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Inside This Issue

Key Takeaways from the DOL's "Best Practices" Missing Participant Guidance

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Introduction

All too often, retirement plan administrators and benefits attorneys encounter situations with missing participants or uncashed checks that result in head scratching and exasperation. It is difficult to believe that trying to deliver money to someone could produce such frustration, but it happens more than one would think. In an attempt to alleviate some of these woes and help ensure that participants and their beneficiaries receive the retirement benefits due to them, the Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) came out with three related pieces of guidance on January 12, 2021[1]: (1) a set of Best Practices for Pension Plans[2] (the "Best Practices"), describing steps that plan fiduciaries can take to reduce missing participant issues; (2) Compliance Assistance Release No. 2021-01,[3] outlining the investigative approach that guides the

[1] U.S. Dep't of Labor (DOL), Employee Benefits Security Admin. (EBSA), Missing Participant Guidance, *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/missing-participants-guidance.

[2] DOL, EBSA, *Missing Participants - Best Practices for Pension Plans* (Jan. 12, 2021) (hereinafter the "Best Practices"), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/missing-participants-guidance/best-practices-for-pension-plans.

[3] DOL, EBSA, Compliance Assistance Release No. 2021-01, *Terminated Vested Participants Project Defined Benefit Pension Plans* (Jan. 12, 2021), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/missing-participants-guidance/compliance-assistance-release-2021-01.

(Continued on page 183)








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(Continued from page 181)

DOL's regional offices under its Terminated Vested Participants Project; and (3) Field Assistance Bulletin 2021-01,[4] authorizing fiduciaries of terminating defined contribution plans to transfer missing participants' account balances to the Pension Benefit Guaranty Corporation's (PBGC) Missing Participants Program as a matter of temporary enforcement policy. This article highlights key points from the Best Practices and focuses on practical tips plan fiduciaries can take away from the DOL guidance.

Background

The DOL has increased its focus in recent years on missing participant issues, specifically on whether plan fiduciaries and service providers are taking sufficient steps to locate participants or beneficiaries who are entitled to a benefit but cannot be found. While numerous DOL audits have centered on this issue, and the DOL has issued guidance on fiduciary duties and missing participants in *terminating* defined contribution plans (e.g., FAB 2014-01[5]), there has been little regulatory input explaining how the audits would be conducted or how fiduciaries and service providers can demonstrate that they have satisfied their obligations under the Employee Retirement Income Security Act of 1974[6] ("ERISA") to search for missing participants in the case of an *ongoing* plan. The DOL's January 2021 publications, while largely nonbinding, provide welcome guidance.

Best Practices

In 2020, EBSA investigators helped missing and nonresponsive participants recover over $1.4 billion in benefits. Drawing on this experience, the DOL developed the Best Practices. The DOL notes that the Best Practices are not mandatory, do not have the force of law, and are only intended to "provide clarity" to plan fiduciaries on how to prevent missing participant issues before they crop up and how to handle them once they do. The DOL's guidance is based on general fiduciary principles that apply equally to defined benefit and defined contribution plans. The DOL also emphasized that plan fiduciaries are not expected to take every step discussed below; rather, fiduciaries should balance the cost and burden of these steps against the amount of money at issue, and should also consider which steps would be most effective in light of a plan's participants.

Monitor for Red Flags

In its Best Practices, the DOL begins by highlights a number of "red flags" to be aware of that often indicate a deeper missing participant issue, including:

- More than a "small number" of missing or nonresponsive participants.
- More than a "small number" of participants who have terminated employment with a vested benefit and reached normal retirement age, but have not started receiving their pension benefits.
- Missing, inaccurate, or incomplete contact information, census data, or both (for example, incorrect or out of date mail, email, and other contact information; partial social security numbers; missing birthdates or spousal information; or other "placeholder" entries, such as "01/01/1900" used for birthdates or "John Doe" for names).
- An absence of sound policies and procedures for handling returned or undeliverable mail.
- An absence of sound policies and procedures for handling uncashed checks.

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[4] DOL, EBSA, Field Assistance Bulletin No. 2021-01, *Temporary Enforcement Policy Regarding the Participation of Terminating Defined Contribution Plans in the PBGC Missing Participants Program* (Jan. 12, 2021) ("FAB 2021-01"), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2021-01.

[5] DOL, EBSA, Field Assistance Bulletin No. 2014-01, *Fiduciary Duties and Missing Participants in Terminated Definedc Contribution Plans* (Aug. 14, 2014) ("FAB 2014-01"), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2014-01.

[6] 29 U.S.C. § 1001 et seq.

Take-away: To keep red flags at bay, regular audits of plan census information should be conducted to identify potential issues. Because large plans often outsource responsibility to a recordkeeper for maintaining and updating census data, it may be necessary to review the recordkeeper agreement to determine how often they audit census information, and to discuss with the plan's recordkeeper steps that can be taken to keep information up to date. It is also important to understand the recordkeeper's process for handling change of address notices and returned or undeliverable mail, and whether there is a comprehensive policy that describes the process for handling missing or unresponsive participants.

Maintain Accurate Census Information

Next, the DOL points to active steps that plan fiduciaries can take to prevent red flags from arising. As noted above, one of those steps is ensuring census information stays current. In addition to auditing census information for red flags, the DOL suggests using the following methods, as appropriate:

- Periodically contact participants (both active and retired) and beneficiaries to confirm or update contact information (which could include social media and next of kin/ emergency contact information).
- Make it easy for participants to update their contact information. For example, include contact information change requests in plan communications, allow participants to update contact information for themselves/ their beneficiaries online, include prompts for participants and beneficiaries to confirm their contact information when logging into their online plan accounts, and update census records based on participant updates.
- Flag undeliverable mail, email, and uncashed checks for follow-up.
- Pay particular attention around major corporate events, such as mergers and acquisitions, or a change of recordkeepers, which are all common times for plans to lose track of participants. The DOL noted that "well-run plans" will make missing participant searches of the plan at issue, related plans (e.g., health plans) and employer records (e.g., payroll records) part of the collection and transfer of records.

Take-away: To the extent possible, contact information change requests should be included in most, if not all, plan mailings. It is also important to regularly remind participants and beneficiaries of the need to keep contact information up to date. Ideally, platforms used for participants and beneficiaries to access account information and make online elections would include a prompt upon login asking for confirmation of contact information. Based on the DOL's guidance, adding fields for participants to include social media contact information—especially in the context of a younger participant population—such as Twitter and Instagram handles, could be beneficial.

In the plan termination context where the plan's recordkeeper is responsible for issuing checks to participants in satisfaction of plan benefits, it is essential to understand when the checks go stale and what processes the recordkeeper has in in place to deal with uncashed checks. This is particularly important when seeking to transfer missing participant balances to the PBGC.

Effective Communication Strategies

The DOL suggests the following practices in communications with participants and beneficiaries:

- Use plain language, offer non-English assistance, and encourage contact through the plan/plan sponsor website and toll-free numbers.
- State upfront and prominently what correspondence is about, such as in a subject line;
- Ensure that correspond is identifiable to participants. For example, if a participant's 401(k) plan changed names or plan sponsor after the participant terminated employment, label correspondence with the name of the plan or plan sponsor, as applicable, that was in use while the participant was an active employee.
- Inform participants as to how the plan can help eligible employees consolidate defined contribution plan accounts or rollover IRAs.
- Build in steps during the onboarding and exit processes to confirm or update contact and other necessary information to calculate benefits, and remind employees of the importance of keeping contact information updated.

Take-away: Much of the DOL's Best Practices involve working closely with recordkeepers and/or other service providers that maintain the plan's website and phone number. Along these lines, it is valuable to confirm the capabilities of service providers, such as

determining what language assistance is available in light of a plan population's needs and discussing how mailings will be labelled. It is also important to ensure that the process used during onboarding/exit interviews includes confirming or updating contact information, and then transferring any updated information to the recordkeeper.

Missing Participant Searches

The meat of the issue is what to do when participants are missing or unresponsive. The DOL suggests "searching regularly" using "some or all" of the following steps:

- Draw on information from related plans and employer/payroll records for participant, beneficiary, and next of kin/emergency information.
- Check with designated beneficiaries and emergency contacts.
- Use free online tools such as search engines social media, and proprietary internet search tools.
- Use a commercial locator service or a credit-reporting agency, or review public records databases (like those for mortgages or real estate taxes).
- Attempt contact at the last known address through U.S. Postal Service certified mail or a private delivery service, and/or attempt contact by email, phone, text, or social media.
- Search obituaries and death records if participants remain nonresponsive and then redirect communications to beneficiaries if appropriate.
- Reach out to missing participants' colleagues by, e.g., contacting employees who worked with the participant or union officials.
- Register missing participants on public and private pension registries, such as the National Registry of Unclaimed Benefits, and publicize the registry to participants.

The DOL noted that not all of its suggested practices to locate missing participants are appropriate for every plan, and plan fiduciaries should consider what practices would yield the best results, taking into account the participant population, the size of a particular participant's account balance, and the cost of search efforts.

Take-away: The DOL's missing participant search guidance is wide ranging, and the steps outlined above are not meant to be performed in any particular order. Further, and as expressly stated therein, the Best Practices do not have the force and effect of law and are not meant to obligate fiduciaries to take any specific actions to locate missing participants. The DOL explicitly did not state exactly what a fiduciary must do to locate a missing participant, but noted that plan fiduciaries can consider the cost of the search and the size of the participant's account balance. Determining which steps to take, and how many, involves consideration of ERISA's fiduciary duties, including the duty to act with the care, skill, prudence, and diligence that another prudent fiduciary would use under the circumstances.

