Judicial Council of California
Rules Committee

courts.ca.gov/rulescomm.htm
rulesmeetings@jud.ca.gov

RULES COMMITTEE

MINUTES OF OPEN VIDEOCONFERENCE MEETING

Thursday, September 4, 2025
12:10 – 1:40 p.m.

Rules Committee Members Present:	Hon. Carin T. Fujisaki (Chair), Hon. Joan K. Irion (Vice-chair), Hon. Khymberli S. Apaloo, Hon. Bunmi O. Awoniyi, Hon. Charles S. Crompton, and Hon. Ryan Davis
Rules Committee Members Absent:	Ms. Kate Bieker, Mr. Charles Johnson, Hon. Ricardo R. Ocampo, Mr. Craig M. Peters, and Mr. Maxwell V. Pritt
Incoming Member of the Rules Committee Present	Hon. Tamara L. Wood
Rules Committee Staff Present	Mr. Eric Long and Ms. Benita Downs
Advisory Bodies Staff Present	Kristin Burford, Sarah Fleischer-Ihn, Jenny Grantz, Sarah Jacobvitz, Stephanie Lacambra, Paarth Malkan, Sarah Saria, Gabrielle Selden, and Jeremy Varon
Others JC Staff Present:	James Barolo, Deirdre Benedict, Audrey Fancy, Frances Ho, Michael Giden, Camilla Kieliger, Lollie Roberts, Christy Simon, Marymichael Smrdeli, Corby Sturges, Greg Tanaka, and Shayla Taylor

OPEN MEETING

Call to Order and Roll Call

The chair called the meeting to order at 12:10 p.m., and Ms. Downs took roll call.

Approval of Minutes

The advisory body reviewed and approved the minutes of the June 3 and June 13, 2025, Rules Committee meetings.

DISCUSSION AND ACTION ITEMS (ITEMS 01–22)

APPELLATE

Judicial Council Report–Recommend Council Action

Item 01/SPR25-01

Appellate Procedure: Remote Appearances at Oral Argument in the Appellate Division

The committee reviewed a recommendation from the Appellate Advisory Committee that the Judicial Council amend rules 8.885 and 8.929 of the California Rules of Court regarding oral argument in the

appellate division to authorize remote appearances by parties and more broadly authorize remote participation by appellate division judges.

***Action: The committee unanimously approved the recommendation from the Appellate Advisory Committee, which is to go to the Judicial Council for action at the October council meeting*.**

Item 02/SPR25-02

Appellate Procedure: Extension of Time in Misdemeanor and Infraction Appeals

The committee reviewed a recommendation from the Appellate Advisory Committee that the Judicial Council approve *Application for Extension of Time to File Brief—Misdemeanor or Infraction Case* (form CR-127), a new form for requesting extensions of time to file a brief in misdemeanor and infraction appeals.

***Action: The committee unanimously approved the recommendation from the Appellate Advisory Committee, which is to go to the Judicial Council for action at the October council meeting*.**

CIVIL AND SMALL CLAIMS

Judicial Council Report–Recommend Council Action

Item 03/SPR25-03

Rules and Forms: Comprehensive Adjudications of Groundwater Rights

The committee reviewed a recommendation from the Civil and Small Claims Advisory Committee that the Judicial Council adopt rule 3.404 of the California Rules of Court and amend rule 3.400, related to comprehensive groundwater adjudications.

***Action: The committee unanimously approved the recommendation from the Civil and Small Claims Advisory Committee, which is to go to the Judicial Council for action at the October council meeting*.**

Item 04/SPR25-04 (joint with the Court Executives Advisory Committee)

Rules and Forms: New Case Categories for Civil Case Cover Sheet

The committee reviewed a joint recommendation from the Civil and Small Claims Advisory Committee and the Court Executives Advisory Committee that the Judicial Council revise form CM-010 to add "Comprehensive groundwater adjudication" as a case type and add "Asbestos" and "Employment Development Department (EDD)" as case categories.

***Action: The committee unanimously approved the joint recommendation from the Civil and Small Claims Advisory Committee and Court Executive Advisory Committee, which is to go to the Judicial Council for action at the October council meeting*.**

Item 05/SPR25-05

Civil Practice and Procedure: Deadlines for Filings for Class Certification Motions

The committee reviewed a recommendation from the Civil and Small Claims Advisory Committee that the Judicial Council amend rule 3.764 of the California Rules of Court to adjust the deadlines for filings related to class certification motions.

Action: The committee unanimously approved the recommendation from the Civil and Small Claims Advisory Committee, which is to go to the Judicial Council for action at the October council meeting.

Item 06/SPR25-06

Civil Practice and Procedure: Implementation of Assembly Bill 2837

The committee reviewed a recommendation from the Civil and Small Claims Advisory Committee that the Judicial Council adopt three forms and revise thirteen forms to implement Assembly Bill 2837 (Stats. 2024, ch. 514) which made numerous changes to the laws regarding enforcement of judgment, including a new requirement to verify the judgment debtor's address before the sheriff can serve papers related to enforcement of a judgment for personal debt; changes to the start of the earnings withholding period; and new requirements for orders on claims of exemption from enforcement of judgment.

Action: The committee unanimously approved the recommendation from the Civil and Small Claims Advisory Committee, which is to go to the Judicial Council for action at the October council meeting.

Item 07/SPR25-07

Unlawful Detainer: Form Revisions to Reflect Repeal of COVID-19 Legislation

The committee reviewed a recommendation from the Civil and Small Claims Advisory Committee that the Judicial Council revise five forms and revoke ten forms to implement Assembly Bill 2347 (Stats. 2024, ch. 512), which changed the deadline to respond to a summons in unlawful detainer proceedings and other summary proceedings for obtaining possession of real property.

Action: The committee unanimously approved the recommendation from the Civil and Small Claims Advisory Committee, which is to go to the Judicial Council for action at the October council meeting.

Item 08/SPR25-08

Civil Practice and Procedure: Amendment of the Collections Case Rule

The committee reviewed a recommendation from the Civil and Small Claims Advisory Committee that the Judicial Council amend rule 3.740 of the California Rules of Court to increase the monetary limit for collections cases to $35,000.

***Action: The committee unanimously approved the recommendation from the Civil and Small Claims Advisory Committee, which is to go to the Judicial Council for action at the October council meeting*.**

Item 09/SPR25-09

Civil Practice and Procedure: Confidential Information Form for Doxing Cases

The committee reviewed a recommendation from the Civil and Small Claims Advisory Committee that the Judicial Council revise *Confidential Information Form Under Civil Code Section 1708.85* (form MC-125) to implement the statutory procedure for using a pseudonym when bringing a case under Civil Code section 1708.89.

***Action: The committee unanimously approved the recommendation from the Civil and Small Claims Advisory Committee, which is to go to the Judicial Council for action at the October council meeting*.**

Item 10/SPR25-10

Civil Practice and Procedure: Authorization to Appear on Behalf of a Party in Small Claims Cases

The committee reviewed a recommendation from the Civil and Small Claims Advisory Committee that the Judicial Council revise form SC-109 to ensure it complies with Code of Civil Procedure section 116.540.

***Action: The committee unanimously approved the recommendation from the Civil and Small Claims Advisory Committee, which is to go to the Judicial Council for action at the October council meeting*.**

CRIMINAL

Judicial Council Report–Recommend Council Action

Item 11/SPR25-11

Criminal Law: Findings and Orders for Pretrial Release or Detention

The committee reviewed a recommendation from the Criminal Law Advisory Committee that the Judicial Council approve *Findings and Orders for Pretrial Release or Detention* (form CR-104) for optional use to

assist courts with making appropriate findings and orders for pretrial release or detention as articulated in *In re Humphrey* (2021) 11 Cal.5th 135.

***Action: The committee unanimously approved the recommendation from the Criminal Law Advisory Committee, which is to go to the Judicial Council for action at the October council meeting*.**

Item 12/SPR25-12

Criminal Law: Implementation of Recent Legislation Regarding Criminal Protective Orders

The committee reviewed a recommendation from the Criminal Law Advisory Committee that the Judicial Council repeal a rule of court, revise three existing criminal protective order forms, and approve four new forms and an information sheet. The recommendation also proposes the adoption of a new confidential California Law Enforcement Telecommunications System form for use with criminal protective orders, and amending rule 1.51 of the California Rules of Court to require prosecuting agencies to use the form.

***Action: The committee unanimously approved the recommendation from the Criminal Law Advisory Committee, which is to go to the Judicial Council for action at the October council meeting*.**

Item 13/SPR25-13

Criminal Law: Mental Competency Proceedings

The committee reviewed a recommendation from the Criminal Law Advisory Committee that the Judicial Council adopt rule 4.132 of the California Rules of Court, amend rules 4.130 and 4.131, and renumber former rule 4.131 as new rule 4.133. This recommendation would implement legislative changes and make additional amendments to clarify procedures, remove language duplicative of statute, and improve organization, clarity, and concision.

***Action: The committee unanimously approved the recommendation from the Criminal Law Advisory Committee, which is to go to the Judicial Council for action at the October council meeting*.**

Item 14/SPR24-14

Criminal Law: Findings and Orders Regarding Prohibited Items While on Diversion

The committee reviewed a recommendation from the Criminal Law Advisory Committee that the Judicial Council approve a new order form for optional use to assist courts with making the appropriate findings and orders prohibiting a defendant from owning or possessing firearms, other deadly weapons, and ammunition while on mental health or military diversion.

***Action: The committee unanimously approved the recommendation from the Criminal Law Advisory Committee, which is to go to the Judicial Council for action at the October council meeting*.**

FAMILY AND JUVENILE

Judicial Council Report–Recommend Council Action

Item 15/SPR25-15

Family Law: Rules and Forms to Determine Parental Relationship Based on Gestational Carrier Agreement

The committee reviewed a recommendation from the Family and Juvenile Law Advisory Committee that the Judicial Council adopt six forms for mandatory use and approve five forms for optional use in a new form series for parties (intended parents) who conceive a child with a surrogate (a gestational carrier) under the terms of a gestational carrier agreement (also called "an assisted reproduction agreement for gestational carriers") and then seek a judgment in family court determining a parental relationship under Family Code sections 7960–7962. The recommendation also proposes the adoption of a new rule of court, amending several rules of court, repealing one rule, and revising three forms specific to gestational surrogacy cases.

***Action: The committee unanimously approved the recommendation from the Family and Juvenile Law Advisory Committee, which is to go to the Judicial Council for action at the October council meeting*.**

Item 16/SPR25-16

Family Law: Standards for Computer Software Used to Assist in Determining Support

The committee reviewed a recommendation from the Family and Juvenile Law Advisory Committee that the Judicial Council amend rule 5.275 of the California Rules of Court, which provides standards for computer software used to assist in determining child support and spousal support. The action is necessary to bring the rule into conformity with existing law as well as with Family Code provisions related to additional child support that were amended, effective September 1, 2024, by Senate Bill 343 (Stats. 2023, ch. 213). This proposal will also update terminology and clarify language relating to (1) computer hardware and software and (2) guideline calculator software testing and certification.

***Action: The committee unanimously approved the recommendation from the Family and Juvenile Law Advisory Committee, which is to go to the Judicial Council for action at the October council meeting*.**

Item 17/SPR25-17

Juvenile Law: Retention of Jurisdiction and Petitions Requesting Juvenile Case Files of Deceased Children

The committee reviewed a recommendation from the Family and Juvenile Law Advisory Committee that the Judicial Council adopt one rule of court, amend three rules of court, approve one form, adopt six forms, and revise six forms to implement Assembly Bill 1756 (Stats. 2023, ch. 478, § 62) and Senate Bill 1161 (Stats. 2024, ch. 782, § 12), and to clarify the different legal standards for petitions seeking release

of a delinquency file or living child's juvenile dependency case file under Welfare and Institutions Code section 827(a)(1)(Q) and a deceased child's juvenile dependency case file under section 827(a)(2).

***Action: The committee unanimously approved the recommendation from the Family and Juvenile Law Advisory Committee, which is to go to the Judicial Council for action at the October council meeting*.**

Item 18/SPR25-18

Juvenile Law: Racial Justice Act Forms

The committee reviewed a recommendation from the Family and Juvenile Law Advisory Committee that the Judicial Council approve five new forms to assist litigants and juvenile courts with claims under the Racial Justice Act.

***Action: The committee unanimously approved the recommendation from the Family and Juvenile Law Advisory Committee, which is to go to the Judicial Council for action at the October council meeting*.**

Item 19/SPR25-19

Juvenile Law: Sex Offender Registration

The committee reviewed a recommendation from the Family and Juvenile Law Advisory Committee that the Judicial Council revise *Information on Filing a Petition to Terminate Juvenile Sex Offender Registration* (form JV-915-INFO) to correct legally inaccurate statements in the form.

***Action: The committee unanimously approved the recommendation from the Family and Juvenile Law Advisory Committee, which is to go to the Judicial Council for action at the October council meeting*.**

Item 20/SPR25-20

Juvenile Law: Date a Child Entered Foster Care

The committee reviewed a recommendation from the Family and Juvenile Law Advisory Committee that the Judicial Council, amend rule 5.502 of the California Rules of Court to address the situation of a child who is not removed or is returned at disposition on a Welfare and Institutions Code section 300 petition but is later removed under a section 342 or 387 petition.

***Action: The committee unanimously approved the recommendation from the Family and Juvenile Law Advisory Committee, which is to go to the Judicial Council for action at the October council meeting*.**

Item 21/SPR25-21

Family Law: Joint Petition for Dissolution or Legal Separation

The committee reviewed a recommendation from the Family and Juvenile Law Advisory Committee that the Judicial Council amend four rules of court, adopt three mandatory forms, and approve two optional forms to implement Senate Bill 1427 (Stats. 2024, ch. 190), which authorizes parties who do not qualify to use the current summary dissolution process to file a joint summons and a joint petition to ask the court for a dissolution of the marriage or domestic partnership or for a legal separation.

Action: The committee unanimously approved the recommendation from the Family and Juvenile Law Advisory Committee, which is to go to the Judicial Council for action at the October council meeting.

PROVIDING ACCESS AND FAIRNESS

Judicial Council Report–Recommend Council Action

Item 22/SPR25-22

Access and Fairness: Accommodations for Court Users to Pump or Express Breast Milk

The committee reviewed a recommendation from the Advisory Committee on Providing Access and Fairness that the Judicial Council adopt rule 2.40 of the California Rules of Court and approve *Request for Accommodation to Pump or Express Breast Milk* (form MC-420).

Action: The committee unanimously approved the recommendation from the Advisory Committee on Providing Access and Fairness, which is to go to the Judicial Council for action at the October council meeting

INFORMATION ONLY ITEMS (NO ACTION REQUIRED)

The Next Rules Committee meeting will be held on: September 11, 2025.

ADJOURNMENT

There being no further business, the meeting was adjourned at 1:17 p.m.

Approved by the committee on

Judicial Council of California
Rules Committee

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RULES COMMITTEE

MINUTES OF OPEN VIDEOCONFERENCE MEETING

Thursday, September 11, 2025
12:10 – 1:40 p.m.

Rules Committee Members Present:	Hon. Carin T. Fujisaki (Chair), Hon. Joan K. Irion (Vice-chair), Hon. Bunmi O. Awoniyi, Hon. Charles S. Crompton, Hon. Ryan Davis, and Mr. Charles Johnson
Rules Committee Members Absent:	Hon. Khymberli S. Apaloo, Ms. Kate Bieker, Hon. Ricardo R. Ocampo, Mr. Craig M. Peters, and Mr. Maxwell V. Pritt
Incoming Member of the Rules Committee Present	Hon. Tamara L. Wood
Rules Committee Staff Present:	Mr. Eric Long and Ms. Benita Downs
Advisory Bodies Chair(s) and Staff Present	Karene Alvarado, Kerry Doyle, Ann Gilmour, Jenny Grantz, Frances Ho, Sarah Jacobvitz, Maddie Joyner, Julia Kaufman, Kara Portnow, Gabrielle Selden, and Corby Sturges
Other JC Staff Present	James Barolo, Kristin Burford, Audrey Fancy, Michael Giden, Stephanie Lacambra, Anna Maves, Lizette Perez, Christy Simons, and Greg Tanaka

OPEN MEETING

Call to Order and Roll Call

The chair called the meeting to order at 12:11 p.m., and Ms. Downs took roll call.

DISCUSSION AND ACTION ITEMS (ITEMS 23–35)

PROBATE

Judicial Council Report–Recommend Council Action

Item 23/SPR25-23

Probate Conservatorship: Acceptance of Transfers Under the CCJA

The committee reviewed a recommendation from the Probate and Mental Health Advisory Committee that the Judicial Council amend one rule of court and revise two optional forms to provide the court with information it needs for the transfer of conservatorships into California. The rule amendment would require a conservator appointed in another jurisdiction to include *Confidential Supplemental Information*

(form GC-312) and *Confidential Conservator Screening Form* (form GC-314) with their petition for orders accepting the transfer of the conservatorship to California. The form revisions would clarify that a proposed *Order Appointing Probate Conservator* (form GC-340) must be attached to each petition for orders accepting a transfer and an executed form GC-340 must be attached to each order accepting a transfer.

Action: The committee unanimously approved the recommendation from the Probate and Mental Health Advisory Committee, which is to go to the Judicial Council for action at the October council meeting.

Item 24/SPR25-24

Probate Conservatorship: Information for Conservatees

The committee reviewed a recommendation from the Probate and Mental Health Advisory Committee that the Judicial Council approve one form for the courts to use to provide the information required by Probate Code section 1835.5 (form GC-342), revise one form that lists the general rights of conservatees (form GC-341), and revise the attachment to the second form (form GC-341(MA)) to conform to the revisions to the principal form.

Action: The committee unanimously approved the recommendation from the Probate and Mental Health Advisory Committee, which is to go to the Judicial Council for action at the October council meeting.

PROTECTIVE ORDERS

Judicial Council Report–Recommend Council Action

Item 25/SPR25-25

Family Law and Protective Orders: Implementation of Senate Bill 599 and Assembly Bill 3072

The committee reviewed a recommendation from the Family and Juvenile Law Advisory Committee that the Judicial Council revise domestic violence restraining order forms and family law forms, to adopt a new rule of court, and to amend a standard of judicial administration. The recommendation also proposes minor technical changes to two domestic violence information forms.

Action: The committee unanimously approved the recommendation from the Family and Juvenile Law Advisory Committee, which is to go to the Judicial Council for action at the October council meeting.

Item 26/SPR25-26

Protective Orders: Changes to Domestic Violence and Juvenile Forms to Implement Assembly Bill 2759

The committee reviewed a recommendation from the Family and Juvenile Law Advisory Committee that the Judicial Council adopt two new firearm exemption order forms and revise several domestic violence and juvenile restraining order forms to reflect the new requirements. The recommendation also proposes revisions to form CLETS-001 to include an instruction for petitioners of retail theft protective orders and to make necessary updates.

***Action: The committee unanimously approved the recommendation from the Family and Juvenile Law Advisory Committee, which is to go to the Judicial Council for action at the October council meeting*.**

Item 27/SPR25-27

Protective Orders: Civil Restraining Order Forms to Implement Senate Bill 899

The committee reviewed a recommendation from the Civil and Small Claims Advisory Committee that the Judicial Council adopt and revise numerous restraining order forms, including forms for restraining orders based on civil harassment, elder or dependent adult abuse, gun violence, postsecondary school violence, and workplace violence. The changes proposed in the recommendation would implement Senate Bill 899 (Stats. 2024, ch. 544), which requires courts to inquire whether a person subject to a civil restraining order has complied with the firearm relinquishment requirement and order the clerk to notify law enforcement if a receipt is not filed within 48 hours of receiving the restraining order.

***Action: The committee unanimously approved the recommendation from the Civil and Small Claims Advisory Committee, which is to go to the Judicial Council for action at the October council meeting*.**

Item 28/SPR25-28

Protective Orders: Postsecondary School Violence Forms to Implement Assembly Bill 2096

The committee reviewed a recommendation from the Civil and Small Claims Advisory Committee that the Judicial Council revise all 26 forms in the private postsecondary school violence form set to implement Assembly Bill 2096 (Stats. 2024, ch. 947), which goes into effect on January 1, 2026, and to make other necessary changes to accurately reflect current law.

***Action: The committee unanimously approved the recommendation from the Civil and Small Claims Advisory Committee, which is to go to the Judicial Council for action at the October council meeting*.**

Item 29/SPR25-29

Protective Orders: Civil Harassment Forms to Implement Senate Bill 554

The committee reviewed a recommendation from the Civil and Small Claims Advisory Committee to revise two civil harassment restraining order forms to implement Senate Bill 554 (Stats. 2024, ch. 652).

Action: The committee unanimously approved the recommendation from the Civil and Small Claims Advisory Committee, which is to go to the Judicial Council for action at the October council meeting.

TRIBAL COURT–STATE COURT FORUM

Judicial Council Report–Recommend Council Action

Item 30/SPR25-30 (joint with the Family and Juvenile Law Advisory Committee)

Juvenile Law: Indian Child Welfare Act (ICWA) Inquiry and Family Finding

The committee reviewed a joint proposal from the Tribal Court–State Court Forum and the Family and Juvenile Law Advisory Committee that the Judicial Council amend 4 rules of court and revise 22 forms. The proposal was in response to Assembly Bill 81 (Stats. 2024, ch. 656), which addressed the implementation of the Indian Child Welfare Act (25 U.S.C. §§ 1901 et. seq.), including ICWA inquiry, and Assembly Bill 2929 (Stats. 2024, ch. 845), which addressed family finding in juvenile dependency cases. The proposal also responded to two recent decisions from the Supreme Court of California—*In re. Kenneth D.* and *In re. Dezi C.*—concerning ICWA inquiry. The proposal also corrects several technical issues in the rules and forms.

Action: The committee unanimously approved the joint recommendation from Tribal Court–State Court Forum and the Family and Juvenile Law Advisory Committee, which is to go to the Judicial Council for action at the October council meeting.

ADVISORY COMMITTEE ON CRIMINAL JURY INSTRUCTIONS (CALCRIM)

Judicial Council Report–Recommend Council Action

Item 31

Jury Instructions: Criminal Jury Instructions (2025 Supplement)

The committee reviewed a recommendation from Advisory Committee on Criminal Jury Instructions that the Judicial Council approve for publication the new and revised criminal jury instructions prepared by the advisory committee under rule 2.1050 of the California Rules of Court. The changes will, among other things, keep the instructions current with statutory and case authority. Once approved, the new and revised instructions will be published in the 2025 supplement of *Judicial Council of California Criminal Jury Instructions (CALCRIM)*

Action: The committee unanimously approved the recommendation from the Advisory Committee on Criminal Jury Instructions, which is to go to the Judicial Council for action at the October council meeting.

CENTER FOR JUDICIAL EDUCATION AND RESOURCES (CJER)

Judicial Council Report–Recommend Council Action

Item 32

Judicial Branch Education: Sunset of Pandemic-Related Deadline Extensions

The committee reviewed a recommendation from the Center for Judicial Education and Resources Advisory Committee recommends that the Judicial Council repeal rule 10.492 of the California Rules of Court to eliminate any actual or potential confusion that the pandemic-related deadline extensions for continuing education remain in place.

Action: The committee unanimously approved the recommendation from the Center for Judicial Education and Resources Advisory Committee, which is to go to the Judicial Council for action at the October council meeting.

JUDICIAL COUNCIL STAFF

Judicial Council Report–Recommend Council Action

Item 33

Civil Practice and Procedure: Rules Regarding Telephonic Appearances

The committee reviewed a recommendation from Judicial Council staff that the Judicial Council amend rules 3.670, 5.9, 5.324, 5.531, and 5.900 of the California Rules of Court to reflect the new sunset date in Code of Civil Procedure section 367.75.

Action: The committee unanimously approved the recommendation from Judicial Council staff, which is to go to the Judicial Council for action at the October council meeting.

Item 34

Rules and Forms: Miscellaneous Technical Changes to CARE Act Rule and Adoption, CARE Act, and Sheriff Service Forms

The committee reviewed a recommendation from Judicial Council staff to correct errors in one rule of court and seven Judicial Council forms resulting from typographical mistakes, changes resulting from legislation, and previous rule amendments and forms revisions. Staff recommends the Judicial Council make the necessary corrections to avoid causing confusion for court users, clerks, and judicial officers.

Action: The committee unanimously approved the recommendation from Judicial Council staff, which is to go to the Judicial Council for action at the October council meeting.

Item 35

Rules and Forms: Miscellaneous Technical Changes

The committee reviewed a recommendation from Judicial Council staff to correct errors identified rules of court and Judicial Council forms resulting from input errors, and minor changes needed to conform to changes in law or previous council actions. These changes are technical in nature and necessary to avoid causing confusion for court users, clerks, and judicial officers.

Action: The committee unanimously approved the recommendation from Judicial Council staff, which is to go to the Judicial Council for action at the October council meeting.

INFORMATION ONLY ITEMS (NO ACTION REQUIRED)

The Next Rules Committee meeting will be held on: October 16, 2025.

ADJOURNMENT

There being no further business, the meeting was adjourned at 1:00 p.m.

Approved by the committee on

Judicial Council of California
Rules Committee

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RULES COMMITTEE

MINUTES OF OPEN VIDEOCONFERENCE MEETING

Thursday, October 16, 2025
12:10 – 1:10 p.m.

Rules Committee Members Present:	Hon. Joan K. Irion, Chair, Hon. Tamara L. Wood, Vice-Chair, Hon. Charles S. Crompton, Hon. Ryan Davis, Ms. Rachel W. Hill, Mr. Charles Johnson, Hon. Jeffrey C. Kauffman, Mr. Darrel E. Parker, Hon. Michael Rhoads, and Ms. Dena Stone
Rules Committee Members Absent:	Hon. Bunmi O. Awoniyi, Hon. Ricardo R. Ocampo, and Mr. Craig M. Peters
Rules Committee Staff Present:	Ms. Kristin Burford, Ms. Benita Downs, and Mr. Eric Long
Advisory Bodies Chairs and JC Staff Presenting:	Hon. Maria Lucy Armendariz, Hon. Jayne Chong-Soon Lee, Hon. Tari L. Cody, Hon. Allison M. Danner, Hon. Adrienne M. Grover, Hon. Stephanie E. Hulsey, Hon. Lisa R. Rodriguez, Sarah Fleischer-Ihn, Jenny Grantz, Sarah Jacobvitz, Julia Kaufman, Eric Long, Kara Portnow, Jamie Schechter, and Jeremy Varon
JC Staff Present:	Sarah Davis, Andrey Fancy, Anne Hadreas, Nikki Marquez, Anna Maves, Lollie Roberts, Marymichael Smrdeli, Greg Tanaka, and Shayla Taylor

OPEN MEETING

Call to Order and Roll Call

The chair called the meeting to order at 12:12 p.m., and Ms. Downs took roll call.

DISCUSSION AND ACTION ITEMS (ITEMS 01–08)

APPELLATE

Annual Agenda–Rules Committee Action Only

Item 01

Appellate Advisory Committee

The committee reviewed the proposed 2025–2026 annual agenda of the Appellate Advisory Committee.

Action: The committee unanimously approved the 2025–2026 annual agenda of the Appellate Advisory Committee, with the revisions presented at the meeting.

CALIFORNIA CIVIL JURY INSTRUCTIONS (CACI)

Annual Agenda–Rules Committee Action Only

Item 02

Advisory Committee on Civil Jury Instructions (CACI) Annual Agenda

The committee reviewed the proposed 2025–2026 annual agenda of the Advisory Committee on Civil Jury Instructions.

Action: The committee unanimously approved the 2025–2026 annual agenda of the Advisory Committee on Civil Jury Instructions.

CALIFORNIA CRIMINAL JURY INSTRUCTIONS (CALCRIM)

Annual Agenda–Rules Committee Action Only

Item 03

Advisory Committee on Criminal Jury Instructions (CALCRIM) Annual Agenda

The committee reviewed the proposed 2025–2026 annual agenda of the Advisory Committee on Criminal Jury Instructions.

Action: The committee unanimously approved the 2025–2026 annual agenda of the Advisory Committee on Criminal Jury Instructions.

CIVIL AND SMALL CLAIMS

Annual Agenda–Rules Committee Action Only

Item 04

Civil and Small Claims Advisory Committee

The committee reviewed the proposed 2025–2026 annual agenda of the Civil and Small Claims Advisory Committee.

Action: The committee unanimously approved the 2025–2026 annual agenda of the Civil and Small Claims Advisory Committee, with the revisions presented at the meeting.

CRIMINAL

Annual Agenda–Rules Committee Action Only

Item 05

Criminal Law Advisory Committee Annual Agenda

The committee reviewed the proposed 2025–2026 annual agenda of the Criminal Law Advisory Committee.

Action: The committee unanimously approved the 2025–2026 annual agenda of the Criminal Law Advisory Committee, with the revisions presented at the meeting.

FAMILY AND JUVENILE

Annual Agenda–Rules Committee Action Only

Item 06

Family and Juvenile Law Advisory Committee

The committee reviewed the proposed 2025–2026 annual agenda of the Family and Juvenile Law Advisory Committee.

Action: The committee unanimously approved the 2025–2026 annual agenda of the Family and Juvenile Law Advisory Committee, with the revisions presented at the meeting.

PROBATE AND MENTAL HEALTH

Annual Agenda–Rules Committee Action Only

Item 07

Probate and Mental Health Advisory Committee

The committee reviewed the proposed 2025–2026 annual agenda of the Probate and Mental Health Advisory Committee.

Action: The committee unanimously approved the 2025–2026 annual agenda of the Probate and Mental Health Advisory Committee, with the revisions presented at the meeting.

TRAFFIC

Annual Agenda–Rules Committee Action Only

Item 08

Traffic Advisory Committee Annual Agenda

The committee reviewed the proposed 2025–2026 annual agenda of the Traffic Advisory Committee.

Action: The committee unanimously approved the 2025–2026 annual agenda of the Traffic Advisory Committee.

INFORMATION ONLY ITEMS (NO ACTION REQUIRED)

Next Rules Committee Meeting: October 30, 2025

ADJOURNMENT

There being no further business, the meeting was adjourned at 1:19 p.m.

Approved by the committee on

Item number: 01

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: October 30, 2025

Rules Committee action requested [Choose from drop-down menu below]:
Submit to JC (without circulating for comment)

Title of proposal: Civil Practice and Procedure: Judgment Debtor Address Verification and Calculation of Earnings Withholding Period

Proposed rules, forms, or standards (include amend/revise/adopt/approve)*:*
Revise forms EJ-130, WG-002, WG-003, WG-004, WG-015/EJ-135, WG-017/EJ-137, WG-022, WG-030

Committee or other entity submitting the proposal:
Judicial Council staff

Staff contact (name, phone and email)*: Jenny Grantz, 415-865-4394, jenny.grantz@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): October 22, 2024
Project description from annual agenda: Miscellaneous Technical Changes.Develop rule and form changes as necessary to make corrections and adjustments meeting the criteria of rule 10.22(d)(2): "a nonsubstantive technical change or correction or a minor substantive change that is unlikely to create controversy."

Out of Cycle/Early Implementation: *If requesting July 1 effective date or out of cycle, explain why:*
These form revisions are being recommended out of cycle because they implement changes in law that will become effective on January 1, 2026.

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff

- **Director Approval** (required for all invitations to comment and reports)
  This report or invitation to comment was:
  ☒ reviewed by EGG on *(date)* 10/10/2025
  ☒ approved by Office Director (or Designee) (*name*) James Barolo on (date) October 14, 2025

If either of above not checked, explain why:

*Complete the following for all reports to be submitted to council (optional for ITCs)**:***

- **Form Translations** (check all that apply)
  This proposal:
  ☒ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any report with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☒ This proposal may require changes or additions to self-help web content.

Judicial Council *of* California

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 25-178
For business meeting on December 12, 2025

Title
Civil Practice and Procedure: Judgment Debtor Address Verification and Calculation of Earnings Withholding Period

Rules, Forms, Standards, or Statutes Affected
Revise forms EJ-130, WG-002, WG-003, WG-004, WG-015/EJ-135, WG-017/EJ-137, WG-022, WG-030

Recommended by
Michelle Curran, Administrative Director
Judicial Council

Report Type
Action Required

Effective Date
January 1, 2026

Date of Report
October 24, 2025

Contact
Jenny Grantz, 415-865-4394
jenny.grantz@jud.ca.gov

Executive Summary

Assembly Bill 774 (Stats. 2025, ch. 708), enacted October 13, 2025, makes several changes to the laws regarding enforcement of judgment, including a change to the start of the withholding period for earnings withholding orders. Judicial Council staff recommend revising eight Judicial Council forms to ensure they correctly state the law when AB 774 becomes effective on January 1, 2026. These revisions will be circulated for post-approval public comment as part of a larger proposal to implement AB 774.

Recommendation

Judicial Council staff recommend that the Judicial Council, effective January 1, 2026:

1. Revise the following forms to reflect changes made by AB 774 to the address verification requirement in Code of Civil Procedure section 684.130:

   - *Writ of Execution* (form EJ-130)
   - *Employee Instructions* (form WG-003)

- *Declaration of Address Verification* (form WG-015/EJ-135)
- *Application to Stay Levy or Garnishment* (form WG-017/EJ-137)

2. Revise the following forms to reflect the change made by AB 774 to the start of the withholding period for earnings withholding orders:
   - *Earnings Withholding Order* (form WG-002)
   - *Earnings Withholding Order for Support* (form WG-004)
   - *Earnings Withholding Order for Taxes* (form WG-022)
   - *Earnings Withholding Order for Elder or Dependent Adult Financial Abuse* (form WG-030)

The proposed revised forms are attached at pages 5–19.

Relevant Previous Council Action

The Judicial Council most recently took action on the eight forms in this report at its October 24, 2025, business meeting, when it approved a recommendation to adopt and revise forms to implement Assembly Bill 2837 (Stats. 2024, ch. 514). At that meeting, the council adopted forms WG-015/EJ-135 and WG-017/EJ-137 and revised forms EJ-130, WG-002, WG-003, WG-004, WG-022, and WG-030, effective January 1, 2026.

Analysis/Rationale

Judicial Council staff recommend revising eight forms to implement AB 774 (see Link A), which amends several existing statutes regarding enforcement of judgment, including several statutes amended by AB 2837. When the AB 774 amendments become effective on January 1, 2026, some of the form revisions made to implement AB 2837 will no longer be correct. Judicial Council staff therefore recommend revising the forms in this report effective January 1, 2026, and recommend that the versions of the forms attached to this report supersede the versions approved by the Judicial Council on October 24 to implement AB 2837.[1]

[1] The revised forms attached to this report include the revisions recommended to implement AB 774 as well as the revisions approved on October 24, 2025, to the extent the October 24 revisions do not conflict with AB 774. However, the highlighting in the attached forms reflects only the revisions recommended to implement AB 774. The form revisions approved on October 24 to implement AB 2837 are described in the advisory committee report to the Judicial Council entitled *Civil Practice and Procedure: Implementation of Assembly Bill 2837* (Oct. 9, 2025), available at *https://jcc.legistar.com/View.ashx?M=F&ID=14853402&GUID=4BCDAB8E-02EF-4E98-828A-C07FE09EFC0A*.

Address verification requirement

Code of Civil Procedure section 684.130 provides that if the levying officer is required to serve "any writ, order, notice, or other paper" related to enforcement of a judgment for personal debt,[2] the judgment creditor must provide a declaration stating that the judgment debtor's address has been verified using reasonable diligence within the past 12 months and describing the methods used to complete the verification.[3] The judgment creditor must then file the signed declaration with the court. Section 684.130 currently requires the judgment creditor to file the declaration within 5 business days of delivering it to the levying officer, but AB 774 changes that deadline to 10 business days.[4] Staff recommend changing "5 business days" to "10 business days" in the following places:

- The notice on page 3 of form EJ-130;
- The notice on page 1 of form WG-003;
- The instructions on page 1 of form WG-015/EJ-135; and
- Item 4a(2) on form WG-017/EJ-137.

AB 774 also amends the portion of section 684.130 that sets forth methods for verifying the judgment debtor's address. The statute currently states that acceptable address verification methods include sending a letter by certified mail or using a commercial address verification process that includes sending a letter by first-class mail.[5] AB 774 clarifies that a person employing either of these methods may send either a letter or a legal pleading. Staff therefore recommend revising items 4b and 4c on form WG-015/EJ-135 to change "letter" to "letter or legal pleading."

Earnings withholding period

Code of Civil Procedure section 706.022(a) currently states that the employer should begin withholding earnings on the 30th day after service of the earnings withholding order on the judgment debtor (the employee). Under AB 774, the start of the withholding period will be calculated based on service of the order on the employer, not the judgment debtor.[6]

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[2] The levying officer is statutorily required to serve certain documents related to enforcement of judgment, including notices of levy, writs of execution, and writs of possession. (Code Civ. Proc., §§ 700.010(a) (writs of execution and notices of levy), 715.020(a) (writs of possession).)

[3] Code Civ. Proc., § 684.130(b)(2).

[4] Assem. Bill 774 (Stats. 2025, ch. 708) § 1 (amending Code Civ. Proc., § 684.130(b)(6)).

[5] Code Civ. Proc., § 684.130(b)(2)(B), (C).

[6] Assem. Bill 774 (Stats. 2025, ch. 708) § 7.

Staff recommend the following revisions to forms WG-002, WG-004, WG-022, and WG-030 to implement this change in law:

- Revising item 2 on page 1 of forms WG-002, WG-004, and WG-030 to state that the withholding period should be calculated from "the date when you were served with this order."

- Revising the relevant portions of the instructions on page 2 of forms WG-002, WG-004, and WG-030 to say "you were served" instead of "the employee was served."

- Revising item 5d on form WG-022 to state that withholding begins "on or after the 30th day after this order is served on the employer."

Policy implications

The key policy implication is to ensure that the forms in this report correctly reflect the statutory amendments made by AB 774, effective January 1, 2026, to the address verification requirement in Code of Civil Procedure section 684.130 and the start of the withholding period for earnings withholding orders as set forth in section 706.022(a).

Comments

Public comments were not solicited for this proposal because the revisions are within the Judicial Council's purview to adopt without circulation. (See Cal. Rules of Court, rule 10.22(d)(2).) Later this year, the Civil and Small Claims Advisory Committee will develop a proposal to implement AB 774 and will include the revisions discussed in this report in the solicitation for public comments on that proposal.

Alternatives considered

Staff did not consider the alternative of taking no action because the forms will not reflect current law unless they are revised.

Fiscal and Operational Impacts

The statutory amendments made by AB 774 and the resulting form revisions will require education and training of court staff and judicial officers and possibly some changes to computerized case management systems. These operational impacts are the result of changes in law and cannot be avoided.

