below, or alternatively may decline to provide your vaccination status. If you decline to provide information about your vaccination status, we will be required to assume you are unvaccinated for purposes of rules or requirements in the workplace that are different for vaccinated or unvaccinated employees. For example, if requirements on face coverings allow fully vaccinated employees not to wear face coverings in certain settings, the information collected below will be used to determine whether you will be required to wear a face covering in those settings.

For purposes of this certification, you are considered "fully vaccinated" two weeks after completing the second dose of a two-dose COVID-19 vaccine (e.g., Pfizer or Moderna) or two weeks after receiving a single dose of a one-dose vaccine (e.g., Johnson & Johnson/Janssen).

Please select the statement below that accurately describes your vaccination status:	
☐	I am fully vaccinated.
☐	I received my second dose of the Pfizer or Moderna vaccine or my single dose of a Johnson & Johnson vaccine less than two weeks ago.
☐	I received my first dose of Moderna or Pfizer, and my second appointment is scheduled.
☐	I have not yet been vaccinated, but I have already scheduled an appointment to receive my first dose of vaccine.
☐	I have not been vaccinated.
☐	I decline to answer whether I have been vaccinated.

I understand that I am required to provide accurate information in response to the question above. I hereby affirm that I have accurately and truthfully answered the question above. I also understand that if I stated that I am fully vaccinated, my employer may request documentation of my vaccination status (e.g., a copy of my vaccine card or other similar official document confirming vaccination status).

Signature: _____

Date: _____

sccFreeVax.org

Santa Clara County PUBLIC HEALTH

County of Santa Clara
Public Health Department

Health Officer
976 Lenzen Avenue, 2nd Floor
San José, CA 95126
408.792.3798

ORDER OF THE HEALTH OFFICER OF THE COUNTY OF SANTA CLARA ESTABLISHING FOCUSED SAFETY MEASURES TO PROTECT THE COMMUNITY FROM COVID-19

DATE OF ORDER: May 18, 2021

Please read this Order carefully. Violation of or failure to comply with this Order is a misdemeanor punishable by fine, imprisonment, or both. (California Health and Safety Code § 120295, *et seq.*; Cal. Penal Code §§ 69, 148(a)(1); Santa Clara County Ordinance Code § A1-28; County Ordinance NS-9.291.)

UNDER THE AUTHORITY OF CALIFORNIA HEALTH AND SAFETY CODE SECTIONS 101040, 101085, 120175, AND SANTA CLARA COUNTY ORDINANCE CODE SECTION A18-33, THE HEALTH OFFICER OF THE COUNTY OF SANTA CLARA ("HEALTH OFFICER") ORDERS:

1. **Purpose and Intent.**

    a. This Order supersedes the October 5, 2020 Risk Reduction Order of the Health Officer ("Prior Order"), and will take effect on the date and time set forth in Section 11 below. This Order puts in place certain local requirements designed to limit transmission of SARS-CoV-2, the virus that causes the Novel Coronavirus Disease 2019 ("COVID-19"). The public health threat from COVID-19 is decreasing in the County. However, COVID-19 continues to pose a risk especially to residents of Santa Clara County ("County") who are not fully vaccinated, and certain safety measures continue to be necessary to protect against COVID-19 cases and deaths. Vaccines are the most effective method for preventing COVID-19 cases and deaths, and for preventing transmission of COVID-19, and it is therefore important to ensure that as many eligible people as possible are vaccinated against COVID-19. Further, it is critical to ensure there is continued reporting of cases to protect individuals and the larger community. This Order requires specific safety measures, focused on case reporting, vaccination, and use of face coverings indoors. The Health Officer will continue to monitor data regarding the evolving scientific understanding of the risks posed by COVID-19, including the impact of vaccination, and may amend or rescind this Order based on analysis of that data and knowledge. As of the effective date and time of this Order, all individuals and businesses in the County are required to follow the provisions of this Order. Government agencies must also follow the provisions of this Order unless otherwise specified.

b. The primary intent of this Order is to continue to protect the community from COVID-19 and to also increase vaccination rates to reduce transmission of COVID-19 long-term, so that the whole community is safer and the COVID-19 health emergency can come to an end. All provisions of this Order must be interpreted to effectuate this intent. Failure to comply with any of the provisions of this Order constitutes an imminent threat and menace to public health, constitutes a public nuisance, and is punishable by fine, imprisonment, or both.

c. This Order is based on evidence of continued community transmission of SARS-CoV-2 within the County as well as scientific evidence and best practices to prevent transmission of respiratory viruses generally and SARS-CoV-2 specifically.

2. **Applicability.** All individuals, businesses, and other entities in the County are ordered to comply with the applicable provisions of this Order. For clarity, individuals who do not currently reside in the County must comply with all applicable requirements of the Order when they are in the County. Governmental entities must follow the requirements of this Order applicable to businesses, unless otherwise specifically directed by the Health Officer.

3. **Incorporation of Emergency Proclamations and State Orders.**

a. This Order is issued in accordance with, and incorporates by reference, the Governor's March 4, 2020 Proclamation of a State of Emergency; the February 3, 2020 Proclamation by the Director of Emergency Services Declaring the Existence of a Local Emergency in the County; the County Health Officer's February 3, 2020 Declaration of Local Health Emergency Regarding Novel Coronavirus 2019 (COVID-19); the February 10, 2020 Resolution of the Board of Supervisors of the County of Santa Clara Ratifying and Extending the Declaration of a Local Health Emergency; and the February 10, 2020 Resolution of the Board of Supervisors of the County of Santa Clara Ratifying and Extending the Proclamation of a Local Emergency.

b. This Order is also issued in light of the various Orders of the State Public Health Officer; the Governor's March 19, 2020 Executive Order N-33-20 directing California residents to follow State public health directives; the Governor's May 4, 2020 Executive Order N-60-20; and subsequent orders of the Governor and State Health Officer. These orders expressly acknowledge that local health officers have authority to establish and implement public health measures within their respective jurisdictions that are more restrictive than those implemented by the State Public Health Officer.

4. **Obligation to Follow Stricter Order.** Where a conflict exists between this Order and any order issued by the State Public Health Officer, the Governor, or a State agency (such as the California Division of Occupational Safety and Health (Cal/OSHA)) related to the COVID-19 pandemic, the most restrictive provision controls. For clarity, all individuals and entities must

comply with the State Order, any mandatory guidance issued by the California Department of Public Health, any mandatory orders of the Governor or a State agency, or any other mandatory provision of State law to the extent it is stricter than any provision of this Order. Consistent with California Health and Safety Code section 131080 and the Health Officer Practice Guide for Communicable Disease Control in California, except if the State Health Officer issues an order expressly directed at this Order and based on a finding that a provision of this Order constitutes a menace to public health, any more restrictive measures in this Order continue to apply and control in this County. In addition, to the extent any federal guidelines are inconsistent with this Order, this Order is controlling.

5. **Obligation to Follow Health Officer Directives and Mandatory State Guidance.** In addition to complying with all provisions of this Order, all individuals and entities, including all businesses and governmental entities, must also follow any applicable directives issued by the County Health Officer and any applicable mandatory guidance issued by the California Department of Public Health. To the extent that provisions in the directives of the County Health Officer and the guidance of the State Health Officer conflict, the more restrictive provisions apply.

6. **Definitions.**

    a. For purposes of this Order, a "business" includes any for-profit, non-profit, or educational entity, whether a corporate entity, organization, partnership, or sole proprietorship, and regardless of the nature of the service, the function it performs, or its corporate or entity structure. For clarity, "business" also includes a for-profit, non-profit, or educational entity performing services or functions under contract with a governmental agency.

    b. For purposes of this Order, "personnel" means the following individuals who provide goods or services or perform operations associated with a business in the County: employees; contractors and sub-contractors (such as those who sell goods or perform services onsite or who deliver goods for the business); independent contractors (such as "gig workers" who perform work via the business's application or other online interface); vendors who are permitted to sell goods onsite; volunteers; and other individuals who regularly provide services onsite at the request of the business.

    c. For purposes of this Order, a person is "fully vaccinated" two weeks after completion of the entire recommended series of vaccination (usually one or two doses) with a vaccine authorized to prevent COVID-19 by the federal Food and Drug Administration, including by way of an emergency use authorization. For example, as of the date of issuance of this Order, an individual would be fully vaccinated at least two weeks after receiving a second dose of the Pfizer or Moderna COVID-19 vaccine or two weeks after receiving the single dose Johnson & Johnson COVID-19 vaccine.

7. **Getting Vaccinated Is the Best Way to Reduce Risk.** Getting vaccinated against COVID-19 is the best way to protect the vaccinated person from infection, hospitalization, and death from COVID-19, as well as to prevent harm to others by reducing the risk of transmission of COVID-19. Therefore, all eligible persons are strongly urged to get vaccinated against COVID-19 as soon as possible.

8. **Face Coverings.** All persons must follow the Health Officer's Mandatory Directive on Use of Face Coverings.

9. **Requirements Applicable to All Businesses and Governmental Entities.**

    a. **Activities Encouraged to Occur Outdoors**. All businesses and governmental entities should consider moving operations and activities outdoors, where there is significantly less risk of COVID-19 transmission, especially if patrons are unlikely to be vaccinated.

    b. **Mandatory Reporting Regarding Personnel Contracting COVID-19.** Businesses and governmental entities must require that all personnel immediately alert the business or governmental entity if they test positive for COVID-19 and were present in the workplace either (1) within the 48 hours prior to onset of symptoms or within 10 days after onset of symptoms if they were symptomatic; or (2) within 48 hours prior to the date on which they were tested or within 10 days after the date on which they were tested if they were asymptomatic. In the event that a business or governmental entity learns that any of its personnel is a confirmed positive case of COVID-19 and was at the workplace in this timeframe, the business or governmental entity is required to report the positive case within 24 hours to the County Public Health Department at www.sccsafeworkplace.org. Businesses and governmental entities must also comply with all case investigation and contact tracing measures directed by the County, including providing any information requested within the timeframe provided by the County, instructing personnel to follow isolation and quarantine protocols specified by the County, and excluding positive cases and unvaccinated close contacts from the workplace during these isolation and quarantine periods.

    c. **Ascertainment of Vaccination Status.** Businesses and governmental entities must ascertain the vaccination status of all personnel. Until a person's vaccination status is ascertained, they must be treated as not fully vaccinated. Personnel who decline to provide vaccination status must also be treated as unvaccinated. Businesses and governmental entities must complete their initial ascertainment of vaccination status for all personnel within 14 days of the effective date of this Order. Thereafter, they must obtain updated vaccination status for all personnel who were not fully vaccinated every 14 days. Business and governmental entities must maintain appropriate records to demonstrate compliance with this provision.

d. **Mandatory Rules for Personnel not Fully Vaccinated.** Businesses and governmental entities must require all personnel who are not fully vaccinated to (1) comply with all applicable provisions of the Mandatory Directive on Use of Face Coverings, and (2) comply with all applicable provisions of the Health Officer's Mandatory Directive on Unvaccinated Personnel.

10. **Enforcement.** Pursuant to Government Code sections 26602 and 41601, Health and Safety Code section 101029, and Santa Clara County Ordinance Code section A1-34 *et seq.*, the Health Officer requests that the Sheriff, all chiefs of police in the County, and all enforcement officers ensure compliance with and enforce this Order. The violation of any provision of this Order constitutes an imminent threat and menace to public health, constitutes a public nuisance, and is punishable by fine, imprisonment, or both. This Order is also subject to the civil enforcement authority established by Urgency Ordinance No. NS-9.291.

11. **Effective Date.** This Order shall become effective on 12:01 a.m. on Wednesday, May 19, 2021. This Order shall continue to be in effect until it is rescinded, superseded, or amended in writing by the Health Officer.

12. **Copies.** Copies of this Order shall promptly be: (1) made available at the County Government Center at 70 W. Hedding Street, San José, California; (2) posted on the County Public Health Department's COVID-19 website (covid19.sccgov.org); and (3) provided to any member of the public requesting a copy of this Order.

13. **Severability**. If any provision of this Order or its application to any person or circumstance is held to be invalid, the remainder of the Order, including the application of such part or provision to other persons or circumstances, shall not be affected and shall continue in full force and effect. To this end, the provisions of this Order are severable.

IT IS SO ORDERED:

Dated: 5/18/2021

Sara H. Cody, M.D.
Health Officer of the County of Santa Clara

Approved as to form and legality:

Dated: 5/18/2021

James R. Williams
County Counsel

Santa Clara County
PUBLIC HEALTH

MANDATORY DIRECTIVE:

Use of Face Coverings

Issued May 18, 2021

sccgov.org/coronavirus

Effective: May 19, 2021

County of Santa Clara
Public Health Department

Health Officer
976 Lenzen Avenue, 2nd Floor
San José, CA 95126
408.792.5040

MANDATORY DIRECTIVE ON USE OF FACE COVERINGS

Please review all applicable State public health orders, guidance, and regulations. Where there is a difference between the County public health requirements and the State public health requirements, the more restrictive requirements must be followed.

Information on the State's public health requirements is available at covid19.ca.gov.

Issued: May 18, 2021
Effective: May 19, 2021

This Directive sets forth requirements for wearing face coverings. Evidence has shown that face coverings block the wearer from releasing exhaled respiratory particles, including particles that may contain SARS-CoV-2, the virus that causes the Novel Coronavirus Disease 2019 ("COVID-19"). Face coverings also protect the wearer by filtering fine droplets and particles exhaled by others, including those that may contain SARS-CoV-2. Infectious respiratory particles may be released during breathing, talking, coughing, sneezing, singing, exercising, or shouting. Use of face coverings is particularly important for persons who are not fully vaccinated because they are at greater risk of becoming infected with COVID-19 and spreading infection to others.

This Directive is mandatory, and failure to follow it is a violation of the County Health Officer's Order issued on May 18, 2021 ("Order").

The Order Issued May 18, 2021

The Order contains recommendations and imposes several requirements on all businesses and governmental entities to ensure that the County stays as safe as possible, including but not limited to the following:

- **Ascertainment of Vaccination Status and Mandatory Rules for Personnel not Fully Vaccinated.** Businesses and governmental entities must ascertain the vaccination status of all personnel (including employees, contractors, and volunteers) who are currently or will be working at a facility or worksite in the county and must comply with the rules for personnel who are not fully vaccinated, as required in Sections 9.c and 9.d of the Order.

- **Face Covering Requirements.** All businesses and governmental entities must comply with the mandatory rules in this Directive.

- **Case Reporting Requirements.** Businesses and governmental entities must require that all personnel immediately alert the business or governmental entity if they test positive for COVID-19 and were present in the workplace either (1) within the 48 hours prior to onset of symptoms or within 10 days after onset of symptoms if they were symptomatic; or (2) within 48 hours prior to the date on which they were tested or within 10 days after the date on which they were tested if they were asymptomatic. In the event that a business or governmental entity learns that any of its personnel is a confirmed positive case of COVID-19 and was at the workplace in this timeframe, the business or governmental entity is required to report the positive case within 24 hours to the County Public Health Department at www.sccsafeworkplace.org and comply with subsequent necessary measures.

See the Order and the FAQ page for more details.

Face Covering Requirements

1. All residents, businesses, and governmental entities must follow the California Department of Public Health's Guidance for Use of Face Coverings ("CDPH Face Covering Guidance") issued on May 3, 2021. This provision may be modified when changes are made to the CDPH Face Covering Guidance.

2. All businesses and governmental entities must ensure that personnel, customers, and other persons at facilities or worksites they control comply with this Directive.

Stay Informed

For answers to frequently asked questions, please see the FAQ page. **Please note that this Directive may be updated**. For up-to-date information on the Health Officer Order, visit the County Public Health Department's website at www.sccgov.org/coronavirus.

Santa Clara County
PUBLIC HEALTH

MANDATORY DIRECTIVE:

Unvaccinated Personnel

Issued May 18, 2021

sccgov.org/coronavirus

Effective: May 19, 2021

County of Santa Clara
Public Health Department

Health Officer
976 Lenzen Avenue, 2nd Floor
San José, CA 95126
408.792.5040

MANDATORY DIRECTIVE FOR UNVACCINATED PERSONNEL

Please review all applicable State public health orders, guidance, and regulations. Where there is a difference between the County public health requirements and the State public health requirements, the more restrictive requirements must be followed.

Information on the State's public health requirements is available at covid19.ca.gov.

Issued: May 18, 2021
Effective: May 19, 2021

This Directive explains requirements applicable to all personnel who are not confirmed as fully vaccinated. These requirements help ensure that unvaccinated personnel are kept safe and help prevent transmission of COVID-19. **This Directive is mandatory, and failure to follow it is a violation of the County Health Officer's Order issued on May 18, 2021 ("Order").** Any business, organization, or government entity that has any personnel who are not fully vaccinated must comply with the requirements in this Directive.

The Order Issued May 18, 2021

The Order contains recommendations and imposes several requirements on all businesses and government entities to ensure that Santa Clara County stays as safe as possible, including but not limited to the following:

- **Ascertainment of Vaccination Status and Mandatory Rules for Personnel not Fully Vaccinated.** Businesses and governmental entities must ascertain the vaccination status of all personnel (including employees, contractors, and volunteers) who are currently or will be working at a facility or worksite in the county and must comply with the rules for personnel who are not fully vaccinated, as required in Sections 9.c and 9.d of the Order.

- **Face Covering Requirements.** All persons must comply with the mandatory rules on use of face coverings contained in the Health Officer's Mandatory Directive on Use of Face Coverings.

- **Case Reporting Requirements.** Businesses and governmental entities must require that all personnel immediately alert the business or governmental entity if they test positive

for COVID-19 and were present in the workplace either (1) within the 48 hours prior to onset of symptoms or within 10 days after onset of symptoms if they were symptomatic; or (2) within 48 hours prior to the date on which they were tested or within 10 days after the date on which they were tested if they were asymptomatic. In the event that a business or governmental entity learns that any of its personnel is a confirmed positive case of COVID-19 and was at the workplace in this timeframe, the business or governmental entity is required to report the positive case within 24 hours to the County Public Health Department at www.sccsafeworkplace.org and comply with subsequent necessary measures.

See the Order and the FAQ page for more details.

In addition to these general requirements applicable to all businesses under the Order, businesses and governmental entities must comply with the following requirements.

