

Judicial Council of California Civil Jury Instructions

CACI*

* Pronounced “Casey”

Supplement With Revised Instructions

As approved at
the Judicial Council’s Rules Committee June 2026 meeting
and the Judicial Council July 2026 Meeting



**Judicial Council of California
Advisory Committee on Civil Jury Instructions**

Hon. Adrienne M. Grover, Chair

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Paul A. Ernest, J.D. at 1-971-270-8766

Email: paul.ernest@lexisnexus.com

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Editorial Office

101 Park Ave., 24th Floor, New York, NY 10178 (800) 543-6862

www.lexisnexus.com

Preface to CACI Updates

This supplement to the 2026 edition of CACI includes a number of additions and changes to the instructions, which were first published in 2003. In providing these updates, the Judicial Council Advisory Committee on Civil Jury Instructions is fulfilling its charge to maintain CACI. The committee is also striving to add instructions in new areas of the law and to augment existing areas.

The impetus for the revisions came from several sources including CACI users who detected changes in the law or who simply sought to do a better job of explaining the law in plain English. Responding to feedback from users is consistent with the Advisory Committee's goal to act as a vehicle for maintaining CACI as the work product of the legal community. We hope that our hundreds of contributors view our role in the same way and that they will continue to support us.

July 2026

Hon. Adrienne M. Grover
Court of Appeal, Sixth District
Chair, Advisory Committee on Civil Jury Instructions

The Advisory Committee on Civil Jury Instructions welcomes comments. Send comments by email to: civiljuryinstructions@jud.ca.gov

Or you may send print comments by regular mail to:
Advisory Committee on Civil Jury Instructions—Attn. Eric Long
Legal Services Office
455 Golden Gate Avenue
San Francisco, CA 94102-3588

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July 2026

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100. Preliminary Admonitions

You have now been sworn as jurors in this case. I want to impress on you the seriousness and importance of serving on a jury. Trial by jury is a fundamental right in California. The parties have a right to a jury that is selected fairly, that comes to the case without bias, and that will attempt to reach a verdict based on the evidence presented. Before we begin, I need to explain how you must conduct yourselves during the trial.

Do not allow anything that happens outside this courtroom to affect your decision. During the trial do not talk about this case or the people involved in it with anyone, including family and persons living in your household, friends and coworkers, spiritual leaders, advisors, or therapists. You may say you are on a jury and how long the trial may take, but that is all. You must not even talk about the case with the other jurors until after I tell you that it is time for you to decide the case.

This prohibition is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic device or media, such as a cell phone, computer, tablet, the internet, any text or instant-messaging service, or social media, to send or receive any information to or from anyone about this case or your experience as a juror until after you have been discharged from your jury duty.

During the trial you must not listen to anyone else talk about the case or the people involved in the case. You must avoid any contact with the parties, the lawyers, the witnesses, and anyone else who may have a connection to the case. If anyone tries to talk to you about this case, tell that person that you cannot discuss it because you are a juror. If that person keeps talking to you, simply walk away and report the incident to the court [attendant/bailiff] as soon as you can.

After the trial is over and I have released you from jury duty, you may discuss the case with anyone, but you are not required to do so.

During the trial, do not read, listen to, or watch any coverage about this case. [I have no information that there will be coverage concerning this case.] This prohibition extends to the use of the internet in any way, including reading anything about the case or about anyone involved with it. If you receive any information about this case from any source outside of the courtroom, promptly report it to the court

[attendant/bailiff]. It is important that all jurors see and hear the same evidence at the same time.

Do not do any research on your own or as a group. Do not use online tools, dictionaries, the internet, or other reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case or use any online maps or mapping programs or any other program or device to search for or to view any place discussed in the testimony. If you happen to pass by the scene, do not stop or investigate. If you do need to view the scene during the trial, you will be taken there as a group under proper supervision.

[If you violate any of these prohibitions on communications and research, including prohibitions on electronic communications and research, you may be held in contempt of court or face other sanctions. That means that you may have to serve time in jail, pay a fine, or face other punishment for that violation.]

It is important that you keep an open mind throughout this trial. Evidence can only be presented a piece at a time. Do not form or express an opinion about this case while the trial is going on. You must not decide on a verdict until after you have heard all the evidence and have discussed it thoroughly with your fellow jurors in your deliberations.

Do not concern yourselves with the reasons for the rulings I will make during the course of the trial. Do not guess what I may think your verdict should be from anything I might say or do.

When you begin your deliberations, you may discuss the case only in the jury room and only when all the jurors are present.

You must decide what the facts are in this case. Do not let bias, sympathy, prejudice, or public opinion influence your verdict.

At the end of the trial, I will explain the law that you must follow to reach your verdict. You must follow the law as I explain it to you, even if you do not agree with the law.

New September 2003; Revised April 2004, October 2004, February 2005, June 2005, December 2007, December 2009, December 2011, December 2012, May 2020, July 2026

Directions for Use

This instruction should be given at the outset of every case, even as early as when the jury panel enters the courtroom (without the first sentence).

The instruction identifies examples of technological tools that might be used.

Because technology is continuously evolving, users should consider whether to modify the instruction, in the context of a particular case, to include other tools or methods by which prohibited contact or research can occur.

If the jury is allowed to separate, Code of Civil Procedure section 611 requires the judge to admonish the jury that “it is their duty not to converse with, or suffer themselves to be addressed by any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.”

Sources and Authority

- Constitutional Right to Jury Trial. Article I, section 16 of the California Constitution.
- Instructing the Jury. Code of Civil Procedure section 608.
- Jury as Trier of Fact. Evidence Code section 312.
- Admonishments to Jurors. Code of Civil Procedure section 611.
- Contempt of Court for Juror Misconduct. Code of Civil Procedure section 1209(a)(6).
- Under Code of Civil Procedure section 611, jurors may not “form or express an opinion” prior to deliberations. (See also *City of Pleasant Hill v. First Baptist Church of Pleasant Hill* (1969) 1 Cal.App.3d 384, 429 [82 Cal.Rptr. 1]. It is misconduct for a juror to prejudge the case. (*Deward v. Clough* (1966) 245 Cal.App.2d 439, 443–444 [54 Cal.Rptr. 68].)
- Jurors must not undertake independent investigations of the facts in a case. (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 36 [224 P.2d 808]; *Walter v. Ayvazian* (1933) 134 Cal.App. 360, 365 [25 P.2d 526].)
- Jurors are required to avoid discussions with parties, counsel, or witnesses. (*Wright v. Eastlick* (1899) 125 Cal. 517, 520–521 [58 P. 87]; *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 144 [45 Cal.Rptr. 313, 403 P.2d 721].)
- It is misconduct for jurors to engage in experiments that produce new evidence. (*Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1746 [286 Cal.Rptr. 435].)
- Unauthorized visits to the scene of matters involved in the case are improper. (*Anderson v. Pacific Gas & Electric Co.* (1963) 218 Cal.App.2d 276, 280 [32 Cal.Rptr. 328].)
- It is improper for jurors to receive information from the news media about the case. (*Province v. Center for Women’s Health & Family Birth* (1993) 20 Cal.App.4th 1673, 1679 [25 Cal.Rptr.2d 667], disapproved on other grounds in *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 41 [32 Cal.Rptr.2d 200, 876 P.2d 999]; *Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 408 [196 Cal.Rptr. 117].)

CACI No. 100

- “ ‘The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.’ ” (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132], internal citations omitted.)
- An instruction to disregard any appearance of bias on the part of the judge is proper and may cure any error in a judge’s comments. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257–259 [288 P.2d 1003], disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 [328 P.2d 449] and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478 [6 Cal.Rptr. 289, 353 P.2d 929].)
- “It is well understood by most trial judges that it is of the utmost importance that the trial judge not communicate in any manner to the jury the judge’s opinions on the case submitted to the jury, because juries tend to attach inflated importance to any such communication, even when the judge has no intention whatever of influencing a jury’s determination.” (*Dorshkind v. Harry N. Koff Agency, Inc.* (1976) 64 Cal.App.3d 302, 307 [134 Cal.Rptr. 344].)

Secondary Sources

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, § 322.50 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.05

California Judges Benchbook: Civil Proceedings—Trial §§ 12.6, 13.50, 13.51, 13.58 (Cal CJER 2019)

431. Causation: Multiple Causes

A person's negligence may combine with another factor to cause harm. If you find that [name of defendant]'s negligence was a substantial factor in causing [name of plaintiff]'s harm, then [name of defendant] is responsible for the harm. [Name of defendant] cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing [name of plaintiff]'s harm.

New September 2003

Directions for Use

This instruction will apply only when negligence is the theory asserted against the defendant. This instruction should be modified if the defendant is sued on a theory of product liability or intentional tort.

Sources and Authority

- “Where several persons act in concert and damages result from their joint tort, each person is held for the entire damages unless segregation as to causation can be established. Even though persons are not acting in concert, if the results produced by their acts are indivisible, each person is held liable for the whole.” (*Hughey v. Candoli* (1958) 159 Cal.App.2d 231, 240 [323 P.2d 779].)
- “In cases where concurrent independent causes contribute to an injury, we apply the ‘substantial factor’ test of the Restatement Second of Torts, section 423, which subsumes traditional ‘but for’ causation.” (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 352 fn. 12 [188 Cal.Rptr.3d 309, 349 P.3d 1013].)
- “A defendant’s negligent conduct may combine with another factor to cause harm; if a defendant’s negligence was a substantial factor in causing the plaintiff’s harm, then the defendant is responsible for the harm; a defendant cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing the plaintiff’s harm; but conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.” (*Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 187 [164 Cal.Rptr.3d 309].)
- “The multiple causes instruction set forth in ‘CACI No. 431 is necessary to explain to the jury a “plaintiff need not prove that the defendant’s negligence was the sole cause of plaintiff’s injury in order to recover. Rather it is sufficient that defendant’s negligence is a legal cause of injury, even though it operated in combination with other causes, whether tortious or nontortious.” Thus, ‘where a defendant’s negligence is a concurring cause of an injury, the law regards it as a legal cause of the injury, regardless of the extent to which it contributes to the injury.’ ” (*TRC Operating Co., Inc. v. Chevron USA, Inc.* (2024) 102

Cal.App.5th 1040, 1099 [322 Cal.Rptr.3d 353], original italics, internal citations omitted.)

- “For there to be comparative fault there must be more than one contributory or concurrent legal cause of the injury for which recompense is sought.” (*Douppnik v. General Motors Corp.* (1991) 225 Cal.App.3d 849, 866 [275 Cal.Rptr. 715].)
- “Because we conclude that, in this case, in which causation was the most critical contested issue and in which there was substantial evidence of multiple causes of [decedent]’ s death, the trial court improperly [refused to instruct] the jury with respect to concurrent causation” (*Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1152 [84 Cal.Rptr.2d 257].)
- “Clearly, where a defendant’s negligence is a concurring cause of an injury, the law regards it as a legal cause of the injury, *regardless of the extent to which it contributes to the injury.*” (*Espinosa v. Little Company of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1317–1318 [37 Cal.Rptr.2d 541], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1344

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.16

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.11 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.89 (Matthew Bender)

California Products Liability Actions, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.280–165.284 (Matthew Bender)

440. Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements

A law enforcement officer may use reasonable force to [arrest/detain/ [./or] prevent escape of/ [./or] overcome resistance by] a person when the officer has reasonable cause to believe that that person has committed or is committing a crime. However, the officer may use only that degree of force necessary to [arrest/detain/ [./or] prevent escape of/ [./or] overcome resistance by] the person. [Even if the officer is mistaken, a person being arrested or detained has a duty not to use force to resist the officer unless the officer is using unreasonable force.]

[*Name of plaintiff*] claims that [*name of defendant*] was negligent in using unreasonable force to [arrest/detain/ [./or] prevent escape of/ overcome resistance by] [him/her/nonbinary pronoun]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of defendant*] used force to [arrest/detain/ [./or] prevent escape of/ [./or] overcome resistance by] [*name of plaintiff*];
2. That the amount of force used by [*name of defendant*] was unreasonable;
3. That [*name of plaintiff*] was harmed; and
4. That [*name of defendant*]'s use of unreasonable force was a substantial factor in causing [*name of plaintiff*]'s harm.

In deciding whether [*name of defendant*] used unreasonable force, you must consider the totality of the circumstances to determine what amount of force a reasonable [*insert type of officer*] in [*name of defendant*]'s position would have used under the same or similar circumstances. “Totality of the circumstances” means all facts known to the officer at the time, including the conduct of [*name of defendant*] and [*name of plaintiff*] leading up to the use of force. Among the factors to be considered are the following:

- (a) Whether [*name of plaintiff*] reasonably appeared to pose an immediate threat to the safety of [*name of defendant*] or others;
- (b) The seriousness of the crime at issue; [and]
- (c) Whether [*name of plaintiff*] was actively resisting [arrest/detention] or attempting to avoid [arrest/detention] by flight[; and/.]
- [(d) [*Name of defendant*]'s tactical conduct and decisions before using force on [*name of plaintiff*].]

[An officer who makes or attempts to make an arrest does not have to

retreat or stop because the person being arrested is resisting or threatening to resist. Tactical repositioning or other de-escalation tactics are not retreat. An officer does not lose the right to self-defense by using objectively reasonable force to [arrest/detain/ [/or] prevent escape of/ [/or] overcome resistance by] the person.]

New June 2016; Revised May 2020, November 2020, May 2021

Directions for Use

Use this instruction if the plaintiff makes a negligence claim under state law arising from the force used in effecting an arrest or detention. Such a claim is often combined with a claimed civil rights violation under 42 United States Code section 1983. See CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements*. It might also be combined with a claim for battery. See CACI No. 1305, *Battery by Peace Officer—Essential Factual Elements*. For additional authorities on excessive force by a law enforcement officer, see the Sources and Authority to these two CACI instructions.

By its terms, Penal Code section 835a's deadly force provisions apply to "peace officers." It would appear that a negligence claim involving nondeadly force does not depend on whether the individual qualifies as a peace officer under the Penal Code. (See Pen. Code, § 835a; see also Pen. Code, § 830 et seq. [defining "peace officer"].) For cases involving the use of deadly force by a peace officer, use CACI No. 441, *Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements*. (Pen. Code, § 835a.) This instruction and CACI No. 441 may require modification if the jury must decide whether the force used by the defendant was deadly or nondeadly.

Include the last bracketed sentence in the first paragraph only if there is evidence the person being arrested or detained used force to resist the officer.

Factors (a), (b), and (c) are often referred to as the "*Graham* factors." (See *Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are to be applied under California negligence law. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal.Rptr.3d 1, 207 P.3d 506].) They are not exclusive (see *Glenn v. Wash. County* (9th Cir. 2011) 673 F.3d 864, 872); additional factors may be added if appropriate to the facts of the case. If negligence, civil rights, and battery claims are all involved, the instructions can be combined so as to give the *Graham* factors only once. A sentence may be added to advise the jury that the factors apply to multiple claims.

Factor (d) is bracketed because no reported California state court decision has held that an officer's tactical decisions before using nondeadly force can be actionable negligence. It has been held that liability can arise if the officer's earlier tactical conduct and decisions show, as part of the totality of circumstances, that the ultimate use of deadly force was unreasonable. (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252].) In this respect,

California negligence law differs from the federal standard under the Fourth Amendment. (*Hayes, supra*, 57 Cal.4th at p. 639 [“[T]he state and federal standards are not the same, which we now confirm”]; cf. *Vos v. City of Newport Beach* (9th Cir. 2018) 892 F.3d 1024, 1037 [“To determine police liability [under state law negligence], a court applies tort law’s ‘reasonable care’ standard, which is distinct from the Fourth Amendment’s ‘reasonableness’ standard. The Fourth Amendment is narrower and ‘plac[es] less emphasis on preshooting conduct.’ ”])

Include the final bracketed paragraph only if the defendant claims that the person being arrested resisted arrest or threatened resistance.

Sources and Authority

- Legislative Findings re Use of Force by Law Enforcement. Penal Code section 835a(a).
- Use of Objectively Reasonable Force to Arrest. Penal Code section 835a(b).
- When Peace Officer Need Not Retreat. Penal Code section 835a(d).
- Definitions. Penal Code section 835a(e).
- “There is an abundance of authority permitting a plaintiff to go to the jury on both intentional and negligent tort theories, even though they are inconsistent. It has often been pointed out that there is no prohibition against pleading inconsistent causes of action stated in as many ways as plaintiff believes his evidence will show, and he is entitled to recover if one well pleaded count is supported by the evidence.” (*Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 586 [86 Cal.Rptr. 465, 468 P.2d 825].)
- “The evidence relevant to negligence and intentional tort overlaps here and presents a case similar to *Grudt*. . . . [¶] This court held it was reversible error to exclude the negligence issue from the jury even though plaintiff also had pled intentional tort. The court pointed to the rule that a party may proceed on inconsistent causes of action unless a nonsuit is appropriate.” (*Munoz v. Olin* (1979) 24 Cal.3d 629, 635 [156 Cal.Rptr. 727, 596 P.2d 1143].)
- “Consistent with these principles and the factors the high court has identified, the federal court in this case did not instruct the jury to conduct some abstract or nebulous balancing of competing interests. Instead, as noted above, it instructed the jury to determine the reasonableness of the officers’ actions in light of ‘the totality of the circumstances at the time,’ including ‘the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or attempting to escape.’ The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence law. Moreover, California’s civil jury instructions specifically direct the jury, in determining whether police officers used unreasonable force for purposes of tort liability, to consider the same factors that the high court has identified and that the federal court’s instructions in this case set forth. (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 1305.) Thus, plaintiffs err in arguing that the

federal and state standards of reasonableness differ in that the former involves a fact finder's balancing of competing interests.” (*Hernandez, supra*, 46 Cal.4th at p. 514, internal citation omitted.)

- “Determining whether the force used to effect a particular seizure is ‘reasonable’ under the Fourth Amendment requires a careful balancing of ‘ “the nature and quality of the intrusion on the individual’s Fourth Amendment interests” ’ against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because ‘[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,’ however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” (*Graham, supra*, 490 U.S. at p. 396, internal citations omitted.)
- “The most important of these [*Graham* factors, above] is whether the suspect posed an immediate threat to the officers or others, as measured objectively under the circumstances.” (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [141 Cal.Rptr.3d 553].)
- “Plaintiff must prove unreasonable force as an element of the tort.” (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272 [74 Cal.Rptr.2d 614].)
- “ “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . [T]he question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. . . .” ’ In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required.” (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527–528 [89 Cal.Rptr.3d 801], internal citations omitted.)
- “ ‘[A]s long as an officer’s conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he or she choose the “most reasonable” action or the conduct that is the least likely to cause harm and at the same time the most likely to result in the successful apprehension of a violent suspect, in order to avoid liability for negligence.’ ” (*Hayes, supra*, 57 Cal.4th at p. 632.)
- “The California Supreme Court did not address whether decisions before non-deadly force can be actionable negligence, but addressed this issue only in the context of ‘deadly force.’ ” (*Mulligan v. Nichols* (9th Cir. 2016) 835 F.3d 983, 991, fn. 7.)
- “[T]here is no right to use force, reasonable or otherwise, to resist an unlawful

detention” (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)

- “[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer *unless* excessive force is used or threatened; excessive force in that event triggers the individual’s right of self-defense.” (*Evans, supra*, 22 Cal.App.4th at p. 331, original italics, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 496

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.24 seq. (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.22 (Matthew Bender)

441. Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] was negligent in using deadly force to [arrest/detain/ [,or] prevent escape of/ [,or] overcome resistance to] [him/her/nonbinary pronoun/name of decedent]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] was a peace officer;**
- 2. That [name of defendant] used deadly force on [name of plaintiff/decedent];**
- 3. That [name of defendant]’s use of deadly force was not necessary to defend human life;**
- 4. That [name of plaintiff/decedent] was [harmed/killed]; and**
- 5. That [name of defendant]’s use of deadly force was a substantial factor in causing [name of plaintiff/decedent]’s [harm/death].**

A peace officer may use deadly force only when necessary in defense of human life. [Name of defendant]’s use of deadly force was necessary to defend human life only if a reasonable officer in the same situation would have believed, based on the totality of the circumstances known to or perceived by [name of defendant] at the time, that deadly force was necessary [either]:

[to defend against an imminent threat of death or serious bodily injury to [name of defendant] [and/or] [another person]][, or.]

[to apprehend a fleeing person for a felony, when all of the following conditions are present:

- i. The felony threatened or resulted in death or serious bodily injury to another;**
- ii. [Name of defendant] reasonably believed that the person fleeing would cause death or serious bodily injury to another unless immediately apprehended; and**
- iii. [Name of defendant] made reasonable efforts to identify [himself/herself/nonbinary pronoun] as a peace officer and to warn that deadly force may be used, unless the officer had objectively reasonable grounds to believe the person is aware of those facts.]**

[A peace officer must not use deadly force against persons based only on the danger those persons pose to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person.]

[A person being [arrested/detained] has a duty not to use force to resist a peace officer unless the peace officer is using unreasonable force.]

["Deadly force" is force that creates a substantial risk of causing death or serious bodily injury. It is not limited to the discharge of a firearm.]

A threat of death or serious bodily injury is "imminent" if, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or to another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.

"Totality of the circumstances" means all facts known to or perceived by the peace officer at the time, including the conduct of [name of defendant] and [name of plaintiff/decedent] leading up to the use of deadly force. In determining whether [name of defendant]'s use of deadly force was necessary in defense of human life, you must consider [name of defendant]'s tactical conduct and decisions before using deadly force on [name of plaintiff/decedent] and whether [name of defendant] used other available resources and techniques as [an] alternative[s] to deadly force, if it was reasonably safe and feasible to an objectively reasonable officer.

[A peace officer who makes or attempts to make an arrest does not have to retreat or stop because the person being arrested is resisting or threatening to resist. Tactical repositioning or other de-escalation tactics are not retreat. A peace officer does not lose the right to self-defense by using objectively reasonable force to [arrest/detain/ [,or] prevent escape/ [,or] overcome resistance].]

New November 2020; Revised July 2026

Directions for Use

Use this instruction for a negligence claim arising from a peace officer's use of deadly force. Penal Code section 835a preserves the "reasonable force" standard for nondeadly force, but creates a separate, higher standard that authorizes a peace officer to use deadly force only when "necessary in defense of human life." If the plaintiff claims that the defendant used both deadly and nondeadly force, or if the jury must decide whether the force used was deadly or nondeadly, this instruction may be used along with the corresponding essential elements for negligence involving nondeadly force. See CACI No. 440, *Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*.

Element 1 may be stipulated to or decided by the judge as a matter of law. In such a case, the judge must instruct the jury that the defendant was a peace officer. If

there are contested issues of fact regarding element 1, include the specific factual findings necessary for the jury to determine whether the defendant was a peace officer.

Select either or both bracketed options concerning the justifications for using deadly force under Penal Code section § 835a(c) depending on the facts of the case. If only one justification is supported by the facts, omit the either/or language. Include the bracketed sentence following the justifications if the plaintiff claims that the only threat the plaintiff posed was self-harm. A peace officer may not use deadly force against a person based on a danger that person poses to themselves if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person. (Pen. Code, § 835a(c)(2).)

“Deadly force” means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm. (Pen. Code, § 835a(e)(1).) The definition may be omitted from the instruction if a firearm was used. Note that this definition does not require that the encounter result in the death of the person against whom the force was used. If there is no dispute about the use of deadly force, the court should instruct the jury that deadly force was used.

Include the final bracketed paragraph only if the defendant claims that the person being arrested resisted arrest or threatened resistance.

In a wrongful death or survival action, use the name of the decedent victim where applicable and further modify the instruction as appropriate.

Sources and Authority

- Legislative Findings Regarding Use of Force by Law Enforcement. Penal Code section 835a(a).
- When Use of Deadly Force Is Justified. Penal Code section 835a(c).
- When Peace Officer Need Not Retreat. Penal Code section 835a(d).
- Definitions. Penal Code section 835a(e).
- “Peace Officer” Defined. Penal Code section 830 et seq.
- “There is an abundance of authority permitting a plaintiff to go to the jury on both intentional and negligent tort theories, even though they are inconsistent. It has often been pointed out that there is no prohibition against pleading inconsistent causes of action stated in as many ways as plaintiff believes his evidence will show, and he is entitled to recover if one well pleaded count is supported by the evidence.” (*Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 586 [86 Cal.Rptr. 465, 468 P.2d 825].)
- “The evidence relevant to negligence and intentional tort overlaps here and presents a case similar to *Grudt v. City of Los Angeles*, *supra*, 2 Cal.3d 575. . . . [¶] This court held it was reversible error to exclude the negligence issue from the jury even though plaintiff also had pled intentional tort. The court pointed to

the rule that a party may proceed on inconsistent causes of action unless a nonsuit is appropriate.” (*Munoz v. Olin* (1979) 24 Cal.3d 629, 635 [156 Cal.Rptr. 727, 596 P.2d 1143].)

- “[T]here is no right to use force, reasonable or otherwise, to resist an unlawful detention” (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)
- “[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer *unless* excessive force is used or threatened; excessive force in that event triggers the individual’s right of self-defense.” (*Evans, supra*, 22 Cal.App.4th at p. 331, original italics, internal citation omitted.)
- “[T]he reasonableness of a peace officer’s conduct must be determined in light of the totality of circumstances. [Citations.] . . . [P]reshooting conduct is included in the totality of circumstances surrounding an officer’s use of deadly force, and therefore the officer’s duty to act reasonably when using deadly force extends to preshooting conduct.” (*Villalobos v. City of Santa Maria* (2022) 85 Cal.App.5th 383, 389 [301 Cal.Rptr.3d 308], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 427, 993

3 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.10 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, § 464.102 (Matthew Bender)

California Civil Practice: Torts § 12:22 (Thomson Reuters)

451. Affirmative Defense—Contractual Assumption of Risk

[Name of defendant] **claims that [name of plaintiff] may not recover any damages because [he/she/nonbinary pronoun] agreed before the incident that [he/she/nonbinary pronoun] would not hold [name of defendant] responsible for any damages.**

If [name of defendant] proves that there was such an agreement and that it applies to [name of plaintiff]’s claim, then [name of defendant] is not responsible for [name of plaintiff]’s harm[, unless you find that [name of defendant] was grossly negligent or intentionally harmed [name of plaintiff]].

[If you find that [name of defendant] was grossly negligent or intentionally harmed [name of plaintiff], then the agreement does not apply. You must then determine whether [he/she/nonbinary pronoun/it] is responsible for [name of plaintiff]’s harm based on the other instructions that I have given you.]

New September 2003; Revised December 2011

Directions for Use

This instruction sets forth the affirmative defense of express or contractual assumption of risk. (See *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 856 [120 Cal.Rptr.3d 90].) It will be given in very limited circumstances. Both the interpretation of a waiver agreement and application of its legal effect are generally resolved by the judge before trial. The existence of a duty is a question of law for the court (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 719 [183 Cal.Rptr.3d 234]), as is the interpretation of a written instrument if the interpretation does not turn on the credibility of extrinsic evidence. (*Allabach v. Santa Clara County Fair Assn., Inc.* (1996) 46 Cal.App.4th 1007, 1011 [54 Cal.Rptr.2d 330].)

However, there may be contract law defenses (such as fraud, lack of consideration, duress, unconscionability) that could be asserted by the plaintiff to contest the validity of a waiver. If these defenses depend on disputed facts that must be considered by a jury, then this instruction should also be given.

Express assumption of risk does not relieve the defendant of liability if there was gross negligence or willful injury. (See Civ. Code, § 1668.) However, the doctrine of primary assumption of risk may then become relevant if an inherently dangerous sport or activity is involved. (See *Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, 1081 [122 Cal.Rptr.3d 22].)

If there are jury issues with regard to gross negligence, include the bracketed language on gross negligence. Also give CACI No. 425, “*Gross Negligence*” *Explained*. If the jury finds no gross negligence, then the action is barred by express assumption of risk unless there are issues of fact with regard to contract formation.

Sources and Authority

- Contract Releasing Party From Liability for Fraud or Willful Injury is Against Public Policy. Civil Code section 1668.
- “We hold that a limitation on damages for willful injury to the person or property of another is invalid under section 1668.” (*New England Country Foods, LLC v. VanLaw Food Products, Inc.* (2025) 17 Cal.5th 703, 707 [331 Cal.Rptr.3d 890, 567 P.3d 63].)
- “[P]arties may contract for the release of liability for future ordinary negligence so long as such contracts do not violate public policy. ‘A valid release precludes liability for risks of injury within the scope of the release.’ ” (*Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 877 [208 Cal.Rptr.3d 792], internal citations omitted.)
- “With respect to the question of express waiver, the legal issue is *not* whether the particular risk of injury appellant suffered is inherent in the recreational activity to which the Release applies [citations], but simply *the scope of the Release*.” (*Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 27 [236 Cal.Rptr.3d 682], original italics.)
- “Express assumption occurs when the plaintiff, in advance, expressly consents . . . to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. . . . The result is that . . . being under no duty, [the defendant] cannot be charged with negligence.” (*Saenz v. Whitewater Voyages, Inc.* (1990) 226 Cal.App.3d 758, 764 [276 Cal.Rptr. 672], internal citations omitted.)
- “While often referred to as a defense, a release of future liability is more appropriately characterized as an express assumption of the risk that negates the defendant’s duty of care, an element of the plaintiff’s case.” (*Eriksson, supra*, 233 Cal.App.4th at p. 719.)
- “[C]ases involving express assumption of risk are concerned with instances in which, as the result of an express agreement, the defendant owes no duty to protect the plaintiff from an injury-causing risk. Thus in this respect express assumption of risk properly can be viewed as analogous to primary assumption of risk.” (*Knight v. Jewett* (1992) 3 Cal.4th 296, 308–309, fn. 4 [11 Cal.Rptr.2d 2, 834 P.2d 696].)
- “ ‘ “It is only necessary that the act of negligence, which results in injury to the releaser, be reasonably related to the object or purpose for which the release is given.” ’ . . . ‘An act of negligence is reasonably related to the object or purpose for which the release was given if it is included within the express scope of the release.’ ” (*Eriksson, supra*, 233 Cal.App.4th at p. 722.)
- “Although [decendent] could not release or waive her parents’ subsequent wrongful death claims, it is well settled that a release of future liability or express assumption of the risk by the decendent may be asserted as a defense to such claims.” (*Eriksson, supra*, 233 Cal.App.4th at p. 725.)

- “[E]xculpatory clause which affects the public interest cannot stand.” (*Tunkl v. Regents of Univ. of California* (1963) 60 Cal.2d 92, 98 [32 Cal.Rptr. 33, 383 P.2d 441].)
- “In *Tunkl*, our high court identified six characteristics typical of contracts affecting the public interest: ‘ “[1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.” ’ Not all of these factors need to be present for an exculpatory contract to be voided as affecting the public interest.” (*Hass, supra*, 26 Cal.App.5th at p. 29, internal citations omitted.)
- “The issue [of whether something is in the public interest] is tested *objectively*, by the activity’s importance to the *general public*, not by its subjective importance to the particular plaintiff.” (*Booth v. Santa Barbara Biplane Tours, LLC* (2008) 158 Cal.App.4th 1173, 1179–1180 [70 Cal.Rptr.3d 660], original italics.)
- “[P]ublic policy generally precludes enforcement of an agreement that would remove an obligation to adhere to even a *minimal* standard of care. Applying that general rule here, we hold that an agreement purporting to release liability for future gross negligence committed against a developmentally disabled child who participates in a recreational camp designed for the needs of such children violates public policy and is unenforceable.” (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 777 [62 Cal.Rptr.3d 527, 161 P.3d 1095], original italics.)
- “ ‘ “[A] purveyor of recreational activities owes a duty to a patron not to increase the risks inherent in the activity in which the patron has paid to engage.” ’ ” Thus, in cases involving a waiver of liability for future negligence, courts have held that conduct that substantially or unreasonably increased the inherent risk of an activity or actively concealed a known risk could amount to gross negligence, which would not be barred by a release agreement.” (*Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC* (2018) 25 Cal.App.5th 344, 359 [235 Cal.Rptr.3d 716].)
- “ ‘ “A written release may exculpate a tortfeasor from future negligence or

misconduct. [Citation.] To be effective, such a release ‘*must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties.*’ [Citation.] The release need not achieve perfection. [Citation.] Exculpatory agreements in the recreational sports context do not implicate the public interest and therefore are not void as against public policy. [Citations.]” ’ “An ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing. [Citations.]” ’ ” (*Huverserian v. Catalina Scuba Luv, Inc.* (2010) 184 Cal.App.4th 1462, 1467 [110 Cal.Rptr.3d 112], original italics, internal citations omitted.)

- “Unlike claims for ordinary negligence, products liability claims cannot be waived.” (*Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 640 [184 Cal.Rptr.3d 155].)
- “Since there is no disputed issue of material fact concerning gross negligence, the release also bars [plaintiff]’s cause of action for breach of warranty.” (*Grebing, supra*, 234 Cal.App.4th at p. 640.)
- “Generally, a person who signs an instrument may not avoid the impact of its terms on the ground that she failed to read it before signing. However, a release is invalid when it is procured by misrepresentation, overreaching, deception, or fraud. ‘It has often been held that if the releaser was under a misapprehension, not due to his own neglect, as to the nature or scope of the release, and if this misapprehension was induced by the misconduct of the releasee, then the release, regardless of how comprehensively worded, is binding only to the extent actually intended by the releaser.’ ‘In cases providing the opportunity for overreaching, the releasee has a duty to act in good faith and the releaser must have a full understanding of his legal rights. [Citations.] Furthermore, it is the province of the jury to determine whether the circumstances afforded the opportunity for overreaching, whether the releasee engaged in overreaching and whether the releaser was misled. [Citation.]’ A ‘strong showing of misconduct’ by the plaintiff is not necessary to demonstrate the existence of a triable issue of fact here; only a ‘slight showing’ is required.” (*Jimenez v. 24 Hour Fitness USA, Inc.* (2015) 237 Cal.App.4th 546, 563–564 [188 Cal.Rptr.3d 228], internal citations omitted.)
- “Plaintiffs assert that Jerid did not ‘freely and knowingly’ enter into the Release because (1) the [defendant’s] employee represented the Release was a sign-in sheet; (2) the metal clip of the clipboard obscured the title of the document; (3) the Release was written in a small font; (4) [defendant] did not inform Jerid he was releasing his rights by signing the Release; (5) Jerid did not know he was signing a release; (6) Jerid did not receive a copy of the Release; and (7) Jerid was not given adequate time to read or understand the Release. [¶] We do not find plaintiffs’ argument persuasive because . . . there was nothing preventing Jerid from reading the Release. There is nothing indicating that Jerid was prevented from (1) reading the Release while he sat at the booth, or (2) taking the Release, moving his truck out of the line, and reading the Release. In sum, plaintiffs’ arguments do not persuade us that Jerid was denied a reasonable

opportunity to discover the true terms of the contract.” (*Rosencrans, supra*, 192 Cal.App.4th at pp. 1080–1081.)