Attachments and Links

1. Forms EJ-130, WG-002, WG-003, WG-004, WG-015/EJ-135, WG-017/EJ-137, WG-022, and WG-030, at pages 5–19
2. Link A: Assem. Bill 774 (Stats. 2025, ch. 708), *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202520260AB774*

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*): ☐ ATTORNEY FOR ☐ ORIGINAL JUDGMENT CREDITOR ☐ ASSIGNEE OF RECORD	*FOR COURT USE ONLY* DRAFT 10/17/2025 NOT APPROVED BY COUNCIL
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	CASE NUMBER:
WRIT OF ☐ **EXECUTION (Money Judgment)** ☐ **POSSESSION OF** ☐ **Personal Property** ☐ **Real Property** ☐ **SALE**	☐ **Limited Civil Case** (including Small Claims) ☐ **Unlimited Civil Case** (including Family and Probate)

1. **To the Sheriff or Marshal of the County of:**
   You are directed to enforce the judgment described below with daily interest and your costs as provided by law.
2. **To any registered process server:** You are authorized to serve this writ only in accordance with CCP 699.080 or CCP 715.040.
3. (Name):
   is the ☐ original judgment creditor ☐ assignee of record whose address is shown on this form above the court's name.
4. **Judgment debtor** *(name, type of legal entity if not a natural person, and last known address):*

   ☐ Additional judgment debtors on next page
5. **Judgment entered** on *(date):*
   (See type of judgment in item 22.)
6. ☐ Judgment renewed on *(dates):*
7. **Notice of sale** under this writ:
   a. ☐ has not been requested.
   b. ☐ has been requested *(see next page).*
8. ☐ Joint debtor information on next page.
9. ☐ Writ of Possession/Writ of Sale information on next page.
10. ☐ This writ is issued on a sister-state judgment.

For items 11–17, see form MC-012 and form MC-013-INFO.

11. Total judgment *(as entered or renewed)*	$
12. Costs after judgment *(CCP 685.090)*	$
13. Subtotal *(add 11 and 12)*	$
14. Credits to principal *(after credit to interest)*	$
15. Principal remaining due *(subtract 14 from 13)*	$
16. Accrued interest remaining due per CCP 685.050(b) *(not on GC 6103.5 fees)*	$
17. Fee for issuance of writ (*per GC 70626(a)(l)*)	$
18. **Total amount due** *(add 15, 16, and 17)*	$

19. **Levying officer:**
    a. Add daily interest from date of writ *(at the legal rate on 15) (not on GC 6103.5 fees)* . . . . . $
    b. Pay directly to court costs included in 11 and 17 *(GC 6103.5, 68637; CCP 699.520(j))* . . . . . $
20. ☐ The amounts called for in items 11–19 are different for each debtor. These amounts are stated for each debtor on Attachment 20.

[SEAL]

Date: _____ Clerk, by _____, Deputy

NOTICE TO PERSON SERVED: SEE PAGE 3 FOR IMPORTANT INFORMATION.

Plaintiff/Petitioner: Defendant/Respondent:	CASE NUMBER:

21. ☐ Additional judgment debtor(s) *(name, type of legal entity if not a natural person, and last known address):*

22. The judgment is for *(check one):*

a. ☐ wages owed.

b. ☐ child support or spousal support.

c. ☐ personal debt, as defined in Code of Civil Procedure section 683.110(d). (*If this box is checked, the judgment creditor must complete* Declaration of Address Verification *(form WG-015/EJ-135) before asking the sheriff to serve this form on the judgment debtor.*)

d. ☐ other *(describe):*

23. ☐ Notice of sale has been requested by *(name and address):*

24. ☐ Joint debtor was declared bound by the judgment (Code Civ. Proc., §§ 989–994)

a. *on (date):*

b. name, type of legal entity if not a natural person, and last known address of joint debtor:

c. *on (date):*

d. name, type of legal entity if not a natural person, and last known address of joint debtor:

e. ☐ Additional costs against certain joint debtors are itemized: ☐ below ☐ on Attachment 24c.

25. ☐ (Writ of Possession or Writ of Sale) **Judgment** was entered for the following:

a. ☐ Possession of real property: The complaint was filed on *(date):*

(Check (1) or (2). Check (3) if applicable. Complete (4) if (2) or (3) have been checked.)

(1) ☐ The *Prejudgment Claim of Right to Possession* (form CP10.5) was served in compliance with Code of Civil Procedure section 415.46. The judgment includes all tenants, subtenants, named claimants, and other occupants of the premises.

(2) ☐ The *Prejudgment Claim of Right to Possession* was NOT served in compliance with Code of Civil Procedure section 415.46.

(3) ☐ The unlawful detainer resulted from a foreclosure sale of a rental housing unit. (An occupant not named in the judgment may file a *Claim of Right to Possession* at any time up to and including the time the levying officer returns to effect eviction, regardless of whether a *Prejudgment Claim of Right to Possession* was served.) *(See Code Civ. Proc., §§ 415.46 & 1174.3(a)(2).)*

(4) If the unlawful detainer resulted from a foreclosure (item 25a(3)), or if the *Prejudgment Claim of Right to Possession* was not served in compliance with Code of Civil Procedure section 415.46 (item 25a(2)), answer the following:

(a) The daily rental value on the date the complaint was filed was $

(b) The court will hear objections to enforcement of the judgment under Code of Civil Procedure section 1174.3 on the following dates *(specify):*

Plaintiff/Petitioner: Defendant/Respondent:	CASE NUMBER:

25. b. ☐ Possession of personal property.

☐ If delivery cannot be had, then for the value *(itemize in 25e)* specified in the judgment or supplemental order.

c. ☐ Sale of personal property.

d. ☐ Sale of real property.

e. The property is described ☐ below ☐ on Attachment 25e.

NOTICE TO PERSON SERVED

WRIT OF EXECUTION OR SALE. Your rights and duties are indicated on the accompanying *Notice of Levy* (form EJ-150).

WRIT OF POSSESSION OF PERSONAL PROPERTY. If the levying officer is not able to take custody of the property, the levying officer will demand that you turn over the property. If custody is not obtained following demand, the judgment may be enforced as a money judgment for the value of the property specified in the judgment or in a supplemental order.

WRIT OF POSSESSION OF REAL PROPERTY. If the premises are not vacated within five days after the date of service on the occupant or, if service is by posting, within five days after service on you, the levying officer will remove the occupants from the real property and place the judgment creditor in possession of the property. Except for a mobile home, personal property remaining on the premises will be sold or otherwise disposed of in accordance with Code of Civil Procedure section 1174 unless you or the owner of the property pays the judgment creditor the reasonable cost of storage and takes possession of the personal property not later than 15 days after the time the judgment creditor takes possession of the premises.

EXCEPTION IF RENTAL HOUSING UNIT WAS FORECLOSED. If the residential property that you are renting was sold in a foreclosure, you have additional time before you must vacate the premises. If you have a lease for a fixed term, such as for a year, you may remain in the property until the term is up. If you have a periodic lease or tenancy, such as from month to month, you may remain in the property for 90 days after receiving a notice to quit. A blank form *Claim of Right to Possession and Notice of Hearing* (form CP10) accompanies this writ. You may claim your right to remain on the property by filling it out and giving it to the sheriff or levying officer.

EXCEPTION IF YOU WERE NOT SERVED WITH A FORM CALLED PREJUDGMENT CLAIM OF RIGHT TO POSSESSION. If you were not named in the judgment for possession and you occupied the premises on the date on which the unlawful detainer case was filed, you may object to the enforcement of the judgment against you. You must complete the form *Claim of Right to Possession and Notice of Hearing* (form CP10) and give it to the sheriff or levying officer. A blank form accompanies this writ. You have this right whether or not the property you are renting was sold in a foreclosure.

JUDGMENTS FOR PERSONAL DEBT. If you are the judgment debtor identified in item 4 on this form, and if item 22 on this form says the judgment is for personal debt, the judgment creditor is required to verify your address before asking the levying officer to serve this *Writ of Execution*. The judgment creditor must give the levying officer a completed copy of *Declaration of Address Verification* (form WG-015/EJ-135) and must file completed form WG-015/EJ-135 with the court within 10 business days of giving a copy of the form to the levying officer. If the judgment creditor doesn't take these steps, you can ask the court to stay any wage garnishment order, bank account levy, or other levy related to this *Writ of Execution*. You can use *Application for Stay of Levy or Garnishment* (form WG-017/EJ-137) to ask the court to stay the levy or garnishment until the address verification has been completed.

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	LEVYING OFFICER (*name and address*): DRAFT 10/17/2025 NOT APPROVED BY COUNCIL
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY: ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
EARNINGS WITHHOLDING ORDER (Wage Garnishment)	LEVYING OFFICER FILE NO.: / COURT CASE NO.:

EMPLOYEE: *KEEP YOUR COPY OF THIS LEGAL PAPER.* **EMPLEADO:** *GUARDE ESTE PAPEL OFICIAL.*

EMPLOYER: Enter the following date to assist your recordkeeping.
Date this order was received by employer (specify the date of personal delivery by levying officer or registered process server or the date mail receipt was signed):

TO THE EMPLOYER REGARDING YOUR EMPLOYEE:

Name and address of employer

Name and address of employee

Social Security No. ☐ on form WG-035 ☐ unknown

1. A judgment creditor has obtained this order to collect a court judgment against your employee. You are directed to withhold part of the earnings of the employee (*see instructions on page 2 of this form).* Pay the withheld sums to the **levying officer** *(name and address above*).

   If the employee works for you now, you must **give the employee a copy of this order and *Employee Instructions*** **(form WG-003)** within 10 days after receiving this order.

   Complete *Employer's Return* **(form WG-005)** and **mail it to the levying officer** within 15 days after receiving this order. You must do so even if the employee no longer works for you.

2. The total amount due is: $

   Count 30 calendar days from the date when you were served with this order. **Do not** withhold earnings payable for any pay period that ends before the 30th day. **Do** withhold from earnings that are payable for any pay period ending on or after that 30th day. If you receive notice that the employee has filed a claim of exemption, read the Instructions to Employer on page 2 of this form for more information about calculating the start of the withholding period.

   Continue withholding for all pay periods until you withhold the amount due. The levying officer will notify you of an assessment you should withhold in addition to the amount due. Do not withhold more than the total of these amounts. Never withhold any earnings payable before the beginning of the earnings withholding period.

3. The judgment was entered in the court on *(date):*

   The judgment creditor *(if different from the plaintiff)* is *(name):*

4. The Instructions to Employer on page 2 of this form tell you how much of the employee's earnings to withhold each payday and answer other questions you may have.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE)

☐ LEVYING OFFICER ☐ REGISTERED PROCESS SERVER

INSTRUCTIONS TO EMPLOYER ON EARNINGS WITHHOLDING ORDERS

The instructions in paragraph 1 on page 1 of this form describe your initial duties to provide information to your employee and the levying officer.

Your other duties are TO WITHHOLD THE CORRECT AMOUNT OF EARNINGS (if any) and PAY IT TO THE LEVYING OFFICER during the *withholding period.*

The withholding period is the period covered by *Earnings Withholding Order* (this order). The withholding period begins 30 calendar days after you were served with the order and continues until you have withheld the total amount due, plus additional amounts for costs and interest (which will be listed in a levying officer's notice). However, if the employee files a claim of exemption and notifies you of the filing no later than 29 days after you were served with *Earnings Withholding Order*, then the withholding period begins 45 days after you were served with *Earnings Withholding Order*.

The withholding period may end sooner if (1) you receive a written notice signed by the levying officer specifying an earlier termination date, or (2) you receive an order of higher priority (explained on page 2 of *Employer's Return* (form WG-005)).

You are entitled to rely on and must obey all written notices signed by the levying officer.

Employer's Return (form WG-005) describes several situations that could affect the withholding period for this order. If you receive more than one *Earnings Withholding Order* during a withholding period, review form WG-005 for instructions.

If the employee stops working for you, the *Earnings Withholding Order* ends after no amounts are withheld for a continuous 180-day period. If withholding ends because the earnings are subject to an order of higher priority, the *Earnings Withholding Order* ends after a continuous two-year period during which no amounts are withheld under the order. **Return the Earnings Withholding Order to the levying officer with a statement explaining why it is being returned.**

WHAT TO DO WITH THE MONEY

The amounts withheld during the withholding period must be paid to the levying officer by the 15th day of the next month after each payday. If you wish to pay more frequently than monthly, each payment must be made within 10 days after the close of the pay period.

Include the case number, levying officer's file number (if different from the case number), and the employee's name on each payment to ensure the money is applied to the correct account.

WHAT IF YOU STILL HAVE QUESTIONS?

The garnishment law is contained in the Code of Civil Procedure beginning with section 706.010. Sections 706.022, 706.025, 706.050, and 706.104 explain the employer's duties.

The Federal Wage Garnishment Law and federal rules provide the basic protections on which the California law is based. Inquiries about the federal law will be answered by mail, telephone, or personal interview at any office of the Wage and Hour Division of the U.S. Department of Labor. The Wage and Hour Division's contact information is available at dol.gov/agencies/whd/contact.

COMPUTATION INSTRUCTIONS

Code of Civil Procedure section 706.050 explains how to determine the amount to withhold (if anything) depending on the employee's disposable earnings, which are calculated based on the employee's pay period and the applicable hourly minimum wage. This calculation is summarized in the next section of this form and on the California Courts self-help website (selfhelp.courts.ca.gov/guide-earnings-withholding-orders-employers).

THESE COMPUTATION INSTRUCTIONS APPLY UNDER NORMAL CIRCUMSTANCES. THEY DO NOT APPLY TO ORDERS FOR THE SUPPORT OF A SPOUSE, FORMER SPOUSE, OR CHILD.

State law limits how much of an employee's earnings can be withheld. These limits are based on the employee's disposable earnings, not their gross pay or take-home pay.

(A) To determine the CORRECT AMOUNT OF EARNINGS TO BE WITHHELD (if any), first compute the employee's *disposable earnings.*

Earnings include any money (whether called wages, salary, commissions, bonuses, or anything else) that is paid by an employer to an employee for personal services. Vacation or sick pay is subject to withholding as it is received by the employee. Tips are generally not included as earnings because they are not paid by the employer.

Disposable earnings are the earnings left after subtracting the part of the earnings a state or federal law requires an employer to withhold. Generally these required deductions are (1) federal income tax, (2) federal social security, (3) state income tax, (4) state disability insurance, and (5) payments to public employee retirement systems. Disposable earnings will change when the required deductions change.

(B) After the employee's disposable earnings are known, calculate the withholding amount as shown in Code of Civil Procedure section 706.050. You can follow the directions below in (C) or on the California Courts Self-Help website (selfhelp.courts.ca.gov/guide-earnings-withholding-orders-employers). You will need to know the amount of the minimum wage in the location where the employee works.

(C) Calculate the maximum amount that may be withheld from the employee's disposable earnings, which is the *lesser* of the following two amounts:

- 20 percent of disposable earnings for that week; **or**
- 40 percent of the amount by which the employee's disposable earnings that week exceed the applicable minimum wage. If there is a local minimum wage in effect in the location where the employee works that exceeds the state minimum wage at the time the earnings are payable, the local minimum wage is the applicable minimum wage.

To calculate the correct amount, follow the steps below:

Step 1: Determine the applicable minimum wage per pay period.

- For a daily or weekly pay period, multiply the applicable hourly minimum wage by 48.
- For a biweekly pay period, multiply the applicable hourly minimum wage by 96.
- For a semimonthly pay period, multiply the applicable hourly minimum wage by 104.
- For a monthly pay period, multiply the applicable hourly minimum wage by 208.

Step 2: Subtract the amount from Step 1 from the employee's disposable earnings during that pay period.

Step 3: If the amount from Step 2 is less than zero, do not withhold any money from the employee's earnings.

Step 4: If the amount from Step 2 is greater than zero, multiply that amount by 0.40.

Step 5: If the amount from Step 4 is lower than 20 percent of the employee's disposable earnings, withhold this amount. If it is greater than 20 percent of the employee's disposable earnings, withhold 20 percent of the disposable earnings.

Occasionally, the employee's earnings will also be subject to a *Wage and Earnings Assignment Order,* an order available from family law courts for child, spousal, or family support. The amount required to be withheld for that order should be deducted from the amount to be withheld for this order.

IMPORTANT WARNINGS

1. IT IS AGAINST THE LAW TO FIRE THE EMPLOYEE BECAUSE OF *EARNINGS WITHHOLDING ORDERS* FOR THE PAYMENT OF ONLY ONE INDEBTEDNESS. No matter how many orders you receive, so long as they all relate to a single judgment (no matter how many debts are represented in that judgment), the employee may not be fired.
2. IT IS ILLEGAL TO AVOID AN *EARNINGS WITHHOLDING ORDER* BY POSTPONING OR ADVANCING THE PAYMENT OF EARNINGS. The employee's pay period must not be changed to prevent the order from taking effect.
3. IT IS ILLEGAL NOT TO PAY AMOUNTS WITHHELD FOR THE *EARNINGS WITHHOLDING ORDER* TO THE LEVYING OFFICER. Your duty is to pay the money to the levying officer who will pay the money in accordance with the law that applies to this case.

   IF YOU VIOLATE ANY OF THESE LAWS YOU MAY BE HELD LIABLE TO PAY CIVIL DAMAGES AND YOU MAY BE SUBJECT TO CRIMINAL PROSECUTION!

EMPLOYEE INSTRUCTIONS

-NOTICE-

IMPORTANT LEGAL NOTICE TO EMPLOYEE
ABOUT EARNINGS WITHHOLDING ORDERS
(Wage Garnishment)

The **Earnings Withholding Order** requires your employer to pay part of your earnings to the sheriff or other levying officer. The levying officer will pay the money to a creditor who has a court judgment against you. The information below may help you protect the money you earn.

-NOTICIA-

NOTICIA LEGAL IMPORTANTE RESPECTO
A LAS ÓRDENES DE RETENCIÓN DE SUELDO

La **Orden de Retención de Sueldo** requiere que su empleador pague una parte de su sueldo a un oficial de embargo. El oficial le pagará el dinero retenido a su acreedor que ha conseguido una decisión judicial en contra de usted. Pida usted que un amigo o su abogado le lea este papel oficial. Esta información le puede ayudar a proteger su sueldo.

CAN YOU BE FIRED BECAUSE OF THIS?

NO. You cannot be fired unless your earnings have been withheld before for a different court judgment. If this is the first judgment for which your wages will be withheld and your employer fires you because of this, the California Labor Commissioner (dir.ca.gov/dlse/DistrictOffices.htm) can help you get your job back.

HOW MUCH OF YOUR PAY WILL BE WITHHELD?

The Earnings Withholding Order (abbreviated in this notice as **EWO**) that applies to you contains Employer Instructions. These explain how much of your earnings can be withheld. Generally, the amount is about 20 percent of your take-home pay until the amount due has been withheld. The levying officer will notify the employee of an additional assessment charged for paying out money collected under this order, and that amount will also be withheld.

If you have trouble figuring this out, ask your employer for help.

IS THERE ANYTHING YOU CAN DO?

YES. There are several possibilities.

1. See an attorney. An attorney may be able to help you make an agreement with your creditor or help you stop your earnings from being withheld. You may wish to consider bankruptcy or asking the bankruptcy court to help you pay your creditors. These possibilities may stop your wages from being withheld. An attorney can help you decide what is best for you. Take your **EWO** to the attorney to help you get the best advice and the fastest help. Read California Courts self-help website for information about finding an attorney (selfhelp.courts.ca.gov/hire-lawyer).

2. Try to work out an agreement yourself with your creditor. Call the creditor or the creditor's attorney, listed on the **EWO**. If you make an agreement, the withholding of your wages will stop or be changed to a smaller amount you agree on. *(See item 4 on page 2 of this form for another way to make an offer to your creditor.)*

3. You can ask for an EXEMPTION. An exemption will protect more, or maybe even all, of your earnings. You can get an exemption if you need your earnings to support yourself or your family, **but you cannot get an exemption if:**
   a. You use some of your earnings for luxuries and they aren't really necessary for support; ***OR***
   b. You owe money to an attorney because of a court order in a family case; ***OR***
   c. You owe the debt for past due child support of spousal support (alimony); ***OR***
   d. You owe the debt to a former employee for wages.

HOW DO YOU ASK FOR AN EXEMPTION?

See the other side of this form for instructions about claiming an exemption.

IS THE EWO RELATED TO PERSONAL DEBT?

If the EWO is being used to enforce a judgment for personal debt, the judgment creditor is required to verify your address before asking the levying officer to serve the EWO. The judgment creditor must give the levying officer a completed copy of *Declaration of Address Verification* (form WG-015/EJ-135) and must file a completed form WG-015/EJ-135 with the court within 10 business days of giving a copy of the form to the levying officer. If the judgment creditor doesn't take these steps, you can ask the court to stay (pause) the wage garnishment order until the address verification is complete. You can use *Application for Stay of Levy or Garnishment* (form WG-017/EJ-137) to ask the court for a stay.

HOW DO YOU ASK FOR AN EXEMPTION?

1. Call or write the levying officer for three copies each of *Claim of Exemption* (form WG-006) and *Financial Statement* (form WG-007). Or go to courts.ca.gov/rules-forms/find-your-court-forms to download copies of the forms. These forms are free.
2. Fill out both forms. If an item on the form has a box ☐ in front of it, only check the box if the item applies to your case.
3. It is ***your*** job to prove with the *Financial Statement* form that your earnings are needed for support. Write down the details about your needs. For example, if your child has special medical expenses, tell which child, what illnesses, who the doctor is, how often the doctor must be visited, the cost per visit, and the costs of medicines. These details should be listed in item 6 on *Financial Statement*. If you need more space, write "See Attachment 6" in item 6 and attach a separate piece of paper labeled "Attachment 6" where you can explain your expenses in detail.
4. You can use *Claim of Exemption* (form WG-006) to make an offer to the judgment creditor to have a specified amount withheld each pay period. Complete item 3 on the form to indicate the amount you agree to have withheld **each payday during the withholding period.** (Be sure it's less than the amount to be withheld otherwise.) If your creditor accepts your offer, he will not oppose your claim of exemption. (See item (1) in the "ONE OF TWO THINGS WILL HAPPEN**"** section below.)
5. Sign *Claim of Exemption* and *Financial Statement*. Be sure *Claim of Exemption* shows the address where you receive mail.
6. Mail or deliver two copies of each of the two forms to the levying officer. Keep one copy for yourself in case there is a court hearing.

Do not use *Claim of Exemption* (form WG-006) or *Financial Statement* (form WG-007) to seek a modification of child support or alimony payments. These payments can be modified only by the family law court that ordered them.

FILE YOUR CLAIM OF EXEMPTION AS SOON AS POSSIBLE FOR THE MOST PROTECTION.

ONE OF TWO THINGS WILL HAPPEN AFTER YOU ASK FOR AN EXEMPTION

(1) The judgment creditor will not oppose (object to) your claim of exemption. If this happens, after 10 days the levying officer will tell your employer to stop withholding or withhold less from your earnings. The part (or all) of your earnings needed for support will be paid to you or paid as you direct. And you will get back earnings the levying officer or your employer were holding when you asked for the exemption.

—OR—

(2) The creditor will oppose (object to) your claim of exemption. If this happens, you will receive *Notice of Opposition to Claim of Exemption* (form WG-009) and *Notice of Hearing on Claim of Exemption* (form WG-010), where the creditor explains why your exemption should not be allowed. A box in the middle of form WG-010 tells you the time and place of the court hearing, which will be about 10 days after the creditor files form WG-010 with the court. Be sure to go to the hearing if you can.

If the judgment creditor has checked the box in item 3 on *Notice of Hearing on Claim of Exemption*, the creditor will not be in court. You do not have to go to the hearing if you are willing to have the court make its decision based on your *Financial Statement* and the creditor's *Notice of Opposition to Claim of Exemption*.

If you go to the hearing, take any bills, paycheck stubs, canceled checks, or other evidence (including witnesses) that will help you prove your *Claim of Exemption* and *Financial Statement* are correct and your earnings are needed to support you or your family. And bring any evidence that *Notice of Opposition to Claim of Exemption* is wrong. For example, if the notice says the judgment was for wages for a past employee, you might be able to give evidence that the person was not an employee or the debt was not for wages.

If the judge at the hearing agrees with you, your employer will be ordered to stop withholding your earnings or withhold less money. The judge can even order that the **EWO** end before the hearing (so you would get some earnings back).

If the judge does not agree with you, the withholding will continue unless you **appeal** to a higher court. The rules for appeals are complex, so you should see an attorney if you want to appeal.

If you have one court hearing, you should not file another *Claim of Exemption* about the same **EWO** unless your finances have gotten worse in an important way.

If your **EWO** is changed or ended, the levying officer must serve your employer with the changed **EWO** or a notice that the **EWO** has ended.

WHAT HAPPENS TO YOUR EARNINGS IF YOU FILE A CLAIM OF EXEMPTION?

Your employer must continue to hold back part of your earnings for the **EWO** until they receive a notice signed by the levying officer to change the order or end it early. The levying officer will keep your withheld earnings until your *Claim of Exemption* is denied or takes effect. At that time your earnings will be paid according to the law that applies to your case.

REGARDING CHILD SUPPORT

If you are obligated to make child support payments, the local child support agency may help you to have an Order Assigning Salary or Wages entered. This order has the top priority claim on your earnings. When it is in effect, little or no money may be available to be withheld for an **EWO**. And, if the local child support agency is involved in collecting this support from you, it may agree to accept less money if this special order is entered.

WHAT IF YOU STILL HAVE QUESTIONS?

If you cannot see an attorney, or don't want to see an attorney, you might be able to answer some of your questions by reading sections 706.050 and 706.105 of the California Code of Civil Procedure (available at leginfo.legislature.ca.gov or your local law library). Other sections of the code, beginning with section 706.010 may also answer some of your questions.

Also, the office of the Wage and Hour Division of the U.S. Department of Labor may be able to answer some of your questions. The Wage and Hour Division's contact information is available at dol.gov/agencies/whd/contact.

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	LEVYING OFFICER *(name and address)*:
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	DRAFT 10/17/2025 NOT APPROVED BY COUNCIL
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	COURT CASE NUMBER:
EARNINGS WITHHOLDING ORDER FOR SUPPORT **(Wage Garnishment)**	LEVYING OFFICER FILE NUMBER:

EMPLOYEE: *KEEP YOUR COPY OF THIS LEGAL PAPER.* ***EMPLEADO:*** *GUARDE ESTE PAPEL OFICIAL.*

EMPLOYER: Enter the following date to assist your recordkeeping.
Date this order was received by employer (specify the date of personal delivery by levying officer or registered process server or the date mail receipt was signed):

TO THE EMPLOYER REGARDING YOUR EMPLOYEE:

Name and address of employer

Name and address of employee

Social Security No. ☐ on form WG-035 ☐ unknown

1. A judgment creditor has obtained this order to collect a court judgment against your employee. You are directed to withhold part of the earnings of the employee *(see instructions on page 2 of this form).* Pay the withheld sums to the **levying officer** *(name and address above).*

   If the employee works for you now, you must **give the employee a copy of this order and *Employee Instructions*** **(form WG-003)** within 10 days after receiving this order.

   Complete *Employer's Return* **(form WG-005) and mail it to the levying officer** within 15 days after receiving this order. You must do so even if the employee no longer works for you.

2. The total amount due is: $

   Count 30 calendar days from the date you were served with this order. **Do not** withhold earnings payable for any pay period that ends before the 30th day. **Do** withhold from earnings that are payable for any pay period ending on or after that 30th day. If you receive notice that the employee has filed a claim of exemption, read the Employer's Instructions on page 2 of this form for more information about calculating the start of the withholding period.

   Continue withholding for all pay periods until you withhold the amount due. The levying officer will notify you of an assessment you should withhold in addition to the amount due. Do not withhold more than the total of these amounts. Never withhold any earnings payable before the beginning of the earnings withholding period.

3. The judgment was entered in the court shown above. The judgment creditor is *(name):*

4. The Employer's Instructions on page 2 of this form tell you how much of the employee's earnings to withhold each payday and contain special rules that apply to *Earnings Withholding Order for Support* (form WG-004). Follow those instructions unless you receive a court order or order from the levying officer giving you other instructions.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE)

☐ LEVYING OFFICER ☐ REGISTERED PROCESS SERVER

EMPLOYER'S INSTRUCTIONS
(EARNINGS WITHHOLDING ORDERS FOR SUPPORT)

The instructions apply only to *Earnings Withholding Orders for Support* (this order). Applicable instructions appear on other types of Earnings Withholding Orders.

The instructions in paragraph 1 on page 2 of this form describe your initial duties to provide information to your employee and the levying officer.

Your other duties are TO WITHHOLD THE CORRECT AMOUNT OF EARNINGS (if any) and PAY IT TO THE LEVYING OFFICER during the *withholding period.*

The usual *withholding period* begins 30 calendar days after you were served with *Earnings Withholding Order for Support*. However, if the employee files a claim of exemption and notifies you of the filing no later than 29 days after you were served with *Earnings Withholding Order for Support*, then the withholding period begins 45 days after the date you were served with *Earnings Withholding Order for Support*.

The withholding period for this order *co*ntinues until one of two things happens:
(1) You have withheld the total amount specified in the order, plus any amounts listed in a notice from the levying officer; or
(2) You receive a court order or notice signed by the levying officer specifying a termination date.

You are entitled to rely on and must obey all written notices signed by the levying officer.

Employer's Return (form WG-005) describes several situations that could affect the withholding period for this order. If you receive more than one Earnings Withholding Order during a withholding period, review *Employer's Return* for instructions.

Your duty to withhold does not end merely because the employee no longer works for you. Withholding for *Earnings Withholding Order for Support* does not automatically terminate until one year after the employment of the employee by the employer ends.

WHAT TO DO WITH THE MONEY

The amounts withheld during the withholding period must be paid to the levying officer by the 15th day of the next month after each payday. If you wish to pay more frequently than monthly, each payment must be made within 10 days after the close of the pay period.
Include the case number, levying officer's file number (if different from the case number), and the employee's name on each payment to ensure the money is applied to the correct account.

WHAT IF YOU STILL HAVE QUESTIONS?

The garnishment law is contained in the Code of Civil Procedure beginning with section 706.010. Sections 706.022, 706.025, and 706.104 explain the employer's duties.

The Federal Wage Garnishment Law and federal rules provide the basic protections on which the California law is based.

Inquiries about the federal law will be answered by mail, telephone or personal interview at any office of the Wage and Hour Division of the U.S. Department of Labor. The Wage and Hour Division's contact information is available at dol.gov/agencies/whd/contact.

COMPUTATION INSTRUCTIONS

State and federal law limit how much of an employee's earnings can be withheld. These limits are based on the employee's disposable earnings, not their gross pay or take-home pay. To determine the CORRECT AMOUNT OF EARNINGS TO BE WITHHELD (if any), first compute the employee's *disposable* earnings.

(A) Earnings include any money, (whether called wages, salary, commissions, bonuses or anything else) that is paid by an employer to an employee for personal services. Vacation or sick pay is subject to withholding as it is received by the employee. Tips are generally not included as earning since they are not paid by the employer.

(B) *Disposable earnings* are the earnings left after subtracting the part of the earnings a state or federal law requires an employer to withhold. Generally these required deductions are (1) federal income tax, (2) federal social security, (3) state income tax, (4) state disability insurance, and (5) payments to public employees' retirement systems. Disposable earnings will change when the required deductions change.

WITHHOLD 50 PERCENT of the *disposable earnings* for the *Withholding Order for Support*. For example, if the employee has monthly disposable earnings of $1,432, the sum of $716 would be withheld to pay to the levying officer on account of this order.

Occasionally, the employee's earnings will also be subject to a Wage and Earnings Assignment Order, an order available for child support or spousal support. The amount required to be withheld for that order should be deducted from the amount to be withheld for this order. For example, if the employee is subject to a Wage and Earnings Assignment Order and the employer is required to withhold $300 per month to pay on that order, when the employer receives this *Earnings Withholding Order for Support*, the employer should deduct the $300 for the Wage and Earnings Assignment Order from the $716 and pay the balance to the levying officer each month for this order.

IMPORTANT WARNINGS

1. IT IS AGAINST THE LAW TO FIRE THE EMPLOYEE BECAUSE OF EARNINGS WITHHOLDING ORDERS FOR THE PAYMENT OF ONLY ONE INDEBTEDNESS. No matter how many orders you receive, so long as they all relate to a single judgment (no matter how many debts are represented in that judgment) the employee may not be fired.
2. IT IS ILLEGAL TO AVOID AN EARNINGS WITHHOLDING ORDER BY POSTPONING OR ADVANCING THE PAYMENT OF EARNINGS. The employee's pay period must not be changed to prevent the order from taking effect.
3. IT IS ILLEGAL NOT TO PAY AMOUNTS WITHHELD FOR THE EARNINGS WITHHOLDING ORDER TO THE LEVYING OFFICER. Your duty is to pay the money to the levying officer, who will pay the money in accordance with the laws that apply to this case.

IF YOU VIOLATE ANY OF THESE LAWS, YOU MAY BE HELD LIABLE TO PAY CIVIL DAMAGES AND YOU MAY BE SUBJECT TO CRIMINAL PROSECUTION!

ATTORNEY OR PARTY WITHOUT ATTORNEY:	STATE BAR NO.:	FOR COURT USE ONLY
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
EMAIL ADDRESS:		
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
PLAINTIFF/PETITIONER:		
DEFENDANT/RESPONDENT:		

DRAFT
10/17/2025
NOT APPROVED
BY COUNCIL

DECLARATION OF ADDRESS VERIFICATION
(Wage Garnishment—Enforcement of Judgment)

CASE NUMBER:

Instructions to the judgment creditor for completing this form:

- If you are enforcing a judgment for personal debt, you are required to verify the judgment debtor's address no later than 12 months before you give the levying officer any papers to serve on the judgment debtor. (Code Civ. Proc., § 684.130.)
- You must notify the levying officer and the court that you have completed the address verification by completing this form, giving a copy to the levying officer, and filing the completed form with the court within 10 business days of giving a copy to the levying officer.

1. I am *(specify)*: ☐ attorney for ☐ original judgment creditor ☐ assignee of record
2. I am asking the levying officer to serve *Writ of Execution* (form EJ-130), *Notice of Levy* (form EJ-150), or other documents related to enforcement of a judgment for personal debt.

   (Personal debt means money due or owing because of a transaction for money, property, insurance, or services used primarily for the debtor's personal, family, or household purposes. Personal debt does not include rental debt or debts incurred due to, or obtained by, tortious or fraudulent conduct or judgments for unpaid wages, damages, or penalties owed to an employee. (Code Civ. Proc., § 683.110.))
3. I am asking the levying officer to serve the judgment debtor at the following address:

   ┌ ┐
   └ ┘
4. Within the last 12 months, I verified the address in item 3, or someone verified the address in item 3 on my behalf, by *(check one)*:
   a. ☐ Receiving correspondence from the judgment debtor on *(date)*: that included a return address or other comparable verification of the judgment debtor's address.
   b. ☐ Sending a letter or legal pleading to the judgment debtor's address on *(date)*: using certified mail, or through some other method of transmission through the United States Postal Service that provides a return receipt, and received a return receipt signed by the judgment debtor.
   c. ☐ Using a commercial address verification service, including skip-tracing, or using a public records database. I then sent a letter or legal pleading to the verified address via first-class mail on *(date)*: and the letter or legal pleading was not returned to sender.
   d. ☐ Using the following method *(describe the method and the date it was completed)*:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) (SIGNATURE)

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* DRAFT 10/17/2025 NOT APPROVED BY COUNCIL
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	LEVYING OFFICER *(name and address):*
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	LEVYING OFFICER FILE NO.:
APPLICATION TO STAY LEVY OR GARNISHMENT **(Wage Garnishment—Enforcement of Judgment)**	COURT CASE NO.:

1. Judgment debtor *(name):*
   asks the court to stay (pause) a wage garnishment, bank account levy, or other levy.

2. The judgment debtor received *(check all that apply; to list more documents, check here* ☐ *and attach a page labeled Attachment 2):*
   a. ☐ *Notice of Levy* (form EJ-150) issued on *(date):*
   b. ☐ *Earnings Withholding Order* (form WG-002) issued on *(date):*

3. The levy or garnishment is for a judgment for personal debt.
   (Personal debt means money due or owing because of a transaction for money, property, insurance, or services used primarily for the debtor's personal, family, or household purposes. Personal debt does not include rental debt or debts incurred due to, or obtained by, tortious or fraudulent conduct or judgments for unpaid wages, damages, or penalties owed to an employee. (Code Civ. Proc., § 683.110.))

4. The judgment debtor asks the court to *(check one):*
   a. ☐ Stay the levy or garnishment until the judgment creditor files *Declaration of Address Verification.* The judgment creditor asked the levying officer to serve the judgment debtor with the papers listed in item 1 and did not *(check all that apply):*
      (1) ☐ Give the levying officer a completed *Declaration of Address Verification* (form WG-015/EJ-135).
      (2) ☐ File the completed *Declaration of Address Verification* (form WG-015/EJ-135) with the court within 10 business days of giving a copy of the declaration to the levying officer.
   b. ☐ Stay the levy or garnishment until after the hearing scheduled by *Notice of Hearing on Claim of Exemption* (form WG-010/EJ-175). The hearing is scheduled to take place more than 30 days after form WG-010/EJ-175 was filed:
      (1) *Notice of Hearing on Claim of Exemption* was filed on *(date):*
      (2) The hearing on the claim of exemption is scheduled for *(date):*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE)

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR STATE TAX AGENCY:	*FOR COURT USE ONLY* DRAFT 10/17/2025 NOT APPROVED BY COUNCIL
NAME OF COURT: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
APPLICATION OF *(Name)*: TAXPAYER / RESPONDENT	
EARNINGS WITHHOLDING ORDER FOR TAXES	CASE NUMBER:
NAME OF STATE TAX AGENCY:	TAX AGENCY NUMBER:

1. The State's *Application for Earnings Withholding Order for Taxes* came on for hearing on
   (date): in ☐ Dept.: ☐ Div.: ☐ Room:
   before *(name of judicial officer)*:
2. a. ☐ Attorney for state tax agency present in court *(attorney name)*:
   b. ☐ Taxpayer present in court.
   c. ☐ Attorney for taxpayer present in court *(attorney name)*:
3. The court has considered
   ☐ the evidence presented
   ☐ the taxpayer's *Claim of Exemption and Financial Declaration* (form WG-026)
   ☐ the parties' stipulation.
4. **THE COURT FINDS**
   a. The taxpayer (employee) is entitled to a monthly exemption of: $
   b. The taxpayer is employed by *(name and address of employer)*:

   c. ☐ $ has been withheld from the employee's earnings under a *Temporary Earnings Withholding Order for Taxes.*
5. **THE COURT ORDERS the employer to**
   a. Withhold and pay to the state tax agency: $ from the employee's disposable earnings each month.
   b. Pay to the employee any disposable earnings above that amount, not to exceed: $ per month.
   c. WITHHOLD AND PAY TO THE STATE TAX AGENCY ANY DISPOSABLE EARNINGS ABOVE THOSE SET FORTH IN ITEMS 4a AND 4b.
   d. Begin withholding with the first pay period that ends on or after the 30th day after this order is served on the employer.
   e. Continue withholding until the tax liability has been satisfied unless an order with higher priority is received.
   f. Send all sums withheld to the state tax agency within 10 days after the last paycheck of each month.
   g. ☐ other *(specify):*

Date:

JUDICIAL OFFICER

(Instructions to employer on page 2 of this form)

APPLICATION OF *(Name)*: TAXPAYER / RESPONDENT	CASE NUMBER:

INSTRUCTIONS TO EMPLOYER

A. When remitting withheld sums to the state tax agency, include the employee's name and Social Security number and the tax agency number.