Requirements for Personnel Not Fully Vaccinated

1. *For purposes of this Directive, the following definitions apply:*

    a. For purposes of this Directive, "personnel" means the following individuals who provide goods or services or perform operations associated with a business in the county: employees; contractors and sub-contractors (such as those who sell goods or perform services onsite or who deliver goods for the business); independent contractors (such as "gig workers" who perform work via the business's application or other online interface); vendors who are permitted to sell goods onsite; volunteers; and other individuals who regularly provide services onsite at the request of the business.

    b. For purposes of this Directive, a person is "fully vaccinated" two weeks after completion of the entire recommended series of vaccination (usually one or two doses) with a vaccine authorized to prevent COVID-19 by the federal Food and Drug Administration, including by way of an emergency use authorization. For example, as of the date of issuance of this Order, an individual would be fully vaccinated at least two weeks after receiving a second dose of the Pfizer or Moderna COVID-19 vaccine or two weeks after receiving the single dose Johnson & Johnson COVID-19 vaccine.

2. *Mandatory Requirements for Personnel Not Fully Vaccinated*

    a. Businesses and governmental entities must ensure that all personnel not fully vaccinated who are working onsite wear face coverings in accordance with the Health Officer's Mandatory Directive on Use of Face Coverings.

b. Businesses and governmental entities must ensure that all personnel not fully vaccinated who are a "close contact" to a confirmed case, or who have been confirmed to have COVID-19, are excluded from the workplace for the duration of all applicable quarantine and/or isolation periods in accordance with the guidance of the Health Officer at www.sccsafeworkplace.org.

c. Businesses and governmental entities must provide all personnel not fully vaccinated, whether working onsite or remotely, with information on how to get vaccinated. A sample compliant information sheet is available at www.sccsafeworkplace.org.

3. *Strong Recommendations for Personnel Not Fully Vaccinated*

a. The Health Officer urges businesses and governmental entities to prohibit all personnel not fully vaccinated from engaging in any work-related travel, especially travel greater than 150 miles from the county.

b. The Health Officer urges businesses and governmental entities to require all personnel not fully vaccinated to obtain weekly PCR testing for COVID-19, or daily antigen testing with COVID PCR confirmation of any positives.

Stay Informed

For answers to frequently asked questions, please see the FAQ page. **Please note that this Directive may be updated**. For up-to-date information on the Health Officer Order, visit the County Public Health Department's website at www.sccgov.org/coronavirus.

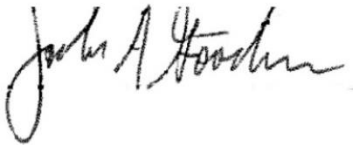
ANALYSIS

This is an urgency ordinance to require private employers in the unincorporated areas of the County to provide paid leave for employees to receive COVID-19 vaccine injections. This urgency ordinance adds Chapter 8.205 (Employee Paid Leave for Expanded Vaccine Access) to Title 8 – Consumer Protection, Business and Wage Regulations – of the Los Angeles County Code.

This ordinance is an urgency measure that will take immediate effect upon its approval by at least a four-fifths vote of the Board of Supervisors.

RODRIGO A. CASTRO-SILVA
County Counsel

By



JOSHUA GOODMAN
Deputy County Counsel
Labor & Employment Division

JAG:eb

Requested: 4/20/21
Revised: 5/04/21

ORDINANCE NO._____

An ordinance adding Chapter 8.205 (Employee Paid Leave for Expanded Vaccine Access) to Division 5 – COVID-19 Worker Protections of Title 8 – Consumer Protection, Business and Wage Regulations of the Los Angeles County Code, establishing paid leave for employees in the unincorporated areas of Los Angeles County to receive the COVID-19 vaccine.

The Board of Supervisors of the County of Los Angeles ordains as follows:

SECTION 1. Chapter 8.205 is hereby added to read as follows:

8.205.010 Findings and Purpose.

It is critical that barriers to COVID-19 vaccine access are removed to ensure an effective and equitable ability for residents to obtain the vaccine. Although the vaccine is free regardless of insurance or immigration status, many employees lack the financial means to take the necessary time off from work to access the vaccine. This is especially true for low wage and essential workers.

Health experts have estimated that at least 70 to 85 percent of the population will need to be fully vaccinated to reach herd immunity. As of April 4, 2021, approximately 40 percent of County residents have received one dose of the vaccine. However, Black and Latinx residents have a lower vaccination rate when compared to other demographic groups – and this equity gap is even more pronounced for Black and Latinx men. In California, most essential workers are Black and Latinx. In fact, of Latinx workers in the State, 55 percent are employed as essential workers, and 48 percent of Black workers are in essential roles. Men are overrepresented in frontline jobs including food preparation, farm workers, and construction workers. Though the State does not currently collect vaccination data by occupation, the low vaccination rate in Black and Latinx communities for those ages 16 and above strongly suggests that more must be done to reach essential workers.

To close these gaps, the County deploys mobile units to go directly to select workplaces to provide vaccines. These mobile units target multiple communities, including highly impacted areas, neighborhoods with low access to transportation, homebound individuals, and senior housing centers. However, their capacity is limited,

and mobile units alone cannot meet the significant need for every workplace across the County. It is clear that more must be done to remove barriers to access for workers across the County, especially our essential workers.

Workers must have a greater ability to access vaccination sites. Furthermore, workers must not be forced to decide between a paycheck and taking the necessary steps to safeguard their own wellbeing and the public health. To that end, the County has an interest in ensuring that all workers have access to additional paid leave benefits to obtain the COVID-19 vaccine.

The federal Families First Coronavirus Relief Act (FFCRA) included provisions requiring employers to provide 80 hours of paid sick leave for coronavirus-related purposes such as recovery, quarantine, and isolation. However, it included carve outs for businesses with fewer than 25 employees or greater than 500 employees. Furthermore, it exempted employees from the public sector, regardless of the size of the entity. Reports have indicated that because of this carve-out, roughly 50 percent of employees were exempt from this critical provision.

California Senate Bill 95 (codified in Labor Code section 248.2) provided 80 hours of COVID-19 related sick time beyond the expiration of the FFCRA. Although Labor Code section 248.2 provides paid time off for workers to receive the COVID-19 vaccine, the County's most vulnerable residents, especially our essential workers, may have already exhausted the existing 80-hour benefit, and lack the necessary hours to take time off work to get vaccinated. To that end, the County has an interest in ensuring that these workers are provided additional paid leave to receive their vaccine.

It is in the best interest of the County's public health and the County's economy that we ensure that all workers are vaccinated as expeditiously as possible to prevent further outbreaks or delays for the County's re-opening. As the County reopens, ensuring workers are vaccinated will provide greater assurance that businesses are safe for customers to return to, and restore greater consumer confidence in returning to regular economic activity.

8.205.020 Definitions.

The following definitions apply to this Chapter:

A. "County" means the unincorporated areas of the County of Los Angeles.

B. "COVID-19 Vaccine Leave" means time an Employee is compensated by an Employer for receiving each COVID-19 vaccine injection, as described in Section 8.205.030. This paid leave includes time spent for an Employee to travel to and from a COVID-19 vaccine appointment, to receive the COVID-19 vaccine injection, and to recover from any symptoms related to receiving the COVID-19 vaccine that prevent the Employee from being able to work or telework.

C. "DCBA" means the Los Angeles County Department of Consumer and Business Affairs.

D. "Employee" means an individual who performs any work in the County for an Employer. For purposes of this Chapter, a worker is presumed to be an Employee, and an Employer has the burden to demonstrate that a worker is a bona fide independent contractor and not an Employee.

E. "Employer" means a person, as defined in Section 18 of the California Labor Code, including a corporate officer or executive, who directly or indirectly or through an agent or any other person, including through the services of a temporary service or staffing agency or similar entity, employs or exercises control over the wages, hours, or working conditions of any Employee. This Chapter and the definition of Employer does not apply to federal, state, or local government agencies.

F. "Full Time Employee" means:

1. An Employee who the Employer considers to work full time; or

2. An Employee who worked or was scheduled to work, on average, at least 40 hours per week for the Employer in the two weeks preceding the date the Employee took COVID-19 Vaccine Leave.

G. "Part-Time Employee" means an Employee who is not a Full-Time Employee.

8.205.030 COVID-19 Vaccine Paid Leave.

A. A Full-Time Employee who has exhausted all available leave time under Labor Code section 248.2 is entitled to use up to four hours of additional paid leave per injection to receive the COVID-19 vaccine.

B. A Part-Time Employee who has exhausted all available leave time under Labor Code section 248.2 is entitled to additional paid leave to receive the COVID-19 vaccine at the following rate: the prorated amount of four hours per injection based on their normally scheduled work hours over the two-week period preceding the injection. As an example, if an employee worked 20 hours per week during the two-week period,

the Employee would be entitled to two hours of COVID-19 Vaccine Paid Leave per injection.

C. An Employee who receives COVID-19 Vaccine Paid Leave shall be compensated at their normal rate of pay. COVID-19 Vaccine Paid Leave shall be calculated based on an Employee's highest average two-week pay over the period of January 1, 2021 through the effective date of this Chapter.

D. The total number of hours of COVID-19 Vaccine Paid Leave to which an Employee is entitled under this Section shall be in addition to any paid sick leave that may be available to the Employee under Labor Code section 246, et seq.

E. An Employer may ask an Employee to provide written verification of receipt of the COVID-19 vaccine in order to receive COVID-19 Vaccine Leave.

8.205.040 Employer Notification Requirements.

A. COVID-19 Vaccine Leave Posting. Every Employer must post in a conspicuous place where Employees work a written notice prepared and made available electronically by the DCBA informing Employees of the COVID-19 Vaccine Leave Ordinance and of their rights under this Chapter.

B. Supplemental Disclosure Allowed. Nothing in this Section requires Employers to duplicate disclosures required by State law, including sections 226 and 2810.5 of the California Labor Code. Disclosures required by this Section may be satisfied by supplementing any State-mandated disclosure.

8.205.050 Employer Record Keeping and Access Requirements.

A. Payroll Records. Employers must keep records necessary to demonstrate compliance with this Chapter, including accurate and complete payroll records pertaining to each Employee that document the name, address, occupation, dates of employment, rate or rates of pay, and the amount paid.

B. Retention Period. Every Employer must retain payroll records required in subsection A pertaining to each Employee for a period of four years.

C. Records and Interview Access; Cooperation with Investigations. To monitor and investigate compliance with the requirements of this Chapter, every Employer shall: (a) allow the DCBA access to such records required in subsection A, (b) allow the DCBA to interview persons, including Employees, during normal business hours, and (c) cooperate with the DCBA investigators.

D. Presumption of Violation. There shall be a rebuttable presumption that an Employer violated this Chapter if an allegation is made concerning an Employee's entitlement to COVID-19 Vaccine Leave under this Chapter and an Employer does not comply with the requirements of this Section to maintain or retain payroll records, or does not allow the DCBA reasonable access to such records.

E. Records Access Charges. When an Employer demonstrates to the DCBA that the Employer will incur a fee or charge for providing the records required in this Section, the Employer will be required to provide the DCBA with only the prior two years of records, unless the DCBA determines that obtaining four years of records is reasonable and necessary for the enforcement of this Chapter.

8.205.060 Retaliatory Action Prohibited.

No Employer can refuse to employ, terminate, reduce in compensation, or otherwise take any adverse action against any person for seeking to enforce their rights under this Chapter by any lawful means, for participating in proceedings related to this Chapter, for opposing any practice proscribed by this Chapter, or for otherwise asserting rights under this Chapter. Rights protected under this Chapter include: the right to file a complaint or inform any person about any party's alleged noncompliance with this Chapter; and the right to inform any person of potential rights under this Chapter and to assist in asserting such rights. Protections of this Chapter apply to any Employee who mistakenly, but in good faith, alleges noncompliance with this Chapter.

8.205.070 Employee Remedies.

A. Private Right of Action. An Employee claiming a violation of this Chapter may file an action in the Superior Court of the State of California against an Employer, within three years of the occurrence of the alleged violation, and may be awarded:

1. Reinstatement to the position from which the Employee was discharged in violation of this Chapter.

2. Back pay unlawfully withheld.

3. All penalties and/or fines imposed pursuant to other provisions of this Chapter or State law, as determined by the court.

4. For retaliatory action by an Employer, the Employee shall be entitled to a trebling of lost wages and penalties and/or fines imposed, in addition to reinstatement, as determined by the court.

5. Interest on all due and unpaid wages at the rate of interest specified in subdivision (b) of Section 3289 of the California Civil Code, which shall accrue from the date that the wages were due and payable as provided in Part 1 (commencing with Section 200) of Division 2 of the California Labor Code, to the date the wages are paid in full.

6. Other legal or equitable relief the court may deem appropriate.

7. If an Employee is the prevailing party in any legal action taken pursuant to this Chapter, the court may award reasonable attorneys' fees and costs as part of the costs recoverable.

B. Administrative Complaint. Any Employee, or any other person, may file a complaint with the DCBA alleging a potential violation of this Chapter. A complaint should include a statement of the dates, places, and persons or entities responsible for such violation. Complaints must be filed within three years after the occurrence of the alleged violation of this Chapter.

8.205.080 Administrative Enforcement.

A. Wage Enforcement Authority. The Department of Consumer and Business Affairs is authorized to investigate complaints of alleged violation of this Chapter and to enforce the requirements of this Chapter in the same manner, and subject to the same procedures and appeals, as set forth in Chapter 8.101, the Los Angeles County Wage Enforcement Ordinance. That includes all enforcement powers and duties, investigative authority, access privileges to Employer records, confidentiality, settlement authority, referral of violations to appropriate law enforcement

agencies, and authority to issue notices of violation, correction orders, and wage enforcement orders.

B. Payments on Employees' Behalf. The County, when enforcing on behalf of an Employee, has the authority to require that payment of all amounts due under this Chapter be paid directly to the County. The failure of an Employer to pay any amounts due under this Chapter shall constitute a debt under this Section to the County. The County, as plaintiff and/or judgment creditor, may file a civil action on behalf of an Employee and/or the County or, to the extent feasible under State law, create and impose a lien against any property owned or operated by an Employer or other person who fails to pay wages, penalties and administrative fines assessed by the DCBA, or pursue other legal and equitable remedies available to the County. The County shall be awarded reasonable attorneys' fees and costs as well as costs associated with enforcing a violation under this Chapter.

C. Nothing in this Chapter shall limit or otherwise prohibit any governmental agency with jurisdiction over wage-related claims from enforcing, or pursuing remedies on behalf of affected Employees permitted by, the provisions of this Chapter.

8.205.090 No Waiver of Rights.

Any waiver by an Employee of any or all of the provisions of this Chapter shall be deemed contrary to public policy and shall be void and unenforceable.

8.205.100 Conflicts.

Nothing in this Chapter shall be interpreted or applied to create any power or duty in conflict with any federal or State law.

8.205.110 Severability.

If any subsection, sentence, clause or phrase of this Chapter is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Chapter. The Board of Supervisors hereby declares that it would have adopted this Chapter and each and every subsection, sentence, clause and phrase thereof not declared invalid or unconstitutional, without regard to whether any portion of the Chapter would be subsequently declared invalid or unconstitutional.

8.205.120 Operative Period.

This ordinance shall be in effect until August 31, 2021. The provisions of this Chapter are made retroactive to January 1, 2021.

8.205.130 Exemption for Collective Bargaining Agreement.

All of the provisions, or any part, of this Chapter, may be expressly waived in a collective bargaining agreement, but only if the waiver is explicitly set forth in the agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted to constitute, a waiver of all or any of the provisions of this Chapter.

SECTION 2. Immediate Effect.

This ordinance shall be and is hereby declared to be in full force and effect immediately upon its passage by a four-fifths or greater vote, pursuant to sections 25123(d) and 25131 of the California Government Code. The Board of Supervisors

finds that the establishment of the benefits provided for herein are necessary for the immediate preservation of the public peace, health, or safety given the extraordinary effects on employment resulting from the ongoing COVID-19 pandemic.

[CH8205JGCC]

Session 2: Item 7

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Michelle D. Volk (SBN 217151)
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

CALIFORNIA EDUCATORS FOR MEDICAL FREEDOM, ARTEMIO QUINTERO, MIGUEL SOTELO, JANET PHYLLIS BREGMAN, CEDRIC JOHNSON, MIDSANON (SONI) LLOYD, HEATHER POUNDSTONE, and THERESA D. SANFORD,

Plaintiffs,

v.

AUSTIN BEUTNER, in his individual capacity and in his official capacity as Superintendent of the LOS ANGELES UNIFIED SCHOOL DISTRICT, and LINDA DEL CUETO, in her individual capacity and in her official capacity as the Director of Human Resources for the LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendants.

Case No.: 21-cv-02388

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

DEMAND FOR JURY TRIAL

Plaintiffs, CALIFORNIA EDUCATORS FOR MEDICAL FREEDOM ("CEMF"), ARTEMIO QUINTERO, MIGUEL SOTELO, JANET PHYLLIS

BREGMAN, CEDRIC JOHNSON, MIDSANON (SONI) LLOYD, HEATHER POUNDSTONE, and THERESA D. SANFORD, by and through their undersigned counsel, sue Defendants, AUSTIN BEUTNER, in his individual capacity and in his official capacity as the Superintendent of the LOS ANGELES UNIFIED SCHOOL DISTRICT ("LAUSD"), and LINDA DEL CUETO, in her individual capacity and in her official capacity as the Director of Human Resources for LAUSD, and allege as follows:

INTRODUCTION

1. Plaintiffs are informed and believe and thereon allege that Defendants have implemented a policy mandating that all employees of LAUSD be vaccinated against the virus known as SARS-CoV-2, which causes the corona virus disease known as COVID-19 (together "COVID-19") by the use of vaccine materials that have not, as yet, been finally approved by the relevant federal agencies, as a condition of their continuing employment (hereinafter, the "Mandate").

2. None of the currently available vaccines for COVID-19 (the "COVID Vaccines") has received final approval from the Food and Drug Administration (the "FDA"). Rather, each one of the COVID Vaccines is an *unapproved product* that has been authorized for emergency use under a series of Emergency Use Authorizations ("EUAs"). The statute granting the FDA the power to authorize a medical product for emergency use requires that the person being administered the unapproved product be advised of his or her right to refuse administration of the product. *See* 21 U.S.C. § 360bbb-3(e)(1)(A) ("Section 360bbb-3").

3. For its part, the FDA refers to the COVID Vaccines as "*investigational products*" – i.e., they remain experimental. In accordance with the governing statute, the FDA requires that patients and caregivers be informed of their right to refuse administration of the product. As well, the FDA has held that the terms and conditions

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of the EUAs preempt state and local laws that would impose obligations that are inconsistent with those terms and conditions.

