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Deepfake "Evidence" and the Defensible Workplace Investigation

P. Dashiell Tucker

Introduction

Deepfake is a deep learning technology that can create realistic but fake audio and visual media, also called "synthetic media." Such technology may be used to "swap" a face, mimic a voice, or generate completely new audio, video, or still image media using a person's likeness, among other uses.[1] Access to powerful generative AI tools for image creation has been steadily democratized even as the capacity of such tools has advanced by leaps and bounds, lowering the technical barriers to producing increasingly convincing synthetic media.[2]

[1] Hao, J. (2024). Advances in Deepfake Generation and Detection Technologies: Challenges and Opportunities. *Transactions on Computer Science and Intelligent Systems Research*, *6*, 13-21, 13. 10.62051/m3s6nc42; New York Institute of Technology. (2023, October 26). *Deepfakes: How do they work and what are the risks?* The Cyber Corner. https://blogs.nyit.edu/the_cyber_corner/deepfakes_how_do_they_work_and_what_are_the_risks; Gupta, B. (2023, March 14). DeepFake: A Deep Learning Approach in Artificial Content Generation. *Medium*. https://medium.com/@gupta.brij/deepfake-a-deep-learning-approach-in-artificial-content-generation-a626ceebe48f

[2] Sharma, K., Li, Y., Comite, U. (2026) The Rise of Deepfake Fraud: Legal Challenges and AI-Driven Detection Strategies. In R. Marcão, V. R. Santos, & N. Mateus-Coelho (Eds.), Policies Against Fraud and Cybercrime: Strategic, Legal, and Technological Approaches (pp. 161-196, 162). IGI Global; Afchar, D., Nozick, V., Yamagishi, J., & Echizen, I. (2018). MesoNet: A compact facial video forgery detection network. *IEEE International Workshop on Information Forensics and Security (WIFS)*, *2018*, 1–7. 10.1109/WIFS.2018.8630761; Tolosana, R., Vera-Rodriguez, R., Fierrez, J., Morales, A., & Ortega-Garcia, J. (2020). Deepfakes and beyond: A survey of face manipulation and fake detection. *Information Fusion*, *64*, 131–148. 10.1016/j.inffus.2020.06.014

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Deepfake "Evidence" and the Defensible Workplace Investigation

P. Dashiell Tucker

(Continued from page 213)

A non-expert with a laptop or even a smartphone may now create an image so realistic that the human eye may not be able to recognize it as fake, especially now that the "traditional" hallmarks of AI-created images (*e.g.*, extra fingers, unrealistic lighting, or, in the case of audio media, unusual cadence or monotone delivery) are no longer applicable in much of deepfake media. Moreover, not all artificial intelligence ("AI") detection tools can discern a deepfake with 100% accuracy.[3]

Although deepfakes in the workplace may seem pedestrian beside headlines involving national security or financial fraud, their consequences can feel no less significant to an employer. The increasing sophistication and accessibility of the technology create particular risk with respect to workplace discipline and investigations, presenting employers with a new challenge: determining what happened when the evidence may be fabricated but utterly convincing to the naked eye. An employer may receive a seemingly authentic image or video of an employee engaging in misconduct or an audio recording purportedly capturing an employee's statements, only to discover—or fail to discover—that the "evidence" has been either manipulated or entirely fabricated. Acting on apparently credible evidence that later proves to be a deepfake can result in unjust discipline and expose the employer to legal risk. Alternatively, an employee accused of misconduct may offer fabricated exculpatory evidence with the employer being none the wiser. Such an outcome may also incur legal and other consequences if it leads to the employer failing to address misconduct. As one real-life example of the former scenario, an athletic director at a public high school in Baltimore County, Maryland, used deepfake technology to create fake audio of the high school's principal making racist and antisemitic remarks.[4] Although the audio was discovered to be a forgery, it nonetheless had a significant impact, disrupting school activities and causing the principal to be placed on leave, among other consequences.[5]

The problems presented by deepfakes in the workplace are not merely technological (*i.e.*, a matter of detection) but procedural. Employers must now reconsider what constitutes a defensible workplace investigation process when the authenticity of the evidence itself is or may come into question. While this does not require employers to become experts in digital forensics, it does mean that employers must develop sufficiently rigorous and consistent investigatory processes for determining when and what evidence supports disciplinary action or a decision not to discipline. This article discusses several key considerations in building a defensible investigative process in the era of deepfakes and briefly highlights additional areas of legal risk for both unionized and non-unionized workplaces, namely privacy and bargaining obligations.

Building a Defensible Investigation

A defensible workplace investigation is one whose process can withstand the scrutiny of a legal challenge. Consistency, impartiality, thoroughness, and robust documentation are key. In the context of deepfake technology, this means accounting for the possibility of manipulation from the outset, identifying circumstances that warrant heightened scrutiny, verifying the source of media evidence, gathering and evaluating corroborating or contradictory evidence, and developing a well-documented basis for drawing conclusions about evidence that is alleged or suspected to be synthetic media.

First Things First – Preserve the Original and Ecosystem

In the scenarios described above, the media evidence in question is presumably coming from some source external to the employer, such as from one employee accusing another or an employee offering evidence of innocence. A media file should be preserved exactly as it was received. Employers may need to save the media

[3] Hao, J. (2024), p. 18.

[4] Finley, B. (2024, April 25). Athletic director used AI to frame principal with racist remarks in fake audio clip, police say. *AP News*. https://apnews.com/article/ai-artificial-intelligence-principal-audio-maryland-baltimore-county-pikesville-853ed171369bcbb888eb54f55195cb9c; Skene, L. (2025, April 29). Former school athletic director gets 4 months in jail in racist AI deepfake case. *AP News*. https://apnews.com/article/racist-ai-recording-maryland-high-school-487ea673b0449077cb23e7970546cb9f

[5] Finley, 2024; Skene, 2025.

in a different format than they received it because they lack the software to view or hear the content of the original. But opening, resaving, or converting a file to a different format can overwrite or alter metadata, thus erasing or corrupting what may be the primary evidence to verify when and where the media was captured and whether it has been edited. This also guards against later accusations that the media was altered through the review process. Analysis of the media, including through AI detection tools, should be done off of additional copies of the original file. If the media evidence is known or suspected to be something other than the "source" file—such as a screenshot or a repost on social media—attempt to obtain the source file or, if obtaining the source file is not possible, document the attempt and why it was unsuccessful. Be aware, however, that obtaining source media files may implicate privacy issues, as discussed further *infra*, if doing so involves employee social media or personal devices.

If the media is purportedly from a source over which the employer has control or if the incident allegedly took place on or in employer property (*e.g.*, a building or a vehicle), be sure to also preserve the whole ecosystem of related records, such as access logs, web history, badge reader data, vehicle GPS, or other media that may contradict or corroborate, such as surveillance footage that overlaps with or otherwise relates to the physical space in which the incident is alleged to have occurred.

Deciding When and How to Vet the Evidence

When should an employer subject a piece of media evidence to greater scrutiny? If an employee accused of misconduct claims the evidence is fabricated, assessing authenticity may be an obvious next step. But when media is offered as exculpatory evidence, the answer may be less clear. In either case, consistency and objectivity are essential.