B. **PRIORITY OF EARNINGS WITHHOLDING ORDERS**

First: Order Assigning Salary or Wages
Second: Earnings Withholding Order for Support
Third: Earnings Withholding Order for Taxes
Fourth: Earnings Withholding Order

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO. : EMAIL ADDRESS: ATTORNEY FOR (*name*):	LEVYING OFFICER (*name and address*): DRAFT 10/17/2025 NOT APPROVED BY COUNCIL
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF: DEFENDANT:	CASE NUMBER:
EARNINGS WITHHOLDING ORDER FOR ELDER OR DEPENDENT ADULT FINANCIAL ABUSE (Wage Garnishment)	LEVYING OFFICER FILE NUMBER:

EMPLOYEE: *KEEP YOUR COPY OF THIS LEGAL PAPER.* ***EMPLEADO:*** *GUARDE ESTE PAPEL OFICIAL.*

EMPLOYER: Enter the following date to assist your recordkeeping.
Date this order was received by employer (specify the date of personal delivery by levying officer or registered process server or the date mail receipt was signed):

TO THE EMPLOYER REGARDING YOUR EMPLOYEE:

Name and address of employer

Name and address of employee

Social Security No. ☐ on form WG-035 ☐ unknown

1. A judgment creditor has obtained this order to collect a court judgment against your employee. You are directed to withhold part of the earnings of the employee *(see instructions on page 2 of this form).*

   Pay the withheld sums to the **levying officer** *(name and address above).* If the employee works for you now, you must **give the employee a copy of this order and *Employee Instructions* (form WG-003)** within 10 days after receiving this order.

   Complete *Employer's Return* (form WG-005) and mail it to the levying officer within 15 days after receiving this order. You must do so even if the employee no longer works for you.

2. a. The total amount due is: $
   b. The amount arising from an elder or dependent financial abuse claim is: $

   Count 30 calendar days from the date when you were served with this order. **Do not** withhold earnings payable for any pay period that ends before the 30th day. **Do** withhold from earnings that are payable for any pay period ending on or after that 30th day. If you receive notice that the employee has filed a claim of exemption, read the Instructions to Employer on page 2 of this form for more information about calculating the start of the withholding period.

   Continue withholding for all pay periods until you withhold the amount due. The levying officer will notify you of an assessment you should withhold in addition to the amount due. Do not withhold more than the total of these amounts. Never withhold any earnings payable before the beginning of the earnings withholding period.

3. The judgment was entered in the court on *(date):*

   The judgment creditor (if different from the plaintiff) is *(name):*

4. The Instructions to Employer on page 2 of this form tell you how much of the employee's earnings to withhold each payday. Follow those instructions unless you receive a court order or order from the levying officer giving you other instructions.

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE)

☐ LEVYING OFFICER ☐ REGISTERED PROCESS SERVER

INSTRUCTIONS TO EMPLOYER ON EARNINGS WITHHOLDING ORDERS

The instructions in paragraph 1 on page 1 of this form describe your initial duties to provide information to your employee and the levying officer.

Your other duties are TO WITHHOLD THE CORRECT AMOUNT OF EARNINGS (if any) and PAY IT TO THE LEVYING OFFICER during the *withholding period.*

The withholding period is the period covered by *Earnings Withholding Order* (this order). The withholding period begins 30 calendar days after you were served with the order and continues until you have withheld the total amount due, plus additional amounts for costs and interest (which will be listed in a levying officer's notice). However, if the employee files a claim of exemption and notifies you of the filing no later than 29 days after you were served with *Earnings Withholding Order*, then the withholding period begins 45 days after the date you were served with *Earnings Withholding Order*.

The withholding period may end sooner if (1) you receive a written notice signed by the levying officer specifying an earlier termination date, or (2) you receive an order of higher priority (explained on page 2 of *Employer's Return* (form WG-005)).

You are entitled to rely on and must obey all written notices signed by the levying officer.

Employer's Return (form WG-005) describes several situations that could affect the withholding period for this order. If you receive more than one *Earnings Withholding Order* during a withholding period, review form WG-005 for instructions.

If the employee stops working for you, the *Earnings Withholding Order* ends after no amounts are withheld for a continuous 180-day period. If withholding ends because the earnings are subject to an order of higher priority, the *Earnings Withholding Order* ends after a continuous two-year period during which no amounts are withheld under the order. **Return the *Earnings Withholding Order* to the levying officer with a statement explaining why it is being returned.**

WHAT TO DO WITH THE MONEY

The amounts withheld during the withholding period must be paid to the levying officer by the 15th day of the next month after each payday. If you wish to pay more frequently than monthly, each payment must be made within 10 days after the close of the pay period.

Include the case number, levying officer's file number (if different from the case number), and the employee's name on each payment to ensure the money is applied to the correct account.

WHAT IF YOU STILL HAVE QUESTIONS?

The garnishment law is contained in the Code of Civil Procedure beginning with section 706.010. Sections 706.022, 706.025, 706.050, and 706.104 explain the employer's duties.

The Federal Wage Garnishment Law and federal rules provide the basic protections on which the California law is based. Inquiries about the federal law will be answered by mail, telephone, or personal interview at any office of the Wage and Hour Division of the U.S. Department of Labor. The Wage and Hour Division's contact information is available at dol.gov/agencies/whd/contact.

COMPUTATION INSTRUCTIONS

Code of Civil Procedure section 706.050 explains how to determine the amount to withhold (if anything) depending on the employee's disposable earnings, which are calculated based on the employee's pay period and the applicable hourly minimum wage. This calculation is summarized in the next section of this form and on the California Courts self-help website (selfhelp.courts.ca.gov/guide-earnings-withholding-orders-employers).

THESE COMPUTATION INSTRUCTIONS APPLY UNDER NORMAL CIRCUMSTANCES. THEY DO NOT APPLY TO ORDERS FOR THE SUPPORT OF A SPOUSE, FORMER SPOUSE, OR CHILD.

State law limits how much of an employee's earnings can be withheld. These limits are based on the employee's disposable earnings, not their gross pay or take-home pay.

(A) To determine the CORRECT AMOUNT OF EARNINGS TO BE WITHHELD (if any), first compute the employee's *disposable earnings*.

Earnings include any money (whether called wages, salary, commissions, bonuses, or anything else) that is paid by an employer to an employee for personal services. Vacation or sick pay is subject to withholding as it is received by the employee. Tips are generally not included as earnings because they are not paid by the employer.

Disposable earnings are the earnings left after subtracting the part of the earnings a state or federal law requires an employer to withhold. Generally these required deductions are (1) federal income tax, (2) federal social security, (3) state income tax, (4) state disability insurance, and (5) payments to public employee retirement systems. Disposable earnings will change when the required deductions change.

(B) After the employee's disposable earnings are known, calculate the withholding amount as shown in Code of Civil Procedure section 706.050. You can follow the directions below in (C) or on the California Courts self-help website (selfhelp.courts.ca.gov/guide-earnings-withholding-orders-employers). You will need to know the amount of the minimum wage in the location where the employee works.

(C) Calculate the maximum amount that may be withheld from the employee's disposable earnings, which is the *lesser* of the following two amounts:

- 20 percent of disposable earnings for that week; **or**
- 40 percent of the amount by which the employee's disposable earnings that week exceed the applicable minimum wage. If there is a local minimum wage in effect in the location where the employee works that exceeds the state minimum wage at the time the earnings are payable, the local minimum wage is the applicable minimum wage.

To calculate the correct amount, follow the steps below:

Step 1: Determine the applicable minimum wage per pay period.

- For a daily or weekly pay period, multiply the applicable hourly minimum wage by 48.
- For a biweekly pay period, multiply the applicable hourly minimum wage by 96.
- For a semimonthly pay period, multiply the applicable hourly minimum wage by 104.
- For a monthly pay period, multiply the applicable hourly minimum wage by 208.

Step 2: Subtract the amount from Step 1 from the employee's disposable earnings during that pay period.

Step 3: If the amount from Step 2 is less than zero, do not withhold any money from the employee's earnings.

Step 4: If the amount from Step 2 is greater than zero, multiply that amount by 0.40.

Step 5: If the amount from Step 4 is lower than 20 percent of the employee's disposable earnings, withhold this amount. If it is greater than 20 percent of the employee's disposable earnings, withhold 20 percent of the disposable earnings.

Occasionally, the employee's earnings will also be subject to a *Wage and Earnings Assignment Order,* an order available from family law courts for child, spousal, or family support. The amount required to be withheld for that order should be deducted from the amount to be withheld for this order.

IMPORTANT WARNINGS

1. IT IS AGAINST THE LAW TO FIRE THE EMPLOYEE BECAUSE OF *EARNINGS WITHHOLDING ORDERS* FOR THE PAYMENT OF ONLY ONE INDEBTEDNESS. No matter how many orders you receive, so long as they all relate to a single judgment (no matter how many debts are represented in that judgment), the employee may not be fired.
2. IT IS ILLEGAL TO AVOID AN *EARNINGS WITHHOLDING ORDER* BY POSTPONING OR ADVANCING THE PAYMENT OF EARNINGS. The employee's pay period must not be changed to prevent the order from taking effect.
3. IT IS ILLEGAL NOT TO PAY AMOUNTS WITHHELD FOR THE *EARNINGS WITHHOLDING ORDER* TO THE LEVYING OFFICER. Your duty is to pay the money to the levying officer, who will pay the money in accordance with the law that applies to this case.

   IF YOU VIOLATE ANY OF THESE LAWS, YOU MAY BE HELD LIABLE TO PAY CIVIL DAMAGES AND YOU MAY BE SUBJECT TO CRIMINAL PROSECUTION!

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: 10/30/25

Rules Committee action requested [Choose from drop-down menu below]:
Approve

Title of proposal: Jury Instructions: Civil Jury Instructions With Minor or Nonsubstantive Revisions (Release 48)

Proposed rules, forms, or standards (include amend/revise/adopt/approve)*:*
Revise CACI Nos. 418, 426, 460, 500, 907, 1009B, 2505, and 4324

Committee or other entity submitting the proposal:
Advisory Committee on Civil Jury Instructions

Staff contact (name, phone and email)*: Eric Long, 415-865-7691, eric.long@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): 10/16/25
Project description from annual agenda: 5. Maintenance—Sources and Authority; 6. Maintenance—Secondary Sources; and 7. Technical Corrections

Out of Cycle/Early Implementation: *If requesting July 1 effective date or out of cycle, explain why:*

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff

- **Director Approval** (required for all invitations to comment and reports)
  This report or invitation to comment was:
  ☒ reviewed by EGG on *(date)* 10/7/25
  ☒ approved by Office Director (or Designee) (*name*) James Barolo
  on (date) 10/8/25

If either of above not checked, explain why:

*Complete the following for all reports to be submitted to council (optional for ITCs)**:***

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any report with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

Judicial Council *of* California

455 Golden Gate Avenue · San Francisco, California 94102-3688
Telephone 415-865-4200 · Fax 415-865-4205

M E M O R A N D U M

Date
October 16, 2025

To
Members of the Rules Committee

From
Advisory Committee on Civil Jury Instructions
Adrienne M. Grover, Chair

Subject
Jury Instructions: Civil Jury Instructions With Minor or Nonsubstantive Revisions (Release 48)

Action Requested
Review and Approve Publication of Instructions

Deadline
October 30, 2025

Contact
Eric Long
Legal Services
415-865-7691 phone
eric.long@jud.ca.gov

Executive Summary

The Advisory Committee on Civil Jury Instructions recommends that the Rules Committee approve revisions to the *Judicial Council of California Civil Jury Instructions* (*CACI*) to maintain and update those instructions. The eight instructions in this release, which were prepared by the advisory committee, contain the types of revisions that the Judicial Council has given the Rules Committee final authority to approve—primarily changes to the Sources and Authority.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Rules Committee approve for publication, effective December 12, 2025, revisions to nine civil jury instructions prepared by the advisory committee that contain changes that do not require posting for public

comment or full Judicial Council approval: CACI Nos. 418, 426, 460, 500, 907, 1009B, 2505, and 4324.

These instructions will be published in the 2026 edition of *CACI* and posted online on the California Courts website.

The revised instructions are attached at pages 5–36.

Relevant Previous Council Action

The Judicial Council approved civil jury instructions—drafted by the Task Force on Jury Instructions—for initial publication in September 2003. The Advisory Committee on Civil Jury Instructions is charged with maintaining and updating those instructions.[1]

In 2006, the Judicial Council approved the Rules Committee's delegation of authority to the Advisory Committee on Civil Jury Instructions to review and approve nonsubstantive grammatical and typographical corrections to the jury instructions and authority for the Rules Committee to "[r]eview and approve nonsubstantive technical changes and corrections and minor substantive changes unlikely to create controversy to Judicial Council of California Civil Jury Instructions (CACI) and Criminal Jury Instructions (CALCRIM)."[2]

Under the implementing guidelines that the Rules Committee (known at the time as the Rules and Projects Committee or RUPRO) adopted on December 19, 2006, titled *Jury Instructions Corrections and Technical and Minor Substantive Changes*, examples of the changes the Rules Committee has final authority to approve include the following:

(a) Additions, substitutions, and deletions of cases and statutes in the Sources and Authority;
(b) Changes to statutory language quoted in Sources and Authority that are required by legislative amendments, provided that the amendment does not affect the text of the instruction itself;[3]
(c) Additions or changes to the Directions for Use;[4]

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[1] Cal. Rules of Court, rules 2.1050(e), 10.58(a).

[2] Judicial Council of Cal., Rules and Projects Committee, *Jury Instructions: Approve New Procedure for RUPRO Review and Approval of Changes in the Jury Instructions* (Sept. 12, 2006), p. 1.

[3] In light of the committee's 2014 decision to remove verbatim quotes of statutes, rules, and regulations from *CACI*, this category is now mostly moot. It still applies if a statute, rule, or regulation is revoked, or if subdivisions are renumbered.

[4] The committee presents only nonsubstantive changes to the Directions for Use for the Rules Committee's final approval. Substantive changes are posted for public comment and presented to the Judicial Council for approval.

(d) Changes to instruction text that are nonsubstantive—that is, changes that do not affect or alter any fundamental legal basis of the instruction—and are unlikely to create controversy;
(e) Changes to instruction text required by subsequent developments (such as new cases or legislative amendments), provided that the change, though substantive, is both necessary and unlikely to create controversy; and
(f) Revocation of instructions for which any fundamental legal basis of the instruction is no longer valid because of statutory amendment or case law.

Analysis/Rationale

Overview of revisions

The eight instructions in this release have proposed revisions under category (a) above (additions, substitutions, and deletions in the Sources and Authority). Where required, the committee has recommended updating entries to direct quotes from case authority and has moved entries from a Restatement to Secondary Sources. Also included within these instructions are grammatical, typographical, and citation corrections for which the Rules Committee has delegated authority to the Advisory Committee on Civil Jury Instructions.

Standards for adding case excerpts to Sources and Authority

The standards approved by the advisory committee for adding case excerpts to the Sources and Authority are as follows:

- *CACI* Sources and Authority are in the nature of a digest. Entries should be direct quotes from cases. However, all cases that may be relevant to the subject area of an instruction need not be included, particularly if they do not involve a jury matter.
- Each legal component of the instruction should be supported by authority—either statutory or case law.
- Authority addressing the burden of proof should be included.
- Authority addressing the respective roles of judge and jury (questions of law and questions of fact) should be included.
- Only one case excerpt should be included for each legal point.
- California Supreme Court authority should always be included, if available.
- If no Supreme Court authority is available, the most recent California appellate court authority for a point should be included.
- A U.S. Supreme Court case should be included on any point for which it is the controlling authority.

- A Ninth Circuit Court of Appeals case may be included if the case construes California law or federal law that is the subject of the *CACI* instruction.
- Other cases may be included if deemed particularly useful to the users.
- The fact that the committee chooses to include a case excerpt in the Sources and Authority does not mean that the committee necessarily believes that the language is binding precedent. The standard is simply whether the language would be useful or of interest to users.

Policy implications

Rule 2.1050 of the California Rules of Court requires the committee to regularly update, revise, and add topics to *CACI* and to submit its recommendations to the council for approval. This proposal fulfills that requirement.

Comments

Because the revisions to these instructions do not change the legal effect of the instructions, they were not circulated for public comment.

Alternatives considered

California Rules of Court, rules 2.1050 and 10.58 specifically charge the advisory committee to regularly review case law and statutes; to make recommendations to the Judicial Council for updating, amending, and adding topics to *CACI*; and to submit its recommendations to the council for approval. The proposed revisions and additions meet this responsibility. There are no alternatives to be considered.

Fiscal and Operational Impacts

There are no implementation costs.

Attachments and Links

1. Proposed revised *CACI* instructions, CACI Nos. 418, 426, 460, 500, 907, 1009B, 2505, and 4324, at pages 5–36

Civil Jury Instructions
(Release 48; for Rules Committee Approval)
Table of Contents

418. Presumption of Negligence per se

[*Insert citation to statute, regulation, or ordinance***] states:**

_____

If [*name of plaintiff/defendant***] proves**

1. **That [***name of defendant/plaintiff***] violated this law and**

2. **That the violation was a substantial factor in bringing about the harm,**

then you must find that [*name of defendant/plaintiff***] was negligent [unless you also find that the violation was excused].**

If you find that [*name of defendant/plaintiff***] did not violate this law or that the violation was not a substantial factor in bringing about the harm [or if you find the violation was excused], then you must still decide whether [***name of defendant/plaintiff***] was negligent in light of the other instructions.**

New September 2003; Revised December 2005, June 2011, November 2020

Directions for Use

This jury instruction addresses the establishment of the two factual elements underlying the presumption of negligence. If they are not established, then a finding of negligence cannot be based on the alleged statutory violation. However, negligence can still be proven by other means. (See *Nunneley v. Edgar Hotel* (1950) 36 Cal.2d 493, 500–501 [225 P.2d 497].)

If a rebuttal is offered on the ground that the violation was excused, then the bracketed portion in the second and last paragraphs should be read. For an instruction on excuse, see CACI No. 420, *Negligence per se: Rebuttal of the Presumption of Negligence—Violation Excused*.

If the statute is lengthy, the judge may want to read it at the end of this instruction instead of at the beginning. The instruction would then need to be revised, to tell the jury that they will be hearing the statute at the end.

Rebuttal of the presumption of negligence is addressed in the instructions that follow (see CACI Nos. 420 and 421).

Sources and Authority

- Negligence per se. Evidence Code section 669.

- "Although compliance with the law does not prove the absence of negligence, violation of the law does raise a presumption that the violator was negligent. This is called negligence per se." (*Jacobs*

Farm/Del Cabo, Inc. v. Western Farm Service, Inc. (2010) 190 Cal.App.4th 1502, 1526 [119 Cal.Rptr.3d 529]; see also Cal. Law Revision Com. com. to Evid. Code, § 669.)

- " 'The negligence per se doctrine is codified in Evidence Code section 669, subdivision (a), under which negligence is presumed if the plaintiff establishes four elements: (1) the defendant violated a statute, ordinance, or regulation; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.' 'The burden is on the proponent of a negligence per se instruction to demonstrate that these elements are met.' " (*Taulbee v. EJ Distribution Corp.* (2019) 35 Cal.App.5th 590, 596 [247 Cal.Rptr.3d 538], internal citations omitted.)

- "The first two elements are normally questions for the trier of fact and the last two are determined by the trial court as a matter of law. That is, the trial court decides whether a statute or regulation defines the standard of care in a particular case." (*Jacobs Farm/Del Cabo, Inc., supra,* 190 Cal.App.4th at p. 1526, internal citation omitted; see also Cal. Law Revision Com. com. to Evid. Code, § 669.)

- "[T]he doctrine of negligence per se is not a separate cause of action, but creates an evidentiary presumption that affects the standard of care in a cause of action for negligence." (*Turner v. Seterus, Inc.* (2018) 27 Cal.App.5th 516, 534 [238 Cal.Rptr.3d 528].)

- "Providing the jury with the contents of [] statutes alone does not adequately elucidate how the statutes pertain to the analysis the jury must undertake. Jurors will know what the statute says, but not its significance or how it applies to the case they must decide. Jurors here were told only what section 21801 said—not what they should do with it. A negligence per se instruction, where appropriate, provides the needed linkage and ensures the plaintiff gets the benefit of the negligence per se presumption." (*Drury v. Ryan* (2025) 109 Cal.App.5th 1102, 1112 [331 Cal.Rptr.3d 113].)

- "Under the doctrine of negligence per se, the plaintiff 'borrows' statutes to prove duty of care and standard of care. [Citation.] The plaintiff still has the burden of proving causation." (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 584 [172 Cal.Rptr.3d 204].)

- "Where a statute establishes a party's duty, ' "proof of the [party's] violation of a statutory standard of conduct raises a presumption of negligence that may be rebutted only by evidence establishing a justification or excuse for the statutory violation." ' This rule, generally known as the doctrine of negligence per se, means that where the court has adopted the conduct prescribed by statute as the standard of care for a reasonable person, a violation of the statute is presumed to be negligence." (*Spriesterbach v. Holland* (2013) 215 Cal.App.4th 255, 263 [155 Cal.Rptr.3d 306], internal citation omitted.)

- "[I]n negligence per se actions, the plaintiff must produce evidence of a violation of a statute and a substantial probability that the plaintiff's injury was caused by the violation of the statute before the burden of proof shifts to the defendant to prove the violation of the statute did not cause the plaintiff's injury." (*Toste v. CalPortland Construction* (2016) 245 Cal.App.4th 362, 371 [199 Cal.Rptr.3d 522].)

- " 'The significance of a statute in a civil suit for negligence lies in its formulation of a standard of conduct that the court adopts in the determination of such liability. The decision as to what the civil standard should be still rests with the court, and the standard formulated by a legislative body in a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it. In the absence of such a standard the case goes to the jury, which must determine whether the defendant has acted as a reasonably prudent man would act in similar circumstances. The jury then has the burden of deciding not only what the facts are but what the unformulated standard is of reasonable conduct. When a legislative body has generalized a standard from the experience of the community and prohibits conduct that is likely to cause harm, the court accepts the formulated standards and applies them [citations], except where they would serve to impose liability without fault.' " (*Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 547 [25 Cal.Rptr.2d 97, 863 P.2d 167], internal citations omitted.)

- "There is no doubt in this state that a federal statute or regulation may be adopted as a standard of care." (*DiRosa v. Showa Denko K. K.* (1996) 44 Cal.App.4th 799, 808 [52 Cal.Rptr.2d 128].)

- "[T]he courts and the Legislature may create a negligence duty of care, but an administrative agency cannot independently impose a duty of care if that authority has not been properly delegated to the agency by the Legislature." (*Cal. Serv. Station Etc. Ass'n v. Am. Home Assur. Co.* (1998) 62 Cal.App.4th 1166, 1175 [73 Cal.Rptr.2d 182].)

- "In combination, the [1999] language and the deletion [to Lab. Code, § 6304.5] indicate that henceforth, Cal-OSHA provisions are to be treated like any other statute or regulation and may be admitted to establish a standard or duty of care in all negligence and wrongful death actions, including third party actions." (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 928 [22 Cal.Rptr.3d 530, 102 P.3d 915].)

- "While courts have applied negligence per se to building code violations, it has only been applied in limited situations." (*Jones v. Awad* (2019) 39 Cal.App.5th 1200, 1212 [252 Cal.Rptr.3d 596].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1002–1028

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-H, *Negligence Predicated On Statutory Violation ("Negligence Per Se")*, ¶ 2:1845 (The Rutter Group)

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 8G-C, *Procedural Considerations—Presumptions*, ¶ 8:3604 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.28–1.31

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, §§ 3.10, 3.13 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, §§ 90.88, 90.89 (Matthew Bender)

California Products Liability Actions, Ch. 7, *Proof*, § 7.04 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.50 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.70, 165.80, 165.81 (Matthew Bender)

426. Negligent Hiring, Supervision, or Retention of Employee

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by [***name of employee***] and that [***name of employer defendant***] is responsible for that harm because [***name of employer defendant***] negligently [hired/ supervised/ [or] retained] [***name of employee***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That [***name of employer defendant***] hired [***name of employee***];]**

2. **That [***name of employee***] [[was/became] [unfit [or] incompetent] to perform the work for which [he/she/***nonbinary pronoun***] was hired/[***specify other particular risk***]];**

3. **That [***name of employer defendant***] knew or should have known that [***name of employee***] [[was/became] [unfit/ [or] incompetent]/[***other particular risk***]] and that this [unfitness [or] incompetence/ [***other particular risk***]] created a particular risk to others;**

4. **That [***name of employee***]'s [unfitness [or] incompetence/ [***other particular risk***]] harmed [***name of plaintiff***]; and**

5. **That [***name of employer defendant***]'s negligence in [hiring/ supervising/ [or] retaining] [***name of employee***] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2009; Revised December 2015, June 2016

Directions for Use

Give this instruction if the plaintiff alleges that the employer of an employee who caused harm was negligent in the hiring, supervision, or retention of the employee after actual or constructive notice that the employee created a particular risk or hazard to others. For instructions holding the employer vicariously liable (without fault) for the acts of the employee, see the Vicarious Responsibility series, CACI No. 3700 et seq.

Include optional question 1 if the employment relationship between the defendant and the negligent person is contested. (See *Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1185−1189 [183 Cal.Rptr.3d 394].) It appears that liability may also be imposed on the hirer of an independent contractor for the negligent selection of the contractor. (See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 662–663 [109 Cal.Rptr. 269].) Therefore, it would not seem to be necessary to instruct on the test to determine whether the relationship is one of employer-employee or hirer-independent contractor. (See CACI No. 3704, *Existence of "Employee" Status Disputed*.)

Choose "became" in elements 2 and 3 in a claim for negligent retention.

In most cases, "unfitness" or "incompetence" (or both) will adequately describe the particular risk that

the employee represents. However, there may be cases in which neither word adequately describes the risk that the employer should have known about.

Sources and Authority

- "California case law recognizes the theory that an employer can be liable to a third person for negligently hiring, supervising, or retaining an unfit employee." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054 [58 Cal.Rptr.2d 122].)

- "Negligence liability will be imposed on an employer if it 'knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes.' " (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139 [91 Cal.Rptr.3d 864].)

- "[Plaintiff] brought several claims against [defendant employer], including negligent hiring, supervising, and retaining [employee], and failure to warn. To prevail on his negligent hiring/retention claim, [plaintiff] will be required to prove [employee] was [defendant employer]'s agent and [defendant employer] knew or had reason to believe [employee] was likely to engage in sexual abuse. On the negligent supervision and failure to warn claims, [plaintiff] will be required to show [defendant employer] knew or should have known of [employee]'s alleged misconduct and did not act in a reasonable manner when it allegedly recommended him to serve as [plaintiff]'s Bible instructor." (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 591 [201 Cal.Rptr.3d 156], internal citations omitted.)

- "[A] negligent supervision claim depends, in part, on a showing that the risk of harm was reasonably foreseeable. [Citations.] 'Foreseeability is determined in light of all the circumstances and does not require prior identical events or injuries.' [Citations.] ' "It is not necessary to prove that the very injury which occurred must have been foreseeable by the school authorities . . . . Their negligence is established if a reasonably prudent person would foresee that injuries of the same general type would be likely to happen in the absence of [adequate] safeguards." ' " (*D.Z. v. Los Angeles Unified School Dist.* (2019) 35 Cal.App.5th 210, 229 [247 Cal.Rptr.3d 127], internal citations omitted.)

- "Liability for negligent supervision and/or retention of an employee is one of direct liability for negligence, not vicarious liability." (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815 [52 Cal.Rptr.3d 376].)

- "Liability for negligent hiring and supervision is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees. The tort has developed in California in factual settings where the plaintiff's injury occurred in the workplace, or the contact between the plaintiff and the employee was generated by the employment relationship." (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339–1340 [78 Cal.Rptr.2d 525].)

- "To establish negligent supervision, a plaintiff must show that a person in a supervisorial position over the actor had prior knowledge of the actor's propensity to do the bad act." (*Z.V. v. County of*

Riverside (2015) 238 Cal.App.4th 889, 902 [189 Cal.Rptr.3d 570].)

- "Apparently, [defendant] had no actual knowledge of [the employee]'s past. But the evidence recounted above presents triable issues of material fact regarding whether the [defendant] had reason to believe [the employee] was unfit or whether the [defendant] failed to use reasonable care in investigating [the employee]." (*Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 843 [10 Cal.Rptr.2d 748]; cf. *Flores v. AutoZone West Inc.* (2008) 161 Cal.App.4th 373, 384–386 [74 Cal.Rptr.3d 178] [employer had no duty to investigate and discover that job applicant had a juvenile delinquency record].)

- "We note that the jury instructions issued by our Judicial Council include 'substantial factor' causation as an element of the tort of negligent hiring, retention, or supervision. The fifth element listed in CACI No. 426 is '[t]hat [name of employer defendant]'s negligence in [hiring/ supervising/ [or] retaining] [name of employee] *was a substantial factor in causing [name of plaintiff]'s harm.*' [¶] CACI No. 426 is consistent with California case law on the causation element of [plaintiff]'s claim against [employer]." (*Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction Co., Inc.* (2018) 5 Cal.5th 216, 224, fn.5 [233 Cal.Rptr.3d 487, 418 P.3d 400], original italics.)

- "A claim that an employer was negligent in hiring or retaining an employee-driver rarely differs in substance from a claim that an employer was negligent in entrusting a vehicle to the employee. Awareness, constructive or actual, that a person is unfit or incompetent to drive underlies a claim that an employer was negligent in hiring or retaining that person as a driver. (See Judicial Council of Cal. Civ. Jury Instns. (2011) CACI No. 426.) That same awareness underlies a claim for negligent entrustment. (See CACI No. 724.) In a typical case, like this, the two claims are functionally identical." (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1157 [126 Cal.Rptr.3d 443, 253 P.3d 535].)

- "The language of the instruction used specifies the particular risk at issue in this case. That is consistent with the model instruction, which prompts the user to 'specify other particular risk,' as well as the Directions for Use for CACI No. 426, which state: 'In most cases, "unfitness" or "incompetence" (or both) will adequately describe the particular risk that the employee represents. However, there may be cases in which neither word adequately describes the risk that the employer should have known about.' It is also consistent with the case law, discussed above, holding that a claim for negligent supervision requires a showing of foreseeability of a *particular* risk of harm." (*D.Z., supra,* 35 Cal.App.5th at p. 235, original italics.)

- "[I]f an employer admits vicarious liability for its employee's negligent driving in the scope of employment, 'the damages attributable to both employer and employee will be coextensive.' Thus, when a plaintiff alleges a negligent entrustment or hiring cause of action against the employer and the employer admits vicarious liability for its employee's negligent driving, the universe of defendants who can be held responsible for plaintiff's damages is reduced by one—the employer—for purposes of apportioning fault under Proposition 51. Consequently, the employer would not be mentioned on the special verdict form. The jury must divide fault for the accident among the listed tortfeasors, and the employer is liable only for whatever share of fault the jury assigns to the employee." (*Diaz, supra,* 41 Cal.4th at p. 1159, internal citations omitted.)

- "[W]hen an employer … admits vicarious liability, neither the complaint's allegations of employer misconduct relating to the recovery of punitive damages nor the evidence supporting those allegations are superfluous. Nothing in *Diaz* or *Armenta* suggests otherwise." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1264 [218 Cal.Rptr.3d 664].)

- "[A] public school district may be vicariously liable under [Government Code] section 815.2 for the negligence of administrators or supervisors in hiring, supervising and retaining a school employee who sexually harasses and abuses a student." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 879 [138 Cal.Rptr.3d 1, 270 P.3d 699].)

- "If a teacher sexually abuses a student, the school district that employs the teacher is not liable for the teacher's conduct under section 815.2(a) because such conduct is not within the scope of employment. But the same school district may be held liable if its supervisory employees were negligent in hiring and supervising the abusive teacher and that negligence resulted in the student's harm." (*A.H. v. Tamalpais Union High School Dist.* (2024) 105 Cal.App.5th 340, 350 [325 Cal.Rptr.3d 800], internal citations omitted.)

- "[P]laintiff premises her direct negligence claim on the hospital's alleged failure to properly screen [doctor] before engaging her and to properly supervise her after engaging her. Since hiring and supervising medical personnel, as well as safeguarding incapacitated patients, are clearly within the scope of services for which the hospital is licensed, its alleged failure to do so necessarily states a claim for professional negligence. Accordingly, plaintiff cannot pursue a claim of direct negligence against the hospital." (*So v. Shin* (2013) 212 Cal.App.4th 652, 668 [151 Cal.Rptr.3d 257].)

- "[Asking] whether [defendant] hired [employee] was necessary given the dispute over who hired [employee]—[defendant] or [decedent]. As the trial court noted, 'The employment was neither stipulated nor obvious on its face.' However, if the trial court began the jury instructions or special verdict form with, 'Was [employee] unfit or incompetent to perform the work for which he was hired,' confusion was likely to result as the question assumed a hiring. Therefore, the jury needed to answer the question of whether [defendant] hired [employee] before it could determine if [defendant] negligently hired, retained, or supervised him." (*Jackson, supra,* 233 Cal.App.4th at pp. 1187−1188.)

- "Any claim alleging negligent hiring by an employer will be based in part on events predating the employee's tortious conduct. Plainly, that sequence of events does not itself preclude liability." (*Liberty Surplus Ins. Corp., supra,* 5 Cal.5th at p. 225, fn. 7.)

- "We find no relevant case law approving a claim for direct liability based on a public entity's allegedly negligent hiring and supervision practices. … Here, … there is no statutory basis for declaring a governmental entity liable for negligence in its hiring and supervision practices and, accordingly, plaintiffs' claim against County based on that theory is barred … ." (*de Villers v. County of San Diego* (2007) 156 Cal.App.4th 238, 252–253 [67 Cal.Rptr.3d 253].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1350

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-I, *Employment Torts and Related Claims—Negligence*, ¶ 5:800 et seq. (The Rutter Group)

3 California Torts, Ch. 40B, *Employment Discrimination and Harassment*, § 40B.21 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.12 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.22 (Matthew Bender)

460. Strict Liability for Ultrahazardous Activities—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] was engaged in an ultrahazardous activity that caused [him/her/***nonbinary pronoun***/it] to be harmed and that [***name of defendant***] is responsible for that harm.**

People who engage in ultrahazardous activities are responsible for the harm these activities cause others, regardless of how carefully they carry out these activities. [*Insert ultrahazardous activity***] is an ultrahazardous activity.**

To establish [his/her/*nonbinary pronoun***/its] claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was engaged in [***insert ultrahazardous activity***];**

2. **That [***name of plaintiff***] was harmed;**

3. **That [***name of plaintiff***]'s harm was the kind of harm that would be anticipated as a result of the risk created by [***insert ultrahazardous activity***]; and**

4. **That [***name of defendant***]'s [***insert ultrahazardous activity***] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Sources and Authority

- "The doctrine of ultrahazardous activity provides that one who undertakes an ultrahazardous activity is liable to every person who is injured as a proximate result of that activity, regardless of the amount of care he uses." (*Pierce v. Pacific Gas & Electric Co.* (1985) 166 Cal.App.3d 68, 85 [212 Cal.Rptr. 283], internal citations omitted.)

  ~~Whether an activity is ultrahazardous is a question of law to be determined by the court. (*Luthringer v. Moore* (1948) 31 Cal.2d 489, 496 [190 P.2d 1].)~~

- "Factors courts consider when determining whether an activity is ultrahazardous include, ' "(a) existence of a high degree of risk of some harm to the person, land or chattels of others; [¶] (b) likelihood that the harm that results from it will be great; [¶] (c) inability to eliminate the risk by the exercise of reasonable care; [¶] (d) extent to which the activity is not a matter of common usage; [¶] (e) inappropriateness of the activity to the place where it is carried on; and [¶] (f) extent to which its value to the community is outweighed by its dangerous attributes." ' Whether an activity is ultrahazardous is a question of law." (*Carmichael v. Café Sevilla of Riverside, Inc.* (2025) 108 Cal.App.5th 292, 299 [329 Cal.Rptr.3d 36], internal citations omitted.)

- ~~Restatement of Torts Second, section 519, provides:~~

  ~~(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.~~

  ~~(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.~~

- ~~Restatement of Torts Second, section 520, provides:~~

  ~~In determining whether an activity is abnormally dangerous, the following factors are to be considered:~~

  ~~(a) existence of a high degree of risk of some harm to the person, land or chattels of others;~~

  ~~(b) likelihood that the harm that results from it will be great;~~

  ~~(c) inability to eliminate the risk by the exercise of reasonable care;~~

  ~~(d) extent to which the activity is not a matter of common usage;~~

  ~~(e) inappropriateness of the activity to the place where it is carried on; and~~

  ~~(f) extent to which its value to the community is outweighed by its dangerous attributes.~~

- ~~Section 519 formerly provided, in part, that "one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize is likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm." This section was followed by the court in *Luthringer, supra,* and by other courts in subsequent cases. (See *Garcia v. Estate of Norton* (1986) 183 Cal.App.3d 413, 418 [228 Cal.Rptr. 108].) This statement regarding forseeability is evidently still good law in California, even though the wording of section 519 does not presently contain the limitation.~~

- Strict liability in this context has been confined to "consequences which lie within the extraordinary risk posed by the abnormally dangerous activity and is limited to the 'class of persons who are threatened by the abnormal danger, and the kind of damage they may be expected to incur.' " (*Goodwin v. Reilley* (1985) 176 Cal.App.3d 86, 92 [221 Cal.Rptr. 374], citing Prosser & Keeton, The Law of Torts (5th ed. 1984) § 75, p. 562.)

- "The important factor is that certain activities under certain conditions may be so hazardous to the public generally, and of such relative infrequent occurrence, that it may well call for strict liability as the best public policy." (*Luthringer~~, supra,~~* ~~31 Cal.2d at p. 500~~ *v. Moore* (1948) 31 Cal.2d 489,

500 [190 P.2d 1].)