4. Section 360bbb-3 reflects a fundamental, public policy goal of striking a balance between giving people the option of having access to experimental medical products during public emergencies, while also assuring that no one is forced to accept administration of such an experimental medical product. The Mandate effectively usurps that public policy objective and contradict and frustrates clear federal statutory authority and guidelines governing the introduction of medical products into interstate commerce.

5. Section 360bbb-3 further recognizes the well-settled doctrine that medical experiments, better known in modern parlance as "clinical research", may not be performed on human subjects without the express, informed consent of the individual receiving treatment.

6. This right to avoid the imposition of human experimentation is fundamental, and has its roots in the Nuremberg Code of 1947 and has been ratified by the 1964 Declaration of Helsinki, and further codified in the United States Code of Federal Regulations. The standard is indeed so universally recognized that it constitutes a *jus cogens* norm under international law.

7. The Nuremberg principles have been adopted by the California Legislature, and no person subject to this State's jurisdiction may be forced to undergo the administration of experimental medicine without that person's informed consent. The Mandate is therefore contrary to the law of this State.

8. Even if approved by the FDA, the COVID Vaccines will remain experimental.

9. There is no "pandemic exception" to the law or the Constitution. Plaintiffs ask that the Court intervene to protect their rights before it is too late.

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PARTIES

10. Plaintiff CEMF is a voluntary, unincorporated association of LAUSD employees whose purpose is to advocate for medical choice and bodily autonomy on behalf of its members, vis a vis the Mandate. *See* Declaration of Vanessa Vance, attached hereto as Exhibit "A". CEMF's members are directly affected by the Mandate, and therefore would have standing in their own right to bring this action. As well, the interests at stake in this case are germane to CEMF's purpose, and neither the claims asserted nor the relief requested requires the individual participation of its members.

11. Plaintiff ARTEMIO QUINTERO is a citizen of Los Angeles County, and is employed by LAUSD as a Carpenter.

12. Plaintiff MIGUEL SOTELO is a citizen of Los Angeles County, and is employed by LAUSD as an Electrician.

13. Plaintiff JANET PHYLLIS BREGMAN is a citizen of Los Angeles County, and is employed by LAUSD as a Teacher.

14. Plaintiff CEDRIC JOHNSON is a citizen of Los Angeles County, and is employed by LAUSD as a SSS PSA Counselor.

15. Plaintiff MIDSANON (SONI) LLOYD is a citizen of Los Angeles County, and is employed by LAUSD as a Teacher.

16. Plaintiff HEATHER POUNDSTONE is a citizen of Los Angeles County, and is employed by LAUSD as a Teacher and Librarian.

17. Plaintiff THERESA D. SANFORD is a citizen of Los Angeles County, and is employed by LAUSD as a Teacher.

18. Allegations regarding "Plaintiffs" hereinbelow shall be deemed to include the individual Plaintiffs and the members of Plaintiff CEMF.

19. Defendant AUSTIN BEUTNER is the Superintendent of LAUSD, and is *sui juris*. Mr. Beutner is ultimately charged with, *inter alia*, enforcing all employment policies of the LAUSD. He is being sued in his official and individual capacities.

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20. Defendant LINDA DEL CUETO is the Director of Human Resources for LAUSD, and is *sui juris*. On information and belief, Ms. Del Cueto is charged with developing and enforcing employment policies of LAUSD. She is named as a defendant herein in her official and individual capacities.

21. Defendants Beutner and Del Cueto have personally undertaken actions under color of law that deprive or imminently threaten to deprive Plaintiffs of certain rights, privileges, and immunities under the laws and Constitution of the United States, and under the laws and Constitution of the State of California.

22. This lawsuit seeks prospective relief against Defendants in their official capacities, and damages or nominal damages against them in their individual capacities. Defendants are state actors unprotected by sovereign immunity for purposes of this action.

JURISDICTION AND VENUE

23. This Court has jurisdiction to hear this case under 28 U.S.C. § 1331, which confers original jurisdiction on federal district courts to hear suits arising under the laws and Constitution of the United States, as well as under 28 U.S.C. § 1343(3) in relation to Defendants' intent to deprive Plaintiffs of certain rights, privileges, and immunities as detailed herein.

24. This Court has jurisdiction over the claims asserting violations of the laws and Constitution of the State of California through its supplemental jurisdiction under 28 U.S.C. § 1367(a), as those claims are so closely related to the Plaintiffs' federal question and 42 U.S.C. § 1983 claims that they form part of the same case or controversy under Article III of the United States Constitution.

25. This Court has the authority to award the requested declaratory relief under 28 U.S.C. § 2201; the requested injunctive relief under 28 U.S.C. § 1343(a), Rule 65 of the Federal Rules of Civil Procedure, and its traditional equitable power to enjoin

unconstitutional actions by state agencies and officials; and attorneys' fees and costs under 42 U.S.C. § 1988.

26. The Central District of California, Western Division is the appropriate venue for this action pursuant to 28 U.S.C. § 1391(b)(1) and (2) because it is the District in which Defendants reside, exercise their authority in their official capacities, and/or have threatened to deprive Plaintiffs of the rights and liberties under the laws and Constitution of the United States, and in addition thereto to violate the laws and Constitution of the State of California, as further alleged herein. It is also the District in which a substantial part of the events giving rise to Plaintiffs' claims have occurred and continue to occur.

FACTUAL BACKGROUND

The Universal Prohibition on Human Experimentation Without Consent

27. Among the horrors that emerged from the rubble of World War II were stories of barbaric medical experiments performed on unwilling victims of Nazi Germany's concentration camps.

28. On August 8, 1945, the prevailing Allies established an International Military Tribunal (the "IMT"). Under the aegis of the IMT, the law authorized the creation of U.S. military tribunals for the trial of "lower-level" war criminals, such as doctors accused of conducting medical experiments without the subjects' consent.[1]

29. A U.S. military tribunal subsequently found 15 doctors guilty of conducting nonconsensual experiments, which included the testing of drugs for immunization against malaria, epidemic jaundice, smallpox, and cholera. "In every single instance appearing in the record," the tribunal concluded, "subjects were used

[1] Sources for the historical facts set forth herein can be found in *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009), which explains in detail the history and reasons why the prohibition against nonconsensual human experimentation should be regarded as a *jus cogens* norm.

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who did not consent to the experiments. . . ." The tribunal sentenced seven of the doctors to death, and the remaining eight to life in prison.

30. As part of its final judgment, the tribunal promulgated the Nuremberg Code on Permissible Medical Experiments. Point One of the Nuremberg Code states: "**The voluntary consent of the human subject is absolutely essential**."

31. This standard has since been repeatedly ratified and adopted around the globe, in laws, treaties, regulations, and ethical guidelines for medical research. For example, in 1964, the World Medical Association adopted the Declaration of Helsinki, which provides that human subjects "must be volunteers and informed participants in the research project." Declaration of Helsinki at Art. 20.

32. Although themselves non-binding, the principles underlying the Declaration of Helsinki and the Nuremberg Code have been incorporated into international conventions, as well as the laws and regulations of countries around the world, including the United States of America.

33. The International Covenant on Civil and Political Rights of the United Nations, which went into effect in 1976, provides in Article I that "[a]ll peoples have the right of self determination" and in Article 7 that "no one shall be subjected without his free consent to medical or scientific experimentation."

34. The informed consent principles of the Declaration of Helsinki were also incorporated by a 2001 Directive passed by the European Parliament and the Council of the European Union.

35. In addition, 35 members of the Council of Europe have signed the Convention on Human Rights and Biomedicine, which provides that informed consent is required for a subject's involvement in medical research.

36. In 2005, the General Conference of UNESCO adopted the Universal Declaration on Bioethics and Human Rights, requiring free and informed consent for participation in medical research-oriented treatments.

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37. On December 1, 2020, the High Court of Justice, Queen's Bench Division, Administrative Court in the United Kingdom concluded that minors lack the ability to give informed consent to the administration of puberty blockers to treat gender dysphoria because the procedure remains experimental.[2]

38. These principles have been adopted by statutes and regulations in the United States.

39. In 1979, the Department of Health, Education and Welfare issued the Belmont Report, which addressed the issue of informed consent in the human experimentation setting. The Report identified respect for self-determination by "autonomous persons" as the first of three "basic ethical principles" which "demands that subjects enter into the research voluntarily and with adequate information."

40. Ultimately, the principles of the Belmont Report, which itself was guided by the Nuremberg Code and the Declaration of Helsinki, were adopted by the FDA in its regulations requiring the informed consent of human subjects for medical research. *See* 21 C.F.R. § 50.20.[3] The Department of Health and Human Services has similarly adopted this standard in its regulations governing grants for medical research. *See* 45

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[2] *See Bell v. The Tavistock and Portman NHS Foundation Trust*, Case No. CO/60/2020, [2020] EWHC 3274 (Admin) (Engl. & Wales) https://www.judiciary.uk/wp-content/uploads/2020/12/Bell-v-Tavistock-Judgment.pdf.

[3] The exceptions to this standard are extremely narrow, and require certification by a researcher and an independent physician that, for example, "[t]he human subject is confronted with a life-threatening situation necessitating the use of the test article"; informed consent cannot be obtained from the subject; time does not permit obtaining informed consent from the subject's legal representative; and "there is available no alternative method of approved or generally recognized therapy that provides an equal or greater likelihood of saving the life of the subject." 21 C.F.R. § 50.23. *See also* 21 C.F.R. § 50.24 (providing a similarly narrow exception to informed consent requirements for emergency research).

C.F.R. § 46.116. The United States clearly regards itself as bound by the provisions of the Nuremberg Code and the Declaration of Helsinki.

41. The Nuremberg principles have also been adopted by this State. *See* Cal. Health & Saf. Code § 24170, *et. seq*. (requiring informed consent for human trial subjects).[4]

42. For these and other reasons, the prohibition against nonconsensual human experimentation must be regarded not only as established by U.S. law and regulations, but also as so broadly recognized by all nations as to constitute a *jus cogens* norm under international law.

Operation Warp Speed

43. On January 30, 2020, the World Health Organization ("WHO") declared a "public health emergency of international concern over the global outbreak" of COVID-19. Among other recommendations, the WHO called for accelerated development of "vaccines, therapeutics and diagnostics."

44. The following day, U.S. Health and Human Services ("HHS") Secretary Alex Azar declared a national Public Health Emergency ("PHE"), retroactive to January 27, 2020, "to aid the nation's healthcare community in responding" to COVID-19. By then, HHS was already collaborating with the pharmaceutical industry regarding the development of vaccines.

45. In April 2020, the national Administration announced Operation Warp Speed ("OWS") – a public/private partnership to develop and distribute a vaccine for COVID-19 by the end of 2020 or early 2021.

46. The process for developing a vaccine normally takes place in several phases, over a period of years.

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[4] California is not the only state to encode the Nuremberg principles. *See, e.g.,* Pub NY Health Ch. 45, Art. 24-a (mandating informed consent in human research); VA Code Ann. § 32.1-162.18 (same).

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47. The general stages of the development cycle for a vaccine are:

a. Exploratory stage;

b. Pre-clinical stage (animal testing);

c. Clinical development (human trials – *see* below);

d. Regulatory review and approval;

e. Manufacturing; and

f. Quality control.[5]

48. The third stage, clinical development, is itself a three-phase process:

a. During Phase I, small groups of people receive the trial vaccine.

b. In Phase II, the clinical study is expanded and vaccine is given to people who have characteristics (such as age and physical health) similar to those for whom the new vaccine is intended.

c. In Phase III, the vaccine is given to thousands of people and tested for efficacy and safety.

49. Phase III itself normally occurs over a course of years. That is because it can take years for the side effects of a new vaccine to manifest themselves.

50. Phase III must be followed by a period of regulatory review and approval. During this stage, data and outcomes are reviewed by peers and by the FDA.

51. Finally, the manufacturer must demonstrate that the vaccine can be manufactured under conditions that assure adequate quality control.

52. The timeline set by OWS telescoped what would normally take years of research into a matter of months.

53. Commercial vaccine manufacturers and other entities proceeded with development of COVID-19 vaccine candidates using different technologies including RNA, DNA, protein, and viral vectored vaccines.

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[5] https://www.cdc.gov/vaccines/basics/test-approve.html.

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54. Two potential vaccines emerged early on as likely candidates: one developed by Moderna (the "Moderna Vaccine"), the other by Pfizer (the "Pfizer Vaccine"), with both announcing Phase III trial results in November 2020.

55. In early 2021, Janssen Biotech, Inc. submitted Phase III trial results for its adenovirus vector vaccine (the "Janssen Vaccine").

The EUAs

56. In order for a new vaccine to be approved in the normal course, the manufacturer must submit an application to the FDA pursuant to section 505(b) of the Food, Drug, and Cosmetics Act, encoded at 21 U.S.C. § 355(b) (the "FDCA"). None of the currently-available COVID Vaccines, including the Moderna and Pfizer Vaccines that have been acquired and are being administered to LAUSD employees, has been approved by the FDA.

57. Rather, the COVID Vaccines have been authorized for *emergency use* under § 564 of the FDCA (encoded at 21 U.S.C. § 360bbb-3), which Congress enacted to vest the Secretary of Health and Human Services with permissive authority to "authorize the introduction into interstate commerce, during the effective period of a declaration [of emergency], of a drug, device, or biological product intended for use in an actual or potential emergency. . . ." 21 U.S.C. § 360bbb-3(a)(1).

58. The statute provides for the authorization of both unapproved products and unapproved uses of an approved product. *See* 21 U.S.C. § 360bbb-3(a)(2). The Vaccines fall under the former category, as they have not been previously approved for any use, nor have they been approved to date.

59. Section 360bbb-3 mandates the following conditions for authorization of an unapproved product:

> . . . [T]he Secretary, to the extent practicable given the applicable circumstances described in subsection (b)(1), ***shall***, for a person who carries out any activity for which the

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> authorization is issued, establish such conditions on an authorization under this section as the Secretary finds necessary or appropriate to protect the public health, including the following:
>
> **. . . (ii)** Appropriate conditions ***designed to ensure*** that ***individuals to whom the product is administered are informed—***
>
> **. . . (III)** ***of the option to accept or refuse administration of the product***. . . .

21 U.S.C. § 360bbb-3(e)(1)(A)(ii) (emphasis added).

60. Pfizer and Moderna applied for EUAs under Section 360bbb-3 in November-December 2020. Janssen applied for an EUA in early 2021.

61. On December 11, 2020, the FDA granted an EUA for the Pfizer Vaccine. An updated version of the EUA Letter to Pfizer is attached hereto as Exhibit "B".

62. The FDA granted an EUA for the Moderna Vaccine on December 18, 2020. The EUA Letter to Moderna is attached hereto as Exhibit "C".

63. The FDA granted an EUA for the Janssen Vaccine on February 27, 2021. The EUA Letter to Janssen is attached hereto as Exhibit "D".

64. Each of the EUA Letters provides details regarding the reasoning for the EUAs, and dictating strict conditions for, among other things, administering the Vaccines.

65. Under "Conditions of Authorization," each of the EUA letters directs that the manufacturers:

> and authorized distributor(s) will ensure that the authorized []

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> COVID-19 Vaccine is distributed, as directed by the U.S. government, including CDC and/or other designee, and the authorized labeling (i.e., Fact Sheets) will be made available to vaccination providers, recipients, and caregivers consistent with the terms of this letter.

See, e.g., Ex. "C" at 5, ¶A.

66. Each EUA Letter is accompanied by a Fact Sheet for Health Care Providers and a Fact Sheet for Patients and Caregivers. The Fact Sheets to Providers mandate, among other things, that a provider must communicate, to the recipient or the caregiver, information consistent with the "Fact Sheet for Recipients and Caregivers" prior to administering the vaccine, including information that "*the recipient or their caregiver has the option to accept or refuse*" the vaccine. *See* Pfizer Fact Sheet for Health Care Providers, attached as Exhibit "E" (emphasis added).

67. The Fact Sheets for Recipients and Caregivers likewise contain the following advice:

> **WHAT IF I DECIDE NOT TO GET THE [] COVID-19 VACCINE?**
>
> ***It is your choice*** *to receive or not receive the [] COVID-19 Vaccine*. Should you decide not to receive it, it will not change your standard medical care.

See Moderna Fact Sheet for Recipients and Caregivers, attached as Exhibit "F" (emphasis added).

68. Consistent with its mandate under Section 360bbb-3, the FDA continues to refer to the Vaccines as "unapproved" or "investigational" products. *See, e.g.*, Ex. "D" at 8 (referring to Pfizer Vaccine as an "*unapproved* product") (emphasis added);

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Ex. "B" at 1 (noting that the Moderna Vaccine "is an *investigational* vaccine *not licensed* for any indication") (emphasis added).

69. In other words, as a legal matter and as a matter of FDA policy and guidance, the Vaccines remain experimental.[6]

70. Separate and apart from the requirements of Section 360bbb-3 and the FDA's guidance thereunder, Plaintiffs have a reasonable apprehension that the technology underlying the Moderna and Pfizer Vaccines (the vaccines being acquired by LAUSD) are experimental.

71. The Moderna and Pfizer Vaccines use messenger RNA ("mRNA"). Before last year, no mRNA-based vaccine had ever made it to human trials, because when injected in sufficiently high doses to render the desired effect, it triggered dangerous immune reactions, even resulting in death, in animal subjects, making it too dangerous to test on humans. Even if that problem has been solved, given the severely telescoped timeline for development, no one knows at this time what will be the long-term effects of mRNA vaccine technology. It is, by definition, experimental medicine.

72. Moreover, the Vaccines remain experimental because Phase III clinical trials are either ongoing or were never completed.

73. Originally, Phase III clinical trials were scheduled to continue until 2023. However, the EUAs have necessarily created a situation in which the Phase III clinical trial phase is being conducted on the population of people who are administered the Vaccines under the EUAs, but without the benefit of the usual controls that would be in place for a clinical trial.

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[6] Only one vaccine, against inhaled anthrax, has ever previously been approved for emergency use. A district court found that it was an investigational drug and enjoined its forced administration to military servicemembers without their informed consent. *See Doe v. Rumsfeld*, 297 F. Supp. 2d 119 (D.D.C. 2003).

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The Mandate

74. On or about March 16, 2020, LAUSD closed all schools in Los Angeles County to in-person instruction.

75. Since that time, LAUSD has struggled to come up with a plan for reopening for in-classroom instruction.[7]

76. Defendants Beutner, Del Cueto, and others have enacted and sought to enforce or threaten to imminently enforce an express or *de facto* policy to require LAUSD employees to be vaccinated against COVID-19, despite the fact that none of the COVID Vaccines have been approved and remain experimental.

