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Inside This Issue

The High Cost of Employer Inaction in FEHA Complaints

ANGELA R. CABRAL 43

California's Captive Audience Law Enjoined: Federal Court Blocks Enforcement of SB 399

COURTNEY O. CHAMBERS AND
CIRRUS B. JAHANGIRI 48

WAGE & HOUR ADVISOR: Court of Appeal Holds Putative Class Members Who Rescind Individual Settlement Agreements Can Be Required to Repay Settlements

AARON BUCKLEY 51

CASE NOTES 55

- ADEA* 55
- Arbitration* 55
- Discrimination* 56
- Termination* 56

CALENDAR OF EVENTS 58

EDITORIAL BOARD AND AUTHOR CONTACT INFORMATION 59

The High Cost of Employer Inaction in FEHA Complaints

Angela R. Cabral

Introduction

The California Fair Employment and Housing Act (FEHA) imposes affirmative obligations on employers to prevent, investigate, and correct workplace discrimination and harassment. Courts are increasingly scrutinizing the quality and effectiveness of an employer's response to alleged workplace misconduct, and liability may arise where that response is perceived as delayed, dismissive, or insufficiently protective of the complaining employee. Two recent decisions from the California Court of Appeal highlight the significant legal exposure employers face when complaints are not handled with care and appropriate remedial action not taken. These cases reinforce that even where the underlying conduct may not clearly establish employer liability at the outset, a flawed response can independently give rise to FEHA claims and substantial damages. These decisions underscore the importance of not only investigating complaints, but also taking prompt, meaningful steps to stop potential misconduct and prevent further harm.

Employer Requirements Under FEHA

FEHA prohibits discrimination, harassment, and retaliation in employment and housing based on protected characteristics, such as, for example, race, national origin, sex, and religion.¹

FEHA requires that employers take "all reasonable steps" to prevent and correct discrimination and harassment in the workplace.² To show compliance

¹ California Government Code Section §12900 *et. seq.*

² Cal. Gov. Code §12940(k).

(Continued on page 45)

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The High Cost of Employer Inaction in FEHA Complaints

Angela R. Cabral

(Continued from page 43)

with this requirement, employers must adopt an internal policy that includes, among other things, a complaint process whereby employees, or those who are in contact with employees, may submit confidential complaints.³ The employer must ensure all complaints are investigated thoroughly, fairly, and timely by impartial and qualified personnel.⁴ If at the end of the investigation misconduct is found, “appropriate remedial measures shall be taken.”⁵ Complainants and/or those who cooperate in an investigation must be protected from retaliation.⁶ In addition to adopting a robust anti-discrimination and anti-harassment workplace policy, employers are required to provide anti-discrimination and anti-harassment training to all employees on an annual basis.⁷

To be successful in a lawsuit against their employer, plaintiffs “must establish the offending [harassing] conduct was imputable to [the] employer.”⁸ Plaintiffs can do so in two ways. First, an employer is strictly liable when the harasser is a supervisor who is acting in their supervisory capacity when the harassment occurs.⁹ Second, an employer is liable for the harassment of an employee against a coworker “if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.”¹⁰

Two new cases from the California Court of Appeal illustrate that an employer’s response to a complaint can lead to liability if improperly handled.

Carranza v. City of Los Angeles

*Carranza v. City of Los Angeles*¹¹ is a case where liability was, in part, based on how the employer responded to an employee’s complaint. The case involved a high-ranking female LAPD Captain, Lillian Carranza, who alleged sexual harassment under FEHA after she learned that a topless photo falsely purporting to be her was being circulated among officers on duty. Carranza asked the Los Angeles Police Department (“LAPD” or “Department”) multiple times to notify its employees that the photo was not of her, and to order employees to stop sharing it.¹²

The Department declined to do so for several reasons.¹³ First, it argued that issuing a Department wide notice would draw more attention to the photo, causing employees who had not already seen it to seek it out and thereby exacerbate the problem. Second, the Department worried that such a notice would compromise its ongoing investigation into the matter.¹⁴ The Department investigated Carranza’s complaint and determined that a photo purporting to be of Carranza had been circulating in the Department, in violation of both the City’s and the LAPD’s sexual harassment policies.¹⁵ However, no employees were ultimately disciplined as a result of the investigation findings.¹⁶

Carranza sued the City of Los Angeles for sexual harassment under FEHA. A jury determined that she had experienced severe and pervasive harassment and that the City was liable because the LAPD failed to take immediate and appropriate corrective action despite knowing of the conduct.¹⁷ The jury awarded Carranza \$4 million in noneconomic damages.¹⁸ The City appealed, arguing that substantial evidence did not support the jury’s findings.

³ 2 Cal Code Regs. § 11023(b)(4).

⁴ 2 Cal Code Regs. § 11023(b)(4), (7).

⁵ 2 Cal Code Regs. § 11023(b)(9).

⁶ 2 Cal Code Regs. § 11023(b)(10).

⁷ 2 Cal Code Regs. § 11024.

⁸ *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 279.

⁹ See, e.g., *Atalla v. Rite Aid Corp.* (2023) 89 Cal.App.5th 294, 309–310.

¹⁰ *Bailey v. San Francisco Dist. Attorney’s Office* (2024) 16 Cal.5th 611, 635 (quoting Cal. Gov. Code § 12940, subd. (j) (1)) [emphasis added].