- "It is axiomatic that an essential element of a plaintiff's cause of action, whether based on negligence or strict liability, is the existence of a causal connection between defendant's act and the injury which plaintiff suffered." (*Smith v. Lockheed Propulsion Co.* (1967) 247 Cal.App.2d 774, 780 [56 Cal.Rptr. 128], internal citations omitted.)

- ~~Defendant contended that the strict liability doctrine "cannot be applied unless the defendant is aware of the abnormally dangerous condition or activity." This is unsound: One who carried on such an "activity is liable for injuries to a person whom the actor reasonably should recognize as likely to be harmed ... , even though 'the utmost care is exercised to prevent the harm.' "~~ "[O]ne who carries on an ultrahazardous activity is liable for injuries to a person whom the actor *reasonably should* recognize as likely to be harmed by a miscarriage of the ultrahazardous activity, even though 'the utmost care is exercised to prevent the harm.' " (*Garcia v. Estate of Norton* (1986) ~~*supra*, 183 Cal.App.3d at p. 420~~ 183 Cal.App.3d 413, 420 [228 Cal.Rptr. 108], internal citation omitted, original italics.)

Secondary Sources

Restatement Second of Torts §§ 519, 520.

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1575–1588 et seq.

1 Levy et al., California Torts, Ch. 7, *Strict Liability for Hazardous Activities*, §§ 7.01–7.06 (Matthew Bender)

1 California Environmental Law & Land Use Practice, Ch. 1, *Nuisance, Trespass, and Strict Liability for Ultrahazardous Activities* (Matthew Bender)

1A California Trial Guide, Unit 11, *Opening Statement*, § 11.55 (Matthew Bender)

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

23 California Points and Authorities, Ch. 234, *Ultrahazardous Activities* (Matthew Bender)

1 California Civil Practice: Torts §§ 2:4–2:10 (Thomson Reuters)

500. Medical Negligence—Essential Factual Elements

Please see CACI No. 400, *Negligence—Essential Factual Elements*

New September 2003; Revised December 2011, December 2015

Directions for Use

In medical malpractice or professional negligence cases, the word "medical" or "professional" should be added before the word "negligence" in the first paragraph of CACI No. 400. From a theoretical standpoint, medical negligence is still considered negligence. (See *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997–998 [35 Cal.Rptr.2d 685, 884 P.2d 142].)

Also give the appropriate standard-of-care instruction for the defendant's category of medical professional. (See CACI No. 501, *Standard of Care for Health Care Professionals,* CACI No. 502, *Standard of Care for Medical Specialists,* CACI No. 504, *Standard of Care for Nurses,* CACI No. 514, *Duty of Hospital*.)

It is not necessary to instruct that causation must be proven within a reasonable medical probability based upon competent expert testimony. The reference to "medical probability" in medical malpractice cases is no more than a recognition that the case involves the use of medical evidence. (*Uriell v. Regents of University of California* (2015) 234 Cal.App.4th 735, 746 [184 Cal.Rptr.3d 79].)

Sources and Authority

- "Professional Negligence" of Health Care Provider Defined. Code of Civil Procedure section 340.5, Civil Code sections 3333.1 and 3333.2.

- "The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage." (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968 [191 Cal.Rptr.3d 766].)

- "In California, a physician's duty of care to a patient does not arise until a physician-patient relationship is established. Absent this relationship or other statutory requirement …, a doctor is under no duty to take affirmative action to assist or protect another person." (*McCurry v. Singh* (2024) 104 Cal.App.5th 1170, 1180 [325 Cal.Rptr.3d 21], internal citations omitted.)

- "The court's use of standard jury instructions for the essential elements of negligence, including causation, was appropriate because medical negligence is fundamentally negligence." (*Uriell, supra,* 234 Cal.App.4th at p. 744 [citing Directions for Use to this instruction].)

- "Section 340.5 defines 'professional negligence' as 'a negligent act or omission by a health care

provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are *within the scope of services for which the provider is licensed* and which are not within any restriction imposed by the licensing agency or licensed hospital.' The term 'professional negligence' encompasses actions in which 'the injury for which damages are sought is directly related to the professional services provided by the health care provider' or directly related to 'a matter that is an ordinary and usual part of medical professional services.' '[C]ourts have broadly construed "professional negligence" to mean negligence occurring during the rendering of services for which the health care provider is licensed.' " (*Arroyo v. Plosay* (2014) 225 Cal.App.4th 279, 297 [170 Cal.Rptr.3d 125], original italics, internal citations omitted.)

- "With respect to professionals, their specialized education and training do not serve to impose an increased duty of care but rather are considered additional 'circumstances' relevant to an overall assessment of what constitutes 'ordinary prudence' in a particular situation." (*Flowers, supra,* 8 Cal.4th at pp. 997–998.)

- "Since the standard of care remains constant in terms of 'ordinary prudence,' it is clear that denominating a cause of action as one for 'professional negligence' does not transmute its underlying character. For substantive purposes, it merely serves to establish the basis by which 'ordinary prudence' will be calculated and the defendant's conduct evaluated." (*Flowers, supra,* 8 Cal.4th at p. 998.)

- "The Medical Injury Compensation Reform Act (MICRA) contains numerous provisions effecting substantial changes in negligence actions against health care providers, including a limitation on noneconomic damages, elimination of the collateral source rule as well as preclusion of subrogation in most instances, and authorization for periodic payments of future damages in excess of $ 50,000. While in each instance the statutory scheme has altered a significant aspect of claims for medical malpractice, such as the measure of the defendant's liability for damages or the admissibility of evidence, the fundamental substance of such actions on the issues of duty, standard of care, breach, and causation remains unaffected." (*Flowers, supra,* 8 Cal.4th at p. 999.)

- "On causation, the plaintiff must establish 'it is more probable than not the negligent act was a cause-in-fact of the plaintiff's injury.' ' "A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action." ' '[C]ausation in actions arising from medical negligence must be proven within a reasonable medical probability based on competent expert testimony, i.e., something more than a "50-50 possibility." ' '[T]he evidence must be sufficient to allow the jury to infer that in the absence of the defendant's negligence, there was a reasonable medical probability the plaintiff would have obtained a better result.' " (*Belfiore-Braman v. Rotenberg* (2018) 25 Cal.App.5th 234, 247 [235 Cal.Rptr.3d 629], internal citations omitted.)

- "That there is a distinction between a reasonable medical 'probability' and a medical 'possibility' needs little discussion. There can be many possible 'causes,' indeed, an infinite number of circumstances which can produce an injury or disease. A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, *it becomes more likely than not that the injury was a result of its action*. This is the outer limit of inference upon which an issue may be

submitted to the jury." (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1118 [8 Cal.Rptr.3d 363], original italics, internal citations omitted.)

- "The rationale advanced by the hospital is that … if the need for restraint is 'obvious to all,' the failure to restrain is ordinary negligence. … [T]his standard is incompatible with the subsequently enacted statutory definition of professional negligence, which focuses on whether the negligence occurs in the rendering of professional services, rather than whether a high or low level of skill is required. [Citation.]" (*Bellamy v. Appellate Dep't of the Superior Court* (1996) 50 Cal.App.4th 797, 806–807 [57 Cal.Rptr.2d 894].)

- "[E]ven in the absence of a physician-patient relationship, a physician has liability to an examinee for negligence or professional malpractice for injuries incurred during the examination itself." (*Mero v. Sadoff* (1995) 31 Cal.App.4th 1466, 1478 [37 Cal.Rptr.2d 769].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1066–1068, 1071, 1072

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.65

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals*, § 30.11, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.01 (Matthew Bender)

17 California Forms of Pleading and Practice, Ch. 209, *Dentists*, § 209.15 (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, §§ 295.13, 295.43 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.11 (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, § 175.20 et seq. (Matthew Bender)

907. Status of Passenger Disputed

A common carrier owes the highest care and vigilance to persons only while they are passengers. [*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was [*name of defendant*]'s passenger at the time of the incident.

To establish that [*name of plaintiff*] was a passenger, [he/she/*nonbinary pronoun*] must prove all of the following:

1. **That [*name of plaintiff*] intended to become a passenger;**

2. **That [*name of plaintiff*] was accepted as a passenger by [*name of defendant*]; and**

3. **That [*name of plaintiff*] placed [himself/herself/*nonbinary pronoun*] under the control of [*name of defendant*]**

To be a passenger, it is not necessary for the person to actually enter the carrier's vehicle [*or name mode of travel, e.g., bus, train*]; however, the carrier must have taken some action indicating acceptance of the person as a passenger. A person continues to be a passenger until the person safely leaves the carrier's vehicle [or equipment].

A common carrier must use the highest care and vigilance in providing its passengers with a safe place to get on and off its vehicles [or equipment].

New September 2003; Revised May 2020

Sources and Authority

- The heightened degree of care for common carriers is owed only while "passengers are *in transitu*, and until they have safely departed the carrier's vehicle." (*Marshall v. United Airlines* (1973) 35 Cal.App.3d 84, 86 [110 Cal.Rptr. 416].)

- The relationship of carrier and passenger is "created when one offers to become a passenger, and is accepted as a passenger after he has placed himself under the control of the carrier." (*Grier v. Ferrant* (1944) 62 Cal.App.2d 306, 310 [144 P.2d 631].)

- "[A] person sometimes surrenders control of their safety—and hence creates a common carrier-passenger relationship with its heightened duty of care—in 'brief windows of time immediately *before*' transit begins. This occurs only when (1) the person demonstrates intent to become a passenger, (2) the carrier takes ' "some action indicating acceptance" ' of the person as a passenger or ' "do[es] something by way of an invitation to [the person] to board" ', and (3) the person is placed under the control of the carrier." (*Smith v. Magic Mountain LLC* (2024) 106 Cal.App.5th 1128, 1138 [327 Cal.Rptr.3d 628] [citing CACI No. 907], original italics, internal citations omitted.)

- ~~It is not necessary that the passenger have entered the vehicle for the relationship to exist: ~~" 'The relation is in force when one, intending in good faith to become a passenger, goes to the place designated as the site of departure at the appropriate time and the carrier takes some action indicating acceptance of the passenger as a traveler.' " (*Orr v. Pacific Southwest Airlines* (1989) 208 Cal.App.3d 1467, 1473 [257 Cal.Rptr. 18], internal citations omitted.)

- ~~The carrier-passenger relationship terminates once the passenger has disembarked and entered a place of relative safety. ~~"Once he had safely exited the train, the relationship of carrier and passenger terminated." (*McGettigan v. Bay Area Rapid Transit Dist.* (1997) 57 Cal.App.4th 1011, 1018 [67 Cal.Rptr.2d 516].)

- ~~Carriers must exercise utmost care " '[u]ntil the passenger reaches a place outside the sphere of any activity of the carrier which might reasonably constitute a mobile or animated hazard to the passenger.' ~~"The relationship of carrier and passenger, and the obligation to exercise the utmost care and diligence to provide safe carriage of passengers, continues until such time as an alighting passenger has reasonable opportunity to reach a place outside of the immediate sphere of activity of the carrier which might reasonably constitute an active hazard to the passengers." (*Brandelius v. City and County of San Francisco* (1957) 47 Cal.2d 729, 735 [306 P.2d 432], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1058, 1059

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.02[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* , § 109.36 (Matthew Bender)

2A California Points and Authorities, Ch. 33, *Carriers*, § 33.22 (Matthew Bender)

2 California Civil Practice: Torts § 28:7 (Thomson Reuters)

1009B. Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by an unsafe condition while employed by [***name of contractor***] and working on [***specify nature of work that defendant hired the contractor to perform***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] retained some control over [***name of contractor***]'s manner of performance of [***specify nature of contracted work***];**

2. **That [***name of defendant***] actually exercised [his/her/***nonbinary pronoun***/its] retained control over that work by [***specify alleged negligence of defendant***];**

3. **That [***name of plaintiff***] was harmed; and**

4. **That [***name of defendant***]'s negligent exercise of [his/her/***nonbinary pronoun***/its] retained control affirmatively contributed to [***name of plaintiff***]'s harm.**

*Derived from former CACI No. 1009 April 2007; Revised April 2009, December 2010, December 2011, May 2017, May 2022, November 2024**

Directions for Use

This instruction is for use if a dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. The basis of liability is that the defendant retained control over the manner of performance of some part of the work entrusted to the contractor. (*Sandoval v. Qualcomm Inc.* (2021) 12 Cal.5th 256, 273 [283 Cal.Rptr.3d 19, 494 P.3d 487].) Both retaining control and actually exercising control over some aspect of the work is required because hirers who fully and effectively delegate work to a contractor owe no tort duty to that contractor's workers. (See *Ibid.*) If there is a question of fact regarding whether the defendant entrusted the work to the contractor, the instruction should be modified. For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe Conditions*. For an instruction for injuries based on unsafe conditions not discoverable by the plaintiff's employer, see CACI No. 1009A, *Liability to Employees of Independent Contractors for Unsafe Concealed Conditions*. For an instruction for injuries based on the property owner's providing defective equipment, see CACI No. 1009D, *Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment*.

The hirer's exercise of retained control must have "affirmatively contributed" to the plaintiff's injury. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202 [115 Cal.Rptr.2d 853, 38 P.3d 1081]; see *Sandoval, supra,* 12 Cal.5th at p. 277.) However, the affirmative contribution need not be active conduct but may be a failure to act. (*Hooker, supra,* 27 Cal.4th at p. 212, fn. 3; see *Sandoval, supra,* 12 Cal.5th at p. 277.) "Affirmative contribution" means that there must be causation between the hirer's exercising retained control and the plaintiff's injury. Modification may be required if the defendant's failure to act is alleged pursuant to *Hooker*.

Sources and Authority

- "A hirer 'retains control' where it retains a sufficient degree of authority over the manner of performance of the work entrusted to the contractor. … So 'retained control' refers specifically to a hirer's authority over work entrusted to the contractor, i.e., work the contractor has agreed to perform. For simplicity we will often call this the 'contracted work'—irrespective of whether it's set out in a written contract or arises from an informal agreement. A hirer's authority over noncontract work—although potentially giving rise to other tort duties—thus does not give rise to a retained control duty unless it has the effect of creating authority over the contracted work." (*Sandoval, supra,* 12 Cal.5th at pp. 274–275.)

- "We conclude that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker, supra,* 27 Cal.4th at p. 202, original italics.)

- "Imposing tort liability on a hirer of an independent contractor when the hirer's conduct has affirmatively contributed to the injuries of the contractor's employee is consistent with the rationale of our decisions in *Privette* [*v. Superior Court* (1993) 5 Cal.4th 689], *Toland* [*v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253] and *Camargo* [*v. Tjaarda Dairy* (2001) 25 Cal.4th 1235] because the liability of the hirer in such a case is not ' "in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor." ' To the contrary, the liability of the hirer in such a case is *direct* in a much stronger sense of that term." (*Hooker, supra,* 27 Cal.4th at pp. 211–212, original italics, internal citations and footnote omitted.)'

- "The delegation of control over safety 'may be direct, when the hirer has contracted with the independent contractor, or indirect, when the hirer contracts with another contractor who then subcontracts the work to the independent contractor.' The *Privette* doctrine therefore bars liability against not only the hirer, but also any other entities in that 'chain of delegation.' " (*Collins v. Diamond Generating Corp.* (2024) 107 Cal.App.5th 1162, 1175 [328 Cal.Rptr.3d 714].)

- "Contract workers must prove that the hirer *both* retained control *and* actually exercised that retained control in such a way as to affirmatively contribute to the injury." (*Sandoval, supra,* 12 Cal.5th at p. 276, original italics.)

- "Such affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury." (*Hooker, supra,* 27 Cal.4th at p. 212, fn. 3.)

- " 'Affirmative contribution' means that the hirer's exercise of retained control contributes to the injury in a way that isn't merely derivative of the contractor's contribution to the injury. Where the contractor's conduct is the immediate cause of injury, the affirmative contribution requirement

can be satisfied only if the hirer in some respect induced—not just failed to prevent—the contractor's injury-causing conduct." (*Sandoval, supra,* 12 Cal.5th at p. 277, internal citation omitted.)

- "If a hirer entrusts work to an independent contractor, but retains control over safety conditions at a jobsite and then negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, the hirer is liable for those injuries, based on its own negligent exercise of that retained control." (*Tverberg v. Fillner Constr., Inc.* (2012) 202 Cal.App.4th 1439, 1446 [136 Cal.Rptr.3d 521].)

- "[A]ffirmative contribution is a different sort of inquiry than substantial factor causation. For instance, a fact finder might reasonably conclude that a hirer's negligent hiring of the contractor was a substantial factor in bringing about a contract worker's injury, and yet negligent hiring is not affirmative contribution because the hirer's liability is essentially derivative of the contractor's conduct. Conversely, affirmative contribution does not itself require that the hirer's contribution to the injury be substantial." (*Sandoval, supra,* 12 Cal.5th at p. 278, internal citations omitted.)

- "A hirer's failure to correct an unsafe condition, by itself, does not establish an affirmative contribution." (*Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718 [208 Cal.Rptr.3d 699].)

- "On facts [showing a contractor's awareness of a hazard], then, it is the contractor's responsibility, not the hirer's responsibility, to take the necessary precautions to protect its employees from a known workplace hazard. And should the contractor fail to take the necessary precautions, … its employees cannot fault the hirer for the contractor's own failure." (*McCullar v. SMC Contracting, Inc.* (2022) 83 Cal.App.5th 1005, 1017 [298 Cal.Rptr.3d 785].)

- "When the employer directs that work be done by use of a particular mode or otherwise interferes with the means and methods of accomplishing the work, an affirmative contribution occurs. When the hirer does not fully delegate the task of providing a safe working environment but in some manner actively participates in how the job is done, the hirer may be held liable to the employee if its participation affirmatively contributed to the employee's injury. [¶] By contrast, passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution. The failure to institute specific safety measures is not actionable unless there is some evidence that the hirer or the contractor had agreed to implement these measures. Thus, the failure to exercise retained control does not constitute an affirmative contribution to an injury. Such affirmative contribution must be based on a negligent exercise of control. In order for a worker to recover on a retained control theory, the hirer must engage in some active participation." (*Tverberg, supra,* 202 Cal.App.4th at p. 1446, internal citations omitted.)

- "Although plaintiffs concede that [contractor] had exclusive control over how the window washing would be done, they urge that [owner] nonetheless is liable because it affirmatively contributed to decedent's injuries 'not [by] active conduct *but … in the form of an omission to act*.' Although it is undeniable that [owner]'s failure to equip its building with roof anchors contributed to decedent's death, *McKown* [*v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219] does

not support plaintiffs' suggestion that a passive omission of this type is actionable. … Subsequent Supreme Court decisions … have repeatedly rejected the suggestion that the passive provision of an unsafe workplace is actionable. … Accordingly, the failure to provide safety equipment does not constitute an 'affirmative contribution' to an injury within the meaning of *McKown*." (*Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, 1093 [229 Cal.Rptr.3d 594], original italics.)

- "[U]nder Government Code section 815.4, a public entity can be held liable under the retained control doctrine, provided a private person would be liable under the same circumstances. This means that the public entity must *negligently* exercise its retained control so as to affirmatively contribute to the injuries of the employee of the independent contractor." (*McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 985 [79 Cal.Rptr.3d 777], original italics.)

- "The *Privette* line of decisions establishes a presumption that an independent contractor's hirer 'delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees.'… [T]he *Privette* presumption affects the burden of producing evidence." (*Alvarez v. Seaside Transportation Services LLC* (2017) 13 Cal.App.5th 635, 642 [221 Cal.Rptr.3d 119], internal citations omitted.)

Secondary Sources

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-A, *Liability For Defective Conditions On Premises*, ¶ 6:1 et seq. (The Rutter Group)

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.08 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.23 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability,* §§ 421.11, 421.12 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability,* § 178.20 et seq. (Matthew Bender)

2505. Retaliation—Essential Factual Elements (Gov. Code, § 12940(h))

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her/***nonbinary pronoun***] for [***describe activity protected by the FEHA***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [***describe protected activity***];**

2. **[That [***name of defendant***] [discharged/demoted/[***specify 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;]**

3. **That [***name of plaintiff***]'s [***describe protected activity***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/demote/[***specify other adverse employment action***]] [***name of plaintiff***]/conduct];**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s decision to [discharge/demote/[***specify other adverse employment action***]] [***name of plaintiff***] was a substantial factor in causing [him/her/***nonbinary pronoun***] harm.**

[[*Name of plaintiff***] does not have to prove [discrimination/harassment] in order to be protected from retaliation. If [he/she/***nonbinary pronoun***] [reasonably believed that [***name of defendant***]'s conduct was unlawful/requested a [disability/religious] accommodation], [he/she/***nonbinary pronoun***] may prevail on a retaliation claim even if [he/she/***nonbinary pronoun***] does not present, or prevail on, a separate claim for [discrimination/harassment/[***other***]].]**

New September 2003; Revised August 2007, April 2008, October 2008, April 2009, June 2010, June 2012, December 2012, June 2013, June 2014, June 2016, December 2016

Directions for Use

In elements 1 and 3, describe the protected activity in question. Government Code section 12940(h) provides that it is unlawful to retaliate against a person "because the person has opposed any practices forbidden under [Government Code sections 12900 through 12966] or because the person has filed a complaint, testified, or assisted in any proceeding under [the FEHA]." It is also unlawful to retaliate or

otherwise discriminate against a person for requesting an accommodation for religious practice or disability, regardless of whether the request was granted. (Gov. Code, § 12940(*l*)(4) [religious practice], (m)(2) [disability].)

Read the first option for element 2 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. For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute retaliation, but taken as a whole establish prohibited conduct. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052–1056 [32 Cal.Rptr.3d 436, 116 P.3d 1123].) Give both the first and second options if the employee presents evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment theory. (See, e.g., *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 423–424 [69 Cal.Rptr.3d 1].) Also select "conduct" in element 3 if the second option or both the first and second options are included for element 2.

Retaliation in violation of the FEHA may be established by constructive discharge; that is, that the employer intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in the employee's position would have had no reasonable alternative other than to resign. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 [76 Cal.Rptr.3d 632].) If constructive discharge is alleged, give the third option for element 2 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Also select "conduct" in element 3 if the third option is included for element 2.

Element 3 requires that the protected activity be a substantial motivating reason for the retaliatory acts. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; *Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 479 [161 Cal.Rptr.3d 758]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

Note that there are two causation elements. There must be a causal link between the retaliatory animus and the adverse action (see element 3), and there must be a causal link between the adverse action and damages (see element 5). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

This instruction has been criticized in dictum because it is alleged that there is no element requiring retaliatory intent. (See *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1229–1231 [136 Cal.Rptr.3d 472].) The court urged the Judicial Council to redraft the instruction and the corresponding special verdict form so as to clearly state that retaliatory intent is a necessary element of a retaliation claim under FEHA.

The jury in the case was instructed per element 3 "that Richard Joaquin's reporting that he had been sexually harassed was a motivating reason for the City of Los Angeles' decision to terminate Richard Joaquin's employment or deny Richard Joaquin promotion to the rank of sergeant." The committee believes that the instruction as given is correct for the intent element in a retaliation case. (Cf. *Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 127−132 [199 Cal.Rptr.3d 462] [for disability discrimination, "substantial motivating reason" is only language required to express intent].) However, in

cases such as *Joaquin* that involve allegations of a prohibited motivating reason (based on a report of sexual harassment) and a permitted motivating reason (based on a good faith belief that the report was falsified), the instruction may need to be modified to make it clear that plaintiff must prove that defendant acted based on the *prohibited* motivating reason and not the *permitted* motivating reason.

Sources and Authority

- Retaliation Prohibited Under Fair Employment and Housing Act. Government Code section 12940(h).

- Retaliation for Requesting Reasonable Accommodation for Religious Practice and Disability Prohibited. Government Code section 12940(*l*)(4), (m)(2).

- "Person" Defined Under Fair Employment and Housing Act. Government Code section 12925(d).

- Prohibited Retaliation. Title 2 California Code of Regulations section 11021.

- "[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ' " 'drops out of the picture,' " ' and the burden shifts back to the employee to prove intentional retaliation." (*Yanowitz, supra,* 36 Cal.4th at p. 1042, internal citations omitted.)

- "Actions for retaliation are 'inherently fact-driven'; it is the jury, not the court, that is charged with determining the facts." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 299 [156 Cal.Rptr.3d 851].)

- "It is well established that a plaintiff in a retaliation case need only prove that a retaliatory animus was at least a substantial or motivating factor in the adverse employment decision." (*George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1492 [102 Cal.Rptr.3d 431].)

- "Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Yanowitz, supra,* 36 Cal.4th at p. 1052.)

- "Contrary to [defendant]'s assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute." (*Yanowitz, supra,*

36 Cal.4th at pp. 1055–1056, internal citations omitted.)

- "[U]nder certain circumstances, a retaliation claim may be brought by an employee who has complained of or opposed conduct, even when a court or jury subsequently determines the conduct actually was not prohibited by the FEHA. Indeed, this precept is well settled. An employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment or sexual discrimination." (*Miller v. Department of Corr.* (2005) 36 Cal.4th 446, 473–474 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- "Clearly, section 12940, subdivision (h) encompasses a broad range of protected activity. An employee need not use specific legal terms or buzzwords in opposing discrimination. Nor is it necessary for an employee to file a formal charge. The protected activity element may be established by evidence that the plaintiff threatened to file a discrimination charge, by a showing that the plaintiff mistakenly, but reasonably and sincerely believed he was opposing discrimination, or by evidence an employer believed the plaintiff was a potential witness in another employee's FEHA action." (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 652 [163 Cal.Rptr.3d 392], internal citations and footnote omitted.)

- " 'Standing alone, an employee's unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee's opposition was based upon a reasonable belief that the employer was engaging in discrimination.' '[C]omplaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct.' [¶] But employees need not explicitly and directly inform their employer that they believe the employer's conduct was discriminatory or otherwise forbidden by FEHA." (*Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1046 [207 Cal.Rptr.3d 120], internal citation omitted.)

- "The relevant question … is not whether a formal accusation of discrimination is made but whether the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner." (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1193 [220 Cal.Rptr.3d 42].)

- "Notifying one's employer of one's medical status, even if such medical status constitutes a 'disability' under FEHA, does not fall within the protected activity identified in subdivision (h) of section 12940—i.e., it does not constitute engaging in opposition to any practices forbidden under FEHA or the filing of a complaint, testifying, or assisting in any proceeding under FEHA." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 247 [206 Cal.Rptr.3d 841].)

- "[Plaintiff]'s advocacy for the disabled community and opposition to elimination of programs that might benefit that community do not fall within the definition of protected activity. [Plaintiff] has not shown the [defendant]'s actions amounted to discrimination against disabled citizens, but even if they could be so construed, discrimination by an employer against members of the general public is not a prohibited *employment* practice under the FEHA." (*Dinslage v. City and County of San Francisco* (2016) 5 Cal.App.5th 368, 383 [209 Cal.Rptr.3d 809], original italics.)

- "Moreover, [defendant]'s actions had a substantial and material impact on the conditions of employment. The refusal to promote [plaintiff] is an adverse employment action under FEHA. There was also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes undeserved negative job reviews, reductions in his staff, ignoring his health concerns and acts which caused him substantial psychological harm." (*Wysinger, supra,* 157 Cal.App.4th at p. 424, internal citations omitted.)

- "A long period between an employer's adverse employment action and the employee's earlier protected activity may lead to the inference that the two events are not causally connected. But if between these events the employer engages in a pattern of conduct consistent with a retaliatory intent, there may be a causal connection." (*Wysinger, supra,* 157 Cal.App.4th at p. 421, internal citation omitted.)

- "Both direct and circumstantial evidence can be used to show an employer's intent to retaliate. 'Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive.' Circumstantial evidence typically relates to such factors as the plaintiff's job performance, the timing of events, and how the plaintiff was treated in comparison to other workers." (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153 [119 Cal.Rptr.2d 131], internal citations omitted.)

- "The retaliatory motive is 'proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.' 'The causal link may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision." ' " (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 615 [262 Cal.Rptr. 842], internal citations omitted.)

- "[A]n employer generally can be held liable for the retaliatory actions of its supervisors." (*Wysinger, supra,* 157 Cal.App.4th at p. 420.)

- "Where a supervisor or other person of authority obstructs and threatens to punish a reporting employee if she persists in bringing a complaint to higher level officials, such acts may be considered by a jury to constitute actionable retaliation." (*Bailey v. San Francisco Dist. Attorney's Office* (2024) 16 Cal.5th 611, 640 [323 Cal.Rptr.3d 369, 552 P.3d 430].)

- "Plaintiff, although a partner, is a person whom section 12940, subdivision (h) protects from retaliation for opposing the partnership-employer's harassment against those employees." (*Fitzsimons v. California Emergency Physicians Medical Group* (2012) 205 Cal.App.4th 1423, 1429 [141 Cal.Rptr.3d 265].)

- "[A]n employer may be found to have engaged in an adverse employment action, and thus liable for retaliation under section 12940(h), 'by permitting … fellow employees to punish [him] for invoking [his] rights.' We therefore hold that an employer may be held liable for coworker retaliatory conduct if the employer knew or should have known of coworker retaliatory conduct and either participated

and encouraged the conduct, or failed to take reasonable actions to end the retaliatory conduct." (*Kelley v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 213 [126 Cal.Rptr.3d 651], internal citation omitted.)

- "[T]he employer is liable for retaliation under section 12940, subdivision (h), but nonemployer individuals are not personally liable for their role in that retaliation." (*Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173 [72 Cal.Rptr.3d 624, 177 P.3d 232].)

- " 'The legislative purpose underlying FEHA's prohibition against retaliation is to prevent employers from deterring employees from asserting good faith discrimination complaints … .' Employer retaliation against employees who are believed to be prospective complainants or witnesses for complainants undermines this legislative purpose just as effectively as retaliation after the filing of a complaint. To limit FEHA in such a way would be to condone 'an absurd result' that is contrary to legislative intent. We agree with the trial court that FEHA protects employees against preemptive retaliation by the employer." (*Steele, supra,* 162 Cal.App.4th at p. 1255, internal citations omitted.)

- " 'The plaintiff's burden is to prove, by competent evidence, that the employer's proffered justification is mere pretext; i.e., that the presumptively valid reason for the employer's action was in fact a coverup. … In responding to the employer's showing of a legitimate reason for the complained-of action, the plaintiff cannot " 'simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee ' "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence," … and hence infer "that the employer did not act for the [asserted] non-discriminatory reasons." ' " ' " (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1409 [194 Cal.Rptr.3d 689].)

- "The showing of pretext, while it may indicate retaliatory intent or animus, is not the sole means of rebutting the employer's evidence of nonretaliatory intent. ' "While 'pretext' is certainly a relevant issue in a case of this kind, making it a central or necessary issue is not sound. The central issue is and should remain whether the evidence as a whole supports a reasoned inference that the challenged action was the product of discriminatory or retaliatory animus. The employer's mere articulation of a legitimate reason for the action cannot answer this question; it can only dispel the *presumption* of improper motive that would otherwise *entitle* the employee to a judgment in his favor." ' " (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 94 [221 Cal.Rptr.3d 668], original italics.)

- "Government Code section 12940, subdivision (h), does not shield an employee against termination or lesser discipline for either lying or withholding information during an employer's internal investigation of a discrimination claim. In other words, public policy does not protect deceptive activity during an internal investigation. Such conduct is a legitimate reason to terminate an at-will employee." (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1528 [152 Cal.Rptr.3d 154], footnotes omitted.)

- "Although appellant does not argue she was constructively discharged, such a claim is not necessary to find unlawful retaliation." (*McCoy, supra,* 216 Cal.App.4th at p. 301.)

- "The phrase 'because of' [in Gov. Code, § 12940(a)] is ambiguous as to the type or level of intent (i.e., motivation) and the connection between that motivation and the decision to treat the disabled person differently. This ambiguity is closely related to [defendant]'s argument that it is liable only if motivated by discriminatory animus. [¶] The statutory ambiguity in the phrase 'because of" was resolved by our Supreme Court about six months after the first jury trial [in *Harris, supra,* 56 Cal.4th at p. 203]." (*Wallace, supra,* 245 Cal.App.4th at p. 127.)

- " '[W]hile discrimination may be carried out by means of speech, such as a written notice of termination, and an illicit animus may be evidenced by speech, neither circumstance transforms a discrimination suit to one arising from speech. What gives rise to liability is not that the defendant spoke, but that the defendant denied the plaintiff a benefit, or subjected the plaintiff to a burden, on account of a discriminatory or retaliatory consideration.' " (*Laker v. Board of Trustees of California State University* (2019) 32 Cal.App.5th 745, 772 [244 Cal.Rptr.3d 238].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1028, 1052–1054

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:121–7:205 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.83–2.88

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.131 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.37, 115.94 (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 2:74–2:75 (Thomson Reuters)

4324. Affirmative Defense—Waiver by Acceptance of Rent

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/***nonbinary pronoun***/it] because [***name of plaintiff***] accepted payment of rent after [the three-day notice period had expired/[***name of defendant***] had violated the [lease/rental agreement]]. To succeed on this defense, [***name of defendant***] must prove:**

[1. That [*name of plaintiff***] accepted a [partial] payment of rent after [the three-day notice period had expired/[***name of plaintiff***] knew that [***name of defendant***] had violated the [lease/rental agreement]] [./; and]**

[2. That [*name of plaintiff***] failed to provide actual notice to [***name of defendant***] that partial payment would be insufficient to avoid eviction.]**

If [*name of defendant***] has proven that [he/she/***nonbinary pronoun***/it] paid rent, then [he/she/***nonbinary pronoun***/it] has the right to continue occupying the property unless [***name of plaintiff***] proves [one of the following:]**

[1. That even though [*name of plaintiff***] received [***name of defendant***]'s [***specify noncash form of payment, e.g., check***], [he/she/***nonbinary pronoun***/it] rejected the rent payment because [***e.g., it never cashed the check***]][./; or]**

[2. That the lease contained a provision stating that acceptance of [late rent/rent after knowing of a violation of the [lease/rental agreement]] would not affect [his/her/*nonbinary pronoun***/its] right to evict [***name of defendant***]][./; or]**

[3. That [*name of plaintiff***] clearly and continuously objected to the violation of the [lease/rental agreement].]**

New August 2007; Revised April 2008, June 2010, December 2011

Directions for Use

The affirmative defense in this instruction applies to an unlawful detainer for nonpayment of rent or breach of another condition of the lease if either the landlord accepts a rent payment after the three-day period to cure or quit has expired or the landlord waived a breach of a condition by accepting rent after the breach and then subsequently served a notice of forfeiture and filed an unlawful detainer. Acceptance of rent may also be a defense to an unlawful detainer if the tenant remains in possession after the expiration of the terms of the lease. (See Civ. Code, § 1945; *Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 740 [124 Cal.Rptr.3d 555].) This defense is available for breach of a covenant prohibiting a sublease or assignment only if the landlord received written notice of the sublease or assignment from the tenant and accepted rent thereafter. (See Civ. Code, § 1954.53(d)(4).)

With regard to the tenant-defendant's burden, include the word "partial" in element 1 and read element 2 only in cases involving commercial tenancies and partial payment. (Code Civ. Proc., § 1161.1(c).)

With regard to the landlord plaintiff's burden, give option 3 if there is evidence that the landlord at all times made it clear that acceptance of rent was not a waiver of the breach. (See *Thriftimart, Inc. v. Me & Tex* (1981) 123 Cal.App.3d 751, 754 [177 Cal.Rptr. 24] [accepting rent for five years was not a waiver].)

Sources and Authority

- Commercial Tenancy: Acceptance of Partial Payment Not Waiver. Code of Civil Procedure section 1161.1(c).

- Acceptance of Rent After Expiration of Term. Civil Code section 1945.

- When Acceptance of Rent Is Not Waiver. Civil Code section 1954.53(d)(4).

- "It is a general rule that the right of a lessor to declare a forfeiture of the lease arising from some breach by the lessee is waived when the lessor, with knowledge of the breach, accepts the rent specified in the lease. While waiver is a question of intent, the cases have required some positive evidence of rejection on the landlord's part or a specific reservation of rights in the lease to overcome the presumption that tender and acceptance of rent creates." (*EDC Assocs. v. Gutierrez* (1984) 153 Cal.App.3d 167, 170 [200 Cal.Rptr. 333], internal citations omitted.)

- "The acceptance of rent by the landlord from the tenant, after the breach of a condition of the lease, with full knowledge of all the facts, is a waiver of the breach and precludes the landlord from declaring a forfeiture of the lease by reason of said breach. This is the general rule and is supported by ample authority. … 'The most familiar instance of the waiver of the forfeiture of a lease arises from the acceptance of rent by the landlord after condition broken, and it is a universal rule that if the landlord accepts rent from his tenant after full notice or knowledge of a breach of a covenant or condition in his lease for which a forfeiture might have been demanded, this constitutes a waiver of forfeiture which cannot afterward be asserted for that particular breach or any other breach which occurred prior to the acceptance of the rent. In other words, the acceptance by a landlord of the rents, with full knowledge of a breach in the conditions of the lease, and of all of the circumstances, is an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease, and demanding a forfeiture thereof.' " (*Kern Sunset Oil Co. v. Good Roads Oil Co.* (1931) 214 Cal. 435, 440–441 [6 P.2d 71], internal citations omitted.)

- "Here the lessor not only relied upon the express agreement in the contract of the lease against waiver of its right to assert a forfeiture for the acceptance of rent after knowledge of the breach of covenant prohibiting assignment of the lease without its written consent first obtained, but it also gave notice that its acceptance of the rent after the breach of covenant became known was not to be construed as a consent to the assignment of the lease or a waiver of its right to assert a forfeiture." (*Karbelnig v. Brothwell* (1966) 244 Cal.App.2d 333, 342 [53 Cal.Rptr. 335].)

- "The landlord had the obligation of going forward with the evidence in order to prove that the money orders were not negotiated or that it took other action to insure that there was no waiver. 'Although a plaintiff ordinarily has the burden of proving every allegation of the complaint and a defendant of proving any affirmative defense, fairness and policy may sometimes require a different allocation.

Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim.' " (*EDC Assocs., supra,* 153 Cal.App.3d at p. 171, internal citations omitted.)

- "Waiver is a matter of intent. Here plaintiff, from the start, evidenced, not a willingness to waive -- which would have kept the original lease in force at the contractual rent -- but a willingness to lease the land encroached upon and, if that extended lease were arrived at, to continue the lease on the original parcel. We cannot impose on plaintiff a penalty for a reasonable effort to achieve an amicable adjustment of the breach." (*Thriftimart, Inc., supra,* 123 Cal.App.3d at p. 754.)