Much of the DOL's guidance involves contacting people other than the participant – e.g., the administrator of another plan, the participant's beneficiary, or the participant's former coworkers. The DOL even suggests publishing a list of "missing" participants, e.g., on the plan sponsor's intranet, though plan sponsors may have significant concerns with this approach. The DOL itself acknowledged that some of these steps may implicate privacy concerns and, therefore, privacy counsel should be consulted before employing these approaches.

Policies & Procedures

Finally, the DOL advises implementing written policies and procedures to ensure they are clear, and documenting key decisions and actions taken to implement those policies. The DOL also advises ensuring recordkeepers are performing agreed-upon services and working with the recordkeeper for communication practices.

Take-away: The types of policies fiduciaries may want to document include: (i) guidance for handling undeliverable/returned mail, email, and uncashed checks; (ii) procedures for conducting regular plan census information audits; (iii) plans for collecting census information during employee onboarding and exit processes; and (iv) guidelines outlining what steps will be taken to take to locate missing participants. Fiduciaries should also make sure to document all steps taken to follow these procedures and locate participants. Having sufficient documentation could be especially useful in the case of a DOL audit. Further,

in the case of a terminating plan, one thing you can be assured of is that on audit, the DOL will request to see missing participant and uncashed check procedures, as well as documentation of steps that have been taken in an attempt to locate missing participants.

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Wage & Hour Advisor: Court of Appeal Holds Wage Statements Need Not Show Full 1.5x Overtime Rate; Showing the 0.5x OT Premium Rate is Sufficient

Aaron Buckley

Introduction

On May 28, 2021, the California Court of Appeal issued an opinion holding that wage statements showing hourly pay rates with the combined number of overtime and non-overtime hours worked at each rate and listing overtime hours a second time with 0.5 times the regular rate of pay rather than a 1.5 times overtime rate complied with Labor Code section 226, the California law that specifies requirements for employee wage statements.

Background on Labor Code Section 226

Labor Code section 226, subdivision (a) requires employers to issue to an employee, with each payment of wages, an accurate itemized wage statement that includes, among other things, "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. . . .[1]

An employee suffering injury from a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed four thousand dollars ($4,000), and is entitled to an award of costs and reasonable attorney's fees.[2] Employers who violate subdivision (a) are also subject to a civil penalty (recoverable in a Private Attorneys General Act (PAGA) action) in the amount of two hundred fifty dollars ($250) per employee per violation in an initial citation and one thousand dollars ($1,000) per employee for each violation in a subsequent citation.[3]

General Atomics v. Superior Court (Green)[4]

Tracy Green filed a class and PAGA action against her employer, General Atomics, for issuing her wage statements that she contended failed to comply with Labor Code section 226, subdivision (a).[5] Green argued that the correct rate of pay for overtime wages was 1.5 times the regular rate of pay, but the wage statements issued to her showed only 0.5 times the regular rate.[6] General Atomics contended its wage statements were lawful, and filed a motion for summary judgment in which it argued its wage statements complied with subdivision (a) because they showed the applicable hourly rates—i.e., the standard contractual hourly rate and the 0.5 times premium rate—and the hours worked at each.[7] In support of its motion General Atomics presented a sample wage statement from the Division of Labor Standards Enforcement (DLSE), the state agency charged with enforcing California's wage and hour laws, showing the overtime hourly rate as a 0.5x overtime premium.[8] General Atomics also argued that showing a 1.5x overtime rate would produce noncompliant wage statements in many scenarios, including when an employee is paid at multiple standard hourly rates during a single pay period.[9]

The trial court denied General Atomics' motion for summary judgment, finding that the wage statements it issued were noncompliant, and that it should have shown the non-overtime hours and overtime hours separately, with their applicable hourly rates.[10] General Atomics filed a petition for writ of mandate challenging the trial court's order, and the court of appeal issued an order to show cause and ordered briefing.[11]

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[1] Cal. Lab. Code § 226, subd. (a)(9).

[2] Cal. Lab. Code § 226, subd. (e)(1).

[3] Cal. Lab. Code § 226.3.

[4] No. D078211, 2021 Cal. App. LEXIS 452 (May 28, 2021).

[5] 2021 Cal. App. LEXIS at *3.

[6] 2021 Cal. App. LEXIS at *3.

[7] 2021 Cal. App. LEXIS at *3-4.

[8] 2021 Cal. App. LEXIS at *4.

[9] 2021 Cal. App. LEXIS at *4.

[10] 2021 Cal. App. LEXIS at *5-6.

[11] 2021 Cal. App. LEXIS at *6-7.

The court of appeal characterized the issue as a dispute over the meaning of the phrase, "all applicable hourly rates," a phrase used but not defined in Section 226, subdivision (a).[12] To determine whether General Atomics' wage statements complied with the statute, the appellate court began its analysis by making a number of observations about the nature of overtime pay and how it is calculated.

First, the three-judge panel noted that when an employee works overtime, the employee is entitled to receive one-and-one-half times the "regular rate of pay" for overtime hours.[13]

Second, an employee's "regular rate of pay" is not the same as the employee's standard contractual (straight-time) rate of pay, because the regular rate of pay must include adjustments to the standard contractual rate including shift differential pay and other non-hourly compensation earned by the employee during the week.[14]

Third, because not all employees earn standard contractual pay at a single rate that remains fixed throughout the pay period, the regular rate of pay can be a weighted average that reflects work done at varying times at varying rates.[15]

And finally, although the statutory overtime rate is 1.5x the regular rate of pay, an employee does not simply earn 1.5x the regular rate of pay for overtime hours, in addition to the standard contractual rate for non-overtime hours.[16] The regular rate reflects an employee's total standard compensation divided by the employee's total hours worked.[17]

According to the panel, to use a 1.5x calculation for the regular rate of pay "intelligibly," the wage statement must reflect that all hours are being compensated at the "regular" rate of pay, with non-overtime hours at 1.0x the "regular" rate (as opposed to the actual hourly rate), and overtime hours at 1.5 times the regular rate.[18] However, the panel reasoned, "simply showing non-overtime hours and overtime hours worked as multiples of the regular rate of pay would obscure the standard contractual hourly rates."[19] The court observed that the wage statements provided by General Atomics avoided this result by identifying the standard or contractual hourly rates, with the total number of hours worked at each rate, and then identifying separately the 0.5x overtime premium, based on the "regular" rate of pay, and multiplying by the number of overtime hours. The appellate court also determined that the format of General Atomics' wage statement resulted in the correct total pay.[20]

Returning to Section 226, subdivision (a)'s requirement that a wage statement show "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate," the panel concluded the General Atomics wage statements complied with this requirement because they showed the standard (straight-time) rates in effect and the total number of hours at each rate, and also showed the overtime rate as a premium, 0.5x the regular rate of pay, and the total number of overtime hours worked at that rate.[21] "Multiplying the 0.5x overtime rate by the number of overtime hours, and adding that result to the employee's total contractual compensation, results in the correct total pay. . . . The wage statements provided by General Atomics therefore show both the applicable hourly rates and the total number of hours worked at each. They do not run afoul of the statute."[22]

The panel opined that Green's interpretation of the statute, which would require showing all overtime pay at 1.5x the regular rate of pay, "makes it more difficult for an employee to calculate her total contractual compensation because she must split the contractual compensation attributable to the overtime hours from the overtime premium."[23] Based on this analysis, the court of appeal granted General Atomics' petition and ordered the trial court to vacate its order denying General Atomics' motion for summary judgment and to enter an order granting the motion.[24]

[12] 2021 Cal. App. LEXIS at *10-11.

[13] 2021 Cal. App. LEXIS at *11.

[14] 2021 Cal. App. LEXIS at *11-12.

[15] 2021 Cal. App. LEXIS at *12.

[16] 2021 Cal. App. LEXIS at *13.

[17] 2021 Cal. App. LEXIS at *13.

[18] 2021 Cal. App. LEXIS at *13.

[19] 2021 Cal. App. LEXIS at *14.

[20] 2021 Cal. App. LEXIS at *14.

[21] 2021 Cal. App. LEXIS at *14-15.

[22] 2021 Cal. App. LEXIS at *15.

[23] 2021 Cal. App. LEXIS at *16.

[24] 2021 Cal. App. LEXIS at *23.

Conclusion

Assuming the court of appeal's opinion is not reversed by the California Supreme Court, it clears up a long-simmering dispute over the correct interpretation of Labor Code section 226, and brings some welcome relief to employers who have been frustrated by conflicting trial court opinions on the issue.

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The Amazon Union Vote, the PRO Act, and the Future of Labor Organizing*

Alexis Pellechio

Introduction

Labor organizing and unions are relatively recent inventions in the course of human history, yet few topics can inspire such strong feelings or heated debate in the United States. Since the passage of the National Labor Relations Act in 1935, employees and employers alike have frequently sparred over the benefits and burdens of unionization. Now, even as unionization rates are at an all-time low, it seems that the public has returned its focus to the labor movement. The recent widely publicized Amazon union vote in Bessemer, Alabama, combined with political changes in Washington D.C. and increased activism in general across the country, have created the sense among some that the labor movement is poised to have its moment. Adding to the conversation is the recent introduction and passage in the House of Representatives of the Protecting the Right to Organize Act[1] (PRO Act). The PRO Act, which would greatly enhance the ability of unions to organize workers, has been introduced in Congress before but previously could not progress in a GOP-controlled Senate. Now, with political power having shifted, Congress is considering the bill again. The current version is sitting in the Senate, where it is unlikely to pass in its present form. Even so, given the new energy and push from pro-labor politicians and labor leaders to enact significant changes to promote union organizing, it is beneficial to explore and understand the provisions that might become part of a final version of the PRO Act. If passed, the PRO Act would be the most significant modification to the National Labor Relations Act since 1947.