Be Consistent

Every decision point is an opportunity for bias to be introduced into the process, which leads to inconsistencies across similar decision scenarios. For example, when the question is whether to believe the evidence before one's eyes, bias may creep in where the decision-maker feels the misconduct the employee is accused of matches—or doesn't match—with what they feel they already "know" about the employee. Confirmation bias, affinity bias, attribution bias, recency bias, the horns effect, and other forms of bias may all have an effect on the decision to take seriously a challenge to the authenticity of media evidence. Bias can create legal risks. In any workplace setting, inconsistent decision-making can open an employer up to accusations of discrimination. In a for-cause employment relationship, inconsistency can undermine an employer's argument that it had just cause for discipline or other decisions.[6] As with any policy related to discipline, employers should have a clearly articulated, objective basis for deciding when to assess the authenticity of evidence and ensure the policy is consistently applied. In the case of media evidence from external sources, a policy to always run such media through an AI detection tool may be the best way to ensure consistency.

Use the Right Tools

While deepfake detection tools may not guarantee 100% accuracy, they are more accurate and objective than relying on human perception. A recent study found that the accuracy rate for human identification of synthetic content was about even with chance (50%) across a variety of media types, "suggesting that people's visual and auditory perceptual capabilities are inadequate for reliably identifying synthetic media . . ."[7] Deepfake detectors may look for signs, called "artifacts," in the visual data, which act as "tells" that a piece of media is generated or manipulated, such as distortions and irregularities in the pixels or mismatched lighting that may not be visible to the human eye but which detection tools can "see" and recognize.[8] Detection tools may also look for authentication information embedded in the media.[9] ChatGPT (OpenAI), Claude (Anthropic), and Gemini (Google), for example, embed Coalition for Content Provenance and Authenticity (C2PA) content

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[6] *See*, *e.g.*, Brand & Biren, Discipline and Discharge in Arbitration, Just Cause, § 2, p. 5-6, discussing the seven-part Daugherty test for just cause, which includes consideration of whether the employer made a reasonable effort to discover the facts, whether that investigation was fair and objective, and whether the proof was sufficient to sustain the ultimate decision.

[7] Cooke, D., Edwards, A., Barkoff, S. & Kelly, K. (2025, October). As Good as a Coin Toss: Human Detection of AI-Generated Content. Communications of the ACM, 68:10, 100-109. https://dl.acm.org/doi/epdf/10.1145/3729417.

[8] Amerini, I., Barni, M., Battiato, S., Bestagini, P., Boato, G., Bruni, V., Caldelli, R., De Natale, F., De Nicola, R., Guarnera, L., Mandelli, S., Majid, T., Marcialis, G. L., Micheletto, M., Montibeller, A., Orrù, G., Ortis, A., Perazzo, P., Puglisi, G., Purnekar, N., Salvi, D., Tubaro, S., Villari, M., & Vitulano, D. (2025). Deepfake Media Forensics: Status and Future Challenges. *Journal of Imaging*, *11(3)*, 73. https://doi.org/10.3390/jimaging11030073.

[9] Amerini et al. (2025).

credentials (an open-source technical standard of metadata) in the visual media they generate, which any C2PA-compatible tool or verification viewer can read.[10] Some hardware, such as smartphones, digital cameras, and video camcorders, also may embed C2PA content credentials. OpenAI also recently committed to including Google's SynthID watermarks in the media it generates;[11] unlike metadata, SynthID is part of the content itself, embedding an invisible digital trace directly into pixels or frequencies of the visual or audio media, and can persist through editing and other transformations.[12]

Keep in mind, however, that detection tools have limits or may look for different things, and that the absence of evidence is not evidence. Not all deepfake creation tools embed C2PA content credentials or watermarks. And just because metadata is missing does not mean that the image is fake or manipulated. When a piece of media is a screenshot (for example, from someone's social media feed or text messages), metadata may be scrubbed or replaced as a natural consequence; this is partly why following up to get the source and "native" format of the image, recording, or video, if possible, is so important. Likewise, the presence of C2PA metadata may not guarantee that content is unedited, and even unedited media out of context may be misleading.

The key takeaway is to not rely on human detection, but to adopt a clear and consistent basis for testing the authenticity of media evidence and to ensure that investigators and decision-makers are familiar with AI detection tools and their limits, and utilize those tools where appropriate.

When to Bring in an Expert

Whether to bring in an external expert may depend on factors beyond the precise facts of the incident and media involved, including the employer's technological capacity and expertise, as well as budgetary considerations. Broadly speaking though, an expert may be recommended where the disputed media is a central piece of evidence, where the level of discipline that may be applied is significant (*e.g.*, termination rather than a counseling memo), or when the source or "native" media file is not available for review. Further, if an employer's internal risk analysis suggests that litigation may ensue, it may be wise to have a witness capable of explaining the technical basis for including or excluding disputed evidence in an investigation's calculus or a disciplinary decision.

Address Provenance and Challenges in Witness Interviews

Interviewers and investigators also play an important role in documenting challenges to authenticity. Whether conducting an internal investigation or handing it off to an external entity, employers should ensure witness and complainant interviews include questions regarding provenance and custody. For example, who purportedly created or captured the media? On what device? When and where? How did the media travel from the source to the employer (chain of custody)? Has the media been posted, downloaded, or screen-recorded?

Where an accused employee is disputing the authenticity of evidence, employers should likewise be sure to fully unpack the basis for the employee's assertion the evidence is fake. What specifically about the video or image is fabricated? Assuming inauthenticity, does the employee recognize any elements of the disputed media that would offer a clue to its source[13] material? Do they know of any contradictory media evidence that would corroborate their version of the story?

These questions and others help establish a record not only of what is alleged to have happened or why a piece of media evidence is being challenged, but also the basis for the employer's conclusions about the media's authenticity.

Reduce Reliance on Disputed Evidence

Corroborating evidence may also mitigate risks of relying on media evidence alleged to be fake. This requires an investigator to not just look beyond the disputed media to independent evidence, but to think creatively about that piece of media. If a reliable eyewitness or employer-controlled data corroborates

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[10] For example, if you were to create an image with Gemini and then upload that image into ChatGPT, ChatGPT should be able to tell you its provenance.

[11] Weatherbed, J. (2026, May 19). OpenAI says it's getting serious about AI detection and labeling: Images generated by ChatGPT will now carry Google's SynthID watermarks. *The Verge*. https://www.theverge.com/ai-artificial-intelligence/933442/openai-synthid-content-credentials-c2pa-expansion.

[12] Pierce, D. (2023, August 29). Google made a watermark for AI images that you can't edit out. *The Verge*. https://www.theverge.com/2023/8/29/23849107/synthid-google-deepmind-ai-image-detector.

[13] "Source" in this case means a piece of media that may have been used to make the deepfake. Because deepfakes use "training" material to create their content, a piece of synthetic media may be traceable to the picture, video, or audio it is based on, such as from a public social media profile or even pictures posted on the employer's own website.

an event, such evidence may independently sustain a disciplinary decision. But in the absence of anything so conclusive, an investigator may need to ask instead, if the event depicted really occurred, what other verifiable facts would exist? For example, if an employee was purportedly in the breakroom when they made an alleged comment, does video surveillance in nearby corridors reflect the employee's transit to that breakroom? Or, as noted in the section on preservation, does badge reader data, a timekeeping system, GPS data, or cloud or other access records corroborate the events or the explanation of provenance?