- “Whether a contract provision is clear and unambiguous is a question of law, not of fact.” (*Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 598 [250 Cal.Rptr. 299].)
- “By signing as [decedent]’s parent, [plaintiff] approved of the terms of the release and understood that her signature made the release ‘irrevocable and binding.’ Under these circumstances, the release could not be disaffirmed. [¶] Although [plaintiff]’s signature prevented the agreement from being disaffirmed, it does not make her a party to the release.” (*Eriksson, supra*, 233 Cal.App.4th at p. 721.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1439, 1449–1451
California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.44

1 Levy et al., California Torts, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.03 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.90 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.171
(Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.402 (Matthew Bender)

530A. Medical Battery

[Name of plaintiff] **claims that** *[name of defendant]* **committed a medical battery. To establish this claim, *[name of plaintiff]* must prove all of the following:**

1. **[That *[name of defendant]* performed a medical procedure without *[name of plaintiff]*'s consent; [or]]**
[That *[name of plaintiff]* consented to one medical procedure, but *[name of defendant]* performed a substantially different medical procedure;]
2. **That *[name of plaintiff]* was harmed; and**
3. **That *[name of defendant]*'s conduct was a substantial factor in causing *[name of plaintiff]*'s harm.**

A patient can consent to a medical procedure by words or conduct.

Derived from former CACI No. 530 April 2007; Revised October 2008

Directions for Use

Select either or both of the two bracketed options in the first element depending on the nature of the case. In a case of a conditional consent in which it is alleged that the defendant proceeded without the condition having occurred, give CACI No. 530B, *Medical Battery—Conditional Consent*.

Sources and Authority

- “The California Supreme Court has described the right to consent to medical treatment as ‘ “basic and fundamental,” ’ ‘intensely individual,’ and ‘broadly based.’ The same court has also emphasized that excusing the patient from a judicial proceeding regarding a surgery to be performed over his objection ‘denie[s] fundamental due process.’ It is immaterial that a doctor has said the treatment is required to save the patient’s life. Rather, ‘ “A doctor might well believe that an operation or form of treatment is desirable or necessary, but the law does not permit him to substitute his own judgment for that of the patient by any form of artifice or deception.” ’ Finally, the patient’s reasons for refusing are irrelevant. ‘For self-determination to have any meaning, it cannot be subject to the scrutiny of anyone else’s conscience or sensibilities.’ ” (*Stewart v. Superior Court* (2017) 16 Cal.App.5th 87, 105 [224 Cal.Rptr.3d 219], internal citations omitted.)
- Battery may also be found if a substantially different procedure is performed: “Where a doctor obtains consent of the patient to perform one type of treatment and subsequently performs a substantially different treatment for which consent was not obtained, there is a clear case of battery.” (*Cobbs v. Grant* (1972) 8

CACI No. 530A

Cal.3d 229, 239 [104 Cal.Rptr. 505, 502 P.2d 1].)

- “The battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented. When the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present. However, when the patient consents to certain treatment and the doctor performs that treatment but an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent given appears; rather, the doctor in obtaining consent may have failed to meet his due care duty to disclose pertinent information. In that situation the action should be pleaded in negligence.” (*Cobbs, supra*, 8 Cal.3d at p. 240.)
- “Our high court has made it clear that battery and lack of informed consent are separate causes of action. A claim based on lack of informed consent—which sounds in negligence—arises when the doctor performs a procedure without first adequately disclosing the risks and alternatives. In contrast, a battery is an intentional tort that occurs when a doctor performs a procedure without obtaining any consent.” (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324 [71 Cal.Rptr.3d 469].)
- “Confusion may arise in the area of ‘exceeding a patient’s consent.’ In cases where a doctor exceeds the consent and such excess surgery is found necessary due to conditions arising during an operation which endanger the patient’s health or life, the consent is presumed. The surgery necessitated is proper (though exceeding specific consent) on the theory of assumed consent, were the patient made aware of the additional need.” (*Pedesky v. Bleiberg* (1967) 251 Cal.App.2d 119, 123 [59 Cal.Rptr. 294].)
- “Consent to medical care, including surgery, may be express or may be implied from the circumstances.” (*Bradford v. Winter* (1963) 215 Cal.App.2d 448, 454 [30 Cal.Rptr. 243].)
- “It is elemental that consent may be manifested by acts or conduct and need not necessarily be shown by a writing or by express words.” (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 38–39 [224 P.2d 808].)
- “[T]he reason why CACI No. 530B has an explicit intent and knowledge requirement and CACI No. 530A does not is clear. The law presumes that ‘[w]hen the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present.’ That situation is covered by CACI No. 530A.” (*Dennis v. Southard* (2009) 174 Cal.App.4th 540, 544 [94 Cal.Rptr.3d 559], internal citation omitted.)
- “In the absence of any definitive case law establishing whether operating on the wrong disk within inches of the correct disk is a ‘substantially different procedure,’ we conclude the matter is a factual question for a finder of fact to decide and at least in this instance, not one capable of being decided on demurrer.” (*Kaplan v. Mamelak* (2008) 162 Cal.App.4th 637, 647 [75 Cal.Rptr.3d 861].)

- “But not any deviation from consented-to medical treatment will sustain a medical battery claim—rather, the treatment given, or procedure performed, must be ‘substantially different’ than that for which informed consent was given. Whether a treatment or procedure is ‘substantially different’ from that for which consent has been given, may, ‘[i]n the absence of any definitive case law,’ be a factual issue involving expert testimony.” (*Doe v. Kachru* (2025) 115 Cal.App.5th 175, 188 [338 Cal.Rptr.3d 1], internal citations and quotation marks omitted.)
- “Although . . . consent to surgery necessarily encompasses consent to postoperative care, not all postoperative *contact* between doctor and patient constitutes *care*. The question of the nature of the contact between plaintiff and [defendant], and whether that contact was within the scope of plaintiff’s consent, is a factual question for a finder of fact to decide.” (*So v. Shin* (2013) 212 Cal.App.4th 652, 669 [151 Cal.Rptr.3d 257], original italics.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 459–1635

Haning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶ 3:1394 (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 3-F, *MICRA Provisions Affecting Damages*, ¶ 3:1883–3:1885 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.11–9.16

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.41, Ch. 41, *Assault and Battery*, § 41.01 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, §§ 415.13, 415.20 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.20 et seq. (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice*, § 175.28 et seq. (Matthew Bender)

33 California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

1006. Landlord's Duty

A landlord must conduct reasonable periodic inspections of rental property whenever the landlord has the legal right of possession. Before giving possession of leased property to a tenant [or on renewal of a lease] [or after retaking possession from a tenant], a landlord must conduct a reasonable inspection of the property for unsafe conditions and must take reasonable precautions to prevent injury due to the conditions that were or reasonably should have been discovered in the process. The inspection must include common areas under the landlord's control.

After a tenant has taken possession, a landlord must take reasonable precautions to prevent injury due to any unsafe condition in an area of the premises under the landlord's control if the landlord knows or reasonably should have known about it.

[After a tenant has taken possession, a landlord must take reasonable precautions to prevent injury due to any unsafe condition in an area of the premises under the tenant's control if the landlord has actual knowledge of the condition and the right and ability to correct it.]

New September 2003; Revised April 2008, April 2009, December 2009, June 2010

Directions for Use

Give this instruction with CACI No. 1000, *Premises Liability—Essential Factual Elements*, CACI No. 1001, *Basic Duty of Care*, and CACI No. 1003, *Unsafe Conditions*, if the injury occurred on rental property and the landlord is alleged to be liable. Include the last paragraph if the property is not within the landlord's immediate control.

Include “or on renewal of a lease” for commercial tenancies. (See *Mora v. Baker Commodities, Inc.* (1989) 210 Cal.App.3d 771, 781 [258 Cal.Rptr. 669].) While no case appears to have specifically addressed a landlord's duty to inspect on renewal of a residential lease, it would seem impossible to impose such a duty with regard to a month-to-month tenancy. Whether there might be a duty to inspect on renewal of a long-term residential lease appears to be unresolved.

Under the doctrine of nondelegable duty, a landlord cannot escape liability for failure to maintain property in a safe condition by delegating the duty to an independent contractor. (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 726 [28 Cal.Rptr.2d 672].) For an instruction for use with regard to a landlord's liability for the acts of an independent contractor, see CACI No. 3713, *Nondelegable Duty*.

Sources and Authority

- “A landlord owes a duty of care to a tenant to provide and maintain safe

conditions on the leased premises. This duty of care also extends to the general public. ‘A lessor who leases property for a purpose involving the admission of the public is under a duty to see that it is safe for the purposes intended, and to exercise reasonable care to inspect and repair the premises before possession is transferred so as to prevent any unreasonable risk of harm to the public who may enter. An agreement to renew a lease or relet the premises . . . cannot relieve the lessor of his duty to see that the premises are reasonably safe at that time.’ [¶] Where there is a duty to exercise reasonable care in the inspection of premises for dangerous conditions, the lack of awareness of the dangerous condition does not generally preclude liability. ‘Although liability might easily be found where the landowner has actual knowledge of the dangerous condition “[t]he landowner’s lack of knowledge of the dangerous condition is not a defense. He has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable.” ’ ” (*Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1134 [32 Cal.Rptr.2d 755], internal citations omitted.)

- “Public policy precludes landlord liability for a dangerous condition on the premises which came into existence after possession has passed to a tenant. This is based on the principle that the landlord has surrendered possession and control of the land to the tenant and has no right even to enter without permission. It would not be reasonable to hold a lessor liable if the lessor did not have the power, opportunity, and ability to eliminate the dangerous condition.” (*Garcia v. Holt* (2015) 242 Cal.App.4th 600, 604 [195 Cal.Rptr.3d 47], internal citations omitted.)
- “The rationale for this rule has been that property law regards a lease as equivalent to a sale of the land for the term of the lease. As stated by Prosser: ‘In the absence of agreement to the contrary, the lessor surrenders both possession and control of the land to the lessee, retaining only a reversionary interest; and he has no right even to enter without the permission of the lessee. Consequently, it is the general rule that he is under no obligation to anyone to look after the premises or keep them in repair, and is not responsible, either to persons injured on the land or to those outside of it, for conditions which develop or are created by the tenant after possession has been transferred. Neither is he responsible, in general, for the activities which the tenant carries on upon the land after such transfer, even when they create a nuisance.’ ” (*Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 510–511 [118 Cal.Rptr. 741], internal citations omitted.)
- “To this general rule of nonliability, the law has developed a number of exceptions, such as where the landlord covenants or volunteers to repair a defective condition on the premises, where the landlord has actual knowledge of defects which are unknown and not apparent to the tenant and he fails to disclose them to the tenant, where there is a nuisance existing on the property at

the time the lease is made or renewed, when a safety law has been violated, or where the injury occurs on a part of the premises over which the landlord retains control, such as common hallways, stairs, elevators, or roof. [¶] A common element in these exceptions is that either at or after the time possession is given to the tenant the landlord retains or acquires a recognizable degree of control over the dangerous condition with a concomitant right and power to obviate the condition and prevent the injury. In these situations, the law imposes on the landlord a duty to use ordinary care to eliminate the condition with resulting liability for injuries caused by his failure so to act.” (*Uccello, supra*, 44 Cal.App.3d at p. 511, internal citations omitted.)

- “With regard to landlords, ‘reasonable care ordinarily involves making sure the property is safe at the beginning of the tenancy, and repairing any hazards the landlord learns about later.’ ‘“Because a landlord has relinquished possessory interest in the land, his or her duty of care to third parties injured on the land is attenuated as compared with the tenant who enjoys possession and control. Thus, before liability may be thrust on a landlord for a third party’s injury due to a dangerous condition on the land, the plaintiff must show that the landlord had actual knowledge of the dangerous condition in question, plus the right and ability to cure the condition.” ’ ” (*Day v. Lupo Vine Street, L.P.* (2018) 22 Cal.App.5th 62, 69 [231 Cal.Rptr.3d 193], internal citations omitted.)
- “Because a landlord has the right to enter property (and thus has possession and control over that property) when initiating or renewing a lease, a landlord owes a greater duty to third parties injured by dangerous conditions existing on the property *at those moments in time*. [¶] At these specific moments in time, a landlord has a duty (1) to conduct a reasonable inspection of the property *if* the landlord has a reason to know there may be a dangerous condition on the property at that time, and (2) to repair, if that inspection reveals a dangerous condition. Because the landlord’s obligation is only to do what is reasonable under the circumstances, and because what is reasonable turns on the burden of reducing or avoiding the risk [of harm] and the likelihood of injury, a landlord need not take extraordinary measures or make unreasonable expenditures of time and money in trying to discover hazards unless the circumstances so warrant. Because a landlord at these moments in time sometimes has a duty to conduct a reasonable inspection, such a landlord is accordingly charged not only with what they actually knew but also with what they constructively knew (that is, what they “should have known” by virtue of the inspection).” (*St. John v. Schaeffler* (2025) 109 Cal.App.5th 1146, 1159–1160 [331 Cal.Rptr.3d 122], original italics, internal citations and quotation marks omitted, citing CACI No. 1006.)
- “Limiting a landlord’s obligations releases it from needing to engage in potentially intrusive oversight of the property, thus permitting the tenant to enjoy its tenancy unmolested.” (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 412 [82 Cal.Rptr.3d 735], internal citations omitted.)
- “[A] commercial landowner cannot totally abrogate its landowner responsibilities merely by signing a lease. As the owner of property, a lessor out of possession

must exercise due care and must act reasonably toward the tenant as well as to unknown third persons. At the time the lease is executed and upon renewal a landlord has a right to reenter the property, has control of the property, and must inspect the premises to make the premises reasonably safe from dangerous conditions. Even if the commercial landlord executes a contract which requires the tenant to maintain the property in a certain condition, the landlord is obligated at the time the lease is executed to take reasonable precautions to avoid unnecessary danger.” (*Mora, supra*, 210 Cal.App.3d at p. 781, internal citations omitted.)

- “[T]he landlord’s responsibility to inspect is limited. Like a residential landlord, the duty to inspect charges the lessor ‘only with those matters which would have been disclosed by a reasonable inspection.’ The burden of reducing or avoiding the risk and the likelihood of injury will affect the determination of what constitutes a reasonable inspection. The landlord’s obligation is only to do what is reasonable under the circumstances. The landlord need not take extraordinary measures or make unreasonable expenditures of time and money in trying to discover hazards unless the circumstances so warrant. When there is a potential serious danger, which is foreseeable, a landlord should anticipate the danger and conduct a reasonable inspection before passing possession to the tenant. However, if no such inspection is warranted, the landlord has no such obligation.” (*Mora, supra*, 210 Cal.App.3d at p. 782, internal citations and footnote omitted.)
- “It is one thing for a landlord to leave a tenant alone who is complying with its lease. It is entirely different, however, for a landlord to ignore a defaulting tenant’s possible neglect of property. Neglected property endangers the public, and a landlord’s detachment frustrates the public policy of keeping property in good repair and safe. To strike the right balance between safety and disfavored self-help, we hold that [the landlord]’s duty to inspect attached upon entry of the judgment of possession in the unlawful detainer action and included reasonable periodic inspections thereafter.” (*Stone v. Center Trust Retail Properties, Inc.* (2008) 163 Cal.App.4th 608, 613 [77 Cal.Rptr.3d 556].)
- “[I]t is established that a landlord owes a duty of care to its tenants to take reasonable steps to secure the common areas under its control.” (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 675 [25 Cal.Rptr.2d 137, 863 P.2d 207].)
- “The existence of the landlord’s duty to others to maintain the property in a reasonably safe condition is a question of law for the court.” (*Johnson v. Prasad* (2014) 224 Cal.App.4th 74, 79 [168 Cal.Rptr.3d 196].)
- “The reasonableness of a landlord’s conduct under all the circumstances is for the jury. A triable issue of fact exists as to whether the defendants’ maintenance of a low, open, unguarded window in a common hallway where they knew young children were likely to play constituted a breach of their duty to take reasonable precautions to prevent children falling out of the window.” (*Amos v. Alpha Prop. Mgmt.* (1999) 73 Cal.App.4th 895, 904 [87 Cal.Rptr.2d 34], internal

citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1284, 1285

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.02 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, § 170.03 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.10, 334.53 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.11 et seq. (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.23 (Matthew Bender)

California Civil Practice: Torts §§ 16:12–16:16 (Thomson Reuters)

1305B. Battery by Peace Officer (Deadly Force)—Essential Factual Elements

[Name of plaintiff] **claims that** *[name of defendant]* **unnecessarily used deadly force on** *[him/her/nonbinary pronoun/name of decedent]*. To establish this claim, *[name of plaintiff]* **must prove all of the following:**

- 1. That** *[name of defendant]* **intentionally touched** *[name of plaintiff]* *decedent* **[or caused** *[name of plaintiff]* *decedent* **to be touched];**
- 2. That** *[name of defendant]* **used deadly force on** *[name of plaintiff]* *decedent* **];**
- 3. That** *[name of defendant]*'s **use of deadly force was not necessary to defend human life;**
- 4. That** *[name of plaintiff]* *decedent* **was** **[harmed/killed]; and**
- 5. That** *[name of defendant]*'s **use of deadly force was a substantial factor in causing** *[name of plaintiff]* *decedent*'s **[harm/death].**

A peace officer may use deadly force only when necessary in defense of human life. *[Name of defendant]*'s use of deadly force was necessary to defend human life only if a reasonable officer in the same situation would have believed, based on the totality of the circumstances known to or perceived by *[name of defendant]* at the time, that deadly force was necessary *[insert one or both of the following:]*

[to defend against an imminent threat of death or serious bodily harm to* *[name of defendant]* *[or]* *[to another person]**]; or/.]

[to apprehend a fleeing person for a felony, when all of the following conditions are present:

- i. The felony threatened or resulted in death or serious bodily injury to another;**
- ii. *[Name of defendant]* reasonably believed that the person fleeing would cause death or serious bodily injury to another unless immediately apprehended; and**
- iii. If practical under the circumstances, *[name of defendant]* made reasonable efforts to identify *[himself/herself/nonbinary pronoun]* as a peace officer and to warn that deadly force would be used, unless the officer had objectively reasonable grounds to believe the person is aware of those facts.]**

[A peace officer must not use deadly force against persons based only on the danger those persons pose to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person.]

[A person being [arrested/detained] has a duty not to use force to resist the peace officer unless the peace officer is using unreasonable force.]

“Deadly force” means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm.

A threat of death or serious bodily injury is “imminent” when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.

“Totality of the circumstances” means all facts known to the peace officer at the time, including the conduct of [name of defendant] and [name of plaintiff/decedent] leading up to the use of deadly force. In determining whether [name of defendant]’s use of deadly force was necessary in defense of human life, you must consider [name of defendant]’s tactical conduct and decisions before using deadly force on [name of plaintiff/decedent] and whether [name of defendant] used other available resources and techniques as [an] alternative[s] to deadly force, if it was reasonably safe and feasible to do so. [You must also consider whether [name of defendant] knew or had reason to know that the person against whom [he/she/nonbinary pronoun] used force was suffering from a physical, mental health, developmental, or intellectual disability [that may have affected the person’s ability to understand or comply with commands from the officer[s]].]

[A peace officer who makes or attempts to make an arrest does not have to retreat or stop because the person being arrested is resisting or threatening to resist. Tactical repositioning or other de-escalation tactics are not retreat. A peace officer does not lose the right to self-defense by use of objectively reasonable force to effect the arrest or to prevent escape or to overcome resistance. A peace officer does, however, have a duty to use reasonable tactical repositioning or other de-escalation tactics.]

New May 2021; Revised July 2026

Directions for Use

Use this instruction for a claim of battery using deadly force by a peace officer. If a plaintiff alleges battery by both deadly and nondeadly force, or if the jury must decide whether the amount of force used was deadly or nondeadly, this instruction may be used along with the CACI No. 1305A, *Battery by Law Enforcement Officer*

(Nondeadly Force)—Essential Factual Elements.

By its terms, Penal Code section 835a's deadly force provisions apply to "peace officers," a term defined by the Penal Code. (See Pen. Code, § 835a; see also Pen. Code, § 830 et seq. [defining "peace officer"].) That the defendant is a peace officer may be stipulated to or decided by the judge as a matter of law. In such a case, the judge must instruct the jury that the defendant was a peace officer. If there are contested issues of fact on this issue, include the specific factual findings necessary for the jury to determine whether the defendant was acting as a peace officer.

In the paragraph after the essential factual elements, select either or both bracketed options depending on the asserted justification(s) for the use of deadly force.

"Deadly force" means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm. (Pen. Code, § 835a(e)(1).) Note that this definition does not require that the encounter result in the death of the person against whom the force was used. If there is no dispute about the use of deadly force, the court should instruct the jury that deadly force was used.

In the "totality of the circumstances" paragraph, do not include the final optional sentence or its optional clause unless there is evidence of a disability or evidence of the person's ability to comprehend or comply with the officer's commands.

Include the final bracketed paragraph only if the defendant claims that the person being arrested resisted arrest or threatened resistance.

In a wrongful death or survival action, use the name of the decedent victim where applicable and further modify the instruction as appropriate.

Sources and Authority

- Legislative Findings re Use of Force by Law Enforcement. Penal Code section 835a(a).
- When Use of Deadly Force is Justified. Penal Code section 835a(c).
- When Peace Officer Need Not Retreat. Penal Code section 835a(d).
- Definitions. Penal Code section 835a(e).
- "Peace Officer" Defined. Penal Code section 830 et seq.
- "[T]here is no right to use force, reasonable or otherwise, to resist an unlawful detention" (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)
- "[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer *unless* excessive force is used or threatened; excessive force in that event triggers the individual's right of self-defense." (*Evans, supra*, 22 Cal.App.4th at p. 331, original italics, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 427, 993

CACI No. 1305B

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.24 seq. (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.22 (Matthew Bender)

California Civil Practice: Torts § 12:22 (Thomson Reuters)

1804A. Misappropriation of Name, Voice, Signature, Photograph, or Likeness (Civ. Code, § 3344)

[Name of plaintiff] **claims that** *[name of defendant]* **violated** *[his/her/nonbinary pronoun]* **right to** *[privacy/publicity/privacy and publicity]* **by misappropriating** *[his/her/nonbinary pronoun]* *[name/voice/signature/photograph/likeness]*. **To establish this claim,** *[name of plaintiff]* **must prove all of the following:**

- 1. That** *[name of defendant]* **knowingly used** *[name of plaintiff]*'s *[name/voice/signature/photograph/likeness]* **on merchandise/ [or] to advertise or sell** *[describe what is being advertised or sold]*;
- 2. That the use did not occur in connection with a news, public affairs, or sports broadcast or account, or with a political campaign;**
- 3. That** *[name of defendant]* **did not have** *[name of plaintiff]*'s **consent;**
- 4. That** *[name of defendant]*'s **use of** *[name of plaintiff]*'s *[name/voice/signature/photograph/likeness]* **was directly connected to** *[name of defendant]*'s **commercial purpose;**
- 5. That** *[name of plaintiff]* **was harmed; and**
- 6. That** *[name of defendant]*'s **conduct was a substantial factor in causing** *[name of plaintiff]*'s **harm.**

Derived from former CACI No. 1804 April 2008; Revised April 2009, July 2025

Directions for Use

If the plaintiff is asserting more than one privacy right or a right of publicity, give an introductory instruction stating that a person's right to privacy or right of publicity can be violated in more than one way and listing the legal theories under which the plaintiff is suing. This instruction states a statutory claim for misappropriation under Civil Code section 3344. Select the specific type of misappropriation from the applicable bracketed terms for the aspect of the plaintiff's identity at issue in the case.

One's name and likeness are protected under both the common law and under Civil Code section 3344. As the statutory remedy is cumulative (Civ. Code, § 3344(g)), both this instruction and CACI No. 1803, *Misappropriation of Name, Likeness, or Identity*, which sets forth the common law cause of action, may be given.

Different standards apply if the use is in connection with a news, public affairs, or sports broadcast or account, or with a political campaign. (See Civ. Code, § 3344(d); *Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 421–426 [198 Cal.Rptr. 342].) The plaintiff bears the burden of proving the nonapplicability of these

CACI No. 1804A

exceptions. (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 416–417 [114 Cal.Rptr.2d 307].) Element 2 may be omitted if there is no question of fact with regard to this issue. See CACI No. 1804B, *Misappropriation of Name, Voice, Signature, Photograph, or Likeness—Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign*, for an instruction to use if one of the exceptions of Civil Code section 3344(d) applies.

If plaintiff alleges that the use was not covered by Civil Code section 3344(d) (e.g., not a “news” account) but that even if it were covered it is not protected under the standards of *Eastwood*, then both this instruction and CACI No. 1804B should be given in the alternative. In that case, it should be made clear to the jury that if the plaintiff fails to prove the inapplicability of Civil Code section 3344(d) as set forth in element 2, the claim is still viable if the plaintiff proves all the elements of CACI No. 1804B.

Consider giving an instruction explaining consent. See generally CACI No. 1302, *Consent Explained*.

Note that a plaintiff is entitled to the sum of \$750 under Civil Code section 3344(a)(1) even if actual damages are not proven. (See *Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988, 1008 [72 Cal.Rptr.3d 194] [claim for 14,060 misappropriations of plaintiff’s name under section 3344(a) constitutes single cause of action for which statutory damages are \$750].)

Sources and Authority

- Liability for Use of Name, Voice, Signature, Photograph, or Likeness. Civil Code section 3344.
- “Photograph” Defined. Civil Code section 3344(b).
- “Civil Code section 3344 provides a statutory cause of action for commercial misappropriation that complements, rather than codifies, the common law misappropriation cause of action.” (*Local TV, LLC v. Superior Court* (2016) 3 Cal.App.5th 1, 13 [206 Cal.Rptr.3d 884].)
- “[C]alifornia’s appropriation statute is not limited to celebrity plaintiffs.” (*KNB Enters v. Matthews* (2000) 78 Cal.App.4th 362, 367 [92 Cal.Rptr.2d 713].)
- “There are two vehicles a plaintiff can use to protect this right: a common law cause of action for commercial misappropriation and a section 3344 claim. To prove the common law cause of action, the plaintiff must establish: ‘“(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.” [Citation.]’ To prove the statutory remedy, a plaintiff must present evidence of ‘all the elements of the common law cause of action’ and must also prove ‘a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose.’” (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 544 [135 Cal.Rptr.3d 200], internal citations omitted.)
- “The differences between the common law and statutory actions are: (1) Section

3344, subdivision (a) requires a knowing use whereas under case law, mistake and inadvertence are not a defense against commercial appropriation; and (2) Section 3344, subdivision (g) expressly provides that its remedies are cumulative and in addition to any provided for by law.” (*Eastwood, supra*, 149 Cal.App.3d at p. 417, fn. 6, internal citation omitted.)

- “[B]oth the statutory and common law versions of a right of publicity claim require that the defendant actually use the plaintiff’s likeness . . .” (*Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 210 [222 Cal.Rptr.3d 250].)
- “Plaintiffs assert that Civil Code section 3344’s ‘commercial use’ requirement does not need to ‘involve some form of advertising or endorsement.’ This is simply incorrect, as Civil Code section 3344, subdivision (a) explicitly provides for possible liability on ‘[a]ny person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner . . . for purposes of advertising . . . without such person’s prior consent.’ The statute requires some ‘use’ by the advertiser aimed at obtaining a commercial advantage for the advertiser.” (*Cross, supra*, 14 Cal.App.5th at p. 210.)
- “[T]he single-publication rule as codified in [Civil Code] section 3425.3 applies, in general, to a cause of action for unauthorized commercial use of likeness.” (*Christoff v. Nestle USA, Inc.* (2009) 47 Cal.4th 468, 476 [97 Cal.Rptr.3d 798, 213 P.3d 132].)
- “Any facts which tend to disprove one of the allegations raised in a complaint may be offered in the defendant’s answer based upon a general denial and need not be raised by affirmative defense. . . . Throughout this litigation plaintiffs have borne the burden of establishing that their names and likenesses were used in violation of section 3344, and this burden has always required proof that the disputed uses fell outside the exemptions granted by subdivision (d).” (*Gionfriddo, supra*, 94 Cal.App.4th at pp. 416–417, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 789–791

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-L, *Invasion Of Privacy*, ¶¶ 5:1116–5:1118 (The Rutter Group)

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.05 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, §§ 429.35–429.36 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, §§ 184.22–184.24 (Matthew Bender)

California Civil Practice: Torts § 20:17 (Thomson Reuters)

1804B. Misappropriation of Name, Voice, Signature, Photograph, or Likeness—Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign (Civ. Code, § 3344(d))

[Name of plaintiff] **claims that** *[name of defendant]* **violated** *[his/her/nonbinary pronoun]* **right to** *[privacy/publicity/privacy and publicity]* **by misappropriating** *[his/her/nonbinary pronoun]* *[name/voice/signature/photograph/likeness]* **in connection with a** *[[news/public affairs/sports] broadcast or account/political campaign]*. **To establish this claim,** *[name of plaintiff]* **must prove all of the following:**

- 1. That** *[name of defendant]* **knowingly used** *[name of plaintiff]*'s *[name/voice/signature/photograph/likeness]* **[on merchandise/ [or] to advertise or sell** *[describe what is being advertised or sold]]*;
- 2. That the use occurred in connection with a** *[[news/public affairs/sports] broadcast or account/political campaign]*;
- 3. That the use contained false information;**
- 4. [Use for public figure: That** *[name of defendant]* **knew the** *[broadcast or account/campaign material]* **was false or that** *[he/she/nonbinary pronoun/it]* **acted with reckless disregard of its falsity;]**

[or]

[Use for private individual: That *[name of defendant]* **was negligent in determining the truth of the** *[broadcast or account/campaign material]***];]**

- 5. That** *[name of defendant]*'s **use of** *[name of plaintiff]*'s *[name/voice/signature/photograph/likeness]* **was directly connected to** *[name of defendant]*'s **commercial purpose;**
- 6. That** *[name of plaintiff]* **was harmed; and**
- 7. That** *[name of defendant]*'s **conduct was a substantial factor in causing** *[name of plaintiff]*'s **harm.**

Derived from former CACI No. 1804 April 2008; Revised April 2009, July 2025

Directions for Use

Give this instruction if the plaintiff's name, voice, signature, photograph, or likeness has been used in connection with a news, public affairs, or sports broadcast or account, or with a political campaign. In this situation, consent is not required. (Civ. Code, § 3344(d).) However, in *Eastwood v. Superior Court*, the court held that the

constitutional standards under defamation law apply under section 3344(d) and that the statute as it applies to news does not provide protection for a knowing or reckless falsehood. (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 421–426 [198 Cal.Rptr. 342].) Under defamation law, this standard applies only to public figures, and private individuals may sue for negligent publication of defamatory falsehoods. Presumably, the same distinction between public figures and private individuals would apply under Civil Code section 3344(d). Element 4 provides for the standards established and suggested by *Eastwood*.

Select the specific type of misappropriation from the applicable bracketed terms for the aspect of the plaintiff's identity at issue in the case.

Give CACI No. 1804A, *Misappropriation of Name, Voice, Signature, Photograph, or Likeness*, if there is no issue whether one of the exceptions of Civil Code section 3344(d) applies. If plaintiff alleges that the use was not covered by subdivision (d) (e.g., not a “news” account) but that even if it were covered it is not protected under the standards of *Eastwood*, then both this instruction and CACI No. 1804A should be given in the alternative. In that case, it should be made clear to the jury that if the plaintiff fails to prove the inapplicability of Civil Code section 3344(d) as set forth element 2 of CACI No. 1804A, the claim is still viable if the plaintiff proves all the elements of this instruction.

If the plaintiff is asserting more than one privacy right or a right of publicity, give an introductory instruction stating that a person's right to privacy or right of publicity can be violated in more than one way and listing the legal theories under which the plaintiff is suing. One's name and likeness are protected under both the common law and under Civil Code section 3344. As the statutory remedy is cumulative (Civ. Code, § 3344(g)), both this instruction and CACI No. 1803, *Misappropriation of Name, Likeness, or Identity*, which sets forth the common law cause of action, may be given.

Note that a plaintiff is entitled to the sum of \$750 under Civil Code section 3344(a)(1) even if actual damages are not proven. (See *Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988, 1008 [72 Cal.Rptr.3d 194] [claim for 14,060 misappropriations of plaintiff's name under section 3344(a) constitutes single cause of action for which statutory damages are \$750].)

Even though consent is not required, it may be an affirmative defense. CACI No. 1721, *Affirmative Defense—Consent* (to defamation), may be used in this situation.

Sources and Authority

- Liability for Use of Name, Voice, Signature, Photograph, or Likeness. Civil Code section 3344.
- “In 1971, California enacted [Civil Code] section 3344, a commercial appropriation statute which complements the common law tort of appropriation.” (*KNB Enters. v. Matthews* (2000) 78 Cal.App.4th 362, 366–367 [92 Cal.Rptr.2d 713].)
- “[C]alifornia's appropriation statute is not limited to celebrity plaintiffs.” (*KNB*

Enters., supra, 78 Cal.App.4th at p. 367.)