¹¹ *Carranza v. City of Los Angeles* (2025) 111 Cal.App.5th 388.

¹² *Carranza*, 111 Cal.App.5th at 394.

¹³ *Carranza*, 111 Cal.App.5th at 395.

¹⁴ *Carranza*, 111 Cal.App.5th at 395.

¹⁵ *Carranza*, 111 Cal.App.5th at 397–398.

¹⁶ *Carranza*, 111 Cal.App.5th at 397–398.

¹⁷ *Carranza*, 111 Cal.App.5th at 393.

¹⁸ *Carranza*, 111 Cal.App.5th at 393.

The Court of Appeal sustained the verdict, finding that not only was the harassing conduct at issue severe and pervasive on its own, but that the City's failure to address the problem "compounded" Carranza's distress.¹⁹ The Court pointed out that the Department "did not order [its] officers to stop sharing the photo, advise them that it was not Carranza in the photo, or discipline anyone involved in the distribution of the photo." This, the Court said, "[spoke] to the sufficiency of the LAPD's response to the harassment, but also to the pervasiveness and severity of the harassment itself."²⁰ Therefore, the work environment became "severe or pervasive" when the employer refused to repudiate the conduct.²¹

Kruitbosch v. Bakersfield Recovery Services, Inc.

In *Kruitbosch v. Bakersfield Recovery Services*, Lisa Sanders, a co-worker of the plaintiff Steven Kruitbosch, allegedly made sexual advances towards him at his home and via his personal cellphone while they were both off duty and away from the premises of their employer, Bakersfield Recovery Service, Inc. ("BRS").²² Kruitbosch immediately complained to the Program Director, Stephanie Carroll, and a Human Resources representative, Kimberley Giles, about Sanders' conduct.²³ Carroll informed Kruitbosch that there was "not much she could do" about Sanders' behavior because the alleged activity occurred off work premises.²⁴ Meanwhile, later that day, Giles posted a video on social media depicting whining dogs and said "[t]his is a workday at [the] office," which Kruitbosch understood to be directed towards himself and his complaint.²⁵ Later in the week, Giles sarcastically commented to Kruitbosch, "I hope you don't get no more pictures."²⁶ At no point did either Carroll or Giles take any steps to separate Kruitbosch from Sanders, nor did BRS take any action to discipline Sanders.²⁷

Kruitbosch soon thereafter quit and sued BRS, alleging various employment-related claims, including sexual harassment, discrimination, retaliation, and failure to prevent harassment, discrimination, or retaliation

under FEHA.²⁸ BRS filed a demurrer, which the trial court sustained without leave to amend.²⁹ The plaintiff appealed.

FEHA prevents harassment in the workplace and generally does not extend to conduct that occurs off the worksite or after working hours.³⁰ However, such off-duty conduct can fall within FEHA's protections if it occurs in a work-related context.³¹ The Court of Appeal determined that under the totality of the specific circumstances in this case, Sanders' conduct as a co-worker, which occurred entirely during off-duty hours, was not imputable to the employer, so BRS was not directly liable for Sanders' harassing conduct.³² Those claims remained dismissed.

However, the Court found BRS was potentially liable for how it responded to the plaintiff when the plaintiff complained about Sanders' harassment. An employer's response to harassment occurring outside the physical or digital workplace can independently create a hostile work environment.³³ The plaintiff in this case argued that Giles's comment and social media post mocking him, in conjunction with Carroll's "ratification of Sanders' conduct through stated inaction," materially altered his working conditions.³⁴ Because the Court was required to accept the truth of the plaintiff's allegations at the demurrer stage, it stated it "[could not] conclude as a matter of law that Carroll's inaction and Giles' comments, collectively, could not alter plaintiff's working environment in an objectively severe manner."³⁵ The Court specifically noted that there was no investigation of plaintiff's complaint, no admonition to Sanders to cease her conduct, and no steps taken to separate plaintiff from Sanders.³⁶ According to the Court, "[a] reasonable person in plaintiff's circumstances could understand from such a response that it was not that Sanders' conduct occurred off-site which prevented BRS from acting, but that BRS viewed what she had done as not serious."³⁷

¹⁹ *Carranza*, 111 Cal.App.5th at 404.

²⁰ *Carranza*, 111 Cal.App.5th at 404.

²¹ *Carranza*, 111 Cal.App.5th at 404.

²² *Kruitbosch v. Bakersfield Recovery Services, Inc.* (2025) 114 Cal.App.5th 200.

²³ *Kruitbosch*, Cal.App.5th at 208.

²⁴ *Kruitbosch*, Cal.App.5th at 208.

²⁵ *Kruitbosch*, Cal.App.5th at 208.

²⁶ *Kruitbosch*, Cal.App.5th at 209.

²⁷ *Kruitbosch*, Cal.App.5th at 209.

²⁸ *Kruitbosch*, 114 Cal.App.5th at 206.

²⁹ *Kruitbosch*, 114 Cal.App.5th at 210.

³⁰ *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1016.

³¹ *Farmers Ins. Group*, 11 Cal.4th at 1016.

³² *Kruitbosch*, 114 Cal.App.5th at 219-220.

³³ *Kruitbosch*, 114 Cal.App.5th at 220 (citing *Fuller v. Idaho Department of Corrections* (9th Cir. 2017) 865 F.3d 1154).

³⁴ *Kruitbosch*, 114 Cal.App.5th at 220.

