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New Challenges Created By Our Courts

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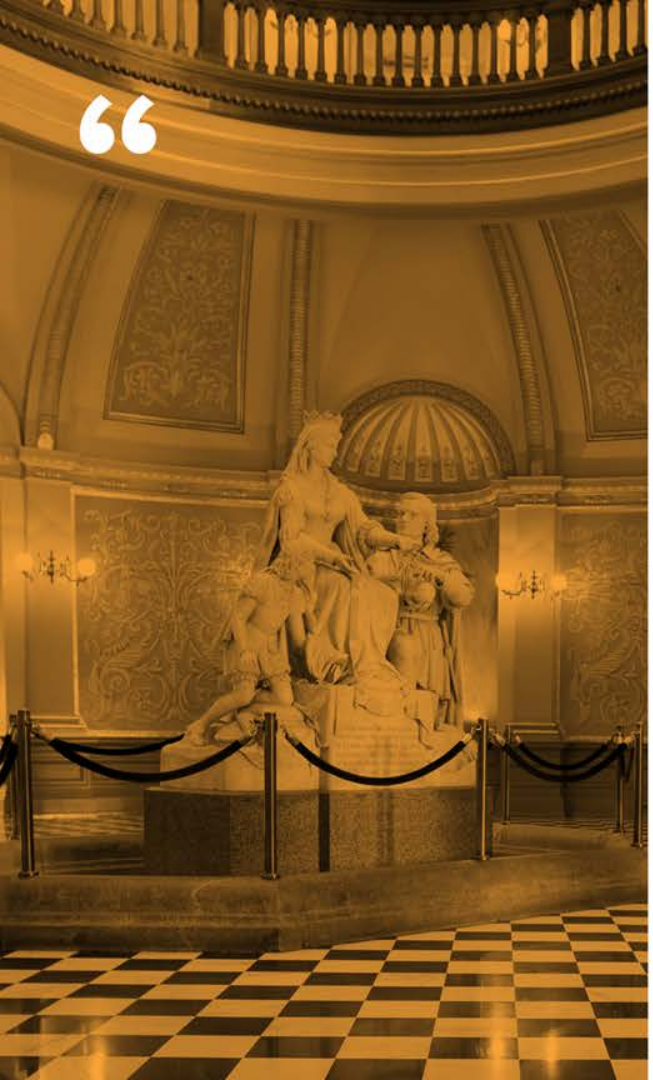
Dynamex Operations West, Inc. v. Superior Court

Facts

- Dynamex delivery drivers of packages to customers
- Initially classified as employees – converted to independent contractors even though same tasks performed
- Drivers argued reclassification violated California law



Dynamex Operations West, Inc. v. Superior Court

Issue

- What legal standard should be applied in determining whether workers are independent contractors for purposes of the California Wage Orders?

Dynamex Operations West, Inc. v. Superior Court

Result

- Court adopted new "ABC" test – difficult to satisfy
- Burden on hiring entity to establish all 3 prongs embodied in the "ABC" test
- Under "ABC" test, a worker is an employee under the Wage Orders unless the hiring entity establishes:
  A. That the worker is free from control and direction;
  B. Performs work outside the usual course of the hiring entity's business; **and**
  C. Is customarily engaged in an independently established trade, occupation, or business.

Garcia v. Border Transportation Group LLC

Facts

- Case filed prior to *Dynamex* decision
- Taxi driver alleged misclassification as an independent contractor
- Brought some causes of action under the Wage Orders and some under other statutory provisions
- Trial court held he was independent contractor based on the *Borello* test
- *Dynamex* decision was issued while appeal was pending

Garcia v. Border Transportation Group LLC

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Issue

– Whether the “ABC” test issued in *Dynamex* applies to non-Wage Order claims

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Garcia v. Border Transportation Group LLC

Result

- Court of Appeal held that the "ABC" test set forth in *Dynamex* only applies to Wage Order claims
- *Borello* test still proper standard for non-Wage Order claims
  - Court concluded that it was logical to apply the "suffer and permit" standard and the "ABC" test to Wage Order claims because the Wage Orders expressly define "employ" in this manner
  - "No reason to apply the ABC test categorically to every working relationship"

Garcia v. Border Transportation Group LLC

Takeaways

- Whether Dynamex has retroactive effect is still unresolved, but several courts have said yes
- Garcia court focused on part C of the "ABC" test – reminder that all prongs must be met
- Critical inquiry is not whether worker is "capable" of independent business operation, but whether there is an "existing" showing of such
- It's still early going in the post-Dynamex fallout; this is one of the first appellate court decisions applying the new standard