- " 'When the term of a lease expires but the lessee holds over without the owner's consent, he becomes a tenant at sufferance. [Citation.] "Since the possession of the tenant at sufferance is wrongful, the owner may elect to regard the tenant as a trespasser … ." [Citation.] If instead the owner accepts rent from a tenant at sufferance he accepts the tenant's possession as rightful and the tenancy is converted into a periodic one.' " (*Kaufman, supra,* 195 Cal.App.4th at p. 740.)

- "Under section 1945, 'If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly, nor in any case one year.' This presumption is rebuttable." (*Baca v. Kuang* (2025) 107 Cal.App.5th 1292, 1298 [328 Cal.Rptr.3d 854].)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, § 696

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) § 10.60

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.31–6.37, 6.41, 6.42

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.65 (Matthew Bender)

Miller & Starr, California Real Estate 4th, § 19:205 (Thomson Reuters)

Item number: 03

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: 10/30/25

Rules Committee action requested [Choose from drop-down menu below]:
Recommend JC approval (has circulated for comment)

Title of proposal: Jury Instructions: Civil Jury Instructions (Release 48)

Proposed rules, forms, or standards (include amend/revise/adopt/approve)*:*
Revise CACI Nos. 113, 470, 471, 472, 2500, 2501, 2502, 2512, 2521A, 2521B, 2521C, 2522A, 2522B, 2522C, 2527, 2528, 2540, 2547, 2548, 2549, VF-2500, VF-2501, VF-2506A, VF-2507A, VF-2515, 2720, 2721, 3060, 3061, VF-3030, VF-3031, 4302, 4303, 4320, and 4323; revise CACI No. 4106 and renumber it as CACI No. 4106A; and add CACI Nos. 4106B and 4350

Committee or other entity submitting the proposal:
Advisory Committee on Civil Jury Instructions

Staff contact (name, phone and email)*: Eric Long, 415-865-7691, eric.long@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): 10/16/25
Project description from annual agenda: 1. Maintenance—Case Law; 2. Maintenance—Legislation; 3. Maintenance—Comments from Users; 4. New Instructions and Expansion into New Subject Matter Areas, 5. Maintenance—Sources and Authority; 6. Maintenance—Secondary Sources

Out of Cycle/Early Implementation: *If requesting July 1 effective date or out of cycle, explain why:*
2026 edition of the Judicial Council of California Civil Jury Instructions (CACI), effective upon approval by the Judicial Council

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff

- **Director Approval** (required for all invitations to comment and reports)
  This report or invitation to comment was:
  ☒ reviewed by EGG on *(date)* 10/7/25
  ☒ approved by Office Director (or Designee) (*name*) James Barolo
  on (date) 10/9/25

If either of above not checked, explain why:

*Complete the following for all reports to be submitted to council (optional for ITCs)**:***

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any report with new or revised forms)

☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

Judicial Council *of* California

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 25-175
For business meeting on December 12, 2025

Title
Jury Instructions: Civil Jury Instructions (Release 48)

Rules, Forms, Standards, or Statutes Affected
Judicial Council of California Civil Jury Instructions (*CACI*)

Recommended by
Advisory Committee on Civil Jury Instructions
Hon. Adrienne M. Grover, Chair

Report Type
Action Required

Effective Date
December 12, 2025

Date of Report
October 16, 2025

Contact
Eric Long, 415-865-7691
eric.long@jud.ca.gov

Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approval of new and revised civil jury instructions and verdict forms prepared by the committee. Among other things, these changes bring the instructions up to date with developments in the law over the previous six months. Upon Judicial Council approval, the instructions will be published in the official 2026 edition of the *Judicial Council of California Civil Jury Instructions* (*CACI*).

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective December 12, 2025, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court:

1. Revisions to 35 instructions and verdict forms: CACI Nos. 113, 470, 471, 472, 2500, 2501, 2502, 2512, 2521A, 2521B, 2521C, 2522A, 2522B, 2522C, 2527, 2528, 2540, 2547, 2548, 2549, VF-2500, VF-2501, VF-2506A, VF-2507A, VF-2515, 2720, 2721, 3060, 3061, VF-3030, VF-3031, 4302, 4303, 4320, and 4323;

2. Revisions to CACI No. 4106 and renumbering of it as CACI No. 4106A; and

3. Addition of 2 instructions: CACI Nos. 4106B and 4350.

A table of contents and the new and revised civil jury instructions and verdict forms are attached at pages 6–170.

Relevant Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.58 of the California Rules of Court, which established the advisory committee and its charge.[1] At that meeting, the council approved *CACI* under what is now rule 2.1050 of the California Rules of Court. Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CACI* to ensure that the instructions remain clear, accurate, current, and complete.

This is release 48 of *CACI*. The council approved release 47 at its July 2025 meeting.

Analysis/Rationale

A total of 38 instructions and verdict forms are presented in this release. In addition, at its meeting on October 30, 2025, the Judicial Council's Rules Committee approved minor changes to 8 other instructions under a delegation of authority from the council to the Rules Committee.[2]

The recommended revisions and additions to the instructions are based on comments or suggestions from justices, judges, attorneys, and bar associations; proposals by staff and committee members; and recent developments in the law. Below is a summary of the more significant additions and changes recommended to the council.

Revised instructions

CACI Nos. 470, 471, and 472

Based on the Supreme Court's decision in *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696], *CACI* has offered three instructions on exceptions to the assumption of risk defense for use in different sporting contexts: (1) coparticipants, (2) instructors, trainers, and coaches, and (3) facility owners, operators, and event sponsors. The

[1] Rule 10.58(a) states: "The committee regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council's civil jury instructions."

[2] At its October 20, 2006, meeting, the Judicial Council delegated to the Rules Committee (formerly called the Rules and Projects Committee, or RUPRO) the final authority to approve nonsubstantive technical changes and corrections and minor substantive changes to jury instructions unlikely to create controversy. The council also gave the Rules Committee the authority to delegate to the jury instructions advisory committees the authority to review and approve nonsubstantive grammatical and typographical corrections and other similar changes to the jury instructions, which the Rules Committee has done.

Under the implementing guidelines that the Rules Committee approved on December 14, 2006, which were submitted to the council on February 15, 2007, the Rules Committee has the final authority to approve (among other things) additional cases and statutes cited in the Sources and Authority and additions or changes to the Directions for Use.

instructions have been updated several times as the case law surrounding the exceptions has developed. Last year, the Court of Appeal in *Greener v. M. Phelps, Inc.* (2024) 107 Cal.App.5th 1080, 1086 [328 Cal.Rptr.3d 787] asked the advisory committee to "consider revising CACI No. 471 to be self-contained so as to minimize confusion and avoid the need to cross-refer to other instructions." Although the court's observations related to only one of the instructions, the committee took the opportunity to reexamine all three to improve clarity. The committee recommends consistent phrasing of element 1 in CACI No. 470 and the first option for element 1 in CACI No. 471, which are virtually identical. In CACI No. 471, the committee added an optional definition of "conduct entirely outside the range of ordinary," which is used in element 1 but not explained. (CACI No. 470 already included a paragraph explaining "conduct entirely outside the range of ordinary.") In addition, to address the concern raised by the court in *Greener*, the committee has added an optional paragraph on the duty of reasonable care for instructors, trainers, or coaches, which will avoid any need to rely on content from the general negligence instruction. Similarly, in CACI No. 472, the committee has added a paragraph on "risk inherent in a sport or activity" and an explanation of the owner's, operator's, or sponsor's duty to use reasonable care, both of which will make the instruction clearer for jurors by eliminating the need to refer to other content.

For CACI No. 470, the committee also recommends removing the final sentence from the instruction. In the context of sports and recreational activities, consideration of the nature of the defendant-coparticipant's conduct is addressed in element 1 and the explanation of "conduct entirely outside the range of ordinary activity" in the paragraph that follows the elements. Although the existing statement is generally correct (see Sources and Authority, quoting *Ford v. Gouin* (1992) 3 Cal.4th 339, 342 [11 Cal.Rptr.2d 30, 834 P.2d 724]), the committee believes that the instruction is complete without introducing additional concepts (accidental, careless, or negligent) and that removal of the sentence will eliminate some potential for juror confusion.

Fair Employment and Housing Act (FEHA) and Unruh Civil Rights Act instructions (series 2500 and 3000)

Senate Bill 1137 (Stats. 2024, ch. 779) recognized the concept of intersectionality—"an analytical framework that sets forth that different forms of inequality operate together, exacerbate each other, and can result in amplified forms of prejudice and harm"—in California's civil rights laws. (*Ibid.*, § 1(a).) As a result, provisions of the Government Code (FEHA) and the Civil Code (Unruh) now expressly prohibit discrimination or harassment not just because of one protected characteristic, but also because of any combination of two or more protected characteristics. The legislation declares that these amendments "do not constitute a change in, or diminishment of, existing protections and obligations, but are declaratory of existing law." (*Ibid.*, § 1(e).) The committee, nevertheless, concluded that it was important to incorporate into the various FEHA and Unruh instructions and verdict forms that were phrased using a singular term like "protected status" an option that includes a combination of characteristics.

CACI Nos. 2720 and 2721

The Court of Appeal in *Rodriguez v. Parivar, Inc.* (2022) 83 Cal.App.5th 739 [299 Cal.Rptr.3d 719] criticized a special verdict form used in a jury trial for an overtime case. As the court observed in footnote 11, "[t]he trial court's error in crafting the special verdict form is understandable because it drew from standard CACI No. 2720, which instructs that a defendant must prove that a plaintiff 'perform[ed] executive duties more than half of the time.' Unfortunately, however, that standard instruction does not refer to 'duties which meet the test of the exemption.'" The committee revisited these instructions and concluded that the element concerning the employee's duties and the paragraph explaining the element would benefit from clarification. The committee recommends revising element 5 in CACI No. 2720, element 4 in CACI No. 2721, and the paragraph that follows the elements in both instructions to state that the relevant inquiry is whether the employee was primarily, defined as more than half the time, engaged in duties that meet the test of the exemption. The committee also thought that jurors would be assisted by the inclusion of relevant details from the applicable wage order; however, recognizing that the duties will be different in every case, the committee has added bracketed content and a note in the Directions for Use encouraging users to explain the relevant executive or administrative duties from the applicable wage order.

New instructions

CACI Nos. 4106A and 4106B

A committee member commented that CACI No. 4106, *Breach of Fiduciary Duty by Attorney - Essential Factual Elements*, might be improved by moving some of the content out of the Directions for Use. A claim for breach of fiduciary duty by an attorney can be based on either negligence or fraud depending on the circumstances but that those claims require different causation standards. (See *Knutson v. Foster* (2018) 25 Cal.App.5th 1075 [236 Cal.Rptr.3d 473].) CACI No. 4106 had addressed the different causation standards in the Directions for Use and asked users to give the "but for" causation standard for negligent breach cases, rather than the substantial factor causation standard stated in element 3. To more directly address the appropriate causation standard for each variety of claim, the committee recommends splitting this instruction into two new instructions: CACI Nos. 4106A and 4106B. For fraudulent or intentional breach, the committee recommends revising and renumbering CACI No. 4106 as CACI No. 4106A. The committee has developed CACI No. 4106B for use when a claim is based on negligence. These two alternative instructions will help jurors understand the two claims and should assist litigants and courts in cases in which both intentional and negligent breach are alleged.

***CACI No. 4350,* Breach of Implied Warranty of Habitability—Essential Factual Elements**

The council's civil jury instructions currently include a series of instructions on Unlawful Detainer (series 4300). Two trial court judges suggested developing new instructions for related claims brought affirmatively by tenants outside of the unlawful detainer process. The committee agreed and recommends expanding the series to "Unlawful Detainer and Other Landlord-Tenant Claims." The first new instruction addresses a tenant's affirmative claim for breach of the implied warranty of habitability, which largely parallels a tenant's affirmative defense based on

uninhabitable conditions. The committee will continue to work in this area to add new instructions covering other landlord-tenant claims.

Policy implications

The committee endeavors to accurately state the law in a way that is understandable to the average juror. Except for language choices, there are generally no policy implications.

Comments

The proposed additions and revisions in *CACI* circulated for comment from July 29 through September 12, 2025. Comments were received from three different commenters: one court and two bar associations. The Superior Court of Los Angeles County agreed with all changes. The Orange County Bar Association submitted comments on multiple instructions and verdict forms, agreeing with some and agreeing if modified with others. The California Employment Lawyers Association suggested revisions to several FEHA and Unruh instructions.

The committee appreciates the time taken to respond to the proposed changes. The committee evaluated all comments and, as a result, refined some of the instructions and verdict forms in this release. A chart of the comments and the committee's responses is attached at pages 171–194.

Alternatives considered

Rules 2.1050(e) and 10.58(a) of the California Rules of Court require the committee to update, revise, and add topics to *CACI* on a regular basis and to submit its recommendations to the council for approval. There are no alternative actions for the committee to consider. The committee did, however, consider suggestions from members of the legal community that did not result in recommendations for this release.

Fiscal and Operational Impacts

No implementation costs are associated with this proposal.

Attachments

1. CACI Nos. 113, 470, 471, 472, 2500, 2501, 2502, 2512, 2521A, 2521B, 2521C, 2522A, 2522B, 2522C, 2527, 2528, 2540, 2547, 2548, 2549, VF-2500, VF-2501, VF-2506A, VF-2507A, VF-2515, 2720, 2721, 3060, 3061, VF-3030, VF-3031, 4106A, 4106B, 4302, 4303, 4320, 4323, and 4350, at pages 6–170
2. Chart of comments, at pages 171–194

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Civil Jury Instructions
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LABOR CODE ACTIONS

CIVIL RIGHTS

BREACH OF FIDUCIARY DUTY

UNLAWFUL DETAINER AND LANDLORD-TENANT

113. Bias

Each one of us has biases about or certain perceptions or stereotypes of other people. Bias is a tendency to favor or disfavor a person or group of people. We may be aware of some of our biases, though we may not reveal them to others. We may not be fully aware of some of our other biases. We refer to biases that we are not fully aware of as "implicit" or "unconscious." They may be based on stereotypes we would reject if they were brought to our attention. Implicit or unconscious biases can affect how we perceive others and how we make decisions, without our being aware of the effect of these biases on those decisions.

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, and whom we believe or disbelieve. We may favor or be more likely to believe people whom we see as similar to us or with whom we identify. Or we may disfavor or be less likely to believe people whom we see as different from us.

As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against parties, attorneys, or witnesses because of their race, national origin, ethnicity, disability, gender, gender identity, gender expression, religion, sexual orientation, age, [or] socioeconomic status[, or [*insert any other impermissible form of bias***]].**

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party, attorney, or witness.

New June 2010; Revised December 2012, May 2020, November 2023, December 2025

Directions for Use

The court in consultation with the parties may add categories in the third paragraph ~~3~~ as relevant to the case.

Sources and Authority

- Duty to Prevent Bias and Ensure Fairness. Standard 10.20(b)(1), (2) of the California Standards of Judicial Administration.
- Judge Must Perform Duties Without Bias. Canon 3(b)(5) of the California Code of Judicial Ethics.

Secondary Sources

Witkin, California Procedure (5th ed. 2008) Trial, §§ 145–146

1 California Trial Guide, Unit 10, *Voir Dire Examination*, §§ 10.03[1], 10.21[2], 10.50, 10.80, 10.100, 10.110 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 6, *Jury Selection*, § 6.21

470. Primary Assumption of Risk—Exception to Nonliability—Coparticipant in Sport or Other Recreational Activity

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[*Name of plaintiff***] claims [he/she/***nonbinary pronoun***] was harmed while participating in [***specify sport or other recreational activity, e.g., touch football***] and that [***name of defendant***] is responsible for that harm. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] ~~either [~~intentionally injured [***name of plaintiff***] or~~]~~ ~~acted so recklessly that [his/her/***nonbinary pronoun***]~~ engaged in conduct ~~was~~ entirely outside the range of ordinary activity involved in [***e.g., touch football***];**

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.**

Conduct is entirely outside the range of ordinary activity involved in [*e.g., touch football***] if that conduct (1) increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., touch football***], and (2) it can be prohibited without discouraging vigorous participation or otherwise fundamentally changing the [sport/activity].**

~~**[***Name of defendant***] is not responsible for an injury resulting from conduct that was merely accidental, careless, or negligent.**~~

New September 2003; Revised April 2004, October 2008, April 2009, December 2011, December 2013; Revised and Renumbered from CACI No. 408 May 2017; Revised May 2018, December 2025

Directions for Use

This instruction sets forth a plaintiff's response to the affirmative defense of primary assumption of risk asserted by a defendant who was a coparticipant in the sport or other recreational activity. For an instruction applicable to coaches, instructors, or trainers, see CACI No. 471, *Primary Assumption of Risk—Exception to Nonliability—Instructors, Trainers, or Coaches*. For an instruction applicable to facilities owners and operators and to event sponsors, see CACI No. 472, *Primary Assumption of Risk—Exception to Nonliability—Facilities Owners and Operators and Event Sponsors*. For an instruction applicable to occupations with inherent risk, see CACI No. 473, *Primary Assumption of Risk—Exception to Nonliability—Occupation Involving Inherent Risk.*

Primary assumption of risk generally ~~absolves the~~ limits the defendant's ~~of a~~ duty of care ~~toward the plaintiff with regard to injury incurred~~ to a plaintiff injured in the course of a sporting or other recreational activity covered by the doctrine. (~~See~~ *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].) Element 1 sets forth the exceptions in which there is a duty. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 498 [64 Cal.Rptr.3d 803, 165 P.3d 581] ["In the sports context, the plaintiff is

deemed to have assumed those risks inherent in the sport in which plaintiff chooses to participate. A defendant participating in the same sporting activity owes no duty to a coparticipating plaintiff to avoid ordinary negligence as to those risks."].) If the plaintiff alleges intentional injury, include the bracketed language in element 1.

While duty is generally a question of law, some courts have held that whether the defendant has increased the risk beyond those inherent in the sport or activity is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] and cases cited therein, including cases *contra*.) There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (~~See~~ *Shin, supra, ~~v. Ahn~~* ~~(2007)~~ 42 Cal.4th ~~482,~~ at p. 486 ~~[64 Cal.Rptr.3d 803, 165 P.3d 581]~~.)

Sources and Authority

- "Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks; primary assumption of risk ... bar[s] recovery because no duty of care is owed as to such risks." (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 11 [45 Cal.Rptr.2d 855], internal citations omitted.)

- "Although the doctrine is often applied as between sports coparticipants, it defines the duty owed as between persons engaged in any activity involving inherent risks. The doctrine applies to activity 'done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury' … ." (*Jimenez v. Roseville City School Dist.* (2016) 247 Cal.App.4th 594, 601 [202 Cal.Rptr.3d 536], internal citations omitted; see also *Bertsch v. Mammoth Community Water Dist.* (2016) 247 Cal.App.4th 1201, 1208 [202 Cal.Rptr.3d 757] ["These factors certainly apply to skateboarding"]; *Swigart v. Bruno* (2017) 13 Cal.App.5th 529, 540 [220 Cal.Rptr.3d 556] [horseback riding is an inherently dangerous sport]; *Foltz v. Johnson* (2017) 16 Cal.App.5th 647, 656–657 [224 Cal.Rptr.3d 506] [off-road dirt bike riding].)

- "A coparticipant in an active sport ordinarily bears no liability for an injury resulting from conduct in the course of the sport that is merely careless or negligent." (*Ford v. Gouin* (1992) 3 Cal.4th 339, 342 [11 Cal.Rptr.2d 30, 834 P.2d 724].)

- "[W]e conclude that a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport." (*Knight, supra,* 3 Cal.4th at p. 320.)

- "The *Knight* rule, however, 'does not grant unbridled legal immunity to all defendants participating in sporting activity. The Supreme Court has stated that "it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport." Thus, even though "defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself," they may not increase the likelihood of injury above that which is inherent.' " (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1261 [102 Cal.Rptr.2d 813], internal citations omitted.)

- "The duty to not increase an inherent risk does not turn on the plaintiff's subjective knowledge or appreciation of the specific risk of harm." (*Foltz, supra,* 16 Cal.App.5th at p. 654.)

- "In *Freeman v. Hale,* the Court of Appeal advanced a test ... for determining what risks are inherent in a sport: '[C]onduct is totally outside the range of ordinary activity involved in the sport (and thus any risks resulting from that conduct are not inherent to the sport) if the prohibition of that conduct would neither deter vigorous participation in the sport nor otherwise fundamentally alter the nature of the sport.' " (*Distefano, supra,* 85 Cal.App.4th at p. 1261.)

- "[G]olfers have a limited duty of care to other players, breached only if they intentionally injure them or engage in conduct that is 'so reckless as to be totally outside the range of the ordinary activity involved in the sport.' " (*Shin, supra,* 42 Cal.4th at p. 497.)

- ~~"The [horseback] rider generally assumes the risk of injury inherent in the sport. Another person does not owe a duty to protect the rider from injury by discouraging the rider's vigorous participation in the sport or by requiring that an integral part of horseback riding be abandoned. And the person has no duty to protect the rider from the careless conduct of others participating in the sport. The person owes the horseback rider only two duties: (1) to not 'intentionally' injure the rider; and (2) to not 'increase the risk of harm beyond what is inherent in [horseback riding]' by 'engag[ing] in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport' " (*Levinson v. Owens* (2009) 176 Cal.App.4th 1534, 1545–1546 [98 Cal.Rptr.3d 779].)~~

- "[T]he general test is 'that a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.' Although a defendant has no duty of care to a plaintiff with regard to inherent risks, a defendant still has a duty not to increase those risks." (*Swigart, supra,* 13 Cal.App.5th at p. 538, internal citations omitted.)

- "The question of which risks are inherent in a recreational activity is fact intensive but, on a sufficient record, may be resolved on summary judgment. Judges deciding inherent risk questions under this doctrine 'may consider not only their own or common experience with the recreational activity involved but may also consult case law, other published materials, and documentary evidence introduced by the parties on a motion for summary judgment.' " (*Foltz, supra,* 16 Cal.App.5th at p. 656, internal citations omitted.)

- "[W]hether defendant breached the limited duty of care he owed other golfers by engaging in conduct that was 'so reckless as to be totally outside the range of the ordinary activity involved in [golf]' depends on resolution of disputed material facts. Thus, defendant's summary judgment motion was properly denied." (*Shin, supra,* 42 Cal.4th at p. 486, internal citation omitted.)

~~"Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of~~

~~the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co., supra,* 118 Cal.App.4th at pp. 591–592 [whether defendant's design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co., supra,* 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [whether distraction caused by activities of minor league baseball team's mascot increased inherent risk of spectator being hit by a foul ball 'is issue of fact to be resolved at trial']; but see *Huff v. Wilkins, supra,* 138 Cal.App.4th at p. 745 ['it is the trial court's province to determine whether defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-roading], and it should hold a hearing for this purpose before impaneling a jury']; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] ['[i]t is for the court to decide … whether the defendant has increased the risks of the activity beyond the risks inherent in the sport']; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal.Rptr.2d 325] [indicating it is for the court to determine whether defendant's conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn, supra,* 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588].)~~

- "The determinant of duty, 'inherent risk,' is to be decided solely as a question of law and based on the general characteristics of the sport activity and the parties' relationship to it." (*Griffin v. The Haunted Hotel, Inc.* (2015) 242 Cal.App.4th 490, 501 [194 Cal.Rptr.3d 830].)

- "Primary assumption of risk has often been applied in the context of active sports, but the doctrine also applies to other recreational activities that ' "involv[e] an inherent risk of injury to voluntary participants ... where the risk cannot be eliminated without altering the fundamental nature of the activity." ' 'Where the doctrine applies to a recreational activity, operators, instructors and participants in the activity owe other participants only the duty not to act so as to increase the risk of injury over that inherent in the activity.' Coparticipants must not intentionally or recklessly injure other participants, but the doctrine is a complete defense to a claim of negligence. However, recovery for injuries caused by risks *not* inherent in the activity is not barred by the doctrine." (*Wolf v. Weber* (2020) 52 Cal.App.5th 406, 410–411 [266 Cal.Rptr.3d 104], original italics, internal citations omitted.)

- "Admittedly, it is sometimes said that '[t]he existence and scope of a defendant's duty of care in the primary assumption of risk context "is a *legal* question which depends on the nature of the sport or activity … and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury." ' This statement of the rule is correct where there is no dispute about the inherent risks, and such cases may be resolved on summary judgment. [¶] However this statement is overly broad. Although the risks inherent in *many* activities are not subject to reasonable dispute (e.g., being hit with a baseball during a game), the risks inherent in *some* activities are not commonly known. In such cases, expert testimony may be required ' "for purposes of weighing whether the inherent risks of the activity were increased by the defendant's conduct." ' Thus, it is not entirely accurate to say inherent risks of an activity always present purely legal questions, because sometimes

the nature of an activity and its risks must be gleaned from the evidence." (*Jimenez, supra,* 247 Cal.App.4th at p. 608, original italics.)

- "[Plaintiff] has repeatedly argued that primary assumption of the risk does not apply because she did not impliedly consent to having a weight dropped on her head. However, a plaintiff's expectation does not define the limits of primary assumption of the risk. 'Primary assumption of risk focuses on the legal question of duty. It does not depend upon a plaintiff's implied consent to injury, nor is the plaintiff's subjective awareness or expectation relevant. … .' " (*Cann v. Stefanec* (2013) 217 Cal.App.4th 462, 471 [158 Cal.Rptr.3d 474].)

- "Primary assumption of the risk does not depend on whether the plaintiff subjectively appreciated the risks involved in the activity; instead, the focus is an objective one that takes into consideration the risks that are ' "inherent" ' in the activity at issue." (*Swigart, supra,* 13 Cal.App.5th at p. 538.)

- "A jury could find that, by using a snowboard without the retention strap, in violation of the rules of the ski resort and a county ordinance, defendant unnecessarily increased the danger that his snowboard might escape his control and injure other participants such as plaintiff. The absence of a retention strap could therefore constitute conduct not inherent to the sport which increased the risk of injury." (*Campbell v. Derylo* (1999) 75 Cal.App.4th 823, 829 [89 Cal.Rptr.2d 519].)

~~"The existence and scope of a defendant's duty depends on the role that defendant played in the activity. Defendants were merely the hosts of a social gathering at their cattle ranch, where [plaintiff] asked to ride one of their horses; they were not instructors and did not assume any of the responsibilities of an instructor." (*Levinson, supra,* 176 Cal.App.4th at pp. 1550–1551, internal citation omitted.)~~

- "[T]he primary assumption of risk doctrine is not limited to activities classified as sports, but applies as well to other recreational activities 'involving an inherent risk of injury to voluntary participants … where the risk cannot be eliminated without altering the fundamental nature of the activity.' " (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1156 [150 Cal.Rptr.3d 551, 290 P.3d 1158].)

- "Whether a duty exists 'does not turn on the reasonableness or unreasonableness of the plaintiff's conduct, but rather on [(1)] the nature of the activity or sport in which the defendant is engaged and [(2)] the relationship of the defendant and the plaintiff to that activity or sport.' It is the 'nature of the activity' and the parties' relationship to it that determines whether the doctrine applies—not its characterization as a sporting event." (*McGarry v. Sax* (2008) 158 Cal.App.4th 983, 999–1000 [70 Cal.Rptr.3d 519], internal citations omitted.)

- "[T]o the extent that ' " 'a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence,' " ' he or she is subject to the defense of comparative negligence but not to an absolute defense. This type of comparative negligence has been referred to as ' "secondary assumption of risk." ' Assumption of risk that is based upon the absence of a defendant's duty of care is called ' "primary assumption of risk." ' 'First, in "primary assumption of risk" cases—where the defendant owes no duty to protect the plaintiff from a particular risk of harm—a plaintiff who has suffered such harm is not entitled to recover from the defendant, whether the plaintiff's conduct in undertaking the activity was *reasonable* or unreasonable. Second, in "secondary assumption of risk" cases—involving instances in which the defendant has breached the

duty of care owed to the plaintiff—the defendant is not entitled to be entirely relieved of liability for an injury proximately caused by such breach, simply because the plaintiff's conduct in encountering the risk of such an injury was reasonable rather than unreasonable.' " (*Kindrich v. Long Beach Yacht Club* (2008) 167 Cal.App.4th 1252, 1259 [84 Cal.Rptr.3d 824], original italics, internal citations omitted.)

- "Even were we to conclude that [plaintiff]'s decision to jump off the boat was a voluntary one, and that therefore he assumed a risk inherent in doing so, this is not enough to provide a complete defense. Because voluntary assumption of risk as a complete defense in a negligence action was abandoned in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829 [119 Cal.Rptr. 858, 532 P.2d 1226], only the absence of duty owed a plaintiff under the doctrine of primary assumption of risk would provide such a defense. But that doctrine does not come into play except when a plaintiff and a defendant are engaged in certain types of activities, such as an 'active sport.' That was not the case here; plaintiff was merely the passenger on a boat. Under *Li,* he may have been contributorily negligent but this would only go to reduce the amount of damages to which he is entitled." (*Kindrich, supra,* 167 Cal.App.4th at p. 1258.)

- "Though most cases in which the doctrine of primary assumption of risk exists involve recreational sports, the doctrine has been applied to dangerous activities in other contexts ~~(see, e.g., *Saville v. Sierra College* (2005) 133 Cal.App.4th 857 [36 Cal.Rptr.3d 515] [training in peace officer takedown maneuvers]; *Hamilton v. Martinelli & Associates* (2003) 110 Cal.App.4th 1012 [2 Cal.Rptr.3d 168] [training on physical restraint methods]; *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112 [75 Cal.Rptr.2d 801] [practice of cheerleader routines]; *Bushnell* [*v. Japanese-American Religious & Cultural Center*], 43 Cal.App.4th 525 [50 Cal.Rptr.2d 671] [practice of moves in judo class]; and *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761 [53 Cal.Rptr.2d 713] [injury to nurse's aide by nursing home patient])~~." (*McGarry, supra,* 158 Cal.App.4th at pp. 999–1000, internal citation omitted [collecting cases].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1496–1511

1 Levy et al., California Torts, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.03, Ch. 15, *General Premises Liability*, § 15.21 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics,* § 273.30 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.172 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence,* § 165.401 (Matthew Bender)

471. Primary Assumption of Risk—Exception to Nonliability—Instructors, Trainers, or Coaches

[*Name of plaintiff***] claims [he/she/***nonbinary pronoun***] was harmed by [***name of defendant***]'s [coaching/training/instruction]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [coach/trainer/instructor];**

2. **[That [***name of defendant***] ~~intended to cause [*name of plaintiff*] injury~~ [intentionally injured [*name of plaintiff*] or] ~~acted so recklessly in that [his/her/*nonbinary pronoun*]~~ engaged in conduct ~~was~~ entirely outside the range of ordinary activity involved in teaching or coaching [***sport or other recreational activity, e.g., horseback riding***] in which [***name of plaintiff***] was participating;]**

   [or]

   [That [*name of defendant***] unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., ~~horseback riding~~boxing***];]**

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.**

[Conduct is entirely outside the range of ordinary activity involved in teaching or coaching [*e.g., horseback riding*] if that conduct (1) increased the risks to [*name of plaintiff*] over and above those inherent in [*e.g., horseback riding*], and (2) it can be prohibited without discouraging vigorous participation or otherwise fundamentally changing the [sport/activity].]

[A [coach/trainer/instructor] has a duty to use reasonable care not to increase the risks to a student over and above those inherent in [*e.g., boxing*]. A person can be unreasonable by acting or by failing to act. A person is unreasonable if that person does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.]

New September 2003; Revised April 2004, June 2012, December 2013; Revised and Renumbered from CACI No. 409 May 2017; Revised May 2020, December 2025

Directions for Use

This instruction sets forth a plaintiff's response to a defendant's assertion of the affirmative defense of primary assumption of risk for coaches ~~and~~, trainers, and instructors. Primary assumption of risk generally ~~absolves the~~ limits the defendant's ~~of a~~ duty of care ~~toward the plaintiff with regard to injury incurred~~ to a plaintiff injured in the course of a sporting or other recreational activity covered by the

doctrine. (~~See~~ *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].)

~~There are exceptions, however, in which there is a duty of care.~~ Use the first option for element 2 if ~~it is alleged~~ a plaintiff alleges that the coach, ~~or~~ trainer, or instructor intended to cause the student's injury or engaged in conduct totally outside the range of the ordinary activity involved in teaching or coaching the sport or activity. Use the second option for element 2 if ~~it is alleged~~ a plaintiff alleges that the coach's or trainer's failure to use ordinary care increased the risk of injury to the plaintiff, for example, by encouraging or allowing the plaintiff to participate in the sport or activity when the plaintiff was physically unfit to participate or by allowing the plaintiff to use unsafe equipment or instruments. (~~See~~ *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 845 [120 Cal.Rptr.3d 90].) ~~If the second option is selected, also give CACI No. 400, *Negligence—Essential Factual Elements*.~~ The second option has been recognized as narrow, while the first option applies to the vast majority of cases in which a sports instructor is alleged to have injured a student. (See *Greener v. M. Phelps, Inc.* (2024) 107 Cal.App.5th 1080, 1087 [328 Cal.Rptr.3d 787] [applying option two in combat or grappling sports when an instructor engages in the activity while not providing any demonstration or instruction].)

Include the first bracketed paragraph after the elements only if using the first option for element 2. Include the final bracketed paragraph only in a sport-specific negligence case involving the second option for element 2. Do not give CACI No. 400, *Negligence—Essential Factual Elements*, and CACI No. 401, *Basic Standard of Care*.

While duty is a question of law, courts have held that whether the defendant has unreasonably increased the risk is a question of fact for the jury. (~~See~~ *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] [and cases cited therein].) There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (~~See~~ *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. 470, *Primary Assumption of Risk—Exception to Nonliability—Coparticipant in Sport or Other Recreational Activity*. For an instruction on primary assumption of risk applicable to facilities owners and operators and to event sponsors, see CACI No. 472, *Primary Assumption of Risk—Exception to Nonliability—Facilities Owners and Operators and Event Sponsors*. For an instruction applicable to occupations with inherent risk, see CACI No. 473, *Primary Assumption of Risk—Exception to Nonliability—Occupation with Inherent Risk*.

Sources and Authority

- "In order to support a cause of action in cases in which it is alleged that a sports instructor has required a student to perform beyond the student's capacity or without providing adequate instruction, it must be alleged and proved that the instructor acted with intent to cause a student's injury or that the instructor acted recklessly in the sense that the instructor's conduct was 'totally outside the range of the ordinary activity' involved in teaching or coaching the sport." (*Kahn v. East Side Union High School District* (2003) 31 Cal.4th 990, 1011 [4 Cal.Rptr.3d 103, 75 P.3d 30], internal citation omitted.)

- "[T]he primary assumption of risk doctrine is not limited to activities classified as sports, but applies

as well to other recreational activities 'involving an inherent risk of injury to voluntary participants … where the risk cannot be eliminated without altering the fundamental nature of the activity.' " (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1156 [150 Cal.Rptr.3d 551, 290 P.3d 1158].)

- "Although the doctrine is often applied as between sports coparticipants, it defines the duty owed as between persons engaged in any activity involving inherent risks. The doctrine applies to activity 'done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury' … ." (*Jimenez v. Roseville City School Dist.* (2016) 247 Cal.App.4th 594, 601 [202 Cal.Rptr.3d 536], internal citations omitted; see also *Bertsch v. Mammoth Community Water Dist.* (2016) 247 Cal.App.4th 1201, 1208 [202 Cal.Rptr.3d 757] ["These factors certainly apply to skateboarding"], internal citations omitted.)

- "Here, we do not deal with the relationship between coparticipants in a sport, or with the duty that an operator may or may not owe to a spectator. Instead, we deal with the duty of a coach or trainer to a student who has entrusted himself to the former's tutelage. There are precedents reaching back for most of this century that find an absence of duty to coparticipants and, often, to spectators, but the law is otherwise as applied to coaches and instructors. For them, the general rule is that coaches and instructors owe a duty of due care to persons in their charge. The coach or instructor is not, of course, an insurer, and a student may be held to notice that which is obvious and to ask appropriate questions. But all of the authorities that comment on the issue have recognized the existence of a duty of care." (*Tan v. Goddard* (1993) 13 Cal.App.4th 1528, 1535–1536 [17 Cal.Rptr.2d 89], internal citations omitted.)

- "[D]ecisions have clarified that the risks associated with learning a sport may themselves be inherent risks of the sport, and that an instructor or coach generally does not increase the risk of harm inherent in learning the sport simply by urging the student to strive to excel or to reach a new level of competence." (*Kahn, supra,* 31 Cal.4th at p. 1006.)

- "To the extent a duty is alleged against a coach for 'pushing' and/or 'challenging' a student to improve and advance, the plaintiff must show that the coach intended to cause the student's injury or engaged in reckless conduct—that is, conduct totally outside the range of the ordinary activity involved in teaching or coaching the sport. Furthermore, a coach has a duty of ordinary care not to increase the risk of injury to a student by encouraging or allowing the student to participate in the sport when he or she is physically unfit to participate or by allowing the student to use unsafe equipment or instruments." (*Eriksson, supra,* 191 Cal.App.4th at p. 845, internal citation omitted.)

- "That an instructor might ask a student to do more than the student can manage is an inherent risk of the activity. Absent evidence of recklessness, or other risk-increasing conduct, liability should not be imposed simply because an instructor asked the student to take action beyond what, with hindsight, is found to have been the student's abilities. To hold otherwise would discourage instructors from requiring students to stretch, and thus to learn, and would have a generally deleterious effect on the sport as a whole." (*Honeycutt v. Meridian Sports Club, LLC* (2014) 231 Cal.App.4th 251, 258 [179 Cal.Rptr.3d 473].)

- "[Coaches and sports instructors] "owe students a duty 'not to increase the risks inherent in the learning process undertaken by the student.' But this does not require them to 'fundamentally alter the

nature of the sport and, in some instances, effectively preclude participation altogether ... .' Instead, '[b]y choosing to participate in a sport that poses the obvious possibility of injury, the student athlete must learn to accept an adverse result of the risks inherent in the sport.' " (*Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428, 1436−1437 [89 Cal.Rptr.2d 920], internal citations omitted.)

- "The determinant of duty, 'inherent risk,' is to be decided solely as a question of law and based on the general characteristics of the sport activity and the parties' relationship to it." (*Griffin v. The Haunted Hotel, Inc.* (2015) 242 Cal.App.4th 490, 501 [194 Cal.Rptr.3d 830].)

- "Admittedly, it is sometimes said that '[t]he existence and scope of a defendant's duty of care in the primary assumption of risk context "is a *legal* question which depends on the nature of the sport or activity … and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury." ' This statement of the rule is correct where there is no dispute about the inherent risks, and such cases may be resolved on summary judgment. [¶] However this statement is overly broad. Although the risks inherent in *many* activities are not subject to reasonable dispute (e.g., being hit with a baseball during a game), the risks inherent in *some* activities are not commonly known. In such cases, expert testimony may be required ' "for purposes of weighing whether the inherent risks of the activity were increased by the defendant's conduct." ' … Thus, it is not entirely accurate to say inherent risks of an activity always present purely legal questions, because sometimes the nature of an activity and its risks must be gleaned from the evidence." (*Jimenez, supra,* 247 Cal.App.4th at p. 608, original italics, internal citations omitted.)