Document for a Future (Skeptical) Audience

A theme that may already have emerged, and a frequent refrain among management lawyers with respect to employee discipline, is that employers must "build the record" of their decision-making for a future skeptical audience, namely an arbitrator or judge. Robust documentation supports credibility when an employer seeks to establish it had legitimate business reasons not only for the ultimate decision, but for all the smaller decisions that led to or supported that conclusion. If independently established facts are sufficient to sustain the decision, be sure to explain that clearly and thoroughly. Document the steps taken to ascertain the authenticity of the disputed media evidence and the conclusions reached, if any, at each stage of the process. A well-documented process may rebut a later claim of wrongful termination or discrimination, or evade litigation entirely by incentivizing settlement on the part of a plaintiff-employee. Arguably more importantly, rigorously documented decision-making also helps establish and maintain consistent and objective internal processes, helping subsequent decision-makers understand how to treat similar cases.

Keeping an Eye on Additional Risk Areas

Finally, employers should be aware of two additional considerations that may arise as they develop their response to the threats presented by deepfake technology.

In a unionized workplace, adopting new policies that specifically discuss, for example, the use of employer media, software, or hardware to create synthetic media, or the consequences of using such technology to create fake depictions of one's coworkers, may incur bargaining obligations even if they are work rules that fall within management rights. While misuse of employer hardware/software or creating fake media and trying to pass it off as real may already be "covered" by an employer's existing use, discrimination, harassment, or broad just cause discipline (*i.e.*, dishonesty as a basis for discipline) policies, clearly articulated policies help set employee expectations and avoid future arguments over whether something was "really a rule," and thus may be worth the work of bargaining any effects.

When the source of a piece of contested media is an employee's social media or personal device, privacy will be a concern in any workplace. Article 1, Section 1 of the California constitution accords employees a degree of privacy in the workplace, rights supported by sections of the Labor Code. For example, employers may not demand that an employee share their personal social media usernames or passwords, nor may an employer require an employee to log into private accounts under their supervision.[14] Making decision-makers aware of the types of privacy issues that may arise is the first step to avoiding risk. Here, too, having clearly articulated policies may help avoid legal issues and set employee expectations. Employers should consider updating their investigation policies to address how external evidence is assessed and weighed. As one example, what happens if an employee submits evidence of another employee's misconduct, purportedly downloaded onto their iPhone from a website, but later that website cannot be found and the accusing employee refuses to turn over their phone, even for a narrow search to corroborate the download? Policies may not be able to account for every possible scenario, but they can set some basic ground rules to aid internal consistency and employee understanding.

In sum, employers must shape their investigative process and other internal policies to account for the risks of increasingly accessible and sophisticated deepfake generation tools. While detection tools are also advancing quickly, an employer's procedure for addressing disputed evidence is equally, if not more important, to defending against potential legal challenges.

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[14] Cal. Lab. Code § 980.

WAGE & HOUR ADVISOR: Ninth Circuit Decision Highlights Risks From Implementing Arbitration Agreements During Class Action Litigation

Aaron Buckley

Introduction

One of the most powerful weapons available to employers who wish to avoid class and collective action litigation is the use of arbitration agreements that include class and collective action waivers. While properly drafted arbitration agreements implemented before disputes arise are generally enforceable, a Ninth Circuit decision from earlier this year held that district courts may refuse to enforce arbitration agreements implemented *during* class action litigation where the employer's communications were found to be misleading and designed to undermine established litigation procedures.

Avery v. TEKsystems, Inc.[1]

TEKsystems, Inc. (TEK) is a staffing agency that places external employees, which it calls "consultants," on temporary assignments with its clients to provide IT services.[2] TEK had policy requiring consultants to sign arbitration agreements as a condition of employment, but this practice did not apply to TEK's internal employees.[3]

A group of former TEK internal employees who worked as recruiters brought a class action complaint in state court alleging six causes of action under California law based on alleged wage and hour violations.[4] TEK removed the case to federal court.[5] After participating in discovery for over a year, TEK approved a plan to expand its mandatory arbitration program to include its internal employees, including recruiters.[6]

On December 19, 2023, five days after the close of briefing on the plaintiffs' motion for class certification, TEK sent an email ("Email 1") to all its internal employees announcing the new arbitration agreement which included a class and collective action waiver.[7] In Email 1, TEK characterized class and collective actions as "wasteful, inefficient means for resolving disputes, and tend to enrich only attorneys rather than the individuals who may have legitimate claims."[8] Email 1 notified employees they would be deemed to have accepted the agreement if they remained employed after December 31, 2023.[9]

After sending Email 1, later that same day TEK sent a second email ("Email 2") to all recruiters who were members of the putative class.[10] Email 2 notified the recruiters about the pending litigation and that they were members of the putative class, and included a link the recruiters could click to view the operative complaint.[11] Email 2 further notified the recruiters they could opt out of the agreement for the limited purpose of remaining in the putative class by signing and returning an opt-out form no later than January 9, 2024.[12] Email 2 also stated, "You of course are free to consult your attorney."[13] Of the 164 recruiters who received Email 2, 41 opted out to remain putative class members, and the remaining 123 did not opt out.[14]

On February 13, 2024, the district court granted the plaintiffs' motion for class certification.[15] Four months later TEK filed a motion to compel arbitration against members of the putative class who TEK contended were bound by the new arbitration agreement.[16]

The district court denied TEK's motion, finding Rule 23(d) of the Federal Rules of Civil Procedure (FRCP 23(d)) gives district courts broad authority to regulate the notice and opt-out process in class action

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1 No. 24-5810, 165 F.4th 1219, 2026 U.S. App. LEXIS 2091 (9th Cir. Jan. 28, 2026).

2 165 F.4th at 1222.

3 165 F.4th at 1222.

4 165 F.4th at 1222.

5 165 F.4th at 1222.

6 165 F.4th at 1222.

7 165 F.4th at 1222.

8 165 F.4th at 1223.

9 165 F.4th at 1223.

10 165 F.4th at 1224.

11 165 F.4th at 1224-25.

12 165 F.4th at 1225.

13 165 F.4th at 1225.

14 165 F.4th at 1225.

15 165 F.4th at 1225.

16 165 F.4th at 1226.

litigation, and to impose limitations when a party's conduct threatens the fairness of the litigation.[17] The district court found that TEK's communications regarding the new arbitration agreement were misleading and omitted key information.[18] Additionally, the district court found the two emails contradictory, noting that Email 1 purported to make the agreement mandatory as a condition of further employment without mentioning any opt-out procedure, but Email 2 indicated an opt-out was possible for purposes of the pending litigation.[19] The district court concluded that by implementing the opt-out procedure, "TEK turned this Rule 23 opt-out class proceeding into an opt-in proceeding, and to ensure as few current employee class members as possible opted in, TEK disparaged class actions and hid important information from the putative class members."[20] TEK appealed.[21]

The Ninth Circuit panel first examined the district court's conclusion that FRCP 23(d) allows trial courts to refuse to enforce arbitration agreements.[22] The panel concluded the district court was correct, citing a long line of case authority and holding a district court's broad authority to exercise control over class actions "includes the authority to refuse to enforce an arbitration agreement."[23]

The panel next examined the district court's application of FRCP 23(d) to determine whether the district court abused its discretion in declining to enforce TEK's arbitration agreement.[24] On this issue, the panel agreed with the district court's conclusion that TEK's communications with the recruiters was misleading for a number of reasons.[25] These reasons included TEK's disparaging remarks about class actions, the contradictory communications regarding the opt-out procedure including confusing deadlines, and TEK's statement to recruiters that they "are free to consult their attorney," which failed to indicate that class members could obtain legal advice regarding the opt-out from the plaintiffs' counsel without paying out of pocket.[26] In addition, the panel concluded that TEK's actions "upended FRCP 23(d) by turning the opt-out process into an opt-in process. … Invalidating the Agreement is necessary to be consistent with FRCP 23 as it restores the opt-out process as the default."[27]

Conclusion

Employers who wish to ensure their arbitration agreements are enforceable should implement them *before* disputes arise, as any agreements rolled out during litigation will be closely scrutinized. Pre-dispute arbitration agreements can be implemented as part of the standard onboarding process for new employees. Communications regarding arbitration agreements should be neutral, professional, and internally consistent to avoid confusion. Employees should be allowed adequate time to review agreements and ask questions, and any opt-out procedures should be thoroughly explained. After arbitration agreements are implemented, they should be reviewed annually and updated as necessary to take into account new legal developments, including new case law, which could affect their enforceability.