- “There are two vehicles a plaintiff can use to protect this right: a common law cause of action for commercial misappropriation and a section 3344 claim. To prove the common law cause of action, the plaintiff must establish: ‘“(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.” [Citation.]’ To prove the statutory remedy, a plaintiff must present evidence of ‘all the elements of the common law cause of action’ and must also prove ‘a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose.’” (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 544 [135 Cal.Rptr.3d 200], internal citations omitted.)
- “The differences between the common law and statutory actions are: (1) Section 3344, subdivision (a) requires a knowing use whereas under case law, mistake and inadvertence are not a defense against commercial appropriation; and (2) Section 3344, subdivision (g) expressly provides that its remedies are cumulative and in addition to any provided for by law.” (*Eastwood, supra*, 149 Cal.App.3d at p. 417, fn. 6, internal citation omitted.)
- “The spacious interest in an unfettered press is not without limitation. This privilege is subject to the qualification that it shall not be so exercised as to abuse the rights of individuals. Hence, in defamation cases, the concern is with defamatory lies masquerading as truth. Similarly, in privacy cases, the concern is with nondefamatory lies masquerading as truth. Accordingly, we do not believe that the Legislature intended to provide an exemption from liability for a knowing or reckless falsehood under the canopy of ‘news.’ We therefore hold that Civil Code section 3344, subdivision (d), as it pertains to news, does not provide an exemption for a knowing or reckless falsehood.” (*Eastwood, supra*, 149 Cal.App.3d at p. 426, internal citations omitted.)
- “[T]he single-publication rule as codified in [Civil Code] section 3425.3 applies, in general, to a cause of action for unauthorized commercial use of likeness.” (*Christoff v. Nestle USA, Inc.* (2009) 47 Cal.4th 468, 476 [97 Cal.Rptr.3d 798, 213 P.3d 132].)
- “Any facts which tend to disprove one of the allegations raised in a complaint may be offered in the defendant’s answer based upon a general denial and need not be raised by affirmative defense. . . . Throughout this litigation plaintiffs have borne the burden of establishing that their names and likenesses were used in violation of section 3344, and this burden has always required proof that the disputed uses fell outside the exemptions granted by subdivision (d).” (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 416–417 [114 Cal.Rptr.2d 307], internal citation omitted.)
- “We presume that the Legislature intended that the category of public affairs would include things that would not necessarily be considered news. Otherwise, the appearance of one of those terms in the subsection would be superfluous, a

reading we are not entitled to give to the statute. We also presume that the term ‘public affairs’ was intended to mean something less important than news. Public affairs must be related to real-life occurrences.” (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 546 [18 Cal.Rptr.2d 790], internal citations omitted.)

- “[N]o cause of action will lie for the ‘publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.’ ” (*Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 789–791

Chin et al., California Practice Guide: Employment Litigation, Ch. 5–:L, *Invasion Of Privacy*, ¶¶ 5:1116–5:1118 (The Rutter Group)

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.05 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.36 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.35 (Matthew Bender)

California Civil Practice: Torts § 20:17 (Thomson Reuters)

1821. Damages for Use of Name, Voice, Signature, Photograph, or Likeness (Civ. Code, § 3344(a))

If you decide that [name of plaintiff] has proved [his/her/nonbinary pronoun] claim against [name of defendant], you also must decide how much money will reasonably compensate [name of plaintiff] for the harm. This compensation is called “damages.”

[Name of plaintiff] must prove the amount of [his/her/nonbinary pronoun] damages. [Name of plaintiff] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [name of plaintiff]:

- 1. [Humiliation, embarrassment, and mental distress, including any physical symptoms;]**
- 2. [Harm to [name of plaintiff]’s reputation;] [and]**
- 3. [Insert other item(s) of claimed harm].**

In addition, [name of plaintiff] may recover any profits that [name of defendant] received from the use of [name of plaintiff]’s [name/voice/signature/photograph/likeness] [that have not already been taken into account with regard to the above damages]. To establish the amount of these profits you must:

- 1. Determine the gross, or total, revenue that [name of defendant] received from the use;**
- 2. Determine the expenses that [name of defendant] had in obtaining the gross revenue; and**
- 3. Deduct [name of defendant]’s expenses from the gross revenue.**

[Name of plaintiff] must prove the amount of gross revenue, and [name of defendant] must prove the amount of expenses.

*New September 2003; Revised June 2012, December 2012, July 2026**

Directions for Use

Under Civil Code section 3344(a)(1), an injured party may recover either actual damages or \$750, whichever is greater, as well as profits from the unauthorized use that were not taken into account in calculating actual damages. (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 547 [135 Cal.Rptr.3d 200].) If no actual damages are sought, the first part of the instruction may be deleted or modified to simply instruct the jury to award \$750 if it finds liability.

The plaintiff might claim that the plaintiff would have earned the same profits that the defendant wrongfully earned. In such a case, to avoid a double recovery, the advisory committee recommends computing damages to recover the defendant's wrongful profits separately from actual damages, that is, under the second part of the instruction and not under actual damages item 3 ("other item(s) of claimed harm"). See also CACI No. VF-1804, *Privacy—Misappropriation of Name, Voice, Signature, Photograph, or Likeness*. Give the bracketed phrase in the paragraph that introduces the second part of the instruction if the plaintiff alleges lost profits that are different from the defendant's wrongful profits and that are claimed under actual damages item 3.

Sources and Authority

- Liability for Use of Name, Voice, Signature, Photograph, or Likeness. Civil Code section 3344.
- "[Plaintiff] alleges, and submits evidence to show, that he was injured economically because the ad will make it difficult for him to endorse other automobiles, and emotionally because people may be led to believe he has abandoned his current name and assume he has renounced his religion. These allegations suffice to support his action. Injury to a plaintiff's right of publicity is not limited to present or future economic loss, but 'may induce humiliation, embarrassment, and mental distress.' " (*Abdul-Jabbar v. General Motors Corp.* (9th Cir. 1996) 85 F.3d 407, 416, internal citation omitted.)
- "The statutory language of section 3344 is unambiguous—the plaintiff bears the burden of presenting proof of the gross revenue attributable to the defendant's unauthorized use of the plaintiff's likeness, and the defendant must then prove its deductible expenses. CACI No. 1821 mirrors the language of section 3344: '[plaintiff] must prove the amount of gross revenue, and [. . . defendant] must prove the amount of expenses.' (CACI No. 1821.)" (*Olive v. General Nutrition Centers, Inc.* (2018) 30 Cal.App.5th 804, 814 [242 Cal.Rptr.3d 15], internal citation omitted.)
- "CACI No. 1821 adequately explained the applicable law to the jury." (*Olive, supra*, 30 Cal.App.5th at p. 815.)
- "We can conceive no rational basis for the Legislature to limit the \$750 as an alternative to all other damages, including profits. If someone profits from the unauthorized use of another's name, it makes little sense to preclude the injured party from recouping those profits because he or she is entitled to statutory damages as opposed to actual damages. Similar reasoning appears to be reflected in the civil jury instructions for damages under section 3344, which provides: 'If [name of plaintiff] has not proved the above damages, or has proved an amount of damages less than \$750, then you must award [him/her] \$750. [¶] In addition, [name of plaintiff] may recover any profits that [name of defendant] received from the use of [name of plaintiff]'s [name . . .] [that have not already been taken into account in computing the above damages].' (CACI No. 1821, italics omitted.)." (*Orthopedic Systems Inc., supra*, 202 Cal.App.4th at p. 546.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1715–1724

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-L, *Invasion Of Privacy*, ¶¶ 5:1116–5:1118 (The Rutter Group)

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.13 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.36 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.35 (Matthew Bender)

California Civil Practice, Torts § 20:17 (Thomson Reuters)

VF-1804. Privacy—Misappropriation of Name, Voice, Signature, Photograph, or Likeness (Civ. Code, § 3344)

We answer the questions submitted to us as follows:

- 1. Did [name of defendant] knowingly use [name of plaintiff]'s [name/voice/signature/photograph/likeness] on merchandise or to advertise or sell products or services?**

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- 2. Did [name of defendant] have [name of plaintiff]'s consent?**

_____ Yes _____ No

If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

- 3. Was [name of defendant]'s use of [name of plaintiff]'s [name/voice/signature/photograph/likeness] directly connected to [name of defendant]'s commercial purpose?**

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- 4. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?**

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- [5. Did [name of plaintiff] suffer any actual damages or is [name of plaintiff] reasonably likely to suffer any actual damages in the future?**

_____ Yes _____ No

If your answer to question 5 is yes, then answer questions 6 and 7. If you answered no, answer question 7.]

- 6. What are [name of plaintiff]'s actual damages?**

[a. Past economic loss

[lost earnings \$_____]

[lost profits \$_____]

[medical expenses \$_____]

[other past economic loss \$_____]

Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings \$_____]

[lost profits \$_____]

[medical expenses \$_____]

[other future economic loss \$_____]

Total Future Economic Damages: \$_____]

**[c. Past noneconomic loss, including [humiliation/embarrassment/
mental distress including any physical symptoms:] \$_____]**

**[d. Future noneconomic loss, including
[humiliation/embarrassment/mental distress including any
physical symptoms:] \$_____]**

TOTAL ACTUAL DAMAGES \$_____

**[7. Did [name of defendant] receive any profits from the use of [name
of plaintiff]'s [name/voice/signature/photograph/likeness] that you
did not include under [name of plaintiff]'s actual damages for lost
profits in Question 6 above?**

_____ Yes _____ No

**If your answer to question 7 is yes, then answer question 8. If you
answered no, stop here, answer no further questions, and have
the presiding juror sign and date this form.**

**8. What amount of those profits did [name of defendant] receive from
the use of [name of plaintiff]'s [name/voice/signature/photograph/
likeness]?**

TOTAL PROFITS RECEIVED BY DEFENDANT \$_____]

**Signed: _____
Presiding Juror**

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify

the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, April 2008, December 2010, June 2012, December 2012, December 2016, May 2024, July 2025, July 2026**

Directions for Use

This verdict form is based on CACI No. 1804A, *Misappropriation of Name, Voice, Signature, Photograph, or Likeness*, and CACI No. 1821, *Damages for Use of Name, Voice, Signature, Photograph, or Likeness*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Under Civil Code section 3344(a)(1), the plaintiff may recover actual damages or \$750, whichever is greater. The plaintiff may also recover any profits that the defendant received from the unauthorized use that were not taken into account in calculating actual damages. (*Orthopedic Systems Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 547 [135 Cal.Rptr.3d 200].) The advisory committee recommends calculating the defendant's profits to be disgorged separately from actual damages. Questions 5 through 8 take the jury through the recommended course. If no actual damages are sought, question 5 may be omitted and the jury instructed to enter \$750 as the total actual damages in question 6. If the jury awards actual damages of less than \$750, the court should raise the amount to \$750. If there is no claim to disgorge the defendant's wrongful profits, questions 7 and 8 may be omitted.

Additional questions may be necessary if the facts implicate Civil Code section 3344(d). See Directions for Use under CACI No. 1804B, *Misappropriation of Name, Voice, Signature, Photograph, or Likeness—Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign*.

If specificity is not required, users do not have to itemize all the actual damages listed in question 6 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

2500. Disparate Treatment—Essential Factual Elements (Gov. Code, § 12940(a))

[Name of plaintiff] **claims that** *[name of defendant]* **wrongfully discriminated against** *[him/her/nonbinary pronoun]*. **To establish this claim, *[name of plaintiff]* must prove all of the following:**

1. **That *[name of defendant]* was *[an employer/[other covered entity]]*;**
2. **That *[name of plaintiff]* *[was an employee of *[name of defendant]*/* applied to *[name of defendant]* for a job/*[describe other covered relationship to defendant]*];**
3. ***[That *[name of defendant]* *[discharged/refused to hire/[other adverse employment action]]* *[name of plaintiff]*];***

[or]

[That *[name of defendant]* subjected *[name of plaintiff]* to an adverse employment action;]

[or]

[That *[name of plaintiff]* was constructively discharged;]

4. **That *[name of plaintiff]*'s *[protected characteristic or combination of characteristics]* was a substantial motivating reason for *[name of defendant]*'s *[decision to *[discharge/refuse to hire/[other adverse employment action]]* *[name of plaintiff]*/conduct]*;**
5. **That *[name of plaintiff]* was harmed; and**
6. **That *[name of defendant]*'s conduct was a substantial factor in causing *[name of plaintiff]*'s harm.**

New September 2003; Revised April 2009, June 2011, June 2012, June 2013, May 2020, May 2024, December 2025, July 2026**

Directions for Use

This instruction is intended for use when a plaintiff alleges disparate treatment discrimination under the FEHA against an employer or other covered entity. Disparate treatment occurs when an employer treats an individual less favorably than others because of the individual's protected characteristic or combination of characteristics. In contrast, disparate impact (the other general theory of discrimination) occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group. For disparate impact claims, see CACI No. 2502, *Disparate Impact—Essential Factual Elements*.

If the defendant's status as employer is in dispute, the court may need to instruct the

jury on the statutory definition of “employer” under the FEHA, which can include business entities acting as agents of employers. (Gov. Code, § 12926(d); *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(b)–(h), (j), (k).)

Read the first option for element 3 if there is no dispute as to whether the employer’s acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, “*Adverse Employment Action*” *Explained*, if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 3 and also give CACI No. 2510, “*Constructive Discharge*” *Explained*. Select “conduct” in element 4 if either the second or third option is included for element 3.

Note that there are two causation elements. There must be a causal link between the discriminatory animus and the adverse action (see element 4), and there must be a causal link between the adverse action and the damage (see element 6). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

Element 4 requires that a protected characteristic or combination of characteristics be a substantial motivating reason for the adverse action. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, “*Substantial Motivating Reason*” *Explained*.) Modify element 4 if plaintiff does not allege discrimination because of a protected characteristic but alleges discrimination because the plaintiff was (1) perceived to have a protected characteristic or combination of characteristics; or (2) perceived to be associated with someone who has, or is perceived to have, a protected characteristic or combination of characteristics. (Gov. Code, § 12926(o).)

For damages instructions, see applicable instructions on tort damages.

Sources and Authority

- Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- Combination of Characteristics, Perception, and Perceived Association. Government Code section 12926(o).
- “Race.” Government Code section 12926(w).
- “Protective Hairstyles.” Government Code section 12926(x).
- “Reproductive Health Decision-making.” Government Code section 12926(y).
- “The California Fair Employment and Housing Act, which defines ‘employer’ to ‘include[]’ ‘any person acting as an agent of an employer,’ permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not

decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA’s definition of employer; we express no view of the scope of a business entity agent’s possible liability under the FEHA’s aider and abettor provision.” (*Raines, supra*, 15 Cal.5th at p. 291, internal citations omitted.)

- “[C]onceptually the theory of ‘[disparate] treatment’ . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin.” (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1317 [237 Cal.Rptr. 884], quoting *Teamsters v. United States* (1977) 431 U.S. 324, 335–336, fn. 15 [97 S.Ct. 1843, 52 L.Ed.2d 396].)
- “California has adopted the three-stage burden-shifting test for discrimination claims set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed. 2d 668]. ‘This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.’ ” (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 307 [115 Cal.Rptr.3d 453], internal citations omitted.)
- “The *McDonnell Douglas* framework was designed as ‘an analytical tool for use by the trial judge in applying the law, not a concept to be understood and applied by the jury in the factfinding process.’ ” (*Abed v. Western Dental Servs., Inc.* (2018) 23 Cal.App.5th 726, 737 [233 Cal.Rptr.3d 242].)
- “At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. This step is designed to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. While the plaintiff’s prima facie burden is ‘not onerous’, he must at least show ‘“actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were ‘based on a [prohibited] discriminatory criterion . . .’ . . .” . . .’ ” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354–355 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)
- “If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. This presumption, though ‘rebuttable,’ is ‘legally mandatory.’ Thus, in a trial, ‘[i]f the trier of fact believes the plaintiff’s evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.’ [¶] Accordingly, at this trial stage, the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to ‘raise[] a genuine issue of fact’ and to ‘justify a judgment for the [employer],’ that its action was

taken for a legitimate, nondiscriminatory reason. [¶] If the employer sustains this burden, the presumption of discrimination disappears. The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." (*Guz, supra*, 24 Cal.4th at pp. 355–356, internal citations omitted.)

- "The trial court decides the first two stages of the *McDonnell Douglas* test as questions of law. If the plaintiff and defendant satisfy their respective burdens, the presumption of discrimination disappears and the question whether the defendant unlawfully discriminated against the plaintiff is submitted to the jury to decide whether it believes the defendant's or the plaintiff's explanation." (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 965 [181 Cal.Rptr.3d 553].)
- "We conclude that where a plaintiff establishes a prima facie case of discrimination based on a failure to interview her for open positions, the employer must do more than produce evidence that the hiring authorities did not know why she was not interviewed. Nor is it enough for the employer, in a writ petition or on appeal, to cobble together after-the-fact *possible* nondiscriminatory reasons. While the stage-two burden of production is not onerous, the employer must clearly state the *actual* nondiscriminatory reason for the challenged conduct." (*Dept. of Corrections & Rehabilitation v. State Personnel Bd.* (2022) 74 Cal.App.5th 908, 930 [290 Cal.Rptr.3d 70], original italics.)
- "To succeed on a disparate treatment claim at trial, the plaintiff has the initial burden of establishing a prima facie case of discrimination, to wit, a set of circumstances that, if unexplained, permit an inference that it is more likely than not the employer intentionally treated the employee less favorably than others on prohibited grounds. Based on the inherent difficulties of showing intentional discrimination, courts have generally adopted a multifactor test to determine if a plaintiff was subject to disparate treatment. The plaintiff must generally show that: he or she was a member of a protected class; was qualified for the position he sought; suffered an adverse employment action, and there were circumstances suggesting that the employer acted with a discriminatory motive. [¶] On a defense motion for summary judgment against a disparate treatment claim, the defendant must show either that one of these elements cannot be established or that there were one or more legitimate, nondiscriminatory reasons underlying the adverse employment action." (*Jones v. Dept. of Corrections* (2007) 152 Cal.App.4th 1367, 1379 [62 Cal.Rptr.3d 200], internal citations omitted.)
- "Although '[t]he specific elements of a prima facie case may vary depending on the particular facts,' the plaintiff in a failure-to-hire case '[g]enerally . . . must provide evidence that (1) he [or she] was a member of a protected class, (2) he [or she] was qualified for the position he [or she] sought . . . , (3) he [or she] suffered an adverse employment action, such as . . . denial of an available job,

and (4) some other circumstance suggests discriminatory motive,’ such as that the position remained open and the employer continued to solicit applications for it.” (*Abed, supra*, 23 Cal.App.5th at p. 736.)

- “Although we recognize that in most cases, a plaintiff who did not apply for a position will be unable to prove a claim of discriminatory failure to hire, a job application is not an *element* of the claim.” (*Abed, supra*, 23 Cal.App.5th at p. 740, original italics.)
- “Employers who lie about the existence of open positions are not immune from liability under the FEHA simply because they are effective in keeping protected persons from applying.” (*Abed, supra*, 23 Cal.App.5th at p. 741.)
- “[Defendant] still could shift the burden to [plaintiff] by presenting admissible evidence showing a legitimate, nondiscriminatory reason for terminating her. ‘It is the employer’s honest belief in the stated reasons for firing an employee and not the objective truth or falsity of the underlying facts that is at issue in a discrimination case.’ . . . ‘[I]f nondiscriminatory, [the employer’s] true reasons need not necessarily have been wise or correct. . . . While the objective soundness of an employer’s proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, “legitimate” reasons . . . in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding of *discrimination*. . . .’ ” (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 170–171 [125 Cal.Rptr.3d 1], original italics, internal citations omitted.)
- “[W]e hold that a residency program’s claim that it terminated a resident for academic reasons is not entitled to deference. . . . [T]he jury should be instructed to evaluate, without deference, whether the program terminated the resident for a genuine academic reason or because of an impermissible reason such as retaliation or the resident’s gender.” (*Khoiny v. Dignity Health* (2022) 76 Cal.App.5th 390, 404 [291 Cal.Rptr.3d 496].)
- “The burden therefore shifted to [plaintiff] to present evidence showing the [defendant] engaged in intentional discrimination. To meet her burden, [plaintiff] had to present evidence showing (1) the [defendant]’s stated reason for not renewing her contract was untrue or pretextual; (2) the [defendant] acted with a discriminatory animus in not renewing her contract; or (3) a combination of the two.” (*Swanson, supra*, 232 Cal.App.4th at p. 966.)
- “Evidence that an employer’s proffered reasons were pretextual does not necessarily establish that the employer intentionally discriminated: ‘ “[I]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff’s explanation of intentional discrimination.” ’ ” However, evidence of pretext is important: ‘ “[A] plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.” ’ ” (*Diego v. City of Los Angeles* (2017) 15 Cal.App.5th 338, 350–351 [223 Cal.Rptr.3d 173], internal citations omitted.)

- “While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a ‘causal connection’ between the employee’s protected status and the adverse employment decision.” (*Mixon, supra*, 192 Cal.App.3d at p. 1319.)
- “Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, . . . proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time.” (*Harris, supra*, 56 Cal.4th at p. 232, original italics.)
- “We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a “but for” cause.” (*Harris, supra*, 56 Cal.4th at p. 229.)
- “In cases involving a comparison of the plaintiff’s qualifications and those of the successful candidate, we must assume that a reasonable juror who might disagree with the employer’s decision, but would find the question close, would not usually infer discrimination on the basis of a comparison of qualifications alone. In a close case, a reasonable juror would usually assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call. [Citation.] But this does not mean that a reasonable juror would in every case defer to the employer’s assessment. If that were so, no job discrimination case could ever go to trial. If a factfinder can conclude that a reasonable employer would have found the plaintiff to be *significantly better* qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate—something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture.” (*Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 674–675 [111 Cal.Rptr.3d 896], original italics.)
- “While not all cases hold that ‘the disparity in candidates’ qualifications “must be so apparent as to jump off the page and slap us in the face to support a finding of pretext”’ the precedents do consistently require that the disparity be substantial to support an inference of discrimination.” (*Reeves, supra*, 186 Cal.App.4th at p. 675, internal citation omitted.)
- “In no way did the Court of Appeal in *Reeves* overturn the long-standing rule that comparator evidence is relevant and admissible where the plaintiff and the comparator are similarly situated in all relevant respects and the comparator is treated more favorably. Rather, it held that in a job hiring case, and in the

context of a summary judgment motion, a plaintiff's weak comparator evidence 'alone' is insufficient to show pretext.” (*Gupta v. Trustees of California State University* (2019) 40 Cal.App.5th 510, 521 [253 Cal.Rptr.3d 277].)

- “[Defendant] contends that a trial court must assess the relative strength and nature of the evidence presented on summary judgment in determining if the plaintiff has ‘created only a weak issue of fact.’ However, [defendant] overlooks that a review of all of the evidence is essential to that assessment. The stray remarks doctrine, as advocated by [defendant], goes further. It allows a court to weigh and assess the remarks in isolation, and to disregard the potentially damaging nature of discriminatory remarks simply because they are made by ‘nondecisionmakers, or [made] by decisionmakers unrelated to the decisional process.’ [Defendant] also argues that ambiguous remarks are stray, irrelevant, prejudicial, and inadmissible. However, ‘the task of disambiguating ambiguous utterances is for trial, not for summary judgment.’ Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury. The stray remarks doctrine allows the trial court to remove this role from the jury.” (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 540–541 [113 Cal.Rptr.3d 327, 235 P.3d 988], internal citations omitted; see Gov. Code, § 12923(c) [Legislature affirms the decision in *Reid v. Google, Inc.* in its rejection of the “stray remarks doctrine”].)
- “[D]iscriminatory remarks can be relevant in determining whether intentional discrimination occurred: ‘Although stray remarks may not have strong probative value when viewed in isolation, they may corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence. Certainly, who made the comments, when they were made in relation to the adverse employment decision, and in what context they were made are all factors that should be considered’ ” (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1190–1191 [220 Cal.Rptr.3d 42].)
- “Discrimination on the basis of an employee’s foreign accent is a sufficient basis for finding national origin discrimination.” (*Galvan v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 549, 562 [250 Cal.Rptr.3d 16].)
- “Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes.” (*Guz, supra*, 24 Cal.4th at p. 354.)
- “We have held ‘that, in a civil action under the FEHA, all relief generally available in noncontractual actions . . . may be obtained.’ This includes injunctive relief.” (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted, disapproved on another point in *Bailey v. San Francisco Dist. Attorney’s Office* (2024) 16 Cal.5th 611, 631 fn. 6 [323 Cal.Rptr.3d 369, 552 P.3d 430].)
- “The FEHA does not itself authorize punitive damages. It is, however, settled that California’s punitive damages statute, Civil Code section 3294, applies to actions brought under the FEHA” (*Weeks v. Baker & McKenzie* (1998) 63

Cal.App.4th 1128, 1147–1148 [74 Cal.Rptr.2d 510], internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1025, 1029

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:194, 7:200–7:201, 7:356, 7:391–7:392 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.44–2.82

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2] (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 2:2, 2:20 (Thomson Reuters)

2512. Limitation on Remedies—Same Decision

If you find that [discrimination/retaliation] was a substantial motivating reason for [name of plaintiff]’s [discharge/[other adverse employment action]], you must then consider [name of defendant]’s stated reason for the [discharge/[other adverse employment action]].

If you find that [e.g., plaintiff’s poor job performance] was also a substantial motivating reason, then you must determine whether the defendant has proven that [he/she/nonbinary pronoun/it] would have [discharged/[other adverse employment action]] [name of plaintiff] anyway at that time based on [e.g., plaintiff’s poor job performance] even if [he/she/nonbinary pronoun/it] had not also been substantially motivated by [discrimination/retaliation].

In determining whether [e.g., plaintiff’s poor job performance] was a substantial motivating reason, determine what actually motivated [name of defendant], not what [he/she/nonbinary pronoun/it] might have been justified in doing.

If you find that [discrimination/retaliation] was a substantial motivating reason for [name of plaintiff]’s [discharge/[other adverse employment action]], you will be asked to determine the amount of damages that [he/she/nonbinary pronoun] is entitled to recover. If, however, you find that [name of defendant] would have [discharged/[other adverse employment action]] [name of plaintiff] anyway at that time for [specify defendant’s nondiscriminatory/nonretaliatory reason], then [name of plaintiff] will not be entitled to reinstatement, back pay, or damages.

New December 2013; Revised June 2015, June 2016, December 2025, July 2026

Directions for Use

Give this instruction along with CACI No. 2507, “*Substantial Motivating Reason Explained*,” if the employee has presented sufficient evidence for the jury to find that the employer took adverse action against him or her for a prohibited reason, but the employer has presented sufficient evidence for the jury to find that it had a legitimate reason for the action. In such a “mixed-motive” case, the employer is relieved from an award of damages, but may still be liable for attorney fees and costs and injunctive relief. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 211 [152 Cal.Rptr.3d 392, 294 P.3d 49].)

Mixed-motive must be distinguished from pretext though both require evaluation of the same evidence, i.e., the employer’s purported legitimate reason for the adverse action. In a pretext case, the only actual motive is the discriminatory one and the purported legitimate reasons are fabricated in order to disguise the true motive. (*City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191

Cal.App.3d 976, 985 [236 Cal.Rptr. 716].) The employee has the burden of proving pretext. (*Harris, supra*, 56 Cal.4th at pp. 214–215.) If the employee proves discrimination or retaliation and also pretext, the employer is liable for all potential remedies including damages. But if the employee proves discrimination or retaliation but fails to prove pretext, then a mixed-motive case is presented. To avoid an award of damages, the employer then has the burden of proving that it would have made the same decision anyway solely for the legitimate reason, even though it may have also discriminated or retaliated.

Sources and Authority

- “[U]nder the FEHA, when a jury finds that unlawful discrimination was a substantial factor motivating a termination of employment, and when the employer proves it would have made the same decision absent such discrimination, a court may not award damages, backpay, or an order of reinstatement. But the employer does not escape liability. In light of the FEHA’s express purpose of not only redressing but also preventing and deterring unlawful discrimination in the workplace, the plaintiff in this circumstance could still be awarded, where appropriate, declaratory relief or injunctive relief to stop discriminatory practices. In addition, the plaintiff may be eligible for reasonable attorney’s fees and costs.” (*Harris, supra*, 56 Cal.4th at p. 211.)
- “Because employment discrimination litigation does not resemble the kind of cases in which we have applied the clear and convincing standard, we hold that preponderance of the evidence is the standard of proof applicable to an employer’s same-decision showing” (*Harris, supra*, 53 Cal.4th at p. 239.)
- “[W]hen we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision *at the time it made its actual decision*.” (*Harris, supra*, 56 Cal.4th at p. 224, original italics.)
- “In light of today’s decision, a jury in a mixed-motive case alleging unlawful termination should be instructed that it must find the employer’s action was substantially motivated by discrimination before the burden shifts to the employer to make a same-decision showing, and that a same-decision showing precludes an award of reinstatement, backpay, or damages.” (*Harris, supra*, 56 Cal.4th at p. 241.)
- “We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a ‘but for’ cause.” (*Harris, supra*, 56 Cal.4th at p. 229.)
- “[A] plaintiff has the initial burden to make a prima facie case of discrimination by showing that it is more likely than not that the employer has taken an adverse employment action based on a prohibited criterion. A prima facie case establishes a presumption of discrimination. The employer may rebut the presumption by producing evidence that its action was taken for a legitimate,

nondiscriminatory reason. If the employer discharges this burden, the presumption of discrimination disappears. The plaintiff must then show that the employer's proffered nondiscriminatory reason was actually a pretext for discrimination, and the plaintiff may offer any other evidence of discriminatory motive. The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff." (*Harris, supra*, 56 Cal.4th at pp. 214–215.)

- "In some cases there is no single reason for an employer's adverse action, and a discriminatory motive may have influenced otherwise legitimate reasons for the employment decision. In *Harris v. City of Santa Monica* (*Harris*) the California Supreme Court recognized the traditional *McDonnell Douglas* burden-shifting test was intended for use in cases presenting a single motive for the adverse action, that is, in 'cases that do not involve mixed motives.' As the Court explained, this 'framework . . . presupposes that the employer has a single reason for taking an adverse action against the employee and that the reason is either discriminatory or legitimate. By hinging liability on whether the employer's proffered reason for taking the action is genuine or pretextual, the *McDonnell Douglas* inquiry aims to ferret out the "true" reason for the employer's action. In a mixed-motives case, however, there is no single "true" reason for the employer's action.' " (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1182 [220 Cal.Rptr.3d 42], internal citations omitted.)
- "Following the California Supreme Court's decision in *Harris*, . . . the Judicial Council added CACI No. 2512, to be given when the employer presents evidence of a legitimate reason for the adverse employment action, informing the jurors that even if they find that discrimination was a substantial motivating reason for the adverse action, if the employer establishes that the adverse action nonetheless would have been taken for legitimate reasons, 'then [the plaintiff] will not be entitled to reinstatement, back pay, or damages.' " (*Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1320–1321 [200 Cal.Rptr.3d 315].)
- " '[Plaintiff] further argues that for equitable reasons, an employer that wishes to make a same-decision showing must concede that it had mixed motives for taking the adverse employment action instead of denying a discriminatory motive altogether. But there is no inconsistency when an employer argues that its motive for discharging an employee was legitimate, while also arguing, contingently, that if the trier of fact finds a mixture of lawful and unlawful motives, then its lawful motive alone would have led to the discharge.' " (*Thornbrough v. Western Placer Unified School Dist.* (2013) 223 Cal.App.4th 169, 199 [167 Cal.Rptr.3d 24] [quoting *Harris, supra*, 56 Cal.App.4th at p. 240].)
- "As a preliminary matter, we reject [defendant]'s claim that the jury could have found no liability on the part of [defendant] had it been properly instructed on the mixed-motive defense at trial. As discussed, the Supreme Court in *Harris* held that the mixed-motive defense is available under the FEHA, but only as a limitation on remedies and not as a complete defense to liability. Consequently,

when the plaintiff proves by a preponderance of the evidence that discrimination was a substantial motivating factor in the adverse employment decision, the employer is liable under the FEHA. When the employer proves by a preponderance of the evidence that it would have made the same decision even in the absence of such discrimination, the employer is still liable under the FEHA, but the plaintiff's remedies are then limited to declaratory or injunctive relief, and where appropriate, attorney's fees and costs. As presently drafted, BAJI No. 12.26 does not accurately set forth the parameters of the defense as articulated by the Supreme Court, but rather states that, in a mixed-motive case, 'the employer is not liable if it can establish by a preponderance of the evidence that its legitimate reason, standing alone, would have induced it to make the same decision.' By providing that the mixed-motive defense, if proven, is a complete defense to liability, [defendant]'s requested instruction directly conflicts with the holding in *Harris*." (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 481 [161 Cal.Rptr.3d 758], internal citations omitted.)