³⁵ *Kruitbosch*, 114 Cal.App.5th at 220.

³⁶ *Kruitbosch*, 114 Cal.App.5th at 223.

³⁷ *Kruitbosch*, 114 Cal.App.5th at 223.

The Court thus found that the plaintiff had presented a viable legal theory upon which the case would be able to move forward.³⁸

Employers Must Ensure Appropriate Responses to Complaints

Together, *Carranza* and *Kruitbosch* underscore FEHA's mandate that employers take "all reasonable steps" to prevent and correct workplace harassment is not satisfied by adherence to formal policies. Rather, in assessing liability a court will inquire into the adequacy of the totality of the employer's response when processing complaints. These decisions make clear that FEHA liability may arise not only from the underlying harassing conduct, but also from an employer's failure to take immediate, appropriate, and meaningful corrective action after receiving notice of potential misconduct. While conducting a fair and impartial investigation is a key step an employer must take in response to a complaint, an employer must do more by ensuring it takes prompt action to shield a complaining employee from further harm. As *Carranza* demonstrates, an employer's failure to repudiate known harassing conduct may exacerbate the harm to the employee and contribute to a finding that harassment was severe or pervasive. Similarly, *Kruitbosch* confirms that even where the underlying misconduct is not itself imputable to the employer, the employer's response to a complaint may independently give rise to liability when it appears to sanction misconduct and materially alters the employee's working conditions for the worse. Accordingly, employers must not only ensure that they take complaints seriously and investigate them promptly, but that they take any other necessary remedial measures to ensure harassing or discriminatory conduct stops immediately. Failure to do so risks transforming an otherwise defensible situation into actionable liability under FEHA.

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³⁸ *Kruitbosch*, 114 Cal.App.5th at 223. In the unpublished section of the decision, the Court also determined that the plaintiff's FEHA Failure to Prevent Harassment claim was viable since BRS's actions presented a viable harassment claim. (*Kruitbosch*, 114 Cal.App.5th at 225.)

California's Captive Audience Law Enjoined: Federal Court Blocks Enforcement of SB 399

Courtney O. Chambers and Cirrus B. Jahangiri

In September 2025, the U.S. District Court for the Eastern District of California issued a preliminary injunction prohibiting enforcement of California Senate Bill (SB) 399, California's Work Freedom from Employer Intimidation Act, also known as *captive audience* meetings.¹ SB 399, effective January 1, 2025, added section 1137 to the California Labor Code to restrict employers from taking adverse action against employees who declined to attend employer-sponsored meetings addressing certain political or religious matters, *i.e.*, captive audience meetings.

In granting the preliminary injunction, the Court concluded that plaintiffs—several employer associations—were likely to succeed on the merits of their claims based on two primary grounds (1) SB 399 is preempted by the National Labor Relations Act (NLRA) and (2) SB 399 violates the First Amendment of the United States Constitution:

- **NLRA preemption controls:** The Court held that the NLRA preempts SB 399, reaffirming that regulation of employer employee communications about unionization rests exclusively with federal law and the NLRB.
- **A content-based restriction on speech:** The Court rejected the claim that the law merely regulated conduct, noting that its prohibition turns entirely on the *subject* of a mandatory meeting. Because the law restricts core expressive activity—an employer's views on political, religious, or union matters—it cannot withstand strict First Amendment scrutiny.

The decision highlights ongoing tensions between state efforts to regulate workplace speech and longstanding federal labor law principles, particularly in light of recent changes at the National Labor Relations Board (NLRB or the Board).

This article examines the Court's ruling with a focus on the legal reasoning underlying the injunction and the broader implications for labor-management relations in California.

Relationship to Existing Federal and State Labor Law Frameworks

The Court's injunction against SB 399 fits within a broad and evolving framework governing workplace speech, employee organizing rights, and the respective roles of state and federal regulators. For decades, the NLRA has served as the primary mechanism for regulating labor-management communication concerning the workplace, primarily the topic of unionization, with the NLRB tasked with drawing the line between protected speech and unlawful communication. Employer speech regarding unionization has historically been evaluated under Section 8(c) of the NLRA, which permits employers to express views, arguments, or opinions so long as such communications do not contain threats of reprisal or promises of benefit. Courts have repeatedly emphasized that this provision reflects Congress's intent to protect robust debate in the workplace while guarding against coercive conduct. Against this backdrop, SB 399 represented a departure from traditional labor regulation by imposing state-law consequences tied to the subject matter of employer communications.

The Court's Injunction Order

In granting plaintiffs' motion for a preliminary injunction, the Court applied the four-factor test articulated in *Winter v. Natural Resources Defense Council*²: (1) likelihood of success on the merits; (2) irreparable harm; (3) balance of equities; and (4) the public interest. The Court found that Plaintiffs satisfied each factor, emphasizing that alleged violations of First Amendment rights constitute irreparable harm and that there is a strong public interest in preventing enforcement of unconstitutional laws.

While the Court's order is interlocutory and does not resolve the ultimate merits of the case, it reflects a detailed assessment of SB 399's interaction with federal labor law and constitutional speech protections.

¹ *Cal. Chamber of Commerce v. Bonta*, 2025 U.S. Dist. LEXIS 193529.

² 555 U.S. 7 (2008).

