Important Case Law Impacting Employment in California

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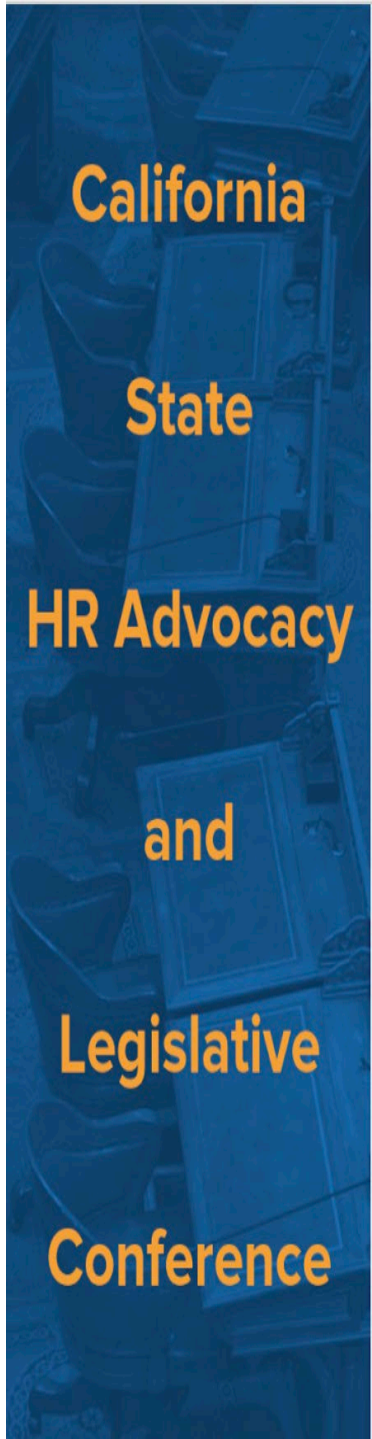
Case Law Update

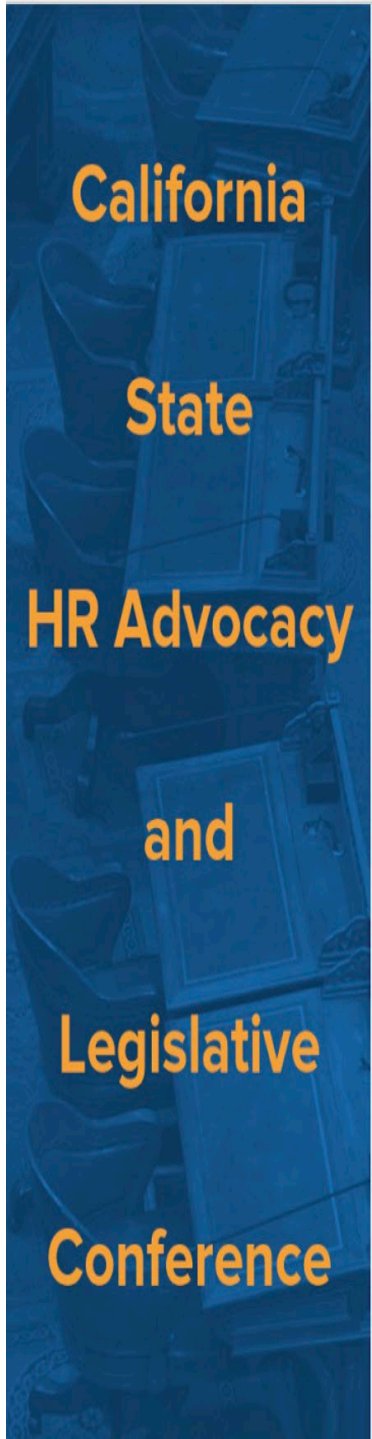
Introduction

- Cases from California and federal courts spanned the spectrum from fair employment to wage and hour to non-disclosure agreements.
- We anticipate 2022 being a similar year with matters ranging from exemption related disputes to whistleblower cases associated with COVID-19/vaccine related matters.
- Perhaps most difficult for businesses is that, similar to the football in the Charlie Brown cartoon, the law changes as business are prepared to finally get to a point of compliance with existing regulations.



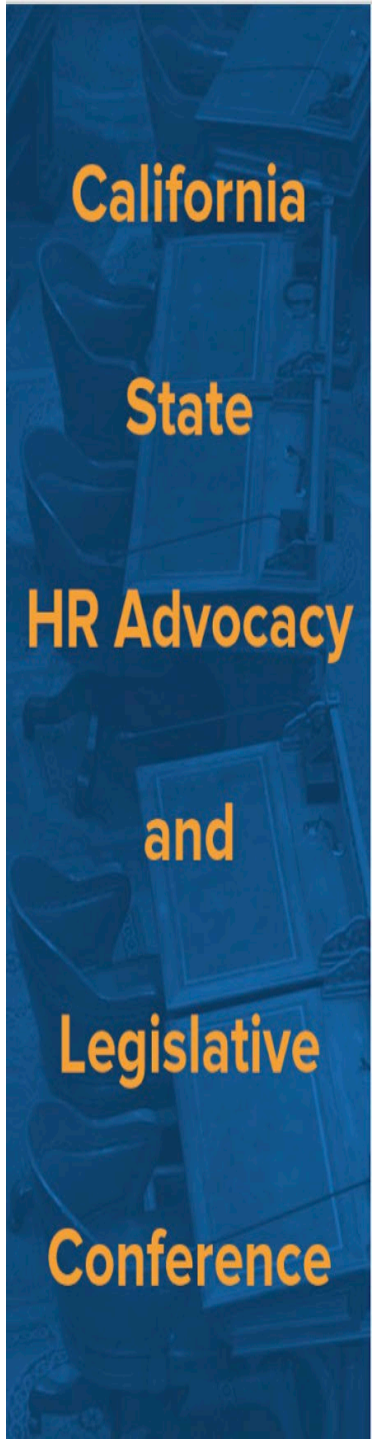
Vazquez et al., v. Jan-Pro Franchising

10 Cal. 5th 944



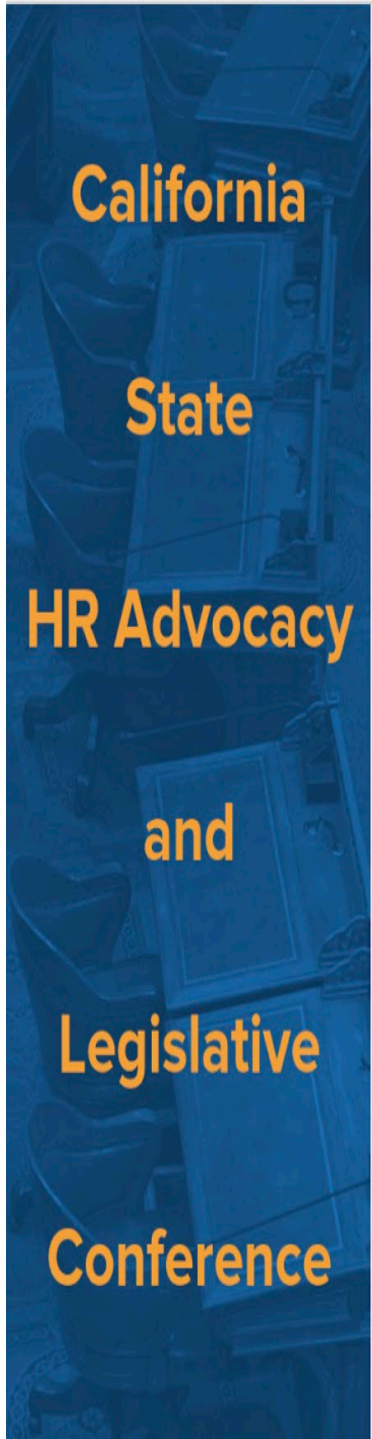
Vazquez et al., v. Jan-Pro Franchising International

- Janitors filed a class action lawsuit alleging that employer janitorial cleaning business misclassified them as independent contractors rather than employees, failing to pay them for overtime and minimum wages.
- Issue: Does the decision in *Dynamex Operations West v. Superior Court (2018)* apply retroactively?