The Historic -and Tumultuous- Amazon Vote

On April 9, 2021, over 3,000 Amazon warehouse workers in Bessemer, Alabama cast ballots to decide whether to form a union.[2] The vote ended a months-long campaign by the Retail, Wholesale and Department Store Union (RWDSU) to organize warehouse workers at the country's second largest employer. While the warehouse only opened about a year ago, organizing efforts came together shortly thereafter when a small group of workers approached the union.[3] Their chief complaints concerned Amazon's near-constant supervision of them throughout the workday and their managers' unwillingness to listen to or address employee concerns.[4] The union was able to garner enough support amongst workers for the National Labor Relations Board to hold an election. Despite what appeared to be strong early support, workers in the end voted decisively against forming a union.[5]

The RWDSU's campaign was the latest unsuccessful attempt to organize workers within Amazon. Amazon has been facing labor organizing efforts for years as critics speak out against the company's high productivity standards, low wages, and lack of worker input. In 2014, Amazon technicians in Delaware attempted to unionize, but ultimately a majority voted against it.[6] The vote in the Bessemer warehouse was the first since the 2014 election.

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[1] H.R. 842, 117th Cong. (2021-2022) (Introduced Feb. 04, 2021), *available at* https://www.congress.gov/bill/117th-congress/house-bill/842/text.

[2] National Labor Relations Board, Office of Public Affairs, *NLRB Announces Results in Amazon Election* (Apr. 9, 2021) (hereinafter "NLRB Press Release"), *available at* https://www.nlrb.gov/news-outreach/news-story/nlrb-announces-results-in-amazon-election.

[3] Alina Selyukh, *It's A No: Amazon Warehouse Workers Vote Against Unionizing in Historic Election*, NPR (Apr. 9, 2021), *available at* https://www.npr.org/2021/04/09/982139494/its-a-no-amazon-warehouse-workers-vote-against-unionizing-in-historic-election.

[4] Selyukh, *supra* note 3.

[5] The final tally of the vote published by the Board was 738 for the union and 1,798 against unionization. 505 ballots were challenged and 76 were deemed void. NLRB Press Release, *supra* note 2.

[6] Alina Selyukh, *For Amazon and Alabama, Warehouse Union Vote Would Shake Up History*, NPR (Jan. 29, 2021), *available at* https://www.npr.org/2021/01/28/960869795/for-amazon-and-alabama-warehouse-union-vote-would-shake-up-history.

In the months leading up to the recent election, Amazon fought back against the campaign with mandatory information sessions, consistent text messages to workers, and posters with the slogan "Do it without dues."[7] Amazon frequently pointed to their $15 starting pay and generous health benefits as evidence that employees do not need to unionize.[8]

The union argues that these anti-union tactics created confusion amongst employees and caused fear that those who voted for a union would be subject to some sort of retaliation.[9] RWDSU filed their objections with the National Labor Relations Board (NLRB) on April 16, and Region 10 held a hearing on May 7th to determine if the results of the election should be overturned.[10] The filing sets forth 23 objections alleging Amazon's conduct prevented a free exercise of choice in the vote.[11] These objections include allegedly threatening layoffs and facility closure, intimidating employees by identifying and removing pro-union employees from mandatory informational sessions, and creating the impression that Amazon was surveilling employees as they cast their ballots at Amazon-installed collection boxes.[12]

Regardless of the outcome of the post-election legal wrangling, the high-profile organizing effort has reignited the debate over the utility, benefits, and costs of unionization. Several celebrities and politicians from both sides of the aisle voiced their support for the unionization at the Bessemer warehouse.[13] The conversation around organized labor may be just getting started, as politicians consider the Protecting the Right to Organize Act (PRO Act) and as workers and organizers grapple with how to adapt their strategies to represent workers at a growing powerhouse like Amazon.[14]

The Protecting the Right to Organize Act

To some, the Bessemer warehouse vote made it clear that labor laws in the United States are outdated. The National Labor Relations Act was enacted in 1935 to protect the rights of employees and employers, encourage collective bargaining, and prevent certain private labor practices which could harm the general welfare of workers and businesses.[15] Since its passage, there have been hundreds of attempts to amend or repeal the National Labor Relations Act,[16] but only a few major amendments have been enacted. In 1947, the Taft-Hartley Act was passed altering the structure of the Board and the law's unfair labor practices and representation election provisions.[17] The Landrum-Griffin Act in 1959 further amended the law by altering several provisions, including designating new unfair labor practices and tightening boycott prohibitions.[18] Aside from these few amendments, the National Labor Relations Act has withstood attempts to alter it in the over 80 years since it was passed. Many believe that the time is long overdue to revisit the country's labor laws, particularly with respect to organizing.

This is where the PRO Act comes in. Both supporters and detractors agree that the PRO Act, if enacted, would represent a major shift in existing labor law, and make it far easier for unions to organize workers. The earliest version of the PRO Act was introduced

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[7] Selyukh, *supra* note 3.

[8] Selyukh, *supra* note 3.

[9] Chelsea Connor, *RWDSU Files NLRB Election Objections,* RWDSU (Apr. 19, 2021), *available at* https://www.rwdsu.info/rwdsu_files_nlrb_election_objections.

[10] Annie Palmer, *Labor Board Will Hear Objections to Amazon Union Election on May 7*, CNBC (Apr. 27, 2021), *available at* https://www.cnbc.com/2021/04/27/labor-board-hearing-on-amazon-union-election-to-start-may-7.html.

[11] Connor, *supra* note 9.

[12] Connor, *supra* note 9. As of the writing of this article, Region 10 has not yet issued a decision on the RWDSU's objections. It is likely that the losing party will appeal the decision to the Board in Washington, D.C.

[13] Selyukh, *supra* note 3.

[14] Noam Sheiber, *Union Loss May Bring New Phase of Campaign Against Amazon*, NY Times (Apr. 9, 2021), *available at* https://www.nytimes.com/2021/04/09/business/economy/amazon-labor-unions.html.

[15] National Labor Relations Board, *Key Reference Material: National Labor Relations Act*, *available at* https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act.

[16] *80 Years of Workplace Democracy*, National Labor Relations Board, at 32, *available at* https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1536/NLRB%2080th%20Anniversary.pdf.

[17] *80 Years of Workplace Democracy*, *supra* note 16.

[18] *Our History: 1959 Landrum-Griffin Act*, National Labor Relations Board, *available at* https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1959-landrum-griffin-act. Another amending statute, the 1974 Health Care Amendments, also significantly expanded the purview of the National Labor Relations Act, but further comment on this law would be too industry-specific for this article.

in the House of Representatives in 2019 but failed to pass the GOP-controlled Senate.[19] The PRO Act was reintroduced by Representative Robert Scott on February 4, 2021, and garnered enough support in the House to pass in a 225-206 vote mostly along party lines.[20] Since Democrats only narrowly control the Senate, there is likely not enough support to overcome the filibuster and compel a vote on the bill.[21] Despite the bleak prognosis for the PRO Act in the Senate in its current form, individual provisions either in an amended version or a different but related bill might make it through to President Biden, who has continually voiced his support for unions and labor organizing.[22] The PRO Act has supporters and critics, both of whom predict drastic changes if the PRO Act were to pass. Selected key provisions of the PRO Act are summarized below, along with a summary of competing perspectives.

First, the PRO Act would eliminate state right-to-work laws.[23] Currently, over half of the states in the United States have laws in place that prohibit collective bargaining agreements from requiring employees to pay union dues, or to pay an agency fee equivalent, in order to maintain employment.[24] Organized labor has long criticized these so-called right-to-work laws as allowing "free riders" to enjoy the benefits of a collective bargaining agreement without having to pay dues.[25] Opponents of right-to-work laws argue that the laws drain unions of the necessary resources to adequately represent workers. Allowing some workers to avoid dues makes it harder for unions to "defend themselves against wealthy special interests" and better-resourced employers.[26] Supporters, however, argue that right-to-work laws allow more freedom for American workers to exercise a choice between joining a union or not.[27] Supporters of these laws believe that the elimination of right-to-work laws would unjustifiably benefit unions financially at the expense of workers, forcing employees to financially support a union they may not want.[28] If the PRO Act is passed, collective bargaining agreements -- even in states with right-to-work laws -- could require that all workers contribute financially to the union as a condition of employment. The PRO Act would declare that a collective bargaining agreement which requires that "all employees in a bargaining unit shall contribute fees to a labor organization for the cost of representation, collective bargaining, contract enforcement, and related expenditures as a condition of employment shall be valid and enforceable notwithstanding any State or Territorial law."[29]

Second, the PRO Act would significantly alter the union election process by strictly regulating employer communications during a union organizing drive, by allowing for a faster turnaround in elections following the filing of an election petition, and by permitting more flexibility in defining the bounds of a bargaining unit.[30] Employees would also be permitted to vote in a safe, neutral location away from their employer's premises.[31] These union election provisions, in theory, would allow employees a free choice when they are deciding whether to join a union by eliminating employer interference. Employers would no longer be parties to elections and would have no say in the proceedings, allowing employees the opportunity to explore the option of unionizing without fear of reprisal or termination.[32] Notably, employers would

[19] Natale V. Di Natale & Kayla N. West, *U.S. House Pass the PRO Act: How It Could Affect the Future of Labor Law*, Nat'l L. Rev., *available at* https://www.natlawreview.com/article/us-house-passed-pro-act-how-it-could-affect-future-labor-law.