- "Pretext may . . . be inferred from the timing of the company's termination decision, by the identity of the person making the decision, and by the terminated employee's job performance before termination." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 272 [100 Cal.Rptr.3d 296].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1037, 1067

7 Witkin, California Procedure (6th ed. 2021), Judgment § 101

3 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.11 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23 (Matthew Bender)

**2521A. Work Environment Harassment—Conduct Directed at
Plaintiff—Essential Factual Elements—Employer or Entity
Defendant (Gov. Code, §§ 12923, 12940(j))**

[Name of plaintiff] **claims that [he/she/nonbinary pronoun] was subjected to harassment based on [his/her/nonbinary pronoun] [describe protected characteristic or combination of characteristics] at [name of defendant] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive.**

To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff] was [an employee of/an applicant for a position with/a person providing services under a contract with/ an unpaid intern with/a volunteer with] [name of defendant];**
- 2. That [name of plaintiff] was subjected to harassing conduct based on [his/her/nonbinary pronoun] [protected characteristic or combination of characteristics];**
- 3. That the harassing conduct was severe or pervasive;**
- 4. That a reasonable [describe person with protected characteristic or combination of characteristics] in [name of plaintiff]’s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
- 5. That [name of plaintiff] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
- 6. [Select applicable basis of defendant’s liability:]**
[That a supervisor engaged in the conduct;]
[or]
[That [name of defendant] [or [his/her/nonbinary pronoun/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]
- 7. That [name of plaintiff] was harmed; and**
- 8. That the conduct was a substantial factor in causing [name of plaintiff]’s harm.**

Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018, July 2019, May 2020, November 2021, November 2023, May 2024*, December 2025, July 2026*

Directions for Use

This instruction is for use in a hostile work environment case when the defendant is an employer or other entity covered by the FEHA. If the defendant is a labor organization, employment agency, apprenticeship training program or any training program leading to employment (rather than an employer), the instruction should be modified as appropriate. (See Gov. Code, § 12940(j)(1).) Further modification may be necessary if the defendant is a business-entity agent of an employer. (*Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See *ibid.*) If the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] “[A]s long as the harassment occurs in a work-related context, the employer is liable”]; *Kruitbosch v. Bakersfield Recovery Services, Inc.* (2025) 114 Cal.App.5th 200, 218 [336 Cal.Rptr.3d 815] “[T]he work-related nature of conduct is examined under the totality of the circumstances”).)

For an individual defendant, such as the alleged harasser or plaintiff’s coworker, see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*. For a case in which the plaintiff is not the target of the harassment, see CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*. For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” Explained, and CACI No. 2524, “*Severe or Pervasive*” Explained.

Modify element 2 if plaintiff does not allege harassment because of a protected characteristic or combination of characteristics but alleges harassment because the plaintiff was (1) perceived to have a protected characteristic or combination of characteristics; or (2) perceived to be associated with someone who has, or is perceived to have, a protected characteristic or combination of characteristics. (Gov. Code, § 12926(o).)

For a definition of “supervisor,” see CACI No. 2525, *Harassment—“Supervisor” Defined*. If there are both employer and individual supervisor defendants (see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer’s strict liability for supervisor harassment. (*State Dept. of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9

Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat.] Employers may be liable for the conduct of certain agents. (See Gov. Code, §§ 12925(d), 12926(d), and 12940(j)(1); and *Raines, supra*, 15 Cal.5th at p. 291.)

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Combination of Characteristics, Perception, and Perceived Association. Government Code section 12926(o).
- “The California Fair Employment and Housing Act, which defines ‘employer’ to ‘include[]’ ‘any person acting as an agent of an employer,’ permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA’s definition of employer; we express no view of the scope of a business entity agent’s possible liability under the FEHA’s aider and abettor provision.” (*Raines, supra*, 15 Cal. 5th at p. 291, internal citations omitted.)
- “To establish a prima facie case of a hostile work environment, [the plaintiff] must show that (1) [plaintiff] is a member of a protected class; (2) [plaintiff] was subjected to unwelcome harassment; (3) the harassment was based on [plaintiff’s] protected status; (4) the harassment unreasonably interfered with [plaintiff’s] work performance by creating an intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment.” (*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 581 [250 Cal.Rptr.3d 1].)
- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or

her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’ ” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- “[A]n employer is strictly liable for all acts of sexual harassment by a supervisor.” (*State Dept. of Health Servs.*, *supra*, 31 Cal.4th at p. 1042.)
- “The applicable language of the FEHA does not suggest that an employer’s liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee ‘other than an agent,’ ‘not acting as the employer’s agent,’ or ‘not acting within the scope of an agency for the employer.’ By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment ‘by an employee other than an agent *or supervisor*’ (italics added), the Legislature has indicated that *all* acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer’s agent, and that agency principles come into play only when the harasser is *not* a supervisor.” (*State Dept. of Health Servs.*, *supra*, 31 Cal.4th at p. 1041, original italics.)
- “When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action).” (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 952 [139 Cal.Rptr.3d 464].)
- “If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no ‘unlawful employment practice’ that the FEHA governs.” (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)
- “Under FEHA, an employer is strictly liable for harassment by a supervisor. However, an employer is only strictly liable under FEHA for harassment by a supervisor ‘if the supervisor is acting in the capacity of supervisor when the harassment occurs.’ ‘The employer is *not* strictly liable for a supervisor’s acts of harassment resulting from a completely private relationship unconnected with the employment and not occurring at the workplace or during normal working hours.’ ” (*Atalla v. Rite Aid Corp.* (2023) 89 Cal.App.5th 294, 309 [306 Cal.Rptr.3d 1], internal citations omitted, original italics.)
- “An employer’s response to harassment occurring outside the physical or digital workplace can independently create a hostile work environment.” (*Kruitbosch*, *supra*, 114 Cal.App.5th at p. 220.)

- “Here, [defendant] was jointly liable with its employees on a respondeat superior or vicarious liability theory on every cause of action in which it was named as a defendant.” (*Bihun, supra*, 13 Cal.App.4th at p. 1000.)
- “The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]’s harassment claim either. Since ‘there is no possible justification for harassment in the workplace,’ an employer cannot offer a legitimate nondiscriminatory reason for it.” (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)
- “[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment.’ ” (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)
- “When the workplace is permeated with discriminatory intimidation, ridicule and insult that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’ the law is violated.” (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)
- “[Defendant’s] position that a plaintiff must be harassed to her face is inconsistent with the long-standing principle that ‘ “a person can perceive, and be affected by, harassing conduct” in the relevant environment “by knowledge of that harassment” as well as by “personal observation.” ’ [¶] FEHA does not reward discretion in harassing behaviors. Rather, it protects victims from workplace environments poisoned by inappropriate conduct—whether ‘sung, shouted, or whispered.’ ” (*Carranza v. City of Los Angeles* (2025) 111 Cal.App.5th 388, 406–407 [332 Cal.Rptr.3d 778].)
- “[W]e conclude that an isolated act of harassment may be actionable if it is sufficiently severe in light of the totality of the circumstances, and that a coworker’s use of an unambiguous racial epithet, such as the N-word, may be found to suffice.” (*Bailey v. San Francisco Dist. Attorney’s Office* (2024) 16 Cal.5th 611, 620 [323 Cal.Rptr.3d 369, 552 P.3d 430].)
- “[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: ‘[N]ot all workplace conduct that may be described as “harassment” affects a “term, condition, or privilege” of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive “to alter the conditions of [the victim’s] employment and create an abusive working environment.” ’ . . . ‘Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually

altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted, disapproved in part by *Bailey, supra*, 16 Cal.5th at p. 631, fn. 6.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)
- "The stray remarks doctrine . . . allows a court to weigh and assess the remarks in isolation, and to disregard the potentially damaging nature of discriminatory remarks simply because they are made by 'nondecisionmakers, or [made] by decisionmakers unrelated to the decisional process.' [Defendant] also argues that ambiguous remarks are stray, irrelevant, prejudicial, and inadmissible. However, 'the task of disambiguating ambiguous utterances is for trial, not for summary judgment.' Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 540–541 [113 Cal.Rptr.3d 327, 235 P.3d 988], internal citations omitted.)
- "[I]n reviewing the trial court's grant of [defendant]'s summary judgment motion, the Court of Appeal properly considered evidence of alleged discriminatory comments made by decision makers and coworkers along with all other evidence in the record." (*Reid, supra*, 50 Cal.4th at p. 545.)
- "[M]any employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper. Such cases, we caution, are rarely appropriate for disposition on summary judgment, however liberalized it be." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 286 [100 Cal.Rptr.3d 296].)
- "In contending that the 'subjectively offensive' element was not proven, a defendant 'will assert that a plaintiff consented to the conduct through active participation in it, or was not injured because the plaintiff did not subjectively find it abusive.' [¶] [Evidence Code] Section 1106 limits the evidence the defendant may use to support this assertion. It provides that '[i]n any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff' This general rule is, however, subject to the exception that it 'does not apply to evidence of the plaintiff's sexual conduct with the alleged

perpetrator.’ The term ‘sexual conduct’ within the meaning of section 1106 has been broadly construed to include ‘all active or passive behavior (whether statements or actions), that either directly or through reasonable inference establishes a plaintiff’s willingness to engage in sexual activity,’ including ‘racy banter, sexual horseplay, and statements concerning prior, proposed, or planned sexual exploits.’ ” (*Meeks v. AutoZone, Inc.* (2018) 24 Cal.App.5th 855, 874 [235 Cal.Rptr.3d 161], internal citations omitted.)

- “[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.” (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)
- “Under . . . FEHA, sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination *because of sex*.” (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1525 [169 Cal.Rptr.3d 794], original italics.)
- “[T]here is no requirement that the *motive* behind the sexual harassment must be sexual in nature. ‘[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.’ Sexual harassment occurs when, as is alleged in this case, sex is used as a weapon to create a hostile work environment.” (*Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1564 [45 Cal.Rptr.3d 597], original italics, internal citation omitted.)
- “The plaintiff must show that the harassing conduct took place because of the plaintiff’s sex, but need not show that the conduct was motivated by sexual desire. For example, a female plaintiff can prevail by showing that the harassment was because of the defendant’s bias against women; she need not show that it was because of the defendant’s sexual interest in women. In every case, however, the plaintiff must show a discriminatory intent or motivation based on gender.” (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114 [129 Cal.Rptr.3d 384], internal citations omitted.)
- “[A] heterosexual male is subjected to harassment because of sex under the FEHA when attacks on his heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the attacks are motivated by sexual desire or interest.” (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1239–1240 [166 Cal.Rptr.3d 676].)
- “A recent legislative amendment modifies section 12940, subdivision (j)(4)(C) (a provision of FEHA specifying types of conduct that constitute harassment because of sex) to read: ‘For purposes of this subdivision, “harassment” because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. *Sexually harassing conduct need not be motivated by sexual desire.*’ ” (*Lewis, supra*, 224 Cal.App.4th at p. 1527, fn. 8, original italics.)
- “California courts have held so-called ‘me too’ evidence, that is, evidence of gender bias against employees other than the plaintiff, may be admissible

evidence in discrimination and harassment cases.” (*Meeks, supra*, 24 Cal.App.5th at p. 871.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 353, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-A, *Sources Of Law Prohibiting Harassment*, ¶¶ 10:18–10:19, 10:22, 10:31 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

**2521B. Work Environment Harassment—Conduct Directed at
Others—Essential Factual Elements—Employer or Entity
Defendant (Gov. Code, §§ 12923, 12940(j))**

[Name of plaintiff] **claims that coworkers at *[name of defendant]* were subjected to harassment based on *[describe protected characteristic or combination of characteristics]* and that this harassment created a work environment for *[name of plaintiff]* that was hostile, intimidating, offensive, oppressive, or abusive.**

To establish this claim, *[name of plaintiff]* must prove all of the following:

- 1. That *[name of plaintiff]* was [an employee of/an applicant for a position with/a person providing services under a contract with/ an unpaid intern with/a volunteer with] *[name of defendant]*;**
- 2. That *[name of plaintiff]*, although not personally subjected to harassing conduct, personally witnessed harassing conduct that took place in *[his/her/nonbinary pronoun]* immediate work environment;**
- 3. That the harassing conduct was severe or pervasive;**
- 4. That a reasonable *[describe person with protected characteristic or combination of characteristics]* in *[name of plaintiff]*'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
- 5. That *[name of plaintiff]* considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward other *[describe persons with protected characteristic or combination of characteristics]*;**
- 6. *[Select applicable basis of defendant's liability:]*
[That a supervisor engaged in the conduct;]
[or]
[That *[name of defendant]* [or *[his/her/nonbinary pronoun/its]* supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**
- 7. That *[name of plaintiff]* was harmed; and**
- 8. That the conduct was a substantial factor in causing *[name of plaintiff]*'s harm.**

December 2015, May 2018, July 2019, November 2021, May 2024, December 2025, July 2026*

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an employer or other entity covered by the FEHA. If the defendant is a labor organization, employment agency, apprenticeship training program or any training program leading to employment (rather than an employer), the instruction should be modified as appropriate. (See Gov. Code, § 12940(j)(1).) Further modification may be necessary if the defendant is a business-entity agent of an employer. (*Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See *ibid.*) If the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] [“[A]s long as the harassment occurs in a work-related context, the employer is liable”].)

For an individual defendant, such as the alleged harasser or plaintiff’s coworker, see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*. For a case in which the plaintiff is the target of the harassment, see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*. For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” Explained, and CACI No. 2524, “*Severe or Pervasive*” Explained.

For a definition of “supervisor,” see CACI No. 2525, *Harassment—“Supervisor” Defined*. If there are both employer and individual supervisor defendants (see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer’s strict liability for supervisor harassment. (*State Dept. of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Combination of Characteristics, Perception, and Perceived Association. Government Code section 12926(o).
- “The California Fair Employment and Housing Act, which defines ‘employer’ to ‘include[]’ ‘any person acting as an agent of an employer,’ permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA’s definition of employer; we express no view of the scope of a business entity agent’s possible liability under the FEHA’s aider and abettor provision.” (*Raines, supra*, 15 Cal.5th at p. 291, internal citations omitted.)
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’ ” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- “The plaintiff’s work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman’s perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers.” (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)
- “Harassment against others in the workplace is only relevant to the plaintiff’s case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff’s position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others.” (*Beyda, supra*, 65 Cal.App.4th at p. 520.)
- “To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires ‘an even higher showing’ than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must ‘establish that the sexually harassing conduct permeated [her] direct work environment.’ [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, ‘those incidents cannot affect . . . her perception of the hostility of the work environment.’ ” (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284–285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)
- “[U]nder the FEHA, an employer is strictly liable for *all* acts of sexual harassment by a supervisor. (*State Dept. of Health Servs., supra*, 31 Cal.4th at p. 1041, original italics.)
- “The applicable language of the FEHA does not suggest that an employer’s liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee ‘other than an agent,’ ‘not acting as the employer’s agent,’ or ‘not acting within the scope of an agency for the employer.’ By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment ‘by an employee other than an agent *or supervisor*’ (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer’s agent, and that agency principles come into play only

when the harasser is not a supervisor. (*State Dept. of Health Servs.*, *supra*, 31 Cal.4th at p. 1041, original italics.)

- “[I]n order for the employer to avoid strict liability for the supervisor’s actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor’s actions regardless of whether the supervisor was acting as the employer’s agent.” (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)
- “In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action.” (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)
- “If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no ‘unlawful employment practice’ that the FEHA governs.” (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 353, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

**2521C. Work Environment Harassment—Sexual
Favoritism—Essential Factual Elements—Employer or Entity
Defendant (Gov. Code, §§ 12923, 12940(j))**

[Name of plaintiff] claims that *[he/she/nonbinary pronoun]* was subjected to harassment based on sexual favoritism at *[name of defendant]* and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive. “Sexual favoritism” means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant those preferences.

To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* was *[an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with]* *[name of defendant]*;
2. That there was sexual favoritism in the work environment;
3. That the sexual favoritism was severe or pervasive;
4. That a reasonable *[describe person with protected characteristic or combination of characteristics]* in *[name of plaintiff]*’s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism;
5. That *[name of plaintiff]* considered the conduct to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism;
6. *[Select applicable basis of defendant’s liability:]*

[That a supervisor [engaged in the conduct/created the sexual favoritism];]

[or]

[That [name of defendant] [or [his/her/nonbinary pronoun/its] supervisors or agents] knew or should have known of the sexual favoritism and failed to take immediate and appropriate corrective action;]

7. That *[name of plaintiff]* was harmed; and
8. That the conduct was a substantial factor in causing *[name of*

plaintiff’s harm.

Derived from former CACI No. 2521 December 2007; Revised December 2015, May 2018, July 2019, May 2020, November 2021, May 2024, December 2025, July 2026*

Directions for Use

This instruction is for use in a hostile work environment case involving sexual favoritism when the defendant is an employer or other entity covered by the FEHA. If the defendant is a labor organization, employment agency, apprenticeship training program or any training program leading to employment (rather than an employer), the instruction should be modified as appropriate. (See Gov. Code, § 12940(j)(1).) Further modification may be necessary if the defendant is a business-entity agent of an employer. (*Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See *ibid.*) If the facts of the case support it, the instruction should be modified as appropriate for the applicant’s circumstances.

For an individual defendant, such as the alleged harasser or plaintiff’s coworker, see CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant*. For a case in which the plaintiff is the target of harassment, see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*. For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” *Explained*, and CACI No. 2524, “*Severe or Pervasive*” *Explained*.

For a definition of “supervisor,” see CACI No. 2525, *Harassment—“Supervisor” Defined*. If there are both employer and individual supervisor defendants (see CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer’s strict liability for supervisor harassment. (*State Dept. of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment*

Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.

Sources and Authority

- Declaration of Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Combination of Characteristics, Perception, and Perceived Association. Government Code section 12926(o).
- “The California Fair Employment and Housing Act, which defines ‘employer’ to ‘include[]’ ‘any person acting as an agent of an employer,’ permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA’s definition of employer; we express no view of the scope of a business entity agent’s possible liability under the FEHA’s aider and abettor provision.” (*Raines, supra*, 15 Cal.5th at p. 291, internal citations omitted.)
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to

‘make it more difficult to do the job.’ ” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- “Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment.” (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)
- “[S]exual favoritism by a manager may be actionable when it leads employees to believe that ‘they [can] obtain favorable treatment from [the manager] if they became romantically involved with him’, the affair is conducted in a manner ‘so indiscreet as to create a hostile work environment,’ or the manager has engaged in ‘other pervasive conduct . . . which created a hostile work environment.’ ” (*Miller, supra*, 36 Cal.4th at p. 465, internal citations omitted.)
- “[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state.” (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)
- “The FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim’s supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. This is a negligence standard. Because the FEHA imposes this negligence standard only for harassment ‘by an employee other than an agent or supervisor’, by implication the FEHA makes the employer strictly liable for harassment by a supervisor.” (*State Dept. of Health Servs., supra*, 31 Cal.4th at pp. 1040–1041, original italics.)
- “The applicable language of the FEHA does not suggest that an employer’s liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee ‘other than an agent,’ ‘not acting as the employer’s agent,’ or ‘not acting within the scope of an agency for the employer.’ By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment ‘by an employee other than an agent *or supervisor*’ (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer’s agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Servs., supra*, 31 Cal.4th at p. 1041, original italics.)
- “[I]n order for the employer to avoid strict liability for the supervisor’s actions

under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- "In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)
- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 353, 370

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

**2522A. Work Environment Harassment—Conduct Directed at
Plaintiff—Essential Factual Elements—Individual Defendant (Gov.
Code, §§ 12923, 12940(j))**

[Name of plaintiff] claims that [name of individual defendant] subjected [him/her/nonbinary pronoun] to harassment based on [describe protected characteristic or combination of characteristics] at [name of covered entity] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive.

To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff] was [an employee of/an applicant for a position with/a person providing services under a contract with/ an unpaid intern with/a volunteer with] [name of covered entity];**
- [2. That [name of individual defendant] was an employee of [name of covered entity];]**
- 3. That [name of plaintiff] was subjected to harassing conduct based on [his/her/nonbinary pronoun] [protected characteristic or combination of characteristics];**
- 4. That the harassing conduct was severe or pervasive;**
- 5. That a reasonable [describe person with protected characteristic or combination of characteristics] in [name of plaintiff]’s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
- 6. That [name of plaintiff] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
- 7. That [name of individual defendant] [participated in/assisted/ [or] encouraged] the harassing conduct;**
- 8. That [name of plaintiff] was harmed; and**
- 9. That the conduct was a substantial factor in causing [name of plaintiff]’s harm.**

Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018, July 2019, May 2020, November 2021, May 2022, December 2025, July 2026

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was the target of the harassing conduct and the defendant is also an employee of the covered entity. (Gov. Code, § 12940(j)(3).) Include optional element 2 if there is a dispute

about the defendant's status as an employee and include optional question 2 on the verdict form. See CACI No. VF-2507A, *Work Environment Harassment—Conduct Directed at Plaintiff—Individual Defendant*.

The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See Gov. Code, § 12940(j)(1).) If the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] “[A]s long as the harassment occurs in a work-related context, the employer is liable”.)

For an employer defendant, see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*. For a case in which the plaintiff is not the target of the harassment, see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*. For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” Explained, and CACI No. 2524, “*Severe or Pervasive*” Explained.

Modify element 3 if the plaintiff does not allege harassment based on a protected characteristic or combination of characteristics but alleges harassment based on the plaintiff being (1) perceived to have a protected characteristic or combination of characteristics; or (2) perceived to be associated with someone who has, or is perceived to have, a protected characteristic or combination of characteristics. (Gov. Code, § 12926(o).)

If there are both employer and individual supervisor defendants (see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dept. of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment.

CACI No. 2522A

Government Code section 12923.

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Employee Personal Liability for Harassment. Government Code section 12940(j)(3).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Combination of Characteristics, Perception, and Perceived Association. Government Code section 12926(o).
- “To establish a prima facie case of a hostile work environment, [the plaintiff] must show that (1) [plaintiff] is a member of a protected class; (2) [plaintiff] was subjected to unwelcome harassment; (3) the harassment was based on [plaintiff’s] protected status; (4) the harassment unreasonably interfered with [plaintiff’s] work performance by creating an intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment.” (*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 581 [250 Cal.Rptr.3d 1].)
- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’ ” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- “Under FEHA, an employee who harasses another employee may be held personally liable.” (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1524 [169 Cal.Rptr.3d 794].)
- “A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer.” (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1331 [58 Cal.Rptr.2d 308].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual*

Harassment, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56–2:56.50 (Thomson Reuters)

2522B. Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

[Name of plaintiff] claims that coworkers at [name of covered entity] were subjected to harassment based on [describe protected characteristic or combination of characteristics] and that this harassment created a work environment for [name of plaintiff] that was hostile, intimidating, offensive, oppressive, or abusive.

To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff] was [an employee of/an applicant for a position with/a person providing services under a contract with/ an unpaid intern with/a volunteer with] [name of covered entity];**
- [2. That [name of individual defendant] was an employee of [name of covered entity];]**
- 3. That [name of plaintiff], although not personally subjected to harassing conduct, personally witnessed harassing conduct that took place in [his/her/nonbinary pronoun] immediate work environment;**
- 4. That the harassing conduct was severe or pervasive;**
- 5. That a reasonable [describe person with protected characteristic or combination of characteristics] in [name of plaintiff]’s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
- 6. That [name of plaintiff] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward other [describe persons with protected characteristic or combination of characteristics];**
- 7. That [name of individual defendant] [participated in/assisted/ [or] encouraged] the harassing conduct;**
- 8. That [name of plaintiff] was harmed; and**
- 9. That the conduct was a substantial factor in causing [name of plaintiff]’s harm.**

Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018, July 2019, November 2021, May 2022, December 2025, July 2026

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is also an employee of the covered entity. (Gov. Code, § 12940(j)(3).) Include optional element 2 if there is a dispute about the defendant's status as an employee and include optional question 2 on the verdict form. See CACI No. VF-2507B, *Work Environment Harassment—Conduct Directed at Others—Individual Defendant*.

The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See Gov. Code, § 12940(j)(1).) If the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] [“[A]s long as the harassment occurs in a work-related context, the employer is liable”].)

For an employer defendant, see CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*. For a case in which the plaintiff is the target of the harassment, see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*. For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” Explained, and CACI No. 2524, “*Severe or Pervasive*” Explained.

If there are both employer and individual supervisor defendants (see CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dept. of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.

CACI No. 2522B

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Employee Personal Liability for Harassment. Government Code section 12940(j)(3).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Combination of Characteristics, Perception, and Perceived Association. Government Code section 12926(o).
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’ ” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- “The plaintiff’s work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman’s perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers.” (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)
- “Harassment against others in the workplace is only relevant to the plaintiff’s case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff’s position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others.” (*Beyda, supra*, 65 Cal.App.4th at p. 520.)
- “To state that an employee must be the direct victim of the sexually harassing

conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires ‘an even higher showing’ than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must ‘establish that the sexually harassing conduct permeated [her] direct work environment.’ [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, ‘those incidents cannot affect . . . her perception of the hostility of the work environment.’ ” (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284–285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- “[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA).” (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)
- “A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer.” (*Fiol, supra*, 50 Cal.App.4th at p. 1331.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

**2522C. Work Environment Harassment—Sexual
Favoritism—Essential Factual Elements—Individual Defendant
(Gov. Code, §§ 12923, 12940(j))**

[Name of plaintiff] claims that [he/she/nonbinary pronoun] was subjected to harassment based on sexual favoritism at [name of covered entity] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive. “Sexual favoritism” means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant these preferences.

To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff] was [an employee of/an applicant for a position with/a person providing services under a contract with/ an unpaid intern with/a volunteer with] [name of employer];**
- [2. That [name of individual defendant] was an employee of [name of covered entity];]**
- 3. That there was sexual favoritism in the work environment;**
- 4. That the sexual favoritism was severe or pervasive;**
- 5. That a reasonable [describe person with protected characteristic or combination of characteristics] in [name of plaintiff]’s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism;**
- 6. That [name of plaintiff] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism;**
- 7. That [name of individual defendant] [participated in/assisted/ [or] encouraged] the sexual favoritism;**
- 8. That [name of plaintiff] was harmed; and**
- 9. That the conduct was a substantial factor in causing [name of plaintiff]’s harm.**

Derived from former CACI No. 2522 December 2007; Revised December 2015, May 2018, July 2019, May 2020, November 2021, May 2022, December 2025, July 2026

Directions for Use

This instruction is for use in a hostile work environment case involving sexual favoritism when the defendant is also an employee of the covered entity. (Gov. Code, § 12940(j)(3).) Include optional element 2 if there is a dispute about the defendant's status as an employee and include optional question 2 on the verdict form. See CACI No. VF-2507C, *Work Environment Harassment—Sexual Favoritism—Individual Defendant*.

The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (Gov. Code, § 12940(j)(1).) If the facts of the case support it, the instruction should be modified as appropriate to the applicant's circumstances.

For an employer defendant, see CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. For a case in which the plaintiff is the target of harassment, see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*. For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” Explained, and CACI No. 2524, “*Severe or Pervasive*” Explained.

If there are both employer and individual supervisor defendants (see CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dept. of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

Sources and Authority

- Declaration of Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Employee Personal Liability for Harassment. Government Code section 12940(j)(3).

CACI No. 2522C

- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Combination of Characteristics, Perception, and Perceived Association. Government Code section 12926(o).
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’ ” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- “Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment.” (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)
- “[S]exual favoritism by a manager may be actionable when it leads employees to believe that ‘they [can] obtain favorable treatment from [the manager] if they became romantically involved with him’, the affair is conducted in a manner ‘so indiscreet as to create a hostile work environment,’ or the manager has engaged in ‘other pervasive conduct . . . which created a hostile work environment.’ ” (*Miller, supra*, 36 Cal.4th at p. 465, internal citations omitted.)
- “[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state.” (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)
- “[W]e conclude a nonharassing supervisor, who fails to take action to prevent

sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA).” (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- “A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer.” (*Fiol, supra*, 50 Cal.App.4th at p. 1331.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36[5] (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

2524. “Severe or Pervasive” Explained

“Severe or pervasive” means conduct that alters the conditions of employment and creates a work environment that is hostile, intimidating, offensive, oppressive, or abusive.

In determining whether the conduct was severe or pervasive, you should consider all the circumstances, including any or all of the following:

- (a) The nature of the conduct;**
- (b) How often, and over what period of time, the conduct occurred;**
- (c) The circumstances under which the conduct occurred;**
- (d) Whether the conduct was physically threatening or humiliating.**

[Name of plaintiff] does not have to prove that [his/her/nonbinary pronoun] productivity has declined. It is sufficient to prove that a reasonable person who was subjected to the harassing conduct would find that the conduct so altered working conditions as to make it more difficult to do the job.

[A single incident can be sufficiently severe or pervasive to constitute harassment.]

New September 2003; Revised December 2007, July 2019

Directions for Use

Read this instruction with any of the Work Environment Harassment instructions (CACI Nos. 2521A, 2521B, 2521C, 2522A, 2522B, and 2522C). Read also CACI No. 2523, *“Harassing Conduct” Explained*. Give the last optional sentence if a single incident forms the basis of the claim. (See Gov. Code, § 12923(b) [single incident of harassing conduct can be sufficient to create a triable issue regarding the existence of a hostile work environment].)

In determining what constitutes “sufficiently pervasive” harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial. (See *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610 [262 Cal.Rptr. 842].) Whether this limitation remains in light of Government Code section 12923 is not clear.

Sources and Authority

- “We have agreed with the United States Supreme Court that, to prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex. The

working environment must be evaluated in light of the totality of the circumstances: “[W]hether an environment is “hostile” or “abusive” can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.’ ” (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 462 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’ ” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- “For sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’ . . . [¶] ‘Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.’ . . . California courts have adopted the same standard in evaluating claims under the FEHA.” (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted, disapproved on another point in *Bailey v. San Francisco Dist. Attorney’s Office* (2024) 16 Cal.5th 611, 631, fn. 6 [323 Cal.Rptr.3d 369, 552 P.3d 430].)
- “Whether the sexual conduct complained of is sufficiently pervasive to create a hostile or offensive work environment must be determined from the totality of the circumstances. The plaintiff must prove that the defendant’s conduct would have interfered with a reasonable employee’s work performance . . . and that she was actually offended The factors that can be considered in evaluating the totality of the circumstances are: (1) the nature of the unwelcome sexual acts or works (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609–610 [262 Cal.Rptr. 842], internal citation omitted.)
- “The United States Supreme Court . . . has clarified that conduct need not seriously affect an employee’s psychological well-being to be actionable as

abusive work environment harassment. So long as the environment reasonably would be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.” (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 412 [27 Cal.Rptr.2d 457], internal citations omitted.)

- “As the Supreme Court recently reiterated, in order to be actionable, ‘. . . a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.’ The work environment must be viewed from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’ This determination requires judges and juries to exercise ‘[c]ommon sense, and an appropriate sensitivity to social context’ in order to evaluate whether a reasonable person in the plaintiff’s position would find the conduct severely hostile or abusive.” (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 518–519 [76 Cal.Rptr.2d 547], internal citations omitted.)
- “The requirement that the conduct be sufficiently severe or pervasive to create a working environment a reasonable person would find hostile or abusive is a crucial limitation that prevents sexual harassment law from being expanded into a ‘general civility code.’ ” (*Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1377 [62 Cal.Rptr.3d 200], internal citations omitted.)
- “[T]he jury only needed to find the harassing conduct to be either severe or pervasive” (*Caldera v. Department of Corrections & Rehabilitation* (2018) 25 Cal.App.5th 31, 40 [235 Cal.Rptr.3d 262].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin, et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:160–10:249 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.17, 3.36–3.41

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation, § 2:56 (Thomson Reuters)

2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

[Name of plaintiff] **claims that** *[name of defendant]* **subjected** *[him/her/nonbinary pronoun]* **to disability discrimination. To establish this claim, *[name of plaintiff]* must prove all of the following:**

1. **That** *[name of defendant]* **was** *[an employer/[other covered entity]]*;
2. **That** *[name of plaintiff]* **[was an employee of *[name of defendant]*/** **applied to *[name of defendant]* for a job/[describe other covered relationship to defendant]]**;
3. **That** *[name of defendant]* **[knew that *[name of plaintiff]* had [a history of having]/[perceived/regarded/treated] *[name of plaintiff]* as if [he/she/nonbinary pronoun] had] [a] [select term to describe basis of limitations, e.g., physical condition] [that limited [insert major life activity]]**;
4. **That** *[name of plaintiff]* **was able to perform the essential job duties of [his/her/nonbinary pronoun] [current position/the position for which [he/she/nonbinary pronoun] applied], either with or without reasonable accommodation for [his/her/nonbinary pronoun] [e.g., physical condition]**;
5. **[That *[name of defendant]* [discharged/refused to hire/[other adverse employment action]] *[name of plaintiff]*];**
[or]
[That *[name of defendant]* subjected *[name of plaintiff]* to an adverse employment action];
[or]
[That *[name of plaintiff]* was constructively discharged];
6. **That [[*[name of plaintiff]*’s [history of [a]] [e.g., physical condition]/the perception that *[name of plaintiff]* has [a] [e.g., physical condition]] was a substantial motivating reason for *[name of defendant]*’s [decision to [discharge/refuse to hire/[other adverse employment action]] *[name of plaintiff]*/conduct]**;
7. **That *[name of plaintiff]* was harmed; and**
8. **That *[name of defendant]*’s conduct was a substantial factor in causing *[name of plaintiff]*’s harm.**

[Name of plaintiff] **does not need to prove that *[name of defendant]* held any ill will or animosity toward [him/her/nonbinary pronoun] personally because [he/she/nonbinary pronoun] was [perceived to be] disabled. [On**

the other hand, if you find that [name of defendant] did hold ill will or animosity toward [name of plaintiff] because [he/she/nonbinary pronoun] was [perceived to be] disabled, you may consider this fact, along with all the other evidence, in determining whether [name of plaintiff]’s [history of [a]] [e.g., physical condition] was a substantial motivating reason for [name of defendant]’s [decision to [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff]/conduct].]

New September 2003; Revised June 2006, December 2007, April 2009, December 2009, June 2010, June 2012, June 2013, December 2014, December 2016, May 2019, May 2020, May 2024, December 2025*, July 2026*

Directions for Use

Select a term to use throughout to describe the source of the plaintiff’s limitations. It may be a statutory term such as “physical disability,” “mental disability,” or “medical condition.” (See Gov. Code, § 12940(a).) Or it may be a general term such as “condition,” “disease,” or “disorder.” Or it may be a specific health condition such as “diabetes.”

In elements 3 and 6, select the bracketed language on a history of disability if the claim of discrimination is based on a history of disability, or select the bracketed language on perceived disability if the claim of discrimination is based on the employer’s perception that the plaintiff had a disability. (Gov. Code, § 12926(o); see also Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer]).

For element 1, the court may need to instruct the jury on the statutory definition of “employer” under the FEHA, which can include business entities acting as agents of employers. (Gov. Code, § 12926(d); *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(b)–(h), (j), (k).)