Federal Preemption Under the NLRA

A central pillar of the Court's analysis was federal preemption under the NLRA. Although the NLRA does not contain an express preemption clause, courts have long recognized implied preemption doctrines designed to preserve the NLRB's primary jurisdiction and Congress's intention for labor and management rights to be regulated on a federal level.

Garmon Preemption

Under *San Diego Building Trades Council v. Garmon*³, states may not regulate conduct that is arguably protected or prohibited by Sections 7 or 8 of the NLRA. The Court held that SB 399 falls within this preempted category insofar as it restricts mandatory meetings concerning unionization—conduct the NLRA either protects or prohibits. *Garmon* preemption applies not only where state law directly conflicts with federal labor law, but also when it risks encroaching on the NLRB's primary authority to interpret and apply the NLRA. The Court explained that even well-intentioned state laws may be preempted if they require courts or enforcement agencies to determine whether particular labor-related conduct is lawful under standards that parallel or overlap with federal law.

Plaintiffs relied on the NLRB's recent *Amazon* decision⁴, which held that mandatory antiunion "captive-audience" meetings violate Section 8(a)(1). The Court concluded that although that ruling undercuts Plaintiffs' argument that such meetings are protected under Section 8(c), it also confirms that the conduct SB 399 regulates is at least *arguably prohibited* by federal law and, therefore, enough to invoke *Garmon* preemption. In other words, where the NLRB disfavors certain conduct, the authority to regulate that conduct remains with the Board, not the states. The Court reasoned that allowing states to impose parallel or overlapping regulations risks inconsistent outcomes and undermines the uniform application of federal labor policy.

The Court also rejected arguments that SB 399 fit within recognized exceptions to *Garmon* preemption: (1) the reasonable opportunity exception and (2) the deeply rooted local feeling exception. The reasonable opportunity exception applies when a party cannot reasonably bring the issue to the NLRB, and the Court found it inapplicable because employer speech about unionization is plainly within the NLRB's jurisdiction,

citing the *Amazon* decision to show that the Board can and does address the legality of captive-audience meetings. The deeply rooted local feeling exception protects state regulation of traditionally local interests (e.g., violence, trespass). The Court held that SB 399 does not fall within this category because it expressly targets union-related communications—a matter Congress reserved for federal regulation—and not a long-standing area of state concern. The Court reasoned that speech regarding unionization is a core concern of federal labor law rather than a traditionally local area of regulation. It reasoned that *Garmon* preemption does not turn on whether a state statute provides broader or narrower relief than the NLRA, but rather on whether the regulated conduct falls within the ambit of Section 7 or 8 of the NLRA. Because SB 399 regulates conduct that is at least arguably protected or prohibited by the NLRA, the court concluded that federal law must control regardless of the state's remedial objectives.

Machinists Preemption

The Court further concluded that SB 399 is likely preempted under the *Machinists* preemption⁵, which prohibits states from regulating areas Congress intended to leave to the free play of economic forces. The Court concluded that SB 399 interferes with federally protected noncoercive employer speech and places the State's thumb on the scale in debates about unionization, conduct Congress intended to leave unregulated.

Although California characterized SB 399 as a neutral, minimum labor standard focused on protecting employee autonomy and regulating only employer *conduct* (i.e., adverse employment action), the Court found that the statute directly affects the balance of labor-management debate by limiting employer communications on unionization. In other words, enforcing the statute necessarily requires evaluating the *content* of employer speech, including whether an employer expresses views about unionization. The Court concluded that the statute also sweeps beyond truly coercive "captive-audience" meetings. By applying to *any* employer communication expressing opinions on political or religious matters (including unionization), and by not distinguishing between coercive and noncoercive speech, SB 399 risks chilling employers' lawful, noncoercive expression.

³ 359 U.S. 236, 245 (1959).

⁴ *Amazon.com Servs. LLC*, 373 NLRB No. 136.

⁵ *Lodge 76, International Association of Machinists & Aerospace Workers, AFLCIO v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).

Additionally, the Court rejected the State's argument that SB 399 is a neutral minimum labor standard as it directly affects the employer-employee dialogue on unionization. In the Court's view, SB 399 does not merely establish background employment standards, such as minimum wage or safety rules, but instead regulates the mechanics of labor-management discourse itself. Because the statute restricts the use of noncoercive employer speech—an economic “weapon” Congress intended to leave unregulated—it cannot qualify as a permissible minimum labor standard.

Constitutional Challenges

In addition to NLRA preemption, the Court held that SB 399 is likely unconstitutional under the First Amendment. The Court held that SB 399 violates the First Amendment because it is a content-based restriction on employer speech and cannot survive strict scrutiny. Because it found SB 399 to be a content-based speech regulation, the Court concluded that SB 399 is subject to strict scrutiny.

California contended that SB 399 regulates employer *conduct* (adverse actions against employees who refuse to attend certain meetings) rather than speech, analogizing the statute to anti-discrimination and whistleblower protection laws. The Court rejected this characterization, noting that whether SB 399 applies depends entirely on the subject matter of the employer's communication, *i.e.*, whether the communication involved political or religious matters, including unionization. Because liability turns on the content of the employer's speech, the law necessarily regulates speech and triggers First Amendment scrutiny. For example, an employer may discipline an employee for skipping a mandatory meeting about charitable giving, but not for skipping one about the minimum wage or unionization. Laws that regulate based on subject matter are presumptively unconstitutional. In sum, the Court held that SB 399 fails strict scrutiny because it imposes a broad, content-based restriction on employers' political and religious speech—including speech about unionization—without adequate justification or narrow tailoring.