- ~~"Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co., supra,* 118 Cal.App.4th at pp. 591–592 [whether defendant's design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co., supra,* 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [whether distraction caused by activities of minor league baseball team's mascot increased inherent risk of spectator being hit by a foul ball 'is issue of fact to be resolved at trial']; but see *Huff v. Wilkins, supra,* 138 Cal.App.4th at p. 745 ['it is the trial court's province to determine whether defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-roading], and it should hold a hearing for this purpose before impaneling a jury']; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] ['[i]t is for the court to decide … whether the defendant has increased the risks of the activity beyond the risks inherent in the sport']; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal.Rptr.2d 325] [indicating it is for the court to determine whether defendant's conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn, supra,* 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna, supra,* 169 Cal.App.4th at~~

~~pp. 112–113.)~~

- "The existence of a duty of care is a separate issue from the question whether (on the basis of forseeability among other factors) a particular defendant breached that duty of care, which is an essentially factual matter." (*Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 498 [71 Cal.Rptr.2d 552].)

- "[A duty not to increase the risk] arises only if there is an ' "organized relationship" ' between the defendants and the participant in relation to the sporting activity, such as exists between … a coach or instructor and his or her students. [I]mposing such a duty in the context of these types of relationships is justified because the defendants are 'responsible for, or in control of, the conditions under which the [participant] engaged in the sport.' " (*Bertsch, supra,* 247 Cal.App.4th at pp. 1208−1209, internal citation omitted.)

- "Option 2—a sports-specific negligence standard—imposes liability if the instructor 'unreasonably increased the risks to' the student 'over and above those inherent in' the sport." (*Greener, supra,* 107 Cal.App.5th at p. 1086.)

- "We emphasize the narrowness of our holding, which applies option 2 of CACI No. 471 to combat or grappling sports when an instructor engages in the activity while not providing any demonstration or instruction. Consistent with *Kahn*, option 1 continues to apply to the vast majority of cases in which a sports instructor is alleged to have injured a student." (*Greener, supra,* 107 Cal.App.5th at p. 1087.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1496, 1497, 1501–1510

Haning et al., California Practice Guide: Personal Injury, Ch. 3-D, *Mitigating Factors In Reduction Of Damages*, ¶¶ 3:1067–3:1078 (The Rutter Group)

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

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics*, § 273.31 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.401 et seq. (Matthew Bender)

472. Primary Assumption of Risk—Exception to Nonliability—Facilities Owners and Operators and Event Sponsors

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[*Name of plaintiff***] claims [he/she/***nonbinary pronoun***] was harmed while [participating in/watching] [***sport or other recreational activity, e.g., snowboarding***] at [***name of defendant***]'s [***specify facility or event where plaintiff was injured, e.g., ski resort***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [owner/operator/sponsor/***other***] of [***e.g., a ski resort***];**

2. **[That [***name of defendant***] unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., snowboarding***];]**

   [or]

   [That [*name of defendant***] unreasonably failed to minimize a risk that is not inherent in [***e.g., snowboarding***] and unreasonably exposed [***name of plaintiff***] to an increased risk of harm;]**

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 risk is inherent in a [sport/activity] if eliminating the risk would discourage vigorous participation or otherwise fundamentally change the [sport/activity].

A [owner/operator/sponsor/*other*] of [*e.g., a ski resort*] has a duty to use reasonable care not to increase the risks of [*e.g., snowboarding*] over and above those inherent in the [sport/activity], and a duty to use reasonable care to minimize a risk that is not inherent in [*e.g., snowboarding*] to the extent possible without changing the nature of the [sport/activity].

New December 2013; Revised and Renumbered from CACI No. 410 May 2017; Revised May 2019, December 2025

Directions for Use

This instruction sets forth a plaintiff's response to a defendant's assertion of the affirmative defense of primary assumption of risk. Primary assumption of risk generally ~~absolves the~~ limits the defendant's ~~of a~~ duty of care ~~toward the plaintiff with regard to injury incurred~~ to a plaintiff injured in the course of a sporting or other recreational activity covered by the doctrine. (~~See~~ *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].) ~~There is, however, a duty applicable to f~~Facilities owners and operators and ~~to~~ event sponsors have a duty not to unreasonably increase the risks of injury to participants and spectators beyond those inherent in the activity. (~~See~~ *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th

1148, 1162 [150 Cal.Rptr.3d 551, 290 P.3d 1158] [participants]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [spectators].)

There is also a duty to minimize risks that are extrinsic to the nature of the sport; that is, those that can be addressed without altering the essential nature of the activity. (*Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 38 [236 Cal.Rptr.3d 682] [ancillary provision of medical services].) Choose either or both options for element 2 depending on which duty is alleged to have been breached.

While duty is a question of law, courts have held that whether the defendant has increased the risk is a question of fact for the jury. (~~See~~ *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] [and cases cited therein]; cf. *Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC* (2018) 25 Cal.App.5th 344, 354 [235 Cal.Rptr.3d 716] [court to decide whether an activity is an active sport, the inherent risks of that sport, and whether the defendant has increased the risks of the activity beyond the risks inherent in the sport].) There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (~~See~~ *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

The final paragraph on the standard of care may need to be modified depending on element 2. Do not give this instruction with CACI No. 400, *Negligence—Essential Factual Elements*, and CACI No. 401, *Basic Standard of Care*.

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. 470, *Primary Assumption of Risk—Exception to Nonliability—Coparticipant in Sport or Other Recreational Activity.* For an instruction on primary assumption of risk applicable to instructors, trainers, and coaches, see CACI No. 471, *Primary Assumption of Risk—Exception to Nonliability—Instructors, Trainers, or Coaches*. For an instruction applicable to occupations with inherent risk, see CACI No. 473, *Primary Assumption of Risk—Exception to Nonliability—Occupation With Inherent Risk.*

Sources and Authority

- "[U]nder the primary assumption of risk doctrine, operators, sponsors and instructors in recreational activities posing inherent risks of injury have no duty to eliminate those risks, but do owe participants the duty not to unreasonably increase the risks of injury beyond those inherent in the activity." (*Nalwa, supra,* 55 Cal.4th at p. 1162.)

- "The doctrine applies to recreational activities ' "involving an inherent risk of injury to voluntary participants … where the risk cannot be eliminated without altering the fundamental nature of the activity." ' " (*Griffin v. The Haunted Hotel, Inc.* (2015) 242 Cal.App.4th 490, 500 [194 Cal.Rptr.3d 830].)

- "Although the doctrine is often applied as between sports coparticipants, it defines the duty owed as between persons engaged in any activity involving inherent risks. The doctrine applies to activity 'done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury' … ." (*Jimenez v. Roseville City School Dist.* (2016) 247 Cal.App.4th 594, 601 [202 Cal.Rptr.3d 536], internal citations omitted; see also *Bertsch v. Mammoth Community Water Dist.* (2016) 247 Cal.App.4th 1201, 1208 [202 Cal.Rptr.3d 757] ["These

factors certainly apply to skateboarding"], internal citations omitted.)

- "What the primary assumption of risk doctrine does not do, however, is absolve operators of *any obligation* to protect the safety of their customers. As a general rule, where an operator can take a measure that would increase safety and minimize the risks of the activity *without also altering the nature of the activity,* the operator is required to do so. As the court explained in *Knight,* 'in the sports setting, as elsewhere, the nature of the applicable duty or standard of care frequently varies with the role of the defendant whose conduct is at issue in a given case.' When the defendant is the operator of an inherently risky sport or activity (as opposed to a coparticipant), there are 'steps the sponsoring business entity reasonably should be obligated to take in order to minimize the risks without altering the nature of the sport [or activity].' " (*Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th 1283, 1300 [222 Cal.Rptr.3d 633], original italics, internal citations omitted.)

- "Thus, *Nalwa* actually reaffirms *Knight's* conclusions regarding the duties owed to participants by operators/organizers of recreational activities. In short, such operators and organizers have two distinct duties: the limited duty not to increase the *inherent* risks of an activity under the primary assumption of the risk doctrine and the ordinary duty of due care with respect to the *extrinsic* risks of the activity, which should reasonably be minimized to the extent possible without altering the nature of the activity." (*Hass, supra,* 26 Cal.App.5th at p. 38, original italics.)

- "The determinant of duty, 'inherent risk,' is to be decided solely as a question of law and based on the general characteristics of the sport activity and the parties' relationship to it." (*Griffin, supra,* 242 Cal.App.4th at p. 501.)

- "[T]he term 'risk' does not refer to a specific injury." (*Gee v. National Collegiate Athletic Assn.* (2024) 107 Cal.App.5th 1233, 1246 [328 Cal.Rptr.3d 753].)

- "Admittedly, it is sometimes said that '[t]he existence and scope of a defendant's duty of care in the primary assumption of risk context "is a *legal* question which depends on the nature of the sport or activity … and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury." ' This statement of the rule is correct where there is no dispute about the inherent risks, and such cases may be resolved on summary judgment. [¶] However this statement is overly broad. Although the risks inherent in *many* activities are not subject to reasonable dispute (e.g., being hit with a baseball during a game), the risks inherent in *some* activities are not commonly known. In such cases, expert testimony may be required ' "for purposes of weighing whether the inherent risks of the activity were increased by the defendant's conduct." ' … Thus, it is not entirely accurate to say inherent risks of an activity always present purely legal questions, because sometimes the nature of an activity and its risks must be gleaned from the evidence." (*Jimenez, supra,* 247 Cal.App.4th at p. 608, original italics, internal citations omitted.)

- "In any case in which the primary assumption of risk doctrine applies, operators, instructors, and participants in the activity owe other participants a duty 'not to act so as to *increase* the risk of injury over that inherent in the activity.' But owners and operators of sports venues and other recreational activities have an *additional duty* to undertake reasonable steps or measures to protect their customers' or spectators' safety—if they can do so without altering the nature of the sport or the activity." (*Mayes v. La Sierra University* (2022) 73 Cal.App.5th 686, 698 [288 Cal.Rptr.3d 693],

original italics, internal citations omitted.)

- "Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn*, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna, supra,* 169 Cal.App.4th at pp. 112–113, internal citations omitted.)

- "Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant." (*Knight, supra,* 3 Cal.4th at pp. 315−316.)

- "Under *Knight,* defendants had a duty *not to increase* the inherent risks to which spectators at professional baseball games are regularly exposed and which they assume. As a result, a triable issue of fact remained, namely whether the [defendants]' mascot cavorting in the stands and distracting plaintiff's attention, *while the game was in progress,* constituted a breach of that duty, i.e., constituted negligence in the form of increasing the inherent risk to plaintiff of being struck by a foul ball." (*Lowe, supra,* 56 Cal.App.4th at p. 114, original italics.)

- "[T]hose responsible for maintaining athletic facilities have a … duty not to increase the inherent risks, albeit in the context of businesses selling recreational opportunities." (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 162 [41 Cal.Rptr.3d 299, 131 P.3d 383], internal citation omitted.)

- "*Knight,* consistently with established case law, simply requires courts in each instance to examine the question of duty in light of the nature of the defendant's activities and the relationship of the parties to that activity." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 482 [63 Cal.Rptr.2d 291, 936 P.2d 70].)

- "Because primary assumption of risk focuses on the question of duty, it is *not* dependent on either the plaintiff's implied consent to, or subjective appreciation of, the potential risk." (*Griffin, supra,* 242 Cal.App.4th at p. 502, original italics.)

- "Defendants' obligation not to increase the risks inherent in the activity included a duty to provide safe equipment for the trip, such as a safe and sound craft." (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 255 [38 Cal.Rptr.2d 65].)

- "[A duty not to increase the risk] arises only if there is an ' "organized relationship" ' between the defendants and the participant in relation to the sporting activity, such as exists between a recreational business operator and its patrons … . [I]mposing such a duty in the context of these types of relationships is justified because the defendants are 'responsible for, or in control of, the conditions under which the [participant] engaged in the sport.' " However, '[t]his policy justification does not extend to a defendant wholly uninvolved with and unconnected to the sport,' … who neither 'held out their driveway as an appropriate place to skateboard or in any other way represented that the driveway was a safe place for skateboarding.' " (*Bertsch, supra,* 247 Cal.App.4th at pp. 1208−1209, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1496–1497, 1501–1511

Haning et al., California Practice Guide: Personal Injury, Ch. 3-D, *Mitigating Factors In Reduction Of Damages*, ¶ 3:1120 (The Rutter Group)

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

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics*, § 273.31 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.401 et seq. (Matthew Bender)

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~~ status for example, race, gender, or age~~ 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*

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 ~~status~~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 discrimination based on a protected ~~classification~~characteristic or combination of characteristics 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*.) Modify element 4 if plaintiff ~~was not actually a member of the protected class,~~ does not allege discrimination because of a protected characteristic but alleges discrimination because the plaintiff was (1) perceived ~~to be a member, or associated with someone who was or was perceived to be a member, of the protected class~~ 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. (~~See~~ 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 Decisionmaking." 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 Services, 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. Department 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.)

- "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)

2501. Affirmative Defense—Bona fide Occupational Qualification

[*Name of defendant***] claims that [his/her/***nonbinary pronoun***/its] decision [to discharge/[***other adverse employment action***]] [***name of plaintiff***] was lawful because [he/she/***nonbinary pronoun***/it] was entitled to consider [***protected ~~status (for example, race, gender, or age~~characteristic] as a job requirement. To succeed, [***name of defendant***] must prove all of the following:**

1. **That the job requirement was reasonably necessary for the operation of [***name of defendant***]'s business;**

2. **That [***name of defendant***] had a reasonable basis for believing that substantially all [***members of protected group***] are unable to safely and efficiently perform that job;**

3. **That it was impossible or highly impractical to consider whether each [applicant/employee] was able to safely and efficiently perform the job; and**

4. **That it was impossible or highly impractical for [***name of defendant***] to rearrange job responsibilities to avoid using [***protected ~~status~~characteristic] as a job requirement.**

New September 2003; Revised May 2024, December 2025*

Directions for Use

An employer may assert the bona fide occupational qualification (BFOQ) defense where the employer has a practice that on its face excludes an entire group of individuals because of their protected ~~status~~characteristic. Modifications will be necessary if the BFOQ defense is raised in a case involving allegations of failure to accommodate an employee who is pregnant, recovering from childbirth, or having related medical conditions. (Gov. Code, § 12945(a).)

Sources and Authority

- Bona fide Occupational Qualification. Government Code section 12940(a)(1).
- Bona fide Occupational Qualification for Pregnancy, Childbirth and Related Conditions. Government Code section 12945(a).
- Bona fide Occupational Qualification. Cal. Code Regs., tit. 2, § 11010(a).
- Bona fide Occupational Qualification Under Federal Law. 42 U.S.C. § 2000e-2(e)(1).
- "[T]he availability of a BFOQ defense is 'an extremely narrow exception to the general prohibition of discrimination on the basis of sex.' "~~The BFOQ defense is a narrow exception to the general prohibition on discrimination.~~ (*Bohemian Club v. Fair Employment & Housing Com.* (1986) 187 Cal.App.3d 1, 19 [231 Cal.Rptr. 769].)

- ~~;~~"The BFOQ defense is written narrowly, and this Court has read it narrowly." *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.* (1991) 499 U.S. 187, 201 [111 S.Ct. 1196, 113 L.Ed.2d 158].)

- " '[I]n order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.' " (*Bohemian Club*, *supra*, 187 Cal.App.3d at p. 19, quoting *Weeks v. Southern Bell Telephone & Telegraph Co.* (5th Cir. 1969) 408 F.2d 228, 235.)

- "First, the employer must demonstrate that the occupational qualification is 'reasonably necessary to the normal operation of [the] particular business.' Secondly, the employer must show that the categorical exclusion based on [the] protected class characteristic is justified, i.e., that 'all or substantially all' of the persons with the subject class characteristic fail to satisfy the occupational qualification." (*Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal.App.3d 517, 540 [267 Cal.Rptr. 158], quoting *Weeks*, *supra*, 408 F.2d at p. 235.)

- "Even if an employer can demonstrate that certain jobs require members of one sex, the employer must also 'bear the burden of proving that because of the nature of the operation of the business they could not rearrange job responsibilities ...' in order to reduce the BFOQ necessity." (*Johnson Controls, Inc.*, *supra*, 218 Cal.App.3d at p. 541; see *Hardin v. Stynchcomb* (11th Cir. 1982) 691 F.2d 1364, 1370–1371.)

- "Alternatively, the employer could establish that age was a legitimate proxy for the safety-related job qualifications by proving that it is 'impossible or highly impractical' to deal with the older employees on an individualized basis." (*Western Airlines, Inc. v. Criswell* (1985) 472 U.S. 400, 414–415 [105 S.Ct. 2743, 86 L.Ed.2d 321], internal citation and footnote omitted.)

- "The Fair Employment and Housing Commission has interpreted the BFOQ defense in a manner incorporating all of the federal requirements necessary for its establishment. ... [¶] The standards of the Commission are ... in harmony with federal law regarding the availability of a BFOQ defense." (*Bohemian Club*, *supra*, 187 Cal.App.3d at p. 19.)

- "By modifying 'qualification' with 'occupational,' Congress narrowed the term to qualifications that affect an employee's ability to do the job." (*International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW*, *supra*, 499 U.S. at p. 201.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1025, 1034

Chin et al., California Practice Guide: Employment Litigation, Ch.9-C, *California Fair Employment and Housing Act (FEHA)*, ¶¶ 9:2380, 9:2382, 9:2400, 9:2430 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual Harassment, §§ 2.91–2.94

2 Wilcox, California Employment Law, Ch. 41, *Civil Actions Under Equal Employment Opportunity Laws*, §§ 41.94[3], 41.108 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.54[4] (Matthew Bender)

California Civil Practice: Employment Litigation § 2:84 (Thomson Reuters)

2502. Disparate Impact—Essential Factual Elements (Gov. Code, § 12940(a))

[*Name of plaintiff***] claims that [***name of defendant***] had [an employment practice/a selection policy] that 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/[***other covered relationship to defendant***]];**

3. **That [***name of defendant***] had [an employment practice of [***describe practice***]/a selection policy of [***describe policy***]] that had a disproportionate adverse effect on [***describe protected group*** ~~*for example, persons over the age of 40*~~];**

4. **That [***name of plaintiff***] is [***describe*** *protected* ~~*status*~~*characteristic or combination of characteristics*];**

5. **That [***name of plaintiff***] was harmed; and**

6. **That [***name of defendant***]'s [employment practice/selection policy] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised June 2011, May 2024, December 2025*

Directions for Use

This instruction is intended for disparate impact employment discrimination claims. Disparate impact occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group and cannot be justified by business necessity. (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1405 [194 Cal.Rptr.3d 689].)

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).)

The court should consider instructing the jury on the meaning of "adverse impact," tailored to the facts of the case and the applicable law.

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).

- Disparate Impact May Prove Age Discrimination. Government Code section 12941.1.

- Justification for Disparate Impact. Cal. Code Regs., tit. 2, §§ 11010(b), 11017(a), (e).

- "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.)

- "Prohibited discrimination may ... be found on a theory of disparate impact, i.e., that regardless of motive, a *facially neutral* employer practice or policy, bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse effect on members of the protected class." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, fn. 20 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- "A 'disparate impact' plaintiff ... may prevail without proving intentional discrimination ... [However,] a disparate impact plaintiff 'must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue.' " (*Ibarbia v. Regents of the University of California* (1987) 191 Cal.App.3d 1318, 1329–1330 [237 Cal.Rptr. 92], quoting *Lowe v. City of Monrovia* (9th Cir. 1985) 775 F.2d 998, 1004.)

- " 'To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to avoid a finding of discrimination ... Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination.' " (*City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 985 [236 Cal.Rptr. 716], quoting *Connecticut v. Teal* (1982) 457 U.S. 440, 446-447 [102 S.Ct. 2525, 73 L.Ed.2d 130], internal citation omitted.)

- "It is well settled that valid statistical evidence is required to prove disparate impact discrimination, that is, that a facially neutral policy has caused a protected group to suffer adverse effects. ' "Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has

caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. … [S]tatistical disparities must be sufficiently substantial that they raise such an inference of causation." ' " (*Jumaane, supra,* 241 Cal.App.4th at p. 1405.)

- Under federal title VII, a plaintiff may establish an unlawful employment practice based on disparate impact in one of two ways: (1) the plaintiff demonstrates that a defendant uses a particular employment practice that causes a disparate impact on the basis of a protected status, and the defendant "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"; or (2) the plaintiff demonstrates that there is an alternative employment practice with less adverse impact, and the defendant "refuses to adopt such alternative employment practice." (42 U.S.C. § 2000e-2(k)(1)(A).)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-A, *Employment Presumed At Will*, ¶ 4:25 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:530, 7:531, 7:535 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.65

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.21 (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[4] (Matthew Bender)

California Civil Practice: Employment Litigation, § 2:23 (Thomson Reuters)

2512. Limitation on Remedies—Same Decision

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was [discharged/[***other adverse employment action***]] because of [his/her/***nonbinary pronoun***] [***protected ~~status~~ characteristic or combination of characteristics, ***or action~~, e.g., race, gender, or age~~***], which is an unlawful [discriminatory/retaliatory] reason. [***Name of defendant***] claims that [***name of plaintiff***] [was discharged/[***other adverse employment action***]] because of [***specify reason, e.g., plaintiff's poor job performance***], which is a lawful reason.**

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 [*name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***] for a [discriminatory/retaliatory] reason, 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

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. (~~See~~ *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 ~~status, e.g., race, gender, or age~~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 ~~because [he/she/***nonbinary pronoun***] was~~ based on [his/her/***nonbinary pronoun***] [***protected ~~status, e.g., a woman~~ characteristic or combination of characteristics***];**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***describe member of protected group~~e.g., woman~~***] 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*

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"].)

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—Widespread 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 ~~was not actually a member of the protected class, but alleges harassment because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class~~ 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. (~~See~~ Gov. Code, § 12926(o).)

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. 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 *Reno v. Baird* (1998) 18 Cal.4th 640, 658 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning].)

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 Services, 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.)

- "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.)

- "[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.)

- "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 ~~status, e.g., race, gender, or age~~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 member of protected group~~, e.g., woman~~***] 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 [~~e.g., women~~describe protected group];**

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, November 2021, May 2024, December 2025*

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 widespread 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*.

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. 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 Dep't 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 Dep't 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 Services, 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 member of protected group~~, e.g., woman~~***] 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 work environment 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*

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 based on a protected status such as gender, race, or sexual orientation, 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*.

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. 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 Dep't 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 Dep't 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 Services, 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 ~~status, e.g., race, gender, or age~~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 ~~because [he/she/***nonbinary pronoun***] was~~ based on [his/her/***nonbinary pronoun***] [***protected ~~status, e.g., a woman~~ characteristic or combination of characteristics***];**

4. **That the harassing conduct was severe or pervasive;**

5. **That a reasonable [***describe member of protected group~~e.g., woman~~***] 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

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—Widespread 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 ~~was not actually a member of the protected class, but alleges harassment because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class~~ 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. (~~See~~ 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. 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 ~~status, e.g., race, gender, or age~~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 member of protected group~~, e.g., woman~~***] 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 [~~e.g., women~~*describe protected group*];**

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

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 Dep't 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).
- 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 member of protected group~~, e.g., woman~~***] 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

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 based on a protected status such as gender, race, or sexual orientation, 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 Dep't 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).
- "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)

2527. Failure to Prevent Harassment, Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(k))

[*Name of plaintiff***] claims that [***name of defendant***] failed to take all reasonable steps to prevent [harassment/discrimination/retaliation] [based on ~~[~~*~~describe protected status—e.g., race, gender, or age~~*~~]~~* *[describe protected characteristic or combination of characteristics]*]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/was a person providing services under a contract with [***name of defendant***]];**

2. **That [***name of plaintiff***] was subjected to [harassment/discrimination/retaliation] in the course of employment;**

3. **That [***name of defendant***] failed to take all reasonable steps to prevent the [harassment/discrimination/retaliation];**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s failure to take all reasonable steps to prevent [harassment/discrimination/retaliation] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New June 2006; *Revised April 2007, June 2013, December 2015, December 2025*

Directions for Use

Give this instruction after the appropriate instructions in this series on the underlying claim for discrimination, retaliation, or harassment if the employee also claims that the employer failed to prevent the conduct. (See Gov. Code, § 12940(k).) Read the bracketed language in the opening paragraph beginning with "based on" if the claim is for failure to prevent harassment or discrimination.

For guidance for a further instruction on what constitutes "reasonable steps," see section 11019(b)(4) of Title 2 of the California Code of Regulations.

Sources and Authority

- Prevention of Discrimination and Harassment. Government Code section 12940(k).
- Combination of Characteristics, Perception, and Perceived Association. Government Code section 12926(o).

- "The employer's duty to prevent harassment and discrimination is affirmative and mandatory." (*Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 1021, 1035 [127 Cal.Rptr.2d 285].)

- "Once an employer is informed of the sexual harassment, the employer must take adequate remedial measures. The measures need to include immediate corrective action that is reasonably calculated to (1) end the current harassment and (2) to deter future harassment. [Citation.] The employer's obligation to take prompt corrective action requires (1) that temporary steps be taken to deal with the situation while the employer determines whether the complaint is justified and (2) that permanent remedial steps be implemented by the employer to prevent future harassment … ." (*M.F. v. Pacific Pearl Hotel Management LLC* (2017) 16 Cal.App.5th 693, 701 [224 Cal.Rptr.3d 542].)

- "This section creates a tort that is made actionable by statute. ' " '[T]he word "tort" means a civil wrong, other than a breach of contract, for which the law will provide a remedy in the form of an action for damages.' 'It is well settled the Legislature possesses a broad authority ... to establish ... tort causes of action.' Examples of statutory torts are plentiful in California law." ' Section 12960 et seq. provides procedures for the prevention and elimination of unlawful employment practices. In particular, section 12965, subdivision (a) authorizes the Department of Fair Employment and Housing (DFEH) to bring an accusation of an unlawful employment practice if conciliation efforts are unsuccessful, and section 12965, subdivision (b) creates a private right of action for damages for a complainant whose complaint is not pursued by the DFEH." (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 286 [73 Cal.Rptr.2d 596], internal citations omitted.)

- "With these rules in mind, we examine the section 12940 claim and finding with regard to whether the usual elements of a tort, enforceable by private plaintiffs, have been established: Defendants' legal duty of care toward plaintiffs, breach of duty (a negligent act or omission), legal causation, and damages to the plaintiff." (*Trujillo, supra,* 63 Cal.App.4th at pp. 286–287, internal citation omitted.)

- "[W]hether an employer sufficiently complied with its mandate to 'take immediate and appropriate corrective action' is a question of fact." (*M.F., supra,* 16 Cal.App.5th at p. 703, internal citation omitted.)

- "[C]ourts have required a finding of actual discrimination or harassment under FEHA before a plaintiff may prevail under section 12940, subdivision (k)." (*Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, 1314 [184 Cal.Rptr.3d 774].)

- "Also, there is a significant question of how there could be legal causation of any damages (either compensatory or punitive) from such a statutory violation, where the only jury finding was the failure to prevent actionable harassment or discrimination, which, however, did not occur." (*Trujillo, supra,* 63 Cal.App.4th at p. 289.)

- "[T]he 'Directions for Use' to CACI No. 2527 (2015), … states that the failure to prevent instruction should be given 'after the appropriate instructions in this series on the underlying claim for . . . harassment if the employee also claims that the employer failed to prevent the conduct.' An instruction on the elements of an underlying sexual harassment claim would be unnecessary if the

failure to take reasonable steps necessary to prevent a claim for harassment could be based on harassing conduct that was not actionable harassment." (*Dickson, supra,* 234 Cal.App.4th at p. 1317.)

- "In accordance with … the fundamental public policy of eliminating discrimination in the workplace under the FEHA, we conclude that retaliation is a form of discrimination actionable under [Gov. Code] section 12940, subdivision (k)." (*Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal.App.4th 1216, 1240 [51 Cal.Rptr.3d 206], disapproved on other grounds in *Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158 [72 Cal.Rptr.3d 624, 177 P.3d 232].)

- "[Defendant] suggests that a separate element in CACI No. 2527 requiring [plaintiff] to prove that the failure to prevent discrimination or retaliation was 'a substantial factor in causing her harm' is equivalent to the disputed element in the other CACI instructions requiring [plaintiff] to prove that her pregnancy-related leave was 'a motivating reason' for her discharge. However, the 'substantial factor in causing harm' element in CACI No. 2527 does not concern the causal relationship between the adverse employment action and the plaintiff's protected status or activity. Rather, it concerns the causal relationship between the discriminatory or retaliatory conduct, if proven, and the plaintiff's injury." (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 480 [161 Cal.Rptr.3d 758].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1025, 1026

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment and Housing Act*, ¶¶ 7:670–7:672 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.02[6], 41.80[1], 41.81[7] (Matthew Bender)

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

2528. Failure to Prevent Harassment by Nonemployee (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that [***name of defendant***] failed to take reasonable steps to prevent harassment based on [his/her/***nonbinary pronoun***] [***describe protected~~ status, e.g., race, gender, or age~~ characteristic or combination of characteristics***] by a nonemployee. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/was an unpaid [intern/volunteer] for [***name of defendant***]/was a person providing services under a contract with [***name of defendant***]];**

2. **That while in the course of employment, [***name of plaintiff***] was subjected to harassment based on [his/her/***nonbinary pronoun***] [~~e.g., race~~ protected characteristic or combination of characteristics] by [***name***], who was not an employee of [***name of defendant***];**

3. **That [***name of defendant***] knew or should have known that the nonemployee's conduct placed employees at risk of harassment;**

4. **That [***name of defendant***] failed to take immediate and appropriate [preventive/corrective] action;**

5. **That the ability to take [preventive/corrective] action was within the control of [***name of defendant***];**

6. **That [***name of plaintiff***] was harmed; and**

7. **That [***name of defendant***]'s failure to take immediate and appropriate steps to [prevent/put an end to] the harassment was a substantial factor in causing [***name of plaintiff***]'s harm.**

New November 2018; Revised January 2019, December 2025

Directions for Use

Give this instruction on a claim against the employer for failure to prevent harassment by a nonemployee. The FEHA protects not only employees, but also applicants, unpaid interns or volunteers, and persons providing services under a contract (element 1). (Gov. Code, § 12940(j)(1).) Modify references to employment in elements 2 and 3 as necessary if the plaintiff's status is other than an employee. Note that unlike claims for failure to prevent acts of a coemployee (see Gov. Code, § 12940(k)), only harassment is covered. (Gov. Code, § 12940(j)(1). If there is such a thing as discrimination or retaliation by a nonemployee, there is no employer duty to prevent it under the FEHA.

The employer's duty is to "take immediate and appropriate corrective action." (Gov. Code § 12940(j)(1).) In contrast, for the employer's failure to prevent acts of an employee, the duty is to "take *all* reasonable steps necessary to prevent discrimination and harassment from occurring." (Gov. Code, § 12940(k).)

Whether the employer must prevent or later correct the harassing situation would seem to depend on the facts of the case. If the issue is to stop harassment from recurring after becoming aware of it, the employer's duty would be to "correct" the problem. If the issue is to address a developing problem before the harassment occurs, the duty would be to "prevent" it. Choose the appropriate words in elements 4, 5, and 7 depending on the facts.

Sources and Authority

- Prevention of Harassment by a Nonemployee. Government Code section 12940(j)(1).
- Prevention of Discrimination and Harassment. Government Code section 12940(k).
- Combination of Characteristics, Perception, and Perceived Association. Government Code section 12926(o).
- "The FEHA provides: 'An employer may … be responsible for the acts of nonemployees, with respect to sexual harassment of employees … , where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered.' … ' A plaintiff cannot state a claim for failure to prevent harassment unless the plaintiff first states a claim for harassment." (*M.F. v. Pacific Pearl Hotel Management LLC* (2017) 16 Cal.App.5th 693, 700-701 [224 Cal.Rptr.3d 542].)
- "Once an employer is informed of the sexual harassment, the employer must take adequate remedial measures. The measures need to include immediate corrective action that is reasonably calculated to (1) end the current harassment and (2) to deter future harassment. [Citation.] The employer's obligation to take prompt corrective action requires (1) that temporary steps be taken to deal with the situation while the employer determines whether the complaint is justified and (2) that permanent remedial steps be implemented by the employer to prevent future harassment … ." (*M.F., supra,* 16 Cal.App.5th at p. 701.)
- "[T]he language of section 12940, subdivision (j)(1), does not limit its application to a particular fact pattern. Rather, the language of the statute provides for liability whenever an employer (1) knows or should know of sexual harassment by a nonemployee and (2) fails to take immediate and appropriate remedial action (3) within its control. (*M.F., supra,* 16 Cal.App.5th at p. 702.)
- "[W]hether an employer sufficiently complied with its mandate to 'take immediate and appropriate corrective action' is a question of fact." (*M.F., supra,* 16 Cal.App.5th at p. 703, internal citation omitted.)
- "The more egregious the abuse and the more serious the threat of which the employer has notice, the more the employer will be required under a standard of reasonable care to take steps for the protection of likely future victims." (*M.F., supra,* 16 Cal.App.5th at p. 701.)

Secondary Sources

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

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1019, 1028, 1035

2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her/***nonbinary pronoun***] based on [his/her/***nonbinary pronoun***] [history of [a]] [***select term to describe basis of limitations, e.g., physical condition***]. 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] [a] [***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., 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***] 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**

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 the introductory paragraph and in elements 3 and 6, select the bracketed language on "history" of disability if the claim of discrimination is based on a history of disability rather than a current actual 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).)

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.

Modify elements 3 and 6 if the plaintiff ~~was not~~ did not have a disability ~~actually disabled~~ or ~~had~~ a history of disability~~,~~ but alleges discrimination because the plaintiff was perceived to ~~be~~ have a ~~disabled~~disability. (~~See~~ 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].) This can be done with language in element 3 that the employer "treated [*name of plaintiff*] as if [he/she/*nonbinary pronoun*] ..." and with language in element 6 "That [*name of employer*]'s belief that … ."

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).
- ~~Perception of Disability and Association With Person Who Has or Is Perceived to Have Disability Protected~~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

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. 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 [a] [***e.g., physical condition***];**

4. [**That [***name of associate***]'s [***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 with a genetic component and [name of plaintiff] may develop the disability as well***];]**

   [or]

   [That [*name of plaintiff***] was somewhat inattentive at work because [***name of associate***]'s [***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**

Directions for Use

Give this instruction if plaintiff ~~claims that the plaintiff was subjected to an adverse employment action because~~ alleges disability discrimination because of the plaintiff's association with a person ~~with a disability or perceived to have~~ who has, or is perceived to have, a disability. Discrimination based on an employee's association with a person who ~~is (or is perceived to be)~~ has, or is perceived to have, ~~disabled~~ a disability is an unlawful employment practice under the FEHA. (~~See~~ Gov. Code, § 12926(o).)

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 *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).
- ~~Association With Person Who Has or Is Perceived to Have a Disability Protected~~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)

2548. Disability Discrimination—Refusal to Make Reasonable Accommodation in Housing (Gov. Code, § 12927(c)(1))

[*Name of plaintiff***] claims that [***name of defendant***] refused to reasonably accommodate [his/her/***nonbinary pronoun***] [***select term to describe basis of limitations, e.g., physical disability***] as necessary to afford [him/her/***nonbinary pronoun***] an equal opportunity to use and enjoy a dwelling. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [***specify defendant's source of authority to provide housing, e.g., owner***] of [a/an] [***specify nature of housing at issue, e.g., apartment building***];**

2. **That [***name of plaintiff***] [sought to rent/was living in/[***specify other efforts to obtain housing***]] the [***e.g., apartment***];**

3. **That [***name of plaintiff***] had [a history of having] [a] [***e.g., physical disability***] [that limited [***insert major life activity***]];**

4. **That [***name of defendant***] knew of, or should have known of, [***name of plaintiff***]'s disability;**

5. **That in order to afford [***name of plaintiff***] an equal opportunity to use and enjoy the [***e.g., apartment***], it was necessary to [***specify accommodation required***];**

6. **That it was reasonable to [***specify accommodation***];**

7. **That [***name of defendant***] refused to make this accommodation.**

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*New May 2017; Revised May 2020, December 2025**

Directions for Use

This instruction is for use in a case alleging discrimination in housing based on a failure to reasonably accommodate a disability. Under the Fair Employment and Housing Act, "discrimination" includes the "refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling." (Gov. Code, § 12927(c)(1).)

In the introductory paragraph, select a term 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." Use the term in element 3.

In element 2, if the plaintiff encountered a barrier before actually submitting an application, such as discovering a policy that would make it impossible to live in the unit, specify what the plaintiff did to obtain the housing.

In element 3, select the bracketed language on "history" of disability if the claim of discrimination is based on a history of disability rather than a current actual disability.

Modify element 3 if the plaintiff ~~was not~~ did not ~~actually disabled~~ have a disability or ~~had~~ a history of disability~~,~~ but alleges denial of accommodation because the plaintiff was perceived to ~~be disabled~~ have a disability or to be associated with someone who has, or is perceived to have, a disability. (~~See~~ 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].)

In element 5, explain the accommodation in rules, policies, practices that is alleged to be needed.

Sources and Authority

- "Discrimination" Defined Regarding Housing Disability Accommodations. Government Code section 12927(c)(1).

- "Disability" Defined for Housing Discrimination. Government Code section 12955.3.

- "Housing Accommodation" Defined. Government Code section 12927(d).

- " 'FEHA in the housing area is thus intended to conform to the general requirements of federal law in the area and may provide greater protection against discrimination.' In other words, the FHA provides a minimum level of protection that FEHA may exceed. Courts often look to cases construing the FHA, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 when interpreting FEHA." (*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 [18 Cal.Rptr.3d 669], internal citations omitted.)

- "[T]he basic principles applicable in employment cases should also apply in the housing context." (*Brown v. Smith* (1997) 55 Cal.App.4th 767, 782 [64 Cal.Rptr.2d 301].)

- "In order to establish discrimination based on a refusal to provide reasonable accommodations, a party must establish that he or she (1) suffers from a disability as defined in FEHA, (2) the discriminating party knew of, or should have known of, the disability, (3) accommodation is necessary to afford an equal opportunity to use and enjoy the dwelling, and (4) the discriminating party refused to make this accommodation." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p.1592.)

- "FEHA prohibits, as unlawful discrimination, a 'refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling.' 'In order to establish discrimination based on a refusal to provide reasonable accommodations, a party must establish that he or she (1) suffers from a disability as defined in FEHA, (2) the discriminating party knew of, or should have known of, the disability, (3) accommodation is necessary to afford an equal opportunity to use and enjoy the dwelling, and (4) the discriminating party refused to make this

accommodation.' " (*Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1051 [188 Cal.Rptr.3d 537], internal citation omitted.)