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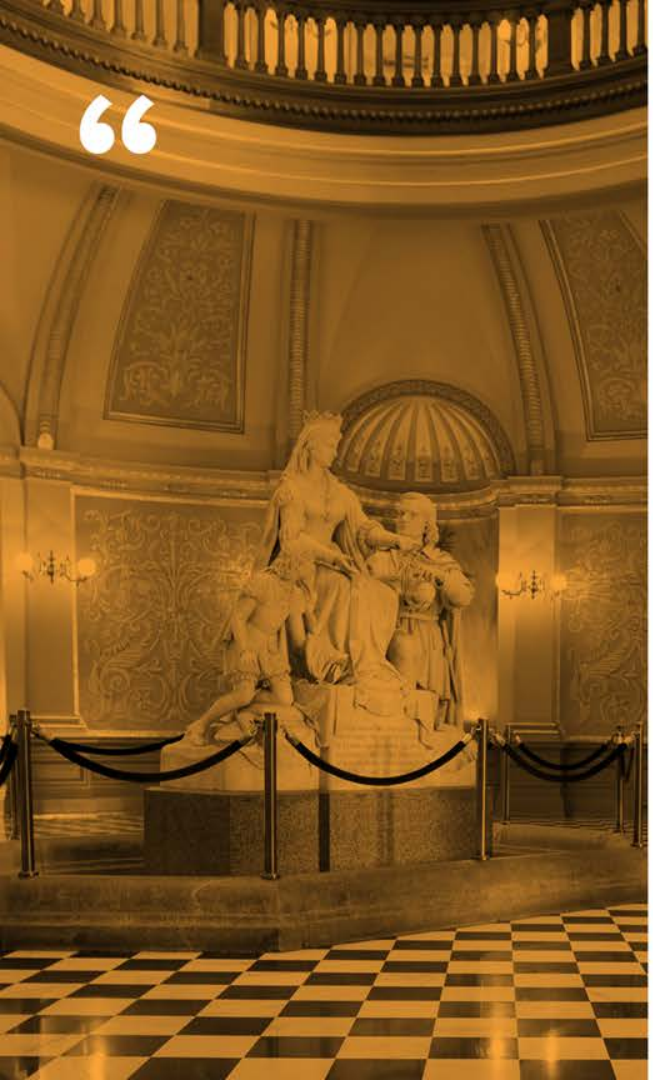
Alvarado v. Dart Container Corporation of California

Facts

- Dart had attendance bonus of $15 for any weekend shift regardless of hours worked
- Dart's formula for calculating overtime was **total compensation/total hours worked**
- Alvarado argued formula should be **total compensation/regular hours** (i.e., excluding overtime hours)



Alvarado v. Dart Container Corporation of California

Issue

- What is the divisor for purposes of calculating the per-hour value of a bonus?
  - Hours worked (including overtime)?
  - Non-overtime hours worked?
  - Non-overtime hours that exist in the pay period?

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Alvarado v. Dart Container Corporation of California

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Result

- Use only non-overtime hours when calculating a bonus's per-hour value
  - Court reasoned that bonus was payable even if no overtime worked during the pay period
  - Pay 1.5 times that rate for every OT hour worked
- Prospective **and retroactive** application
- Expressly limited to flat-sum bonuses**

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Rizo v. Yovino

Facts

- Aileen Rizo hired as math consultant by Fresno County
- County's salary procedure was a 5% raise from previous job salary and then placed into a structured salary schedule
- No other factors were taken into account
- Rizo learned male colleagues hired in similar roles had higher salaries based on previous job salary

Rizo v. Yovino

Issue

- Whether, under the Equal Pay Act, an employer may use past salary to justify pay gaps between men and women