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[17] 165 F.4th at 1226.

[18] 165 F.4th at 1226.

[19] 165 F.4th at 1226.

[20] 165 F.4th at 1226.

[21] 165 F.4th at 1227.

[22] 165 F.4th at 1227.

[23] 165 F.4th at 1227-31.

[24] 165 F.4th at 1231.

[25] 165 F.4th at 1231.

[26] 165 F.4th at 1231-33.

[27] 165 F.4th at 1233.

Editor's Note: A new child savings vehicle is poised to enter the employee benefits landscape. Trump Accounts, created by federal law as tax-advantaged investment accounts for children, are designed to encourage long-term savings through a combination of government funding and private contributions. Although the accounts are intended to benefit children, the legislation also permits employers to contribute through Trump Account Contribution Programs ("TACPs"), placing the program squarely on the radar of labor and employment attorneys. As employers begin evaluating whether these accounts fit their compensation and benefits strategies, recent guidance from the Internal Revenue Service and Treasury Department offers important insight into how the program will operate in practice. The below article includes details to break down what these accounts mean and considerations to review.

IRS Proposes Rules for Trump Account Investment Options: Considerations for Employers

Hillary August, Stephanie Vasconcellos, and Jina Davidovich

On August 21, 2026, the Internal Revenue Service ("IRS") and the Department of the Treasury ("Treasury") published a notice of proposed rulemaking providing guidance on the types of investments that may be held in a Trump Account during the account "growth period" (i.e., the period ending December 31 of the calendar year in which the beneficiary reaches age 17). The proposed regulations, issued under Section 530A of the Internal Revenue Code (the "Code"), generally limit Trump Account investments during the growth period to low-cost, passively managed index mutual funds and exchange-traded funds ("ETFs") that track broad-based US equity indices. In addition, the rules establish investment-selection, monitoring and correction requirements for Trump Account trustees.

While taxpayers and trustees may rely on the proposed regulations immediately if they follow them in their entirety and in a consistent manner, the proposed regulations generally apply to taxable years beginning on or after January 1, 2026, except that trustee-specific requirements apply to taxable years beginning on or after the date final regulations are published.

Employers considering implementing Trump Account Contribution Programs ("TACPs") should be aware of these investment restrictions, despite the majority of the requirements in the proposed regulations being applicable primarily to Trump Account trustees.

Eligible Investments Under the Proposed Regulations

Under the proposed regulations, an "eligible investment" for a Trump Account is a mutual fund or ETF that satisfies all of the following requirements:

- Tracks a qualified index,
- Does not use leverage,
- Has total annual fees and expenses of no more than 0.1% of net asset value, and
- Meets such other criteria as the Secretary of the Treasury determines appropriate.

Actively managed funds are **not** eligible investments, and an investment fund, including a fund-of-funds, that seeks to replicate the returns of multiple indices is not an eligible investment. However, a fund-of-funds that tracks a single qualified index and meets all other requirements is not precluded. ETFs and mutual funds must be domestic corporations registered under the Investment Company Act of 1940.

Requirement 1: Qualified Index Requirements

A "qualified index" is the S&P 500 or any other index that:

- Is composed of equity investments in primarily US companies (the proposed regulations include a safe harbor for an index primarily (90%) comprised of US companies, based on their weightings);
- Has regulated futures contracts traded on a qualified board or exchange;
- Is not industry-specific or sector-specific;
- Is composed entirely of stocks and similar ownership interests (no debt, derivatives, or non-ownership assets); and
- Has a publicly available index methodology.

Examples of qualifying indices cited in the preamble, in addition to the S&P 500, include the CRSP U.S. Total Market Index and the Nasdaq Composite. Market-capitalization-based indices are expressly permitted. Money market funds do not track the returns of a qualified index and thus are not eligible investments.

Requirement 2: Leverage Prohibition

A fund is generally treated as using leverage if borrowings, derivatives or similar instruments materially increase the risk of loss. The proposed regulations provide exceptions for certain ordinary-course practices that do not materially increase risk, including short-term borrowing for liquidity, certain derivatives used to obtain index exposure and securities lending.

Requirement 3: Fees and Expenses Cap

The 0.1% cap on annual fees and expenses applies to the sum of (i) all annual fees charged directly to fund holders, including annual, periodic, transactional, purchase, redemption, and sales load fees regardless of form, and (ii) total annual operating expenses as disclosed in the fund's prospectus. Trustee or custodial fees for maintaining the Trump Account, as well as transaction fees imposed by an intermediary rather than the fund, are not counted toward the cap. For funds with multiple share classes, the cap applies separately to each class.

Requirement 4: Other Criteria (Including ESG Funds Exclusion)

The fund must meet such other criteria as the Secretary of the Treasury determines appropriate. For example, the proposed regulations provide that any fund corresponding to, or marketed as tracking, an ESG index is not an eligible investment. An "ESG index" is any index that has, or is marketed as having, a focus on environmental, social, or governance factors. Treasury explained that ESG indices "limit exposure to companies in a way that makes them similar to sector-specific funds" (which are also prohibited), and stated that the economic impact of this exclusion is minimal.

Trustee Obligations and Monitoring

The proposed regulations impose substantial procedural obligations on Trump Account trustees:

- Investment menus must be limited to eligible investments.
- Trustees must establish and disclose a default eligible investment for each account and state how dividends and distributions will be reinvested as part of the default selection.
- Contributions and reinvested proceeds will be applied to the default investment unless the beneficiary or responsible party directs otherwise.
- The trustee's written governing instrument must address procedures for fund selection, temporary cash holdings, and error correction. Cash generally may be held only for the period reasonably necessary to complete a permitted transaction.
- A trustee must make an initial eligibility determination when first offering a fund, followed by periodic re-determinations at least every 12 months. Trustees may rely on the fund's prospectus and public documents required by federal securities laws.

Consequences of Noncompliance

The consequences of holding an ineligible investment depend principally on whether the investment was ineligible when acquired or became ineligible after acquisition.

- **Ineligible when acquired:** If an investment was ineligible when acquired, the account ceases to be a Trump Account (and an IRA, as discussed further below) as of the first day it holds the ineligible investment, with no remediation window. A limited exception applies to certain trustee administrative errors, which may be corrected within 30 days from the first day the portion was not invested in an eligible fund.
- **Ineligible after acquisition:** If a fund was eligible when acquired but later ceases to qualify, the account retains its status if the trustee sells or disposes of the investment, reinvests the proceeds within the applicable 30-day correction period and the trustee discloses the error and reinvestment to the beneficiaries. If the trustee fails to do so, the account loses its Trump Account and IRA status.