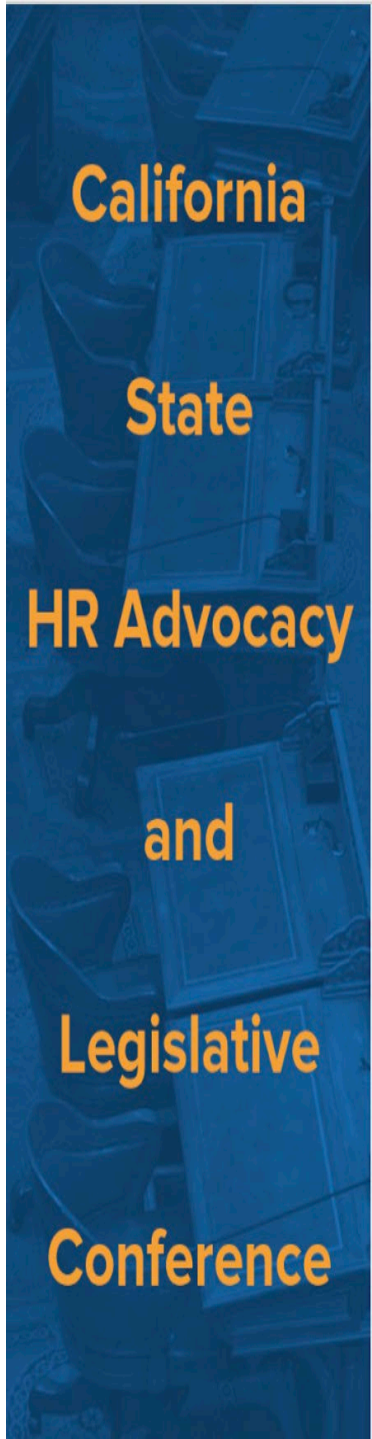
Vazquez et al., v. Jan-Pro Franchising International

- The court found that the *Dynamex* decision, which established the "ABC test" for determining whether an employee is an independent contractor, applies retroactively.
  - Public policy and fairness considerations favor the retroactive application of *Dynamex* to the case at hand.
  - No exceptions to retroactivity are justified, even if parties did not anticipate the interpretations made by the court.



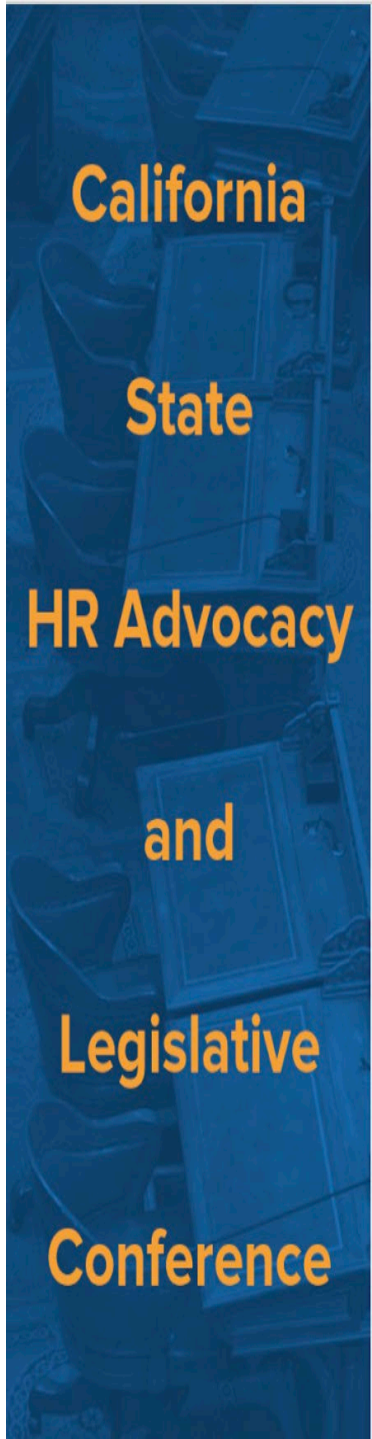
Vazquez et al., v. Jan-Pro Franchising International

- This means that independent contractors, who allege they were misclassified, can currently go back four years to recover unpaid wages assuming there is no pre-dispute arbitration agreement.
- Need to ensure that independent contractor agreements have arbitration agreements and that they are being properly classified as independent contractors.



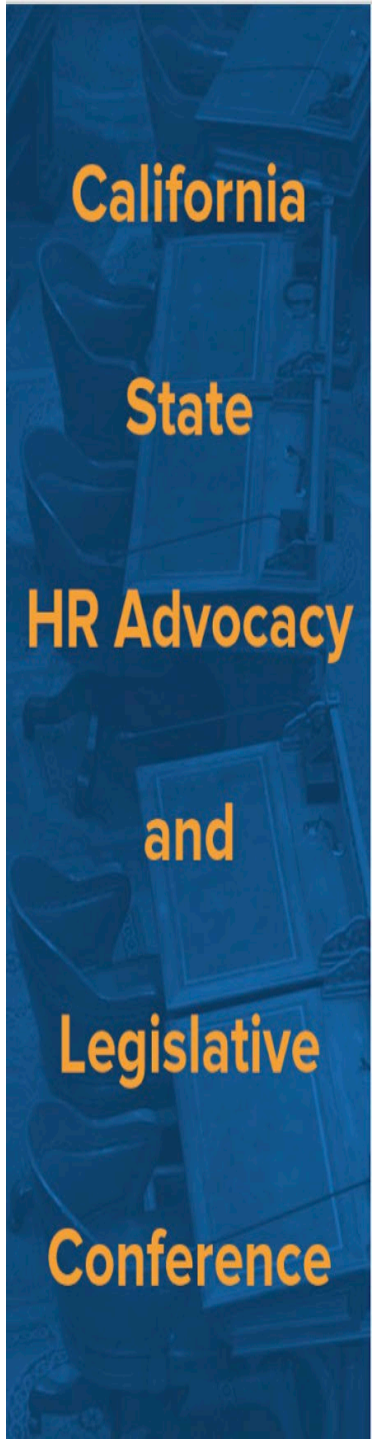
Ferra, et. al. v. Loews Hollywood Hotel

11 Cal. 5th 858



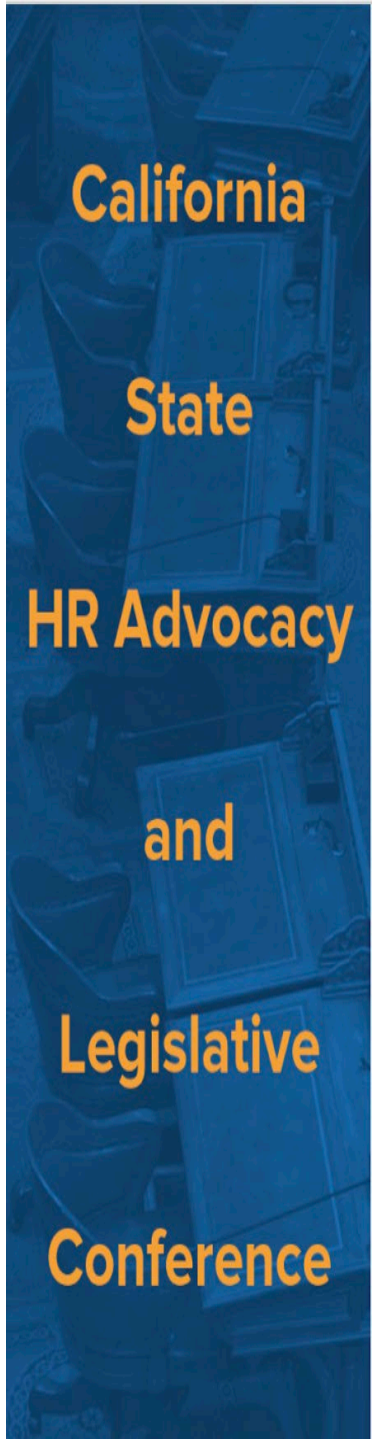
Ferra et al., v. Loews Hollywood Hotel

- Hourly employees brought a class action suit against their former employer, alleging violation of Labor Code § 226.7(c), due to employer's failure to pay noncompliant meal and rest breaks.
- Issue: Did the Legislature intend for the phrase "regular rate of compensation" under § 226.7(c) to have the same meaning as "regular rate of pay" under § 510(a)?
- More specifically, when paying a meal period premium, should an employer use a base hourly rate of pay or a blended rate that facts in commissions, bonuses and supplemental compensation.



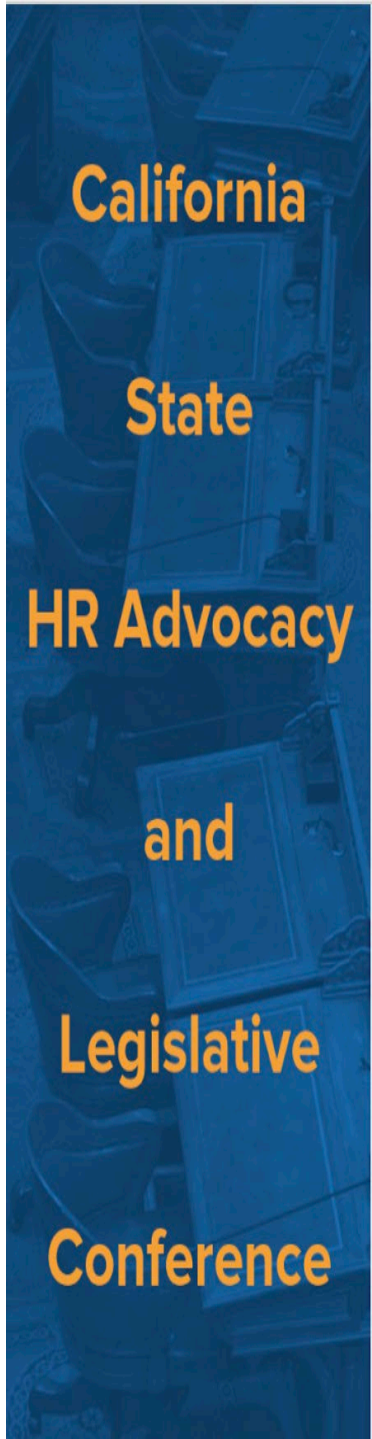
Ferra et al., v. Loews Hollywood Hotel

- California Supreme Court held that courts and the DLSE have consistently held the terms to have the same meaning under the FLSA.
  - Break premiums are designed to preserve employee's health and welfare, while overtime premiums are calculated to provide full wages for work performed.
  - If the Court adopted different meanings for each, employers would be "incentivized to minimize employees' base hourly rates and shift pay."
- The court ruled that you have to pay at the blended rate of pay, factoring in all wages for hours worked.
- This interpretation of the rules applies retroactively to both meal and rest period premiums.