[20] Don Gonyea, *House Democrats Pass Bill That Would Protect Worker Organizing Efforts*, NPR (Mar. 9, 2021), *available at* https://www.npr.org/2021/03/09/975259434/house-democrats-pass-bill-that-would-protect-worker-organizing-efforts.

[21] Di Natale & West, *supra* note 19.

[22] Di Natale & West, *supra* note 19.

[23] H.R. 842 at § 111.

[24] *Right-To-Work Resources*, Nat'l Conf. of State Legis., *available at* https://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx.

[25] John Lomax, Jr., Gerard Morales & Jessica Van Ranken, *The PRO Act's Potential Effect on Employers*, JD Supra (Mar. 16, 2021), *available at* https://www.jdsupra.com/legalnews/the-pro-act-s-potential-effect-on-5634391/.

[26] U.S. Congress, Education & Labor Committee, Fact Sheet, *Protecting the Right to Organize Act* (hereinafter "PRO Act Fact Sheet"), *available at* https://edlabor.house.gov/imo/media/doc/Fact%20Sheet%20-%20PRO%20Act.pdf.

[27] U.S. Chamber of Commerce, *Labor's Litany of Dangerous Ideas: The Protecting the Right to Organize (PRO) Act*, *available at* https://www.uschamber.com/stop-the-pro-act.

[28] Adam Santucci, *Why the Protecting the Right to Organize Act (PRO Act) Keeps Us Awake at Night*, JD Supra (Mar. 16, 2021), *available at* https://www.jdsupra.com/legalnews/why-the-protecting-the-right-to-6837447/.

[29] H.R. 842 at § 111.

[30] Richard F. Vitarelli & Adam C. Doerr, *Protecting the Right to Organize (PRO) Act Passes House, Awaits Senate Fate*, Nat'l L. Rev. (Mar. 31, 2021), *available at* https://www.natlawreview.com/article/once-again-house-passes-protect-right-to-organize-act-sending-bill-to-senate.

[31] PRO Act Fact Sheet, *supra* note 26.

[32] PRO Act Fact Sheet, *supra* note 26.

be prohibited from holding mandatory information sessions, so-called "captive audience" meetings with employees, that are often used to dissuade employees from voting in favor of a union.[33] On the other hand, critics argue that these provisions would upset the long-settled balance of power between employees and employers during the election process, and leave employees vulnerable to pressure and misinformation from unions.[34]

Next, the PRO Act would allow unions to use arbitration or mediation to overcome negotiation obstacles following a successful union election.[35] Often, a successful union organizing drive is followed by a long period of contract negotiations, which can ultimately end in a failure to achieve a first contract between the union and the employer. In these cases, the PRO Act would permit newly certified unions to use binding arbitration to settle the contract.[36] This provision has not seen the same level of debate as other provisions, but supporters believe it would be a helpful tool in facilitating an agreement once a workplace has already voted to be unionized. Allowing a union to seek outside help in settling initial bargaining disputes means that the elected representation can be more effective, and employers can refocus their resources on specific issues within the contract. On the other hand, some believe that this provision would ultimately hinder contract negotiations because both sides would be encouraged to take extreme positions in bargaining, hoping to be better positioned for inevitable arbitration.[37]

Finally, the PRO Act would expand the definition of employee, by narrowing the definition of supervisor and implementing a new test for determining independent contractor status. The new definition of supervisor would be narrowed to only include those who act in the capacity of a supervisor for a majority of their working time. This provision of the PRO Act would also utilize the controversial ABC test to determine if a worker is an independent contractor or an employee.[38] The ABC test is a three-part rule used in a number of jurisdictions, including California, where its use is highly contested.[39] In order to be considered an independent contractor under the ABC test, a worker must be free from the control of the hiring entity, operate outside of the usual course of the hiring entity's business, and customarily be involved in an independent trade.[40] Supporters of this PRO Act provision note that the ABC test would only be used to determine who is eligible to potentially vote in a union election and would mean nothing more, while critics argue that the test is too broad and would essentially eliminate the notion of self-employment.[41] Opponents also point to the confusion that would arise if the ABC test is implemented, because several other federal agencies apply different tests to determine independent contractor status, and employers would be forced to grapple with varying standards.[42]

Overall, reactions to the PRO Act's key provisions have been mixed, though many of the passionately expressed predictions seem far too dire and reflexive. It is nearly impossible to say with certainty how the PRO Act, in practice, would alter the labor landscape if enacted. Moreover, given the lack of support to overcome a filibuster in the Senate, there would need to be major modifications to the PRO Act before it could be passed. The current Senate would not likely endorse a version of the Act which includes the elimination of right-to-work laws, the proposed change in how union elections are conducted, the option for arbitration to settle first contracts, and implementation of the ABC test. Passage will either require sufficient amendments to garner bipartisan support, which is unlikely, or years of waiting as political power shifts while the debates and lobbying continue. Even so, the key concepts contained in the PRO Act have been on organized labor's wish-list for a long time and are perhaps gaining momentum in the wake of recent events; it is important for employers and practitioners to be aware of these potential major shifts in labor law on the horizon, even if the horizon currently seems somewhat distant.

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[33] Gonyea, *supra* note 20.

[34] Santucci, *supra* note 28.

[35] Gonyea, *supra* note 20.

[36] Gonyea, *supra* note 20.

[37] Robert J. Simandl & John A. Rubin, *Labor Law Reform on the Horizon: Ten Things to Watch Under the PRO Act*, Nat'l L. Rev. (Feb. 16, 2021), *available at* https://www.natlawreview.com/article/labor-law-reform-horizon-ten-things-to-watch-under-pro-act.

[38] Di Natale & West, *supra* note 19.

[39] Erik Sherman, *PRO Act and ABC Test: No One Knows What the Effects Will Be*, Forbes (Mar. 24, 2021), *available at* https://www.forbes.com/sites/eriksherman/2021/03/24/pro-act-and-abc-test-no-one-knows-what-the-effects-will-be/.

[40] Di Natale & West, *supra* note 19.

[41] Sherman, *supra* note 39.

[42] Sherman, *supra* note 39.

Consequences of the Amazon Election and Looking Forward

Turning again to the recent Amazon election and subsequent fallout, it is interesting to consider what the future might bring. While the RWDSU's campaign in Alabama has been unsuccessful thus far, it is possible that the recent national attention will inspire other Amazon workers in other workplaces to approach unions in their regions and start their own campaigns. Union leaders have already seen hundreds of new inquiries come in from other workers across the country.[43] The RWDSU and other unions have reported this increase in inquiries, which could ultimately threaten Amazon's ability to avoid unionization.[44] While these inquiries have not yet amounted to another full-blown campaign, the motivation to approach a union was certainly sparked by the progress made in Bessemer. Even if the vote did not succeed, the willingness of the workers to partake in a controversial and fraught process could inspire workers in other workplaces, both within Amazon and with other employers. Amazon will likely face new campaigns across the country while it is still finalizing the results from the Bessemer vote.

Additionally, even though the PRO Act was passed in the House before the Amazon vote, it could now face more intense support and opposition as a result. Some of the biggest controversies in the Amazon campaign -- the mandatory information sessions, alleged threats, and an Amazon-installed ballot box for union votes -- would be prohibited if the PRO Act were to pass in its current form. Supporters will likely point to the Amazon vote as evidence that the PRO Act is necessary to protect workers' rights. Critics will likely echo Amazon's statement that the election was the result of the employees' choice, nothing more and nothing less. This debate, combined with the unfinished nature of the Amazon election and the PRO Act's stasis in the Senate, could bring the PRO Act into the mainstream of political debate.

Conclusion

Regardless of how the Board ultimately rules on the union's objections in the Amazon election, the debate that the high-profile election has reignited, and the debate over the PRO Act, are not likely to just fade away. President Biden has already promised that he will be the "strongest labor President you've ever had",[45] and the PRO Act enjoys greater support and a greater sense of urgency than in years past. Several provisions of the Pro Act, if enacted, would drastically change the nature of workers' rights and union organizing. Supporters and critics alike will continue to be vocal in expressing their strongly held views and predictions. It is impossible to know what exactly would happen to the labor movement if, for example, employer communications were more restricted during union election campaigns, if unions were allowed to utilize arbitration during first contract negotiations, or if the so-called ABC test was used to determine voter eligibility among workers currently classified as contractors. But this much is clear: high profile organizing drives like those at Amazon, along with shifting political power in Washington D.C. and pending legislation like the PRO Act, all ensure that the debate will continue, and that the situation is one that practitioners will need to keep a close eye on.

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[43] Selyukh, *supra* note 3.

[44] Selyukh, *supra* note 3.

[45] Andrew Solender, *Biden Vows to Be 'Strongest Labor President You've Ever Had' at Union Event*, Forbes (Sept. 7, 2020), *available at* https://www.forbes.com/sites/andrewsolender/2020/09/07/biden-vows-to-be-strongest-labor-president-youve-ever-had-at-union-event/.

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CASE NOTES

ARBITRATION

Franklin v. Cmty. Reg'l Med. Ctr., No. 19-17570, 2021 U.S. App. LEXIS 15183 (9th Cir. May 21, 2021)

On May 21, 2021, the U.S. court of appeals for the Ninth Circuit held that a district court's denial of an alleged employer's motion to compel arbitration was affirmed since, under the Waffle House decision, the Secretary of Labor when bringing a Fair Labor Standards Act enforcement action that sought relief on behalf of one party to the arbitration agreement against the other party to that agreement could not be compelled to arbitrate despite the Federal Arbitration Act's policy favoring arbitration agreements.