77. In or about February 2021, Plaintiffs began to receive communications from Defendant Beutner, and other representatives of LAUSD, instructing them to make appointments to get vaccinated. None of these communications have included the Fact Sheet information required by the FDA to be disseminated to recipients under the EUAs.

78. On March 4, 2021, Defendant Del Cueto distributed an interoffice memorandum to the local district superintendents regarding "Human Resources COVID-19 Employee Vaccination Information and Resources," a true and correct copy of which is attached hereto as Exhibit "G".

79. The memorandum includes as "ATTACHMENT 1" Defendants' "VACCINATION GUIDANCE FOR EMPLOYEES" (the "Guidance"). The Guidance states, *inter alia*, that:

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[7] This has been despite growing evidence that large public schools have, since the fall semester of 2020, reopened safely for in-classroom instruction, with positivity rates for COVID-19 well below those for their surrounding communities. *See* https://www.cnn.com/2021/01/11/us/miami-dade-schools-open-coronavirus-wellness/index.html.

a. The Moderna vaccine is currently being administered by Los Angeles Unified nurses and other licensed healthcare professionals to Los Angeles Unified employees.

b. You *will* schedule your appointment . . . .

c. You *will* provide proof of vaccination via the DailyPass for time reporting purposes.

Ex. "F" (emphasis added).

80. ATTACHMENT 2 provides guidance for supervisors, and contains essentially the same language.

81. The Guidance clearly indicates that vaccination is mandatory.

82. As well, Defendant Del Cueto made a verbal statement in the presence of Plaintiff Quintero to the effect that the vaccine is mandatory, and that any refusal by an employee to get vaccinated will trigger disciplinary action.

83. A representative of Teamsters Local 572 informed employees of LAUSD's Operations department via email of the results of a "Q&A" session with representatives of LAUSD. *See* Exhibit "H", attached hereto. The email states that, in response to a question as to whether vaccinations will be mandatory, LAUSD representatives answered: "***All District employees will be required to be vaccinated. No exceptions have been made. . . .***" (emphasis in original). *Id*.

84. The foregoing communications, as well as other statements made to Plaintiffs by supervisors and union representatives, all indicate that Defendants have formed an express or *de facto* policy, referred to herein as the Mandate, that requires vaccination as a condition of Plaintiffs' continuing employment unhindered by disciplinary action.

85. Plaintiffs have further been informed that any refusal to be vaccinated by April 2021 will result in a job detriment, up to and including termination from employment.

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86. On March 18, 2021, the day after the original Complaint in this lawsuit was filed, Defendant Del Cueto circulated an "UPDATED" memorandum, which purported to give employees the option of being tested for COVID instead of being vaccinated. This UPDATED memorandum was nothing more than a cynical attempt to moot Plaintiffs' claims.

87. LAUSD is a political subdivision of the State of California with a governing board publicly elected by residents of Los Angeles County and Defendants Beutner and Del Cueto are employees of LAUSD. The Mandate therefore constitutes "state action" taken "under color of law."

PLAINTIFFS' CONCERNS AND STANDING TO SEEK DECLARATORY RELIEF

88. Plaintiffs are all employees of LAUSD who are directly affected by the Mandate.

89. The statute governing the EUAs, as well as the FDA's conditions for the EUAs, prohibit any person from administering the Vaccines without the consent of the patient, as particularly described hereinabove and governmental agencies from requiring non-consensual administration of same.

90. More broadly, Plaintiffs have a universally recognized, fundamental right to be free from human medical experimentation, a right that is protected by recognized international legal standards, international treaties to which the United States is a signatory and bound thereby, the laws and regulations of the United States, and the Due Process Clause of the Fourteenth Amendment.

91. Plaintiffs do not consent to being administered the COVID Vaccines.

92. Because Defendants have indicated that administration of the COVID Vaccine will be a condition of their ongoing employment, Plaintiffs are uncertain of their rights, and seek declaratory relief in order to have clarity as to their rights.

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93. A real and concrete controversy exists between Plaintiffs and Defendants in that Defendants contend that they have the right, power and authority to require involuntary vaccination as a condition of continuing employment at a public, governmental agency and Plaintiffs contend that they have the right under international treaties and protocols, the Constitution and laws of the United States of America, and the Constitution and laws of the State of California to refuse vaccination without discipline or impairment of their employment status with LAUSD.

94. Defendant Del Cueto's "UPDATED" memorandum reflects only a tactical withdrawal by Defendants. Plaintiffs reasonably believe and therefore allege that the Mandate will be reinstituted if this case is dismissed for mootness.

95. All conditions precedent to this action have been performed, excused, and/or waived.

FIRST CLAIM

(All Plaintiffs vs. Defendants in their personal and official capacities)

DECLARATORY AND INJUNCTIVE RELIEF

(FEDERAL PREEMPTION)

96. Plaintiffs reallege and incorporate by reference their allegations in Paragraphs 1 – 95, as if fully alleged herein, and further allege:

97. Section 360bbb-3 and the FDA's regulations, protocols, and guidance thereunder preempt any and all contrary or inconsistent laws of the States and/or local governments with regard to the authorization of the COVID Vaccines for emergency use in human subjects.

98. The clear intent of Section 360bbb-3 and of the FDA's guidance and regulations implementing the statute is to allow, in the course of a medical crisis, *voluntary* access to *unapproved* – i.e., *experimental* – medical products. It was plainly not the intent of Congress to shortcut the formal approval process for medical products such as vaccines.

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99. By mandating that all employees of LAUSD be administered the COVID Vaccine, the Mandate directly conflicts with federal law and stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in regard to the EUAs.

100. Because the COVID Vaccines are investigational products, authorized – not approved – for use under an Emergency Use Authorization, the laws and regulations of the United States prohibit their administration to any person who does not consent.

101. Plaintiffs do not consent to being administered the COVID Vaccines.

102. Because the Mandate directly conflicts with Section 360bbb-3 and stands as an obstacle to the accomplishment and execution of its full purposes and objectives, the Mandate is preempted and thus invalid.

103. As well, Title 21, Part 50 of the Code of Federal Regulations governs the protection of human subjects in the conduct of all clinical investigations regulated by the U.S. Food and Drug Administration.

104. 21 C.F.R. § 50.20 provides that, "[e]xcept as provided in §§ 50.23 and 50.24, no investigator may involve a human being as a subject in research covered by these regulations unless the investigator has obtained the legally effective informed consent of the subject or the subject's legally authorized representative."

105. None of the exemptions provided in sections 50.23 and 50.24 would apply to Plaintiffs.

106. Accordingly, the Mandate at issue violates federal regulations governing the administration of experimental medicine, and is thus preempted.

107. A real and immediate controversy exists between the parties requiring the intervention of this Court by way of declaratory relief to determine the respective rights and powers of the respective parties.

108. In addition, Plaintiffs have no adequate remedy at law available against Defendants for the injuries and the irreparable harm they will imminently suffer as a

direct result of the Mandate. Plaintiffs therefore seek injunction prohibiting Defendants from mandating, requiring, or otherwise forcing Plaintiffs to be subject to involuntary administration of a COVID Vaccine.

SECOND CLAIM

(All Plaintiffs vs. Defendants in their personal and official capacities)

SUBSTANTIVE DUE PROCESS – MEDICAL EXPERIMENTATION

42 U.S.C. § 1983

109. Plaintiffs reallege and incorporate by reference their allegations in Paragraphs 1 – 95, as if fully alleged herein, and further allege:

110. As set forth above, the COVID Vaccines are experimental.

111. Plaintiffs have a protected liberty interest, secured by the Due Process Clause of the United States Constitution, international protocols and international treaties adopted by and entered into by the United States of America, and by the laws and regulations of the United States, to be free from forced medical experimentation.

112. This right is further recognized as a *jus cogens* norm under the law of nations, which prohibits human medical experimentation without informed consent.

113. Plaintiffs do not consent to being administered the COVID Vaccines.

114. Defendants, Beutner, Del Cueto, and others yet to be identified, have instituted a District-wide Mandate requiring that all employees of LAUSD be vaccinated against COVID-19.

115. Defendants Beutner and Del Cueto are state actors, and have instituted or imminently intend to institute the Mandate under color of law.

116. The forcible administration of the COVID Vaccines, on pain of termination from employment, would deprive Plaintiffs of their substantive due process rights and constitute a violation of their property rights under *Skelly v. State Personnel Board* (1974) 15 Cal.3rd 194.

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117. Plaintiffs have no adequate remedy at law available against Defendants for the injuries and the irreparable harm they will imminently suffer as a direct result of the Mandate. Plaintiffs therefore seek injunction prohibiting Defendants from mandating, requiring, or otherwise forcing Plaintiffs to be subject to involuntary administration of a COVID Vaccine.

THIRD CLAIM

(All Plaintiffs vs. All Defendants)

VIOLATION OF CALIFORNIA'S PROTECTION OF HUMAN SUBJECTS IN MEDICAL EXPERIMENTATION ACT, CAL. HEALTH & SAFETY CODE § 24170, *et. seq*.

118. Plaintiffs reallege and incorporate by reference their allegations in Paragraphs 1 – 95, as if fully alleged herein, and further allege:

119. Plaintiffs invoke the Court's supplemental jurisdiction to claim that the Mandate violates the law of this State governing human medical experimentation.

120. The Protection of Human Subjects in Medical Experimentation Act (the "Act") adopts the Belmont principles by prohibiting medical experimentation on human subjects without their informed consent. Cal. Health & Saf. Code § 24170, *et. seq*.

121. The COVID Vaccines are experimental, as alleged hereinabove.

122. The Mandate is therefore facially void, as a matter of law.

123. Even if the Mandate is not void, Plaintiffs do not consent to being administered the COVID Vaccines.

124. Plaintiffs reserve their rights to seek damages and other relief as the Court may deem just, pursuant to Section 24176 of the Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment in its favor and against Defendants, and each of them, as follows:

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FIRST CLAIM

1. For a declaratory judgment that the Mandate requiring administration of the COVID Vaccines to each of them violates and is preempted by the laws and regulations of the United States governing the administration of investigational medical products, that Defendants Beutner and Del Cueto be enjoined from requiring or enforcing the required administration of any COVID Vaccine to any Plaintiff without that Plaintiff's express informed consent;
2. For an award of nominal damages against Defendants Beutner and Del Cueto, personally; and
3. For an award of attorneys' fees and costs pursuant to 42 U.S.C. § 1988 against Defendants Beutner and Del Cueto, personally.

SECOND CLAIM

1. For a declaratory judgment that the Mandate requiring administration of the COVID Vaccines to each of them violates their rights to substantive due process and/or their liberty and property interests under the Fourteenth Amendment to the Constitution of the United States and the laws and Constitution of the State of California, that Defendants Beutner and Del Cueto be enjoined from requiring or enforcing the required administration of any COVID Vaccine to any Plaintiff without that Plaintiff's express informed consent;
2. For an award of nominal damages against Defendants Beutner and Del Cueto, personally; and
3. For attorneys' fees and costs as provided in 42 U.S.C. § 1988 against Defendants Beutner and Del Cueto, personally.

THIRD CLAIM

1. For a declaratory judgment that Defendants' Mandate Violates California Health and Safety Code §§ 24170, *et. seq*., and that Defendants Beutner and Del Cueto be enjoined from requiring or enforcing the required administration of any

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COVID Vaccine to any Plaintiff without that Plaintiff's express informed consent.

ALL CLAIMS

1. For judgment in favor of Plaintiffs;
2. For costs of suit herein; and
3. For such other and further relief as the Court deems just and proper.

Dated: May 24, 2021 JW HOWARD/ATTORNEYS

/s/ John W. Howard
John W. Howard
Attorney for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs demand a right to a jury trial for all matters so triable.

Dated: May 24, 2021 JW HOWARD/ATTORNEYS

/s/ John W. Howard
John W. Howard
Attorney for Plaintiffs

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

ISAAC LEGARETTA, ANTHONY ZOCCOLI and JOHN or JANE DOES 1-20, Plaintiffs, vs. FERNANDO MACIAS, Dona Ana County Manager, DIRECTOR BRYAN BAKER, an Official with the Dona Ana County Detention Center, CAPTAIN BEN MENDOZA, an official with the Dona Ana County Detention Center, CAPTAIN JOSHUA FLEMING, an official with the Dona Ana County Detention Center, COUNTY OF DONA ANA and JOHN or JANE DOES 1-20, Defendants.	)	Case No.: 2:21-cv-00179 AMENDED COMPLAINT

AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

For the First Amended Complaint, Plaintiffs, by and through their attorneys, N. Ana Garner and Jonathan M. Diener, state:

GENERAL ALLEGATIONS

1. Plaintiffs LEGARETTA and ZOCCOLI are residents of the state of New Mexico, County of Dona Ana, City of Las Cruces. Defendant Fernando Macias is a governmental official within the state of New Mexico. Defendants Director Bryan Baker, Captain Ben Mendoza and Captain Joshua Fleming were at all material times hereto, supervisors to Plaintiffs, any of which have the authority from Defendant Macias to terminate Plaintiffs from their employment or otherwise enforce the illegal mandate for compulsory COVID-19 injection. The County of Dona Ana is the employer of all Defendants and was the employer of the Plaintiffs.

2. This Court possesses proper subject matter and personal jurisdiction over the parties. Jurisdiction of this Court is invoked pursuant to Article III of the U.S. Constitution, 28 U.S.C. §1331 and 1343, 42 U.S.C. §1983 and 1988, 42 U.S.C. §2000d, and common law pursuant to 28U.S.C. §1367(a) and common law.

3. This Court has jurisdiction under Article III because the Plaintiffs allege that Defendant Macias has violated Plaintiffs' rights by issuing a mandate requiring them to take a vaccine for COVID-19 which mandate is in direct conflict with federal law which states that the unapproved COVID-19 vaccine cannot be mandatory. This Court also has jurisdiction because the Plaintiffs allege that the Defendants have violated Plaintiffs' rights under the Bill of Rights of the United States Constitution. Plaintiffs assert that these two issues are important issues, a decision on which may have widespread impact and should be decided by a Federal Court. This Court may and should decide any state law questions within the Complaint by virtue of *pendent* jurisdiction pursuant to 28 U.S.C. 1367(a) and common law.

4. The Plaintiffs were employees at the Dona Ana Detention Center which is administered by the Defendants. On or about February 1, 2021, County Manager Fernando Macias issued a "Mandatory COVID-19 Vaccination Directive," requiring first-responders in Dona Ana County to receive the COVID-19 vaccination as a condition of ongoing employment. **Exhibit A.**

5. On or about February 18, 2021, Plaintiff LEGARETTA received a 5-day notice to comply with the mandate to receive the COVID vaccine. After refusing, LEGARETTA received a "coaching and counseling" write up for not complying with the directive. **Exhibit B.**

Since LEGARRETTA did not consent to take the non-mandatory experimental vaccine and after this suit was filed, he was demoted by being reassigned to the juvenile section of the

Detention Center. This reassignment was done in violation of County administrative rules, which require reverse seniority to assign an employee to a position that no one had applied for. Plaintiff LEGARETTA had seniority above 15 other employees, who should have been considered before Plaintiff for a position for which no one applied. Though this may not have affected pay, working in the juvenile section is generally considered a less desirable position than LEGARRETA's previous position in the adult section.

6. Since LEGARRETA did not consent to take the non-mandatory experimental vaccine and after this suit was filed, he was dismissed from a position he had on the Detention Center's emergency response team which resulted in a loss of income.

7. Since LEGARRETA did not consent to take the non-mandatory experimental vaccine and after he filed this suit, Plaintiff has been subjected to a hostile work environment. As a direct and proximate result of the aforementioned demotion, dismissal from another position and the hostile work environment, LEGARETTA quit his employment with the County. The creation of a hostile work environment and the demotion and dismissal mentioned above constituted a constructive termination by the County.

8. Since Plaintiff ZOCCOLI did not consent to take the non-mandatory experimental injection, Defendants fired him.

9. The Mandatory COVID-19 Vaccination Directive issued by Defendant Macias is in direct violation of Federal law, specifically 21 U.S. Code § 360bbb–3 - *Authorization for medical products for use in emergencies*. That law states that where a medical product is "unapproved" then no one may be mandated to take it. Section (e)(1)(A) of this statute states:

> With respect to the emergency use of an unapproved product, the Secretary, to the extent practicable given the applicable circumstances described in subsection

> (b)(1), shall, for a person who carries out any activity for which the authorization is issued, establish such conditions on an authorization under this section as the Secretary finds necessary or appropriate to protect the public health, including the following:
>
> (i) Appropriate conditions designed to ensure that health care professionals administering the product are informed--
> (I) that the Secretary has authorized the emergency use of the product;
> (II) of the significant known and potential benefits and risks of the emergency use of the product, and of the extent to which such benefits and risks are unknown; and
> (III) of the alternatives to the product that are available, and of their benefits and risks.
> (ii) Appropriate conditions designed to ensure that individuals to whom the product is administered are informed--
> (I) that the Secretary has authorized the emergency use of the product;
> (II) of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and
> (III) **of the option to accept or refuse administration of the product,** of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks. (emphasis added)

10. The Defendants have violated section i(II) of 21 U.S. Code § 360bbb–3(e)(1)(A) cited above in that they did not advise Plaintiffs of the "known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown" of the COVID-19 vaccine.

11. The Defendants have violated i(III) of 21 U.S. Code § 360bbb–3(e)(1)(A) which requires advising of alternatives to the vaccine. Public opinion notwithstanding, medical alternatives to the vaccine do exist. Most importantly for purposes of the injunctive and declaratory relief requested, the Defendants did not inform Plaintiffs of the option to refuse the vaccine. Quite the opposite, each was advised that he would be fired if he did refuse.

12. That the vaccine being forced upon Plaintiffs is unapproved cannot be disputed. Even though the FDA granted emergency use authorizations for the Pfizer/BioNTech and Moderna vaccines in December, 2020, the clinical trials the FDA will rely upon to ultimately decide whether

to approve these vaccines are still underway and are designed to last for approximately two years to collect adequate data to establish if these vaccines are safe and effective enough for the FDA to license. The abbreviated timelines for the emergency use applications and authorizations means there is much the FDA does not know about these products even as it authorizes them for emergency use, including their effectiveness against infection and death from and transmission of, SARS-CoV-2, the virus that is allegedly the cause of the COVID disease. Given the uncertainty about the two vaccines, their EUAs (emergency use authorizations) are explicit that each is "an investigational vaccine not licensed for any indication" and require that all "promotional material relating to the Covid-19 Vaccine clearly and conspicuously ... state that this product has not been approved or licensed by the FDA, but has been authorized for emergency use by FDA". See **Exhibit C**, EUA letter for Pfizer.