This instruction is for use by both an employee and a job applicant. Select the appropriate options in elements 2, 5, and 6 depending on the plaintiff’s status.

If the plaintiff alleges discrimination on the basis of the plaintiff’s association with someone who was or was perceived to be disabled, give CACI No. 2547, *Disability-Based Associational Discrimination—Essential Factual Elements*. (See *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655–660 [163 Cal.Rptr.3d 392] [claim for “disability based associational discrimination” adequately pled].)

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit “that limited [insert major life activity]” in element 3. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (m) [no requirement that medical condition limit major life activity].)

Regarding element 4, it is now settled that the ability to perform the essential duties of the job, with or without reasonable accommodation, is an element of the plaintiff's burden of proof. (See *Green v. State of California* (2007) 42 Cal.4th 254, 257–258 [64 Cal.Rptr.3d 390, 165 P.3d 118].)

Read the first option for element 5 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, "*Adverse Employment Action*" *Explained*, if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 5 and also give CACI No. 2510, "*Constructive Discharge*" *Explained*. Select "conduct" in element 6 if either the second or third option is included for element 5.

Element 6 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, "*Substantial Motivating Reason*" *Explained*.)

Give the optional sentence in the last paragraph if there is evidence that the defendant harbored personal animus against the plaintiff because of the plaintiff's disability.

If the existence of a qualifying disability is disputed, consider giving special instructions defining "medical condition," "mental disability," and "physical disability." (See Gov. Code, § 12926(i), (j), (m) [defining "medical condition," "mental disability," and "physical disability"]; see also Cal. Code Regs., tit. 2, § 11065.)

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- Inability to Perform Essential Job Duties. Government Code section 12940(a)(1).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- Combination of Characteristics, Perception, and Perceived Association. Government Code section 12926(o).
- "Substantial" Limitation Not Required. Government Code section 12926.1(c).
- "The California Fair Employment and Housing Act, which defines 'employer' to 'include[]' 'any person acting as an agent of an employer,' permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our

conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA's definition of employer; we express no view of the scope of a business entity agent's possible liability under the FEHA's aider and abettor provision." (*Raines, supra*, 15 Cal.5th at p. 291, internal citations omitted.)

- "[T]he plaintiff initially has the burden to establish a prima facie case of discrimination. The plaintiff can meet this burden by presenting evidence that demonstrates, even circumstantially or by inference, that he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability. To establish a prima facie case, a plaintiff must show ' . . . "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a [prohibited] discriminatory criterion" ' . . . ' The prima facie burden is light; the evidence necessary to sustain the burden is minimal. As noted above, while the elements of a plaintiff's prima facie case can vary considerably, generally an employee need only offer sufficient circumstantial evidence to give rise to a reasonable *inference* of discrimination." (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 310 [115 Cal.Rptr.3d 453], original italics, internal citations omitted.)
- "The distinction between cases involving *direct evidence* of the employer's motive for the adverse employment action and cases where there is only *circumstantial evidence* of the employer's discriminatory motive is critical to the outcome of this appeal. There is a vast body of case law that addresses proving discriminatory intent in cases where there was no direct evidence that the adverse employment action taken by the employer was motivated by race, religion, national origin, age or sex. In such cases, proof of discriminatory motive is governed by the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668]." (*Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 123 [199 Cal.Rptr.3d 462], original italics, footnote and internal citations omitted.)
- "The three-stage framework and the many principles adopted to guide its application do not apply in discrimination cases where, like here, the plaintiff presents direct evidence of the employer's motivation for the adverse employment action. In many types of discrimination cases, courts state that direct evidence of intentional discrimination is rare, but disability discrimination cases often involve direct evidence of the role of the employee's actual or perceived *disability* in the employer's decision to implement an adverse employment action. Instead of litigating the employer's reasons for the action, the parties' disputes in disability cases focus on whether the employee was able to perform essential job functions, whether there were reasonable accommodations that would have allowed the employee to perform those

functions, and whether a reasonable accommodation would have imposed an undue hardship on the employer. To summarize, courts and practitioners should not automatically apply principles related to the *McDonnell Douglas* test to disability discrimination cases. Rather, they should examine the critical threshold issue and determine whether there is direct evidence that the motive for the employer's conduct was related to the employee's physical or mental condition." (*Wallace, supra*, 245 Cal.App.4th at p. 123, original italics, footnote and internal citations omitted; cf. *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 234 fn. 3 [206 Cal.Rptr.3d 841] [case did not present so-called "typical" disability discrimination case, as described in *Wallace*, in that the parties disputed the employer's reasons for terminating plaintiff's employment].)

- "If the employee meets this [prima facie] burden, it is then incumbent on the employer to show that it had a legitimate, nondiscriminatory reason for its employment decision. When this showing is made, the burden shifts back to the employee to produce substantial evidence that employer's given reason was either 'untrue or pretextual,' or that the employer acted with discriminatory animus, in order to raise an inference of discrimination." (*Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 744 [151 Cal.Rptr.3d 292], internal citations omitted.)
- "Although the same statutory language that prohibits disability discrimination also prohibits discrimination based on race, age, sex, and other factors, we conclude that disability discrimination claims are fundamentally different from the discrimination claims based on the other factors listed in section 12940, subdivision (a). These differences arise because (1) additional statutory provisions apply to disability discrimination claims, (2) the Legislature made separate findings and declarations about protections given to disabled persons, and (3) discrimination cases involving race, religion, national origin, age and sex, often involve pretexts for the adverse employment action—an issue about motivation that appears less frequently in disability discrimination cases." (*Wallace, supra*, 245 Cal.App.4th at p. 122.)
- "[Defendant] argues that, because [it] hired plaintiffs as recruit officers, they must show they were able to perform the essential functions of a police recruit in order to be qualified individuals entitled to protection under FEHA. [Defendant] argues that plaintiffs cannot satisfy their burden of proof under FEHA because they failed to show that they could perform those essential functions. [¶] Plaintiffs do not directly respond to [defendant]'s argument. Instead, they contend that the relevant question is whether they could perform the essential functions of the positions to which they sought reassignment. Plaintiffs' argument improperly conflates the legal standards for their claim under section 12940, subdivision (a), for discrimination, and their claim under section 12940, subdivision (m), for failure to make reasonable accommodation, including reassignment. In connection with a discrimination claim under section 12940, subdivision (a), the court considers whether a plaintiff could perform the essential functions of the job held—or for job applicants, the job desired—with

or without reasonable accommodation.” (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 716–717 [214 Cal.Rptr.3d 113].)

- “Summary adjudication of the section 12940(a) claim . . . turns on . . . whether [plaintiff] could perform the essential functions of the relevant job with or without accommodation. [Plaintiff] does not dispute that she was unable to perform the essential functions of her *former* position as a clothes fitter with or without accommodation. Under federal law, however, when an employee seeks accommodation by being reassigned to a vacant position in the company, the employee satisfies the ‘qualified individual with a disability’ requirement by showing he or she can perform the essential functions of the *vacant position* with or without accommodation. The position must exist and be vacant, and the employer need not promote the disabled employee. We apply the same rule here. To prevail on summary adjudication of the section 12940(a) claim, [defendant] must show there is no triable issue of fact about [plaintiff]’s ability, with or without accommodation, to perform the essential functions of an available vacant position that would not be a promotion.” (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 965 [83 Cal.Rptr.3d 190], original italics, internal citations omitted.)
- “To establish a prima facie case of mental disability discrimination under FEHA, a plaintiff must show the following elements: (1) She suffers from a mental disability; (2) she is otherwise qualified to do the job with or without reasonable accommodation; and (3) she was subjected to an adverse employment action because of the disability.” (*Higgins-Williams v. Sutter Medical Foundation* (2015) 237 Cal.App.4th 78, 84 [187 Cal.Rptr.3d 745].)
- “At most, [plaintiff] alleges only that he anticipated becoming disabled for some time after the organ donation. This is insufficient. [Plaintiff] cannot pursue a cause of action for discrimination under FEHA on the basis of his ‘actual’ physical disability in the absence of factual allegations that he was in fact, physically disabled.” (*Rope, supra*, 220 Cal.App.4th at p. 659.)
- “[Defendant] asserts the statute’s ‘regarded as’ protection is limited to persons who are denied or who lose jobs based on an employer’s reliance on the ‘myths, fears or stereotypes’ frequently associated with disabilities. . . . However, the statutory language does not expressly restrict FEHA’s protections to the narrow class to whom [defendant] would limit its coverage. To impose such a restriction would exclude from protection a large group of individuals, like [plaintiff], with more mundane long-term medical conditions, the significance of which is exacerbated by an employer’s failure to reasonably accommodate. Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute’s plain language leads to the conclusion that the ‘regarded as’ definition casts a broader net and protects *any* individual ‘regarded’ or ‘treated’ by an employer ‘as having, or having had, any physical condition that makes achievement of a major life activity difficult’ or may do so in the future. We agree most individuals who sue exclusively under this definitional prong likely are and will continue to be

victims of an employer's 'mistaken' perception, based on an unfounded fear or stereotypical assumption. Nevertheless, FEHA's protection is nowhere expressly premised on such a factual showing, and we decline the invitation to import such a requirement." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53 [43 Cal.Rptr.3d 874], original italics, internal citations omitted.)

- "[T]he purpose of the 'regarded-as' prong is to protect individuals rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities. In other words, to find a perceived disability, the perception must stem from a false idea about the existence of or the limiting effect of a disability." (*Diffey v. Riverside County Sheriff's Dept.* (2000) 84 Cal.App.4th 1031, 1037 [101 Cal.Rptr.2d 353], internal citation omitted.)
- "We say on this record that [defendant] took action against [plaintiff] based on concerns or fear about his possible future disability. The relevant FEHA definition of an individual regarded as disabled applies only to those who suffer certain specified physical disabilities or those who have a condition with 'no present disabling effect' but which 'may become a physical disability' According to the pleadings, [defendant] fired [plaintiff] to avoid accommodating him because of his association with his physically disabled sister. That is not a basis for liability under the 'regarded as' disabled standard." (*Rope, supra*, 220 Cal.App.4th at p. 659, internal citations omitted.)
- "[A]n employer 'knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation. The employer need only know the underlying facts, not the legal significance of those facts.' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 592 [210 Cal.Rptr.3d 59].)
- "An adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer. Thus, in order to prove [a discrimination] claim, a plaintiff must prove the employer had knowledge of the employee's disability when the adverse employment decision was made. . . . While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations" (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008 [93 Cal.Rptr.3d 338].)
- "[W]e interpret FEHA as authorizing an employer to distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against coworkers. If employers are not permitted to make this distinction, they are caught on the horns of a dilemma. They may not discriminate against an employee based on a disability but, at the same time, must provide all employees with a safe work environment free from threats and violence." (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 166 [125 Cal.Rptr.3d 1], internal citations omitted.)

- “Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, . . . proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time.” (*Harris, supra*, 56 Cal.4th at p. 232, original italics.)
- “We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a ‘but for’ cause.” (*Harris, supra*, 56 Cal.4th at p. 229.)
- “We note that the court in *Harris* discussed the employer’s motivation and the link between the employer’s consideration of the plaintiff’s physical condition and the adverse employment action without using the terms ‘animus,’ ‘animosity,’ or ‘ill will.’ The absence of a discussion of these terms necessarily implies an employer can violate section 12940, subdivision (a) by taking an adverse employment action against an employee “because of” the employee’s physical disability even if the employer harbored no animosity or ill will against the employee or the class of persons with that disability.” (*Wallace, supra*, 245 Cal.App.4th at p. 128.)
- “Based on *Harris*, we conclude that an employer has treated an employee differently ‘because of’ a disability when the disability is a substantial motivating reason for the employer’s decision to subject the [employee] to an adverse employment action. This conclusion resolves how the jury should have been instructed on [defendant]’s motivation or intent in connection with the disability discrimination claim.” (*Wallace, supra*, 245 Cal.App.4th at p. 128.)
- “We conclude that where, as here, an employee is found to be able to safely perform the essential duties of the job, a plaintiff alleging disability discrimination can establish the requisite employer intent to discriminate by proving (1) the employer knew that plaintiff had a physical condition that limited a major life activity, or perceived him to have such a condition, and (2) the plaintiff’s actual or perceived physical condition was a substantial motivating reason for the defendant’s decision to subject the plaintiff to an adverse employment action. . . . [T]his conclusion is based on (1) the interpretation of section 12940’s term ‘because of’ adopted in *Harris*; (2) our discussion of the meaning of the statutory phrase ‘to discriminate against’; and (3) the guidance provided by the current versions of CACI Nos. 2540 and 2507. [¶] Therefore, the jury instruction that [plaintiff] was required to prove that [defendant] ‘regarded or treated [him] as having a disability in order to discriminate’ was erroneous.” (*Wallace, supra*, 245 Cal.App.4th at p. 129.)
- “The word ‘animus’ is ambiguous because it can be interpreted narrowly to

mean ‘ill will’ or ‘animosity’ or can be interpreted broadly to mean ‘intention.’ In this case, it appears [defendant] uses ‘animus’ to mean something more than the intent described by the substantial-motivating-reason test adopted in *Harris*.” (*Wallace, supra*, 245 Cal.App.4th at p. 130, fn. 14, internal citation omitted.)

- “[W]eight may qualify as a protected “handicap” or “disability” within the meaning of the FEHA if medical evidence demonstrates that it results from a physiological condition affecting one or more of the basic bodily systems and limits a major life activity.’ . . . ‘[A]n individual who asserts a violation of the FEHA on the basis of his or her weight must adduce evidence of a physiological, systemic basis for the condition.’ ” (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 928 [227 Cal.Rptr.3d 286].)
- “Being unable to work during pregnancy is a disability for the purposes of section 12940.” (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1340 [153 Cal.Rptr.3d 367].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2025) Agency and Employment, § 368

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1045–1051

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2160–9:2241 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.78–2.80

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.11, 41.32[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22[8], 115.23[2] (Matthew Bender)

California Civil Practice: Employment Litigation § 2:46 (Thomson Reuters)

2547. Disability-Based Associational Discrimination—Essential Factual Elements

[Name of plaintiff] **claims that** [name of defendant] **wrongfully discriminated against** [him/her/nonbinary pronoun] **based on** [his/her/nonbinary pronoun] **association with a person** [with a disability/who is perceived to have a disability]. To establish this claim, [name of plaintiff] **must prove all of the following:**

1. **That** [name of defendant] **was** [an employer/[other covered entity]];
2. **That** [name of plaintiff] [was an employee of [name of defendant]/**applied to** [name of defendant] **for a job**/[describe other covered relationship to defendant]];
3. **That** [name of plaintiff] **was** [specify basis of association or relationship, e.g., the brother of [name of associate]], **who** [had/is perceived to have] [a] [e.g., physical condition];
4. [That [name of associate]’s [perceived] [e.g., physical condition] **was costly to** [name of defendant] **because** [specify reason, e.g., [name of associate] was covered under [plaintiff]’s employer-provided health care plan];]

[or]

[That [name of defendant] **feared** [name of plaintiff]’s **association with** [name of associate] **because** [specify, e.g., [name of associate] has a disability, or was perceived to have a disability, with a genetic component and plaintiff may develop the disability as well];]

[or]

[That [name of plaintiff] **was somewhat inattentive at work because** [name of associate]’s [perceived] [e.g., physical condition] **requires** [name of plaintiff]’s **attention, but not so inattentive that to perform to** [name of defendant]’s **satisfaction** [name of plaintiff] **would need an accommodation;**]

[or]

[[Specify other basis for associational discrimination];]

5. **That** [name of plaintiff] **was able to perform the essential job duties;**
6. [That [name of defendant] [discharged/refused to hire/[other adverse employment action]] [name of plaintiff];]

[or]

[That [name of defendant] subjected [name of plaintiff] to an adverse employment action;]

[or]

[That [name of plaintiff] was constructively discharged;]

- 7. That [name of plaintiff]’s association with [name of associate] was a substantial motivating reason for [name of defendant]’s [decision to [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff]/conduct];**
- 8. That [name of plaintiff] was harmed; and**
- 9. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm.**

New December 2014; Revised May 2017, May 2020, November 2023, May 2024, December 2025*, July 2026*

Directions for Use

Give this instruction if plaintiff alleges disability discrimination because of the plaintiff’s association with a person who has, or is perceived to have, a disability. Discrimination based on an employee’s association with a person who has, or is perceived to have, a disability is an unlawful employment practice under the FEHA. (Gov. Code, § 12926(o).) In the introductory paragraph and elements 3 and 4, choose the appropriate bracketed language depending on whether the association is with a person who has a disability or a person who is perceived to have a disability.

For element 1, the court may need to instruct the jury on the statutory definition of “employer” under the FEHA, which can include business entities acting as agents of employers. (Gov. Code, § 12926(d); *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(b)–(h), (j), (k).)

Select a term to use throughout to describe the source of the person’s disability. It may be a statutory term such as “physical disability,” “mental disability,” or “medical condition.” (See Gov. Code, § 12940(a).) Or it may be a general term such as “condition,” “disease,” or “disorder.” Or it may be a specific health condition such as “diabetes.”

Three versions of disability-based associational discrimination have been recognized, called “expense,” “disability by association,” and “distraction.” (See *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655–660 [163 Cal.Rptr.3d 392] [claim for “disability-based associational discrimination” adequately pled].) Element 4 sets forth options for the three versions, which are illustrative rather than exhaustive; therefore, an “other” option is provided. (See

CACI No. 2547

Castro-Ramirez v. Dependable Highway Express, Inc. (2016) 2 Cal.App.5th 1028, 1042 [207 Cal.Rptr.3d 120].)

An element of a disability discrimination case is that the plaintiff must be otherwise qualified to do the job, with or without reasonable accommodation. (*Green v. State of California* (2007) 42 Cal.4th 254, 262 [64 Cal.Rptr.3d 390, 165 P.3d 118] (see element 5).) However, the FEHA does not expressly require reasonable accommodation for association with a person with a disability. (Gov. Code, § 12940(m) [employer must reasonably accommodate applicant or employee].) Nevertheless, one court has suggested that such a requirement may exist, without expressly deciding the issue. (See *Castro-Ramirez, supra*, 2 Cal.App.5th at pp. 1038–1039.) A reference to reasonable accommodation may be added to element 5 if the court decides to impose this requirement.

Read the first option for element 6 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, “*Adverse Employment Action*” *Explained*, if the existence of an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 6 and also give CACI No. 2510, “*Constructive Discharge*” *Explained*. Select “conduct” in element 7 if either the second or third option is included for element 4.

Element 7 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; *Castro-Ramirez, supra*, 2 Cal.App.5th at p. 1037; see also CACI No. 2507, “*Substantial Motivating Reason*” *Explained*.)

If the question of whether the associate has a disability is disputed, consider giving special instructions defining “medical condition,” “mental disability,” and “physical disability.” (See Gov. Code, § 12926(i), (j), (m) [defining “medical condition,” “mental disability,” and “physical disability”]; see also Cal. Code Regs., tit. 2, § 11065.)

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- “Medical Condition” Defined. Government Code section 12926(i).
- “Mental Disability” Defined. Government Code section 12926(j).
- “Physical Disability” Defined. Government Code section 12926(m).
- Combination of Characteristics, Perception, and Perceived Association. Government Code section 12926(o).
- “Three types of situation are, we believe, within the intended scope of the rarely litigated . . . association section. We’ll call them “expense,” “disability by association,” and “distraction.” They can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) (“expense”) his spouse has a disability that is costly to the employer because the spouse is

covered by the company's health plan; (2a) ("disability by association") the employee's homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) ("distraction") the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours.' " (*Rope, supra*, 220 Cal.App.4th at p. 657.)

- "We agree with *Rope* [*supra*] that *Larimer* [*Larimer v. International Business Machines Corp.* (7th Cir. 2004) 370 F.3d 698] provides an illustrative, rather than an exhaustive, list of the kinds of circumstances in which we might find associational disability discrimination. The common thread among the *Larimer* categories is simply that they are instances in which the 'employer has a motive to discriminate against a nondisabled employee who is merely associated with a disabled person.' As we discuss above, this is an element of a plaintiff's prima facie case—that the plaintiff's association with a disabled person was a substantial motivating factor for the employer's adverse employment action. *Rope* held the alleged facts in that case could give rise to an inference of such discriminatory motive. Our facts do not fit neatly within one of the *Larimer* categories either, but a jury could reasonably infer the requisite discriminatory motive." (*Castro-Ramirez, supra*, 2 Cal.App.5th at p. 1042, internal citation omitted.)
- "[A]n employer who discriminates against an employee because of the latter's association with a disabled person is liable even if the motivation is purely monetary. But if the disability plays no role in the employer's decision . . . then there is no *disability* discrimination.' " (*Rope, supra*, 220 Cal.App.4th at p. 658, original italics.)
- "A prima facie case of disability discrimination under FEHA requires a showing that (1) the plaintiff suffered from a disability, (2) the plaintiff was otherwise qualified to do his or her job, with or without reasonable accommodation, and (3) the plaintiff was subjected to adverse employment action because of the disability. Adapting this [disability discrimination] framework to the associational discrimination context, the 'disability' from which the plaintiff suffers is his or her association with a disabled person. . . . [T]he disability must be a substantial factor motivating the employer's adverse employment action." (*Castro-Ramirez, supra*, 2 Cal.App.5th at p. 1037.)
- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply a motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, . . . proof that discrimination was a *substantial* factor in an employment

decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time.” (*Harris, supra*, 56 Cal.4th at p. 232, original italics.)

- “We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a ‘but for’ cause.” (*Harris, supra*, 56 Cal.4th at p. 229.)
- “[W]hen section 12940, subdivision (m) requires employers to reasonably accommodate ‘the known physical . . . disability of an applicant or employee,’ read in conjunction with other relevant provisions, subdivision (m) may reasonably be interpreted to require accommodation based on the employee’s association with a physically disabled person.” (*Castro-Ramirez, supra*, 2 Cal.App.5th at pp. 1038–1039.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, California Fair Employment And Housing Act (FEHA), ¶¶ 9:2213–9:2215 (The Rutter Group)
2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.32[2], [4] (Matthew Bender)

2570. Age Discrimination—Disparate Treatment—Essential Factual Elements

[Name of plaintiff] **claims that** *[name of defendant]* **subjected** *[him/her/nonbinary pronoun]* **to age discrimination. To establish this claim, *[name of plaintiff]* must prove all of the following:**

1. **That** *[name of defendant]* **was** *[an employer/[other covered entity]]*;
2. **That** *[name of plaintiff]* **[was an employee of *[name of defendant]*/** **applied to *[name of defendant]* for a job/[describe other covered relationship to defendant]]**;
3. **[That *[name of defendant]* [discharged/refused to hire/[other adverse employment action]] *[name of plaintiff]*];**
[or]
[That *[name of defendant]* subjected *[name of plaintiff]* to an adverse employment action];
[or]
[That *[name of plaintiff]* was constructively discharged];
4. **That** *[name of plaintiff]* **was age 40 or older at the time of the [discharge/[other adverse employment action]]**;
5. **That** *[name of plaintiff]*'s **age was a substantial motivating reason for *[name of defendant]*'s [decision to [discharge/refuse to hire/[other adverse employment action]] *[name of plaintiff]*/conduct]**;
6. **That** *[name of plaintiff]* **was harmed; and**
7. **That** *[name of defendant]*'s **conduct was a substantial factor in causing *[name of plaintiff]*'s harm.**

New June 2011; Revised June 2012, June 2013, May 2020, July 2026

Directions for Use

Read the first option for element 3 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, "Adverse Employment Action" Explained, if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 3 and also give CACI No. 2510, "Constructive Discharge" Explained. Select "conduct" in element 5 if the either the second or third option is included for element 3.

Note that there are two causation elements. There must be a causal link between the discriminatory animus based on age and the adverse action (see element 5), and

CACI No. 2570

there must be a causal link between the adverse action and the damage (see element 7). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

Element 5 requires that age discrimination be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, “*Substantial Motivating Reason*” *Explained*.)

Under the *McDonnell Douglas* (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668]) process for allocating burdens of proof and producing evidence, which is used in California for disparate-treatment cases under FEHA, the employee must first present a prima facie case of discrimination. The burden then shifts to the employer to produce evidence of a nondiscriminatory reason for the adverse action. At that point, the burden shifts back to the employee to show that the employer’s stated reason was in fact a pretext for a discriminatory act.

Whether or not the employee has met the employee’s prima facie burden, and whether or not the employer has rebutted the employee’s prima facie showing, are questions of law for the trial court, not questions of fact for the jury. (See *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201 [48 Cal.Rptr.2d 448].) In other words, by the time that the case is submitted to the jury, the plaintiff has already established a prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision. The *McDonnell Douglas* shifting burden drops from the case. The jury is left to decide which evidence it finds more convincing, that of the employer’s discriminatory intent or that of the employer’s age-neutral reasons for the employment decision. (See *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1118, fn. 5 [94 Cal.Rptr.2d 579]).

Under FEHA, age-discrimination cases require the employee to show that the employee’s job performance was satisfactory at the time of the adverse employment action as a part of the employee’s prima facie case (see *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 321 [115 Cal.Rptr.3d 453]), even though it is the employer’s burden to produce evidence of a nondiscriminatory reason for the action. Poor job performance is the most common nondiscriminatory reason that an employer advances for the action. Even though satisfactory job performance may be an element of the employee’s prima facie case, it is not an element that the employee must prove to the trier of fact. Under element 5 and CACI No. 2507, the burden remains with the employee to ultimately prove that age discrimination was a substantial motivating reason for the action. (See *Muzquiz, supra*, 79 Cal.App.4th at p. 1119.)

See also the Sources and Authority to CACI No. 2500, *Disparate Treatment—Essential Factual Elements*.

Sources and Authority

- Age Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- “Age” Defined. Government Code section 12926(b).
- Disparate Treatment; Layoffs Based on Salary. Government Code section 12941.
- “In order to make out a prima facie case of age discrimination under FEHA, a plaintiff must present evidence that the plaintiff (1) is over the age of 40; (2) suffered an adverse employment action; (3) was performing satisfactorily at the time of the adverse action; and (4) suffered the adverse action under circumstances that give rise to an inference of unlawful discrimination, i.e., evidence that the plaintiff was replaced by someone significantly younger than the plaintiff.” (*Sandell, supra*, 188 Cal.App.4th at p. 321.)
- “In other words, ‘[b]y the time that the case is submitted to the jury, . . . the plaintiff has already established his or her prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision, leaving only the issue of the employer’s discriminatory intent for resolution by the trier of fact. Otherwise, the case would have been disposed of as a matter of law for the trial court. That is to say, if the plaintiff cannot make out a prima facie case, the employer wins as a matter of law. If the employer cannot articulate a nondiscriminatory reason for the adverse employment decision, the plaintiff wins as a matter of law. In those instances, no fact-finding is required, and the case will never reach a jury. [¶] In short, if and when the case is submitted to the jury, the construct of the shifting burden “drops from the case,” and the jury is left to decide which evidence it finds more convincing, that of the employer’s discriminatory intent, or that of the employer’s race or age-neutral reasons for the employment decision.’ ” (*Muzquiz, supra*, 79 Cal.App.4th at p. 1118, fn. 5.)
- “Because the only issue properly before the trier of fact was whether the [defendant]’s adverse employment decision was motivated by discrimination on the basis of age, the shifting burdens of proof regarding appellant’s prima facie case and the issue of legitimate nondiscriminatory grounds were actually irrelevant.” (*Muzquiz, supra*, 79 Cal.App.4th at p. 1119.)
- “An employee alleging age discrimination must ultimately prove that the adverse employment action taken was based on his or her age. Since direct evidence of such motivation is seldom available, the courts use a system of shifting burdens as an aid to the presentation and resolution of age discrimination cases. That system necessarily establishes the basic framework for reviewing motions for summary judgment in such cases.” (*Hersant v. Dept. of Social Servs.* (1997) 57 Cal.App.4th 997, 1002 [67 Cal.Rptr.2d 483], internal citations omitted.)
- “Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply a motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing

statements unrelated to the disputed employment decision. At the same time, . . . proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time.” (*Harris, supra*, 56 Cal.4th at p. 232, original italics.)

- “We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a “but for” cause.” (*Harris, supra*, 56 Cal.4th at p. 229.)
- “While we agree that a plaintiff must demonstrate some basic level of competence at his or her job in order to meet the requirements of a *prima facie* showing, the burden-shifting framework established in *McDonnell Douglas* compels the conclusion that any measurement of such competency should, to the extent possible, be based on objective, rather than subjective, criteria. A plaintiff’s burden in making a *prima facie* case of discrimination is not intended to be ‘onerous.’ Rather, the *prima facie* burden exists in order to weed out patently unmeritorious claims.” (*Sandell, supra*, 188 Cal.App.4th at p. 322, internal citations omitted.)
- “A discharge is not ‘on the ground of age’ within the meaning of this prohibition unless age is a ‘motivating factor’ in the decision. Thus, ‘ “an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer’s decision.” ’ ‘[A]n employee claiming discrimination must offer substantial evidence that the employer’s stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.’ ” (*West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 978 [117 Cal.Rptr.2d 647].)
- “[D]ownsize[ing] alone is not necessarily a sufficient explanation, under the FEHA, for the consequent dismissal of an age-protected worker. An employer’s freedom to consolidate or reduce its work force, and to eliminate positions in the process, does not mean it may ‘use the occasion as a convenient opportunity to get rid of its [older] workers.’ ” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 358 [100 Cal.Rptr.2d 352, 8 P.3d 1089].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1041–1044

Chin et al., California Practice Guide: Employment Litigation, Ch. 8-B, *California Fair Employment and Housing Act*, ¶¶ 8:740, 8:800 et seq. (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.31 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.22 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.43 (Matthew Bender)

2740. Violation of Equal Pay Act—Essential Factual Elements (Lab. Code, § 1197.5)

[*Name of plaintiff*] claims that [he/she/nonbinary pronoun] was paid at a wage rate that is less than the rate paid to [an] employee[s] of another [sex/race/ethnicity]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of plaintiff*] was paid less than the rate paid to [a] person[s] of another [sex/race/ethnicity] working for [*name of defendant*];
2. That [*name of plaintiff*] was performing substantially similar work as the other person[s], considering the overall combination of skill, effort, and responsibility required; and
3. That [*name of plaintiff*] was working under similar working conditions as the other person[s].

New May 2018; Revised January 2019, November 2019, May 2020, July 2026

Directions for Use

The California Equal Pay Act prohibits paying employees at lower wage rates than rates paid to employees of another sex, race, or ethnicity for substantially similar work. (Lab. Code, § 1197.5(a), (b).) An employee receiving less than the wage to which the employee is entitled may bring a civil action to recover the balance of the wages, including interest, and an equal amount as liquidated damages. Costs and attorney fees may also be awarded. (Lab. Code, § 1197.5(h).) There is no requirement that an employee show discriminatory intent as an element of the claim. (*Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 622–625, 629 [3 Cal.Rptr.3d 844].)

Consider modifying the instruction to define sex, if appropriate. (Gov. Code, § 12926(r).)

This instruction presents singular and plural options for the comparator, the employee or employees whose pay and work are being compared to the plaintiff's to establish a violation of the Equal Pay Act. The statute refers to *employees* of another sex, race, or ethnicity. Single comparator evidence (e.g., one woman to one man) may be sufficient. (See *Allen v. Staples, Inc.* (2022) 84 Cal.App.5th 188, 194–195 [299 Cal.Rptr.3d 779] [a plaintiff claiming gender-based pay disparity may establish a prima facie case by showing that she was paid less in salary than a single male comparator].)

There are a number of defenses that the employer may assert to defend what appears to be an improper pay differential. (Lab. Code, § 1197.5(a), (b).) See CACI No. 2741, *Affirmative Defense—Different Pay Justified*, and CACI No. 2742, *Bona*

Fide Factor Other Than Sex, Race, or Ethnicity, for instructions on the employer’s affirmative defenses. (See Lab. Code, § 1197.5(a)(1), (b)(1).)

Sources and Authority

- Right to Equal Pay Based on Sex, Race, or Ethnicity. Labor Code section 1197.5(a), (b).
- Private Right of Action to Enforce Equal Pay Claim. Labor Code section 1197.5(h).
- “Sex” Defined. Government Code section 12926(r).
- “Wages” and “Wage Rates” Defined. Labor Code section 1197.5(l)(3).
- “This section was intended to codify the principle that an employee is entitled to equal pay for equal work without regard to gender.” (*Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, 104 [165 Cal.Rptr. 100, 611 P.2d 441].)
- “To prove a prima facie case of wage discrimination, ‘a plaintiff must establish that, based on gender, the employer pays different wages to employees doing substantially similar work under substantially similar conditions. [Footnote omitted.]’ ‘If that prima facie showing is made, the burden shifts to the employer to prove the disparity is permitted by one of the EPA’s [four] statutory exceptions—[such as,] that the disparity is based on a factor other than sex.’ But a plaintiff must show ‘not only that she [was] paid lower wages than a male comparator for equal work, but that she has selected the proper comparator.’ ‘The [EPA] does not prohibit variations in wages; it prohibits *discriminatory* variations in wages. . . . [Accordingly,] ‘a comparison to a specifically chosen employee should be scrutinized closely to determine its usefulness.’ ’ ’ ’ (Allen, *supra*, 84 Cal.App.5th at p. 194, original italics, internal citations omitted.)
- “To establish her prima facie case, [plaintiff] had to show not only that she is paid lower wages than a male comparator for equal work, but that she has selected the proper comparator.” (*Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 324 [55 Cal.Rptr.3d 732].)
- “[T]he plaintiff in a section 1197.5 action must first show that the employer paid a male employee more than a female employee ‘ “for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.” ’ ’ ’ (Green, *supra*, 111 Cal.App.4th at p. 628.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 355 et seq., 430, 431

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination*, ¶ 11:1075 et seq. (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.02 (Matthew Bender)

CACI No. 2740

21 California Forms of Pleading and Practice, Ch. 250, Employment Law: *Wage and Hour Disputes*, § 250.14 (Matthew Bender)

2741. Affirmative Defense—Different Pay Justified

[Name of defendant] claims that [he/she/nonbinary pronoun/it] was justified in paying [name of plaintiff] a wage rate that was less than the rate paid to employees of another [sex/race/ethnicity]. To establish this defense, [name of defendant] must prove all of the following:

1. That the wage differential was based on one or more of the following factors:
 - [a. A seniority system;]
 - [b. A merit system;]
 - [c. A system that measures earnings by quantity or quality of production;]
 - [d. (Specify alleged bona fide factor(s) other than sex, race, or ethnicity, such as education, training, or experience.).]
2. That each factor was applied reasonably; and
3. That the factor[s] that [name of defendant] relied on account[s] for the entire wage differential.