Isabelle Franklin ("Franklin") was a nurse who worked on assignment. She was employed by a staffing agency, United Staffing Solutions, Inc. ("USSI"), with whom she signed a Mediation and Arbitration Policy and Agreement ("arbitration agreement"). The arbitration agreement required Franklin and USSI to arbitrate "all disputes that may arise out of or be related to [Franklin's] employment, including but not limited to the termination of [Franklin's] employment and [Franklin's] compensation." In late 2017, USSI assigned Franklin to work at Community Regional Medical Center's hospital (the "hospital") in Fresno, California. Franklin signed a Travel Nurse Assignment Contract ("assignment contract") with USSI establishing the terms of her assignment. The hospital was not a signatory to either the arbitration agreement or the assignment contract, and there was no contract between Franklin and the hospital. There was also no contract between the hospital and USSI. Instead, the hospital contracted with a managed service provider, Comforce Technical Services, Inc. ("RightSourcing") to source contingent nursing staff like Franklin. RightSourcing, in turn, contracted with USSI to provide the contingent nursing staff for the hospital. Franklin worked at the Hospital from December 2017 to January 2018. Franklin then brought a class and collective action against the hospital, alleging violations of the Fair Labor Standards Act ("FLSA"), the California Labor Code, and the California Business and Professions Code. The FLSA claims alleged that the hospital required Franklin to work during meal breaks and off the clock but failed to pay her for that work. The district court granted the hospital's motion to compel arbitration and dismissed Franklin's claims without prejudice. The district court held that the hospital could compel arbitration as a nonsignatory because Franklin's statutory claims against the Hospital were "intimately founded in and intertwined with" her contracts with USSI. Thus, under California law, Franklin was equitably estopped from avoiding the arbitration provisions of her employment contracts. Franklin appealed before the U.S. court of appeals for the Ninth Circuit.

The Ninth Circuit held that hospital, could compel arbitration because Franklin's claims against the hospital were intimately founded in and intertwined with her contracts with the staffing agency. Thus, under California law, Franklin was equitably estopped from avoiding the arbitration provisions of her employment contracts.

The Ninth Circuit stated that Franklin's claims depended on whether she was paid the wages or overtime she was due, *see, e.g.*, 29 U.S.C. § 207(a)(1), but she did not dispute that USSI, not the hospital, was responsible for paying her. Not only did the assignment contract set her hourly wage rate and overtime rate, but it also set the regular length of her shifts, the time her shifts started and ended, and the number of hours in her workweek. And under the contract, USSI would pay all overtime "as dictated by Hospital policy and/or State Law," subject to USSI pre-approval. It was true that Franklin could hypothetically sustain her claims even if there were no Assignment Contract, but in that case a factfinder would still need information about how and whether Franklin was paid by USSI. Here, that necessary information was established by the terms of her Assignment Contract. Thus, the court agreed with the district court that "whether [Franklin] can maintain liability against the Hospital, given USSI's role as [her] employer, cannot be answered without reference to the Assignment Contract."

Finally, the court stated that Franklin's other claims—that the Hospital failed to provide her accurate wage statements or reimburse her travel expenses—could not stand on their own against the hospital. For example, she alleged that the Hospital "does not provide timely, accurate itemized wage statements" and "often promises to reimburse [her] for ... travel expenses, but often fails to do so." But the assignment contract set out USSI's payroll duties and the amount of Franklin's

travel reimbursement. Therefore, these claims were not "fully viable without reference to the terms of [the Assignment Contract]."

Accordingly, the Ninth Circuit affirmed the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 9.05, *Arbitration* (Matthew Bender).

Walsh v. Ariz. Logistics, Inc., No. 20-15765, 2021 U.S. App. LEXIS 14727 (9th Cir. May 18, 2021)

On May 18, 2021, the U.S. court of appeals for the Ninth Circuit held that a district court's denial of an alleged employer's motion to compel arbitration was affirmed since, under the Waffle House decision, the Secretary of Labor when bringing a Fair Labor Standards Act enforcement action that sought relief on behalf of one party to the arbitration agreement against the other party to that agreement could not be compelled to arbitrate despite the Federal Arbitration Act's policy favoring arbitration agreements.

The Department of Labor brought an enforcement against Larry Browne and his companies Arizona Logistics Inc., d/b/a Diligent Delivery Systems, and Parts Authority Arizona LLC. Only Browne was party to this appeal. The Secretary alleged that Browne and his entities violated the FLSA's minimum wage, overtime, record-keeping, and anti-retaliation requirements by misclassifying delivery drivers as independent contractors rather than employees. Browne moved to compel arbitration of the Secretary's enforcement action based on arbitration agreements that he and his entities entered into with the delivery drivers. The United States District Court for the District of Arizona denied Browne's motion, concluding that the Secretary cannot be compelled to arbitrate based on the Supreme Court's decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002). Browne appealed. The Ninth Circuit conclude that despite the Federal Arbitration Act's (FAA) policy favoring arbitration agreements, the Supreme Court's decision in *Waffle House*, required the court to answer this question in the negative. Therefore, the court affirmed the district court's denial of the alleged employer's motion to compel arbitration.

The court held that that although the Federal Arbitration Act favored arbitration agreements, the Supreme Court's decision in *Waffle House*, holding that the FAA addresses enforceability only as to the parties to the arbitration agreement, dictated that the Secretary could not be compelled to arbitrate this case, even if the employees had agreed to arbitration. As in *Waffle House*, the remedial statute at issue here — Sections 16(c) & 17 of the FLSA — unambiguously authorized the Secretary to obtain monetary relief on behalf of specific aggrieved employees. There was nothing in either section suggesting that an arbitration agreement between the parties to the underlying employment relationship impacted the Secretary's enforcement power. Also, there was no dispute that, like the EEOC in *Waffle House*, the Secretary was not a party to the arbitration agreement between the alleged employer and the employee delivery drivers.

Accordingly, the Ninth Circuit affirmed.

References. See, e.g., Wilcox, *California Employment Law*, § 9.05, *Arbitration* (Matthew Bender).

COMMERCE CLAUSE

Air Transp. Ass'n of Am. v. Wash. Dep't of Labor & Indus., No. 19-35937, 2021 U.S. App. LEXIS 15227 (9th Cir. May 21, 2021)

On May 11, 2021, the U.S. court of appeals for the Ninth Circuit held that Washington's Department of Labor and Industries was properly granted summary judgment in the trade association's action seeking to enjoin enforcement of Washington's law governing paid sick leave, Wash. Rev. Code § 49.46.210 (2021), because the Airline Deregulation Act, 49 U.S.C.S. § 41713, did not preempt application of the paid sick leave to association members' flight crew as the law did not regulate the airline-customer relationship or otherwise bind the airlines to a particular price, route, or service.

The Air Transport Association (d/b/a "Airlines for America" or "A4A") had brought this action against Washington's Department of Labor and Industries ("L&I"), seeking to enjoin enforcement of Washington's law governing paid sick leave, Wash. Rev. Code § 49.46.210 (2021). A4A argued that applying the paid sick leave law (the "PSL") to its members' flight attendants and pilots ("flight crew") was preempted by the Airline Deregulation Act, 49 U.S.C. § 41713, and violated the dormant Commerce Clause. The parties filed cross-motions for summary judgment, and the district court granted L&I's motion. A4A appealed before the U.S. court of appeals for the Ninth Circuit.

The Ninth Circuit stated that A4A argued that, unlike the wage statement law at issue in Ward v. United Airlines, Inc., 986 F.3d 1234, 1243 (9th Cir. 2021), the PSL "operates in close proximity to the traveling

public." The proper inquiry is whether the PSL itself "*binds* the [airlines] to a particular price, route, or service" [*Bernstein v. Virgin Am., Inc.*, 990 F.3d 1157, 1169-70 (9th Cir. 2021)]. The PSL regulated the airline-employee relationship in a way that may ultimately affect the airlines' competitive decisions in the free market. But because the PSL did not regulate the airline-customer relationship or otherwise bind the airlines to a particular price, route, or service, it was not preempted by the ADA.

The Ninth Circuit stated that as applied to A4A's members' flight crew, the PSL does not violate the dormant Commerce Clause. To survive L&I's motion for summary judgment, A4A must show that there is a genuine issue of material fact as to whether complying with the PSL would impose a "substantial burden on interstate commerce," and if so, whether the burden on interstate commerce would be "clearly excessive in relation to the putative local benefits." Viewing the evidence in the light most favorable to A4A, we hold that the evidence does not demonstrate that requiring A4A's members to comply with the PSL would impose a substantial burden on interstate commerce.

Further, the Ninth Circuit stated that the PSL's limited scope undermines A4A's argument as to the impossibility of complying with multiple paid sick leave laws. The PSL only applied to "Washington-based employees" of employers "doing business in Washington." An L&I official testified that flight crew members who are not "based" at a Washington airport and who have no relationship with Washington other than flying in and out of the state are "unlikely to be Washington-based employees." Based on this testimony, the court deduced that the PSL primarily—or perhaps solely—applies to employees of Alaska Airlines, which is headquartered in Washington and is the only A4A member airline that has an airport "base" in the state. The court stated that A4A did not present any concrete examples of Alaska Airlines employees who would be covered by multiple paid sick leave laws if the A4A's members' were to comply with the PSL. To the extent that Washington-based flight crew were determined to be covered by multiple jurisdictions' laws, an airline could avoid potential concerns by choosing to comply with the law that imposes the strictest requirements.