Broader Context and Ongoing Uncertainty

This preliminary injunction illustrates the dynamic, and complex, nature of labor law at both the state and federal law. The decision underscores a core principle of federal labor law: uniform national regulation takes precedence over state-level experimentation, even where state and federal policymakers share similar objectives. The Court emphasized that Congress has vested primary authority over labor speech in the NLRB.

The preliminary injunction notably does not resolve whether captive audience meetings are lawful under the NLRA (which currently are prohibited following the NLRB's recent *Amazon* decision), instead it reinforces the boundary between federal and state authority in regulating workplace speech. Additionally, the Court's decision does not diminish an employee's protection under existing law. Federal labor law continues to prohibit employer conduct that interferes with, restrains, or coerces employees in the exercise of their Section 7 rights. Similarly, California's robust anti-retaliation statutes remain available to address adverse actions unrelated to the content-based speech restrictions imposed by SB 399.

The injunction also leaves open questions about how courts and regulators will reconcile state interests in protecting employee autonomy with federal labor policy moving forward. As workplace communications increasingly intersect with broader political, social, and cultural issues, legislatures may continue to explore mechanisms aimed at limiting perceived coercion in the employment relationship. The Court's ruling suggests that such efforts will face closer scrutiny where they implicate speech of labor organizing.

At bottom, the preliminary injunction against SB 399 highlights enduring tensions between state regulation, federal labor policy, and constitutional free speech protections. While the statute remains unenforceable pending litigation, the case raises broader questions about the extent to which states may regulate employer communications in the workplace. As the litigation proceeds, and as federal labor law continues to evolve, employers, employees, and labor organizations alike will need to closely monitor developments in this area.

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WAGE & HOUR ADVISOR: Court of Appeal Holds Putative Class Members Who Rescind Individual Settlement Agreements Can Be Required to Repay Settlements

Aaron Buckley

Introduction

On January 14, 2026, a divided panel of the California Court of Appeal, Fourth District, issued a peremptory writ of mandate directing a trial court to vacate an order requiring a curative notice to putative class members who had signed individual settlement agreements with an employer, holding the notices were defective because they did not notify class members that if they chose to revoke their individual settlement agreements, they might be required to repay their settlement payments if the employer prevailed.

*The Merchant of Tennis, Inc. v. Superior Court*¹

The Merchant of Tennis, Inc. (Merchant) employed Jessica Garcia from July through December of 2019.² In May 2022, Garcia filed a third amended consolidated class action complaint against Merchant based on allegations of numerous employment-related violations including wage and hour violations.³

In May and June 2024, Merchant entered into approximately 954 individual settlement agreements (ISAs) with putative class members in which the putative class members released their wage and hour claims against Merchant in exchange for cash payments.⁴ Merchant paid over \$875,000 in settlement payments to current and former employees who were putative class members.⁵

In May 2024, Garcia filed a motion for class certification.⁶ In its opposition, Merchant noted that a “substantial portion of the putative class entered into arbitration or settlement agreements” which included class action waivers.⁷ In November 2024, Garcia filed a motion to invalidate the ISAs, asserting that Merchant had procured the ISAs through fraud and

coercion, including false statements concerning the scope of the litigation, the claims released, and the percentage employees would likely recover in a class action lawsuit.⁸

In January 2025, the trial court partially granted Garcia’s motion to invalidate the ISAs, concluding the ISAs were voidable within 45 days of the mailing of a court-approved curative notice, at the election of each putative class member who had signed an ISA, because the ISAs had been procured through fraud or duress.⁹ The trial court ordered the parties to meet and confer to decide the language to be included in the curative notices.¹⁰

The parties were unable to agree on the language to be included in the curative notices.¹¹ Merchant argued that California rescission law, in particular Civil Code section 1691, required immediate repayment of consideration the putative class members received if they chose to rescind their agreements.¹² Garcia argued that advising putative class members they may be required to repay their settlement payments would dissuade them rescinding their agreements, and the issue could be addressed at a later time.¹³

The trial court ruled that the curative notices would state that any amount paid by Merchant to obtain later-voided ISAs would be treated as an offset to any other recovery by putative class members, and that putative class members would not be required to return any payments previously received from Merchant.¹⁴ Merchant filed a petition for writ of mandate, seeking an order requiring the trial court to vacate its ruling on the curative notices, arguing the trial court had erred by finding the putative class members who entered into ISAs would be allowed to keep their settlement payments if they rescinded their ISAs.¹⁵

¹ No. E085766, 2026 Cal. App. LEXIS 15 (Jan. 14, 2026).

² 2026 Cal. App. LEXIS 15, at 3.

³ 2026 Cal. App. LEXIS 15, at 3.

⁴ 2026 Cal. App. LEXIS 15, at 1.

⁵ 2026 Cal. App. LEXIS 15, at 1.

⁶ 2026 Cal. App. LEXIS 15, at 4.

⁷ 2026 Cal. App. LEXIS 15, at 4.

⁸ 2026 Cal. App. LEXIS 15, at 4.

⁹ 2026 Cal. App. LEXIS 15, at 5.

¹⁰ 2026 Cal. App. LEXIS 15, at 5.

¹¹ 2026 Cal. App. LEXIS 15, at 5.