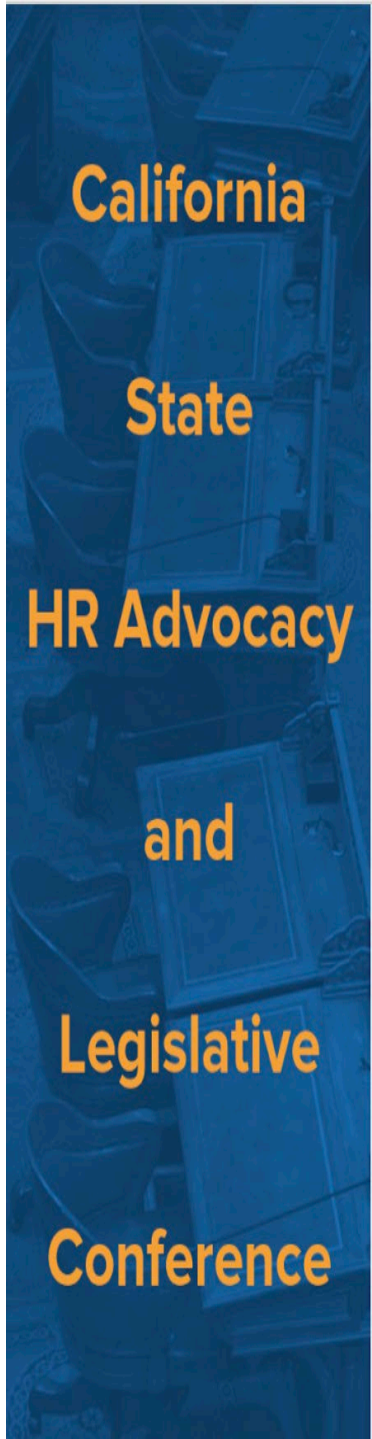
Ferra et al., v. Loews Hollywood Hotel

- Major takeaways:
  - If you have employees that have ever been entitled to supplemental compensation, you may have paid premium pay incorrectly in the past thus creating a potential PAGA violation.
  - If you pay commissions, bonuses or other supplemental compensation on a monthly, quarterly, semi-annual or annual basis, you will likely have to supplement that bonus with a “true up” meal period premium payment based upon the number of premiums paid during the bonus applies to.



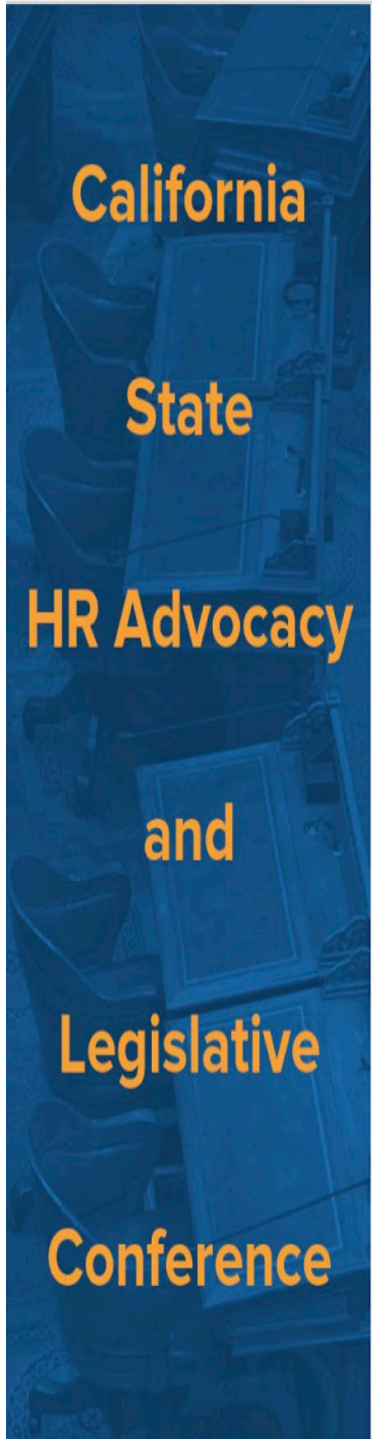
Donohue v. AMN Services, LLC

11 Cal. 5th 58



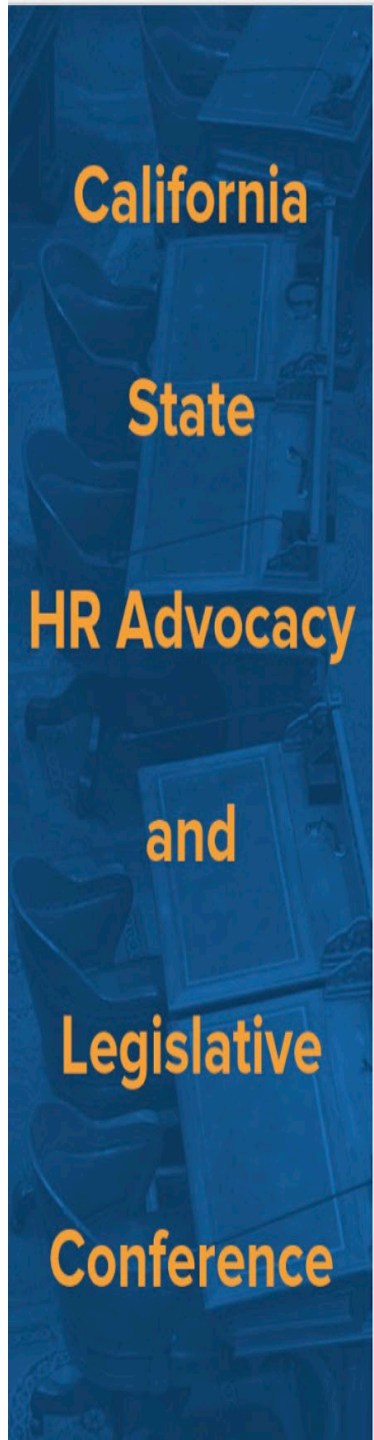
Donohue v. AMN Services, LLC

- Nurse recruiter filed a class action lawsuit against her former employer, claiming employer failed to pay premium wages for meal periods, and denied employees compliant meal periods.
- Issues Whether an employer may round time punches for meal periods and whether time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations.



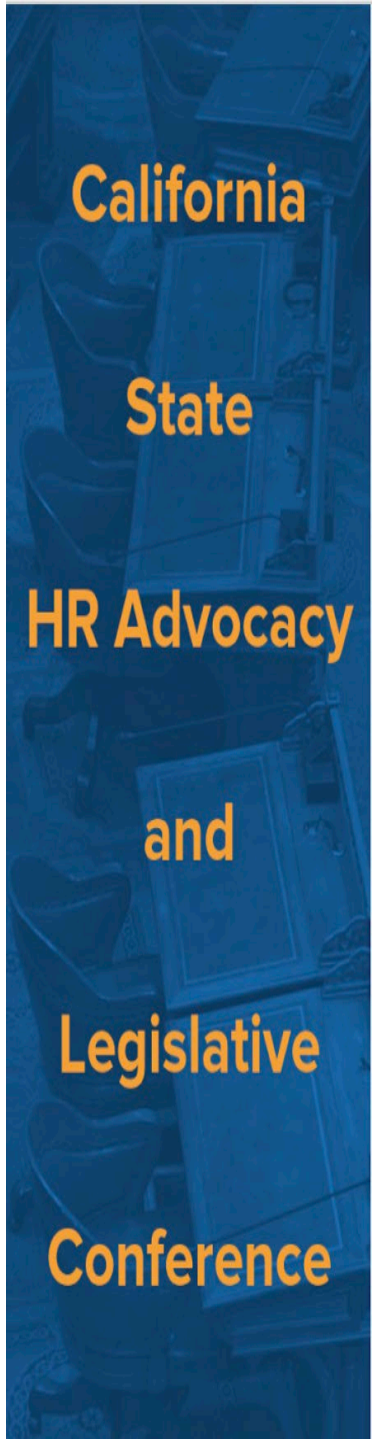
Donohue v. AMN Services, LLC

- The Court held that the practice of rounding time punches for meal periods is inconsistent with Labor Code § 512 and IWC Wage Order No.4.
  - Meal and rest periods are viewed as part of the "remedial worker protection framework," and rounding policies "erode" those protections.
- The Court found that the rebuttable presumption arises where records show noncompliant meal periods.
  - The burden is on the employer to prove that the employee "knowingly and voluntarily" chose not to take the meal period.