Accordingly, the Ninth Circuit affirmed the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 1.21, *Encyclopedias and Annotations* (Matthew Bender).

EMPLOYMENT DISCRIMINATION

Shah v. Meier Enters., No. 18-35962, 2021 U.S. App. LEXIS 14534 (9th Cir. May 17, 2021)

On May 11, 2021, the U.S. court of appeals for the Ninth Circuit in an employment discrimination case, the district court properly granted summary judgment to defendant because plaintiff offered no evidence that would support the reasonable finding that those responsible for his termination did not actually believe that his performance was poor.

In this removed action alleging employment discrimination claims, Shantubhai N. Shah ("Shah") appealed before the U.S. court of appeals for the Ninth Circuit the summary judgment dismissing his claims and the order denying his motion to remand. The court reviewed both the denial of Shah's motion to remand and the grant of summary judgment *de novo*. The Ninth Circuit reviewed the evidence favorably to Shah as the party opposing defendants' motion for summary judgment.

The Ninth Circuit stated that the district court did not err in concluding that Shah failed to give Meier reasonable notice through the November 23, 2016 attempt at service. According to the "proof" of delivery (a U.S. Postal Service tracking slip), the complaint and summons were delivered on November 28, 2016 at 12:58 p.m. to "Front Desk/Reception" at Meier's office. Even assuming that the documents were handed to a particular person (as opposed to, say, being deposited in a receptacle as part of the daily mail delivery), it is simply a matter of speculation whether the delivery was made to someone whose duties imposed the degree of responsibility that should accompany the handling of documents of the importance of legal process. Oregon's primary service method for a corporation suggests the recipient of service should be "a registered agent, officer, or director of the corporation; or ... any clerk on duty in the office of a registered agent." Or. R. Civ. P. 7(D)(3)(b)(i). Under the totality of the circumstances known to Shah, the form of service attempted on November 23, 2016 did not give Meier reasonable notice. Accordingly, the court stated that because the November 23, 2016 attempt at service was not proper and Meier removed the case within 30 days of being properly served on January 20, 2017, the district court did not err in denying Shah's motion to remand.

The Ninth Circuit held that the district court correctly granted summary judgment dismissing Shah's claims. Shah's discrimination claims based on his termination

similarly fail under *McDonnell Douglas* because he has not shown that similarly situated individuals were treated more favorably. Nor has he offered any evidence that would enable a reasonable jury to find that Meier's proffered reasons for his termination—his poor performance and failure to follow company policy with respect to time off—were not the real reasons for his termination. Where "the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory action." Shah offers no evidence that would support the reasonable finding that those responsible for his termination did not actually believe that his performance was poor.

Accordingly, the Ninth Circuit affirmed the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law,* § 43.01, *California Fair Employment and Housing Act* (Matthew Bender).

ERISA

Howard Jarvis Taxpayers Ass'n v. Cal. Secure Choice Ret. Sav. Program, No. 20-15591, 2021 U.S. App. LEXIS 13499 (9th Cir. May 6, 2021)

On May 6, 2021, the U.S. court of appeals for the Ninth Circuit held that the federal Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.S. § 1001 et seq., did not preempt a program called CalSavers, a California law that created a state-managed individual retirement account (IRA) program, because CalSavers was not an ERISA plan as it was established and maintained by the State, not employers; the court noted that the issues presented in the case ultimately were for California's lawmakers and those who elected them, or for the United States Congress to take up the issue if it chose to do so.

Howard Jarvis Taxpayers Association and two of its employees (collectively, "HJTA") filed this action against the CalSavers program and the Chairman of the CalSavers Board in his official capacity. HJTA alleged that ERISA preempts CalSavers and that CalSavers should also be enjoined under Cal. Code Civ. Proc. Section 526a as a waste of taxpayer funds. HJTA was a public interest organization that seeks to promote taxpayer rights. But it filed this challenge in its capacity as a California employer. HJTA alleged that it met the definition of an eligible employer and does not operate its own employee retirement program. HJTA therefore had standing to bring this action, and the controversy is ripe because HJTA plausibly alleges that it will soon be subject to CalSavers. The HJTA employees also hadstanding as future participants in what they claim is an ERISA plan. The district court granted California's motion to dismiss, concluding that ERISA does not preempt CalSavers. The district court also declined to exercise supplemental jurisdiction over HJTA's state law claim. HJTA timely appealed before the U.S. court of appeals for the Ninth Circuit.

This case presented a novel and important question in the law governing retirement benefits: whether the federal Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.*, preempts a California law that creates a state-managed individual retirement account ("IRA") program. The program, CalSavers, applies to eligible employees of certain private employers in California that did not provide their employees with a tax-qualified retirement savings plan. Eligible employees were automatically enrolled in CalSavers, but could opt out. If they did not, their employer could remit certain payroll deductions to CalSavers, which funded the employees' IRAs. California manages and administers the IRAs and acts as the program fiduciary. Citing a need to encourage greater savings among future retirees, other States have enacted similar state-managed IRA programs in recent years. This was the first case challenging such a program on ERISA preemption grounds.

The Ninth Circuit held that the preemption challenge failed. The court stated that CalSavers was not an ERISA plan because it was established and maintained by the State, not employers; it did not require employers to operate their own ERISA plans; and it did not have an impermissible reference to or connection with ERISA. Nor did CalSavers interfere with ERISA's core purposes. ERISA thus did not preclude California's endeavor to encourage personal retirement savings by requiring employers who did not offer retirement plans to participate in CalSavers. The Ninth Circuit therefore affirmed the judgment of the district court.

The Ninth Circuit stated that there was, to be sure, an important policy debate here. California steadfastly maintained that CalSavers was needed to address a serious shortfall in retirement savings that, if not addressed, would impose significant costs on the State years down the line. HJTA seemingly believed that state-run IRA programs reflected too great a role for government in private decision-making, while imposing too many costs on employers. But these were issues for California's lawmakers and those who elect them, or for Congress should it choose to take up this issue. The question for the court was whether Congress had

already outlawed CalSavers. The court stated that for the reasons explained, HJTA's ERISA preemption challenge failed.

Accordingly, the Ninth Circuit affirmed the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 41.67, *Retirement or Pension Plans and Benefits* (Matthew Bender).

FEHA

Smith v. BP Lubricants USA Inc., 64 Cal. App. 5th 138 (May 12, 2021)

On May 12, 2021, a California appellate court held that an employee did not state a FEHA claim against defendants, a supplier and a presenter representing the supplier, based on allegedly racist comments made to the employee during the presentation because the complaint had no facts suggesting concerted activity between the employer and defendants to commit FEHA violations.

Robert Smith's ("Smith's") employer, Najjar Lube Centers, Inc. doing business as Jiffy Lube, held a presentation for its employees to learn about a new Castrol product. Castrol employee Gus Pumarol ("Pumarol") led the presentation. Smith alleged that Pumarol made several comments to Smith during the presentation that he considered racist and offensive. Smith sued BP Lubricants USA Inc., doing business as Castrol ("BP") and Pumarol for harassment under the California Fair Employment and Housing Act [Gov. Code § 12940 et seq.; FEHA] and for discrimination under the Unruh Civil Rights Act [Civ. Code § 51(b)]. Smith also sued Pumarol for intentional infliction of emotional distress ("IIED"). The trial court sustained BP and Pumarol's demurrer without leave to amend, and Smith appealed before the California appellate court.

The appellate court stated that it must interpret the Unruh Civil Rights Act liberally with a view to effectuating its purposes. The court stated that to conclude that Smith could not state a claim because the comments amounted only to harassment would not have furthered the purpose of guaranteeing Californians full and equal access to all business establishments.

The appellate court stated that required findings for IIED could be found based on the allegations that Pumarol made three offensive comments to Smith in front of about 50 of his colleagues, including three of his supervisors, and that after the first comment everyone except for African American employees laughed, yet Pumarol made two more comments that Smith found offensive. Pumarol allegedly said that he would not want Smith's "'banana hands'" on his car and that he could not see Smith, which Smith construed as a comment about his dark complexion. Smith did not state a FEHA claim because the complaint had no facts suggesting concerted activity between the employer and defendants to commit FEHA violations.

Accordingly, the appellate court reversed the trial court's judgment. The court affirmed the trial court's order sustaining BP and Pumarol's demurrer to Smith's FEHA claim without leave to amend. However, the court concluded that Smith sufficiently alleged claims for IIED and violation of the Unruh Civil Rights Act. The court therefore reversed the trial court's orders sustaining BP and Pumarol's demurrer to those claims without leave to amend.

References. See, e.g., Wilcox, *California Employment Law*, § 43.01, *California Fair Employment and Housing Act* (Matthew Bender).

MEAL-BREAK AND WAGE-STATEMENT

Magadia v. Wal-Mart Assocs., No. 19-16184, 2021 U.S. App. LEXIS 16070 (9th Cir. May 28, 2021)

On May 28, 2021, the U.S. court of appeals for the Ninth Circuit held that the employee lacked U.S. Const. art. III standing to bring a claim under California's Private Attorneys General Act alleging that the employer did not pay adequate compensation for missed meal breaks in violation of Lab. Code § 226.7(c) because he did not suffer injury himself; the employee had standing to bring his wage statement claims because a violation of Lab. Code § 226(a) created a cognizable Article III injury; the employee was improperly granted judgment on his claim that the employer did not provide adequate pay rate information on its wage statements in violation of § 226(a)(9) because the statute did not require the employer to list the hourly rates of the overtime adjustment on the employees' wage statements.