The date on which the fund is treated as ceasing to be an eligible investment depends on the trustee's monitoring procedures. If the trustee has not complied with the periodic monitoring requirements, that date is the first day the fund fails to satisfy the eligible investment requirements. For a compliant trustee, however, that date is the earlier of the trustee's next periodic determination or the date the trustee acquires actual knowledge that the fund no longer qualifies.

If an account ceases to be a Trump Account, it also loses its status as an IRA and the account is treated as having made a taxable distribution to the account beneficiary.

Treasury and the IRS have requested comments on potential additional correction relief, including whether a trustee should be permitted to restore earnings lost as a result of its own administrative error, without the replaced earnings counting toward the annual contribution limit. They are also considering whether Trump Account corrections should be incorporated into the IRA correction framework authorized under Section 305(c) of the SECURE 2.0 Act.

Practical Takeaways for Employers

- **Understand the investment landscape before communicating benefits.** Although the investment rules are directed primarily at trustees and account beneficiaries, they are relevant to employers as well. Employer TACP contributions, which may not exceed $2,500 per employee per year (counting toward the overall $5,000 annual contribution cap), flow into Trump Accounts that are subject to these restrictions. Employers should understand how contributed funds are invested so they can communicate the value of the TACP benefit to employees.
- **No employer investment-selection responsibility.** Unlike qualified retirement plans, where employers bear fiduciary responsibility for investment menu selection and monitoring under ERISA, the proposed regulations place investment-selection and monitoring obligations squarely on the Trump Account trustee. This is consistent with the DOL's separate confirmation that TACPs generally are not ERISA plans.
- **Employers cannot manage investment compliance through trustee selection.** A TACP cannot limit contributions to Trump Accounts held by a particular trustee or trustees. As a result, employers will be sending contributions to whatever trustee holds each dependent's account and cannot diligence or negotiate with a single trustee as they might for a health savings account program. Employers implementing TACPs should therefore focus on their own operational readiness, such as verifying that any contributions through a TACP are being made to valid Trump Accounts.
- **Consider submitting comments.** Treasury and the IRS have requested comments on several issues that could affect the design and administration of Trump Accounts and TACPs, such as stock contributions and trustee fees. Employers with strong views on these design questions had to submit comments by October 20, 2026.

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CASE NOTES

ARBITRATION

***Hernandez v. Md. MarketSource*,** No. B341976, 2026 Cal. App. Unpub. LEXIS 5918 (Sep. 4, 2026)

A California appellate court held that, under the California Supreme Court's intervening decision in Hohenshelt v. Superior Court, nonpayment of arbitration fees constitutes a waiver of the right to arbitrate only when the nonpayment was "willful, grossly negligent, or fraudulent" and not the result of "a good faith mistake, inadvertence, or other excusable neglect."

Robert Hernandez filed a complaint against Maryland MarketSource, Inc. and others arising from his employment with defendant and alleging violations of the Labor Code and the Fair Employment and Housing Act. Defendant filed an answer alleging, among other things, that plaintiff was required to arbitrate his claims pursuant to an arbitration agreement. Defendant filed a motion to compel arbitration pursuant to a "Mutual Arbitration Agreement" bearing plaintiff's electronic signature. The agreement obligated plaintiff to pay "any Judicial Arbitration and Mediation Services filing or administrative fee up to the amount of the initial filing fee to commence an action" and defendant to pay "any other JAMS administrative fees, the Arbitrator's fees, and any additional fees unique to arbitration." Plaintiff filed a motion to vacate the order compelling arbitration and for attorney fees. Defendant opposed the motion. The trial court conducted a hearing on the motion to vacate and attorney fees and issued an order granting the motion to vacate.

While defendant's appeal was pending, the California Supreme Court decided *Hohenshelt v. Superior Court* (2025) 18 Cal.5th 310. The appellate court explained: "While defendant's appeal was pending, our Supreme Court in *Hohenshelt v. Superior Court* (2025) 18 Cal.5th 310 (*Hohenshelt*) interpreted section 1281.98 to equate nonpayment of arbitration fees with a waiver of the right to arbitrate only when the nonpayment was 'willful, grossly negligent, or fraudulent' and not the result of 'a good faith mistake, inadvertence, or other excusable neglect.'" The court therefore concluded: "In light of *Hohenshelt*, we reverse and remand to the trial court to determine whether defendant's nonpayment of fees satisfies the newly articulated standard."

Accordingly, the appellate court reversed the trial court's order and remanded for the trial court to determine whether defendant's nonpayment was willful, grossly negligent, or fraudulent, rather than the result of a good faith mistake, inadvertence, or other excusable neglect.

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

Herrera v. Interlang, No. B346752, 2026 Cal. App. Unpub. LEXIS 6020 (Sep. 11, 2026)

A California appellate court held that a later employment agreement did not supersede an earlier arbitration agreement and that the employee was required to arbitrate his claims.

Interlang, LLC hired Albert Herrera in 2017. In December 2017, Herrera and Interlang executed an arbitration agreement governed by the Federal Arbitration Act. The agreement required binding arbitration of all disputes between Herrera and Interlang or its agents "arising from, related to, or having any relationship or connection whatsoever with seeking employment with, employment by, or other association with" Interlang. It also stated that it was the parties' entire agreement concerning dispute resolution, the length of Herrera's employment, and the reasons for termination. In 2021, the parties executed a new employment agreement. That agreement contained an integration clause and referred to a future document identified as "the Company's Arbitration Agreement," but it did not mention the 2017 Arbitration Agreement or state that the earlier agreement was terminated, replaced, or superseded. No evidence showed that the contemplated future arbitration agreement was executed. Interlang terminated Herrera in 2023. In March 2024, Herrera sued Interlang and eleven other entities and individuals, asserting 16 causes of action arising from his employment and termination. Interlang moved to compel arbitration under the 2017 Arbitration Agreement. Herrera opposed the motion, arguing that the 2021 Employment Agreement superseded the 2017 Arbitration Agreement. The trial court agreed and denied the motion to compel. Interlang appealed.

The California appellate court concluded that the 2021 Employment Agreement did not supersede the 2017 Arbitration Agreement. Although the 2021 agreement contained an integration clause, that clause applied only to the subjects covered by the later

agreement. The 2021 agreement did not mention the 2017 Arbitration Agreement or state that the parties intended to terminate or replace it. Its reference to a future document called "the Company's Arbitration Agreement" showed only that the parties contemplated executing another arbitration agreement; it did not establish that the contemplated agreement would extinguish the existing one. Because there was no evidence of an intent to substitute a new obligation for the 2017 Arbitration Agreement, the 2021 agreement also did not constitute a novation. The court further concluded that the 2017 Arbitration Agreement broadly covered disputes arising from or related to Herrera's employment. Once Interlang established the existence of that valid agreement, Herrera bore the burden of showing that any particular claim fell outside its scope. Herrera did not meet that burden because he did not explain how any of his claims, including those involving alleged fraud, securities, compensation, or termination, were unrelated to his employment. The trial court therefore erred in denying Interlang's motion to compel arbitration.

Accordingly, the appellate court reversed the order denying Interlang's motion to compel arbitration and remanded the case with directions to order Herrera to arbitrate his claims under the 2017 Arbitration Agreement.