Prior salary does not justify any disparity in current compensation.

New May 2018; Revised January 2019, July 2026

Directions for Use

The California Equal Pay Act presents four factors that an employer may offer to justify a pay differential that results in an apparent pay disparity based on sex, race, or ethnicity. Factors a, b, and c in element 1 are specific.

Consider modifying the instruction to define sex, if appropriate. (Gov. Code, § 12926(r).)

If factor d is selected, the jury must also be instructed with CACI No. 2742, *Bona Fide Factor Other Than Sex, Race, or Ethnicity*, which establishes what bona fide factors other than sex, race, or ethnicity may justify a pay differential. (See Lab. Code, § 1197.5(a)(1), (b)(1).) Choose the factor or factors that the employer asserts as justification.

Sources and Authority

- Factors Justifying Pay Differential. Labor Code section 1197.5(a)(1), (b)(1).

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 355 et seq., 430, 431

CACI No. 2741

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination*, ¶ 11:1075 et seq. (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.14 (Matthew Bender)

2742. Bona Fide Factor Other Than Sex, Race, or Ethnicity

[Name of defendant] **claims that** *[specify bona fide factor other than sex, race, or ethnicity]* **is a legitimate factor other than** *[sex/race/ethnicity]* **that justifies paying** *[name of plaintiff]* **at a wage rate that is less than the rate paid to employees of another** *[sex/race/ethnicity]*.

[Specify factor] **is a factor that justifies the pay differential only if** *[name of defendant]* **proves all of the following:**

1. **That the factor is not based on or derived from a** *[sex/race/ethnicity]* **-based differential in compensation;**
2. **That the factor is job related with respect to** *[name of plaintiff]* **'s position; and**
3. **That the factor is consistent with a business necessity.**

A “business necessity” means an overriding legitimate business purpose such that the factor effectively fulfills the business purpose it is supposed to serve.

This defense does not apply, however, if *[name of plaintiff]* **proves that an alternative business practice exists that would serve the same business purpose without producing the pay differential.**

New May 2018; Revised July 2026

Directions for Use

This instruction must be given along with CACI No. 2741, *Affirmative Defense—Different Pay Justified*, if factor d of element 1 of CACI No. 2741 is chosen: a bona fide factor other than sex, race, or ethnicity, such as education, training, or experience. This factor applies only if the employer demonstrates that the factor is not based on or derived from a sex, race, or ethnicity-based differential in compensation, is job-related with respect to the position in question, and is consistent with a business necessity. “Business necessity” means an overriding legitimate business purpose such that the factor effectively fulfills the business purpose it is supposed to serve. This defense does not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential. (See Lab. Code, § 1197.5(a)(1)(D), (b)(1)(D).)

Sources and Authority

- Bona Fide Factor Other Than Sex, Race, or Ethnicity. Labor Code section 1197.5(a)(1)(D), (b)(1)(D).

Secondary Sources

CACI No. 2742

3 Witkin, *Summary of California Law* (11th ed. 2017) Agency and Employment, §§ 355 et seq., 430, 431

Chin et al., *California Practice Guide: Employment Litigation*, Ch. 11-G, *Compensation—Wage Discrimination*, ¶ 11:1077.10 et seq. (The Rutter Group)

3 Wilcox, *California Employment Law*, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.02 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.14 (Matthew Bender)

2752. Tip Pool Conversion—Essential Factual Elements (Lab. Code, § 351)

[Name of plaintiff] claims that [name of defendant] [took money/allowed [specify ineligible individual(s) or class(es) of individuals] to take money] from a tip pool that [name of plaintiff] was entitled to receive. [The court has determined that [specify ineligible individual(s) or class(es) of individuals] [was/were] not eligible to receive money from a tip pool.]

To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] was [a/an] [employer/[other covered entity]];**
- 2. That [name of plaintiff] was an employee of [name of defendant];**
- 3. That [name of defendant] maintained a tip pool in which money left by patrons in an amount over and above the actual amount due for [specify services rendered or goods, food, drink, or articles sold] was pooled to be distributed among employees including [name of plaintiff]; and**
- 4. [That [name of defendant] took money from the tip pool that [name of plaintiff] was entitled to receive.]**

[or]

[That [name of defendant] allowed [specify ineligible individual(s) or class(es) of individuals] to take money from the tip pool that [name of plaintiff] was entitled to receive.]

[Name of plaintiff] does not have to prove the exact amount of money that was taken.

[Name of defendant] is required to keep accurate records of all tips or gratuities received by [him/her/nonbinary pronoun/it] for [his/her/nonbinary pronoun/its] employees.

New November 2021

Directions for Use

This instruction sets forth the elements required for an employee to establish wrongful conversion of tip pool money.

Element 1 may be omitted if there is no dispute regarding the defendant's status as an employer.

Element 4 presents alternative factual scenarios: the defendant's direct conversion of tip pool money and the defendant's misallocation of tip pool money to any individual who should not be included in the tip pool, for example, the employer,

the owner, managers, and supervisors. For the second option, the court must determine as a matter of law whether an individual was properly included in the tip pool. (See Lab. Code, § 350(a), (d) [defining employer and agent to include “every person other than the employer having the authority to hire or discharge any employee or supervise, direct, or control the acts of employees”], § 351(a) [prohibiting employers and agents from receiving any gratuity paid to an employee by a patron]. Include the optional sentence in the introductory paragraph if the court has determined that the defendant allowed ineligible individuals to partake in the tip pool.

Sources and Authority

- “Employer” Defined. Labor Code section 350(a).
- “Employee” Defined. Labor Code section 350(b).
- “Gratuity” Defined. Labor Code section 350(e).
- Employee Gratuities. Labor Code section 351(a).
- Employer’s Duty to Keep Records. Labor Code section 353.
- “The purpose of section 351, as spelled out in the language of the statute, is to prevent an employer from collecting, taking or receiving gratuity income or any part thereof, as his own as part of his daily gross receipts, from deducting from an employee’s wages any amount on account of such gratuity, and from requiring an employee to credit the amount of the gratuity or any part thereof against or as a part of his wages. And the legislative intent reflected in the history of the statute, was to ensure that employees, not employers, receive the full benefit of gratuities that patrons intend for the sole benefit of those employees who serve them.” (*Leighton v. Old Heidelberg, Ltd.* (1990) 219 Cal.App.3d 1062, 1068 [268 Cal.Rptr. 647].)
- “[W]hen a customer leaves a tip in a collective tip box, the customer necessarily understands the tip is not intended for a particular person and the tip will be divided among the behind-the-counter service employees. It is undisputed that these employees consist of baristas and shift supervisors. It would be inconsistent with the purpose of the statute to *require* an employer to disregard the customer’s intent and to instead compel the employer to redirect the tips to only some of the service personnel.” (*Chau v. Starbucks Corp.* (2009) 174 Cal.App.4th 688, 699 [94 Cal.Rptr.3d 593], original italics.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 456

1 Wilcox, California Employment Law, Ch. 4, *Payment of Wages*, § 4.10 (Matthew Bender)

2770. Affirmative Defense—Meal Breaks—Waiver by Mutual Consent

[Name of defendant] claims that there was no meal break violation because *[name of plaintiff]* gave up *[his/her/nonbinary pronoun]* right to a meal break on one or more workdays. This is called “waiver.” To succeed on this defense, *[name of defendant]* must prove all of the following:

1. That *[name of plaintiff]* worked no more than six total hours in a workday; and
2. That *[name of plaintiff]* and *[name of defendant]* freely, knowingly, and mutually consented to waiving the meal break of that workday.

[or]

[Name of defendant] claims that there was no meal break violation because *[name of plaintiff]* gave up *[his/her/nonbinary pronoun]* right to a second meal break on one or more workdays. This is called “waiver.” To succeed on this defense, *[name of defendant]* must prove all of the following:

1. That *[name of plaintiff]* worked no more than twelve total hours in a workday;
 2. That *[name of plaintiff]* did not waive *[his/her/nonbinary pronoun]* first meal break of that workday; and
 3. That *[name of plaintiff]* and *[name of defendant]* freely, knowingly, and mutually consented to waiving the second meal break.
-

New December 2022

Directions for Use

This instruction sets forth the affirmative defense of waiver of a meal break by mutual consent. Employees in most industries can waive their first or second meal break but not both. (Lab. Code, § 512(a).) Give only the paragraph of the instruction that applies to the meal break waived under the applicable wage order. (See, e.g., Cal. Code Regs., tit. 8, § 11010, subd. 11(A) & (B).)

For an instruction on waiver of off-duty meal breaks, see CACI No. 2771, *Affirmative Defense—Meal Breaks—Written Consent to On-Duty Meal Breaks*.

Sources and Authority

- Meal Periods. Labor Code section 512.
- Meal Periods. Cal. Code Regs., tit. 8, §§ 11010–11030, 11060–11110,

11130–11150, ¶ 11, § 11160, ¶ 10, § 11170, ¶ 9.

- “Workday” Defined. Labor Code section 500.
- “An employer’s assertion that it did relieve the employee of duty, but the employee waived the opportunity to have a work-free break, is not an element that a plaintiff must disprove as part of the plaintiff’s case-in-chief. Rather, as the Court of Appeal properly recognized, the assertion is an affirmative defense, and thus the burden is on the employer, as the party asserting waiver, to plead and prove it.” (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1052–1053 [139 Cal.Rptr.3d 315, 273 P.3d 513], internal citations omitted (conc. opn. of Werdegar, J.), approved in *Donohue v. AMN Services, LLC* (2021) 11 Cal.App.5th 58, 74–75 [275 Cal.Rptr.3d 422, 481 P.3d 661].)
- “We conclude the revocable, prospective waivers Plaintiffs signed are enforceable in the absence of any evidence the waivers are unconscionable or unduly coercive. The prospective written waiver of a 30-minute meal period for shifts between five and six hours accords with the text and purpose of section 512 and Wage Orders Nos. 4 and 5. The legislative and administrative history confirms the Legislature and IWC determined such waivers are consistent with the welfare of employees.” (*Bradsbery v. Vicar Operating, Inc.* (2025) 110 Cal.App.5th 899, 904–905 [332 Cal.Rptr.3d 73].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 390, 391

1 Wilcox, California Employment Law, Ch. 2, *Applicability of Rules Governing Hours Worked*, §§ 2.08, 2.09 (Matthew Bender)

1 Wilcox, California Employment Law, Ch. 9, *Wage and Hour Class Claims*, § 9.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 250.14, 250.34 (Matthew Bender)

California Civil Practice: Employment Litigation, § 4:4 (Thomson Reuters)

3061. Discrimination in Business Dealings—Essential Factual Elements (Civ. Code, § 51.5)

[Name of plaintiff] **claims that** *[name of defendant]* **denied** *[him/her/nonbinary pronoun]* **full and equal rights to conduct business because of** *[name of plaintiff]*'s **[sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[any combination of those characteristics]/[insert other actionable or protected characteristic or combination of characteristics]]**. **To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That** *[name of defendant]* **[discriminated against/boycotted/blacklisted/refused to buy from/refused to contract with/refused to sell to/refused to trade with]** *[name of plaintiff]*;
2. **[That a substantial motivating reason for** *[name of defendant]*'s **conduct was [its perception of]** *[name of plaintiff]*'s **[sex/race/color/religion/ancestry/national origin/ disability/medical condition/genetic information/marital status/sexual orientation/ citizenship/primary language/immigration status/[any combination of those characteristics]/[insert other actionable or protected characteristic or combination of characteristics]];**

[or]

[That a substantial motivating reason for *[name of defendant]*'s **conduct was [its perception of]** the **[sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/ citizenship/primary language/immigration status/[any combination of those characteristics]/[insert other actionable or protected characteristic or combination of characteristics]] of** *[name of plaintiff]*'s **[partners/members/stockholders/directors/officers/ managers/superintendents/agents/employees/business associates/ suppliers/customers];**

[or]

[That a substantial motivating reason for *[name of defendant]*'s **conduct was [its perception of]** the **[sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/ citizenship/primary language/immigration status/[any combination of those characteristics]/[insert other actionable or protected characteristic or combination of characteristics]] of a person with**

whom [name of plaintiff] was associated;]

3. That [name of plaintiff] was harmed; and
4. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.

*New September 2003; Revised June 2012; Renumbered from CACI No. 3021 and Revised December 2012; Revised June 2013, December 2016, December 2025, July 2026**

Directions for Use

Select the bracketed option from element 2 that is most appropriate to the facts of the case.

Under the Unruh Civil Rights Act (see CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements*), the California Supreme Court has held that intentional discrimination is required. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159–1162 [278 Cal.Rptr. 614, 805 P.2d 873].) While there is no similar California case imposing an intent requirement under Civil Code section 51.5, Civil Code section 51.5 requires that the discrimination be *on account of* any protected characteristic listed or defined in section 51(b) or (e). (Civ. Code, § 51.5(a).)

The Unruh Civil Rights Act is not limited to the categories expressly mentioned in the statute. Although section 51.5 is a separate statute, the analysis is similar. (*Semler v. General Electric Capital Corp.* (2011) 196 Cal.App.4th 1380, 1404 [127 Cal.Rptr.3d 794] [the analysis under Civil Code section 51.5 is the same as the analysis for purposes of the Unruh Civil Rights Act].) Other forms of arbitrary discrimination by business establishments are prohibited. (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 736 [180 Cal.Rptr. 496, 640 P.2d 115].) Therefore, this instruction allows the user to “insert other actionable or protected characteristic. . .” throughout. Nevertheless, there are limitations on expansion beyond the statutory classifications. First, the claim must be based on a personal characteristic similar to those listed in the statute. Second, the court must consider whether the alleged discrimination was justified by a legitimate business reason. Third, the consequences of allowing the claim to proceed must be taken into account. (*Semler, supra*, 196 Cal.App.4th at pp. 1392–1393; see *Harris, supra*, 52 Cal.3d at pp. 1159–1162.) However, these issues are most likely to be resolved by the court rather than the jury. (See *Harris, supra*, 52 Cal.3d at p. 1165.) Therefore, no elements are included to address what may be an “other actionable characteristic.” If there are contested factual issues, additional instructions or special interrogatories may be necessary.

The kinds of prohibited conduct would all seem to involve intentional acts. (See *Nicole M. v. Martinez Unified Sch. Dist.* (N.D. Cal. 1997) 964 F. Supp. 1369, 1389, superseded by statute on other grounds as stated in *Sandoval v. Merced Union High*

Sch. (E.D. Cal. 2006) 2006 U.S. Dist. LEXIS 28446.) The intent requirement is encompassed within the motivating-reason element (element 2).

There is an exception to the intent requirement under the Unruh Act for conduct that violates the Americans With Disabilities Act. (See *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665 [94 Cal.Rptr.3d 685, 208 P.3d 623].). Because this exception is based on statutory construction of the Unruh Act (see Civ. Code, § 51(f)), the committee does not believe that it applies to section 51.5, which contains no similar language.

Note that there are two causation elements. There must be a causal link between the discriminatory intent and the adverse action (see element 2), and there must be a causal link between the adverse action and the harm (see element 4).

Element 2 uses the term “substantial motivating reason” to express causation between the actionable or protected characteristic or combination of characteristics and the defendant’s conduct. “Substantial motivating reason” has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, “*Substantial Motivating Reason*” Explained.) Whether the FEHA standard applies under Civil Code section 51.5 has not been addressed by the courts.

For an instruction on damages under Civil Code section 51.5, see CACI No. 3067, *Unruh Civil Rights Act—Damages*. Note that the jury may award a successful plaintiff up to three times actual damages but not less than \$4,000. (Civ. Code, § 52(a); see also Civ. Code, § 52(h) [“actual damages” means special and general damages].)

It is possible that elements 3 and 4 are not needed if only the statutory minimum \$4,000 award is sought. With regard to the Unruh Act (Civ. Code, § 51), which is also governed by Civil Code section 52(a), the California Supreme Court has held that a violation is per se injurious, and that section 52 provides for minimum statutory damages for every violation regardless of the plaintiff’s actual damages. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

Conceptually, this instruction has some overlap with CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements*. For a discussion of the basis of this instruction, see *Jackson v. Superior Court* (1994) 30 Cal.App.4th 936, 941 [36 Cal.Rptr.2d 207].

Sources and Authority

- Discrimination in Business Dealings. Civil Code section 51.5.

CACI No. 3061

- Protected Characteristics. Civil Code section 51(b).
- Combination of Characteristics, Perception, and Perceived Association. Civil Code section 51(e)(7).
- “In 1976 the Legislature added Civil Code section 51.5 to the Unruh Civil Rights Act and amended Civil Code section 52 (which provides penalties for those who violate the Unruh Civil Rights Act), in order to, inter alia, include section 51.5 in its provisions.” (*Pines v. Tomson* (1984) 160 Cal.App.3d 370, 384 [206 Cal.Rptr. 866], footnote omitted.)
- “[I]t is clear from the cases under section 51 that the Legislature did not intend in enacting section 51.5 to limit the broad language of section 51 to include only selling, buying or trading. Both sections 51 and 51.5 have been liberally applied to all types of business activities. Furthermore, section 51.5 forbids a business to ‘discriminate against’ ‘any person’ and does not just forbid a business to ‘boycott or blacklist, refuse to buy from, sell to, or trade with any person.’ ” (*Jackson, supra*, 30 Cal.App.4th at p. 941, internal citation and footnote omitted.)
- “Although the phrase ‘business establishment of every kind whatsoever’ has been interpreted by the Supreme Court and the Court of Appeal in the context of section 51, we are aware of no case which interprets that term in the context of section 51.5. We believe, however, that the Legislature meant the identical language in both sections to have the identical meaning.” (*Pines, supra*, 160 Cal.App.3d at p. 384, internal citations omitted.)
- “[T]he classifications specified in section 51.5, which are identical to those of section 51, are likewise not exclusive and encompass other personal characteristics identified in earlier cases.” (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 538 [30 Cal.Rptr.2d 706], internal citations omitted.)
- “[T]he analysis under Civil Code section 51.5 is the same as the analysis we have already set forth for purposes of the [Unruh Civil Rights] Act.” (*Semler v. General Electric Capital Corp.* (2011) 196 Cal.App.4th 1380, 1404 [127 Cal.Rptr.3d 794].)
- “[W]hen such discrimination occurs, a person has standing under section 51.5 if he or she is ‘associated with’ the disabled person and has also personally experienced the discrimination.” (*Osborne v. Yasmeh* (2016) 1 Cal.App.5th 1118, 1134 [205 Cal.Rptr.3d 656].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 994–1015

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.10–116.13 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.20 (Matthew Bender)

3071. Retaliation for Refusing to Authorize Disclosure of Medical Information—Essential Factual Elements (Civ. Code, § 56.20(b))

[Name of plaintiff] **claims that** *[name of defendant]* **discriminated against** *[him/her/nonbinary pronoun]* **because** *[he/she/nonbinary pronoun]* **refused to authorize disclosure of** *[his/her/nonbinary pronoun]* **medical information to** *[name of defendant]*. **To establish this claim,** *[name of plaintiff]* **must prove all of the following:**

- 1. That** *[name of defendant]* **asked** *[name of plaintiff]* **to sign an authorization so that** *[name of defendant]* **could obtain medical information about** *[name of plaintiff]* **from** *[his/her/nonbinary pronoun]* **health care providers;**
- 2. That** *[name of plaintiff]* **refused to sign the authorization;**
- 3. That** *[name of defendant]* *[specify retaliatory acts, e.g., terminated plaintiff's employment];*
- 4. That** *[name of plaintiff]*'s **refusal to sign the authorization was a substantial motivating reason for** *[name of defendant]*'s **decision to** *[e.g., terminate plaintiff's employment];*
- 5. That** *[name of plaintiff]* **was harmed; and**
- 6. That** *[name of defendant]*'s **conduct was a substantial factor in causing** *[name of plaintiff]*'s **harm.**

Even if *[name of plaintiff]* **proves all of the above,** *[name of defendant]*'s **conduct was not unlawful if** *[name of defendant]* **proves that the lack of the medical information made it necessary to** *[e.g., terminate plaintiff's employment]*.

New June 2015; Revised May 2020

Directions for Use

An employer may not discriminate against an employee in terms or conditions of employment due to the employee's refusal to sign an authorization to release the employee's medical information to the employer. (Civ. Code, § 56.20(b).) However, an employer may take any action that is necessary in the absence of the medical information due to the employee's refusal to sign an authorization. (*Ibid.*)

Give this instruction if an employee claims that the employer retaliated against the employee for refusing to authorize release of medical information. The employee has the burden of proving a causal link between the refusal to authorize and the employer's retaliatory actions. The employer then has the burden of proving necessity. (See *Kao v. University of San Francisco* (2014) 229 Cal.App.4th 437, 453 [177 Cal.Rptr.3d 145].) If necessary, the instruction may be expanded to define

“medical information.” (See Civ. Code, § 56.05(j)(1), (2) [“medical information” defined].)

The statute requires that the employer’s retaliatory act be “due to” the employee’s refusal to release the medical information. (Civ. Code, § 56.20(b).) One court has instructed the jury that the refusal to release must be a “motivating reason” for the retaliation. (See *Kao, supra*, 229 Cal.App.4th at p. 453.) With regard to the causation standard under the Fair Employment and Housing Act, the California Supreme Court has held that the protected activity must have been a *substantial* motivating reason. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, “*Substantial Motivating Reason*” Explained.)

Sources and Authority

- Confidentiality of Medical Information Act. Civil Code section 56 et seq.
- Employee’s Refusal to Authorize Release of Medical Records to Employer. Civil Code section 56.20(b).
- “The first two elements of a prima facie section 56.20(b) claim are ‘that defendants asked [plaintiff] to sign an “authorization” and [plaintiff] refused to do so.’ An ‘authorization’ is defined in the CMIA as a written document that allows a health care provider or employer to disclose an individual’s medical information to others. Sections 56.11 and 56.21 detail what must be included in an ‘authorization’ under the CMIA, including typeface size, language clearly separated from any other print on the page, the signature of the patient and date of signature, the name of the employer authorized to disclose the medical information, limitations on the use of the medical information by the person authorized to receive the medical information, the date the document ceases to authorize an employer to release information, and the right of the patient to receive a copy of the authorization.” (*Frayo v. Martin* (2024) 102 Cal.App.5th 1025, 1035 [322 Cal.Rptr.3d 188], internal citations omitted.)
- “An employer ‘discriminates’ against an employee in violation of section 56.20, subdivision (b), if it improperly retaliates against or penalizes an employee for refusing to authorize the employee’s *health care provider* to disclose confidential medical information *to the employer or others* (see Civ. Code, § 56.11), or for refusing to authorize *the employer* to disclose confidential medical information relating to the employee *to a third party* (see Civ. Code, § 56.21).” (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 861 [59 Cal.Rptr.2d 696, 927 P.2d 1200], original italics.)
- “[T]he jury was instructed that if [plaintiff] proved his refusal to authorize release of confidential medical information for the FFD [fitness for duty examination] was ‘the motivating reason for [his] discharge,’ [defendant] ‘nevertheless avoids liability by showing that . . . its decision to discharge [plaintiff] was necessary because [plaintiff] refused to take the FFD examination.’ ” (*Kao, supra*, 229 Cal.App.4th at p. 453.)

Secondary Sources

3 Wilcox, California Employment Law, Ch. 51, *Confidentiality of Medical Information*, § 51.13

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.202[4]
(Matthew Bender)

**3102A. Employer Liability for Enhanced Remedies—Both
Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657,
15657.05; Civ. Code, § 3294(b))**

[Name of plaintiff] also claims that *[name of employer defendant]* is responsible for [attorney fees and costs/ [and] *[name of decedent]*’s pain and suffering before death]. To establish this claim, *[name of plaintiff]* must prove by clear and convincing evidence *[insert one or more of the following four options:]*

1. [That *[name of individual defendant]* was an officer, a director, or a managing agent of *[name of employer defendant]* acting on behalf of *[name of defendant]*;] [or]
2. [That an officer, a director, or a managing agent of *[name of employer defendant]* had advance knowledge of the unfitness of *[name of individual defendant]* and employed [him/her/nonbinary pronoun] with a knowing disregard of the rights or safety of others;] [or]
3. [That an officer, a director, or a managing agent of *[name of employer defendant]* authorized *[name of individual defendant]*’s conduct;] [or]
4. [That an officer, a director, or a managing agent of *[name of employer defendant]* knew of *[name of individual defendant]*’s wrongful conduct and adopted or approved the conduct after it occurred.]

An employee is a “managing agent” if the employee exercises substantial independent authority and judgment in corporate decisionmaking such that the employee’s decisions ultimately determine corporate policy.

[If *[name of plaintiff]* proves the above, I will decide the amount of attorney fees and costs.]

*Derived from former CACI No. 3102 October 2008; Revised April 2009, May 2020, July 2026**

Directions for Use

Proof by clear and convincing evidence is generally required for enhanced remedies under Welfare and Institutions Code section 15657. Do not include “by clear and convincing evidence” in the introductory paragraph if the court has determined that the applicable burden of proof is preponderance of the evidence under Welfare and Institutions Code section 15657.02 due to the defendant’s spoliation of evidence.

This instruction should be given with CACI No. 3104 (neglect), CACI No. 3107

(physical abuse), or CACI No. 3110 (abduction) if the plaintiff is seeking the enhanced remedies of attorney fees and costs and/or damages for a decedent's pain and suffering against an employer and the employee is also a defendant. (See Civ. Code, § 3294(b) Welf. & Inst. Code, §§ 15657(c), 15657.05.) If the employer is the only defendant, give CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*. The requirements of Civil Code section 3294(b) need not be met in order to obtain enhanced remedies from an employer for financial abuse. (See Welf. & Inst. Code, § 15657.5(c).)

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Enhanced Remedies for Physical Abuse, Neglect, or Abandonment. Welfare and Institutions Code section 15657.
- Preponderance of the Evidence Standard in Circumstances Involving Spoliation of Evidence by Certain Facilities. Welfare and Institutions Code section 15657.02.
- Enhanced Remedies Against Employer Based on Acts of Employee. Welfare and Institutions Code section 15657.5(c).
- Enhanced Remedies for Abduction. Welfare and Institutions Code section 15657.05.
- Punitive Damages Against Employer. Civil Code section 3294(b).
- “[A] finding of ratification of [agent’s] actions by [employer], and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence.” (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- “The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect.” (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
- “In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve ‘intentional,’ ‘willful,’ or ‘conscious’ wrongdoing of a ‘despicable’ or ‘injurious’ nature. ‘Recklessness’ refers to a subjective state of culpability greater than simple negligence, which has been described as a ‘deliberate disregard’ of the ‘high degree of probability’ that an injury will occur. Recklessness, unlike negligence, involves more than ‘inadvertence, incompetence, unskillfulness, or a failure to take precautions’ but rather rises to the level of a ‘conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.’ ” (*Delaney, supra*, 20 Cal.4th at pp. 31–32, internal citations omitted.)

CACI No. 3102A

- “As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died.” (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], disapproved on other grounds in *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 164 [202 Cal.Rptr.3d 447, 370 P.3d 1011], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1865–1871

Balisok, Civil Litigation Series: Elder Abuse Litigation, §§ 9:1, 9:67, 10:1 (The Rutter Group)

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.41–6.44

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

3102B. Employer Liability for Enhanced Remedies—Employer Defendant Only (Welf. & Inst. Code, §§ 15657, 15657.05; Civ. Code, § 3294(b))

[*Name of plaintiff*] also claims that [*name of defendant*] is responsible for [attorney fees and costs/ [and] [*name of decedent*]'s pain and suffering before death]. To establish this claim, [*name of plaintiff*] must prove by clear and convincing evidence [insert one or more of the following four options:]

1. [That the employee who committed the acts was an officer, a director, or a managing agent of [*name of defendant*] acting on behalf of [*name of defendant*]]; [or]
2. [That an officer, a director, or a managing agent of [*name of defendant*] had advance knowledge of the unfitness of the employee who committed the acts and employed [*him/her/nonbinary pronoun*] with a knowing disregard of the rights or safety of others;] [or]
3. [That an officer, a director, or a managing agent of [*name of defendant*] authorized the conduct of the employee who committed the acts;] [or]
4. [That an officer, a director, or a managing agent of [*name of defendant*] knew of the wrongful conduct of the employee who committed the acts and adopted or approved the conduct after it occurred.]

An employee is a “managing agent” if the employee exercises substantial independent authority and judgment in corporate decisionmaking such that the employee’s decisions ultimately determine corporate policy.

[If [*name of plaintiff*] proves the above, I will decide the amount of attorney fees and costs.]

*Derived from former CACI No. 3102 October 2008; Revised April 2009, May 2020, July 2026**

Directions for Use

Proof by clear and convincing evidence is generally required for enhanced remedies under Welfare and Institutions Code section 15657. Do not include “by clear and convincing evidence” in the introductory paragraph if the court has determined that the applicable burden of proof is preponderance of the evidence under Welfare and Institutions Code section 15657.02 due to the defendant’s spoliation of evidence.

This instruction should be given with CACI No. 3104 (neglect), CACI No. 3107

CACI No. 3102B

(physical abuse), or CACI No. 3110 (abduction) if the plaintiff is seeking the enhanced remedies of attorney fees and costs and/or damages for a decedent's pain and suffering against an employer and the employee is not also a defendant. (See Civ. Code, § 3294(b); Welf. & Inst. Code, §§ 15657(c), 15677.05.) If the employee is also a defendant, give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*. The requirements of Civil Code section 3294(b) need not be met in order to obtain enhanced remedies from an employer for financial abuse. (See Welf. & Inst. Code, § 15657.5(c).)

Sources and Authority

- Enhanced Remedies for Physical Abuse, Neglect, or Abandonment. Welfare and Institutions Code section 15657.
- Preponderance of the Evidence Standard in Circumstances Involving Spoliation of Evidence by Certain Facilities. Welfare and Institutions Code section 15657.02.
- Enhanced Remedies Against Employer for Acts of Employee. Welfare and Institutions Code section 15657.5(c).
- Enhanced Remedies for Abduction. Welfare and Institutions Code section 15657.05.
- Punitive Damages Against Employer. Civil Code section 3294(b).
- “[A] finding of ratification of [agent’s] actions by [employer], and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence.” (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- “The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect.” (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
- “As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died.” (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], disapproved on other grounds in *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 164 [202 Cal.Rptr.3d 447, 370 P.3d 1011], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1865–1871

Balisok, Civil Litigation Series: Elder Abuse Litigation, §§ 9:1, 9:67, 10:1 (The Rutter Group)

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.41–6.44

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*,
§ 5.35 (Matthew Bender)

3104. Neglect—Enhanced Remedies Sought (Welf. & Inst. Code, § 15657)

[Name of plaintiff] also seeks to recover [attorney fees and costs/ [and] damages for [name of decedent]’s pain and suffering]. To recover these remedies, [name of plaintiff] must prove all of the requirements for neglect by clear and convincing evidence, and must also prove by clear and convincing evidence that [[name of individual defendant]/[name of employer defendant]’s employee] acted with [recklessness/oppression/fraud/ [or] malice] in neglecting [name of plaintiff/decedent].

[If [name of plaintiff] proves the above, I will decide the amount of attorney fees and costs.]

*New September 2003; Revised June 2005, October 2008, July 2026**

Directions for Use

Proof by clear and convincing evidence is generally required for enhanced remedies under Welfare and Institutions Code section 15657. Do not include “by clear and convincing evidence” in the first paragraph if the court has determined that the applicable burden of proof is preponderance of the evidence under Welfare and Institutions Code section 15657.02 due to the defendant’s spoliation of evidence.

Give this instruction along with CACI No. 3103, *Neglect—Essential Factual Elements*, if the plaintiff seeks the enhanced remedies of attorney fees and costs and damages for the decedent’s predeath pain and suffering. (See Welf. & Inst. Code, § 15657.)

If the individual responsible for the neglect is a defendant in the case, use “[name of individual defendant].” If only the individual’s employer is a defendant, use “[name of employer defendant]’s employee.”

If the plaintiff is seeking enhanced remedies against the individual’s employer, also give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*, or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*.

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Enhanced Remedies for Neglect. Welfare and Institutions Code section 15657.
- Preponderance of the Evidence Standard in Circumstances Involving Spoliation of Evidence by Certain Facilities. Welfare and Institutions Code section 15657.02.

- “In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve ‘intentional,’ ‘willful,’ or ‘conscious’ wrongdoing of a ‘despicable’ or ‘injurious’ nature. [¶] ‘Recklessness’ refers to a subjective state of culpability greater than simple negligence, which has been described as a ‘deliberate disregard’ of the ‘high degree of probability’ that an injury will occur. Recklessness, unlike negligence, involves more than ‘inadvertence, incompetence, unskillfulness, or a failure to take precautions’ but rather rises to the level of a ‘conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.’ ” (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31–32 [82 Cal.Rptr.2d 610, 971 P.2d 986], internal citations omitted.)
- “As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died.” (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], disapproved on other grounds in *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 164 [202 Cal.Rptr.3d 447, 370 P.3d 1011], internal citations omitted.)
- “The effect of the 1991 amendment to the elder abuse law was to . . . permit a decedent’s personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the \$250,000 cap placed by Civil Code section 3333.2, subdivision (b) for noneconomic damages against a health care provider. In this limited circumstance, the decedent’s right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor.” (*ARA Living Centers—Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224].)
- “[I]f the neglect is ‘reckless[,]’ or done with ‘oppression, fraud or malice,’ then the action falls within the scope of section 15657 and as such cannot be considered simply ‘based on . . . professional negligence’ within the meaning of section 15657.2. The use of such language in section 15657, and the explicit exclusion of ‘professional negligence’ in section 15657.2, make clear the Elder Abuse Act’s goal was to provide heightened remedies for, as stated in the legislative history, ‘acts of egregious abuse’ against elder and dependent adults, while allowing acts of negligence in the rendition of medical services to elder and dependent adults to be governed by laws specifically applicable to such negligence. That only these egregious acts were intended to be sanctioned under section 15657 is further underscored by the fact that the statute requires liability to be proved by a heightened ‘clear and convincing evidence’ standard.”