Roderick Magadia ("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* Lab. Code § 226(a)(9)]. Next, he claimed that Walmart failed to furnish the

pay-period dates with his last paycheck [*see* Lab. Code § 226(a)(6)]. Finally, he asserted that Walmart didn't pay adequate compensation for missed meal breaks [*see* Lab. Code § 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* Lab. Code § 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. Magadia appealed before the U.S. court of appeals for the Ninth Circuit.

The Ninth Circuit held that Magadia lacked Article III standing to bring a PAGA claim for Walmart's meal-break violations since he himself did not suffer injury. Specifically, the court noted that *qui tam* actions are a well-established exception to the traditional Article III analysis, but held that PAGA's features diverged from *Vermont Agency of Nat. Res. V. U.S. ex rel. Stevens*,[1] assignment theory of *qui tam* injury. The court also held that PAGA's features departed from the traditional criteria of *qui tam* statutes.

The Ninth Circuit next considered whether Magadia had standing to bring his two wage-statement claims under Lab. Code § 226(a), which requires employers to accurately furnish certain itemized information on its employees' wage statements. The court held that a violation of Lab. Code § 226(a) created a cognizable Article III injury here. To determine whether the violation of a statute constituted a concrete harm, the panel conducted a two-part inquiry. First, the court held that Lab. Code § 226(a) protected employees' concrete interest in receiving accurate information about their wages in their pay statements; and Walmart's failure to disclose statutorily required information on Magadia's wage documents, if true, violated a "concrete interest." Second, Magadia sufficiently alleged that Walmart's Lab. Code § 226(a) violation — depriving him of accurate itemized wage statements — presented a material risk of harm to his interest in the statutorily guaranteed information. The court also concluded that other class members who could establish Lab. Code § 226(a) injuries had standing to collect damages.

Finally, the Ninth Circuit considered the merits of Magadia's two claims under Lab. Code § 226(a). First, the court held that the wage statement law did not require Walmart to list the rate of the MyShare overtime adjustment on employees' wage statements, and the district court erred in holding otherwise. Because Walmart must retroactively calculate the MyShare overtime adjustment based on work from six prior periods, the court did not consider it an hourly rate "in effect" during the pay period for purposes of Lab. Code § 226(a)(9), and Walmart complied with the wage statement law here. Second, the court held that Walmart's Statement of Final Pay did not violate the wage statement statute. Namely, Walmart complied with Lab. Code § 226(a)(6) when it 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.

Accordingly, the Ninth Circuit vacated the district court's judgment and remanded the matter with instructions.

References. See, e.g., Wilcox, *California Employment Law*, § 5.40, *Civil Action by Employee or Former Employee to Recover Wages and Penalties* (Matthew Bender).

[1] 529 U.S. 765, 20 S. Ct. 1858, 146 L. Ed. 2d 836 (2000).

RETALIATION

Pham v. Bd. of Regents of the Univ. of Cal., No. 19-16541, 2021 U.S. App. LEXIS 14905 (9th Cir. May 19, 2021)

On May 19, 2021, the U.S. court of appeals for the Ninth Circuit in a case where an employee brought a First Amendment and state law retaliation claim against his employer, held that there was a disputed issue of material fact, warranting consideration by the trier of fact, regarding pretext because there was record evidence that the employee's appointment structure changed to his detriment after he complained, that other employees in the department experienced negative treatment after complaining about fraud and mismanagement to their supervisor, and there was a temporal proximity between the employee's complaint and his appointment change that raised an inference of pretext.

Plaintiff Hieu Pham ("Pham") appealed a district court order granting summary judgment for defendants on his First Amendment and California state law retaliation claims. The court reviews a grant of summary judgment de novo.

The parties agreed that the burden-shifting framework from *McDonnell Douglas Corp. v. Green*,[2] applied to Pham's claims under Health & Safety Code § 1278.5 and Lab. Code § 1102.5. There was no dispute that Pham established a prima facie case under *McDonnell-Douglas* based on the reduction of his part-time appointment from 50% to 40% full-time equivalent ("FTE") after he made a protected complaint about a colleague. Nor did the parties dispute that defendants articulated legitimate, nondiscriminatory reasons for the change: that Pham's duties had decreased such that a 50% FTE appointment was no longer appropriate, that budgetary constraints motivated "right-sizing" throughout the department, and that Pham's request for a raise—not his protected complaint about his colleague—prompted the review of his appointment.

The Ninth Circuit stated that to survive summary judgment, Pham was therefore required to produce evidence that defendants' "proffered nondiscriminatory reason is merely a pretext for [retaliation]." Evidence of pretext includes "evidence, direct or circumstantial, 'that a [retaliatory] reason more likely motivated the employer' to make the challenged employment decision" or "evidence 'that the employer's proffered explanation is unworthy of credence.'" Circumstantial evidence of pretext, standing alone, precludes summary judgment for the defendant only if it is "specific" and "substantial"—which this Court "has equated ... with evidence sufficient to raise a genuine issue of material fact under Rule 56(c)."

The Ninth Circuit stated that considered cumulatively, and construing the facts in the light most favorable to Pham, there were sufficient genuine issues of material fact as to pretext to survive summary judgment. There was evidence in the record that Pham's appointment structure changed to his detriment after he complained, and that other employees of the department experienced negative treatment after complaining about fraud and mismanagement to their supervisor. In addition, there was a temporal proximity between Pham's complaint and his appointment change that is within the range we have held to raise an inference of pretext. Thus, viewed cumulatively in the light most favorable to Pham, there were sufficient issues of material fact to avoid summary judgment.

[2] 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

Similarly, summary judgment was improperly granted on Pham's 42 U.S.C. § 1983 First Amendment retaliation claim under the test articulated in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). Pham offered sufficient evidence to survive summary judgment that his protected complaint was a "substantial or motivating" factor for—that is, a but-for cause of—the change to his appointment terms.

Accordingly, the Ninth Circuit reversed the district court's judgment and remanded the matter.

References. See, e.g., Wilcox, *California Employment Law*, § 43.01, *California Fair Employment and Housing Act* (Matthew Bender).

WAGE-AND-HOUR ACTION

Gen. Atomics v. Superior Court (Green), No. D078211, 2021 Cal. App. LEXIS 452 (May 28, 2021)

On May 28, 2021, a California appellate court held that the trial court erred by determining that an employer's wage statements, which showed only 0.5 times the regular rate rather than a 1.5x overtime rate, violated Lab. Code § 226. The wage statements provided by the employer showed both the applicable hourly rates and the total number of hours worked at each. They did not run afoul of the statute.

Tracy Green ("Green") sued her employer, General Atomics, based on its alleged failure to provide accurate, itemized wage statements showing "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee" [Lab. Code § 226(a)(9)]. Green maintained that General Atomics "failed to identify the correct rate of pay for overtime wages" because its wage statements showed "0.5 times the regular rate of pay rather than 1.5."

General Atomics moved for summary adjudication, challenging Green's theory of liability. It contended that its wage statements complied with the statute because they showed the total hours worked, with their standard rate or rates, and the overtime hours worked, with their additional premium rate. The trial court issued an order denying the motion. General Atomics challenges that order by petition for writ of mandate.

The appellate concluded that the trial court erred by determining that General Atomics' wage statements violate [Lab. Code § 226]. The wage statements showed the applicable hourly rates in effect and the corresponding number of hours worked at each rate. In the wage statements provided by General Atomics,

the applicable hourly rates were (1) the standard hourly rate determined by contract or other agreement between the employee and the employer and (2) the overtime premium hourly rate, determined by statute, that must be added to the employee's standard wages to compensate the employee for working overtime. These rates were plainly shown, along with the hours worked at each rate.

The appellate court showed that while other formats could also be acceptable, given the complexities of determining overtime compensation in various contexts, the format adopted by General Atomics adequately conveyed the information required by statute. It also allowed employees to readily determine whether their wages were correctly calculated, which is the central purpose of Lab. Code § 226. The alternative format Green proposed would make such a determination more difficult, rather than less.

Accordingly, the appellate court granted the petition for writ of mandate.

References. See, e.g., Wilcox, *California Employment Law*, § 3.16, *Computation of the Regular Rate of Pay Under Different Pay Practices* (Matthew Bender).

Usher v. White, No. D077133, 2021 Cal. App. LEXIS 448 (May 28, 2021)

On May 28, 2021, a California appellate court held that because the undisputed evidence showed that an owner of an alleged employer was not personally involved in the determination to classify plaintiffs as independent contractors, which purported misclassification formed the basis of their class and subclass allegations and their 10 causes of action, and because it also showed that she lacked sufficient participation in the operation and management of the employer to create a triable issue of material fact that she caused the wage and hour violations, she was not personally liable under Lab. Code § 558.1.

Plaintiffs Jackie Oneal Usher ("Usher") and Eric Leung ("Leung"), on behalf of themselves and all others similarly situated (collectively "plaintiffs"), appealed before the California appellate court judgment for defendant Shirley White ("Shirley"). Plaintiffs in 2014 brought a putative wage-and-hour class action lawsuit against defendants White Communications, LLC ("White Communications" or the "company") and DirecTV, LLC (DirecTV). In early 2018, plaintiffs amended their complaint to add Shirley and her son Jeff White ("Jeff") based on Lab. Code § 558.1, which became effective on January 1, 2016.