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

Hokanson v. Northrop Grumman Sys. Corp., No. B339490, 2026 Cal. App. Unpub. LEXIS 6002 (Sep. 10, 2026)

A California appellate court held that Northrop's arbitration program did not clearly and unmistakably delegate questions concerning the agreement's formation or continuing validity to the arbitrator. Nevertheless, the court independently concluded that the arbitration agreement remained in effect and required Hokanson to arbitrate his employment claims.

David Hokanson sued Northrop Grumman Systems Corporation in 2020 for Labor Code violations and wrongful termination based on events that occurred in 2018. In January 2021, Northrop moved to compel arbitration under an employment agreement Hokanson signed in 2015, which incorporated Northrop's Employee Mediation/Binding Arbitration Program. Hokanson argued that he was not required to arbitrate because the program had expired in 2016, two years before the events giving rise to his claims. In reply, Northrop asserted that the program clearly and unmistakably delegated threshold questions of arbitrability to the arbitrator by providing that all matters of procedure and arbitrability of the issues would be determined by the arbitrator. Because Northrop raised the delegation argument for the first time in reply, the trial court permitted Hokanson to file a sur-reply. The trial court granted the motion to compel arbitration, concluding that the program delegated threshold issues of arbitrability to the arbitrator. The arbitrator rejected Hokanson's expiration argument and entered a final award in Northrop's favor. The trial court confirmed the award and entered judgment, from which Hokanson appealed.

The California appellate court first concluded that the arbitration program did not clearly and unmistakably delegate questions concerning contract formation or the agreement's continuing validity to the arbitrator. Although the program directed the arbitrator to apply the rules of the selected tribunal, it also provided that the program controlled if its terms conflicted with those rules. The program's own delegation language did not clearly encompass whether the agreement had expired. The trial court therefore should have decided Hokanson's expiration challenge rather than referring it to the arbitrator. The appellate court nevertheless resolved that challenge as a matter of law. The program required Hokanson to arbitrate all future disputes arising out of or relating to his employment or termination, without a temporal limitation. Because the reauthorization provision was ambiguous, the court declined to interpret it as automatically terminating the program in 2016 and instead harmonized it with the agreement's express coverage of future employment disputes. The program therefore remained in effect when the parties' dispute arose in 2018, and Hokanson's claims were subject to arbitration.

Accordingly, although the trial court should have decided the expiration issue itself, the appellate court affirmed the order compelling arbitration because the arbitration program remained in effect and covered Hokanson's claims. The judgment confirming the arbitration award in Northrop's favor therefore remained intact.

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

DISCRIMINATION

***Burnell v. Bisgaard*,** No. 25-180, 2026 U.S. App. LEXIS 29437 (9th Cir. Sep. 23, 2026)

The Ninth Circuit affirmed summary judgment for the defendants because Burnell failed to raise a genuine

dispute of material fact supporting her disability-discrimination, failure-to-accommodate, disability-harassment, retaliation, negligent-hiring, and intentional-infliction-of-emotional-distress claims. The court also upheld the denial of reconsideration because Burnell did not present newly discovered evidence, clear error, or an intervening change in controlling law.

Michelle Lynn Burnell sued Lewis Brisbois Bisgaard & Smith, LLP, Heather M. Jensen, and Annemarie McDowell, asserting federal and Washington claims arising from her employment. Proceeding pro se, Burnell alleged disability discrimination, failure to accommodate, disability-based harassment, retaliation, negligent hiring or retention, intentional infliction of emotional distress, and constitutional violations. The parties filed cross-motions for summary judgment. The district court granted summary judgment to the defendants and denied Burnell's motion. It also struck materials Burnell submitted with her summary-judgment reply and six additional replies and later denied her motion for reconsideration. Burnell appealed.

The Ninth Circuit concluded that the district court properly granted summary judgment to the defendants. Burnell's disability-discrimination claims under the Americans with Disabilities Act and the Washington Law Against Discrimination failed because she did not raise a genuine dispute as to whether she suffered an adverse employment action or was discriminated against because of a disability. Her failure-to-accommodate claim failed because she did not identify evidence creating a triable dispute that the defendants denied a reasonable accommodation. Her disability-harassment claim failed because she did not raise a triable dispute that she was harassed because of her disability or that the alleged conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment. Her retaliation claim failed because she did not establish a triable dispute that she suffered an adverse employment action because of protected activity. The court also upheld summary judgment on the negligent-hiring and intentional-infliction-of-emotional-distress claims because Burnell did not raise a triable dispute as to the defendants' liability. Finally, the district court did not abuse its discretion by denying reconsideration because Burnell did not present newly discovered evidence or demonstrate clear error or an intervening change in controlling law.

Accordingly, the Ninth Circuit Court of Appeals affirmed the judgment of the district court.

Reference. See, e.g., Wilcox, *California Employment Law,* §90.21 *Procedural Issues* (Matthew Bender).

Diemert v. City of Seattle, No. 25-1188, 2026 U.S. App. LEXIS 29661 (9th Cir. Sep. 28, 2026)

The Ninth Circuit held that the evidence, viewed collectively and in Diemert's favor, created a genuine dispute as to whether he was subjected to a racially hostile work environment under Title VII and the Washington Law Against Discrimination. Although workplace racial-justice training is not inherently discriminatory, race-based statements and conduct bearing little or no relationship to legitimate training efforts may contribute to a hostile work environment.

Joshua Diemert worked for the City of Seattle's Human Services Department and participated in the City's Race and Social Justice Initiative, which sought to address institutional racism through racial-justice training and racially aligned affinity groups. Diemert alleged that coworkers and supervisors made repeated race-based statements and generalizations, discouraged or denied him opportunities for advancement because of his race, and failed to support him when he complained of discriminatory treatment. After resigning in September 2021, Diemert sued the City, asserting hostile-work-environment, constructive-discharge, disparate-treatment, and retaliation claims under Title VII and the Washington Law Against Discrimination, as well as an equal-protection claim. The district court granted summary judgment to the City on all claims, and Diemert appealed.

The Ninth Circuit concluded that Diemert raised a triable issue on his hostile-work-environment claims. To prevail, Diemert had to show that he was subjected to unwelcome verbal or physical conduct because of his race and that the conduct was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive work environment. The court emphasized that racial-justice programs aimed at addressing discrimination are not inherently discriminatory. But it also explained that an employer may not subject an employee to a hostile work environment through race-based statements or conduct merely because the conduct occurs in connection with a racial-justice initiative. Viewing the record as a whole and in Diemert's favor, the alleged incidents were sufficiently numerous, frequent, and severe to permit a reasonable jury to find a racially hostile work environment. Those incidents included alleged race-based statements and generalizations bearing little or no connection to legitimate training, alleged discouragement or denial of advancement opportunities because of race, and an alleged lack of support after Diemert complained of discriminatory conduct. The court nevertheless affirmed summary judgment on

Diemert's remaining claims. The events close in time to his resignation were not sufficiently severe to establish constructive discharge. His disparate-treatment and retaliation claims failed because the record did not permit a reasonable jury to find an actionable adverse employment action caused by his race or protected activity, and he did not show that the City's explanation for the initial mishandling of his leave request—a paperwork error—was pretextual. The court also affirmed judgment on the equal protection claim because Diemert lacked Article III standing: even assuming that some affinity groups or trainings used express racial classifications, he did not establish that those classifications personally injured him.