13. The FDA on their website has stated the following:FDA believes that the terms and conditions of an EUA issued under section564 preempt state or local law, both legislative requirements and common-law duties, that impose different or additional requirements on the medical product for which the EUA was issued in the context of the emergency declared under section 564 … In an emergency, it is critical that the conditions that are part of the EUA or an order or waiver issued pursuant to section 564A — those that FDA has determined to be necessary or appropriate to protect the public health—be strictly followed, and that no additional conditions be imposed.

14. On August, 2020 at a Centers for Disease Control and Prevention published meeting of the Advisory Committee on Immunization Practices the Committee's Executive Secretary and

Chief Medical Officer of the National Center for Immunizations and Respiratory Diseases, Dr. Amanda Cohn stated:

> "I just wanted to add that, just wanted to remind everybody, that under an Emergency Use Authorization, an EUA, vaccines are not allowed to be mandatory. So, early in this vaccination phase, individuals will have to be consented and they won't be able to be mandated."[1]

15. The EUAs for both the Pfizer/BioNTech and Moderna vaccines require fact sheets to be given to vaccination providers and recipients. These fact sheets make clear that getting the vaccine is optional. For example, the Information Fact Sheet for recipients states that, "It is your choice to receive or not receive the Covid-19 Vaccine," and if "you decide to not receive it, it will not change your standard of medical care."

16. The Pfizer/BioNTech and Moderna "vaccines" are not actually vaccines as that word has been commonly understood. Vaccines such as those used against diseases like polio, small pox and measles use all or portions of material from microorganisms which are from the disease itself but have been weakened or inactivated so as not to cause the recipient to get the disease while giving the recipient immunity should she come into contact with the active disease microorganisms. The mRNA vaccines by Pfizer/BioNTech and Moderna are synthetic. They are not taken from the SARS-CoV2 virus. They work by causing DNA in the recipient to produce replicas of a protein from the SARS-CoV2 virus.

It is worth noting that mRNA technology has never been successfully used with a vaccine.

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[1] https://www.cdc.gov/vaccines/videos/low-res/acipaug2020/COVID-19Supply-NextSteps_3_LowRes.mp4 (@1:14:40).

Vaccine development was attempted in experiments in 2005 and 2012 for vaccines for the MERS and A+SARS Cov-1. It was abandoned because the animals in the clinical trials died from the experimental vaccines.

17. The clinical trials which have been done for the Pfizer/BioNTech and Moderna vaccines only demonstrated one thing – that the "vaccines" may be effective in reducing symptoms of someone who contracts COVID-19 after inoculation. They did not show that the vaccines would prevent infection or transmission to others! This fact has been acknowledged by World Health Organization as well as Dr. Anthony Fauci.[2] The companies did not even investigate whether the vaccines prevent people from becoming asymptomatically infected with the SARS-CoV-2 virus or whether the vaccines will prevent transmission it to other people.[3] (See also, footnote 2).

18. It is uncertain that the vaccines can prevent clinically symptomatic COVID disease, as more reports are coming out of people getting the disease after receiving the full shot protocol.[4] During a press conference, WHO chief scientist and pediatrician Soumya Swaminathan, MD said:

> We continue to wait for more results from the vaccine trials to really understand whether the vaccines, apart from preventing symptomatic disease and severe disease and deaths, whether they're also going to reduce infection or prevent people from getting infected with the virus, then from passing it on or transmitting it to other people. I don't believe we have the evidence on any of the vaccines to be confident that it's going to prevent people from actually getting the infection and therefore being able to pass it on.

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[2] Fisher BL. WHO, Fauci Warn COVID-19 Vaccines May Not Prevent Infection and Disease Transmission. *The Vaccine Reaction* Jan. 3, 2021. Kim S. Dr. Fauci on Mandatory COVID Vaccines: 'Everything Will Be on the Table'. *Newsweek* Jan. 1, 2021. Colson T. Top WHO scientist says vaccinated travelers should still quarantine, citing lack of evidence that COVID-19 vaccines prevent transmission. *Business Insider* Dec. 29, 2020.

[3] https://clinicaltrials.gov/ct2/show/study/NCT04368728]

[4] *2*46 Fully Vaccinated People in Michigan Test Positive for COVID-19; 3 Dead; The Epoch Times, https://www.theepochtimes.com/246-fully-vaccinated-people-in-michigan-test-positive-for-covid-19-3-dead_3765643.html

Dr. Swaminathan said the COVID-19 vaccine was designed to first prevent symptomatic disease, severe disease and deaths. Mark Ryan, MD, MPH, who is executive director of the WHO Health Emergencies Program, agreed with Swaminathan and added:

> So, the first primary objective is to decrease the impact the disease is having on people's lives and, therefore, that will be a major step forward in bringing the world back to some kind of normal. The second phase is then looking at how will this vaccine affect transmission. We just don't know enough yet about length of protection and other things to be absolutely able to predict that, but we should be able to get good control of the virus.

19. In an interview with the New York Times, Anthony Fauci said: "We do not know if the vaccines that prevent clinical disease also prevent infection. They very well might, but we have not proven that yet. That's the reason I keep saying that even though you get vaccinated, we should not eliminate, at all, public health measures like wearing masks because we don't know yet what the effect [of the vaccine] is on transmissibility." (Footnote 2, supra)

20. The fact that the vaccines have only been shown to reduce symptoms of the recipient and not prevent infection or transmission is a fact extremely important to Plaintiffs' claims. This is because the argument for mandated vaccines is that they are necessary to protect society at large. There is not even an argument that can be made that a competent person can be compelled to have a medical intervention "for the greater good" when the intervention has been shown to at most merely benefit a recipient. However, even if society could be benefited in some way from mandated vaccination, the constitutional rights articulated in cases such as *Planned Parenthood* and *Cruzan,* infra, as well as 21 U.S. Code § 360bbb–3, supra would prohibit it.

21. However, it is not just effectiveness in combatting covid that is at issue with these vaccines still being in their test phase. There are real risks to health and even life in the use of these medical products that have not been fully tested. The experimental shots are designed to address a

disease that has an overall survival rate of 99.9% for all ages, and for the over-70 age, it is 99.7%. The Court should take judicial notice of the fact that the use of the AstraZeneca Vaccine for covid has been suspended by much of Europe: Germany, France, Italy, Spain and Ireland at the time this pleading was drafted. The reason is there were many reports of adverse reactions including deaths from blood clots in the brain after receiving the vaccine.[5] More recently, on April 13, the FDA advised states to "pause" the use of J&J vaccines due to blood clotting disorders seen after injection. [6]

22. In the U.S. as March 26, 2021, the CDC has reported through the Vaccine Adverse Event Reporting System (VAERS), a U.S. Government funded database that tracks injuries and deaths caused by vaccines, 50,861 recorded adverse events, including 2,249 deaths following injections of the experimental COVID mRNA shots by Pfizer and Moderna. As of one month earlier, by February 26, there had been 4,930 visits to Emergency Room doctors, 479 permanent disabilities, and 2,743 hospitalizations.[7]

Moreover, it is recognized even by VAERS itself that adverse events including deaths as a

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[5] *The Epoch Times,* March 16, 2021, https://www.theepochtimes.com/astrazeneca-vaccine suspended-by-germany-france-italy-spain-over-precautions_3734234.html

[6] https://www.cnbc.com/2021/04/13/us-regulators-reportedly-call-for-pause-in-use-of-johnson-johnson-vaccine-due-to-clotting-issues.html

[7] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/adverse-events.html

result of vaccines is *greatly underreported*.[8] A report from researchers at Harvard Medical School, including the Director of Bioinformatics, funded by an agency within the U.S. Department of Health and Human Services, stated that "fewer than 1% of vaccine (not just the covid vaccine) adverse events are reported" to VAERS. (*Id.*) In addition, the VAERS Vaccine Court has, in spite of a very demanding procedure for recovery, paid out over $4 billion in damages to vaccine-injured persons since its inception. Further, there is evidence that in the first three months' of administration of the experimental vaccines, the death rate associated with vaccines was more than double that from all vaccines administered in the previous decade.

23. Numbers and statistics may fail to fully convey the tragedy of healthy (often young) people taking the covid vaccine to protect themselves and dying shortly thereafter. The following citation is to a collection of news stories with pictures of those unfortunate persons; the pictures that speak volumes. https://archive.org/details/frontline-workers-testimonies-vaers-reports-26-mar-2021/page/n21/mode/2up.

24. One would expect that healthcare and hospital workers, who deal with disease ,infection and death on a regular basis who have more medical knowledge than most people and who may be more at risk for COVID-19 due to their profession would want to be vaccinated unless there was risk involved. In fact, a very high percentage of such workers are refusing to be

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[8] From the VAERS website at https://vaers.hhs.gov/data/dataguide.html: "VAERS is a passive reporting system, meaning that reports about adverse events are not automatically collected, but require a report to be filed to VAERS. VAERS reports can be submitted voluntarily by anyone, including healthcare providers, patients, or family members. Reports vary in quality and completeness. They often lack details and sometimes can have information that contains errors.

"Underreporting" is one of the main limitations of passive surveillance systems, including VAERS. The term, underreporting refers to the fact that VAERS receives reports for only a small fraction of actual adverse events."

vaccinated because they believe there is a risk to their health from the vaccine.[9]

FEDERAL PREEMPTION

25. The above paragraphs are realleged as if incorporated herein.

26. The Supremacy Clause of the United States Constitution, Art. VI, which is the basis of the federal preemption doctrine, states:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

27. A federal requirement preempts a state requirement if the state requirement actually conflicts with the federal requirement because compliance with both is impossible. *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-143 (1963). Preemption will also be applicable if the state requirement "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). Finally, federal exemption applies if a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947).

28. A more attenuated analysis of the doctrine of federal preemption including express and implied preemption is succinctly articulated in *Frei v. Taro Pharm. United States, Inc*., 443 F.Supp.3d 456 (S.D. N.Y. 2020):

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[9] https://www.latimes.com/california/2020-12-31/healthcare-workers-refuse-covid-19-vaccine-access: https://www.health.harvard.edu/blog/why-wont-some-health-care-workers-get-vaccinated-2021021721967

> Express preemption is present when Congress's intent to preempt state law is explicitly stated in the statute's language. In re *PepsiCo., Inc., Bottled Water Mktg. & Sales Practices Litig.*, 588 F. Supp. 2d 527, 530 (S.D.N.Y. 2008). Implied preemption arises when, in the absence of explicit statutory language, ... Congress intended the Federal Government to occupy a field exclusively, or when state law actually conflicts with federal law. *Air Trans. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 220 (2d Cir. 2008) (citing *English v. Gen. Elec. Co*., 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990)).
>
> The latter type of implied preemption, called "conflict preemption," "comes in two forms—impossibility preemption and obstacle preemption.: *McDaniel v. Upsher-Smith Labs., Inc*., 893F.3d 941, 944 (6th Cir. 2018). The first, impossibility preemption, arises as its title suggests: when compliance with both federal and state law is impossible. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992). 'The proper question for impossibility analysis is whether the private party could independently do under federal law what state law requires of it.' PLIVA, *Inc. v. Mensing*, 564 U.S. at 620, 131 S.Ct. 2567. The second form, obstacle preemption, exists 'when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' Wis. Pub. *Intervenor v. Mortier*, 501 U.S. 597, 605, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991).*Frei v. Taro* at 465-466.

29. The federal law at issue in this case preempts the Defendants' directive which completely disregards it, because compliance with both is impossible. In addition, Defendants' 13 failure to comply with the federal law clearly is an obstacle to the purpose of the federal law to insure people are not mandated or coerced to take an unapproved drug or vaccine. Moreover, Plaintiff contends that the FDA, an agent of the Department of Health and Human Services, intends to exclusively occupy the field of approval of drugs and the manner in which unapproved products may be administered. This would seem to be self-evident. States simply do not venture into the area of drug approval. This is the FDA's field. The Defendants' mandate of an Emergency Use Authorization product violates federal law by not giving employees the right to refuse the vaccination, in clear violation of the doctrine of federal preemption. See generally, *Lorillard*

Tobacco Co. v. Reilly, 533 U.S. 525, 570-71 (2001) (overturning a state public health law because it was already the subject of a comprehensive federal scheme to manage public health).

30. This Court may take judicial note of the fact that the FDA has stated: "FDA believes that the terms and conditions of an EUA issued under section 564 preempt state or local law, both legislative requirements and common-law duties, that impose different or additional requirements on the medical product for which the EUA was issued in the context of the emergency declared under section 564. https://www.fda.gov/

RELIEF REQUESTED

COUNT ONE – DECLARATORY RELIEF

31. Plaintiffs reallege and incorporate the above allegations as if set forth herein.

32. Plaintiffs need not ask whether this relief would apply to a private employer, but the federal law under the EUA clearly preempts public mandates.

33. Plaintiffs request the Court issue declaratory relief that:

(a.) 21 U.S. Code § 360bbb–3, Section (e)(1)(A) does not permit Defendants to coerce an employee to accept an unapproved vaccine on penalty of termination or other sanctions.

(b.) The doctrine of federal preemption invalidates and voids the "Mandatory COVID-19 Vaccination Directive" of Defendant Macias.

COUNT TWO – VIOLATION OF THE WHISTLEBLOWER PROTECTION ACT
(against all Defendants)

34. Plaintiffs reallege and incorporate the above allegations as if set forth herein.

35. Section10-16C-3. of the Whistleblowers Protection Act Public employer retaliatory action prohibited, states as follows:

A public employer shall not take any retaliatory action against a public employee because the public employee:

> A. communicates to the public employer or a third party information about an action or a failure to act that the public employee believes in good faith constitutes an unlawful or improper act;
>
> B. provides information to, or testifies before, a public body as part of an investigation, hearing or inquiry into an unlawful or improper act; or
>
> C. objects to or refuses to participate in an activity, policy or practice that constitutes an unlawful or improper act."

36. Plaintiff LEGARRETA contacted one of the undersigned counsel and advised them that he was being required to accept a covid vaccine without his consent and this suit was filed. Thereafter, the Defendants took the actions alleged in paragraphs five, six and seven hereinabove. These actions constituted a constructive discharge and a retaliatory action in violation of Sections A and C and possibly B of 10-16C-3 of the Whistleblowers Protection Act.

COUNT THREE - INJUNCTIVE RELIEF/MANDAMUS (against all Defendants)

37. Plaintiffs reallege and incorporate the above allegations as if set forth herein.

38. Plaintiff ZOCCOLI was fired by Defendants as a direct result of his failure to adhere to an illegal mandate requiring all first responders to take the COVID19 injection. The New Mexico Supreme Court has defined a retaliatory discharge as follows:

> "For an employee to recover under this new cause of action, he must demonstrate that he was discharged because he performed an act that public policy has authorized or would encourage, or because he refused to do something required of him by his employer that public policy would condemn."

Shovelin v. Central New Mexico Elec. Co-op., Inc., 850 P.2d 996, 115 N.M. 293, 1993 NMSC 15 (N.M. 1993)

39. Pursuant to the Supreme Court's definition in *Shovelin*, the firing of Zoccoli was a retaliatory discharge. Upon information and belief, ZOCCOLI cannot sue for damages for the tort of retaliatory discharge because New Mexico's sovereign immunity would not allow it and such immunity for a retaliatory discharge has not been waived in the New Mexico Tort Claims Act. New Mexico's sovereign immunity protects Defendants in their official capacity from suits for monetary damages but not suits for injunctions. Lacking the ability to sue for damages for retaliatory discharge, Plaintiff will be irreparably harmed absent injunctive relief.

40. This Court is requested to enter an injunction or issue a writ of mandamus requiring that ZOCCOLI be reinstated to his position of employment with the time he has previously worked for the County be applied towards his probationary period.

COUNT FOUR – CONSTITUTIONAL VIOLATION – GENERAL (against all Defendants)

41. Plaintiffs reallege and incorporate the above allegations as if set forth herein.

42. Plaintiffs request the Court make a finding that the Defendants violated Plaintiffs' constitutional rights. There are five purposes such a finding will serve. 1.) The 42 USC Section 1983 claim for obvious reasons, 2.) Likewise, the *unconstitutional conditions* claim, 3.) Such a finding will also be important in determining whether the firing of Plaintiff ZOCCOLI was contrary to public policy and whether ZOCCOLI's actions in refusing the vaccine is supported by public policy for purposes of his retaliatory discharge claim, 4.) A finding that the Plaintiffs' constitutional rights were violated will buttress and support ZOCCOLI's request for injunctive and mandamus relief. (Federal courts have a long history of issuing injunctions where constitutional rights are involved. *See John F. Preis, In Defense of Implied Injunction Relief in Constitutional Cases, 22 Wm. & Mary Bill Rts. J. 1 (2013)*, *https://scholarship.law.wm.edu/wmborj/vol22/iss1/2.)*

5.) Plaintiff LEGARETTA's whistleblower claim requires a finding that he "objects to or refuses to participate in an activity, policy or practice that constitutes an unlawful or improper act". If mandating the vaccine violated LEGARETTA's constitutional rights, his refusal to participate in this "unlawful or improper act" would constitute fulfillment of that prong the Whistleblower Act.

43. Plaintiffs contend that the Defendants' firing or constructively discharging them for not consenting to take a non-mandatory unapproved vaccine is a violation of their due process right to life and liberty under the 14th Amendment and an invasion of the zone of privacy and right to bodily integrity which have been held to emanate from various Bill of Rights amendments, including the first, fourth and fifth as well as the ninth amendment which speaks of essential but unenumerated rights. The constitutionally protected zone of privacy and right to bodily integrity have been articulated is many Supreme Court cases, including *Mapp v. Ohio*, 367 17 U.S. 643 (1961), *Griswold v. State of Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); and *Roe v. Wade,* 410 US 113 (1973).

In *Griswold, supra,* the Court struck down a law which impacted a woman's right to use contraceptives. The Court Justice Douglas writing for the majority said:

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See Poe v. Ullman, 367 U.S. 497, 516—522, 81 S. Ct. 1752, 6 L.Ed.2d 989 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

> The Fourth and Fifth Amendments were described in Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746, as protection against all governmental invasions of the sanctity of a man's home and the privacies of life.'* We recently referred in Mapp v. Ohio, 367 U.S. 643, 656, 81 S.Ct. 1684 1692, 6 L.Ed.2d 1081, to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.' See Beaney, The Constitutional Right to Privacy, 1962 Sup.Ct.Rev. 212; Griswold, The Right to be Let Alone, 55 Nw.U.L.Rev. 216 (1960).
>
> *Griswold* at pp 484-485

44. More recently in *Planned Parenthood v. Casey,* 505 U.S. 833(1992), referencing the Roe v. Wade decision the Court stated:

> *Roe*, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, ***with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since Roe accord with Roe's view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims***.
> *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278, 111 L. Ed. 2d 224, 110 S. Ct. 2841 (1990); cf., *e. g., Riggins v. Nevada*, 504 U.S. 127, 135, 118 L. Ed. 2d 479, 112 S. Ct. 1810 (1992); *Washington v. Harper*, 494 U.S. 210, 108 L. Ed. 2D 178, 110 S. Ct. 1028 (1990); see also, *e. g., Rochin v.California*, 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205 (1952); *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30, 49 L. Ed. 643, 25 S. Ct. 358 (1905). (emphasis added)

45. "The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278, 111 L. Ed. 2d 224, 110 S. Ct. 2841 (1990).