The appellate court stated that under Lab. Code § 558.1, a "natural person who is an owner, director, officer, or managing agent" of an employer may be personally liable if that person, on behalf of the employer, "violates, or causes to be violated" certain wage and hour laws as provided in the statute. The court granted summary judgment for Shirley, concluding as a matter of law she was not liable under Lab. Code § 558.1 because it found undisputed evidence that she did not participate in the determination to classify plaintiffs as independent contractors. The court therefore held Shirley did not "cause" any violation of the enumerated sections of the Labor Code, as set forth in Lab. Code § 558.1 and in plaintiffs' operative complaint.

The appellate court interpreted the words "violates, or causes to be violated" in Lab. Code § 558.1 in their ordinary meaning to impose liability on an "owner" such as Shirley if, when acting on behalf of an employer, the "owner" has personal involvement in the enumerated violations in Lab. Code § 558.1; or, absent personal involvement, has sufficient participation in the activities of the employer—including, for example, over those responsible for the alleged wage and hour violations—such that the "owner" may be deemed to have contributed to, and thus have "caused" such violations.

The court stated that the undisputed evidence in this case showed that Shirley was not personally involved in the determination to classify plaintiffs as independent contractors, which purported misclassification forms the basis of their class and subclass allegations and their 10 causes of action; and that she also lacked sufficient participation in the operation and management of White Communications to create a triable issue of material fact that she "caused" the wage and hour violations. The court therefore independently concludes that the order granting Shirley summary judgment was proper.

Accordingly, the appellate court affirmed the trial court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 5.30, *Actions by Labor Commissioner to Adjudicate Wage Claims And Collect Wages Other Than By Berman Hearing* (Matthew Bender).

Bruni v. The Edward Thomas Hosp. Corp., 64 Cal. App. 5th 247 (May 14, 2021)

On May 14, 2021, a California appellate court held, as did the trial court, that the right of recall pursuant to a Santa Monica recall ordinance, which provides laid off employees that have been employed by the employer for six months or more with a right to be rehired in certain circumstances ordinance, did not apply because plaintiff did not work for the employer for six months or more before he was involuntarily separated from employment for economic reasons; plaintiff's earlier period of employment that ended with his voluntary resignation did not count toward the six-month minimum period of employment, leaving him ineligible for recall under the ordinance; accordingly, plaintiff failed to state a cause of action under the recall ordinance.

Theodore Bruni ("Bruni") appealed a judgment of dismissal following the sustaining of a demurrer by The Edward Thomas Hospitality Corporation and Neptune's Walk, LLC, doing business as Hotel Casa del Mar (collectively, the "hotel").

Bruni was a restaurant server who alleged he was laid off after about four months when his employer, the Hotel, eliminated all part-time positions. Bruni brought this action alleging a violation of Santa Monica Municipal Code section 4.66.010 et seq. (the recall ordinance), which provides laid off employees that have been employed by the employer for six months or more with a right to be rehired in certain circumstances. The California appellate concluded, as did the trial court, that the right of recall did not apply here because Bruni did not work for the Hotel for "six months or more" before he was involuntarily separated from employment for economic reasons.

Bruni had a prior stint of employment with the Hotel that lasted about 10 months, which ended when he voluntarily resigned due to scheduling difficulties. However, the purpose of the recall ordinance was to protect employees who were involuntarily laid off due to economic circumstances—not to protect employees who quit for personal reasons. Therefore, the appellate court concluded that Bruni's earlier period of employment that ended with his voluntary resignation did not count toward the six-month minimum period of employment, leaving him ineligible for recall under the ordinance. Accordingly, Bruni failed to state a cause of action under the recall ordinance.

The appellate court stated that Bruni attempted to state a *Tameny* tort claim based on the Hotel's allegedly wrongful failure to rehire him in violation of public policy. The court concluded that the *Tameny* claim was not well pled because there was no violation of the recall ordinance on which the *Tameny* claim was based. In addition, the court stated that a *Tameny* claim must be predicated on a fundamental public policy that is expressed in a constitutional or statutory provision as opposed to a public policy that finds expression in a municipal ordinance.

Accordingly, the appellate court affirmed the judgment of dismissal.

References. See, e.g., Wilcox, *California Employment Law*, § 60.04, *Violation of Public Policy* (Matthew Bender).

WORKER'S COMPENSATION

Boudreau v. Indus. Res., No. 19-73011, 2021 U.S. App. LEXIS 15732 (9th Cir. May 26, 2021)

On May 26, 2021, the U.S. court of appeals for the Ninth Circuit in a case where an employee brought a First Amendment and state law retaliation claim against his employer, held that there was a disputed issue of material fact, warranting consideration by the trier of fact, regarding pretext because there was record evidence that the employee's appointment structure changed to his detriment after he complained, that other employees in the department experienced negative treatment after complaining about fraud and mismanagement to their supervisor, and there was a temporal proximity between the employee's complaint and his appointment change that raised an inference of pretext.

Petitioner David Boudreau ("Bourdeau") sought review of the Benefits Review Board's ("BRB") order affirming an Administrative Law Judge's ("ALJ") decision awarding Boudreau permanent partial disability benefits pursuant to the Longshore and Harbor Workers' Compensation Act. The BRB "reviews the ALJ's decision for substantial evidence and 'may not substitute its views for those of the [ALJ] or engage in a *de novo* review of the evidence '" [*see* 33 U.S.C. § 921(b)(3)]. The court reviewed the BRB's decision for "errors of law and for adherence to the substantial evidence standard." "The panel and BRB must therefore accept the ALJ's factual findings unless the factual findings are contrary to the law, irrational, or unsupported by substantial evidence."

The Ninth Circuit stated that the BRB did not err by declining to award nominal benefits. Pursuant to the parties' stipulation, the ALJ found that Boudreau's right arm injury was a "scheduled injury" and that Boudreau was permanently partially disabled. A claimant with a scheduled permanent partial disability is presumed to have a current loss of wage-earning capacity. Because Boudreau is presumed to have a current loss of wage-earning capacity—and is being compensated for that disability—Boudreau is not entitled to a nominal award of benefits pursuant to *Rambo II*.

Boudreau argued the BRB and ALJ erred by calculating the impairment of Boudreau's right arm without considering Boudreau's congenital absence of a left arm below the elbow. Boudreau contends the ALJ should have applied the aggravation rule to account for his preexisting condition. "The aggravation rule is a doctrine of general workers' compensation law [that] provides that, where an employment injury aggravates, accelerates, or combines with a preexisting impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable." That subsection provides that "[c]ompensation for permanent partial loss or loss of use of *a member* may be for proportionate loss or loss of use of *the member*." 33 U.S.C. § 908(c)(19) (emphasis added by the court). Because Boudreau's left arm impairment did not increase the impairment caused by the right arm injury, we conclude the ALJ did not err by declining to apply the aggravation rule.

The Ninth Circuit concluded the decision to use the 6th Edition as a starting point was error because Boudreau's diagnosis does not fit within either of the 6th Edition's factual predicates. The 6th Edition posits an injured worker with a "[h]istory of painful injury, residual symptoms without consistent objective findings," or an injured worker who has had "surgical release of flexor or extensor origins with residual symptoms. American Medical Association, Guides to the Evaluation of Permanent Impairment 399 (Robert D. Rondinelli, M.D., et al. eds., 6th ed. 2008) (emphasis added by the court). An impairment rating between zero and two percent is assigned to the first category, and a rating between three and seven percent is assigned to the second category. The ALJ did not acknowledge that Boudreau's injury does not fit into either of these categories because he has not had surgery and his history (a painful injury with residual symptoms) is supported by consistent objective findings. Given the facts in Boudreau's case, it was an abuse of discretion to rely on the 6th Edition as a starting point for calculating the impairment rating.

Accordingly, the Ninth Circuit denied the petition in part, granted in part and remanded.

References. See, e.g., Wilcox, *California Employment Law*, § 20.01, *Purposes and Application of Workers' Compensation System* (Matthew Bender).

CALENDAR OF EVENTS

2021

July 15-16	California Lawyers Association (CLA) Save the Date: 37th Labor and Employment Law Section Annual Meeting	8:00 AM – 5:00 PM
July 31	CLA Webinar: Workers' Compensation Legal Specialization Boot Camp 2021	9:00 AM – 12:15 PM
Aug. 11	CLA Litigation Webinar: Third Party Discovery: Procedural and Ethical Considerations	12:00 PM – 1:00 PM
Aug. 13	CLA Workers' Compensation Webinar: Expert Tips on Apportionment Part I	12:00 PM – 1:00 PM
August 18	CLA Webinar: When Social Media and Employment Law Collide	12:00 PM – 1:30 PM
August 25-27	National Employment Law Institute (NELI) Webinar: Public Sector EEO and Employment Law Update	8:30 AM – 12:15 PM
August 27	CLA Workers' Compensation Webinar: Expert Tips on Apportionment Part II	12:00 PM – 1:00 PM
Sept. 9-10	NELI Webinar: ADA Workshop	8:30 AM – 11:45 PM
Oct. 1	CLA Workers' Compensation Webinar: Significant Issues and Errors in the Guides and Related Case Law; Apportionment; Deposing Doctors	9:00 AM – 12:00 PM
Oct. 6-7	NELI Webinar: ADA Workshop	8:30 AM – 11:45 PM
Nov. 3-5	NELI Webinar: Employment Law Conference	8:30 AM – 12:15 PM
Dec. 1-3	NELI Webinar: Employment Law Conference	8:30 AM – 12:15 PM

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