- "We note that, currently, section 12955.3 explicitly states that 'disability' includes 'any physical or mental disability as defined in Section 12926.' That statute in turn defines 'mental disability' to include "any mental or psychological disorder or condition … that limits a major life activity', that is, 'makes the achievement of the major life activity difficult.' 'Major life activities' is to be broadly construed, and includes 'physical, mental, and social activities and working.' " (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1592, internal citations omitted.)

- " 'If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue.' This obligation to 'open a dialogue' with a party requesting a reasonable accommodation is part of an interactive process in which each party seeks and shares information." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1598, internal citation omitted.)

- "This evidence established the requisite causal link between the [defendant]'s no-pets policy and the interference with the [plaintiffs]' use and enjoyment of their condominium." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1593.)

- "When the reasons for a delay in offering a reasonable accommodation are subject to dispute, the matter is left for the trier of fact to resolve. The administrative law judge properly characterized this lengthy delay as a refusal to provide reasonable accommodation." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1599, internal citation omitted.)

- "We reiterate that the FEHC did not rule that companion pets are always a reasonable accommodation for individuals with mental disabilities. Each inquiry is fact specific and requires a case-by-case determination." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1593.)

Secondary Sources

Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Accommodations Under the Fair Housing Act* (May 17, 2004), www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1073–1076

7 California Real Estate Law and Practice, Ch. 214, *Government Regulation and Enforcement*, § 214.41 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117, *Civil Rights: Housing Discrimination*, § 117.14 (Matthew Bender)

2549. Disability Discrimination—Refusal to Permit Reasonable Modification to Housing Unit (Gov. Code, § 12927(c)(1))

[*Name of plaintiff***] claims that [***name of defendant***] refused to permit reasonable modifications of [***name of plaintiff***]'s [***specify type of housing, e.g., apartment***] necessary to afford [***name of plaintiff***] full enjoyment of the premises. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [***specify defendant's source of authority to provide housing, e.g., owner***] of [a/an] [***e.g., apartment building***];**

2. **That [***name of plaintiff***] [sought to rent/was living in/[***specify other efforts to obtain housing***]] the [***e.g., apartment***];**

3. **That [***name of plaintiff***] had [a history of having] [a] [***select term to describe basis of limitations, e.g., physical disability***] [that limited [***insert major life activity***]];**

4. **That [***name of defendant***] knew of, or should have known of, [***name of plaintiff***]'s disability;**

5. **That in order to afford [***name of plaintiff***] an equal opportunity to use and enjoy the [***e.g., apartment***], it was necessary to [***specify modification(s) required***];**

6. **That it was reasonable to expect [***name of defendant***] to [***specify modification(s) required***];**

7. **That [***name of plaintiff***] agreed to pay for [this/these] modification[s]; [and]**

8. **[That [***name of plaintiff***] agreed that [he/she/***nonbinary pronoun***] would restore the interior of the unit to the condition that existed before the modifications, other than for reasonable wear and tear; and]**

9. **That [***name of defendant***] refused to permit [this/these] modification[s].**

New May 2017; Revised May 2020, November 2023, December 2025**

Directions for Use

This instruction is for use in a case alleging discrimination in housing based on a failure to permit reasonable modifications to a living unit to accommodate a disability. Under the Fair Employment and Housing Act, "discrimination" includes the refusal to permit, at the expense of the person with a disability, reasonable modifications of existing premises occupied or to be occupied by the person with a disability, if the modifications may be necessary to afford the person full enjoyment of the premises. (Gov. Code, § 12927(c)(1).)

In element 2, if the plaintiff encountered a barrier before actually submitting an application, such as discovering a policy that would make it impossible to live in the unit, specify what the plaintiff did to

obtain the housing.

In element 3, select a term 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 element 3, select the bracketed language on "history" of disability if the claim of discrimination is based on a history of disability rather than a current actual disability.

~~Modify element 3 if the plaintiff did not have a disability or a history of a disability, but alleges denial of accommodation because the plaintiff was perceived to have a disability or associated with someone who has, or is perceived to have, a disability. (See 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].)~~

In element 5, specify the modifications that are alleged to be needed.

Element 7 may not apply if section 504 of the Rehabilitation Act of 1973 (applicable to federal subsidized housing) or Title II of the Americans With Disabilities Act requires the landlord to incur the cost of reasonable modifications.

In the case of a rental, the landlord may, if it is reasonable to do so, condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification (other than for reasonable wear and tear). (Gov. Code, § 12927(c)(1).) Include element 8 if the premises to be physically altered is a rental unit, and the plaintiff agreed to restoration. If the parties dispute whether restoration is reasonable, presumably the defendant would have to prove reasonableness. (See Evid. Code, § 500 [party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that s/he is asserting].)

Sources and Authority

- Discrimination Defined Regarding Housing Disability Accommodations. Government Code section 12927(c)(1).
- "Disability" Defined for Housing Discrimination. Government Code section 12955.3.
- "Housing Accommodation" Defined. Government Code section 12927(d).
- " 'FEHA in the housing area is thus intended to conform to the general requirements of federal law in the area and may provide greater protection against discrimination.' In other words, the FHA provides a minimum level of protection that FEHA may exceed. Courts often look to cases construing the FHA, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 when interpreting FEHA." (*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 [18 Cal.Rptr.3d 669], internal citations omitted.)

- "[T]he basic principles applicable in employment cases should also apply in the housing context." (*Brown v. Smith* (1997) 55 Cal.App.4th 767, 782 [64 Cal.Rptr.2d 301].)

- "We note that, currently, section 12955.3 explicitly states that 'disability' includes 'any physical or mental disability as defined in Section 12926.' That statute in turn defines 'mental disability' to include "any mental or psychological disorder or condition … that limits a major life activity', that is, 'makes the achievement of the major life activity difficult.' 'Major life activities' is to be broadly construed, and includes 'physical, mental, and social activities and working.' " (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1592, internal citations omitted.)

- " 'If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue.' This obligation to 'open a dialogue' with a party requesting a reasonable accommodation is part of an interactive process in which each party seeks and shares information." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1598, internal citation omitted.)

Secondary Sources

Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Modifications Under the Fair Housing Act* (March 5, 2008), www.hud.gov/sites/documents/reasonable_modifications_mar08.pdf

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1063

7 California Real Estate Law and Practice, Ch. 214, *Government Regulation and Enforcement*, §§ 214.41, 214.43 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117, *Civil Rights: Housing Discrimination*, § 117.14 (Matthew Bender)

VF-2500. Disparate Treatment (Gov. Code, § 12940(a))

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] an [employer/[***other covered entity***]]?**
____ 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***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**
____ 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 defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]?**
____ 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 plaintiff***]'s [***protected* ~~*status*~~*characteristic or combination of characteristics*] **a substantial motivating reason for [***name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]]?**
____ 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. **Was [***name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]] a substantial factor in causing harm to [***name of plaintiff***]?**
____ 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. **What are [***name of plaintiff***]'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 $ _____

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, December 2010, June 2013, December 2016, May 2024, December 2025

Directions for Use

This verdict form is based on CACI No. 2500, *Disparate Treatment—Essential Factual Elements.*

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.

Relationships other than employer/employee can be substituted in question 2, as in element 2 in CACI No. 2500.

Modify question 4 if plaintiff ~~was not actually a member of the protected class, but alleges discrimination because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class~~ does not allege discrimination because of a protected characteristic or combination of characteristics 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. (~~See~~ Gov. Code, § 12926(o).)

If specificity is not required, users do not have to itemize all the 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.

VF-2501. Disparate Treatment—Affirmative Defense—Bona fide Occupational Qualification (Gov. Code, § 12940(a))

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] an [employer/[***other covered entity***]]?**
   ____ 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***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**
   ____ 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 defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]?**
   ____ 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 plaintiff***]'s [***protected*** ~~*status*~~*characteristic or combination of characteristics*] **a substantial motivating reason for [***name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]]?**
   ____ 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. **Was the job requirement regarding [***protected*** ~~*status*~~*characteristic*] reasonably necessary for the operation of [***name of defendant***]'s business?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, skip questions 6, 7, and 8, and answer question 9.

6. **Did [***name of defendant***] have a reasonable basis for believing that substantially all**

[*members of protected group*] are unable to safely and efficiently perform that job?
____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip questions 7 and 8, and answer question 9.

7. Was it impossible or highly impractical for [*name of defendant*] to consider whether each [applicant/employee] was able to safely and efficiently perform the job?
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, skip question 8 and answer question 9.

8. Was it impossible or highly impractical for [*name of defendant*] to rearrange job responsibilities to avoid using [*protected ~~status~~characteristic*] as a job requirement?
____ Yes ____ No

If your answer to question 8 is no, then answer question 9. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. Was [*name of defendant*]'s [discharge/refusal to hire/[*other adverse employment action*]] a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. What are [*name of plaintiff*]'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 $ _____

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, December 2010, June 2013, December 2016, May 2020, May 2024, December 2025

Directions for Use

This verdict form is based on CACI No. 2500, *Disparate Treatment—Essential Factual Elements*, and CACI No. 2501, *Affirmative Defense—Bona fide Occupational Qualification*.

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.

Relationships other than employer/employee can be substituted in question 2, as in element 2 in CACI No. 2500.

Modify question 4 if the plaintiff ~~was not actually a member of the protected class, but alleges discrimination because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class~~ does not allege discrimination because of a protected characteristic or combination of characteristics 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. (~~See~~ Gov. Code, § 12926(o).)

If specificity is not required, users do not have to itemize all the damages listed in question 10 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.

VF-2506A. Work Environment Harassment—Conduct Directed at Plaintiff—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [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***]?**
   ____ 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***] subjected to harassing conduct ~~because [he/she/*nonbinary pronoun*] was~~ based on [his/her/*nonbinary pronoun*] [***protected ~~status, e.g., a woman~~*** *characteristic or combination of characteristics*]?**
   ____ 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. **Was the harassment severe or pervasive?**
   ____ 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. **Would a reasonable [*describe member of protected group~~e.g., woman~~*] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ 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***] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ 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 defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] know or should [he/she/***nonbinary pronoun***/it/they] have known of the harassing conduct?**

____ 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 defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] fail to take immediate and appropriate corrective action?**

____ 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. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff***]?**

____ Yes ____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff***]'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 $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2506 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021, May 2024, December 2025

Directions for Use

This verdict form is based on CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

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.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521A. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

Modify question 2 if the plaintiff ~~was not actually a member of the protected class, but alleges harassment because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class~~ 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. (~~See~~ Gov. Code, § 12926(o).)

If specificity is not required, users do not have to itemize all the damages listed in question 9 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.

VF-2507A. Work Environment Harassment—Conduct Directed at Plaintiff—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [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***]?**
____ 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 individual defendant***] an employee of [***name of covered entity***]?**
____ 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. **Was [***name of plaintiff***] subjected to harassing conduct ~~because [he/she/*nonbinary pronoun*] was~~ based on [his/her/*nonbinary pronoun*] [***protected*** ~~*status, e.g., a woman*~~ *characteristic or combination of characteristics*]?**
____ 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 harassment severe or pervasive?**
____ 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. **Would a reasonable [*describe member of protected group*~~*e.g., woman*~~] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
____ 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*] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive?
____ 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 individual defendant*] [participate in/assist/ [or] encourage] the harassing conduct?
____ 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. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff*]'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 $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021, May 2022, May 2024, December 2025

Directions for Use

This verdict form is based on CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*.

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.

Include optional question 2 only if optional element 2 is included in CACI No. 2522A.

Modify question 3 if the plaintiff ~~was not actually a member of the protected class, but alleges harassment because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class~~ 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. (~~See~~ Gov. Code, § 12926(o).)

If specificity is not required, users do not have to itemize all the damages listed in question 9 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.

VF-2515. Limitation on Remedies—Same Decision

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] an [employer/[***other covered entity***]]?**
   ____ 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***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**
   ____ 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 defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]?**
   ____ 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 plaintiff***]'s [***protected ~~status~~ characteristic or combination of characteristics, or activity***] a substantial motivating reason for [***name of defendant***]'s [discharge of/refusal to hire/[***other adverse employment action***]] [***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. **Was [***specify employer's stated legitimate reason, e.g., plaintiff's poor job performance***] also a substantial motivating reason for [***name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]]?**
   ____ Yes ____ No

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

6. **Would [***name of defendant***] have [discharged/refused to hire/[***other adverse employment***]**

action]] [*name of plaintiff*] **anyway at that time based on [***e.g., plaintiff's poor job performance***] had [***name of defendant***] not also been substantially motivated by [discrimination/retaliation]?**
____ Yes ____ No

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

7. Was [*name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]] a substantial factor in causing harm to [***name of plaintiff***]?**
____ 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 are [*name of plaintiff***]'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 $ _____

Signed: _____

Presiding Juror

Dated: _____

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

New December 2013; Revised December 2015, December 2016, May 2020, May 2024, December 2025

Directions for Use

This verdict form is based on CACI No. 2512, *Limitation of Damages—Same Decision*. It incorporates questions from VF-2500, *Disparate Treatment*, and VF-2504, *Retaliation*, to guide the jury through the evaluation of the employer's purported legitimate reason for the adverse employment action.

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 5 asks the jury to determine whether the employer's stated legitimate reason actually was a motivating reason for the adverse action. In this way, the jury evaluates the employer's reason once. If it finds that it was an actual motivating reason, it then proceeds to question 6 to consider whether the employer has proved "same decision," that is, that it would have taken the adverse employment action anyway for the legitimate reason, even though it may have also had a discriminatory or retaliatory motivation. If the jury answers "no" to question 5 it then proceeds to consider substantial-factor causation of harm and damages in questions 7 and 8.

Relationships other than employer/employee can be substituted in question 2, as in element 2 in CACI No. 2500.

Modify question 4 if the plaintiff ~~was not actually a member of the protected class, but alleges discrimination because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class~~ does not allege discrimination because of a protected characteristic or combination of characteristics 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. (~~See~~ Gov. Code, § 12926(o).)

If specificity is not required, users do not have to itemize all the damages listed in question 8 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.

2720. Affirmative Defense—Nonpayment of Overtime—Executive Exemption

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] is not required to pay [***name of plaintiff***] for overtime because [***name of plaintiff***] is an executive employee. [***Name of plaintiff***] is exempt from overtime pay requirements as an executive if [***name of defendant***] proves all of the following:**

1. **[***Name of plaintiff***]'s duties and responsibilities involve management of [***name of defendant***]'s [business/enterprise] or of a customarily recognized department or subdivision of the [business/enterprise];**

2. **[***Name of plaintiff***] customarily and regularly directs the work of two or more employees;**

3. **[***Name of plaintiff***] has the authority to hire or fire employees, or [his/her/***nonbinary pronoun***] suggestions as to hiring or firing and as to advancement and promotion or other changes in status are given particular weight;**

4. **[***Name of plaintiff***] customarily and regularly exercises discretion and independent judgment;**

5. **More than half of the time, [~~N~~*name of plaintiff*] performs executive duties that meet the test of the exemption~~more than half of the time~~; and**

6. **[***Name of plaintiff***]'s monthly salary is at least [***insert amount that is twice the state minimum wage for full time employment***].**

In determining whether [*name of plaintiff***] spends more than half of [his/her/***nonbinary pronoun***] time ~~performs~~ performing executive duties ~~more than half of the time~~that meet the test of the exemption, the most important consideration is how [he/she/***nonbinary pronoun***] actually spends [his/her/***nonbinary pronoun***] time. But also consider whether [***name of plaintiff***]'s practice differs from [***name of defendant***]'s realistic expectations of how [***name of plaintiff***] should spend [his/her/***nonbinary pronoun***] time and the realistic requirements of the job.**

[*Define the executive duties that meet the test of the exemption.***]**

[Each of [*name of plaintiff***]'s activities is either an exempt or a nonexempt activity depending on the primary purpose for which [he/she/***nonbinary pronoun***] undertook it at that time. Time spent on an activity is either exempt or nonexempt, not both.]**

New December 2012; Revised June 2014, December 2025

Directions for Use

This instruction is an affirmative defense to an employee's claim for statutory overtime earnings. (See CACI No. 2702, *Nonpayment of Overtime Compensation—Essential Factual Elements*.) The employer claims that the employee is an exempt executive. (See Lab. Code, § 515(a).) The employer must prove all

of the elements. (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1014 [118 Cal.Rptr.3d 834].) For an instruction for the affirmative defense of administrative exemption, see CACI No. 2721, *Affirmative Defense—Nonpayment of Overtime—Administrative Exemption.*

This instruction is based on Industrial Welfare Commission Wage Order 9, which is applicable to the transportation industry. (See 8 Cal. Code Regs., § 11090.) Different wage orders are applicable to different industries. (See Lab. Code, § 515.) The requirements of the executive exemptions under the various wage orders are essentially the same. (Cf., e.g., 8 Cal. Code Regs., § 11040, Wage Order 4, applicable to persons employed in professional, technical, clerical, mechanical, and similar occupations.).

The exemption requires that the employee be primarily engaged in duties that "meet the test of the exemption." (See 8 Cal. Code Regs., § 11090 sec. 1(A)(1)(e), sec. 2(J) ("primarily" means more than one-half the employee's work time).) This requirement is expressed in element 5. However, the contours of executive duties are quite detailed in the wage orders, which incorporate federal regulations under the Fair Labor Standards Act and also provide some specific examples. (See also *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 802 [85 Cal.Rptr.2d 844, 978 P.2d 2].) ~~In many cases, it will be advisable to instruct~~ Provide as appropriate ~~further with~~ details from the applicable wage order, ~~and~~ regulations, or other sources as to what ~~constitutes~~ "executive duties" meet the test of the exemption in ~~element 5~~the paragraph following the elements.

Include the optional last paragraph if a particular work activity arguably involves more than one purpose and could be characterized as exempt or nonexempt, depending on its primary purpose.

This instruction may be expanded to provide examples of the specific exempt and nonexempt activities relevant to the work at issue. (See, e.g., *Heyen v. Safeway, Inc.* (2013) 216 Cal.App.4th 795, 808−809 [157 Cal.Rptr.3d 280].)

Sources and Authority

- Exemptions to Overtime Requirements. Labor Code section 515(a).

- "[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." (*Ramirez, supra,* 20 Cal.4th at pp. 794–795.)

- "In order to discharge its burden to show [plaintiff] was exempt as an executive employee pursuant to Wage Order 9, [defendant] was required to demonstrate the following: (1) his duties and responsibilities involve management of the enterprise or a 'customarily recognized department or subdivision thereof'; (2) he customarily and regularly directs the work of two or more employees; (3) he has the authority to hire or terminate employees, or his suggestions as to hiring, firing, promotion or other changes in status are given 'particular weight'; (4) he customarily and regularly exercises discretion and independent judgment; (5) he is primarily engaged in duties that meet the test of the exemption; and (6) his monthly salary is equivalent to no less than two times the state minimum wage for full-time employment." (*United Parcel Service Wage & Hour Cases, supra,* 190 Cal.App.4th at p. 1014 [citing 8 Cal. Code Regs., §

11090, subd. 1(A)(1)].)

- "Determining whether or not all of the elements of the exemption have been established is a fact-intensive inquiry." (*United Parcel Service Wage & Hour Cases, supra,* 190 Cal.App.4th at p. 1014.)

- "Review of the determination that [plaintiff] was not an exempt employee is a mixed question of law and fact. Whether an employee satisfies the elements of the exemption is a question of fact reviewed for substantial evidence. The appropriate manner of evaluating the employee's duties is a question of law that we review independently." (*Heyen, supra,* 216 Cal.App.4th at p. 817, internal citations omitted.)

- "The appropriateness of any employee's classification as exempt must be based on a review of the actual job duties performed by that employee. Wage Order 9 expressly provides that '[t]he *work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work,* together with the employer's realistic expectations and the realistic requirements of the job, shall be considered … .' No bright-line rule can be established classifying everyone with a particular job title as per se exempt or nonexempt—the regulations identify job duties, not job titles. 'A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations … .' " (*United Parcel Service Wage & Hour Cases, supra,* 190 Cal.App.4th at p. 1014–1015, original italics, internal citation omitted.)

- "This is not a day-by-day analysis. The issue is whether the employees ' "spend more than 51% of their time on managerial tasks in any given workweek." ' " (*Batze v. Safeway, Inc.* (2017) 10 Cal.App.5th 440, 473, fn. 36 [216 Cal.Rptr.3d 390].)

- "Put simply, 'the regulations do not recognize "hybrid" activities—i.e., activities that have both "exempt" and "nonexempt" aspects. Rather, the regulations require that each discrete task be separately classified as either "exempt' or "nonexempt." [Citations.]' [¶] We did not state, however, that the same task must always be labeled exempt or nonexempt: ' [I]dentical tasks may be "exempt" or 'nonexempt" based on the purpose they serve within the organization or department.' " (*Batze, supra,* 10 Cal.App.5th at p. 474.)

- "[T]he federal regulations incorporated into Wage Order 7 do not support the 'multi-tasking' standard proposed by [defendant]. Instead, they suggest, as the trial court correctly instructed the jury, that the trier of fact must categorize tasks as either 'exempt' or 'nonexempt' based on the purpose for which [plaintiff] undertook them." (*Heyen, supra,* 216 Cal.App.4th at p. 826.)

- "Wage Order 4 refers to compensation in the form of a 'salary.' It does not define the term. The regulation does not use a more generic term, such as 'compensation' or 'pay.' Either of these terms would encompass hourly wages, a fixed annual salary, and anything in between. 'Salary' is a more specific form of compensation. A salary is generally understood to be a fixed rate of pay as distinguished from an hourly wage. Thus, use of the word 'salary' implies that an exempt employee's pay must be something other than an hourly wage. California's Labor Commission

noted in an opinion letter dated March 1, 2002, that the Division of Labor Standards Enforcement (DLSE) construes the IWC wage orders to incorporate the federal salary-basis test for purposes of determining whether an employee is exempt or nonexempt." (*Negri v. Koning & Associates* (2013) 216 Cal.App.4th 392, 397−398 [156 Cal.Rptr.3d 697, footnote omitted.)

- "[T]he costs incurred by an employer to provide an employee with board, lodging or other facilities may not count towards the minimum salary amount required for exemption … ." (*Kao v. Holiday* (2017) 12 Cal.App.5th 947, 958 [219 Cal.Rptr.3d 580].)

- "The rule is that state law requirements for exemption from overtime pay must be at least as protective of the employee as the corresponding federal standards. Since federal law requires that, in order to meet the salary basis test for exemption the employee would have to be paid a predetermined amount that is not subject to reduction based upon the number of hours worked, state law requirements must be at least as protective." (*Negri, supra,* 216 Cal.App.4th at p. 398, internal citation omitted.)

- "Under California law, to determine whether an employee was properly classified as 'exempt,' the trier of fact must look not only to the 'work actually performed by the employee during the … workweek,' but also to the 'employer's realistic expectations and the realistic requirements of the job.' " (*Heyen, supra,* 216 Cal.App.4th at p. 828.)

- "There was, to be sure, an ultimate fact question the court could have asked the jury regarding the 'primarily engaged' test. The wage order required that the jury find whether [defendant] proved that [the employee] was 'primarily engaged in duties which meet the test of the [executive] exemption.' *This* is the basis for a proper ultimate fact question … . That is because duties which ' "meet the test of the exemption" ' include not only (1) directly exempt duties—i.e., ' "managerial and supervisory functions" '—but also (2) 'work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions' and (3) work that, while nonexempt, is the result of the employee's own substandard performance as an executive that diverges from the employer's realistic expectations and realistic job requirements. By asking the jury about 'duties which meet the test of the [executive] exemption,' the trial court would have posed a question of ultimate fact, under which the several matters the jury was to consider in determining the nature of [the employee's] duties, including [defendant's] realistic expectations, would have been subsumed." (*Rodriguez v. Parivar, Inc.* (2022) 83 Cal.App.5th 739, 753–754 [299 Cal.Rptr.3d 719], internal citations omitted, original italics.)

- "Having recognized California's distinctive quantitative approach to determining which employees are outside salespersons, we must then address an issue implicitly raised by the parties that caused some confusion in the trial court and the Court of Appeal: Is the number of hours worked in sales-related activities to be determined by the number of hours that the employer, according to its job description or its estimate, claims the employee should be working in sales, or should it be determined by the actual average hours the employee spent on sales activity? The logic inherent in the IWC's quantitative definition of outside salesperson dictates that neither alternative would be wholly satisfactory. On the one hand, if hours worked on sales were determined through an employer's job description, then the employer could make an employee exempt from overtime laws solely by fashioning an idealized job description that had little basis

> in reality. On the other hand, an employee who is supposed to be engaged in sales activities during most of his working hours and falls below the 50 percent mark due to his own substandard performance should not thereby be able to evade a valid exemption. A trial court, in determining whether the employee is an outside salesperson, must steer clear of these two pitfalls by inquiring into the *realistic* requirements of the job. In so doing, the court should consider, first and foremost, how the employee actually spends his or her time. But the trial court should also consider whether the employee's practice diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job." (*Ramirez, supra,* 20 Cal.4th at pp. 801−802, original italics.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 392 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Coverage And Exemptions—In General*, ¶ 11:345 et seq. (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 2, *Minimum Wages*, §§ 2.04, 2.06 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.71 (Matthew Bender)

Simmons, Wage and Hour Manual for California Employers, Ch. 2, *Coverage of Wage and Hour Laws* (Castle Publications Limited)

Simmons, Wage and Hour Manual for California Employers, Ch. 10, *Exemptions* (Castle Publications Limited)

2721. Affirmative Defense—Nonpayment of Overtime—Administrative Exemption

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] is not required to pay [***name of plaintiff***] for overtime because [***name of plaintiff***] is an administrative employee. [***Name of plaintiff***] is exempt from overtime pay requirements as an administrator if [***name of defendant***] proves all of the following:**

1. **[***Name of plaintiff***]'s duties and responsibilities involve the performance of office or nonmanual work directly related to management policies or general business operations of [***name of defendant***] or [***name of defendant***]'s customers;**

2. **[***Name of plaintiff***] customarily and regularly exercises discretion and independent judgment;**

3. **[[***Name of plaintiff***] performs, under general supervision only, specialized or technical work that requires special training, experience, or knowledge;]**

   [*or***]**

   [[*Name of plaintiff***] regularly and directly assists a proprietor or bona fide executive or administrator;]**

   [*or***]**

   [[*Name of plaintiff***] performs special assignments and tasks under general supervision only;]**

4. **More than half of the time, [~~N~~*name of plaintiff*] performs administrative duties that meet the test of the exemption~~more than half of the time~~; and**

5. **[***Name of plaintiff***]'s monthly salary is at least [***insert amount that is twice the state minimum wage for full time employment***].**

In determining whether [*name of plaintiff***] spends more than half of [his/her/***nonbinary pronoun***] time ~~performs~~ performing administrative duties ~~more than half of the time~~ that meet the test of the exemption, the most important consideration is how [he/she/***nonbinary pronoun***] actually spends [his/her/***nonbinary pronoun***] time. But also consider whether [***name of plaintiff***]'s practice differs from [***name of defendant***]'s realistic expectations of how [***name of plaintiff***] should spend [his/her/***nonbinary pronoun***] time and the realistic requirements of the job.**

[*Define the administrative duties that meet the test of the exemption.***]**

[Each of [*name of plaintiff***]'s activities is either an exempt or a nonexempt activity depending on the primary purpose for which [he/she/***nonbinary pronoun***] undertook it at that time. Time spent on an activity is either exempt or nonexempt, not both.]**

New December 2012; Revised June 2014, December 2025

Directions for Use

This instruction is an affirmative defense to an employee's claim for statutory overtime earnings. (See CACI No. 2702, *Nonpayment of Overtime Compensation—Essential Factual Elements*.) The employer claims that the employee is an exempt administrator. (See Lab. Code, § 515(a).) The employer must prove all of the elements. (*Eicher v. Advanced Business Integrators, Inc*. (2007) 151 Cal.App.4th 1363, 1372 [61 Cal.Rptr.3d 114].) For an instruction for the affirmative defense of executive exemption, see CACI No. 2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption.*

This instruction is based on Industrial Welfare Commission Wage Order 9, which is applicable to the transportation industry. (See 8 Cal. Code Regs., § 11090.) Different wage orders are applicable to different industries. (See Lab. Code, § 515.) The requirements of the administrative exemptions under the various wage orders are essentially the same. (Cf., e.g., 8 Cal. Code Regs., § 11040, Wage Order 4, applicable to persons employed in professional, technical, clerical, mechanical, and similar occupations.).

The exemption requires that the employee be "primarily engaged in duties that meet the test of the exemption." (See 8 Cal. Code Regs., § 11090 sec. 1(A)(2)(f), sec. 2(J) ("primarily" means more than one-half the employee's work time).) This requirement is expressed in element 4. However, the contours of administrative duties are quite detailed in the wage orders, which incorporate federal regulations under the Fair Labor Standards Act and also provide some specific examples. (See also *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 802 [85 Cal.Rptr.2d 844, 978 P.2d 2].) ~~In many cases, it will be advisable to instruct~~ Provide as appropriate ~~further with~~ details from the applicable wage order, ~~and~~ regulations, or other sources as to what ~~constitutes~~ "administrative duties" meet the test of the exemption ~~(element 4) and~~ in the paragraph following the elements. In many cases, it also will be advisable to instruct on the meaning of "directly related" (element 1).

Include the optional last paragraph if a particular work activity arguably involves more than one purpose and could be characterized as exempt or nonexempt, depending on its primary purpose.

This instruction may be expanded to provide examples of the specific exempt and nonexempt activities relevant to the work at issue. (See, e.g., *Heyen v. Safeway, Inc.* (2013) 216 Cal.App.4th 795, 808−809 [157 Cal.Rptr.3d 280].)

Sources and Authority

- Exemptions to Overtime Requirements. Labor Code section 515(a).
- "[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." (*Ramirez, supra,* 20 Cal.4th at pp. 794–795.)
- "In order to establish that [plaintiff] was exempt as an administrative employee, [defendant] was required to show all of the following: (1) his duties and responsibilities involve the performance of office or nonmanual work directly related to management policies or general business

operations of [defendant]; (2) he customarily and regularly exercises discretion and independent judgment; (3) he performs work requiring special training, experience, or knowledge under general supervision only (the two alternative prongs of the general supervision element are not pertinent to our discussion); (4) he is primarily engaged in duties that meet the test of exemption; and (5) his monthly salary is equivalent to no less than two times the state minimum wage for full-time employment." (*United Parcel Service Wage & Hour Cases, supra,* 190 Cal.App.4th at p. 1028 [relying on 8 Cal. Code Regs., § 11090, subd. 1(A)(2)].)

- "Read together, the applicable Labor Code statutes, wage orders, and incorporated federal regulations now provide an explicit and extensive framework for analyzing the administrative exemption." (*Harris v. Superior Court* (2011) 53 Cal.4th 170, 182 [135 Cal.Rptr.3d 247, 266 P.3d 953].)

- "Determining whether or not all of the elements of the exemption have been established is a fact-intensive inquiry." (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1014 [118 Cal.Rptr.3d 834].)

- "Review of the determination that [plaintiff] was not an exempt employee is a mixed question of law and fact. Whether an employee satisfies the elements of the exemption is a question of fact reviewed for substantial evidence. The appropriate manner of evaluating the employee's duties is a question of law that we review independently." (*Heyen, supra,* 216 Cal.App.4th at p. 817, internal citations omitted.)

- "The appropriateness of any employee's classification as exempt must be based on a review of the actual job duties performed by that employee. Wage Order 9 expressly provides that '[t]he *work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work,* together with the employer's realistic expectations and the realistic requirements of the job, shall be considered … .' No bright-line rule can be established classifying everyone with a particular job title as per se exempt or nonexempt—the regulations identify job duties, not job titles. 'A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations … .' " (*United Parcel Service Wage & Hour Cases, supra,* 190 Cal.App.4th at p. 1014–1015, original italics, internal citation omitted.)

- "This is not a day-by-day analysis. The issue is whether the employees ' "spend more than 51% of their time on managerial tasks in any given workweek." ' " (*Batze v. Safeway, Inc.* (2017) 10 Cal.App.5th 440, 473, fn. 36 [216 Cal.Rptr.3d 390].)

- "Put simply, 'the regulations do not recognize "hybrid" activities—i.e., activities that have both "exempt" and "nonexempt" aspects. Rather, the regulations require that each discrete task be separately classified as either "exempt' or "nonexempt." [Citations.]' [¶] We did not state, however, that the same task must always be labeled exempt or nonexempt: ' [I]dentical tasks may be "exempt" or 'nonexempt" based on the purpose they serve within the organization or department.' " (*Batze, supra,* 10 Cal.App.5th at p. 474.)

- "In basic terms, the administrative/production worker dichotomy distinguishes between administrative employees who are primarily engaged in ' "administering the business affairs of the enterprise" ' and production-level employees whose ' "primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market." [Citation.]' ¶¶ [T]he dichotomy is a judicially created creature of the common law, which has been effectively superseded in this context by the more specific and detailed statutory and regulatory enactments." (*Harris, supra,* 53 Cal.4th at pp. 183, 188.)

- "We do not hold that the administrative/production worker dichotomy … can never be used as an analytical tool. We merely hold that the Court of Appeal improperly applied the administrative/production worker dichotomy as a dispositive test. [¶] … [I]n resolving whether work qualifies as administrative, courts must consider the particular facts before them and apply the language of the statutes and wage orders at issue. Only if those sources fail to provide adequate guidance … is it appropriate to reach out to other sources." (*Harris, supra,* 53 Cal.4th at p. 190.)

- "[T]he federal regulations incorporated into Wage Order 7 do not support the 'multi-tasking' standard proposed by [defendant]. Instead, they suggest, as the trial court correctly instructed the jury, that the trier of fact must categorize tasks as either 'exempt' or 'nonexempt' based on the purpose for which [plaintiff] undertook them." (*Heyen, supra,* 216 Cal.App.4th at p. 826.)

- "Wage Order 4 refers to compensation in the form of a 'salary.' It does not define the term. The regulation does not use a more generic term, such as 'compensation' or 'pay.' Either of these terms would encompass hourly wages, a fixed annual salary, and anything in between. 'Salary' is a more specific form of compensation. A salary is generally understood to be a fixed rate of pay as distinguished from an hourly wage. Thus, use of the word 'salary' implies that an exempt employee's pay must be something other than an hourly wage. California's Labor Commission noted in an opinion letter dated March 1, 2002, that the Division of Labor Standards Enforcement (DLSE) construes the IWC wage orders to incorporate the federal salary-basis test for purposes of determining whether an employee is exempt or nonexempt." (*Negri v. Koning & Associates* (2013) 216 Cal.App.4th 392, 397−398 [156 Cal.Rptr.3d 697, footnote omitted.)

- "[T]he costs incurred by an employer to provide an employee with board, lodging or other facilities may not count towards the minimum salary amount required for exemption … ." (*Kao v. Holiday* (2017) 12 Cal.App.5th 947, 958 [219 Cal.Rptr.3d 580].)

- "The rule is that state law requirements for exemption from overtime pay must be at least as protective of the employee as the corresponding federal standards. Since federal law requires that, in order to meet the salary basis test for exemption the employee would have to be paid a predetermined amount that is not subject to reduction based upon the number of hours worked, state law requirements must be at least as protective." (*Negri, supra,* 216 Cal.App.4th at p. 398.)

- "Under California law, to determine whether an employee was properly classified as 'exempt,' the trier of fact must look not only to the 'work actually performed by the employee during the … workweek,' but also to the 'employer's realistic expectations and the realistic requirements of the job.' " (*Heyen, supra,* 216 Cal.App.4th at p. 828.)

- "Having recognized California's distinctive quantitative approach to determining which employees are outside salespersons, we must then address an issue implicitly raised by the parties that caused some confusion in the trial court and the Court of Appeal: Is the number of hours worked in sales-related activities to be determined by the number of hours that the employer, according to its job description or its estimate, claims the employee should be working in sales, or should it be determined by the actual average hours the employee spent on sales activity? The logic inherent in the IWC's quantitative definition of outside salesperson dictates that neither alternative would be wholly satisfactory. On the one hand, if hours worked on sales were determined through an employer's job description, then the employer could make an employee exempt from overtime laws solely by fashioning an idealized job description that had little basis in reality. On the other hand, an employee who is supposed to be engaged in sales activities during most of his working hours and falls below the 50 percent mark due to his own substandard performance should not thereby be able to evade a valid exemption. A trial court, in determining whether the employee is an outside salesperson, must steer clear of these two pitfalls by inquiring into the *realistic* requirements of the job. In so doing, the court should consider, first and foremost, how the employee actually spends his or her time. But the trial court should also consider whether the employee's practice diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job." (*Ramirez, supra,* 20 Cal.4th at pp. 801−802, original italics.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 392 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Coverage And Exemptions—In General*, ¶ 11:345 et seq. (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 2, *Minimum Wages*, § 2.04 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.71 (Matthew Bender)

Simmons, Wage and Hour Manual for California Employers, Ch. 2, *Coverage of Wage and Hour Laws* (Castle Publications Limited)

Simmons, Wage and Hour Manual for California Employers, Ch. 10, *Exemptions* (Castle Publications Limited)

3060. Unruh Civil Rights Act—Essential Factual Elements (Civ. Code, §§ 51, 52)

[*Name of plaintiff***] claims that [***name of defendant***] denied [him/her/***nonbinary pronoun***] full and equal [accommodations/advantages/facilities/privileges/services] because of [his/her/***nonbinary pronoun***] [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***] [denied/aided or incited a denial of/discriminated or made a distinction that denied] full and equal [accommodations/advantages/facilities/privileges/services] to [***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/ 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***]];]**

   [That the [sex/race/color/religion/ancestry/national origin/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 whom [***name of plaintiff***] was associated with was a substantial motivating reason for [***name of defendant***]'s conduct;]**

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 December 2011, June 2012; Renumbered from CACI No. 3020 December 2012; Revised June 2013, June 2016, December 2025

Directions for Use

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

Note that element 2 uses the term "substantial motivating reason" to express both intent and causation between the protected ~~classification~~ 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 the Unruh Civil Rights Act has not been addressed by the courts.

With the exception of claims that are also violations of the Americans With Disabilities Act (ADA) (see *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665 [94 Cal.Rptr.3d 685, 208 P.3d 623]), intentional discrimination is required for violations of the Unruh Civil Rights Act. (~~See~~ *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1149 [278 Cal.Rptr. 614, 805 P.2d 873].) The intent requirement is encompassed within the motivating-reason element. For claims that are also violations of the ADA, do not give element 2.

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).