> "At common law, even the touching of one person by another without consent and without legal justification was a battery. See W. Keeton, D. Dobbs, R.Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 9, pp. 39-42 (5th ed.1984). Before the turn of the century, this Court observed that "***[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."*** Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000 1001,35 L.Ed. 734 (1891)……..

> ……This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. Justice Cardozo, while on the Court of Appeals of New York, aptly described this doctrine: "***Every human being of adult years and sound mind has a right to determine what shall be done with his own body ……. The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment***." (emphasis added) C*ruzan,* supra at pps. 269-270.

46. It is worth noting that in *Planned Parenthood, supra*, the Court includes *Jacobson v. Massachusetts* as a case "*recognizing limits on governmental power to mandate medical treatment or to bar its rejection."* because *Jacobsen* has often been cited for the opposite proposition since its holding was that a state law requiring vaccination was valid. However, the Jacobsen court said: "Before closing this opinion, we deem it appropriate, in order to prevent misapprehension as to our views, to observe --perhaps to repeat a thought already sufficiently expressed, namely --that the police power of a State, whether exercised by the legislature or by a local body acting under its authority, may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression." (*Id*, 197 US 38).

Moreover, *Jacobsen* was decided 116 years ago when many of our most sacred and fundamental rights were still being sorted out. Suffrage had not yet occurred, civil rights barely existed, critical cases on fundamental rights such as interstate travel and bodily privacy had not been adjudicated and the administrative state that we live in today simply did not exist. Since *Jacobsen* the court has decided many critical cases which expanded the conceptual and practical reach of the Bill of Rights as outlined in the preceding paragraphs.

47. Plaintiffs contend as emphatically as words will allow that a person has every right to decide whether something is going to be injected into his body which will have an effect on his

body and even more so where it will actually change the way his body functions. This is all the more so when this injection has caused death and disability to some of those who have taken it. This is even more so when the positive effects of the injection are not clear and it may only be effective to reduce symptoms in the event of being infected with the Covid-19 virus. And it is all the more so when the chances of young healthy people like the Plaintiffs dying from the disease itself are miniscule. A ruling by this Court that Plaintiffs have no right to decide whether to allow an unapproved chemical concoction that changes the way the cells of their body function be injected into their bodies without the threat of loss of employment, such a ruling would fly in the face of the rights enshrined in the United States Constitution as well as God-given human rights.

48. It may be tempting for a Court to avoid the issues raised hereinabove or decide them by deferring to the familiar covid *narrative* that it is a very deadly disease and therefore that all measures governments impose to prevent its spread should be given a liberal reading in terms of their legality.[10] However, it is just this sort of acceptance of the popular zeitgeist that a federal court must be on guard against when important constitutional rights are at stake. Justice Gorsuch made this point very forcefully in his concurrence in a recent decision striking down New York

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[10] This narrative though widespread is not universally accepted. In fact, very serious questions are coming to the fore about the efficacy of the PCR covid test on which the case and death counts are based. Prominent scientists and doctors have stated that the test, as it is being used, results in a very large percent of false positives, making it a completely inaccurate test for COVID-19. *See Mandavilli, Apoorva. "Your Coronavirus Test Is Positive. Maybe It Shouldn't Be." New York Times, (August 29, 2020), https://www.nytimes.com/2020/08/29/health/coronavirus-testing.html,213 Supra at fn 211*

See also, Jaafar R, Aherfi S, Wurtz N et al. "Correlation Between 3790 Quantitative Polymerase Chain Reaction-Positive Samples and Positive Cell Cultures, Including 1941 Severe Acute Respiratory Syndrome Coronavirus 2 Isolates." Clin Infect Dis 2020 Sep; https://doi.org/10.1093/cid/ciaa1491. (a very substantial rigorous study which found over 90% false positives)

state's covid restrictions on churches, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 208 L. Ed. 2d 206, 207 (U.S. 2020).

> At that time, COVID had been with us, in earnest, for just three months. Now, as we round out 2020 and face the prospect of entering a second calendar year living in the pandemic's shadow, that rationale has expired according to its own terms. ***Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical***……Why have some mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic? In the end, ***I can only surmise that much of the answer lies in a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other circumstances, we may not shelter in place when the Constitution is under attack.*** Things never go well when we do. (emphasis added) *Id.*

Other noteworthy Supreme Court justices have made similar statements.

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (overruled in part on other grounds by Katz v. United States, 389 U.S. 347 (1967)).
> and
> History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure.... [W]hen we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it." *Skinner v. Railway Labor Executives' Ass'n,*489 U.S. 602, 635 (1989) (Marshall, J., dissenting)

COUNT FIVE – 42 USC § 1983 (against the individually named Defendants)

49. Plaintiffs reallege and incorporate the above allegations as if set forth herein.

50. In doing the acts complained of hereinabove, Defendants have caused the Plaintiffs to be subjected to deprivation of rights, privileges, or immunities secured by the Constitution and laws of the United States and Plaintiffs have been damaged thereby.

51. Plaintiffs are entitled to damages as determined by the Court.

COUNT SIX – UNCONSTITUTIONAL CONDITIONS (against all Defendants)

52. Plaintiffs reallege and incorporate the above allegations as if set forth herein.

53. Where government actors condition the granting of benefits on the renunciation of constitutional rights by the recipient, Courts have held this to be a particular constitutional violation described as *unconstitutional conditions.* One such benefit which governments may not condition on renunciation of constitutional rights is employment. *O'hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996)

54. By the Defendants conditioning continued employment on Plaintiffs' accepting medical treatment to which they did not consent and on Plaintiffs' allowing their bodily integrity and physical bodies to be invaded with an unwanted and unapproved drug/vaccine, Defendants have violated the doctrine of unconstitutional conditions. This entitled Plaintiff ZOCCOLI to mandamus and/or injunctive relief and both Plaintiffs to damages pursuant to their Section 1983 claim.

COUNT SEVEN: VIOLATION OF HUMAN RIGHTS, CUSTOMARY INTERNATIONAL LAW, FEDERAL COMMON LAW and INFORMED CONSENT LAWS (Against County and Defendant Macias)

55. Plaintiffs reallege and incorporate the above allegations as if set forth herein.

56. The prohibition against nonconsensual human experimentation is derived from numerous and varied international and domestic arenas including, but not limited to, the following laws, agreements, resolutions, treaties, conventions, customs, decisions, teachings and pronouncements:

A. *U.S. v. Trinidad,* 839 F.3d 112, fn. 16 (1st Cir. 2016): "Customary international law is part of the federal common law.

B. Restatement (Third) of Foreign Relations Law § 111 (Am. Law Inst. 1987); see also *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (accepting "the settled proposition that federal common law incorporates international law")."

C. Restatement (Third) of Foreign Relations Law of the United States (1987), sec.111(1): "International law and international agreements of the United States are law of the United States and supreme over the law of the several States."

D. Nuremberg Code of 1947

E. The Belmont Report (on which 45 CFR Part 46 was based in part);

F. Universal Declaration on Bioethics and Human Rights adopted by the United States, wherein it is stated:

> "Article 5 – Autonomy and individual responsibility, The autonomy of persons to make decisions, while taking responsibility for those decisions and respecting the autonomy of others, is to be respected….Article 6 – Consent
>
> 1. Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. The consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice."

57. As an example of these human rights, the Nuremberg Code states:

> The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved, as to enable him to make an understanding and enlightened decision.[11]

58. It is a basic fundamental human right not to be subjected to non-consensual

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[11] https://history.nih.gov/display/history/Nuremberg+Code

experimentation. By coercing employees of the County to take an experimental injection, the County manager and supervisors have violated basic principles of free will, choice, bodily integrity, and human dignity. Such actions on the part of Defendants constitute crimes against humanity.

WHEREFORE, Plaintiffs respectfully requests that the Court:

1. Make a finding that Plaintiffs constitutional rights were violated and that they created unconstitutional conditions for employment and award relief or damages accordingly.

2. Enter declaratory relief as requested in Count One.

3. Find that the Defendants have violated the New Mexico Whistleblowers' Act as to Plaintiff LEGARRETA and award damages and relief as outlined in that Act.

4. Issue injunctive relief and/or a writ of mandamus requiring Defendants to reinstate Plaintiff ZOCCOLI.

5. Enjoin Defendants from mandating experimental vaccines.

6. Award damages and attorneys fees pursuant to 42 USC §1983 and 1988.

7. Declaring that coercion and/or mandating an experimental injection constitutes violation of customary international standards, federal common law, and are crimes against humanity.

8. For such other and further relief as the Court deems just and proper in the circumstances.

Respectfully submitted,

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DOÑA ANA COUNTY
COUNTY MANAGER'S OFFICE

MEMORANDUM

To: **All Doña Ana County First Responders**

From: **Fernando R. Macias**

Date: **January 29, 2021**

Subject: **Mandatory COVID-19 Vaccination Directive**

On March 11, 2020, the novel coronavirus (COVID-19) was declared a pandemic by the World Health Organization. Due to the severity of illness and risk of death or serious harm that may result from becoming infected with COVID-19, this pandemic rises to the level of a direct threat as defined by the Occupational Safety and Health Administration (OSHA). As required by OSHA and in accordance with the County's duty to provide and maintain a workplace that is free of known hazards, we are adopting a mandatory COVID-19 vaccination directive to safeguard the health of our employees, their families, the customers we serve, and the community at large from this highly contagious, infectious disease. This directive takes into account all applicable laws and guidance from local health authorities.

All first responders will be required to receive the COVID-19 vaccination unless a reasonable accommodation is approved. Vaccines will be available for first responders on February 2, 3 and 4, 2021. First responders include certified law enforcement officers, detention officers and other staff who have face-to-face contact with inmates, firefighters, emergency medical technicians and paramedics. Volunteer firefighters and EMT's are strongly encouraged to be vaccinated next week as well.

There are certain conditions where receiving the COVID-19 vaccination is not advisable such as a history of adverse reactions to vaccines or other qualifying conditions. General information about the COVID vaccine can be found at https://cv.nmhealth.org/covid-vaccine/. If you believe that you have a qualifying condition that requires an accommodation, contact the Human Resources department to obtain the accommodation request form and guidance regarding the process. An accommodation may be granted if it does not cause an undue hardship or pose a direct threat to the health and safety of others. If you have an EEO or ADA related concern regarding the vaccination requirement, you will need to speak directly to a Human Resources Administrator to see if an accommodation can be made. Questions and concerns related to an accommodation should not be taken to your supervisor or department head as this type of information is generally private and protected.

According to the New Mexico Department of Health, the COVID-19 vaccine rollout is in phase 1b which includes first responders. To register for the vaccine, go to www.vaccinenm.org and follow the steps below:

1. Login to the New Mexico Department of Health vaccination website – www.vaccinenm.org
2. Submit basic contact information and select the employment category **First Responder** or **Corrections** and list any medical conditions.
3. Once you have completed registration with the State, contact the Designated Infection Control Officer (DICO) for your department to notify them. The DICO will then provide you with additional information about how to register for a specific appointment.

Please note that first responder vaccination events taking place on February 2, 3 and 4, 2021 may be the final opportunity for you to receive priority status for the vaccination. It is required that, if you have not already started your vaccinations, that you be vaccinated with your first dose on one of these days, or contact Human Resources for accommodation. Being vaccinated is a requirement and a condition of on-going employment with the County due to the significant health and safety risks posed by contracting or spreading COVID-19.

Once you receive your vaccination, you must provide the proof of vaccination to the Human Resources Department and your department's DICO for tracking purposes.

Thank you for your commitment to our community. And, thank you for your ongoing service in this critical role to protect our residents!

IL

Coaching/Counseling Acknowledgement

I acknowledge that I have had the policy, procedure, or execution of a specific work process demonstrated or explained to me regarding the following:

Officer Legarreta, on January 29, 2021, a Mandatory COVID-19 Vaccination Directive was given by Dona Ana County Manager Fernando Macias via email. The directive specifically states that all first responders will be required to receive the COVID-19 vaccination unless a reasonable accommodation is approved by Human Resources. Additionally, on January 29,2021, Detention Center Director Bryan Baker sent a follow-up email to all detention center staff with a requirement that all individuals with access to the secure area of the facility are mandated to have received their first dose of their vaccination by February 5th, 2021 unless there is a documented ADA or EEO exception granted by Human Resources.

Officer Legarreta, as of today's date you have not provided proof of receiving the COVID-19 Vaccination or having registered for the vaccination. You are being required to follow the attached directives from Fernando Macias and Bryan Baker, which requires you to receive the COVID-19 Vaccination. You have 5 business days from today's date to comply with the directives and provide your registration number. Please keep in mind that you may request a reasonable accommodation by Human Resources. Please provide proof or notification to the Detention Center's Designated Infection Control Officer (DICO) Lieutenant Matthew Cordova within 5 business days of today's date.

with the purpose of bringing my work performance in line with Doña Ana County Detention Center standards and expectations.

I understand and acknowledge that coaching/mentoring is not considered a form of discipline and is solely used as a tool for performance management and is intended to proactively enhance the employee's performance through feedback and re-direction as per Doña Ana County Human Resources Policy 9-1 "Coaching and Counseling".

Isaac Legarreta 2793 — Print Name and ID #

2/17/21 — Date

Signature

J. LUJAN
Coach / Counselor / Supervisor Print Name and ID #

2/17/2021
Date

Coach / Counselor / Supervisor Signature

STANDARDS PRESENTATION
TO
CALIFORNIA OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD

TITLE 8, DIVISION 1, CHAPTER 4

Subchapter 7. General Industry Safety Orders

Adopt Section 3205 to read:

§ 3205. ~~"Shall" and "Should." [Repealed]~~COVID-19 Prevention.

(a) Scope.

(1) This section applies to all employees and places of employment, with the following exceptions:

(A) Work locations with one employee who does not have contact with other persons.

(B) Employees working from home.

(C) Employees with occupational exposure as defined by section 5199, when covered by that section.

(D) Employees teleworking from a location of the employee's choice, which is not under the control of the employer.

(2) Nothing in this section is intended to limit more protective or stringent state or local health department mandates or guidance.

(b) Definitions. The following definitions apply to this section and to sections 3205.1 through 3205.4.

(1) "Close contact" means being within six feet of a COVID-19 case for a cumulative total of 15 minutes or greater in any 24-hour period within or overlapping with the "high-risk exposure period" defined by this section. This definition applies regardless of the use of face coverings.

EXCEPTION: Employees have not had a close contact if they wore a respirator required by employer and used in compliance with section 5144, whenever they were within six feet of the COVID-19 case during the high-risk exposure period.

(2) "COVID-19" means coronavirus disease, an infectious disease caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

(3) "COVID-19 case" means a person who:

(A) Has a positive "COVID-19 test" as defined in this section; or

(B) Has a positive COVID-19 diagnosis from a licensed health care provider; or

TITLE 8, DIVISION 1, CHAPTER 4

(C) Is subject to a COVID-19-related order to isolate issued by a local or state health official; or

(D) Has died due to COVID-19, in the determination of a local health department or per inclusion in the COVID-19 statistics of a county.

(4) "COVID-19 hazard" means potentially infectious material that may contain SARS-CoV-2, the virus that causes COVID-19. Potentially infectious materials include airborne droplets, small particle aerosols, and airborne droplet nuclei, which most commonly result from a person or persons exhaling, talking or vocalizing, coughing, or sneezing, or from procedures performed on persons which may aerosolize saliva or respiratory tract fluids. This also includes objects or surfaces that may be contaminated with SARS-CoV-2.

(5) "COVID-19 symptoms" means fever of 100.4 degrees Fahrenheit or higher, chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, or diarrhea, unless a licensed health care professional determines the person's symptoms were caused by a known condition other than COVID-19.

(6) "COVID-19 test" means a viral test for SARS-CoV-2 that is:

(A) Approved by the United States Food and Drug Administration (FDA) or has an Emergency Use Authorization from the FDA to diagnose current infection with the SARS-CoV-2 virus; and

(B) Administered in accordance with the FDA approval or the FDA Emergency Use Authorization as applicable.

(7) "Exposed group" means all employees at a work location, working area, or a common area at work, where an employee COVID-19 case was present at any time during the high-risk exposure period. A common area at work includes bathrooms, walkways, hallways, aisles, break or eating areas, and waiting areas. The following exceptions apply:

(A) For the purpose of determining the exposed group, a place where persons momentarily pass through while everyone is wearing face coverings, without congregating, is not a work location, working area, or a common area at work.

(B) If the COVID-19 case was part of a distinct group of employees who are not present at the workplace at the same time as other employees, for instance a work crew or shift that does not overlap with another work crew or shift, only employees within that distinct group are part of the exposed group.

(C) If the COVID-19 case visited a work location, working area, or a common area at work for less than 15 minutes during the high-risk exposure period, and all persons were

wearing face coverings at the time the COVID-19 case was present, other people at the work location, working area, or common area are not part of the exposed group.

NOTE: An exposed group may include the employees of more than one employer. See Labor Code sections 6303 and 6304.1.

(8) "Face covering" means a surgical mask, a medical procedure mask, a respirator worn voluntarily, or a tightly woven fabric or non-woven material of at least two layers. A face covering has no visible holes or openings and must cover the nose and mouth. A face covering does not include a scarf, ski mask, balaclava, bandana, turtleneck, collar, or single layer of fabric.

(9) "Fully vaccinated" means the employer has documentation showing that the person received, at least 14 days prior, either the second dose in a two-dose COVID-19 vaccine series or a single-dose COVID-19 vaccine. Vaccines must be FDA approved or have an emergency use authorization from the FDA.

(10) "High-risk exposure period" means the following time period:

(A) For COVID-19 cases who develop COVID-19 symptoms, from two days before they first develop symptoms until all of the following are true: it has been 10 days since symptoms first appeared; 24 hours have passed with no fever, without the use of fever-reducing medications; and symptoms have improved.