Accordingly, the Ninth Circuit reversed summary judgment on Diemert's hostile-work-environment claims under Title VII and the Washington Law Against Discrimination and remanded those claims for further proceedings. It affirmed summary judgment on his constructive-discharge, disparate-treatment, retaliation, and equal-protection claims.

Reference. See, e.g., Wilcox, *California Employment Law,* §90.21 *Procedural Issues* (Matthew Bender).

Renovato v. Carter's Inc., No. B340591, 2026 Cal. App. Unpub. LEXIS 5892 (Sep. 3, 2026)

A California appellate court held that a party may not avoid summary judgment by making lengthy, substantive changes to damaging deposition testimony after the opposing party has relied on that testimony in moving for summary judgment. The trial court properly disregarded Renovato's purported corrections and granted summary judgment because the remaining evidence did not create a triable issue on her employment claims.

After resigning from Carter's, Adriana Renovato sued Carter's Inc., Carter's Retail, Inc., and her former manager, Lisa Quibilan, asserting 14 causes of action arising from her employment and allegedly wrongful termination. During her deposition, Renovato gave testimony that undermined material elements of her claims, including testimony concerning adverse employment actions and the circumstances of her resignation. One week after defendants moved for summary judgment, Renovato submitted extensive substantive "corrections" to that testimony. The trial court disregarded the purported corrections, rejected Renovato's related evidentiary and procedural challenges, and granted summary judgment to defendants on all claims. Renovato appealed.

The California appellate court concluded that the trial court properly disregarded Renovato's purported deposition corrections. Although a deponent may review a transcript and make changes, Renovato's lengthy revisions did not correct transcription mistakes or clarify minor inaccuracies; they materially contradicted damaging sworn testimony after defendants had relied on it in moving for summary judgment. A party cannot manufacture a factual dispute by rewriting deposition testimony in that manner. Reviewing the remaining evidence independently, the court concluded that defendants were entitled to summary judgment. Renovato forfeited appellate arguments concerning several FEHA theories by failing to develop them in her briefs. Her remaining disability-discrimination and retaliation theories failed because her uncorrected testimony established that defendants took no adverse employment action against her during her employment. Her derivative wrongful termination claim therefore also failed. The intentional-infliction-of-emotional-distress claim failed because the alleged conduct was not sufficiently extreme or outrageous as a matter of law, and the contract claims failed because the undisputed evidence established that Renovato was an at-will employee. Her unfair-competition and punitive-damages theories failed because they depended on claims that did not survive summary judgment. The appellate court also found no abuse of discretion in the trial court's evidentiary and procedural rulings. Renovato's generalized challenges did not identify reversible error in the numerous individual rulings she contested.

Accordingly, the appellate court affirmed the judgment granting summary judgment to Carter's and Quibilan on all of Renovato's claims.

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

Ridings v. PeaceHealth, No. 24-7282, 2026 U.S. App. LEXIS 29271 (9th Cir. Sep. 24, 2026)

The Ninth Circuit held that the district court should have considered Ridings's religious-exemption letter under the incorporation-by-reference doctrine because the letter was central to her claims. Considering the letter, Ridings plausibly alleged that PeaceHealth's vaccination requirement conflicted with her sincere religious beliefs, which was sufficient to survive dismissal under Rule 12(b)(6).

Karly Ridings, a registered nurse at PeaceHealth in Oregon, requested an exemption from the hospital system's mandatory COVID-19 vaccination policy. Her letter gave two reasons for declining vaccination. First, because she was pregnant, she expressed concerns about vaccine safety for pregnant women and children in utero. Second, she asserted a religious objection based on her Christian faith and opposition to abortion, explaining that her beliefs prohibited her from using products developed or tested with fetal cells derived from abortions. PeaceHealth placed Ridings on indefinite leave without benefits or pay. Ridings sued PeaceHealth for failure to accommodate her religious beliefs under Title VII and Oregon law. Her complaint referenced the exemption letter and briefly described her religious objection but did not attach the letter. PeaceHealth moved to dismiss, arguing that the complaint did not plausibly allege a conflict between its vaccination policy and a bona fide religious belief. Ridings attached the letter to her opposition and requested leave to amend if the pleading was insufficient. The district court did not consider the letter, dismissed the complaint under Rule 12(b)(6), and denied leave to amend. Ridings appealed.

The Ninth Circuit first concluded that the exemption letter was incorporated by reference into the complaint. A court deciding a Rule 12(b)(6) motion may consider a document that is central to the plaintiff's claim, referenced in the complaint, and of undisputed authenticity. Ridings's claims turned on the reasons she gave PeaceHealth for seeking an exemption, the complaint repeatedly referred to the letter, and neither party disputed its authenticity. The district court therefore should have considered the letter even though Ridings did not attach it to the complaint. Considering the letter, the Ninth Circuit concluded that Ridings plausibly alleged a religious conflict sufficient to state a failure-to-accommodate claim. At the pleading stage, she had to allege that an employment duty conflicted with a sincere religious belief or practice and that she informed PeaceHealth of the belief and conflict. Although her concern about vaccine safety during pregnancy was secular, her separate objection to the use of fetal cells was expressly tied to her Christian faith, her belief in the divinely created dignity of unborn children, and her religious opposition to participating in conduct connected to abortion. The letter cited biblical passages and explained why her beliefs prohibited her from receiving the vaccine. Those allegations plausibly described a religious, rather than merely medical or philosophical, conflict with PeaceHealth's policy. The court did not decide whether Ridings would ultimately prove her claims, whether her beliefs were sincere as a factual matter, whether PeaceHealth provided a reasonable accommodation, or whether an accommodation would have imposed an undue hardship. It held only that Ridings's allegations were sufficient to proceed beyond the pleading stage.

Accordingly, the Ninth Circuit reversed the Rule 12(b)(6) dismissal of Ridings's religious discrimination claims under Title VII and Oregon law and remanded the case for further proceedings.

Reference. See, e.g., Wilcox, *California Employment Law,* §41.35 *Religious Discrimination* (Matthew Bender).

Zehnder v. Mayo Clinic–Arizona, No. 25-4633, 2026 U.S. App. LEXIS 28615 (9th Cir. Sep. 18, 2026)

In an unpublished memorandum, a divided Ninth Circuit panel held that Interventional Radiology Night Call and Night Float were essential functions of Mayo Clinic–Arizona's radiology residency program. Because Zehnder could not perform those functions with her requested accommodation, the majority concluded that she was not a qualified individual for purposes of her failure-to-accommodate claims and affirmed summary judgment for Mayo.

Dr. Shina Zehnder participated in Mayo Clinic–Arizona's diagnostic radiology residency program. The program required residents to complete Interventional Radiology Night Call and Night Float rotations, which involved overnight work and responsibility for urgent or high-acuity matters. After developing a disability that affected her ability to work nights, Zehnder asked to be excused from those rotations. Mayo maintained that the overnight rotations were essential components of the residency's educational and patient-care requirements and did not grant the requested permanent exemption. Zehnder sued, asserting failure-to-accommodate claims under the Americans with Disabilities Act, the Rehabilitation Act, and the Arizona Civil Rights Act, as well as an ADA disparate-impact claim. The district court granted summary judgment to Mayo on all claims. Zehnder appealed.