Rizo v. Yovino

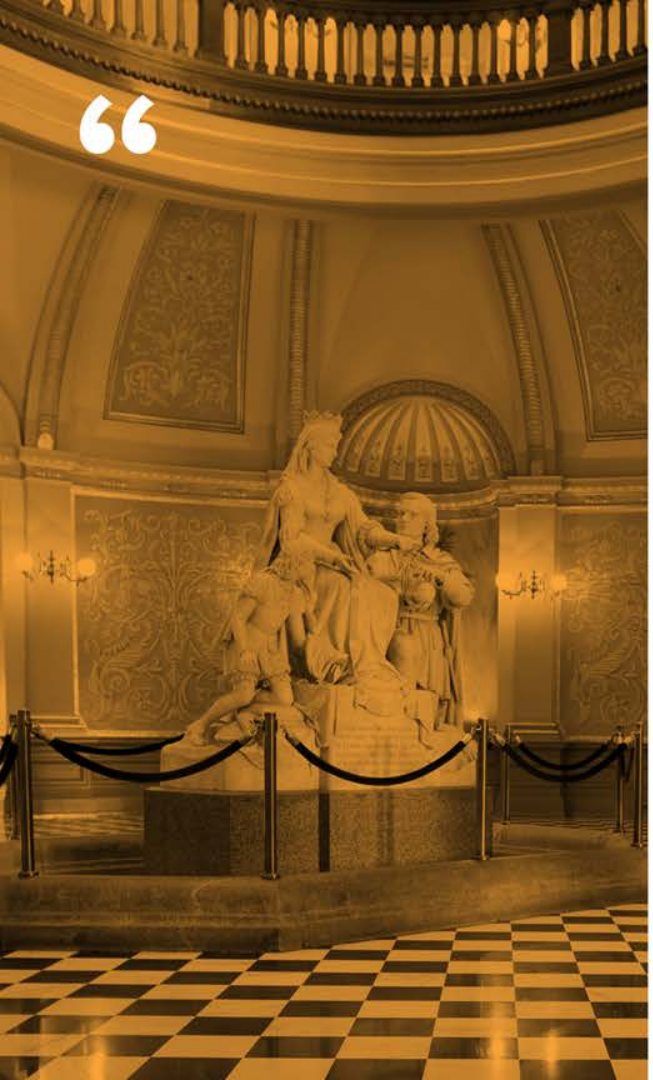
Result

- Ruling in favor of Rizo
- Prior salary alone or in combination with other factors cannot justify a wage differential
- The “any-factor-other-than-sex” defense is limited to legitimate, job-related factors such as employee’s experience, educational background, ability, or prior job performance

Troester v. Starbucks Corporation

Facts

- Douglas Troester was an hourly shift supervisor for Starbucks
- Required to clock out on closing shifts before the “close store procedure”
- Averaged four to ten minutes in off-the-clock work
- 12 hours and 50 minutes over 17 months of employment $102.67 unpaid time



Troester v. Starbucks Corporation

Issue

– Does the FLSA's *de minimis* doctrine apply to California wage claims?

Troester v. Starbucks Corporation

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Results

- California Supreme Court ruled in favor of Troester
- Starbucks must pay California workers for regular off-the-clock work, even if it is only by seconds/minutes
- Court encouraged employers to make use of available modern technology for timekeeping

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Troester v. Starbucks Corporation

Takeaways

- Immediately review pre-shift, post-shift, and similar practices to ensure there is no **regularly** occurring off-the-clock work that you should capture as working time
- Adjust sequence of opening and closing duties where possible
- Consider technological innovations to capture all working time

AHMC Healthcare, Inc. v. Superior Court

Facts

- AHMC Healthcare rounded employees' clock-in and clock-out times to closest quarter-hour
- Study found that certain employees were paid less than they would have been paid had wages been calculated on exact clock-in and out times
- Emilio Letona and Jacquelyn Abeyta lost an average 1.85 minutes per shift
- Brought suit on behalf of themselves and other similarly situated employees arguing that "a rounding policy that resulted in any loss to any employee, no matter how minimal, violates California employment law"

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AHMC Healthcare, Inc. v. Superior Court