(B) For COVID-19 cases who never develop COVID-19 symptoms, from two days before until 10 days after the specimen for their first positive test for COVID-19 was collected.

(11) "Outdoor mega event" means an event that includes over 10,000 participants or spectators outdoors and may include conventions, shows, outdoor nightclubs, concerts, sporting events, theme parks, fairs, festivals, large races, and parades.

(12) "Respirator" means a respiratory protection device approved by the National Institute for Occupational Safety and Health (NIOSH) to protect the wearer from particulate matter, such as an N95 filtering facepiece respirator.

(13) "Worksite," for the limited purposes of COVID-19 prevention regulations only, means the building, store, facility, agricultural field, or other location where a COVID-19 case was present during the high-risk exposure period. It does not apply to buildings, floors, or other locations of the employer that a COVID-19 case did not enter.

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NOTE: The term worksite is used for the purpose of notice requirements in subsections (c)(3)(B)3. and 4. only.

(c) Written COVID-19 Prevention Program. Employers shall establish, implement, and maintain an effective, written COVID-19 Prevention Program, which may be integrated into the employer's Injury and Illness Prevention Program required by section 3203, or be maintained in a separate document. The written elements of a COVID-19 Prevention Program shall include:

(1) System for communicating. The employer shall do all of the following in a form readily understandable by employees:

(A) Ask employees to report to the employer, without fear of reprisal, COVID-19 symptoms, possible close contacts, and possible COVID-19 hazards at the workplace.

(B) Describe how employees with medical or other conditions that put them at increased risk of severe COVID-19 illness can request accommodations.

(C) Provide information about access to COVID-19 testing as described in subsection (c)(5)(I) when testing is required under this section, section 3205.1, or section 3205.2.

(D) In accordance with subsection (c)(3)(B), communicate information about COVID-19 hazards and the employer's COVID-19 policies and procedures to employees and to other employers, persons, and entities within or in contact with the employer's workplace.

NOTE: See subsection (c)(3)(C) for confidentiality requirements for COVID-19 cases.

(2) Identification and evaluation of COVID-19 hazards.

(A) The employer shall allow for employee and authorized employee representative participation in the identification and evaluation of COVID-19 hazards.

(B) The employer shall develop and implement a process for screening employees for and responding to employees with COVID-19 symptoms. The employer may ask employees to evaluate their own symptoms before reporting to work. If the employer conducts screening at the workplace, the employer shall ensure that face coverings are used during screening by both screeners and employees and, if temperatures are measured, that non-contact thermometers are used.

(C) The employer shall develop COVID-19 policies and procedures to respond effectively and immediately to individuals at the workplace who are a COVID-19 case to prevent or reduce the risk of transmission of COVID-19 in the workplace.

TITLE 8, DIVISION 1, CHAPTER 4

(D) The employer shall conduct a workplace-specific identification of all interactions, areas, activities, processes, equipment, and materials that could potentially expose employees to COVID-19 hazards. Employers shall treat all persons, regardless of symptoms or negative COVID-19 test results, as potentially infectious.

1. This shall include identification of places and times when people may congregate or come in contact with one another, regardless of whether employees are performing an assigned work task or not, for instance during meetings or trainings and including in and around entrances, bathrooms, hallways, aisles, walkways, elevators, break or eating areas, cool-down areas, and waiting areas.

2. This shall include an evaluation of employees' potential workplace exposure to all persons at the workplace or who may enter the workplace, including coworkers, employees of other entities, members of the public, customers or clients, and independent contractors. Employers shall consider how employees and other persons enter, leave, and travel through the workplace, in addition to addressing stationary work.

(E) For indoor locations, the employer shall evaluate how to maximize ventilation with outdoor air; the highest level of filtration efficiency compatible with the existing ventilation system; and whether the use of portable or mounted High Efficiency Particulate Air (HEPA) filtration units, or other air cleaning systems, would reduce the risk of COVID-19 transmission.

(F) The employer shall review applicable orders and guidance from the State of California and the local health department related to COVID-19 hazards and prevention. These orders and guidance are both information of general application, including CDPH's Interim guidance for Ventilation, Filtration, and Air Quality in Indoor Environments, and information specific to the employer's industry, location, and operations.

(G) The employer shall evaluate existing COVID-19 prevention controls at the workplace and the need for different or additional controls. This includes evaluation of controls in subsections (c)(4), and (c)(6) through (c)(8).

(H) The employer shall conduct periodic inspections as needed to identify unhealthy conditions, work practices, and work procedures related to COVID-19 and to ensure compliance with employers' COVID-19 policies and procedures.

(3) Investigating and responding to COVID-19 cases in the workplace.

(A) Employers shall have an effective procedure to investigate COVID-19 cases in the workplace. This includes procedures for seeking information from employees

regarding COVID-19 cases and close contacts, COVID-19 test results, and onset of COVID-19 symptoms, and identifying and recording COVID-19 cases.

(B) The employer shall take the following actions when there has been a COVID-19 case at the place of employment:

1. Determine the day and time the COVID-19 case was last present and, to the extent possible, the date of the positive COVID-19 test(s) and/or diagnosis, and the date the COVID-19 case first had one or more COVID-19 symptoms, if any were experienced.

2. Determine who may have had a close contact. This requires an evaluation of the activities of the COVID-19 case and all locations at the workplace which may have been visited by the COVID-19 case during the high-risk exposure period.

   NOTE: See subsection (c)(10) for exclusion requirements for employees after a close contact.

3. Within one business day of the time the employer knew or should have known of a COVID-19 case, the employer shall give written notice, in a form readily understandable by employees, that people at the worksite may have been exposed to COVID-19. The notice shall be written in a way that does not reveal any personal identifying information of the COVID-19 case. Written notice may include, but is not limited to, personal service, email, or text message if it can reasonably be anticipated to be received by the employee within one business day of sending. The notice shall include the disinfection plan required by Labor Code section 6409.6(a)(4). The notice must be sent to the following:

   a. All employees at the worksite during the high-risk exposure period. If the employer should reasonably know that an employee has not received the notice, or has limited literacy in the language used in the notice, the employer shall provide verbal notice, as soon as practicable, in a language understandable by the employee.

   b. Independent contractors and other employers at the worksite during the high-risk exposure period.

4. Within one business day of the time the employer knew or should have known of the COVID-19 case, the employer shall provide the notice required by Labor Code section 6409.6(a)(2) and (c) to the authorized representative of any employee at the worksite during the high-risk exposure period.

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5. Make COVID-19 testing available at no cost, during paid time, to all employees of the employer who had a close contact in the workplace and provide them with the information on benefits described in subsections (c)(5)(B) and (c)(10)(C), with the following exceptions:

a. Employees who were fully vaccinated before the close contact and do not have COVID-19 symptoms.

b. COVID-19 cases who returned to work pursuant to subsection 3205(c)(11)(A) or (B) and have remained free of COVID-19 symptoms, for 90 days after the initial onset of COVID-19 symptoms or, for COVID-19 cases who never developed symptoms, for 90 days after the first positive test.

6. Investigate whether workplace conditions could have contributed to the risk of COVID-19 exposure and what could be done to reduce exposure to COVID-19 hazards.

(C) Personal identifying information of COVID-19 cases or persons with COVID-19 symptoms, and any employee medical records required by this section or by sections 3205.1 through 3205.4, shall be kept confidential unless disclosure is required or permitted by law. Unredacted information on COVID-19 cases shall be provided to the local health department, CDPH, the Division, and NIOSH immediately upon request, and when required by law.

(4) Correction of COVID-19 hazards. Employers shall implement effective policies and/or procedures for correcting unsafe or unhealthy conditions, work practices, policies and procedures in a timely manner based on the severity of the hazard. This includes, but is not limited to, implementing controls and/or policies and procedures in response to the evaluations conducted under subsections (c)(2) and (c)(3) and implementing the controls required by subsections (c)(6) through (c)(8).

(5) Training and instruction. The employer shall provide effective training and instruction to employees that includes the following:

(A) The employer's COVID-19 policies and procedures to protect employees from COVID-19 hazards, and how to participate in the identification and evaluation of COVID-19 hazards under subsection (c)(2)(A).

(B) Information regarding COVID-19-related benefits to which the employee may be entitled under applicable federal, state, or local laws. This includes any benefits available under legally mandated sick and vaccination leave, if applicable, workers'

compensation law, local governmental requirements, the employer's own leave policies, leave guaranteed by contract, and this section.

(C) The fact that COVID-19 is an infectious disease that can be spread through the air when an infectious person talks or vocalizes, sneezes, coughs, or exhales; that COVID-19 may be transmitted when a person touches a contaminated object and then touches their eyes, nose, or mouth, although that is less common; and that an infectious person may have no symptoms.

(D) Any methods of physical distancing implemented by the employer and the importance of face coverings. The fact that particles containing the virus can travel more than six feet, especially indoors, so physical distancing must be combined with other controls, including face coverings and hand hygiene, to be effective.

(E) Whenever respirators are provided for voluntary use under this section or sections 3205.1 through 3205.4:

1. How to properly wear the respirator provided;

2. How to perform a seal check according to the manufacturer's instructions each time a respirator is worn, and the fact that facial hair interferes with a seal.

(F) The importance of frequent hand washing with soap and water for at least 20 seconds and using hand sanitizer when employees do not have immediate access to a sink or hand washing facility, and that hand sanitizer does not work if the hands are soiled.

(G) Proper use of face coverings and the fact that face coverings are not respiratory protective equipment. COVID-19 is an airborne disease. N95s and more protective respirators protect the users from airborne disease while face coverings primarily protect people around the user.

(H) COVID-19 symptoms, the importance of not coming to work and obtaining a COVID-19 test if the employee has COVID-19 symptoms, and the importance of vaccination against COVID-19.

(I) Information on the employer's COVID-19 policies; how to access COVID-19 testing and vaccination; and the fact that vaccination is effective at preventing COVID-19, protecting against both transmission and serious illness or death.

(6) Physical distancing. Until July 31, 2021, employers shall comply with either subsection (A) or (B) for all employees working indoors or at outdoor mega events, as follows:

(A) All employees shall be separated from other persons by at least six feet, except for employees wearing respirators required by the employer and used in compliance with

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section 5144; where an employer can demonstrate that six feet of separation is not feasible; and momentary exposure while persons are in movement. Methods of physical distancing include: telework or other remote work arrangements; reducing the number of persons in an area at one time, including visitors; visual cues such as signs and floor markings to indicate where employees and others should be located or their direction and path of travel; staggered arrival, departure, work, and break times; and adjusted work processes or procedures, such as reducing production speed, to allow greater distance between employees. When it is not feasible to maintain a distance of at least six feet, individuals shall be as far apart as feasible.

(B) All employees who are not fully vaccinated shall be provided respirators for voluntary use in compliance with subsection 5144(c)(2).

(7) Face coverings.

(A) Employers shall provide face coverings and ensure they are worn by employees over the nose and mouth when indoors, when outdoors and less than six feet away from another person, and where required by orders from the CDPH or local health department. Employers shall ensure face coverings are clean and undamaged. Face shields are not a replacement for face coverings, although they may be worn together for additional protection. The following are exceptions to the face coverings requirement:

1. When an employee is alone in a room, or when all persons in a room are fully vaccinated and do not have COVID-19 symptoms.

2. While eating and drinking at the workplace, provided employees are at least six feet apart and outside air supply to the area, if indoors, has been maximized to the extent feasible.

3. Employees wearing respirators required by the employer and used in compliance with section 5144.

4. Employees who cannot wear face coverings due to a medical or mental health condition or disability, or who are hearing-impaired or communicating with a hearing-impaired person.

5. Specific tasks which cannot feasibly be performed with a face covering. This exception is limited to the time period in which such tasks are actually being performed.

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6. Employees who are fully vaccinated, when they are outdoors and do not have any COVID-19 symptoms.

(B) Employees exempted from wearing face coverings due to a medical condition, mental health condition, or disability shall wear an effective non-restrictive alternative, such as a face shield with a drape on the bottom, if their condition or disability permits it.

(C) Any employees not wearing a face covering pursuant to the exceptions in subsections (c)(7)(A)4. or 5., and not wearing a non-restrictive alternative when allowed by subsection (c)(7)(B), shall be at least six feet apart from all other persons unless the unmasked employee is either fully vaccinated or tested at least weekly for COVID-19 during paid time and at no cost to the employee. Employers may not use the provisions of subsection (c)(7)(C) as an alternative to face coverings when face coverings are otherwise required by this section.

(D) No employer shall prevent any employee from wearing a face covering when not required by this section, unless it would create a safety hazard, such as interfering with the safe operation of equipment.

(E) Employers shall implement measures to communicate to non-employees the face coverings requirements on their premises.

(F) The employer shall develop COVID-19 policies and procedures to minimize employee exposure to COVID-19 hazards originating from any person not wearing a face covering, including a member of the public.

(8) Other engineering controls, administrative controls, and personal protective equipment.

(A) Subsection (c)(8)(A) applies until July 31, 2021, for all employees working indoors or at outdoor mega events, if the employer does not comply with subsection (c)(6)(B). At work stations where an employee is assigned to work for an extended period of time, such as cash registers, desks, and production line stations, and where physical distancing required by subsection (c)(6)(A) is not maintained at all times, the employer shall install cleanable solid partitions that effectively reduce transmission between the employee and other persons.

(B) For buildings with mechanical or natural ventilation, or both, employers shall maximize the quantity of outside air provided to the extent feasible, except when the United States Environmental Protection Agency (EPA) Air Quality Index is greater than 100 for any pollutant or if opening windows or maximizing outdoor air by other means would cause a hazard to employees, for instance from excessive heat or cold.

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(C) Employers shall implement cleaning and disinfecting procedures, which require:

1. Identifying and regularly cleaning frequently touched surfaces and objects, such as doorknobs, elevator buttons, equipment, tools, handrails, handles, controls, phones, headsets, bathroom surfaces, and steering wheels. The employer shall inform employees and authorized employee representatives of cleaning and disinfection protocols, including the planned frequency and scope of cleaning and disinfection.

2. Cleaning of areas, material, and equipment used by a COVID-19 case during the high-risk exposure period, and disinfection if the area, material, or equipment is indoors and will be used by another employee within 24 hours of the COVID-19 case.

NOTE: Cleaning and disinfecting must be done in a manner that does not create a hazard to employees. See Group 2 and Group 16 of the General Industry Safety Orders for further information.

(D) To protect employees from COVID-19 hazards, the employer shall evaluate its handwashing facilities, determine the need for additional facilities, encourage and allow time for employee handwashing, and provide employees with an effective hand sanitizer. Employers shall encourage employees to wash their hands for at least 20 seconds each time. Provision or use of hand sanitizers with methyl alcohol is prohibited.

(E) Personal protective equipment.

1. Employers shall evaluate the need for personal protective equipment to prevent exposure to COVID-19 hazards, such as gloves, goggles, and face shields, and provide such personal protective equipment as needed. Whenever an employer provides respirators for voluntary use under this section or sections 3205.1 through 3205.4, the employer shall encourage their use and shall ensure that employees are provided with a respirator of the correct size.

2. Starting July 31, 2021, employers shall provide respirators for voluntary use in compliance with subsection 5144(c)(2) to all employees working indoors or at outdoor mega events who are not fully vaccinated.

3. Employers shall provide and ensure use of respirators in compliance with section 5144 when deemed necessary by the Division through the Issuance of Order to Take Special Action, in accordance with title 8, section 332.3.

4. Employers shall provide and ensure use of eye protection and respiratory protection in compliance with section 5144 when employees are exposed to procedures that

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may aerosolize potentially infectious material such as saliva or respiratory tract fluids.

NOTE: Examples of work covered by subsection (c)(8)(E)4. include, but are not limited to, certain dental procedures and outpatient medical specialties not covered by section 5199.

5. Starting [OAL to insert 15 days after effective date here], employers shall provide respirators for voluntary use in compliance with subsection 5144(c)(2) to employees who have not been fully vaccinated, and encourage use of those respirators, when employees are in a vehicle with at least one other person for 15 minutes or more.

(F) Testing of symptomatic employees. Employers shall make COVID-19 testing available at no cost to employees with COVID-19 symptoms who are not fully vaccinated, during employees' paid time.

(9) Reporting, recordkeeping, and access.

(A) The employer shall report information about COVID-19 cases and outbreaks at the workplace to the local health department whenever required by law, and shall provide any related information requested by the local health department. The employer shall report all information to the local health department as required by Labor Code section 6409.6.

(B) The employer shall maintain records of the steps taken to implement the written COVID-19 Prevention Program in accordance with section 3203(b).

(C) The written COVID-19 Prevention Program shall be made available at the workplace to employees, authorized employee representatives, and to representatives of the Division immediately upon request.

(D) The employer shall keep a record of and track all COVID-19 cases with the employee's name, contact information, occupation, location where the employee worked, the date of the last day at the workplace, and the date of a positive COVID-19 test.

(10) Exclusion of COVID-19 cases and employees who had a close contact. The purpose of this subsection is to limit transmission of COVID-19 in the workplace.

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(A) Employers shall ensure that COVID-19 cases are excluded from the workplace until the return to work requirements of subsection (c)(11) are met.

(B) Employers shall exclude from the workplace employees who had a close contact until the return to work requirements of subsection (c)(11) are met, with the following exceptions:

1. Employees who were fully vaccinated before the close contact and who do not develop COVID-19 symptoms; and
2. COVID-19 cases who returned to work pursuant to subsection (c)(11)(A) or (B) and have remained free of COVID-19 symptoms, for 90 days after the initial onset of COVID-19 symptoms or, for COVID-19 cases who never developed COVID-19 symptoms, for 90 days after the first positive test.

(C) For employees excluded from work under subsection (c)(10), employers shall continue and maintain an employee's earnings, wages, seniority, and all other employee rights and benefits, including the employee's right to their former job status, as if the employee had not been removed from their job. Employers may use employer-provided employee sick leave for this purpose to the extent permitted by law. Wages due under this subsection are subject to existing wage payment obligations and must be paid at the employee's regular rate of pay no later than the regular pay day for the pay period(s) in which the employee is excluded. Unpaid wages owed under this subsection are subject to enforcement through procedures available in existing law. If an employer determines that one of the exceptions below applies, it shall inform the employee of the denial and the applicable exception.

EXCEPTION 1: Subsection (c)(10)(C) does not apply where the employee received disability payments or was covered by workers' compensation and received temporary disability.

EXCEPTION 2: Subsection (c)(10)(C) does not apply where the employer demonstrates that the close contact is not work related.