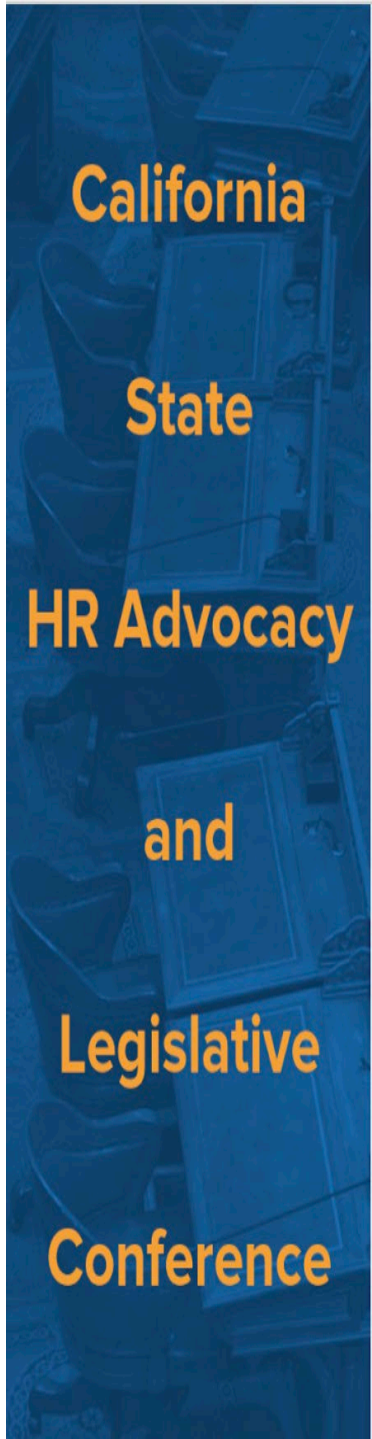
Donohue v. AMN Services, LLC

- Three main takeaways
  - Do not utilize a rounding system for meal period clock-in and clock-out records;
  - Consider whether any rounding program in timekeeping is proper;
  - Companies who utilize bell systems and auto-deducts should review practices to make sure they can demonstrate that an unpaid duty-free 30-minute uninterrupted meal period is being provided.



Jorgenson v. Loyola Marymount

68 Cal.App.5th 882 (2021)



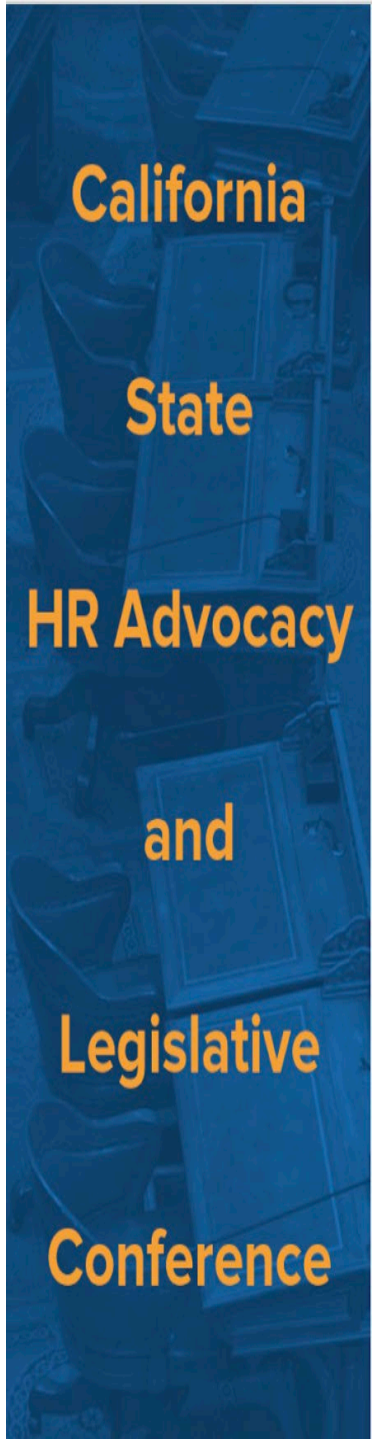
Jorgenson v. Loyola Marymount

Facts

- Plaintiff Jorgenson was a long-time employee of Defendant Loyola Marymount University when Johana Hernandez, a newer, younger employee that Jorgenson helped train, was promoted to be assistant dean over her.

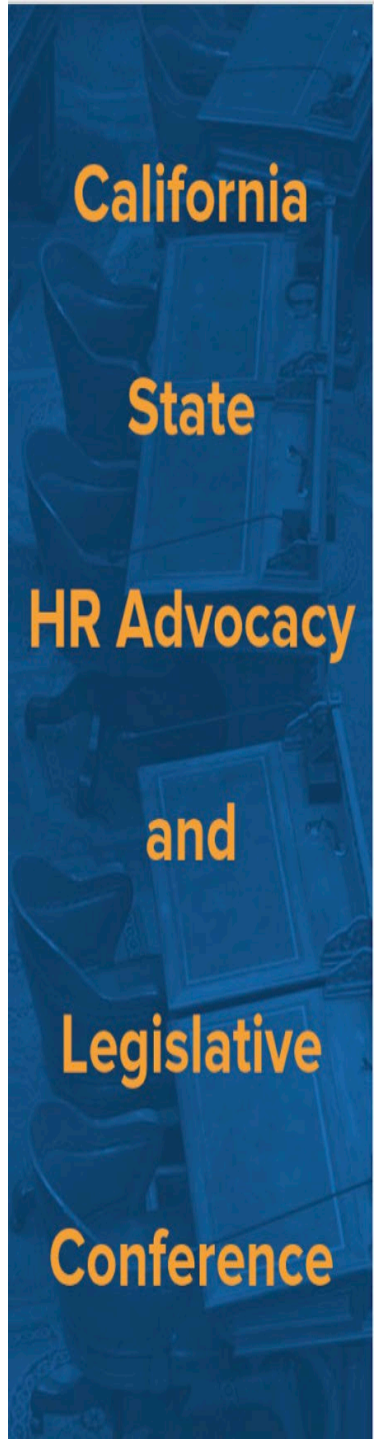
- Jorgenson sued the University for age and gender discrimination. The trial court excluded a declaration from a former university employee, explaining that during her employment, another employee who wasn't Jorgenson expressed interest in an open position. When the former employee mentioned this to Hernandez, Hernandez responded by saying that she "wanted someone younger."

- The trial court granted the University's motion for summary judgement because it found the comment irrelevant since it was made by someone not directly involved in the promotion at issue in the case.



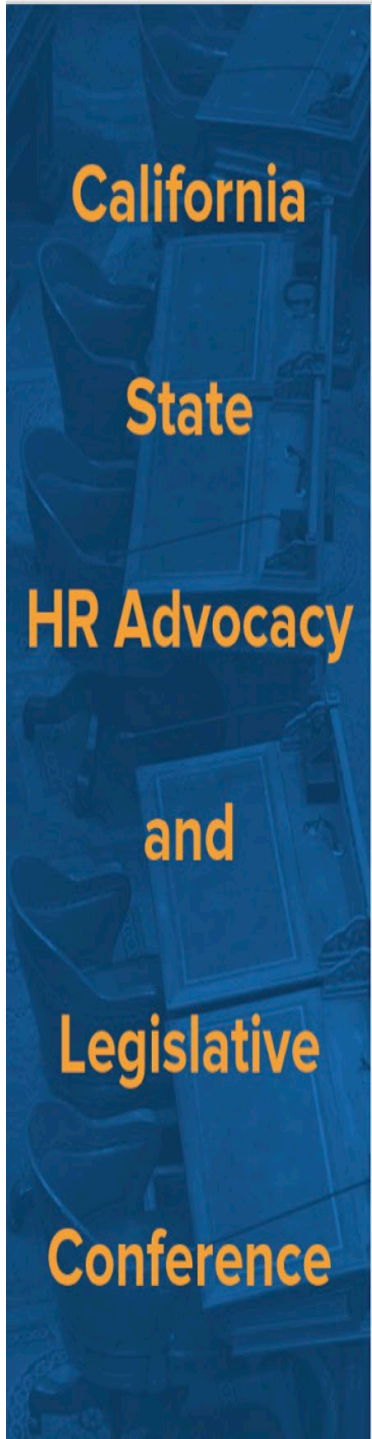
Jorgenson v. Loyola Marymount

- The Court of Appeal reversed the trial court's ruling on summary judgement, holding that the lower court erroneously excluded the former employee's declaration about Hernandez' stray remark.
- The court cited the California Supreme Court decision in *Reid v. Google, Inc.*, and noted that even an age-based comment from a non-decision maker "may be relevant, circumstantial evidence of discrimination" because it could influence the hiring and promotion decisions of the decision maker.
- Important here because now indirect evidence can be used by plaintiffs to create triable issues of fact to defeat summary judgment and/or meet their burden of proof.