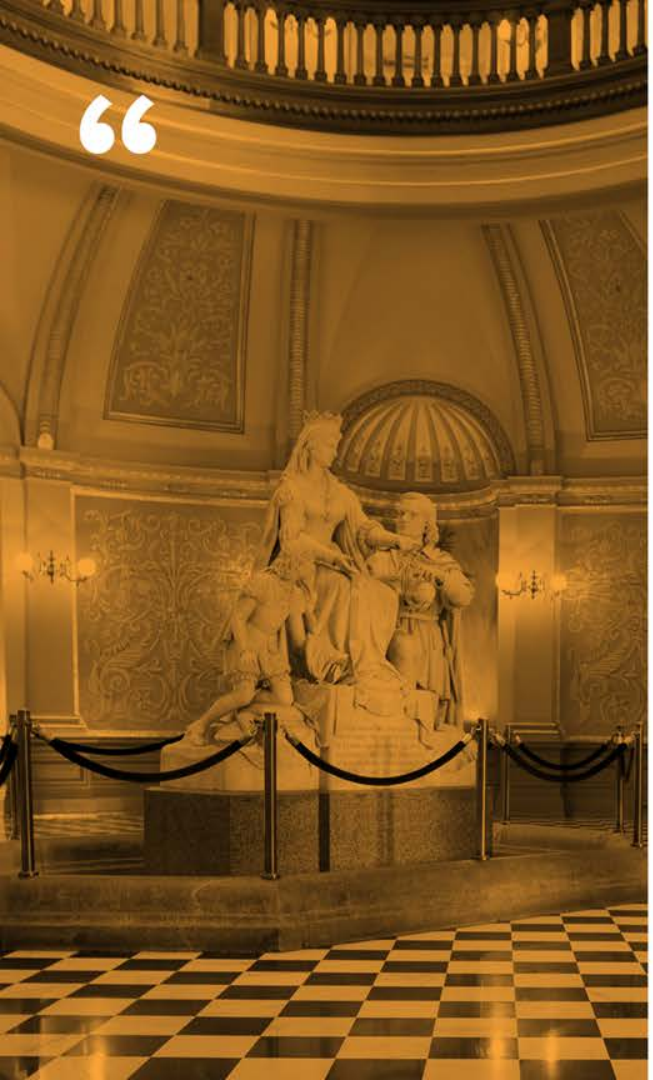
Issue

– Whether the rounding practice was in compliance with California law

AHMC Healthcare, Inc. v. Superior Court

Result

- AHMC's rounding practices **were in compliance** with California law, as they were neutral on their face as well as in practice (a rule adopted by the DLSE)
- Rounding system facially neutral because all time punches were rounded systematically to the nearest quarter-hour without an eye towards whether the employee or employer benefitted from the rounding



AHMC Healthcare, Inc. v. Superior Court

Result

- A rounding policy does not have to result in a net positive amount for every single employee – some employees will win and some will lose under a neutral rounding policy
  - Rounding policy not unlawful where a “bare majority” of employees lose compensation due to neutral rounding
  - Here, 52.1% of employees at one location lost compensation due to the round policy but such was not large enough to demonstrate a lack of neutrality

Epic Systems Corporation v. Lewis

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Facts

- Employee sued Epic individually and on behalf of similarly situated employees for unpaid overtime
- Epic moved to dismiss, citing the waiver clause in its arbitration agreement – a class and collective action waiver
- Case was ultimately consolidated with other similar cases because of a circuit split

Epic Systems Corporation v. Lewis

Issue

– Does an employment arbitration agreement containing a class and collective action waiver violate the NLRA? Or are they permitted by virtue of the FAA?

Epic Systems Corporation v. Lewis

Result

- Supreme Court's ruling in favor of employers
- Right to bring class action claims not considered "concerted action" protected by the NLRA
- Arbitration agreements that include class action waivers are **permitted**

Epic Systems Corporation v. Lewis

Takeaways

- Rare good news for employers!
- May continue to incorporate and enforce mandatory class action waivers in employment arbitration agreements
- Ensure that your arbitration agreements include class action waivers
- Revisit any “opt-out” provisions you may have included before this decision

Correia v. NB Baker Electric, Inc.

Facts

- Two employees sued their employer for a series of wage and hour violations as well as representative claims under PAGA
- Employer's Motion to Compel Arbitration, was granted except as to the PAGA claim
- Employer appealed, arguing that prior CA Supreme Court precedent was overruled by Epic Sysyems

Correia v. NB Baker Electric, Inc.

Result:

- Court concluded still bound by *Iskanian* (CA precedent) because PAGA claims involve civil penalties brought on behalf of the government
- State must consent to any waiver of PAGA claims
- Acknowledged, but ignored, several federal decisions reaching opposite conclusion

Correia v. NB Baker Electric, Inc.

Takeaways

- Whether PAGA claims will be compelled to arbitration currently depends on the venue
- Be careful what you wish for – claims may be compelled to arbitration in representative form
- Remain hyper vigilant in language and implementation of arbitration programs
- Carefully weigh pro's and con's of interim tactics while we wait to see if the U.S. Supreme Court will weigh in

Ward v. Tilly's

Facts

- National retail chain has a policy requiring employees to call in to verify their shift
- Three possibilities:
  - Regular shift followed by an on call shift
    - Informed during shift if would be needed
  - An on call shift followed by a regular shift
    - Must call in two hours before shift
  - A totally on call shift
    - Must call in two hours before shift
  - Employees who failed to call in, called in late, or failed to show were subject to disciplinary action
  - No pay for call time or unworked shifts

Ward v. Tilly's

Issue

- Did requiring employees to call in trigger California's reporting pay requirement
  - Regular rate of pay if scheduled but work not available
  - Half of scheduled day (minimum of two and maximum of four)
- Prior cases had generally limited to when employees actually showed up to work

Ward v. Tilly's

Result

- Reporting pay required when employee required to call in, but no work provided
- Do not need to physically appear to "report to work" if employer directs action
  - Call in
  - Log in to a computer
  - Report to a third location
- Silent as to retroactivity