(D) Subsection (c)(10) does not limit any other applicable law, employer policy, or collective bargaining agreement that provides for greater protections.

(E) At the time of exclusion, the employer shall provide the employee the information on benefits described in subsections (c)(5)(B) and (c)(10)(C).

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(11) Return to work criteria.

(A) COVID-19 cases with COVID-19 symptoms shall not return to work until:

1. At least 24 hours have passed since a fever of 100.4 degrees Fahrenheit or higher has resolved without the use of fever-reducing medications; and

2. COVID-19 symptoms have improved; and

3. At least 10 days have passed since COVID-19 symptoms first appeared.

(B) COVID-19 cases who tested positive but never developed COVID-19 symptoms shall not return to work until a minimum of 10 days have passed since the date of specimen collection of their first positive COVID-19 test.

(C) Once a COVID-19 case has met the requirements of subsection (c)(11)(A) or (B), as applicable, a negative COVID-19 test shall not be required for an employee to return to work.

(D) Persons who had a close contact may return to work as follows:

1. Persons who had a close contact but never developed symptoms may return to work when 10 days have passed since the last known close contact.

2. Persons who had a close contact and developed any COVID-19 symptom cannot return to work until the requirements of subsection (c)(11)(A) have been met, unless all of the following are true:

a. The person tested negative for COVID-19 using a polymerase chain reaction (PCR) COVID-19 test with specimen taken after the onset of symptoms; and
b. At least 10 days have passed since the last known close contact; and
c. The person has been symptom-free for at least 24 hours, without using fever-reducing medications.

3. During critical staffing shortages, when there are not enough staff to provide safe patient care, essential critical infrastructure workers in the following categories may return after Day 7 from the date of last exposure if they have received a negative PCR COVID-19 test result from a specimen collected after Day 5:

a. Health care workers who did not develop COVID-19 symptoms;
b. Emergency response workers who did not develop COVID-19 symptoms; and
c. Social service workers who did not develop COVID-19 symptoms and who work face to face with clients in child welfare or assisted living.

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(E) If an order to isolate, quarantine, or exclude an employee is issued by a local or state health official, the employee shall not return to work until the period of isolation or quarantine is completed or the order is lifted. If no period was specified, then the period shall be in accordance with the return to work periods in subsection (c)(11)(A), (c)(11)(B), or (c)(11)(D), as applicable.

(F) If no violations of local or state health officer orders for isolation, quarantine, or exclusion would result, the Division may, upon request, allow employees to return to work on the basis that the removal of an employee would create undue risk to a community's health and safety. In such cases, the employer shall develop, implement, and maintain effective control measures to prevent transmission in the workplace including providing isolation for the employee at the workplace and, if isolation is not feasible, the use of respirators in the workplace.

Note: Authority cited: Section 142.3, Labor Code. Reference: Sections 142.3, 144.6, and 6409.6, Labor Code.

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Add new section 3205.1 to read:

§ 3205.1. Multiple COVID-19 Infections and COVID-19 Outbreaks.

(a) Scope.

(1) This section applies to a workplace covered by section 3205 if three or more employee COVID-19 cases within an exposed group, as defined by section 3205(b), visited the workplace during their high-risk exposure period at any time during a 14-day period.

(2) This section shall apply until there are no new COVID-19 cases detected in the exposed group for a 14-day period.

(b) COVID-19 testing.

(1) The employer shall make COVID-19 testing available at no cost to its employees within the exposed group, during employees' paid time, except**:**

(A) Employees who were not present at the workplace during the relevant 14-day period(s) under subsection (a).

(B) Employees who were fully vaccinated before section 3205.1 became applicable and who do not have COVID-19 symptoms; and

(C) For COVID-19 cases who did not develop COVID-19 symptoms after returning to work pursuant to subsections 3205(c)(11)(A) or (B), no testing is required for 90 days after the initial onset of COVID-19 symptoms or, for COVID-19 cases who never developed symptoms, 90 days after the first positive test.

(2) COVID-19 testing shall consist of the following:

(A) Immediately upon being covered by this section, testing shall be made available to all employees in the exposed group and then again one week later. Negative COVID-19 test results of employees with COVID-19 exposure shall not impact the duration of any quarantine, isolation, or exclusion period required by, or orders issued by, the local health department.

(B) After the first two COVID-19 tests required by subsection (b)(2)(A), employers shall make COVID-19 testing available once a week at no cost, during paid time, to all employees in the exposed group who remain at the workplace, or more frequently if recommended by the local health department, until this section no longer applies pursuant to subsection (a)(2).

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(c) Employers shall make additional testing available at no cost to employees, during employees' paid time, when deemed necessary by the Division through the Issuance of Order to Take Special Action, in accordance with title 8, section 332.3.

(d) The employer shall continue to comply with all applicable provisions of section 3205, and shall also comply with the following:

(1) Any employees in the exposed group who are not wearing respirators required by the employer and used in compliance with section 5144 shall be separated from other persons by at least six feet, except where an employer can demonstrate that six feet of separation is not feasible, and except for momentary exposure while persons are in movement. Methods of physical distancing include: telework or other remote work arrangements; reducing the number of persons in an area at one time, including visitors; visual cues such as signs and floor markings to indicate where employees and others should be located or their direction and path of travel; staggered arrival, departure, work, and break times; and adjusted work processes or procedures, such as reducing production speed, to allow greater distance between employees.

(2) When it is not feasible to maintain a distance of at least six feet, individuals shall be as far apart as feasible.

(3) At work stations where an employee is assigned to work for an extended period of time, such as cash registers, desks, and production line stations, and where the physical distancing requirement in subsection (d)(1) is not maintained at all times, the employer shall install cleanable solid partitions that effectively reduce transmission between the employee and other persons.

(e) COVID-19 Investigation, review and hazard correction. The employer shall immediately perform a review of potentially relevant COVID-19 policies, procedures, and controls and implement changes as needed to prevent further spread of COVID-19. The investigation and review shall be documented and include:

(1) Investigation of new or unabated COVID-19 hazards including the employer's leave policies and practices and whether employees are discouraged from remaining home

when sick; the employer's COVID-19 testing policies; insufficient outdoor air; insufficient air filtration; and lack of physical distancing.

(2) The review shall be updated every 30 days that this section continues to apply, in response to new information or to new or previously unrecognized COVID-19 hazards, or when otherwise necessary.

(3) The employer shall implement changes to reduce the transmission of COVID-19 based on the investigation and review required by subsections (e)(1) and (e)(2). The employer shall consider moving indoor tasks outdoors or having them performed remotely, increasing outdoor air supply when work is done indoors, improving air filtration, increasing physical distancing as much as feasible, requiring respiratory protection in compliance with section 5144, and other applicable controls.

(f) In buildings or structures with mechanical ventilation, employers shall filter recirculated air with Minimum Efficiency Reporting Value (MERV) 13 or higher efficiency filters if compatible with the ventilation system. If MERV-13 or higher filters are not compatible with the ventilation system, employers shall use filters with the highest compatible filtering efficiency. Employers shall also evaluate whether portable or mounted High Efficiency Particulate Air (HEPA) filtration units or other air cleaning systems would reduce the risk of transmission and, if so, shall implement their use to the degree feasible.

(g) Until July 31, 2021, employees in the exposed group who are working indoors or at outdoor mega events and are not fully vaccinated, when not required by the employer to wear respirators, shall be provided with respirators for voluntary use in compliance with section 5144(c)(2).

NOTE to subsection 3205.1(g): Starting on July 31, 2021, this will be required in all workplaces covered by section 3205.

Note: Authority cited: Section 142.3, Labor Code. Reference: Sections 142.3 and 144.6, Labor Code.

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Add new section 3205.2 to read:

§ 3205.2. Major COVID-19 Outbreaks.

(a) Scope.

(1) This section applies to any workplace covered by section 3205 if 20 or more employee COVID-19 cases in an exposed group, as defined by section 3205(b), visited the workplace during their high-risk exposure period within a 30-day period.

(2) This section shall apply until there are fewer than three COVID-19 cases detected in the exposed group for a 14-day period.

(b) Employers shall continue to comply with section 3205.1, except that the COVID-19 testing described in section 3205.1(b) shall be made available twice a week, or more frequently if recommended by the local health department.

(c) In addition to the requirements of sections 3205 and 3205.1, the employer shall take the following actions:

(1) The employer shall determine the need for a respiratory protection program or changes to an existing respiratory protection program under section 5144 to address COVID-19 hazards.

(2) The employer shall evaluate whether to halt some or all operations at the workplace until COVID-19 hazards have been corrected.

(3) Any other control measures deemed necessary by the Division through the Issuance of Order to Take Special Action, in accordance with title 8 section 332.3.

Note: Authority cited: Section 142.3, Labor Code. Reference: Sections 142.3 and 144.6, Labor Code.

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Add new section 3205.3 to read:

§ 3205.3. COVID-19 Prevention in Employer-Provided Housing.

(a) Scope. This section applies to employer-provided housing. Employer-provided housing is any place or area of land, any portion of any housing accommodation, or property upon which a housing accommodation is located, consisting of: living quarters, dwelling, boardinghouse, tent, bunkhouse, maintenance-of-way car, mobile home, manufactured home, recreational vehicle, travel trailer, or other housing accommodations. Employer-provided housing includes a "labor camp" as that term is used in title 8 of the California Code of Regulations or other regulations or codes. The employer-provided housing may be maintained in one or more buildings or one or more sites, including hotels and motels, and the premises upon which they are situated, or the area set aside and provided for parking of mobile homes or camping. Employer-provided housing is housing that is arranged for or provided by an employer, other person, or entity to workers, and in some cases to workers and persons in their households, in connection with the workers' employment, whether or not rent or fees are paid or collected.

The following exceptions apply:

(1) This section does not apply to housing provided for the purpose of emergency response, including firefighting, rescue, and evacuation, and support activities directly aiding response such as utilities, communications, and medical operations, if:

(A) The employer is a government entity; or

(B) The housing is provided temporarily by a private employer and is necessary to conduct the emergency response operations.

(2) Subsections (c), (d), (e), (f), and (h) do not apply to residents who maintained a household together prior to residing in employer-provided housing, such as family members, when no other persons outside the household are present.

(3) This section does not apply to employees with occupational exposure as defined by section 5199, when covered by that section.

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(4) This section does not apply to employer-provided housing used exclusively to house COVID-19 cases or where a housing unit houses one employee.

(5) This section does not apply to housing in which all residents are fully vaccinated.

(b) Assignment of housing units. To the extent feasible, employers shall reduce exposure to COVID-19 hazards by assigning employee residents to distinct groups and ensuring that each group remains separate from other such groups during transportation and work. Employers shall ensure that shared housing unit assignments are prioritized in the following order:

(1) Residents who usually maintain a household together outside of work, such as family members, shall be housed in the same housing unit without other persons.

(2) Residents who work in the same crew or work together at the same workplace shall be housed in the same housing unit without other persons.

(3) Employees who do not usually maintain a common household, work crew, or workplace shall be housed in the same housing unit only when no other housing alternatives are feasible.

(c) Physical distancing and controls. Employers shall:

(1) Ensure the premises are of sufficient size and layout to permit at least six feet of physical distancing between residents in housing units, common areas, and other areas of the premises.

(2) Ensure beds are spaced to allow at least eight feet between the corner of the head of each bed and positioned to maximize the distance between sleepers' heads. For beds positioned next to each other, i.e. side by side, the beds shall be arranged so that the head of one bed is next to the foot of the next bed. For beds positioned across from each other, i.e. end to end, the beds shall be arranged so that the foot of one bed is closest to the foot of the next bed. Bunk beds shall not be used by more than one person.

(3) In housing units, maximize the quantity and supply of outdoor air and increase filtration efficiency to the highest level compatible with the existing ventilation system. If there is not a Minimum Efficiency Reporting Value (MERV) 13 or higher

filter in use, portable or mounted High Efficiency Particulate Air (HEPA) filtration units shall be used, to the extent feasible, in all sleeping areas in which there are two or more residents who are not fully vaccinated.

(d) Face coverings. Employers shall provide face coverings to all residents and provide information to residents on when they should be used in accordance with state or local health officer orders or guidance.

(e) Cleaning and disinfecting.

(1) Employers shall ensure that housing units, kitchens, bathrooms, and common areas are effectively cleaned to prevent the spread of COVID-19. Housing units, kitchens, bathrooms, and indoor common areas shall be cleaned and disinfected after a COVID-19 case was present during the high-risk exposure period, if another resident will be there within 24 hours of the COVID-19 case. Cleaning and disinfecting shall be done in a manner that protects the privacy of residents.

(2) Employers shall instruct residents not to share unwashed dishes, drinking glasses, cups, eating utensils, and similar items.

(f) Screening. The employer shall encourage residents to report COVID-19 symptoms to the employer.

(g) COVID-19 testing. The employer shall establish, implement, and maintain effective policies and procedures for COVID-19 testing of residents who had a close contact, who have COVID-19 symptoms, or as recommended by the local health department. These policies and procedures shall be communicated to the residents.

(h) COVID-19 cases and close contacts.

(1) Employers shall effectively quarantine residents who have had a close contact from all other residents. Effective quarantine shall include providing residents who had a close contact with a private bathroom and sleeping area. The following residents are exempt from this requirement:

(A) Fully vaccinated residents who do not have COVID-19 symptoms; and
(B) COVID-19 cases who have met the requirements of subsection 3205(c)(11)(A) or (B) and have remained free of COVID-19 symptoms, for 90 days after the

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initial onset of COVID-19 symptoms or, for COVID-19 cases who never developed COVID-19 symptoms, for 90 days after the first positive test.

(2) Employers shall effectively isolate COVID-19 cases from all residents who are not COVID-19 cases. Effective isolation shall include housing COVID-19 cases only with other COVID-19 cases, and providing COVID-19 case residents with a sleeping area and bathroom that is not shared by non-COVID-19 case residents.

(3) Personal identifying information regarding COVID-19 cases and persons with COVID-19 symptoms shall be kept confidential in accordance with subsection 3205(c)(3)(C).

(4) Employers shall end isolation in accordance with subsections 3205(c)(10) and (c)(11) and any applicable local or state health officer orders.

Note: Authority cited: Section 142.3, Labor Code. Reference: Sections 142.3 and 144.6, Labor Code.

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Add new section 3205.4 to read:

§ 3205.4. COVID-19 Prevention in Employer-Provided Transportation.

(a) Scope. This section applies to employer-provided motor vehicle transportation, which is any transportation of an employee during the course and scope of employment, including transportation to and from different workplaces, jobsites, delivery sites, buildings, stores, facilities, and agricultural fields, provided, arranged for, or secured by an employer regardless of the travel distance or duration involved. The following exceptions apply:

(1) This section does not apply if the driver and all passengers are from the same household outside of work, such as family members, or if the driver is alone in the vehicle.

(2) This section does not apply to employer-provided transportation when necessary for emergency response, including firefighting, rescue, and evacuation, and support activities directly aiding response such as utilities, communications, and medical operations.

(3) This section does not apply to employees with occupational exposure as defined by section 5199, when covered by that section.

(4) This section does not apply to vehicles in which all employees are fully vaccinated.

(5) This section does not apply to public transportation.

(b) Assignment of transportation. To the extent feasible, employers shall reduce exposure to COVID-19 hazards by assigning employees sharing vehicles to distinct groups and ensuring that each group remains separate from other such groups during transportation, during work activities, and in employer-provided housing. Employers shall prioritize shared transportation assignments in the following order:

(1) Employees residing in the same housing unit shall be transported in the same vehicle.

(2) Employees working in the same crew or workplace shall be transported in the same vehicle.

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(3) Employees who do not share the same household, work crew or workplace shall be transported in the same vehicle only when no other transportation alternatives are feasible.

(c) Physical distancing and face coverings. Employers shall ensure that:

(1) Face covering requirements of subsection 3205(c)(7) are followed for employees waiting for transportation. Until July 31, 2021, employers must comply with either subsection 3205(c)(6)(A) or (c)(6)(B) when employees are waiting for transportation.

(2) There is one unoccupied seat between each person in the vehicle or the vehicle operator and any passengers are separated by at least three feet in all directions during the operation of the vehicle, regardless of the vehicle's normal capacity. Measuring the space between bodies or between heads are both acceptable measuring methods.

(3) The vehicle operator and any passengers are provided with and wear a face covering in the vehicle as required by subsection 3205(c)(7). Starting [OAL to insert 15 days after effective date here], employees who are not fully vaccinated shall be provided with respirators for voluntary use in compliance with subsection 5144(c)(2), and encouraged to use the respirators, when employees are in a vehicle for 15 minutes or more.

EXCEPTION to subsection (c): Employers are not required to comply with this subsection where all persons inside the vehicle who are not fully vaccinated are required by the employer to wear respirators and are using them in compliance with section 5144.

(d) Screening. Employers shall develop, implement, and maintain effective procedures for screening and excluding drivers and riders with COVID-19 symptoms prior to boarding shared transportation.

(e) Cleaning and disinfecting. Employers shall ensure that:

(1) All high-contact surfaces (door handles, seatbelt buckles, armrests, etc.) used by passengers are cleaned to prevent the spread of COVID-19 and must be cleaned and disinfected if used by a COVID-19 case during the high-risk exposure period, when the surface will be used by another employee within 24 hours of the COVID-19 case.

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(2) All high-contact surfaces used by drivers, such as the steering wheel, armrests, seatbelt buckles, door handles and shifter, shall be cleaned to prevent the spread of COVID-19 between different drivers and are disinfected after use by a COVID-19 case during the high-risk exposure period, if the surface will be used by another employee within 24 hours of the COVID-19 case.

(3) Employers shall provide sanitizing materials and ensure they are kept in adequate supply.

(f) Ventilation. Employers shall ensure that vehicle windows are kept open, and the ventilation system set to maximize outdoor air and not set to recirculate air. Windows do not have to be kept open if one or more of the following conditions exist:

(1) The vehicle has functioning air conditioning in use and excessive outdoor heat would create a hazard to employees.

(2) The vehicle has functioning heating in use and excessive outdoor cold would create a hazard to employees.

(3) Protection is needed from weather conditions, such as rain or snow.

(4) The vehicle has a cabin air filter in use and the U.S. EPA Air Quality Index for any pollutant is greater than 100.

(g) Hand hygiene. Employers shall provide hand sanitizer in each vehicle and ensure that all drivers and riders sanitize their hands before entering and exiting the vehicle. Hand sanitizers with methyl alcohol are prohibited.

(h) This section shall take precedence when in conflict with section 3205.

Note: Authority cited: Section 142.3, Labor Code. Reference: Sections 142.3 and 144.6, Labor Code.