Wesson v. Staples the Office Superstore, LLC

68 Cal.App.5th 746 (2021)

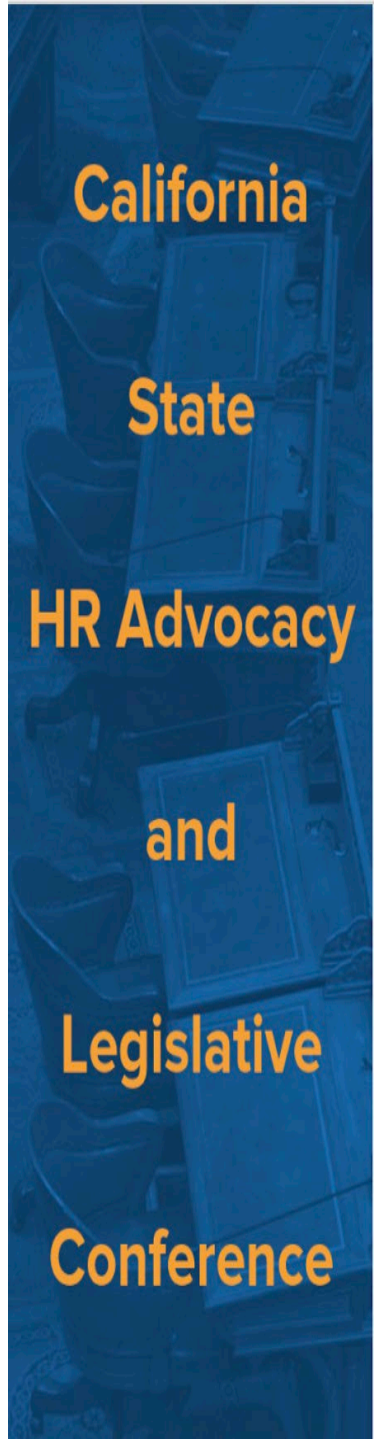


Wesson v. Staples the Office Superstore, LLC

- Plaintiff Wesson worked for Staples as a store general manager. Wesson brought an action against Staples alleging several causes of action, including unpaid overtime and failure to provide meal and rest breaks, based on the theory that Staples misclassified his position as exempt.

- Wesson later amended his complaint to add a cause of action seeking $36 million in civil penalties under the Private Attorneys General Act ("PAGA") on behalf of 346 store general managers.

- Plaintiff subsequently moved to certify a class of store general managers in the class action lawsuit, which the trial court denied because Plaintiff failed to demonstrate that his claims were susceptible to common proof.

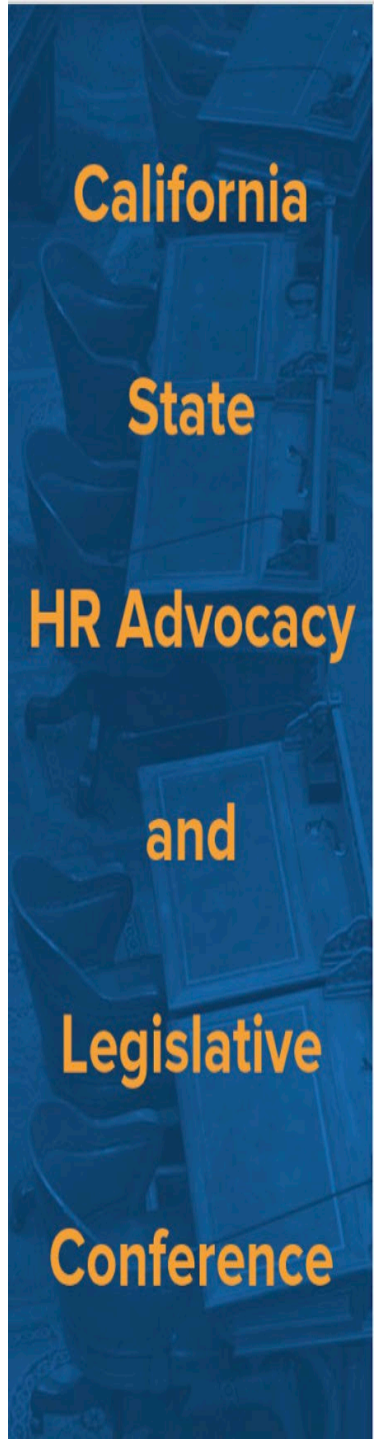


Wesson v. Staples the Office Superstore, LLC

- Staples then moved to strike Plaintiff's PAGA claims, invoking the trial court's inherent authority to manage complex litigation. Staples argued that litigating their affirmative defense that each general manager was properly classified would be unmanageable because Staples would need to conduct individualized investigations and present proof at trial for each manager.

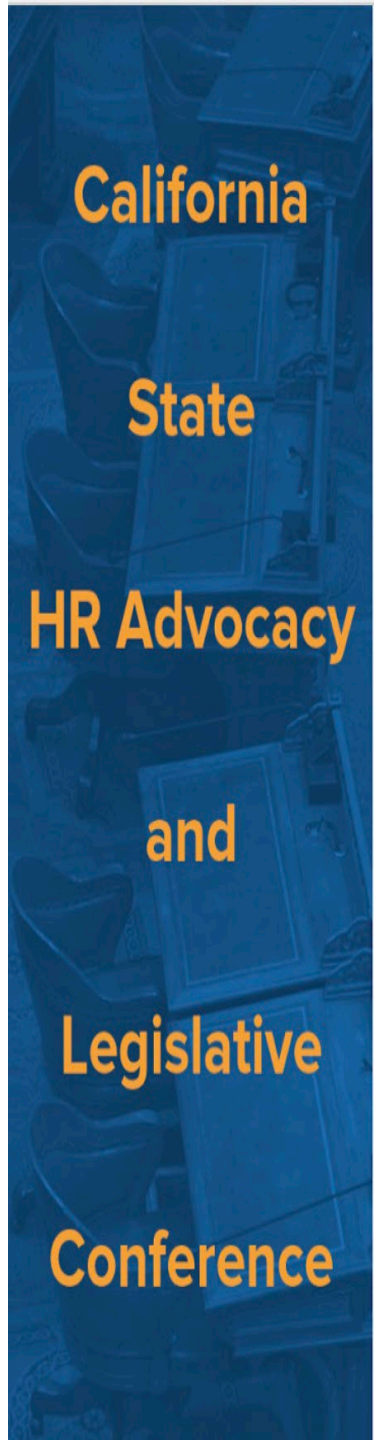
- During a subsequent hearing on Staples' motion to strike the PAGA claim, the parties estimated that they would need a total of six trial days per general manager to litigate the exemption status- which would cause the trial to last eight years.

- The trial court held that it had the authority to ensure the manageability of PAGA claims. After Wesson insisted the court lacked authority to ensure PAGA actions are unmanageable and failed to address how to manageably litigate Staple's affirmative defense, the court granted Staples' motion to strike the PAGA claim as unmanageable.



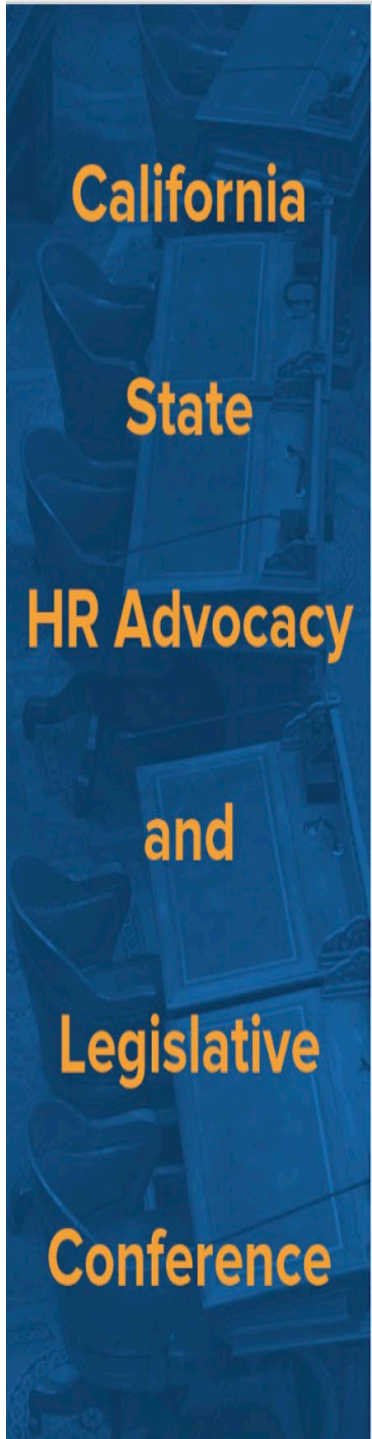
Wesson v. Staples the Office Superstore, LLC

- The court further held that if a PAGA claim cannot be manageably tried, the court may strike the claim if necessary, "and this authority is not inconsistent with PAGA's procedures and objectives, or with applicable precedent."
- The court concluded that because of Wesson's lack of cooperation with the trial court's question of manageability, the trial court did not abuse its discretion in granting Staple's motion to strike the PAGA claim as unmanageable.
- Major win for employers facing large PAGA claims.