¹² 2026 Cal. App. LEXIS 15, at 7.

¹³ 2026 Cal. App. LEXIS 15, at 6-7.

¹⁴ 2026 Cal. App. LEXIS 15, at 8-9.

¹⁵ 2026 Cal. App. LEXIS 15, at 10.

The Court of Appeal began its analysis by noting certain well-settled principles of California law: Employers may obtain releases of wage claims from putative class members, and such releases bar the putative class members from proceeding in the class action litigation.¹⁶ However, if an employer were to obtain a release through duress, menace, fraud, or undue influence, the employee would have the option to rescind the contract and join the class action litigation.¹⁷ But under California law, the party rescinding a contract must restore what was received in settlement of the disputed claim before suing upon it.¹⁸ Applying these principles to the case at hand, the Court of Appeal concluded that if putative class members were to rescind their ISAs, they would be required to repay Merchant the amount they accepted to release their claims, even though Merchant had obtained the releases through fraud or duress.¹⁹

The Court of Appeal, however, rejected Merchant's argument that a putative class member who rescinded an ISA should be required to repay the settlement amount immediately upon rescission. The court noted that Garcia had submitted evidence to the trial court that some of the putative class members would face difficulty paying back the settlement amount, and such difficulty could deter them from rescinding their ISAs and joining the lawsuit.²⁰ The court further noted that under Civil Code section 1693, repayment could be delayed until the end of the litigation, and Civil Code section 1692 gave the trial court discretion to adjust the equities between the parties.²¹

Based on these considerations, the Court of Appeal held the curative notice should include language that if a class member chose to rescind an ISA, the class member could be responsible for repayment of the consideration to Merchant at the conclusion of the litigation, but the trial court would maintain discretion to adjust the equities between the parties at the time of judgment.²²

Conclusion

The right of employers to settle individually with putative class members prior to class certification is well settled. To ensure individual settlement agreements remain enforceable, employers should take care to avoid tactics that could potentially be interpreted as duress, fraud or coercion.

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¹⁶ 2026 Cal. App. LEXIS 15, at 10-11 (citing *Chindarah v. Pick Up Stix, Inc.*, 171 Cal.App.4th 796, 803 (2009)).

¹⁷ 2026 Cal. App. LEXIS 15, at 13 (citing Civil Code section 1689).

¹⁸ 2026 Cal. App. LEXIS 15, at 13 (citing Civil Code section 1691, subd. (b); *Myerchin v. Family Benefits, Inc.*, 162 Cal. App.4th 1526, 1535 (2008)).

¹⁹ 2026 Cal. App. LEXIS 15, at 14.

²⁰ 2026 Cal. App. LEXIS 15, at 19.

²¹ 2026 Cal. App. LEXIS 15, at 20.

²² 2026 Cal. App. LEXIS 15, at 20.

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CASE NOTES

ADEA

***Hussey v. City of Las Vegas*, 2026 U.S. App. LEXIS 424 (9th Cir. Jan. 8, 2026)**

The Ninth Circuit Court of Appeals held that to establish retaliation under the ADEA, it was required to show that one must be engaged in a protected activity, one suffered an adverse employment action, and there was a causal link between the protected activity and the adverse employment action.

Robert Hussey challenged the adverse grant of summary judgment to his longtime employer, the City of Las Vegas, on his retaliation and hostile work environment claims under the Age Discrimination in Employment Act.

The Ninth Circuit held that Hussey failed to put forth any evidence establishing a causal connection between that activity and the allegedly adverse employment action he faced from his supervisor, Lance Covington. Indeed, the adverse conduct that Hussey specifically identified in his complaint, interrogatory responses, and deposition pre-dated his HR complaints. And Hussey produced no evidence that Covington was aware of Hussey's conversation with Holmes or that Covington engaged in conduct rising to the level of adverse employment action after that conversation. Hussey similarly failed to demonstrate a triable issue of fact regarding his hostile work environment claim. Hussey identified only one specific age-related comment and alluded to ten other comments about which he could not recall the details. It was thus permissible to conclude that the identified conduct was not "severe or pervasive enough to alter the conditions of Hussey's employment."

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

Reference. See, e.g., Wilcox, *California Employment Law*, §43.11 *Age Discrimination in Employment Act* (Matthew Bender).

ARBITRATION

***Avery v. Teksystems, Inc.*, 2026 U.S. App. LEXIS 2091 (9th Cir. Jan. 28, 2026)**

The Ninth Circuit Court of Appeals held that under the FAA, an agreement in writing to submit to arbitration an existing controversy should be valid, irrevocable, and enforceable, saved upon such grounds as existed at law or in equity for the revocation of any contract.

Bo Avery, Jill Unverferth, Kristy Camilleri, and Phoebe Rogers ("plaintiffs") filed a putative class action against TEKsystems, Inc. ("TEK") on behalf of former and current recruiters, alleging various state wage and hour violations. Over 22 months after commencement of the litigation and after the class certification briefing had closed, TEK rolled out a new, mandatory arbitration agreement ("Agreement") that automatically applied to class members unless they quit their jobs or opted out of the Arbitration Agreement. Notably, TEK did not raise the issue of arbitration at the class certification hearing. After class certification and plaintiffs filed a motion for partial summary judgment, and five days before the close of the class notice period, TEK moved to compel arbitration against class members bound by the Agreement. The United States District Court for the Northern District of California denied TEK's motion under Federal Rule of Civil Procedure ("FRCP") 23(d), concluding that TEK's communications rolling out the agreement "threatened the fairness of the litigation because the communications were misleading and omitted key information." TEK appealed. The Ninth Circuit affirmed.