The Ninth Circuit majority concluded that IR Night Call and Night Float were essential functions of Mayo's residency program. An essential function is a fundamental duty rather than a marginal one, and the inquiry considers the employer's judgment, preexisting job descriptions, the time devoted to the function, the consequences of not performing it, and the experience of current and former employees. The employer bears the burden of showing that a function is essential. The

majority gave substantial weight to Mayo's judgment that overnight rotations provided distinctive educational experience, autonomy, and exposure to urgent patient-care decisions. The written description in place before Zehnder entered the program advised residents that they would work nights and 24-hour on-call shifts, and Zehnder acknowledged that she knew of the Night Float and IR Night Call requirements. Evidence that no prior resident had been excused from those rotations and that removing Zehnder from them would shift the work to a limited number of other residents further supported Mayo's position. The majority therefore held that a permanent exemption would eliminate essential functions rather than reasonably accommodate Zehnder. Because she could not perform those functions with the requested accommodation, her failure-to-accommodate claims under the ADA, Rehabilitation Act, and Arizona Civil Rights Act failed. The majority separately affirmed summary judgment on Zehnder's ADA disparate-impact claim. It concluded that she had not produced sufficient evidence that Mayo's night-shift requirements caused a significant adverse impact on a protected group, rather than showing only their effect on her individually. Judge Gould dissented. He concluded that the record presented genuine factual disputes over whether the overnight rotations were truly essential and whether Zehnder's requested accommodation was reasonable, issues he believed should have been resolved by a jury rather than on summary judgment.

Accordingly, the Ninth Circuit affirmed summary judgment for Mayo on Zehnder's failure-to-accommodate and disparate-impact claims. The memorandum is unpublished and is not precedent except as provided by Ninth Circuit Rule 36-3.

Reference. See, e.g., Wilcox, *California Employment Law,* §40.22A *Americans with Disabilities Act of 1990* (Matthew Bender).

PAGA

Marquez v. Equinox Holdings, No. B333140, 2026 Cal. App. Unpub. LEXIS 5990 (Sep. 10, 2026)

A California appellate court held that a PAGA claim based on Labor Code section 216(a) does not accrue until an employee or former employee demands payment of wages and the employer willfully refuses to pay. Because Marquez filed suit within one year after her demand and Equinox's alleged refusal, her section 216(a)-based PAGA claim was timely.

Juanita Marquez sued her former employer, Equinox Holdings, Inc., under the Private Attorneys General Act of 2004 (PAGA). Her complaint alleged, among other violations, that Equinox violated Labor Code section 216(a), which applies when an employer with the ability to pay willfully refuses to pay wages due after an employee or former employee makes a demand. Marquez alleged that she demanded unpaid wages on or about October 4, 2021, and that Equinox refused to pay them. She filed her PAGA action in June 2022. Equinox demurred, arguing that PAGA's one-year limitations period barred the action because Marquez did not make her wage demand within one year after her employment ended. The trial court agreed, sustained the demurrer without leave to amend, and entered a judgment of dismissal. Marquez appealed.

The California appellate court concluded that the section 216(a)-based PAGA claim accrued no earlier than Marquez's October 2021 demand. Section 216(a) does not penalize the mere nonpayment of wages. It creates a separate violation when an employer who has the ability to pay willfully refuses to pay wages after an employee or former employee demands payment. Until a demand is made and payment is willfully refused, every element of the statutory violation has not occurred and the claim is not complete. The court rejected Equinox's argument that Marquez was required to make the demand within one year after her employment ended. Nothing in section 216(a) imposes that deadline, and Equinox identified no other statute requiring an employee or former employee to demand unpaid wages within one year after termination in order to pursue a PAGA claim based on section 216(a). Although other claims based on the original wage underpayments may have accrued during Marquez's employment or when it ended, the alleged section 216(a) violation was distinct and could not occur before the demand and refusal. Marquez alleged that she demanded payment on or about October 4, 2021, and filed suit in June 2022. Because the action was filed within one year after the earliest possible accrual date, the complaint did not establish on its face that the section 216(a)-based PAGA claim was untimely. The trial court therefore erred in sustaining the demurrer on limitations grounds.

Accordingly, the appellate court reversed the judgment of dismissal and remanded the case for further proceedings on Marquez's PAGA claim based on Labor Code section 216(a).

Reference. See, e.g., Wilcox, *California Employment Law,* §90.21 *Procedural Issues* (Matthew Bender).

SANCTION ORDER

***Regan v. Cal. Highway Patrol*,** No. B343808, 2026 Cal. App. Unpub. LEXIS 6089 (Sep. 16, 2026)

In an unpublished opinion, a California appellate court held that the trial court properly imposed $11,250 in monetary discovery sanctions against the California Highway Patrol and its attorneys of record for a prolonged pattern of delay and noncompliance. Code of Civil Procedure sections 2023.010 and 2023.030 authorized sanctions for an unusual or continuing pattern of discovery abuse not adequately addressed by a more specific sanctions provision.

Russell Regan worked for the California Highway Patrol from 1994 until his retirement in November 2021. In 2022, he sued the CHP and two former supervisors, alleging age discrimination, harassment, and retaliation under the Fair Employment and Housing Act and the Labor Code. In March 2023, Regan served document requests seeking, among other things, his personnel file and performance evaluations, documents concerning complaints against Captain James Frost, and all materials relating to the CHP's investigation of Regan's Equal Employment Opportunity complaint, including its witness interviews. The Attorney General, representing the CHP, objected that certain responsive materials were confidential peace-officer personnel records requiring in camera review before disclosure. The parties engaged in repeated meet-and-confer efforts and multiple hearings. Regan prevailed on two motions to compel, but responsive documents were not fully produced until October and December 2024. The trial court imposed $11,250 in monetary sanctions against the CHP and its attorneys of record. The CHP and the Attorney General appealed the sanctions order.

The California appellate court concluded that the sanctions were authorized by Code of Civil Procedure sections 2023.010 and 2023.030. Those provisions allow a trial court to sanction discovery misuse and may be invoked when an unusual form or continuing pattern of abuse is not adequately addressed by a more specific sanctions provision. The sanctionable conduct was not confined to the CHP's May 2024 supplemental responses. It encompassed the broader production history beginning with Regan's March 2023 requests, repeated meet-and-confer efforts, two successful motions to compel, and the failure to complete production until October and December 2024. The record supported an implied finding that the CHP and its counsel engaged in a pattern of discovery abuse through prolonged delay and noncompliance. The trial court was not required to use the words "pattern of abuse" or make another express finding before imposing monetary sanctions. Its reasoning and the history before it were sufficient to support that determination. Applying the abuse-of-discretion standard, the appellate court found no basis to disturb the $11,250 award. Regan's effort to obtain responsive documents extended for nearly two years, required multiple conferences and hearings, and resulted in two orders compelling production. The award was substantially less than the approximately $96,000 in fees reflected in Regan's counsel's billing records and was supported by the continuing discovery misconduct.

Accordingly, the appellate court affirmed the $11,250 monetary sanctions order against the CHP and its attorneys of record. The opinion is unpublished and generally may not be cited or relied on except as permitted by California Rules of Court, rule 8.1115.

Reference. See, e.g., Wilcox, *California Employment Law,* §44.45 *Enforcement Procedures* (Matthew Bender).

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December 3-4	NELI: Employment Law Conference	New Orleans, LA

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March 14-17	NELI: Employment Law Briefing	Fort Lauderdale, FL

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