All of Us or None v. Hamrick

64 Cal.App.5th 751 (2021)



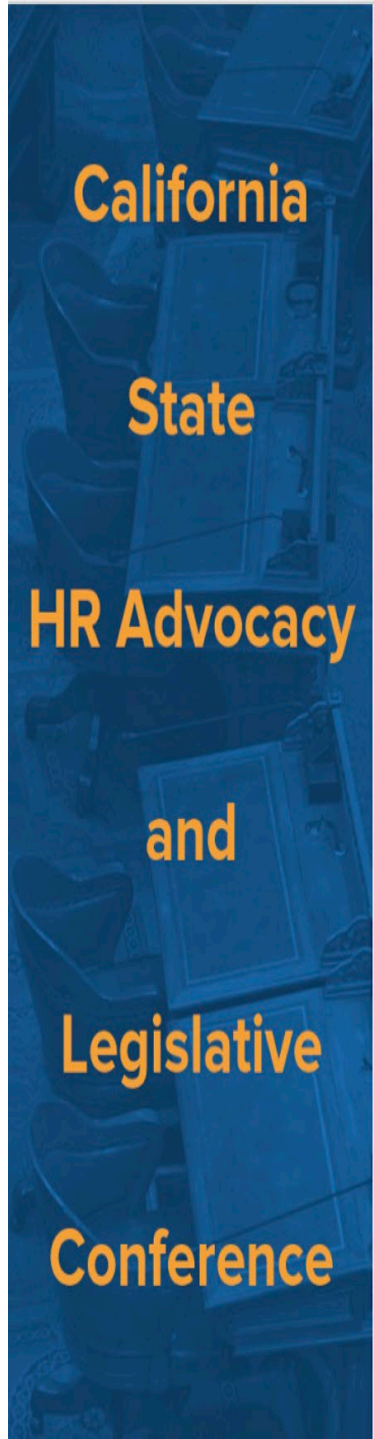
All of Us or None v. Hamrick

Facts

- Plaintiff All of Us or None-Riverside Chapter, a civil and human rights organization for formerly and currently incarcerated individuals, brought an action seeking declaratory and injunctive relief against Defendants: the Riverside Superior Court; the court's Executive Officer; and the court's clerk.

- Plaintiff alleged that Defendants violated Rule 2.507 of the Court by allowing the public to search the court's public website and criminal case index using an individual's date of birth or driver's license number as search criteria.

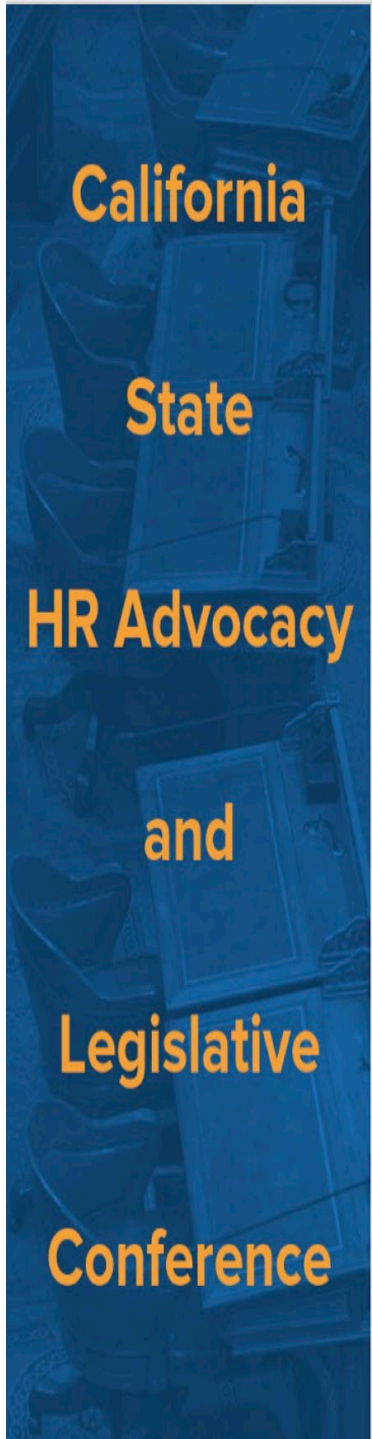
- The trial court held for Defendants, finding no violation of the California Rules of the Court. The court reasoned that the index did not make the person's date of birth or driver's license number available to the public; instead, someone searching the index must already know the information in order to access the criminal records information.



All of Us or None v. Hamrick

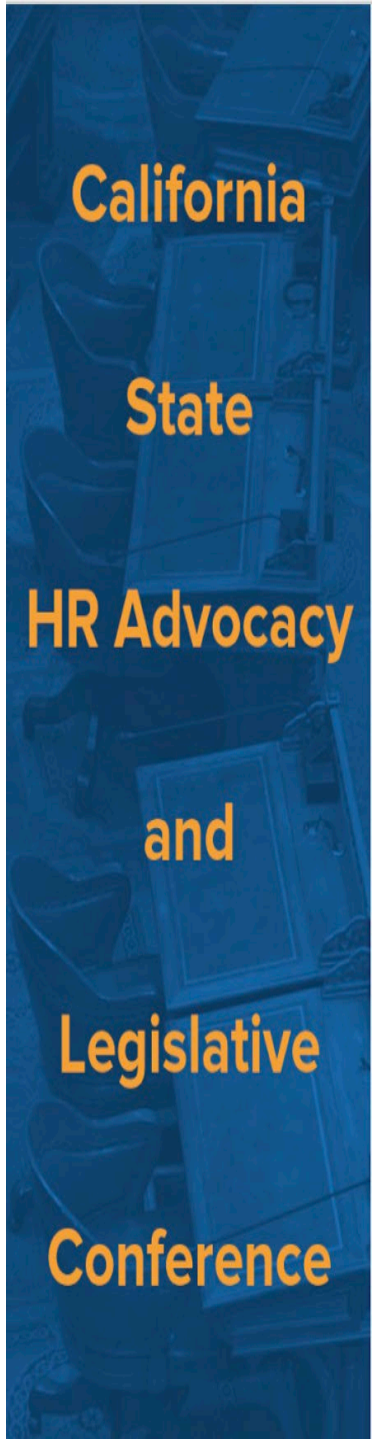
Result

- After considering the text, history and purpose of Rule 2.507, the Court of Appeal reversed the trial court's ruling.
- The court held that the California Rules of Court prohibit allowing public searches of its electronic criminal index through use of an individual's birthdate or driver's license number.
- This will have a significant impact on how third-party vendors conduct criminal background checks and you should consult with your vendor as to how they are accomplishing this, particularly if you are legally obligated to run the criminal check.



Sandoval v. Qualcomm

12 Cal.5th 256 (2021)



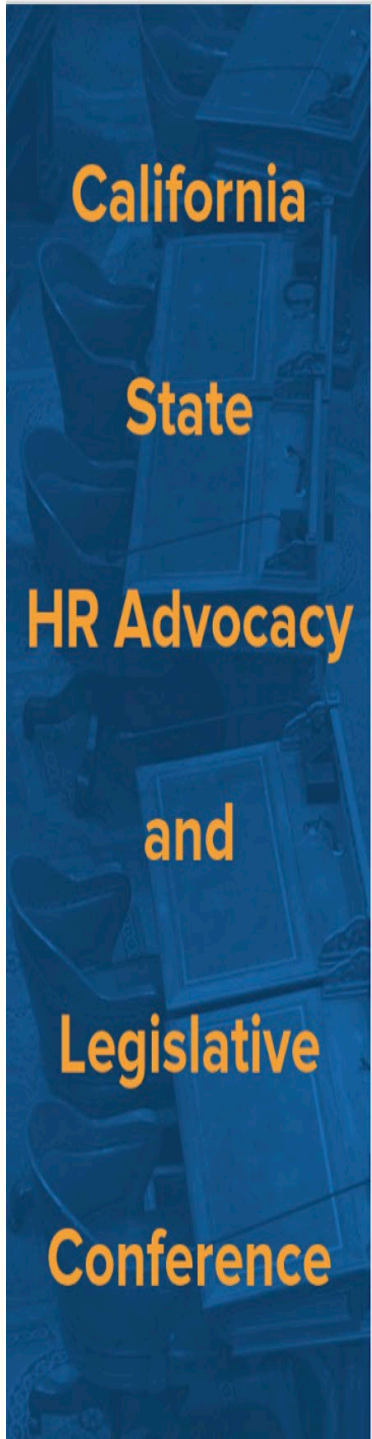
Sandoval v. Qualcomm

Facts

- Plaintiff Sandoval, an electrical parts specialist, was inspecting circuits within switchgears at Defendant Qualcomm's plant. The inspection was conducted by Sandoval's employer, TransPower Testing. During the inspection, Sandoval sustained third degree burns after he triggered an arc flash from a circuit he did not realize was "live" with flowing electricity.

- Sandoval sued Qualcomm for negligence and premises liability, arguing that despite the general rule of hirer non-liability for work-related injuries sustained by contractors' employees, Qualcomm was liable because it retained control over TransPower's inspection and thus, it should have implemented more precautions.

- A jury found for Sandoval, concluding that Qualcomm was liable for negligently exercising control over the worksite. The Court of Appeal affirmed the judgement.