(*Delaney, supra*, 20 Cal.4th at p. 35, internal citation omitted.)

- “[W]e distill several factors that must be present for conduct to constitute neglect within the meaning of the Elder Abuse Act and thereby trigger the enhanced remedies available under the Act. The plaintiff must allege (and ultimately prove by clear and convincing evidence) facts establishing that the defendant (1) had responsibility for meeting the basic needs of the elder or dependent adult, such as nutrition, hydration, hygiene or medical care; (2) knew of conditions that made the elder or dependent adult unable to provide for his or her own basic needs; and (3) denied or withheld goods or services necessary to meet the elder or dependent adult’s basic needs, either with knowledge that injury was substantially certain to befall the elder or dependent adult (if the plaintiff alleges oppression, fraud or malice) or with conscious disregard of the high probability of such injury (if the plaintiff alleges recklessness). The plaintiff must also allege (and ultimately prove by clear and convincing evidence) that the neglect caused the elder or dependent adult to suffer physical harm, pain or mental suffering.” (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 406–407 [129 Cal.Rptr.3d 895], internal citations omitted.)
- “ ‘Liability’ under section 15657 includes as an element ‘causation,’ which, as all elements of liability, must be proved by clear and convincing evidence for purposes of an award of attorney fees.” (*Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 664 [77 Cal.Rptr.3d 743].)
- “We reject plaintiffs’ argument that a violation of the Act does not constitute an independent cause of action. Accordingly, plaintiffs’ failure to obtain a verdict establishing causation—one element of liability—by clear and convincing evidence, precludes an award of attorney fees.” (*Perlin, supra*, 163 Cal.App.4th at p. 666.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1865–1871

Balisok, Civil Litigation Series: Elder Abuse Litigation, §§ 9:1, 9:9, 9:11.1 (The Rutter Group)

California Elder Law Litigation (Cont.Ed.Bar 2003) § 2.72

3 Levy et al., California Torts, Ch. 31 *Liability of Physicians and Other Medical Practitioners*, § 31.50[4][d] (Matthew Bender)

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

3107. Physical Abuse—Enhanced Remedies Sought (Welf. & Inst. Code, § 15657)

[Name of plaintiff] also seeks to recover [attorney fees and costs/ [and] damages for [name of decedent]’s pain and suffering]. To recover these remedies, [name of plaintiff] must prove all of the requirements for the physical abuse by clear and convincing evidence, and must also prove by clear and convincing evidence that [[name of individual defendant]/[name of employer defendant]’s employee] acted with [recklessness/oppresion/fraud/ [or] malice] in physically abusing [name of plaintiff].

[If [name of plaintiff] proves the above, I will decide the amount of attorney fees and costs.]

*New September 2003; Revised June 2005, October 2008, July 2026**

Directions for Use

Give this instruction along with CACI No. 3106, *Physical Abuse—Essential Factual Elements*, if the plaintiff seeks the enhanced remedies of attorney fees and costs and damages for the decedent’s predeath pain and suffering. (See Welf. & Inst. Code, § 15657.) Proof by clear and convincing evidence is generally required for enhanced remedies under Welfare and Institutions Code section 15657. Do not include “by clear and convincing evidence” in the first paragraph if the court has determined that the applicable burden of proof is preponderance of the evidence under Welfare and Institutions Code section 15657.02 due to the defendant’s spoliation of evidence.

If the individual responsible for the physical abuse is a defendant in the case, use “[name of individual defendant].” If only the individual’s employer is a defendant, use “[name of employer defendant]’s employee.”

If the plaintiff is seeking enhanced remedies against the individual’s employer, also give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*, or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*.

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Enhanced Remedies for Physical Abuse. Welfare and Institutions Code section 15657.
- Preponderance of the Evidence Standard in Circumstances Involving Spoliation of Evidence by Certain Facilities. Welfare and Institutions Code section 15657.02.

- “In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve ‘intentional,’ ‘willful,’ or ‘conscious’ wrongdoing of a ‘despicable’ or ‘injurious’ nature. [¶] ‘Recklessness’ refers to a subjective state of culpability greater than simple negligence, which has been described as a ‘deliberate disregard’ of the ‘high degree of probability’ that an injury will occur. Recklessness, unlike negligence, involves more than ‘inadvertence, incompetence, unskillfulness, or a failure to take precautions’ but rather rises to the level of a ‘conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.’ ” (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31–32 [82 Cal.Rptr.2d 610, 971 P.2d 986], internal citations omitted.)
- “As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died.” (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], disapproved on other grounds in *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 164 [202 Cal.Rptr.3d 447, 370 P.3d 1011], internal citations omitted.)
- “The effect of the 1991 amendment to the elder abuse law was to . . . permit a decedent’s personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the \$250,000 cap placed by Civil Code section 3333.2, subdivision (b) for noneconomic damages against a health care provider. In this limited circumstance, the decedent’s right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor.” (*ARA Living Centers—Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224].)
- “The Elder Abuse Act provides enhanced remedies for victims. A prevailing plaintiff is entitled to an award of attorney fees. A deceased victim’s successor is entitled to an award of some noneconomic damages. There is no basis for interpreting the Elder Abuse Act as restricting an award of damages for those fortunate enough to have survived the abuse.” (*Samantha B. v. Aurora Vista Del Mar, LLC* (2022) 77 Cal.App.5th 85, 104 [292 Cal.Rptr.3d 324], internal citations omitted.)
- “[I]f the neglect is ‘reckless[,]’ or done with ‘oppression, fraud or malice,’ then the action falls within the scope of section 15657 and as such cannot be considered simply ‘based on . . . professional negligence’ within the meaning of section 15657.2. The use of such language in section 15657, and the explicit exclusion of ‘professional negligence’ in section 15657.2, make clear the Elder

Abuse Act's goal was to provide heightened remedies for, as stated in the legislative history, 'acts of egregious abuse' against elder and dependent adults, while allowing acts of negligence in the rendition of medical services to elder and dependent adults to be governed by laws specifically applicable to such negligence. That only these egregious acts were intended to be sanctioned under section 15657 is further underscored by the fact that the statute requires liability to be proved by a heightened 'clear and convincing evidence' standard." (*Delaney, supra*, 20 Cal.4th at p. 35, internal citation omitted.)

- " 'Liability' under section 15657 includes as an element 'causation,' which, as all elements of liability, must be proved by clear and convincing evidence for purposes of an award of attorney fees." (*Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 664 [77 Cal.Rptr.3d 743].)
- "We reject plaintiffs' argument that a violation of the Act does not constitute an independent cause of action. Accordingly, plaintiffs' failure to obtain a verdict establishing causation—one element of liability—by clear and convincing evidence, precludes an award of attorney fees." (*Perlin, supra*, 163 Cal.App.4th at p. 666.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1865–1871

Balisok, Civil Litigation Series: Elder Abuse Litigation, §§ 9:1, 9:9, 9:28 (The Rutter Group)

California Elder Law Litigation (Cont.Ed.Bar 2003) § 2.72

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, §§ 5.35, 5.37 (Matthew Bender)

**VF-3102. Neglect—Individual or Individual and Employer
Defendants (Welf. & Inst. Code, §§ 15610.57, 15657; Civ. Code,
§ 3294(b))**

We answer the questions submitted to us as follows:

1. Was *[name of plaintiff/decedent]* **[65 years of age or older/a dependent adult]** while *[he/she/nonbinary pronoun]* was in *[name of employee defendant]*'s care or custody?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did *[name of employee defendant]* have a substantial caretaking or custodial relationship with *[name of plaintiff/decedent]*, involving ongoing responsibility for *[his/her/nonbinary pronoun]* basic needs?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did *[name of employee defendant]* fail to use that degree of care that a reasonable person in the same situation would have used in assisting in personal hygiene or in the provision of food, clothing, or shelter?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was *[name of employee defendant]*'s conduct a substantial factor in causing harm to *[name of plaintiff/decedent]*?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5 [and] question[s] *[select 6 if the defendants are only individuals or both 6 and 7 if an employer is also a defendant]*. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are *[name of plaintiff/decedent]*'s damages?

[a. Past economic loss

[lost earnings \$_____]
 [lost profits \$_____]
 [medical expenses \$_____]
 [other past economic loss \$_____]

Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings \$_____]
 [lost profits \$_____]
 [medical expenses \$_____]
 [other future economic loss \$_____]

Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$_____]

TOTAL \$_____

- [6. Did *[name of plaintiff]* prove 1 through 4 above by clear and convincing evidence and also prove by clear and convincing evidence that *[name of employee defendant]* acted with [recklessness/malice/oppression/ [or] fraud]?**

_____ Yes _____ No

[If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

- [7. Did *[name of plaintiff]* prove by clear and convincing evidence that an officer, a director, or a managing agent of *[name of employer defendant]* had advance knowledge of the unfitness of *[name of employee defendant]* and employed [him/her/nonbinary pronoun] with a knowing disregard of the rights or safety of others?**

_____ Yes _____ No]

[If your answer to question 6 [or 7] is yes, then answer question 8. If you answered no to question 7, stop here, answer no further questions, and have the presiding juror sign and date this form.]

- [8. What were *[name of decedent]*'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?**

\$_____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, April 2008, October 2008, December 2010, December 2016, November 2017, May 2024, July 2026

Directions for Use

This verdict form is based on CACI No. 3103, *Neglect—Essential Factual Elements*, CACI No. 3104, *Neglect—Enhanced Remedies Sought*, and CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Question 3 can be modified to correspond to the alleged wrongful conduct as in element 3 of CACI No. 3103.

Optional questions 6, 7, and 8 address enhanced remedies. Proof by clear and convincing evidence is generally required for enhanced remedies under Welfare and Institutions Code section 15657. Do not include “by clear and convincing evidence” in question 6 or question 7 if the court has determined that the applicable burden of proof is preponderance of the evidence under Welfare and Institutions Code section 15657.02 due to the defendant’s spoliation of evidence.

If the plaintiff proves neglect by clear and convincing evidence, and also proves by clear and convincing evidence that the individual defendant acted with recklessness, malice, oppression, or fraud, the plaintiff may recover attorney fees, costs, and damages for a decedent’s predeath pain and suffering. (See Welf. & Inst. Code, § 15657.) If any of these remedies are sought against the employer, include question 7. (See Welf. & Inst. Code, § 15657(c).) Question 7 may be altered to correspond to one of the alternative bracketed options for employer liability in CACI No. 3102A.

If any enhanced remedies are sought against either the individual or the employer, include question 6. If the neglect led to the elder’s death, in question 5 include only item 5a for past economic loss. But also include the transitional language after question 7 and include question 8.

In the transitional language after question 4, direct the jury to answer question 6 or both questions 6 and 7, depending on whether the employer is also a defendant. Use CACI No. VF-3103, *Neglect—Employer Defendant Only*, instead if the case involves only the employer defendant.

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3103. Neglect—Employer Defendant Only (Welf. & Inst. Code, §§ 15610.57, 15657; Civ. Code, § 3294(b))

We answer the questions submitted to us as follows:

- 1. Was [name of plaintiff/decedent] [65 years of age or older/a dependent adult] while [he/she/nonbinary pronoun] was in [name of defendant]’s care or custody?**

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- 2. Was [name of plaintiff/decedent] in [name of defendant]’s care or custody?**

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- 3. Did one or more of [name of defendant]’s employees fail to use that degree of care that a reasonable person in the same situation would have used in assisting in personal hygiene or in the provision of food, clothing, or shelter?**

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- 4. Was the employee’s conduct a substantial factor in causing harm to [name of plaintiff/decedent]?**

_____ Yes _____ No

If your answer to question 4 is yes, then answer question[s] 5 [and 6]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- 5. What are [name of plaintiff/decedent]’s damages?**

[a. Past economic loss

[lost earnings \$_____]

[lost profits \$_____]

[medical expenses \$_____]

[other past economic loss \$_____]

Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings \$_____]

[lost profits \$_____]

[medical expenses \$_____]

[other future economic loss \$_____]

Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$_____]

TOTAL \$_____

- 6. Did [*name of plaintiff*] prove by clear and convincing evidence that an officer, a director, or a managing agent of [*name of defendant*] had advance knowledge of the unfitness of the employee and employed [*him/her/nonbinary pronoun*] with a knowing disregard of the rights or safety of others?**

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- 7. Did [*name of plaintiff*] prove 1 through 4 above by clear and convincing evidence and also prove by clear and convincing evidence that the employee acted with [recklessness/malice/oppression/ [or] fraud]?**

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- 8. What were [*name of decedent*]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?**

\$_____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

*New September 2003; Revised April 2007, April 2008, October 2008, December 2010, December 2016, May 2024, July 2026**

Directions for Use

This verdict form is based on CACI No. 3103, *Neglect—Essential Factual Elements*, CACI No. 3104, *Neglect—Enhanced Remedies Sought*, and CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Question 3 can be modified to correspond to the alleged wrongful conduct as in element 3 of CACI No. 3103.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Questions 6 and 7 are required to obtain employer liability for enhanced remedies, including attorney fees and costs. (See Welf. & Inst. Code, § 15657; Code Civ. Proc., § 377.34.) Proof by clear and convincing evidence is generally required for enhanced remedies under Welfare and Institutions Code section 15657. Do not include “by clear and convincing evidence” in either question 6 or question 7 if the court has determined that the applicable burden of proof is preponderance of the evidence under Welfare and Institutions Code section 15657.02 due to the defendant’s spoliation of evidence. Question 6 may be altered to correspond to one of the alternative bracketed options in CACI No. 3102B.

If the neglect led to the elder’s death, in question 5 include only item 5a for past economic loss. But also include the transitional language after question 7 and include question 8.

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat’l Bank* (1978) 21 Cal.3d 801,

814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

[medical expenses \$_____]

[other future economic loss \$_____]

Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$_____]

TOTAL \$_____

- [5. Did *[name of plaintiff]* prove 1 through 3 above by clear and convincing evidence and also prove by clear and convincing evidence that *[name of employee defendant]* acted with [recklessness/malice/oppression/ [or] fraud]?**

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

- [6. Did *[name of plaintiff]* prove by clear and convincing evidence that an officer, a director, or a managing agent of *[name of employer defendant]* had advance knowledge of the unfitness of *[name of employee defendant]* and employed [him/her/nonbinary pronoun] with a knowing disregard of the rights or safety of others?**

_____ Yes _____ No]

[If your answer to [either] question 5 [or 6] is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

- [7. What were *[name of decedent]*'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?**

\$_____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

Directions for Use

This verdict form is based on CACI No. 3106, *Physical Abuse—Essential Factual Elements*, CACI No. 3107, *Physical Abuse—Enhanced Remedies Sought*, and CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Optional questions 5, 6, and 7 address enhanced remedies. Proof by clear and convincing evidence is generally required for enhanced remedies under Welfare and Institutions Code section 15657. Do not include “by clear and convincing evidence” in either question 5 or question 6 if the court has determined that the applicable burden of proof is preponderance of the evidence under Welfare and Institutions Code section 15657.02 due to the defendant’s spoliation of evidence.

If the plaintiff proves the physical abuse by clear and convincing evidence, and also proves by clear and convincing evidence that the individual defendant acted with recklessness, malice, oppression, or fraud, the plaintiff may recover attorney fees, costs, and damages for a decedent’s predeath pain and suffering. (See Welf. & Inst. Code, § 15657.) If any of these remedies are sought against the employer, include question 6. (See Welf. & Inst. Code, § 15657(c).) Question 6 may be altered to correspond to one of the alternative bracketed options for employer liability in CACI No. 3102A.

If any enhanced remedies are sought against either the individual or the employer, include question 5. If the physical abuse led to the neglected elder’s death, in question 4 include only item 4a for past economic loss. But also include the transitional language after question 6 and include question 7.

In the transitional language after question 3, direct the jury to answer question 5 or both questions 5 and 6, depending on whether the employer is also a defendant. Use CACI No. VF-3105, *Physical Abuse—Employer Defendant Only*, instead if the case involves only an employer defendant.

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat’l Bank* (1978) 21 Cal.3d 801,

814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$_____]

TOTAL \$_____

5. Did [*name of plaintiff*] prove by clear and convincing evidence that an officer, a director, or a managing agent of [*name of defendant*] had advance knowledge of the unfitness of the employee and employed [him/her/nonbinary pronoun/them] with a knowing disregard of the rights or safety of others?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of plaintiff*] prove 1 through 3 by clear and convincing evidence and also prove by clear and convincing evidence that the employee acted with [recklessness/malice/oppression/ [or] fraud]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What were [*name of decedent*]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?

\$_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

*New September 2003; Revised April 2007, April 2008, October 2008, December 2010, December 2016, May 2024, July 2026**

Directions for Use

This verdict form is based on CACI No. 3106, *Physical Abuse—Essential Factual Elements*, CACI No. 3107, *Physical Abuse—Enhanced Remedies Sought*, and CACI

VF-3105

No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Questions 5 and 6 are required to obtain employer liability for enhanced remedies, including attorney fees and costs. (See Welf. & Inst. Code, § 15657; Code Civ. Proc., § 377.34.) Proof by clear and convincing evidence is generally required for enhanced remedies under Welfare and Institutions Code section 15657. Do not include “by clear and convincing evidence” in question 5 or question 6 if the court has determined that the applicable burden of proof is preponderance of the evidence under Welfare and Institutions Code section 15657.02 due to the defendant’s spoliation of evidence. Question 5 may be altered to correspond to one of the alternative bracketed options in CACI No. 3102B.

If the physical abuse led to the elder’s death, in question 4 include only item 4a for past economic loss. But also include the transitional language after question 6 and include question 7.

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat’l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3108–VF-3199. Reserved for Future Use

Table A. Elder Abuse: Causes of Action, Remedies, and Employer Liability

CAUSES OF ACTION	INDIVIDUAL DEFENDANT	EMPLOYER DEFENDANT
FINANCIAL ABUSE	Traditional Damages: preponderance	Traditional Damages: vicarious liability
	Attorney Fees and Costs: preponderance (Welf. & Inst. Code, § 15657.5(a))	Attorney Fees and Costs: vicarious liability (Welf. & Inst. Code, § 15657.5(c))
	Pre-death Pain and Suffering: CCE:RMOF (Welf. & Inst. Code, § 15657.5(b))	Pre-death Pain and Suffering: vicarious liability + individual CCE:RMOF (Welf. & Inst. Code, § 15657.5(b), (c))
ABDUCTION	Traditional Damages: preponderance	Traditional Damages: vicarious liability
	Attorney Fees and Costs: CCE (Welf. & Inst. Code, § 15657.05(a))	Attorney Fees and Costs: Civ. § Code 3294(b) + individual CCE (Welf. & Inst. Code, § 15657.05(c))
	Pre-death Pain and Suffering: CCE (Welf. & Inst. Code, § 15657.05(b))	Pre-death Pain and Suffering: Civ. Code, § 3294(b) + individual CCE (Welf. & Inst. Code, § 15657.05(c))
NEGLECT AND PHYSICAL ABUSE	Traditional Damages: preponderance	Traditional Damages: vicarious liability
	Attorney Fees and Costs: CCE:RMOF (Welf. & Inst. Code, § 15657(a))	Attorney Fees and Costs: Civ. Code, § 3294(b) + individual CCE:RMOF (Welf. & Inst. Code, § 15657(a)*)
	Pre-death Pain and Suffering: CCE:RMOF (Welf. & Inst. Code, § 15657(b))	Pre-death Pain and Suffering: Civ. Code, § 3294(b) + individual CCE:RMOF (Welf. & Inst. Code, § 15657(b)*)

KEY: CCE = Clear and Convincing Evidence

RMOF = Recklessness, Malice, Oppression, or Fraud

Table A

Civ. Code, § 3294(b) = Standards for imposing liability on employer under Civil Code section 3294(b).

***Welf. & Inst. Code, §§ 15657, 15657.02** = Preponderance of the evidence standard if court has determined that spoliation of evidence has been committed by a residential care facility for the elderly, an adult community care facility, or a skilled nursing facility.

3920. Loss of Consortium (Noneconomic Damage)

[Name of plaintiff] claims that *[he/she/nonbinary pronoun]* has been harmed by the injury to *[his/her/nonbinary pronoun]* *[husband/wife/spouse/domestic partner]*. If you decide that *[name of injured spouse]* has proved *[his/her/nonbinary pronoun]* claim against *[name of defendant]*, you also must decide how much money, if any, will reasonably compensate *[name of plaintiff]* for loss of *[his/her/nonbinary pronoun]* *[husband/wife/spouse/domestic partner]*'s companionship and services, including:

1. The loss of love, companionship, comfort, care, assistance, protection, affection, society, and moral support; and
2. The loss of the enjoyment of sexual relations [or the ability to have children].

[[Name of plaintiff] may recover for harm *[he/she/nonbinary pronoun]* proves *[he/she/nonbinary pronoun]* has suffered to date and for harm *[he/she/nonbinary pronoun]* is reasonably certain to suffer in the future.

For future harm, determine the amount in current dollars paid at the time of judgment that will compensate *[name of plaintiff]* for that harm. This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to economic damages.]

No fixed standard exists for deciding the amount of these damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

Do not include in your award any compensation for the following:

1. The loss of financial support from *[name of injured spouse]*;
2. Personal services, such as nursing, that *[name of plaintiff]* has provided or will provide to *[name of injured spouse]*;
3. Any loss of earnings that *[name of plaintiff]* has suffered by giving up employment to take care of *[name of injured spouse]*; or
4. The cost of obtaining domestic household services to replace services that would have been performed by *[name of injured spouse]*.

New September 2003; Revised December 2010, July 2026

Directions for Use

Loss of consortium is considered a noneconomic damages item under Proposition

51. (Civ. Code, § 1431.2(b)(2).) Loss of future consortium is recoverable, including loss of consortium because of reduced life expectancy. (See *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 799–800 [108 Cal.Rptr.3d 806, 230 P.3d 342].) In such a case, this instruction may need to be modified.

Give the second and third paragraphs if recovery for loss of future consortium is sought. Future noneconomic damages should not be reduced to present value. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585].)

Sources and Authority

- Noneconomic Damages for Loss of Consortium. Civil Code section 1431.2(b)(2).
- “Domestic Partners” Defined and Rights, Benefits, and Protections. Family Code sections 297, 297.5.
- “We . . . declare that in California each spouse has a cause of action for loss of consortium, as defined herein, caused by a negligent or intentional injury to the other spouse by a third party.” (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 408 [115 Cal.Rptr. 765, 525 P.2d 669].)
- “There are four elements to a cause of action for loss of consortium: ‘(1) a valid and lawful marriage between the plaintiff and the person injured at the time of the injury; [¶] (2) a tortious injury to the plaintiff’s spouse; [¶] (3) loss of consortium suffered by the plaintiff; and [¶] (4) the loss was proximately caused by the defendant’s act.’ ” (*Vanhooser v. Superior Court* (2012) 206 Cal.App.4th 921, 927 [142 Cal.Rptr.3d 230].)
- “The concept of consortium includes not only loss of support or services; it also embraces such elements as love, companionship, comfort, affection, society, sexual relations, the moral support each spouse gives the other through the triumph and despair of life, and the deprivation of a spouse’s physical assistance in operating and maintaining the family home.” (*Ledger v. Tippitt* (1985) 164 Cal.App.3d 625, 633 [210 Cal.Rptr. 814], disapproved of on other grounds in *Elden v. Sheldon* (1988) 46 Cal.3d 267, 277 [250 Cal.Rptr. 254, 758 P.2d 582].)
- “Since he has no cause of action in tort his spouse has no cause of action for loss of consortium.” (*Blain v. Doctor’s Co.* (1990) 222 Cal.App.3d 1048, 1067 [272 Cal.Rptr. 250].)
- “The California Supreme Court in *Rodriguez, supra*, 12 Cal.3d at page 409, expressly recognized the right to recover damages for the ‘loss or impairment’ of the plaintiff’s rights of consortium, and we see no basis to conclude that a loss of consortium must be so extensive as to be considered complete in order to be compensable. Instead, a partial loss, or diminution, of consortium is compensable.” (*Mealy v. B-Mobile, Inc.* (2011) 195 Cal.App. 4th 1218, 1224 [124 Cal.Rptr.3d 804].)
- “[S]hould [husband] prevail in his own cause of action against these defendants, he will be entitled to recover, among his medical expenses, the full cost of whatever home nursing is necessary. To allow [wife] also to recover the value of

her nursing services, however personalized, would therefore constitute double recovery.” (*Rodriguez, supra*, 12 Cal.3d at p. 409, internal citations omitted.)

- “For the same reason, [wife] cannot recover for the loss of her earnings and earning capacity assertedly incurred when she quit her job in order to furnish [husband] these same nursing services. To do so would be to allow her to accomplish indirectly that which we have just held she cannot do directly.” (*Rodriguez, supra*, 12 Cal.3d at p. 409.)
- “The deprivation of a husband’s physical assistance in operating and maintaining the home is a compensable item of loss of consortium.” (*Rodriguez, supra*, 12 Cal.3d at p. 409, fn. 31, internal citations omitted.)
- “Although the trial court labeled the damages awarded [plaintiff] as being for ‘loss of consortium’ (a noneconomic damages item under Proposition 51), much of the testimony at trial actually involved the ‘costs of obtaining substitute domestic services’ on her behalf (an economic damage item in the statute).” (*Kellogg v. Asbestos Corp. Ltd.* (1996) 41 Cal.App.4th 1397, 1408 [49 Cal.Rptr.2d 256].)
- “Whether the degree of harm suffered by the plaintiff’s spouse is sufficiently severe to give rise to a cause of action for loss of consortium is a matter of proof. When the injury is emotional rather than physical, the plaintiff may have a more difficult task in proving negligence, causation, and the requisite degree of harm; but these are questions for the jury, as in all litigation for loss of consortium. In *Rodriguez* we acknowledged that the loss is ‘principally a form of mental suffering,’ but nevertheless declared our faith in the ability of the jury to exercise sound judgment in fixing compensation. We reaffirm that faith today.” (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 933 [167 Cal.Rptr. 831, 616 P.2d 813], internal citations omitted.)
- “We . . . conclude that we should not recognize a cause of action by a child for loss of parental consortium.” (*Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441, 451 [138 Cal.Rptr. 302, 563 P.2d 858].)
- A parent may not recover loss of consortium damages for injury to his or her child. (*Baxter v. Superior Court* (1977) 19 Cal.3d 461 [138 Cal.Rptr. 315, 563 P.2d 871].)
- Unmarried cohabitants may not recover damages for loss of consortium. (*Elden, supra*, 46 Cal.3d at p. 277.)
- Under Proposition 51, damages for loss of consortium may be reduced by the negligence of the injured spouse. (*Craddock v. Kmart Corp.* (2001) 89 Cal.App.4th 1300, 1309–1310 [107 Cal.Rptr.2d 881]; *Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1810–1811 [34 Cal.Rptr.2d 732].)
- “‘To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the

original injury.’ ” (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- “[I]n a common law action for loss of consortium, the plaintiff can recover not only for the loss of companionship and affection through the time of the trial but also for any future loss of companionship and affection that is sufficiently certain to occur. In *Rodriguez*, we held that when a plaintiff’s spouse is permanently disabled as a result of a defendant’s wrongdoing, future (posttrial) loss of companionship and affection is sufficiently certain to permit an award of prospective damages. If instead the injured spouse will soon die as a result of his or her injuries, the future (posttrial) loss of companionship and affection is no less certain. In short, we see no reason to make an exception here to the general rule permitting an award of prospective damages in civil tort actions. Therefore, under long-standing principles of tort liability, the recovery of prospective damages in a common law action for loss of consortium includes damages for lost companionship and affection resulting from the anticipated (and sufficiently certain) premature death of the injured spouse.” (*Boeken, supra*, 48 Cal.4th at pp. 799–800, internal citation omitted.)
- “[T]he plaintiff in a common law action for loss of consortium may not recover for loss during a period in which the companionship and affection of the injured spouse would have been lost anyway, irrespective of the defendant’s wrongdoing, and therefore the life expectancy of the plaintiff and the life expectancy of the injured spouse, whichever is shorter, necessarily places an outer limit on damages.” (*Boeken, supra*, 48 Cal.4th at p. 800.)
- “[W]here an injury to a spouse that in turn causes injury to the plaintiff’s right to consortium in the marital relationship is not discovered or discoverable until after the couple’s marriage, and the underlying cause of action thus accrues during the marriage, the plaintiff has a valid claim for loss of consortium even though the negligent conduct may have predated the marriage.” (*Leonard v. John Crane, Inc.* (2012) 206 Cal.App.4th 1274, 1290 [142 Cal.Rptr.3d 700]; see also *Vanhooser, supra*, 206 Cal.App.4th at pp. 927–930 [reaching same result].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1857–1864

California Tort Damages (Cont.Ed.Bar) Loss of Consortium, §§ 2.6–2.7

4 Levy et al., California Torts, Ch. 56, *Loss of Consortium*, § 56.08 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 354, *Loss of Consortium*, §§ 354.12, 354.14 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.25 (Matthew Bender)

California Civil Practice: Torts §§ 10:10–10:16 (Thomson Reuters)

1-2 California Damages: Law and Proof, Ch. 2, *Injured Spouses and Parents*, § 2.2 (Matthew Bender)

VF-3907. Damages for Loss of Consortium (Noneconomic Damage)

We answer the question submitted to us as follows:

1. What are [name of plaintiff]'s damages for loss of [his/her/nonbinary pronoun] [husband/wife/spouse/domestic partner]'s love, companionship, comfort, care, assistance, protection, affection, society, moral support, and enjoyment of sexual relations [or the ability to have children]?

\$_____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New April 2004; Revised December 2010, May 2024, July 2026

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Normally, this form should be combined with the verdict form(s) on the underlying cause(s) of action. Insert the name of the spouse of the injured party as "name of plaintiff."

This form is based on CACI No. 3920, *Loss of Consortium (Noneconomic Damage)*.

4000. Conservatorship—Essential Factual Elements

[*Name of petitioner*] **claims that [*name of respondent*] is gravely disabled due to [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and a severe substance use disorder/impairment by chronic alcoholism] and therefore [should be placed in a conservatorship/the conservatorship should be renewed]. In a conservatorship, a conservator is appointed to oversee, under the direction of the court, the care of persons who are gravely disabled. To succeed on this claim, [*name of petitioner*] must prove beyond a reasonable doubt both of the following:**

1. **That [*name of respondent*] [has a [mental health disorder/severe substance use disorder/co-occurring mental health disorder and severe substance use disorder]/is impaired by chronic alcoholism]; and**
 2. **That [*name of respondent*] is gravely disabled as a result of the [mental health disorder/severe substance use disorder/co-occurring mental health disorder and severe substance use disorder/chronic alcoholism].**
-

*New June 2005; Revised June 2016, May 2022, May 2024, July 2026**

Directions for Use

Give CACI No. 4002, “Gravely Disabled” Explained, with this instruction.

Select the appropriate option in the first sentence depending on whether the case involves an initial petition to establish a conservatorship or a successive petition for reappointment. (Welf. & Inst. Code, §§ 5350, 5361(b).)

A different instruction will be required if the standard for mental incompetence under Penal Code section 1370 is alleged. (Welf. & Inst. Code, § 5008(h)(1)(B).)

Sources and Authority

- Right to Jury Trial. Welfare and Institutions Code section 5350(d).
- “Gravely Disabled” Defined. Welfare and Institutions Code section 5008(h).
- “The Lanterman-Petris-Short Act (the act) governs the involuntary treatment of the mentally ill in California. Enacted by the Legislature in 1967, the act includes among its goals ending the inappropriate and indefinite commitment of the mentally ill, providing prompt evaluation and treatment of persons with serious mental disorders, guaranteeing and protecting public safety, safeguarding the rights of the involuntarily committed through judicial review, and providing individualized treatment, supervision and placement services for the gravely disabled by means of a conservatorship program.” (*Conservatorship of Susan T.*

(1994) 8 Cal.4th 1005, 1008–1009 [36 Cal.Rptr.2d 40, 884 P.2d 988].)

- “LPS Act commitment proceedings are subject to the due process clause because significant liberty interests are at stake. But an LPS Act proceeding is civil. ‘[T]he stated purposes of the LPS Act foreclose any argument that an LPS commitment is equivalent to criminal punishment in its design or purpose.’ Thus, not all safeguards required in criminal proceedings are required in LPS Act proceedings.” (*Conservatorship of P.D.* (2018) 21 Cal.App.5th 1163, 1167 [231 Cal.Rptr.3d 79], internal citations omitted.)
- “The clear import of the LPS Act is to use the involuntary commitment power of the state sparingly and only for those truly necessary cases where a ‘gravely disabled’ person is incapable of providing for his basic needs either alone or with help from others.” (*Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1280 [221 Cal.Rptr.3d 622].)
- “The right to a jury trial upon the establishment of conservatorship is fundamental to the protections afforded by the LPS. As related, that right is expressly extended to the reestablishment of an LPS conservatorship.” (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030, 1037 [226 Cal.Rptr. 33], internal citations omitted.)
- “[T]he trial court erred in accepting counsel’s waiver of [conservatee]’s right to a jury trial” (*Estate of Kevin A.* (2015) 240 Cal.App.4th 1241, 1253 [193 Cal.Rptr.3d 237].)
- “‘The due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act.’ An LPS commitment order involves a loss of liberty by the conservatee. Consequently, it follows that a trial court must obtain a waiver of the right to a jury trial from the person who is subject to an LPS commitment.” (*Conservatorship of Heather W.* (2016) 245 Cal.App.4th 378, 382–383 [199 Cal.Rptr.3d 689].)
- “We . . . hold that capacity or willingness to accept treatment is a relevant factor to be considered on the issue of grave disability but is not a separate element that must be proven to establish a conservatorship.” (*Conservatorship of K.P.* (2021) 11 Cal.5th 695, 703 [280 Cal.Rptr.3d 298, 489 P.3d 296].)
- “We . . . hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons.” (*Conservatorship of Davis, supra*, 124 Cal.App.3d at p. 328, disapproved on other grounds in *Conservatorship of K.P., supra*, 11 Cal.5th at p. 717.)
- “The jury should determine if the person voluntarily accepts meaningful

treatment, in which case no conservatorship is necessary. If the jury finds the person will not accept treatment, then it must determine if the person can meet his basic needs on his own or with help, in which case a conservatorship is not justified.” (*Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1092–1093 [242 Cal.Rptr. 289].)