The court stated that FRCP 23(d) authorized a district court to refuse to enforce an arbitration agreement. A careful examination of the content of TEK's communications clearly demonstrated the misleading nature of the communications and its harmful impact on potential class members. TEK repeatedly disparaged the efficacy of class actions and misleadingly claimed that class actions were "wasteful, inefficient means for resolving disputes" that "tend to enrich only attorneys rather than the individuals who may have legitimate claims." Further, TEK inaccurately stated that a class action "requires TEK to ignore individual employee issues and concerns." TEK's disparaging and inaccurate framing of class actions was particularly significant because TEK's communications "were the first communication many putative class members received about the case."

TEK's attempt to couch its offensive language as its own opinion failed to cure its obvious impact, or the fact that its disparaging comments "appear designed to prevent putative class members from opting into the lawsuit and opting out of the agreement." Additionally, TEK's arbitration roll out was internally inconsistent and thus confusing. TEK also pointed to the 23% opt-out rate of certain class members as evidence that its communications were widespread, fair, and effective.

And although a 23% opt-out rate might be evidence that TEK's communications were potentially widespread, it offered no evidence that its communications were fair and not misleading. Although the Agreement incorporated a delegation provision covering arbitrability disputes, the district court properly ruled on the enforceability of the agreement instead of delegating that issue to the arbitrator. District courts have a duty and broad authority to exercise control over a class action under FRCP 23(d) and deny a motion to compel under that Rule to ensure the fairness of a class action hearing. Moreover, the Agreement's delegation provision did not prevent the district court from determining the enforceability of the Agreement.

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

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

DISCRIMINATION

***Goins v. UPS*, 2026 U.S. App. LEXIS 712 (9th Cir. Jan. 12, 2026)**

The Ninth Circuit Court of Appeals held that to survive a motion for summary judgment, Title VII plaintiffs must first make out a prima facie case of discrimination by showing that they were members of a protected class, that they were qualified for their positions and performing their jobs satisfactorily, that they experienced adverse employment actions, and that similarly situated individuals outside their protected class were treated more favorably.

Galena Goins, Sonia Lopez, and Terry Jones-Jackson appealed the district court's grant of summary judgment in favor of their employer, United Parcel Service, Inc., on their claims alleging unlawful employment discrimination on the basis of sex.

The Ninth Circuit held that plaintiffs failed to make out a prima facie case of discrimination. It was undisputed that plaintiffs, as women, were members of a protected class, and the court assumed without deciding that plaintiffs were qualified for their positions. As to prong three, plaintiffs asserted that they suffered an adverse employment action when UPS refused to accommodate their mobility limitations despite informally accommodating male employees' similar injuries. Plaintiffs had not demonstrated that they and their comparators shared a common core of tasks or performed similarly. Plaintiffs' factual allegations on this point are cursory, lacking details about their male colleagues' positions, job responsibilities, and performance. The district court correctly granted summary judgment to UPS on

Jones-Jackson's EPA and CEPA claims. The district court correctly found that Jones-Jackson did not establish a prima facie case of discrimination because she did not identify a male comparator who had a substantially equal job. The district court did not abuse its discretion by partially denying plaintiffs' motion to modify the scheduling order because plaintiffs failed to demonstrate the requisite diligence. The district court found that plaintiffs did not provide specifics about the particular facts they expected additional discovery to uncover, nor did they show that the facts they sought actually existed and were essential to opposing summary judgment. Plaintiffs did not meaningfully challenge the district court's finding that they "showed an extreme lack of diligence" by relying on non-party agency records for materials that were readily available from party discovery.

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

Reference. See, e.g., Wilcox, *California Employment Law*, §41.36 *Sex Discrimination* (Matthew Bender).

TERMINATION

***Shannon Cross v. Central Contra Costa Transit Authority*, 2026 U.S. App. LEXIS 788 (9th Cir. Jan. 13, 2026)**

The Ninth Circuit Court of Appeals held that under the McDonnell Douglas burden-shifting framework, a plaintiff might establish a prima facie case of discrimination by showing that they belonged to a protected class; they were qualified to do the job; they were subject to an adverse employment action; and the employer treated similarly situated employees outside of the plaintiff's class more favourably, or other circumstances surrounding the adverse employment action gave rise to an inference of discrimination.

Less than a year after her employment as a bus operator, Shannon Cross ("Cross") collided with a bicyclist while operating a CCCTA bus. After an investigation revealed that Cross was completely at fault for the collision, and had also repeatedly violated multiple Central Contra Costa Transit Authority ("CCCTA") policies and California Vehicle Code violations, including running stop signs and red lights, using her cell phone while driving, and failing to stop at crosswalks. Also, two supervisors told Cross that she could not wear her hijab on the basis that it violated the CCCTA's dress code and was unauthorized headgear, which Cross claimed as discriminatory. CCCTA terminated Cross. Cross sued, alleging claims for religious discrimination, retaliation, and hostile work environment under Title VII and California law. The United States District Court for the Northern District of California

grant of summary judgment in favor of CCCTA. Cross appealed. The Ninth Circuit affirmed.