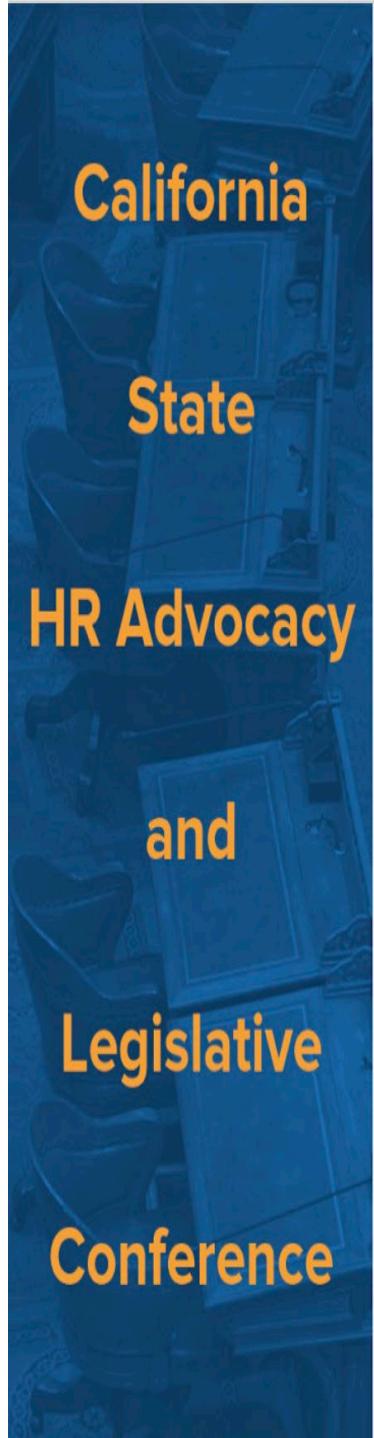


Sandoval v. Qualcomm

- The California Supreme Court reversed and remanded with instructions to enter judgement for Qualcomm.

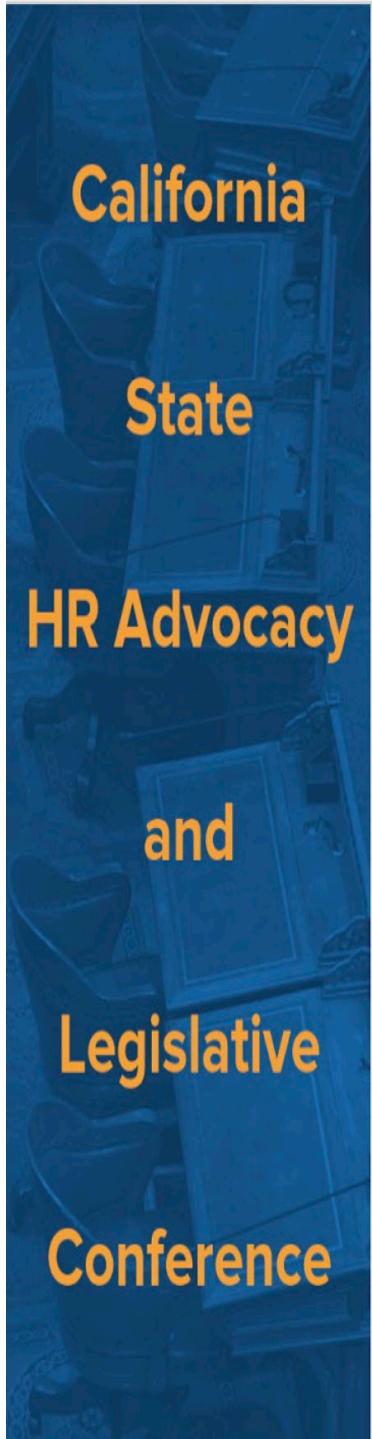
- The court reasoned that because contractors are generally hired based on their expertise and independence, there is a strong presumption that all responsibility for ensuring the safety of contract workers rests with contractors, not the hirer. Therefore, the responsibility here rested with TransPower and not Qualcomm.

- There are two narrow exceptions to the rule of hirer non-liability. The first exception, which was not at issue in the case, finds a hirer liable if it fails to disclose a concealed hazard to the contractor. The second exception, which was at issue in this case, holds a hirer liable if it retains control over the contractor's work and affirmatively contributes to the worker's injury. The court held that the second exception was not applicable in this case because, although TransPower did conduct a power-down, it had turned over control of the worksite and presumptively delegated to TransPower any preexisting duties it owed to Sandoval.



Zamora v. Security Industry Specialists

2021 WL 5037682

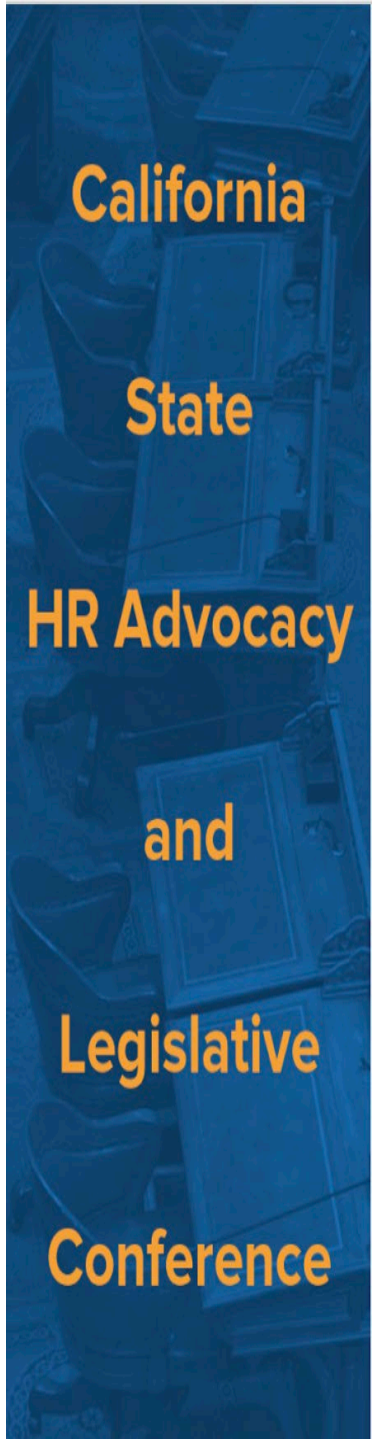


Zamora v. Security Industry Specialists

- Plaintiff Zamora was employed by Security Industry Specialists ("SIS") as a deployment field supervisor assigned to Apple's main campus in Cupertino, California. The job's physical requirements included walking 4-6 hours per day; standing 7 hours a day; climbing; stooping; and lifting up to 50 pounds.

- Eight days after he was hired, Zamora tripped and injured his knee while working. He asked SIS for work that involved less physical activity, but was told there was no other work for him to do.

- In November, 2020, Zamora went on leave because he could not tolerate the pain any longer. His doctor said he could return to work the following day on modified duties involving less physical activities, and that Zamora would need modified work for around two months. However, no modified work was assigned to Zamora.

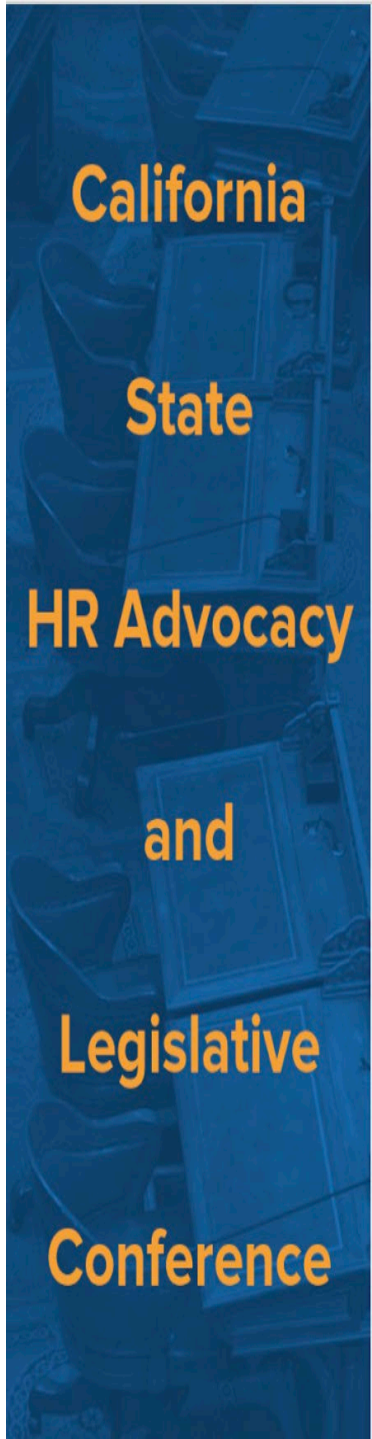


Zamora v. Security Industry Specialists

- In August or September 2021, Apple told SIS that it planned to cut its budget for the company's services, which prompted SIS to reduce its force. SIS eliminated 4 of the 19 supervisor positions at the site where Zamora worked, and because he was ranked 16th, Zamora's position was eliminated.

- After eliminating the 4 supervisory positions, SIS found other positions for 2 of the supervisors who ranked lower than Zamora and demoted them to patrol officers. However, Zamora was not given another position and instead, was laid off and told to look at available job postings at SIS.