- “Our research has failed to reveal any authority for the proposition [that] without a finding that the proposed conservatee is unable or unwilling to voluntarily accept treatment, the court must reject a conservatorship in the face of grave disability. . . . Some persons with grave disabilities are beyond treatment. Taken to its logical conclusion, they would be beyond the LPS Act’s reach, according to the argument presented in this appeal.” (*Conservatorship of Symington, supra*, 209 Cal.App.3d at p. 1469.)
- “The party seeking imposition of the conservatorship must prove the proposed conservatee’s grave disability beyond a reasonable doubt and the verdict must be issued by a unanimous jury.” (*Conservatorship of Susan T., supra*, 8 Cal.4th at p. 1009, internal citation omitted.)
- “Although there is no private right of action for a violation of section 5152, ‘aggrieved individuals can enforce the [LPS] Act’s provisions through other common law and statutory causes of action, such as negligence, medical malpractice, false imprisonment, assault, battery, declaratory relief, United States Code section 1983 for constitutional violations, and Civil Code section 52.1. [Citations.]’ ” (*Swanson v. County of Riverside* (2019) 36 Cal.App.5th 361, 368 [248 Cal.Rptr.3d 476].)

Secondary Sources

15 Witkin, Summary of California Law (11th ed. 2017) Wills and Probate, § 994

3 Witkin, California Procedure (6th ed.2021) Actions, § 103 et seq.

2 California Conservatorship Practice (Cont.Ed.Bar) Ch. 23

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.42 et seq. (Matthew Bender)

4002. “Gravely Disabled” Explained

The term “gravely disabled” means that a person is presently unable to provide for the person’s basic needs for food, clothing, shelter, personal safety, or necessary medical care because of [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and a severe substance use disorder/impairment by chronic alcoholism]. [The term “gravely disabled” does not include persons with intellectual disabilities by reason of the disability alone.]

[[*Insert one or more of the following:*] [psychosis/bizarre or eccentric behavior/delusions/hallucinations/[*insert other*]] [is/are] not enough, by [itself/themselves], to find that [*name of respondent*] is gravely disabled. [He/She/Nonbinary pronoun] must be unable to provide for the basic needs of food, clothing, shelter, personal safety, or necessary medical care because of [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and a severe substance use disorder/impairment by chronic alcoholism].]

["Personal safety" means the ability of a person to survive safely in the community without involuntary detention or treatment.]

["Necessary medical care" means care that a licensed health care practitioner, while operating within the scope of their practice, determines to be necessary to prevent serious deterioration of an existing physical medical condition that, if left untreated, is likely to result in serious bodily injury. "Serious bodily injury" means an injury involving extreme physical pain, substantial risk of death, or protracted loss or impairment of function of a bodily member, organ, or of mental faculty, or requiring medical intervention, including but not limited to hospitalization, surgery, or physical rehabilitation.]

[If you find [*name of respondent*] will not take [his/her/nonbinary pronoun] prescribed medication without supervision and that a mental health disorder makes [him/her/nonbinary pronoun] unable to provide for [his/her/nonbinary pronoun] basic needs for food, clothing, shelter, personal safety, or necessary medical care without such medication, then you may conclude [*name of respondent*] is gravely disabled.

In determining whether [*name of respondent*] is gravely disabled, you may consider evidence that [he/she/nonbinary pronoun] did not take prescribed medication in the past. You may also consider evidence of [his/her/nonbinary pronoun] lack of insight into [his/her/nonbinary pronoun] mental health condition.]

In considering whether [*name of respondent*] is gravely disabled, you may not consider the likelihood of future deterioration or relapse of a condition.

In determining whether [name of respondent] is gravely disabled, you may consider whether [he/she/nonbinary pronoun] is unable or unwilling to voluntarily accept meaningful treatment.

*New June 2005; Revised January 2018, May 2019, May 2020, May 2022, May 2024, July 2025, July 2026**

Directions for Use

This instruction provides the definition of “gravely disabled” from Welfare and Institutions Code section 5008(h)(1)(A) and (h)(2), which will be the applicable standard in most cases. The instruction applies to both adults and minors. (*Conservatorship of M.B.* (2018) 27 Cal.App.5th 98, 107 [237 Cal.Rptr.3d 775].)

Read the bracketed sentence at the end of the first paragraph if appropriate to the facts of the case. There is another standard in Welfare and Institutions Code section 5008(h)(1)(B) involving a finding of mental incompetence under Penal Code section 1370. A different instruction will be required if this standard is alleged.

The Welfare and Institutions Code defines “severe substance use disorder.” (Welf. & Inst. Code, § 5008(o).) Give additional information about this term if appropriate. For example, severe substance use disorder requires a diagnosis, so it may be preferable to identify the individual’s diagnosed severe substance use disorder. “Mental health disorder” and “a co-occurring mental health disorder,” however, are not defined in the statute.

The next to last paragraph regarding the likelihood of future deterioration may not apply if the respondent has no insight into the respondent’s mental health condition. (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1576–1577 [254 Cal.Rptr. 552].)

If there is evidence concerning the availability of third parties that are willing to provide assistance to the proposed conservatee, see CACI No. 4007, *Third Party Assistance*.

Sources and Authority

- “Gravely Disabled” Defined. Welfare and Institutions Code section 5008(h).
- “Severe Substance Use Disorder” Defined. Welfare and Institutions Code section 5008(o).
- “Personal Safety” Defined. Welfare and Institutions Code section 5008(p).
- “Necessary Medical Care” Defined. Welfare and Institutions Code section 5008(q).
- “Serious Bodily Injury” Defined. Welfare and Institutions Code section 15610.67.
- “The enactment of the LPS and with it the substitution of ‘gravely disabled’ for ‘in need of treatment’ as the basis for commitment of individuals not dangerous to themselves or others reflects a legislative determination to meet the

constitutional requirements of precision. The term ‘gravely disabled’ is sufficiently precise to exclude unusual or nonconformist lifestyles. It connotes an inability or refusal on the part of the proposed conservatee to care for basic personal needs of food, clothing and shelter.” (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 284 [139 Cal.Rptr. 357], footnotes omitted.)

- “[T]he public guardian must prove beyond a reasonable doubt that the proposed conservatee is gravely disabled.” (*Conservatorship of Jesse G.* (2016) 248 Cal.App.4th 453, 461 [203 Cal.Rptr.3d 667].)
- “The stricter criminal standard is used because the threat to the conservatee’s individual liberty and personal reputation is no different than the burdens associated with criminal prosecutions.” (*Conservatorship of Smith* (1986) 187 Cal.App.3d 903, 909 [232 Cal.Rptr. 277] internal citations omitted.)
- “Bizarre or eccentric behavior, even if it interferes with a person’s normal intercourse with society, does not rise to a level warranting conservatorship except where such behavior renders the individual helpless to fend for herself or destroys her ability to meet those basic needs for survival.” (*Conservatorship of Smith, supra*, 187 Cal.App.3d at p. 909.)
- “Under [Welfare and Institutions Code] section 5350, subdivision (e)(1), ‘a person is not “gravely disabled” if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person’s basic personal needs for food, clothing, or shelter.’ ” (*Conservatorship of Jesse G., supra*, 248 Cal.App.4th at p. 460.)
- “While [third person] may not have shown that he could manage appellant’s mental health symptoms as adeptly as would a person professionally trained to care for someone with a mental disorder, that is not the standard. As appellant states, ‘[t]he question in a LPS conservatorship case where the proposed conservatee asserts a third party assistance claim is not whether the third party will be able to manage the person’s mental health symptoms completely. Rather, the dispositive question is whether the person is able to provide the proposed conservatee with food, clothing, and shelter on a regular basis.’” (*Conservatorship of Jesse G., supra*, 248 Cal.App.4th at p. 463, fn. 4.)
- “We . . . hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons.” (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369].)
- “[A]n individual who will not voluntarily accept mental health treatment is not for that reason alone gravely disabled.” (*Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1468 [257 Cal.Rptr. 860].)

- “[T]he pivotal issue is whether [respondent] was ‘presently’ gravely disabled and the evidence demonstrates that he was not. Accordingly, the order granting the petition must be overturned.” (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030, 1034 [226 Cal.Rptr. 33], fn. omitted, citing to *Conservatorship of Murphy* (1982) 134 Cal.App.3d 15, 18 [184 Cal.Rptr. 363].)
- “[A] conservatorship cannot be established because of a perceived likelihood of future relapse. To do so could deprive the liberty of persons who will not suffer such a relapse solely because of the pessimistic statistical odds. Because of the promptness with which a conservatorship proceeding can be invoked the cost in economic and liberty terms is unwarranted.” (*Conservatorship of Neal* (1987) 190 Cal.App.3d 685, 689 [235 Cal.Rptr. 577].)
- “A perceived likelihood of future relapse, without more, is not enough to justify establishing a conservatorship. Neither can such a likelihood justify keeping a conservatorship in place if its subject is not presently gravely disabled, in light of the statutory provisions allowing rehearings to evaluate a conservatee’s current status.” (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 302 [256 Cal.Rptr. 415], internal citation omitted.)
- “[T]he definition of ‘[g]ravely disabled minor’ from section 5585.25 is not part of the LPS Act, but is found in the Children’s Civil Commitment and Mental Health Treatment Act of 1988. (§ 5585.) This definition applies ‘only to the initial 72 hours of mental health evaluation and treatment provided to a minor. . . . Evaluation and treatment of a minor beyond the initial 72 hours shall be pursuant to the . . . [LPS Act].’ (§ 5585.20.) Accordingly, we must apply the definition found in the LPS Act, and determine whether there was substantial evidence Minor suffered from a mental disorder as a result of which she ‘would be unable to provide for [her] basic personal needs’ if she had to so provide.” (*Conservatorship of M.B.*, *supra*, 27 Cal.App.5th at p. 107.)
- “Theoretically, someone who is willing and able to accept voluntary treatment may not be gravely disabled if that treatment will allow the person to meet the needs for food, clothing, and shelter. Under the statutory scheme, however, this is an evidentiary conclusion to be drawn by the trier of fact. If credible evidence shows that a proposed conservatee is willing and able to accept treatment that would allow them to meet basic survival needs, the fact finder may conclude a reasonable doubt has been raised on the issue of grave disability, and the effort to impose a conservatorship may fail. It may be necessary in some cases for the fact finder to determine whether the treatment a proposed conservatee is prepared to accept will sufficiently empower them to meet basic survival needs. In some cases of severe dementia or mental illness, there may simply be no treatment that would enable the person to ‘survive safely in freedom.’ ” (*Conservatorship of K.P.* (2021) 11 Cal.5th 695, 711 [280 Cal.Rptr.3d 298, 489 P.3d 296].)

Secondary Sources

3 Witkin, California Procedure (6th ed. 2021) Actions, § 103 et seq.

2 California Conservatorship Practice (Cont.Ed.Bar) §§ 23.3, 23.5

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, §§ 361A.33, 361A.42 (Matthew Bender)

4320. Affirmative Defense—Implied Warranty of Habitability

[Name of defendant] claims that *[he/she/nonbinary pronoun]* does not owe *[any/the full amount of]* rent because *[name of plaintiff]* did not maintain the property in a habitable condition. To succeed on this defense, *[name of defendant]* must prove that *[name of plaintiff]* failed to provide one or more of the following:

- a. [effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors][./; or]
- b. [plumbing or gas facilities that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]
- c. [a water supply capable of producing hot and cold running water furnished to appropriate fixtures, and connected to a sewage disposal system][./; or]
- d. [heating facilities that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]
- e. [electrical lighting with wiring and electrical equipment that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]
- f. [building, grounds, and all areas of the landlord's control, kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin][./; or]
- g. [an adequate number of containers for garbage and rubbish, in clean condition and good repair][./; or]
- h. [floors, stairways, and railings maintained in good repair][./; or]
- i. [a stove that is maintained in good working order and capable of safely generating heat for cooking purposes][./; or]
- j. [a refrigerator that is maintained in good working order and capable of safely storing food][./; or]
- k. *[Insert other condition relating to habitability.]*

[Name of plaintiff]'s failure to meet one or more of these requirements does not necessarily mean that the property was not habitable. The failure must substantially affect the property's habitability.

[Even if *[name of defendant]* proves that *[name of plaintiff]* substantially failed to meet any of these requirements, *[name of defendant]*'s defense

fails if [name of plaintiff] proves that [name of defendant] has done any of the following that contributed substantially to the condition or interfered substantially with [name of plaintiff]'s ability to make the necessary repairs:

[substantially failed to keep [his/her/nonbinary pronoun] living area as clean and sanitary as the condition of the property permitted][./; or]

[substantially failed to dispose of all rubbish, garbage, and other waste in a clean and sanitary manner][./; or]

[substantially failed to properly use and operate all electrical, gas, and plumbing fixtures and keep them as clean and sanitary as their condition permitted][./; or]

[intentionally destroyed, defaced, damaged, impaired, or removed any part of the property, equipment, or accessories, or allowed others to do so][./; or]

[substantially failed to use the property for living, sleeping, cooking, or dining purposes only as appropriate based on the design of the property.]]

The fact that [name of defendant] has continued to occupy the property does not necessarily mean that the property is habitable.

New August 2007; Revised June 2010, June 2013, December 2014, November 2020, December 2025, July 2026

Directions for Use

This instruction applies only to residential tenancies. (See Code Civ. Proc., § 1174.2(a).)

For an instruction setting forth a tenant's affirmative claim against a landlord for breach of the implied warranty of habitability, see CACI No. 4350, *Breach of Implied Warranty of Habitability—Essential Factual Elements*.

The habitability standards included are those set forth in Civil Code section 1941.1. Use only those relevant to the case or insert other applicable standards as appropriate, for example, other statutory or regulatory requirements (see *Knight v. Hallsthammar* (1981) 29 Cal.3d 46, 59, fn.10 [171 Cal.Rptr. 707, 623 P.2d 268]; Health & Saf. Code, §§ 17920.3, 17920.10) or security measures (see *Secretary of Housing & Urban Dev. v. Layfield* (1978) 88 Cal.App.3d Supp. 28, 30 [152 Cal.Rptr. 342]). The habitability characteristics set out in (i) and (j) only apply to leases entered into, amended, or extended on or after January 1, 2026. (Civ. Code, § 1941.1(a)(10), (11).) There are exceptions to these two required characteristics. (See Civ. Code, § 1941.1(b).)

If the landlord alleges that the implied warranty of habitability does not apply because of the tenant's affirmative misconduct, select the applicable reasons. The first two reasons do not apply if the landlord has expressly agreed in writing to perform those acts. (Civ. Code, § 1941.2(b).)

In a case not involving unlawful detainer and the failure to pay rent, the California Supreme Court has stated that the warranty of habitability extends only to conditions of which the landlord knew or should have discovered through reasonable inspections. (See *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1206 [43 Cal.Rptr.2d 836, 899 P.2d 905].) The law on a landlord's notice in the unlawful detainer context, however, remains unsettled. (*Knight, supra*, 29 Cal.3d at p. 55, fn. 6.) A landlord has a duty to maintain the premises in a habitable condition irrespective of whether the tenant knows about a particular condition. (*Knight, supra*, 29 Cal.3d at p. 54.)

Sources and Authority

- Landlord's Duty to Make Premises Habitable. Civil Code section 1941.
- Breach of Warranty of Habitability. Code of Civil Procedure section 1174.2.
- Untenantable Dwelling. Civil Code section 1941.1(a).
- Effect of Tenant's Violations. Civil Code section 1941.2.
- Rebuttable Presumption for Breach of Habitability Requirements. Civil Code section 1942.3.
- Liability of Landlord Demanding Rent for Uninhabitable Property. Civil Code section 1942.4(a).
- "Once we recognize that the tenant's obligation to pay rent and the landlord's warranty of habitability are mutually dependent, it becomes clear that the landlord's breach of such warranty may be directly relevant to the issue of possession. If the tenant can prove such a breach by the landlord, he may demonstrate that his nonpayment of rent was justified and that no rent is in fact 'due and owing' to the landlord. Under such circumstances, of course, the landlord would not be entitled to possession of the premises." (*Green v. Superior Court* (1974) 10 Cal.3d 616, 635 [111 Cal.Rptr. 704, 517 P.2d 1168].)
- "We have concluded that a warranty of habitability is implied by law in residential leases in this state and that the breach of such a warranty may be raised as a defense in an unlawful detainer action. Under the implied warranty which we recognize, a residential landlord covenants that premises he leases for living quarters will be maintained in a habitable state for the duration of the lease. This implied warranty of habitability does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that 'bare living requirements' must be maintained. In most cases substantial compliance with those applicable building and housing code standards which materially affect health and safety will suffice to meet the landlord's obligations under the common law implied warranty of habitability we now recognize." (*Green, supra*, 10 Cal.3d at p. 637, footnotes omitted.)

- “It follows that substantial noncompliance with applicable code standards could lead to a breach of the warranty of habitability.” (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1298, fn. 9 [173 Cal.Rptr.3d 159].)
- “[U]nder *Green*, a tenant may assert the habitability warranty as a defense in an unlawful detainer action. The plaintiff, of course, is not required to plead negative facts to anticipate a defense.” (*De La Vara v. Municipal Court* (1979) 98 Cal.App.3d 638, 641 [159 Cal.Rptr. 648], internal citations omitted.)
- “[T]he fact that a tenant was or was not aware of specific defects is not determinative of the duty of a landlord to maintain premises which are habitable. The same reasons which imply the existence of the warranty of habitability—the inequality of bargaining power, the shortage of housing, and the impracticability of imposing upon tenants a duty of inspection—also compel the conclusion that a tenant’s lack of knowledge of defects is not a prerequisite to the landlord’s breach of the warranty.” (*Knight, supra*, 29 Cal.3d at p. 54.)
- “The implied warranty of habitability recognized in *Green* gives a tenant a reasonable expectation that the landlord has inspected the rental dwelling and corrected any defects disclosed by that inspection that would render the dwelling uninhabitable. The tenant further reasonably can expect that the landlord will maintain the property in a habitable condition by repairing promptly any conditions, of which the landlord has actual or constructive notice, that arise during the tenancy and render the dwelling uninhabitable. A tenant injured by a defect in the premises, therefore, may bring a negligence action if the landlord breached its duty to exercise reasonable care. But a tenant cannot reasonably expect that the landlord will have eliminated defects in a rented dwelling of which the landlord was unaware and which would not have been disclosed by a reasonable inspection.” (*Peterson, supra*, 10 Cal.4th at pp. 1205–1206, footnotes omitted.)
- “At least in a situation where, as here, a landlord has notice of alleged uninhabitable conditions not caused by the tenants themselves, a landlord’s breach of the implied warranty of habitability exists whether or not he has had a ‘reasonable’ time to repair. Otherwise, the mutual dependence of a landlord’s obligation to maintain habitable premises, and of a tenant’s duty to pay rent, would make no sense.” (*Knight, supra*, 29 Cal.3d at p. 55, footnote omitted.)
- “[A] tenant may defend an unlawful detainer action against a current owner, at least with respect to rent currently being claimed due, despite the fact that the uninhabitable conditions first existed under a former owner.” (*Knight, supra*, 29 Cal.3d at p. 57.)
- “Without evaluating the propriety of instructing the jury on each item included in the defendants’ requested instruction, it is clear that, where appropriate under the facts of a given case, tenants are entitled to instructions based upon relevant standards set forth in Civil Code section 1941.1 whether or not the ‘repair and deduct’ remedy has been used.” (*Knight, supra*, 29 Cal.3d at p. 58.)
- “The defense of implied warranty of habitability is not applicable to unlawful

detainer actions involving commercial tenancies.” (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174], internal citation omitted.)

- “In the event of a landlord’s breach of the implied warranty of habitability, the tenant is not absolved of the obligation to pay rent; rather the tenant remains liable for the reasonable rental value as determined by the court for the period that the defective condition of the premises existed.” (*Erlach, supra*, 226 Cal.App.4th at p. 1297.)
- “In defending against a 30-day notice, the sole purpose of the [breach of the warranty of habitability] defense is to reduce the amount of daily damages for the period of time after the notice expires.” (*N. 7th St. Assocs. v. Constante* (2001) 92 Cal.App.4th Supp. 7, 11, fn. 1 [111 Cal.Rptr.2d 815].)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, § 651

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 3-A, *Warranty Of Habitability—In General*, ¶ 3:1 et seq. (The Rutter Group)

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.109–8.112

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.64, 12.36–12.37

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 15

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.64, 210.95A (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.61 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

Miller & Starr, California Real Estate 4th, § 19:224 (Thomson Reuters)

4350. Breach of Implied Warranty of Habitability—Essential Factual Elements

[Name of plaintiff] **claims that** *[he/she/nonbinary pronoun]* **was harmed because** *[name of defendant]* **did not** *[provide/maintain]* **the property in a habitable condition** *[when/after]* *[he/she/nonbinary pronoun]* **moved in. To succeed,** *[name of plaintiff]* **must prove all of the following:**

- 1. That a defective condition on the property substantially affected its habitability;**
- 2. That** *[name of defendant]* **knew or should have known of the defective condition;**
- 3. That** *[name of plaintiff]* **was harmed; and**
- 4. That** *[name of defendant]*'s **conduct was a substantial factor in causing** *[name of plaintiff]*'s **harm.**

[A defective/Defective] condition[s] that may substantially affect the property's habitability *[is/are]* a failure to provide:

- a. [effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors][./; or]**
- b. [plumbing or gas facilities that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]**
- c. [a water supply capable of producing hot and cold running water furnished to appropriate fixtures, and connected to a sewage disposal system][./; or]**
- d. [heating facilities that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]**
- e. [electrical lighting with wiring and electrical equipment that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]**
- f. [building, grounds, and all areas under the landlord's control, kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin][./; or]**
- g. [an adequate number of containers for garbage and rubbish, in clean condition and good repair][./; or]**
- h. [floors, stairways, and railings maintained in good repair][./; or]**

- i. [a stove that is maintained in good working order and capable of safely generating heat for cooking purposes][./; or]
- j. [a refrigerator that is maintained in good working order and capable of safely storing food][./; or]
- k. [Insert other condition relating to habitability.]

New December 2025; Revised July 2026

Directions for Use

The instruction assumes a tenant or former tenant of a residential property is the plaintiff in a separate action, rather than a defendant in an unlawful detainer action. Use CACI No. 4320, *Affirmative Defense—Implied Warranty of Habitability*, if the tenant is raising the implied warranty of habitability as a defense in an unlawful detainer action.

Select the appropriate bracketed options in the introductory sentence depending on when the defective condition is alleged to have existed.

Some cases have listed as an element of this claim that the landlord had a reasonable time to repair the defective condition. (See, e.g., *Peviani v. Arbors at California Oaks Property Owner, LLC* (2021) 62 Cal.App.5th 874, 891 [277 Cal.Rptr.3d 223] [listing “a reasonable time to correct the deficiency” as an element]; but see *Knight v. Hallsthammar* (1981) 29 Cal.3d 46, 55 [171 Cal.Rptr. 707, 623 P.2d 268] [holding, in the context of a defense to an unlawful detainer action, that a breach of the implied warranty of habitability exists regardless of whether a landlord with notice of the condition has had a reasonable time to repair it].) The habitability characteristics set out in (i) and (j) only apply to leases entered into, amended, or extended on or after January 1, 2026. (Civ. Code, § 1941.1(a)(10), (11).) There are exceptions to these required characteristics. (See Civ. Code, § 1941.1(b).)

The optional habitability standards listed are those set forth in Civil Code section 1941.1. Use only those relevant to the case or insert other applicable standards as appropriate, for example, other statutory or regulatory requirements (*Knight, supra*, 29 Cal.3d at p. 59, fn.10; Health & Saf. Code, §§ 17920.3, 17920.10), or security measures. (See *Secretary of Housing & Urban Dev. v. Layfield* (1978) 88 Cal.App.3d Supp. 28, 30 [152 Cal.Rptr. 342].)

Sources and Authority

- Untenantable Conditions. Civil Code section 1941.1.
- “We have concluded that a warranty of habitability is implied by law in residential leases in this state. . . .” (*Green v. Superior Court* (1974) 10 Cal.3d 616, 637 [111 Cal.Rptr. 704, 517 P.2d 1168].)
- “Case law supports an independent action by a tenant or former tenant for damages for breach of a landlord’s implied warranty of habitability. An

independent action for breach of warranty may supplement a tenant's statutory 'repair and deduct' remedy or a tenant's affirmative defense in unlawful detainer." (*Landeros v. Pankey* (1995) 39 Cal.App.4th 1167, 1169–1170 [46 Cal.Rptr.2d 165].)

- "[A] tenant may state a cause of action in tort against his landlord for damages resulting from a breach of the implied warranty of habitability." (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 918–919 [162 Cal.Rptr. 194].)
- "The elements of a cause of action for breach of the implied warranty of habitability 'are the existence of a material defective condition affecting the premises' habitability, notice to the landlord of the condition within a reasonable time after the tenant's discovery of the condition, the landlord was given a reasonable time to correct the deficiency, and resulting damages.'" (*Peviani, supra*, 62 Cal.App.5th at p. 891, internal citation omitted.)
- "[I]t is significant that section 1941 of the California Civil Code speaks of a lessor's duty to put a building into a condition fit for occupation and to repair all later defects which make the premises uninhabitable. At least in a situation where, as here, a landlord has notice of alleged uninhabitable conditions not caused by the tenants themselves, a landlord's breach of the implied warranty of habitability exists whether or not he has had a 'reasonable' time to repair. Otherwise, the mutual dependence of a landlord's obligation to maintain habitable premises, and of a tenant's duty to pay rent, would make no sense." (*Knight, supra*, 29 Cal.3d at p. 55.)
- "The alleged defective condition must 'affect the tenant's apartment or the common areas which he uses.'" (*Peviani, supra*, 62 Cal.App.5th at p. 891, internal citation omitted.)
- "When the alleged defect is in the common area, the landlord's duty to inspect and maintain the common area removes any excuse by the landlord regarding a lack of knowledge." (*Peivani, supra*, 62 Cal.App.5th at p. 891.)
- "A violation of a statutory housing standard that affects health and safety is a strong indication of a materially defective condition." (*Peivani, supra*, 62 Cal.App.5th at p. 891.)
- "[W]here appropriate under the facts of a given case, tenants are entitled to instructions based upon relevant standards set forth in Civil Code section 1941.1 whether or not the 'repair and deduct' remedy has been used." (*Knight, supra*, 29 Cal.3d at p. 58.)
- "In *Knight*, the Supreme Court confirmed that breach of the implied warranty of habitability can support an independent cause of action for damages, but disapproved *Quevedo v. Braga* [(1977) 72 Cal.App.3d Supp. 1] to the extent it required that a tenant be unaware of the defective condition upon occupancy and that a landlord with preexisting notice of the defect be given additional time to repair it." (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1297, fn.8 [173 Cal.Rptr.3d 159].)

- “The implied warranty of habitability recognized in *Green* [v. *Superior Court* (1974) 10 Cal.3d 616] gives a tenant a reasonable expectation that the landlord has inspected the rental dwelling and corrected any defects disclosed by that inspection that would render the dwelling uninhabitable. The tenant further reasonably can expect that the landlord will maintain the property in a habitable condition by repairing promptly any conditions, of which the landlord has actual or constructive notice, that arise during the tenancy and render the dwelling uninhabitable. A tenant injured by a defect in the premises, therefore, may bring a negligence action if the landlord breached its duty to exercise reasonable care. But a tenant cannot reasonably expect that the landlord will have eliminated defects in a rented dwelling of which the landlord was unaware and which would not have been disclosed by a reasonable inspection. The implied warranty of habitability, therefore, does not support an action for strict liability.” (*Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1205–1206 [43 Cal.Rptr.2d 836, 899 P.2d 905], internal footnotes omitted.)

Secondary Sources

7 California Real Estate Law and Practice, Ch. 212, *Breach of Implied Warranty of Habitability*, § 212.40 (Matthew Bender)

5000. Duties of the Judge and Jury

Members of the jury, you have now heard all the evidence [and the closing arguments of the attorneys]. [The attorneys will have one last chance to talk to you in closing argument. But before they do, it] [It] is my duty to instruct you on the law that applies to this case. You must follow these instructions [as well as those that I previously gave you]. You will have a copy of my instructions with you when you go to the jury room to deliberate. [I have provided each of you with your own copy of the instructions.] [I will display each instruction on the screen.]

You must decide what the facts are. You must consider all the evidence and then decide what you think happened. You must decide the facts based on the evidence admitted in this trial.

Do not allow anything that happens outside this courtroom to affect your decision. Do not talk about this case or the people involved in it with anyone, including family and persons living in your household, friends and coworkers, spiritual leaders, advisors, or therapists. Do not do any research on your own or as a group. Do not use online tools, dictionaries or other reference materials.

These prohibitions on communications and research extend to all forms of electronic communications. Do not use any electronic devices or media, such as a cell phone, computer, tablet, the internet, any text or instant-messaging service, or social media, to send or receive any information to or from anyone about this case or your experience as a juror until after you have been discharged from your jury duty.

Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. [Do not read, listen to, or watch any coverage of this trial.] You must not let bias, sympathy, prejudice, or public opinion influence your decision.

[If you violate any of these prohibitions on communications and research, including prohibitions on electronic communications and research, you may be held in contempt of court or face other sanctions. That means that you may have to serve time in jail, pay a fine, or face other punishment for that violation.]

I will now tell you the law that you must follow to reach your verdict. You must follow the law exactly as I give it to you, even if you disagree with it. If the attorneys [have said/say] anything different about what the law means, you must follow what I say.

In reaching your verdict, do not guess what I think your verdict should be from something I may have said or done.

Pay careful attention to all the instructions that I give you. All the instructions are important because together they state the law that you will use in this case. You must consider all of the instructions together.

After you have decided what the facts are, you may find that some instructions do not apply. In that case, follow the instructions that do apply and use them together with the facts to reach your verdict.

If I repeat any ideas or rules of law during my instructions, that does not mean that these ideas or rules are more important than the others. In addition, the order in which the instructions are given does not make any difference.

[Most of the instructions are typed. However, some handwritten or typewritten words may have been added, and some words may have been deleted. Do not discuss or consider why words may have been added or deleted. Please treat all the words the same, no matter what their format. Simply accept the instruction in its final form.]

New September 2003; Revised April 2004, October 2004, February 2005, December 2009, June 2011, December 2013, July 2026

Directions for Use

As indicated by the brackets in the first paragraph, this instruction can be read either before or after closing arguments. The advisory committee recommends that this instruction be read to the jury before reading instructions on the substantive law.

The instruction identifies examples of technological tools that might be used. Because technology is continuously evolving, users should consider whether to modify the instruction, in the context of a particular case, to include other tools or methods by which prohibited contact or research can occur.

Sources and Authority

- Charge to the Jury. Code of Civil Procedure section 608.
- Contempt of Court for Juror Misconduct. Code of Civil Procedure section 1209(a)(6).
- Jury as Trier of Fact. Evidence Code section 312(a).
- An instruction to disregard any appearance of bias on the part of the judge is proper. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257–259 [288 P.2d 1003], disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 [328 P.2d 449] and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478–479 [6 Cal.Rptr. 289, 353 P.2d 929].)
- “ ‘The right to unbiased and unprejudiced jurors is an inseparable and

inalienable part of the right to trial by jury guaranteed by the constitution.’ ” (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132], internal citations omitted.)

- An instruction to consider all the instructions together can help avoid instructional errors of conflict, omission, and undue emphasis. (*Escamilla v. Marshburn Brothers* (1975) 48 Cal.App.3d 472, 484 [121 Cal.Rptr. 891].)
- Providing an instruction stating that, depending on what the jury finds to be the facts, some of the instructions may not apply can help avoid reversal on the grounds of misleading jury instructions. (See *Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 629–630 [124 Cal.Rptr. 143].)
- “[T]he jury was charged that (1) no undue emphasis was intended by repetition of any rule, direction or idea; (2) instructions on the measure of damages should not be interpreted to mean that liability must be found; and (3) the judge did not intend to intimate how any issue should be decided and if any juror believed such intimation was present such should be disregarded. Of course such admonitions will not salvage an inherently one-sided charge although the giving of such instructions should be considered in weighing the net effect of the charge.” (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 57 [118 Cal.Rptr. 184, 529 P.2d 608].)

Secondary Sources

7 Witkin, *California Procedure* (6th ed. 2021) Trial, § 300

Wegner et al., *California Practice Guide: Civil Trials & Evidence*, Ch. 14-D, *Preparing Jury Instructions*, ¶¶ 14:151, 14:190 (The Rutter Group)

28 *California Forms of Pleading and Practice*, Ch. 326, *Jury Instructions*, § 326.21 (Matthew Bender)

1 Matthew Bender *Practice Guide: California Trial and Post-Trial Civil Procedure*, Ch. 17, *Dealing With the Jury*, 17.12

California Judges Benchbook: Civil Proceedings—Trial §§ 12.6, 13.27 (Cal CJER 2019)