The court found summary judgment to be proper, because Cross failed to show direct evidence of discrimination (finding that the supervisors' statements about Cross's headgear had alternative explanations) and, similarly, failed to establish a prima facie case or to show evidence of pretext under the indirect method of proof established in *McDonnell Douglas Corp. v. Green*. The court explained that to establish a prima facie case of discrimination, a plaintiff must offer evidence that gives rise to an inference of unlawful discrimination either by "direct evidence of discriminatory intent" or through the *McDonnell Douglas* framework.

Under *McDonnell Douglas*, a plaintiff must show some evidence that persons outside of the protected class were treated more favorably. Cross pointed to Brown, a non-Muslim bus operator at CCCTA who also had an occurrence with a bicyclist, as evidence of a similarly situated employee who was treated more favorably. But there were "significant differences between" Cross and Brown. First, the Police Department found that Brown was "not at fault" for her accident, whereas Cross was found "100% at fault by the Police Department." Second, Brown's occurrence was deemed "non-preventable," whereas Cross's occurrence was deemed "preventable." Finally, Brown had been a "25+ year veteran," whereas Cross had been driving with CCCTA for less than a year. Differences in seniority also would tend to make two employees dissimilar for purposes of the plaintiff's prima facie case. Because of these differences, Brown was not similarly situated to Cross "in all material respects." Accordingly, Cross failed to establish the fourth element of a prima facie case of discrimination under *McDonnell Douglas*. Nor was Cross able to show that the CCCTA's legitimate reason for terminating her (safety violations) was pretextual. On this basis summary judgment was properly entered on Cross's discrimination claim.

Summary judgment was also proper with respect to Cross's retaliation claims under Title VII and California's Fair Employment and Housing Act ("FEHA"). Cross argues that a reasonable jury could find that she was unlawfully terminated in retaliation "because of" her request to wear a hijab or her complaints of harassment. To determine retaliation claims brought under Title VII and FEHA, courts apply the *McDonnell Douglas* burden-shifting framework. An employee may establish a prima facie case of retaliation by showing: (1) she engaged in a protected activity; (2) her employer subjected her to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.

If the plaintiff establishes a prima facie case, "the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for its decision." If the employer satisfies that burden, then the burden shifts back to the plaintiff to show that the "proffered reason was a pretext for unlawful discrimination."

The court agreed with the district court that Cross failed to show that CCCTA's termination was pretextual. CCCTA terminated Cross because Cross violated California Vehicle Code § 21760(b) when she hit a bicyclist. Cross "acknowledged that she was 'at complete fault'" for the accident. As part of the investigation on Cross's termination, a human resources director observed that Cross had "violated several other serious rules and traffic laws, including running stop signs and red lights, using her cell phone while in revenue service, and failing to stop at BART crosswalks." The director concluded that Cross "repeatedly drives unsafely." The court further noted that, contrary to Cross's argument, CCCTA did not violate its own policy and procedure, which allowed CCCTA to initiate "termination" for reasons including "poor job performance" and "violation of law." Because Cross did not demonstrate that CCCTA's reasons for her termination were pretextual, she failed to meet her burden on her retaliation claims to survive summary judgment.

Cross's religious hostile environment claims fared no better. To allege a prima facie hostile work environment based on religion, Cross needed to plead: that she was subjected to verbal or physical conduct of a harassing nature based on her religion; that this conduct was unwelcome; and that the conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. Cross testified that there were never religious insults directed towards her and that she based her harassment claim on three statements. But, three allegedly offensive comments over the course of nearly a year are not sufficiently severe or pervasive to constitute a hostile work environment. The court held that because these "offhand comments and isolated incidents (unless extremely serious) [did] not amount to discriminatory changes in the 'terms and conditions of employment,'" the district court did not err in granting summary judgment in favor of CCCTA on Cross's harassment claim.

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

Reference. See, e.g., Wilcox, *California Employment Law*, §8.33 *Prohibition Against Discrimination or Retaliation* (Matthew Bender).

CALENDAR OF EVENTS

2026

March 6	CLA Webinar: A Peek Behind the AAA Curtain: What Arbitrators and Parties Should Know	12:00 PM – 1:00 PM
March 9	CLA 5th Annual California International Arbitration Week	Omni Hotel – San Francisco 500 California St. San Francisco, CA 94104
March 10-12	NELI: Employment Law Briefing Webinar	TBA
March 19-21	CLA Inaugural Public Law Conference	Mission Bay Resort 1775 E Mission Bay Dr. San Diego, CA 92109
March 20-21	CLA 49 th IP Institute	The Clift Royal Sonesta SF 495 Geary St. San Francisco, CA 94102
April 14-16	NELI: ADA and FMLA Compliance Update Webinar	8:30 AM – 12:15 PM
April 21-23	NELI: ADA and FMLA Compliance Update Webinar	8:30 AM – 12:15 PM
May 1	CLA 2026 Public Sector Conference	Sheraton Grand Sacramento Hotel 1230 J St. Sacramento, CA 95814
June 4	NELI: Ethics in Labor and Employment Law Webinar	10:00 AM – 12:00 PM
June 9-11	NELI: Mid-Year Employment Law Conference Webinar	TBA
September 9-10	NELI: ADA Workshop Webinar	8:30 AM – 12:45 PM
September 16-17	NELI: ADA Workshop Webinar	8:30 AM – 12:45 PM

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