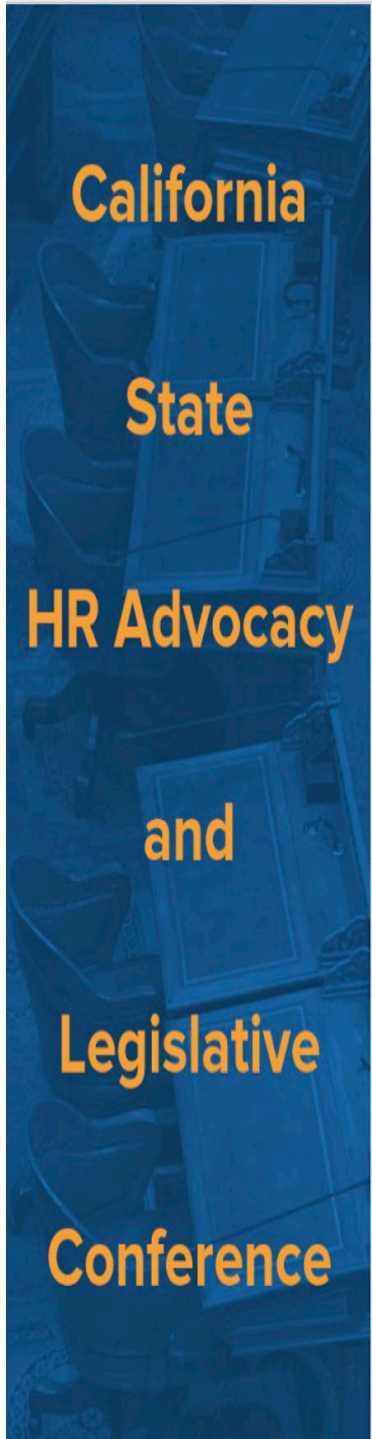
- Zamora sued SIS for various claims under the Fair Employment and Housing Act ("FEHA"). The trial court granted summary adjudication of all but two causes of action, holding that Zamora failed to show that he could do his job with a reasonable accommodation. The parties later stipulated to dismiss the remaining claims, and the court entered judgement for SIS.



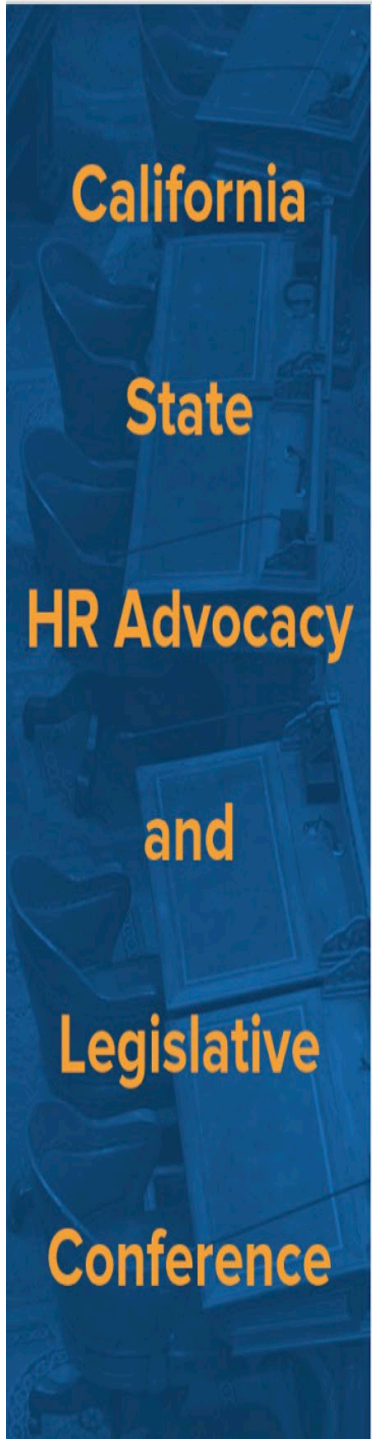
Zamora v. Security Industry Specialists

Result

- The Court of Appeal affirmed the trial court's summary adjudication in favor of SIS with respect to Zamora's retaliation claim. However, the court reversed the trial court's summary adjudication with respect to Zamora's disability discrimination and wrongful termination claims.
- As to the latter claims, the court held that it was unclear whether SIS ever offered an accommodation that would have enabled Zamora to perform the essential duties of his position or ever engaged in the interactive process, as required by law. Because Zamora presented substantial evidence of pretext or discriminatory intent, the court held he could proceed with his disability bias claims. Therefore, the court reversed the judgement and remanded the matter for further proceedings in the trial court.
- The single failure to participate in the interactive process could be bias necessary to establish a disability discrimination claim.



Mandatory Arbitration Agreements



Part 1: AB 51 Litigation

- AB 51 Refresher:
  - Signed into law in 2019
  - Employers **are prohibited** from mandating arbitration agreements as a condition of employment and from retaliating against employees/applicants who refuse to sign
  - Agreements that require “opting out” consider to be mandatory
  - Considered an unlawful employment practice – subject to private right of action
  - Attorneys fees recoverable
  - Violation considered a crime

Part 1: AB 51 Litigation

- In September of 2021, Split Ninth Circuit panel partially upheld AB 51:
  - Employers **are prohibited** from mandating arbitration agreements as a condition of employment and from retaliating against employees/applicants who refuse to sign
    - Federal Arbitration Act does not preempt because:
      - AB 51 does not invalidate or make agreements unenforceable
      - Even if the agreement is consummated in violation of the statute
      - Statute only regulates pre-agreement behavior, and FAA applicable post-agreement
    - FAA only governs consensual agreements, unlike those governed by law

Part 1: AB 51 Litigation

- HOWEVER, law **does not invalidate** arbitration agreements that are otherwise enforceable under FAA
  - Pre-AB 51 Agreements ok
  - Presumably could enforce agreements even after, but face consequences
- AND, **FAA does preempt** AB 51's enforcement mechanisms
  - Employers will not face criminal prosecution
  - Civil penalties also off the table
- Immediate En Banc Review requested = stayed pending appeal – so law still not in effect

- 9th Circuit deferred until after pending decision in SCOTUS case…

Part 2: Viking River Cruises v. Moriana

- Underlying case facts
  - Moriana sued Viking River Cruises under Private Attorney General Act (PAGA)
  - Long line of CA decisions follow the California Supreme Court's decision in Iskanian v CLS Transportation
    - Held that arbitration agreement are unenforceable as to PAGA claims
    - PAGA claims are essentially the state vs. the employer
    - State not a party to the agreement…
  - Court denied Motion, and Viking River appealed
  - Eventually, US Supreme Court granted review
    - Several prior attempts to get PAGA preemption under FAA had failed
    - Timing was somewhat unusual – fast tracked

Part 2: Viking River Cruises v. Moriana

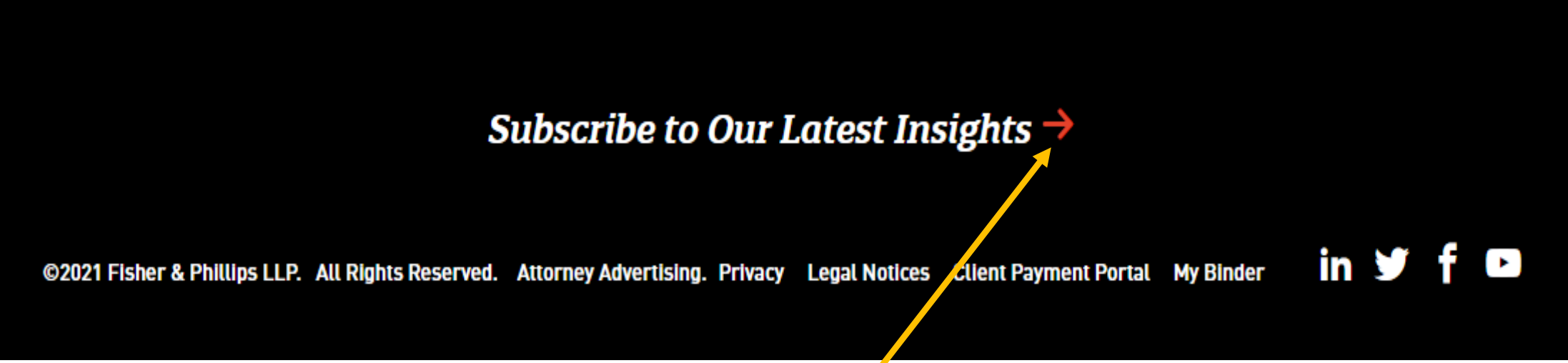
- SCOTUS heard oral argument on March 30th
- Decision expected by end of June
- Potentially massive implications
  - Complete preemption
  - Allow PAGA in arbitration?
- Key is to prepare now

Part 3: Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFASASHA)

- New Federal law
- Prohibits mandatory arbitration of sexual harassment and sexual assault
- Provides employee right to “elect”
  - Invalidate arbitration agreement
  - Arbitrate
- Claims arising after March 3, 2022

(Re)Drafting Mandatory Arbitration Agreements

- Potential next steps
  - AB 51
    - STOP the use of mandatory arbitration agreements
    - PROCEED with using mandatory arbitration agreements
    - Ensure that agreements are VOLUNTARY
  - EFASASHA
    - Modify arbitration agreements to include election or exclude covered claims
    - Wait and see (provided existing agreement contains carve out)
  - Viking River
    - Probably best to wait and see, but prepare



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Questions?

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