For an instruction on damages under the Unruh Civil Rights Act, 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 regardless of any actual damages. (Civ. Code, § 52(a).) In this regard, harm is presumed, and elements 3 and 4 may be considered as established if no actual damages are sought. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195] [Unruh Civil Rights Act violations are per se injurious]; Civ. Code, § 52(a) [provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) ["actual damages" means special and general damages].)

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.

The Act is not limited to the categories expressly mentioned in the statute. 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* *or combination of characteristics*" throughout. Nevertheless, there are limitations on expansion beyond the statutory ~~classifications~~characteristics. First, the claim must be based on a personal characteristic or combination of characteristics 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 v. General Electric Capital Corp.* (2011) 196 Cal.App.4th 1380, 1392–1393 [127 Cal.Rptr.3d 794]; 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 or protected characteristic or combination of characteristics." If there are contested factual issues, additional instructions or special interrogatories may be necessary.

Sources and Authority

- Unruh Civil Rights Act. Civil Code section 51.

- Combination of Characteristics, Perception, and Perceived Association. Civil Code section 51(e)(7).

- Remedies Under Unruh Civil Rights Act. Civil Code section 52.

- "The Unruh Act was enacted to 'create and preserve a nondiscriminatory environment in California business establishments by "banishing" or "eradicating" arbitrary, invidious discrimination by such establishments.' " (*Flowers v. Prasad* (2015) 238 Cal.App.4th 930, 937 [190 Cal.Rptr.3d 33].)

- "Invidious discrimination is the treatment of individuals in a manner that is malicious, hostile, or damaging." (*Javorsky v. Western Athletic Clubs, Inc.* (2015) 242 Cal.App.4th 1386, 1404 [195 Cal.Rptr.3d 706].)

- "A plaintiff can recover under the Unruh Civil Rights Act on two alternate theories: (1) a violation of the ADA [citation]; or (2) denial of access to a business establishment based on intentional discrimination." (*Martin v. Thi E-Commerce, LLC* (2023) 95 Cal.App.5th 521, 527 [313 Cal.Rptr.3d 488].)

- "To state a claim under the Unruh Civil Rights Act, a plaintiff must allege the defendant is a business establishment that intentionally discriminates against and/or denies plaintiff full and equal treatment of a service, advantage, or accommodation based on plaintiff's protected status." (*Liapes v. Facebook, Inc.* (2023) 95 Cal.App.5th 910, 922 [313 Cal.Rptr.3d 330].)

- "A person who aids and abets the commission of an offense, such as an intentional tort, may be liable if the person ' "knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act" ' or ' "gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." ' A person can be liable for aiding and abetting violations of civil rights laws." (*Liapes, supra,* 95 Cal.App.5th at p. 926, internal citations omitted.)

- " 'The Legislature used the words "all" and "of every kind whatsoever" in referring to business establishments covered by the Unruh Act, and the inclusion of these words without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term "business establishments" was used in the broadest sense reasonably possible. The word "business" embraces everything about which one can be employed, and it is often synonymous with "calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain." The word "establishment," as broadly defined, includes not only a fixed location, such as the "place where one is permanently fixed for residence or business," but also a permanent "commercial force or organization" or "a permanent settled position, (as in life or business)." ' " (*O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 795 [191 Cal.Rptr. 320, 662 P.2d 427], internal citations omitted.)

- "[W]e proceed to decide whether [defendant] is a business establishment. The resolution of this issue is one of law." (*Rotary Club of Duarte, supra,* 178 Cal.App.3d at p. 1050.)

- "When a plaintiff has visited a business's website with intent to use its services and alleges that the business's terms and conditions exclude him or her from full and equal access to its services, the plaintiff need not enter into an agreement with the business to establish standing under the Unruh Civil Rights Act. In general, a person suffers discrimination under the Act when the person presents

himself or herself to a business with an intent to use its services but encounters an exclusionary policy or practice that prevents him or her from using those services. We conclude that this rule applies to online businesses and that visiting a website with intent to use its services is, for purposes of standing, equivalent to presenting oneself for services at a brick-and-mortar store. Although mere awareness of a business's discriminatory policy or practice is not enough for standing under the Act, entering into an agreement with the business is not required." (*White v. Square, Inc.* (2019) 7 Cal.5th 1019, 1023 [250 Cal.Rptr.3d 770, 446 P.3d 276].)

- "We hold that including websites connected to a physical place of public accommodation is not only consistent with the plain language of Title III, but it is also consistent with Congress's mandate that the ADA keep pace with changing technology to effectuate the intent of the statute." (*Thurston v. Midvale Corp.* (2019) 39 Cal.App.5th 634, 644 [252 Cal.Rptr.3d 292].)

- "As to intentional discrimination, the California Supreme Court has held that the discriminatory effect of a facially neutral policy or action is not alone a basis for inferring intentional discrimination under the Unruh Civil Rights Act. It follows that we cannot infer intentional discrimination from [plaintiff's] alleged facts that he made [defendant] aware of the discriminatory effect of [defendant's] facially neutral website, and that [defendant] did not ameliorate these effects." (*Martinez v. Cot'n Wash, Inc.* (2022) 81 Cal.App.5th 1026, 1032 [297 Cal.Rptr.3d 712], internal citation omitted.)

- "Beyond the pleading stage, if a plaintiff wants to prevail on an Unruh Civil Rights Act claim, he or she must present sufficient evidence to overcome the online defendant's argument that he or she 'did not actually possess a *bona fide intent* to sign up for or use its services.' " (*Thurston v. Omni Hotels Management Corp.* (2021) 69 Cal.App.5th 299, 307 [284 Cal.Rptr.3d 341], internal citation omitted, original italics.)

- "Here, the City was not acting as a business establishment. It was amending an already existing municipal code section to increase the minimum age of a responsible person from the age of 21 years to 30. The City was not directly discriminating against anyone and nothing in the plain language of the Unruh Civil Rights Act makes its provisions applicable to the actions taken by the City." (*Harrison v. City of Rancho Mirage* (2015) 243 Cal.App.4th 162, 175 [196 Cal.Rptr.3d 267].)

- "[T]he protection against discrimination afforded by the Unruh Act applies to 'all persons,' and is not reserved for restricted categories of prohibited discrimination." (*Marina Point, Ltd., supra,* 30 Cal.3d at p. 736.)

- "Nevertheless, the enumerated categories, bearing the 'common element' of being 'personal' characteristics of an individual, necessarily confine the Act's reach to forms of discrimination based on characteristics similar to the statutory classifications—such as 'a person's geographical origin, physical attributes, and personal beliefs.' The 'personal characteristics' protected by the Act are not defined by 'immutability, since some are, while others are not [immutable], but that they represent traits, conditions, decisions, or choices fundamental to a person's identity, beliefs and self-definition.' " (*Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138, 1145 [228 Cal.Rptr.3d 336].)

- "In addition to the particular forms of discrimination specifically outlawed by the Act (sex, race, color, etc.), courts have held the Act 'prohibit[s] discrimination based on several classifications which

are not specifically enumerated in the statute.' These judicially recognized classifications include unconventional dress or physical appearance, families with children, homosexuality, and persons under 18." (*Hessians Motorcycle Club v. J.C. Flanagans* (2001) 86 Cal.App.4th 833, 836 [103 Cal.Rptr.2d 552], internal citations omitted.)

- "The Act applies not merely in situations where businesses exclude individuals altogether, but also 'where unequal treatment is the result of a business practice.' 'Unequal treatment includes offering price discounts on an arbitrary basis to certain classes of individuals.' " (*Candelore, supra,* 19 Cal.App.5th at pp. 1145–1146, internal citations omitted.)

- "Race discrimination claims under … the Unruh Civil Rights Act follow the analytical framework established under federal employment law. Although coaches are different from 'ordinary employers,' the *McDonnell Douglas* framework strikes the appropriate balance in evaluating race discrimination claims brought by college athletes:… ." (*Mackey v. Board of Trustees of California State University* (2019) 31 Cal.App.5th 640, 661 [242 Cal.Rptr.3d 757], internal citations omitted.)

- "[T]he language and history of the Unruh Act indicate that the legislative object was to prohibit intentional discrimination in access to public accommodations. We have been directed to no authority, nor have we located any, that would justify extension of a disparate impact test, which has been developed and applied by the federal courts primarily in employment discrimination cases, to a general discrimination-in-public-accommodations statute like the Unruh Act. Although evidence of adverse impact on a particular group of persons may have probative value in public accommodations cases and should therefore be admitted in appropriate cases subject to the general rules of evidence, a plaintiff must nonetheless plead and prove a case of intentional discrimination to recover under the Act." (*Harris, supra,* 52 Cal.3d at p. 1149.)

- "On examining the language, statutory context, and history of section 51, subdivision (f), we conclude … [t]he Legislature's intent in adding subdivision (f) was to provide disabled Californians injured by violations of the ADA with the remedies provided by section 52. A plaintiff who establishes a violation of the ADA, therefore, need not prove intentional discrimination in order to obtain damages under section 52." (*Munson, supra,* 46 Cal.4th at p. 665.)

- "Civil Code section 51, subdivision (f) states: 'A violation of the right of any individual under the federal [ADA] shall also constitute a violation of this section.' The ADA provides in pertinent part: 'No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who … operates a place of public accommodation.' The ADA defines discrimination as 'a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.' " (*Baughman v. Walt Disney World Co.* (2013) 217 Cal.App.4th 1438, 1446 [159 Cal.Rptr.3d 825], internal citations omitted.)

- " 'Although the Unruh Act proscribes "any form of arbitrary discrimination", certain types of discrimination have been denominated "reasonable" and, therefore, not arbitrary.' Thus, for example,

'legitimate business interests may justify limitations on consumer access to public accommodations.' " (*Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 520 [74 Cal.Rptr.2d 684], internal citations omitted.)

- "Discrimination may be reasonable, and not arbitrary, in light of the nature of the enterprise or its facilities, legitimate business interests (maintaining order, complying with legal requirements, and protecting business reputation or investment), and public policy supporting the disparate treatment." (*Javorsky, supra,* 242 Cal.App.4th at p. 1395.)

- "[T]he Act's objective of prohibiting 'unreasonable, arbitrary or invidious discrimination' is fulfilled by examining whether a price differential reflects an 'arbitrary, class-based generalization.' … [A] policy treating age groups differently in this respect may be upheld, at least if the pricing policy (1) ostensibly provides a social benefit to the recipient group; (2) the recipient group is disadvantaged economically when compared to other groups paying full price; and (3) there is no invidious discrimination." (*Javorsky, supra,* 242 Cal.App.4th at p. 1399.)

- "Unruh Act issues have often been decided as questions of law on demurrer or summary judgment when the policy or practice of a business establishment is valid on its face because it bears a reasonable relation to commercial objectives appropriate to an enterprise serving the public." (*Harris, supra,* 52 Cal.3d at p. 1165, internal citations omitted.)

- "It is thus manifested by section 51 that all persons are entitled to the full and equal privilege of associating with others in any business establishment. And section 52, liberally interpreted, makes clear that discrimination by such a business establishment against one's right of association on account of the associates' color, is violative of the Act. It follows ... that discrimination by a business establishment against persons on account of their association with others of the black race is actionable under the Act." (*Winchell v. English* (1976) 62 Cal.App.3d 125, 129 [133 Cal.Rptr. 20].)

- "Appellant is disabled as a matter of law not only because she is HIV positive, but also because it is undisputed that respondent 'regarded or treated' her as a person with a disability. The protection of the Unruh Civil Rights Act extends both to people who are currently living with a physical disability that limits a life activity and to those who are regarded by others as living with such a disability. … '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.' Thus, even an HIV-positive person who is outwardly asymptomatic is protected by the Unruh Civil Rights Act." (*Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 529−530 [155 Cal.Rptr.3d 620], original italics, internal citations omitted.)

- "[T]he Unruh Civil Rights Act prohibits arbitrary discrimination in public accommodations with respect to trained service dogs, but not to service-animals-in-training." (*Miller v. Fortune Commercial Corp.* (2017) 15 Cal.App.5th 214, 224 [223 Cal.Rptr.3d 133].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 994–1016

Chin et al., California Practice Guide: Employment Litigation, Ch.7-G, *Unruh Civil Rights Act*, ¶ 7:1525 et seq. (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.10–116.16 (Matthew Bender)

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

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

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. (~~See~~ *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* ~~the~~ any protected ~~category~~characteristic listed or defined in section 51(b) or (e). (Civ. Code, § 51.5(a).) 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 ~~classification~~ 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.
- 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)

VF-3030. Unruh Civil Rights Act (Civ. Code, §§ 51, 52(a))

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [deny/aid or incite a denial of/discriminate or make a distinction that denied] full and equal [accommodations/advantages/facilities/privileges/services] to [***name of plaintiff***]?**
   ____ 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 defendant***]'s perception of] [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/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***]] a substantial motivating reason for [***name of defendant***]'s conduct?**
   ____ 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. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   ____ 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. **What are [***name of plaintiff***]'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 $ _____

Answer question 5.

5. What amount, if any, do you award as a penalty against [*name of 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, December 2010, June 2012; Renumbered from CACI No.VF-3010 December 2012; Revised June 2013, December 2016, May 2024, December 2025

Directions for Use

This verdict form is based on CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements.*

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 the plaintiff~~'s~~ was (1) perceived to have a protected characteristic or characteristics, or (2) perceived to be associated with someone who has, or is perceived to have, a protected characteristic or characteristics~~association with another is the basis for the claim~~, modify question 2 as in element 2 of

CACI No. 3060.

Questions 3 and 4 may be omitted if only the statutory minimum of $4,000 damages is sought. Harm is presumed for this amount. (See Civ. Code, § 52(a); *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)

The penalty in question 5 refers to the right of the jury to award a maximum of three times the amount of actual damages but not less than $4,000. (Civ. Code, § 52(a).) The judge should correct the verdict if the jury award goes over that limit. Also, if the jury awards nothing or an amount less than $4,000 in question 5, the judge should increase that award to $4,000 to reflect the statutory minimum.

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.

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-3031. Discrimination in Business Dealings (Civ. Code, §§ 51.5, 52(a))

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [discriminate against/boycott/blacklist/refuse to buy from/refuse to contract with/refuse to sell to/refuse to trade with] [***name of plaintiff***]?**
   ____ 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 defendant***]'s 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***]] a substantial motivating reason for [***name of defendant***]'s conduct?**
   ____ 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. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ 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. **What are [***name of plaintiff***]'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 $ _____

Answer question 5.

5. What amount, if any, do you award as a penalty against [*name of 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, December 2010, June 2012, Renumbered from CACI No. VF-3011 December 2012; Revised June 2013, December 2016, May 2024, December 2025

Directions for Use

This verdict form is based on CACI No. 3061, *Discrimination in Business Dealings—Essential Factual Elements.*

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 an alternative basis for the defendant's alleged motivation is at issue, modify question 2 as in element 2 of CACI No. 3061.

The award of a penalty in question 5 refers to the right of the jury to award a maximum of three times the amount of actual damages but not less than $4,000. (Civ. Code, § 52(a).) The judge should correct the

verdict if the jury award goes over that amount. Also, if the jury awards nothing or an amount less than $4,000 in question 5, then the judge should increase that award to $4,000 to reflect the statutory minimum.

It is possible that questions 3 and 4 may be omitted 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].)

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.

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.

4106A. Intentional or Fraudulent Breach of Fiduciary Duty by Attorney—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***/it] was harmed because [***name of defendant***] [intentionally/fraudulently] breached an attorney's duty [***describe duty, e.g., "not to represent clients with conflicting interests"***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [intentionally/fraudulently] breached the duty of an attorney [***describe duty***];**

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.**

New September 2003; Revised April 2004; Renumbered from CACI No. 605 December 2007; Revised May 2019, May 2020; Revised and Renumbered from CACI No. 4106 December 2025

Directions for Use

Give CACI No. 430, *Causation: Substantial Factor*, with this instruction. (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1093–1094 [236 Cal.Rptr.3d 473] ["Substantial factor causation is the correct causation standard for an intentional breach of fiduciary duty."].)

If the plaintiff alleges both intentional or fraudulent breach and negligent breach of fiduciary duty by an attorney, give both this instruction and CACI No. 4106B, *Negligent Breach of Fiduciary Duty by Attorney—Essential Factual Elements*. Different causation standards apply to these claims. (*Knutson, supra,* 25 Cal.App.5th at pp. 1093–1094 ["Substantial factor causation is the correct causation standard for an intentional breach of fiduciary duty."].) The jury must be instructed on both causation standards, and it should be made clear which causation standard applies to which claim.

~~The existence of a fiduciary relationship is a question of law. Whether an attorney has breached that fiduciary duty is a question of fact. (*David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890 [250 Cal.Rptr. 339], disapproved on other grounds in *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239 [191 Cal.Rptr.3d 536, 354 P.3d 334].)~~

~~Give CACI No. 430, *Causation: Substantial Factor*, with this instruction.~~

~~The causation standard for an attorney's intentional breach of fiduciary duty differs from that for a negligent breach. If the plaintiff alleges an attorney's intentional breach of duty, do not include the optional last sentence of CACI No. 430, *Causation: Substantial Factor,* on "but for" causation. The "but for" causation standard does not apply to an intentional breach of fiduciary duty. If the plaintiff alleges an attorney's negligent breach of duty, the "but for" ("would have happened anyway") causation standard applies. (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1093–1094 [236 Cal.Rptr.3d 473]; see *Viner v.*~~

~~*Sweet* (2003) 30 Cal.4th 1232 [135 Cal.Rptr.2d 629, 70 P.3d 1046].) If the plaintiff alleges a negligent breach of duty, give the optional last sentence of CACI No. 430: "Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct."~~

~~If the plaintiff alleges both negligent breach and intentional or fraudulent breach, the jury must be instructed on both causation standards and it should be made clear which causation standard applies to which claim.~~

~~If the harm allegedly caused by the defendant's conduct involves the outcome of a legal claim, the jury should be instructed with CACI No. 601, *Legal Malpractice—Causation*, for the "but for" standard. (See *Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 928, 933–937 [125 Cal.Rptr.3d 210] [discussing circumstances when a client need not show that they objectively would have obtained a better result in the underlying case in the absence of the attorney's breach (the trial-within-a-trial method)].)~~

Sources and Authority

- " 'The relation between attorney and client is a fiduciary relation of the very highest character.' " (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189 [98 Cal.Rptr. 837, 491 P.2d 421].)

- " 'The breach of fiduciary duty can be based upon either negligence or fraud depending on the circumstances. It has been referred to as a species of tort distinct from causes of action for professional negligence [citation] and from fraud [citation].' 'The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages.' " (*Knutson, supra,* 25 Cal.App.5th at pp. 1093–1094, internal citation omitted.)

- "With respect to a cause of action alleging breach of a fiduciary duty, the existence of the duty is a question of law. … There is no dispute that a fiduciary duty did exist in this case. The issue is whether defendants breached that duty towards [plaintiff], which is a question of fact." (*David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890 [250 Cal.Rptr. 339], disapproved on other grounds in *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239 [191 Cal.Rptr.3d 536, 354 P.3d 334].)

- "Substantial factor causation is the correct causation standard for an intentional breach of fiduciary duty." (*Knutson, supra,* 25 Cal.App.5th at p. 1094.)

- "The trial court applied the legal malpractice standard of causation to [plaintiff]'s intentional breach of fiduciary duty cause of action. The court cited The Rutter Group's treatise on professional responsibility to equate causation for legal malpractice with causation for all breaches of fiduciary duty: ' "The rules concerning causation, damages, and defenses that apply to lawyer negligence actions … also govern actions for breach of fiduciary duty." ' This statement of the law is correct, however, only as to claims of breach of fiduciary duty arising from negligent conduct." (*Knutson, supra,* 25 Cal.App.5th at p. 1094, internal citations omitted.)

- "Expert testimony is not required, but is admissible to establish the duty and breach elements of a cause of action for breach of fiduciary duty where the attorney conduct is a matter beyond common knowledge." (*Stanley v. Richmond* (1995) ~~*, supra,*~~ 35 Cal.App.4th 1070, 1087 [41 Cal.Rptr.2d 768]~~at~~

~~p. 1087~~, internal citations omitted.)

- "The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, 'together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client.' " (*Stanley, supra,* 35 Cal.App.4th at p. 1087.)

- "In many cases when a client sues his or her attorney for wrongdoing in connection with litigation (e.g., for breach of fiduciary duty or professional negligence), the merits of the underlying case must be adjudicated. This is because in order to prove the element of causation the client must show that he or she objectively would have obtained a better result in the underlying case in the absence of the attorney's breach or negligence. The trial court thus must conduct a 'trial within a trial' of the underlying case." (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 928 [125 Cal.Rptr.3d 210].)

Secondary Sources

1 Witkin, California Procedure (5th ed. 2008) Attorneys, § 87 et al.

Vapnek et al., California Practice Guide: Professional Responsibility ¶ 6:425 (The Rutter Group)

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.02[4] (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, § 76.150 (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, §§ 24A.43, 24A.56B (Matthew Bender)

4106B. Negligent Breach of Fiduciary Duty by Attorney—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***/it] was harmed because [***name of defendant***] negligently breached an attorney's duty [***describe duty, e.g., "not to represent clients with conflicting interests"***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] negligently breached the duty of an attorney [***describe duty***];**

2. **That [***name of plaintiff***] was harmed; and**

3. **That [***name of plaintiff***] would not have suffered the harm if [***name of defendant***] had acted as a reasonably careful attorney.**

New December 2025, Derived from former CACI No. 4106

Directions for Use

Give CACI No. 601, *Legal Malpractice—Causation*, with this instruction. (See *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1242 [135 Cal.Rptr.2d 629, 70 P.3d 1046] ["In both litigation and transactional malpractice cases, the crucial causation inquiry is *what would have happened* if the defendant attorney had not been negligent."].)

If the plaintiff alleges both intentional or fraudulent breach and negligent breach of fiduciary duty by an attorney, give both this instruction and CACI No. 4106A, *Intentional Breach of Fiduciary Duty by Attorney—Essential Factual Elements*. Different causation standards apply to these claims. (See *Viner, supra,* 30 Cal.4th at p. 1242 ["In both litigation and transactional malpractice cases, the crucial causation inquiry is *what would have happened* if the defendant attorney had not been negligent."].) The jury must be instructed on both causation standards and it should be made clear which causation standard applies to which claim.

Sources and Authority

- " 'The relation between attorney and client is a fiduciary relation of the very highest character.' " (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189 [98 Cal.Rptr. 837, 491 P.2d 421].)

- " 'The breach of fiduciary duty can be based upon either negligence or fraud depending on the circumstances. It has been referred to as a species of tort distinct from causes of action for professional negligence [citation] and from fraud [citation].' 'The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages.' " (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1093–1094 [236 Cal.Rptr.3d 473], internal citation omitted.)

- "Expert testimony is not required, but is admissible to establish the duty and breach elements of a

cause of action for breach of fiduciary duty where the attorney conduct is a matter beyond common knowledge." (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1087 [41 Cal.Rptr.2d 768], internal citations omitted.)

- "The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, 'together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client.' " (*Stanley, supra,* 35 Cal.App.4th at p. 1087.)

Secondary Sources

1 Witkin, California Procedure (5th ed. 2008) Attorneys, § 87 et al.

Vapnek et al., California Practice Guide: Professional Responsibility ¶ 6:425 (The Rutter Group)

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.02[4] (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, § 76.150 (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, §§ 24A.43, 24A.56B (Matthew Bender)

4302. Termination for Failure to Pay Rent—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has failed to pay the rent. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**

2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***];**

3. **That under the [lease/rental agreement/sublease], [***name of defendant***] was required to pay rent in the amount of $[***specify amount***] per [***specify period, e.g., month***];**

4. **That [***name of plaintiff***] properly gave [***name of defendant***] three days' written notice to pay the rent or vacate the property;**

5. **That as of [***date of three-day notice***], at least the amount stated in the three-day notice was due;**

6. **That [***name of defendant***] did not pay the amount stated in the notice within three days after [service/receipt] of the notice; and**

7. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

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*New August 2007; Revised June 2011, December 2011, December 2013, May 2021, December 2025**

Directions for Use

~~Modify this instruction as necessary for rent due on a residential tenancy between March 1, 2020, and June 30, 2021, including, but not limited to, substitution of the term "fifteen business days" wherever the term "three days" appears in the essential factual elements. (See COVID-19 Tenant Relief Act, Code Civ. Proc., § 1179.01 et seq.; Stats. 2021, ch. 2 (Sen. Bill 91), Code Civ. Proc., § 1179.02.)~~

Include the bracketed references to a subtenancy in the opening paragraph and in element 7 if persons other than the tenant-defendant are occupying the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1, "rented" in element 2, and either "lease" or "rental agreement" in element 3. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "leases" in element 1, "subleased" in element 2, and "sublease" in element 3. (Code Civ. Proc., § 1161(3).)

Defective service may be waived if defendant admits receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194

Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

If the lease specifies a time period for notice other than the three-day period, substitute that time period in elements 4, 5, and 6, provided that it is not less than three days.

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in element 6.

See CACI No. 4303, *Sufficiency and Service of Notice of Termination for Failure to Pay Rent*, for an instruction regarding proper notice.

Sources and Authority

- Unlawful Detainer for Tenant's Default in Rent Payments. Code of Civil Procedure section 1161(2).
- ~~COVID-19 Tenant Relief Act. Code of Civil Procedure section 1179.01 et seq.~~
- Senate Bill 91 (Stats. 2021, ch. 2). Code of Civil Procedure section 1179.02 et seq.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- Conversion to Civil Action if Possession No Longer at Issue. Civil Code section 1952.3(a).
- "[M]ere failure of a tenant to quit the premises during the three-day notice period does not necessarily justify an unlawful detainer action. If a tenant vacates the premises and surrenders possession to the landlord prior to the complaint being filed, then no action for unlawful detainer will lie even though the premises were not surrendered during the notice period. This is true because the purpose of an unlawful detainer action is to recover possession of the premises for the landlord. Since an action in unlawful detainer involves a forfeiture of the tenant's right to possession, one of the matters that must be pleaded and proved for unlawful detainer is that the tenant remains in possession of the premises. Obviously this cannot be established where the tenant has surrendered the premises to landlord prior to the filing of the complaint. In such a situation the landlord's remedy is an action for damages and rent." (*Briggs v. Electronic Memories & Magnetics Corp.* (1975) 53 Cal.App.3d 900, 905–906 [126 Cal.Rptr. 34], footnote and internal citations omitted.)

- "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra,* 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 753, 756, 758

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.35–8.45

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.17–6.37

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶¶ 5:224.3, 5:277.1 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶ 7:96 (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.22 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

Miller & Starr, California Real Estate 4th, § 19:200 (Thomson Reuters)

4303. Sufficiency and Service of Notice of Termination for Failure to Pay Rent

[*Name of plaintiff***] contends that [he/she/***nonbinary pronoun***/it] properly gave [***name of defendant***] three days' notice to pay the rent or vacate the property. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that [he/she/***nonbinary pronoun***/it] must pay the amount due within three days or vacate the property;**

2. **That the notice stated [no more than/a reasonable estimate of] the amount due, and the name, telephone number, and address of the person to whom the amount should be paid, and**

   [*Use if payment was to be made personally:*

   the usual days and hours that the person would be available to receive the payment; and]

   [*or: Use if payment was to be made into a bank account:*

   the number of an account in a bank located within five miles of the rental property into which the payment could be made, and the name and street address of the bank; and]

   [*or: Use if an electronic funds transfer procedure had been previously established:*

   that payment could be made by electronic funds transfer; and]

3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***].**

[The three-day notice period excludes Saturdays, Sundays, and judicial holidays, but otherwise begins the day after the notice to pay the rent or vacate the property was given to [*name of defendant***].]**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s residence or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her/***nonbinary pronoun***] residence/the commercial property]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail][./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[A notice stating a reasonable estimate of the amount of rent due that is within 20 percent of the amount actually due is reasonable unless [*name of defendant***] proves that it was not reasonable. In determining the reasonableness of the estimate, you may consider whether calculating the amount of rent required information primarily within the knowledge of [***name of defendant***] and whether [***name of defendant***] accurately furnished that information to [***name of plaintiff***].]**

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*New August 2007; Revised December 2010; June 2011, December 2011, November 2019, May 2020, May 2021, December 2025**

Directions for Use

~~Modify this instruction as necessary for rent due on a residential tenancy between March 1, 2020, and June 30, 2021, including, but not limited to, substitution of the term "fifteen business days" wherever the term "three days" appears in the essential factual elements. (See COVID-19 Tenant Relief Act, Code Civ. Proc., § 1179.01 et seq.; Stats. 2021, ch. 2 (Sen. Bill 91), Code Civ. Proc., §§ 1179.02, 1179.03, 1179.04.)~~

Use the reasonable-estimate option in the first sentence of element 2 and include the final paragraph only in cases involving commercial leases. (Code Civ. Proc., § 1161.1(a); see also Code Civ. Proc., § 1161.1(e) [presumption that if amount found to be due is within 20 percent of amount stated in notice, then estimate was reasonable].)

In element 2, select the applicable manner in which the notice specifies that payment is to be made; directly to the landlord, into a bank account, or by electronic funds transfer. (Code Civ. Proc., § 1161(2).)

Select the manner of service used: personal service, substituted service by leaving the notice at the defendant's home or place of work or at the commercial rental property, or substituted service by posting on the property. (See Code Civ. Proc., § 1162.)

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second, third, and fourth bracketed options for the manner of service.

Read the paragraph that follows the elements if any of the three days of the notice period fell on a Saturday, Sunday, or judicial holiday. (See Code Civ. Proc., § 1161(2).) Judicial holidays are shown on the judicial branch website, ~~www.courts.ca.gov/holidays.htm~~ https://courts.ca.gov/about/court-holidays.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout, provided that it is not less than three days.

Defective service may be waived if defendant admits receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

The Tenant Protection Act of 2019 and/or local ordinances may impose additional notice requirements for the termination of a rental agreement. (See Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Sources and Authority

- Conclusive Presumption of Receipt of Rent Sent to Address Provided in Notice. Code of Civil Procedure section 1161(2).
- ~~COVID-19 Tenant Relief Act. Code of Civil Procedure section 1179.01 et seq.~~
- Senate Bill 91 (Stats. 2021, ch. 2). Code of Civil Procedure section 1179.02 et seq.
- Commercial Tenancy: Estimate of Rent Due in Notice. Code of Civil Procedure 1161.1.
- Manner of Service of Notice. Code of Civil Procedure section 1162.
- Tenant Protection Act of 2019. Civil Code section 1946.2.

- " '[P]roper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. [Citations.]' [Citation.] 'A lessor must allege and prove proper service of the requisite notice. [Citations.] Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained. [Citations.]' " (*Borsuk v. Appellate Division of Superior Court* (2015) 242 Cal.App.4th 607, 611 [195 Cal.Rptr.3d 581].)

- "A three-day notice must contain 'the amount which is due.' A notice which demands rent in excess of the amount due does not satisfy this requirement. This rule ensures that a landlord will not be entitled to regain possession in an unlawful detainer action unless the tenant has had the opportunity to pay the delinquent rent." (*Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 697 [32 Cal.Rptr.2d 635], internal citations and footnote omitted.)

- "As compared to service of summons, by which the court acquires personal jurisdiction, service of the three-day notice is merely an element of an unlawful detainer cause of action that must be alleged and proven for the landlord to acquire possession." (*Borsuk, supra,* 242 Cal.App.4th at pp. 612–613.)

- "[A]s used in section 1161(2), 'person' is defined by section 17 and includes corporations as well as natural persons." (*City of Alameda v. Sheehan* (2024) 105 Cal.App.5th 68, 72 [325 Cal.Rptr.3d 438].)

- "[W]e do not agree that a proper notice may not include anything other than technical rent. It is true that subdivision 2 of Code of Civil Procedure section 1161 relates to a default in the payment of rent. However, the subdivision refers to the 'lease or agreement under which the property is held' and requires the notice state 'the amount which is due.' The language is not 'the amount of rent which is due' or 'the rent which is due.' We think the statutory language is sufficiently broad to encompass any sums due under the lease or agreement under which the property is held." (*Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 492 [144 Cal.Rptr. 474].)

- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)

- "We … hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra,* 138 Cal.App.3d Supp. at p. 14.)

- "We … hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra,* 226 Cal.App.3d Supp. at p. 20.)

- "An unlawful detainer action based on failure to pay rent must be preceded by a three-day notice to the tenant to pay rent or quit the premises. Failure to state the exact amount of rent due in the notice is fatal to the subsequent unlawful detainer action." (*Lynch & Freytag v. Cooper* (1990) 218 Cal.App.3d 603, 606, fn. 2 [267 Cal.Rptr. 189], internal citations omitted.)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 753, 755–758, 760

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.26–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.10–6.30, Ch. 8

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶¶ 5:224.3, 5:277.1 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:98.10, 7:327 (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.21 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.22 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy*, § 332.28 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.13, 236.13A (Matthew Bender)

Miller & Starr, California Real Estate 4th, §§ 34:183-34:187 (Thomson Reuters)

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 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. [*Insert other ~~applicable standard~~ 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 ~~be~~ substantially affect the property's habitability.**

A condition that occurred only after [*name of defendant***] failed or refused to pay rent and was served with a notice to pay rent or vacate the property cannot be a defense to the previous nonpayment.**

[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

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. O 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]; see 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].).

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)

4323. Affirmative Defense—Discriminatory Eviction (Unruh Act)

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/***nonbinary pronoun***] because [***name of plaintiff***] is discriminating against [him/her/***nonbinary pronoun***] because of [***insert protected ~~class, e.g., her national origin, or other characteristic~~ characteristic or combination of characteristics or other characteristic protected from arbitrary discrimination***]. To succeed on this defense, [***name of defendant***] must prove both of the following:**

1. **That [***name of defendant***] is [perceived as/associated with someone who is [perceived as]] [***insert protected ~~class, e.g., Hispanic,~~ characteristic or combination of characteristics or other characteristic protected from arbitrary discrimination***]; and**

2. **That [***name of plaintiff***] filed this lawsuit because of [***insert one of the following* **]**

   [[his/her/*nonbinary pronoun***/its] [perception of] [***name of defendant***]'s [***insert protected ~~class, e.g., national origin, or other characteristic~~ characteristic or combination of characteristics or other characteristic protected from arbitrary discrimination***].]**

   [[*name of defendant***]'s association with someone who is [perceived as] [***insert protected ~~class, e.g., Hispanic, or other characteristic~~ characteristic or combination of characteristics or other characteristic protected from arbitrary discrimination***].]**

New August 2007; Revised May 2020, December 2025

Directions for Use

Throughout the instruction, insert either the defendant's protected ~~status~~ characteristic or combination of characteristics under the Unruh Act (see Civ. Code, § 51) or other characteristic on the basis of which the defendant alleges that the defendant has been arbitrarily discriminated against. (See *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 725–726 [180 Cal.Rptr. 496, 640 P.2d 115] [excluding all tenants with children is arbitrary illegal discrimination].)

In element 1, select the appropriate language based on whether the defendant ~~(1) is a member of the protected class, (2) is perceived as a member of the protected class, (3) is associated with someone who is a member of the protected class, or (4) is associated with someone who is perceived as a member of the protected class~~ (1) has a protected characteristic or combination of characteristics, (2) was perceived to have a protected characteristic or characteristics, or (3) was perceived to be associated with someone who has, or is perceived to have, a protected characteristic or characteristics.

In element 2, include the bracketed language regarding perception if the defendant ~~is not actually a member of the protected class~~does not allege discrimination because of a protected characteristic or combination of characteristics, but the allegation is that the plaintiff believes that the defendant ~~is a member~~has a protected characteristic or combination of characteristics.

See also the Sources and Authority section under CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements*.

Sources and Authority

- Discrimination in Public Accommodations Prohibited (Unruh Act). Civil Code section 51.

- Combination of Characteristics, Perception, and Perceived Association. Civil Code section 51(e)(7).

- "In evaluating the legality of the challenged exclusionary policy in this case, we must recognize at the outset that in California, unlike many other jurisdictions, the Legislature has sharply circumscribed an apartment owner's traditional discretion to accept and reject tenants on the basis of the landlord's own likes or dislikes. California has brought such landlords within the embrace of the broad statutory provisions of the Unruh Act, Civil Code section 51. Emanating from and modeled upon traditional 'public accommodations' legislation, the Unruh Act expanded the reach of such statutes from common carriers and places of public accommodation and recreation, e.g., railroads, hotels, restaurants, theaters and the like, to include 'all business establishments of every kind whatsoever.' " (*Marina Point, Ltd., supra,* 30 Cal.3d at pp. 730–731, footnote omitted.)

- "[T]he 'identification of particular bases of discrimination -- color, race, religion, ancestry, and national origin -- *is illustrative rather than restrictive*. Although the legislation has been invoked primarily by persons alleging discrimination on racial grounds, its language and its history compel the conclusion that the Legislature intended to prohibit *all arbitrary discrimination by business establishments*.' " (*Marina Point, Ltd., supra,* 30 Cal.3d at p. 732, original italics.)

- "We hold that defendant should have been permitted to produce proof of the allegations of his special defenses of discrimination, which if proven would bar the court from ordering his eviction because such 'state action' would be violative of both federal and state Constitutions." (*Abstract Inv. Co. v. Hutchinson* (1962) 204 Cal.App.2d 242, 255 [22 Cal.Rptr. 309].)

- "[Evictions that] contravene statutory or constitutional strictures provide a valid defense to the unlawful detainer action~~s~~. … [U]nder the Unruh Act we have condemned *any* arbitrary discrimination against any class." (*Marina Point, Ltd., supra,* 30 Cal.3d at p. 727, 744, original italics.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 712–713

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.118–8.128

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.53, 10.67, 10.68

7 California Real Estate Law and Practice, Ch. 214, *Government Regulation and Enforcement*, § 214.10 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

11 California Forms of Pleading and Practice, Ch. 117, *Civil Rights: Housing Discrimination*, § 117.31 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Unlawful Detainer*, § 35.45 (Matthew Bender)

Miller & Starr, California Real Estate 4th, § 19:223 (Thomson Reuters)

4350. Breach of Implied Warranty of Habitability—Essential Factual Elements

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[*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. [*Insert other condition relating to habitability.***]**

New December 2025

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 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.)

ITC CACI 25-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are verbatim unless indicated by an asterisk (*).

Instruction(s)	Commenter	Comment	Committee Response
113. Bias (Revise)	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
470. Primary Assumption of Risk—Exception to Nonliability—Coparticipant in Sport or Other Recreational Activity (Revise)	Orange County Bar Association by Mei Tsang, President	The removal of illustrative cases in the Sources and Authorities regarding the application of the assumption of risk doctrine to dangerous activities is unnecessary and would not be helpful to the litigant. Reference to cases that illustrate dangerous activities is particularly helpful to the litigant when assessing assumption of risk principles.	The committee appreciates the commenter's concern but recommends deleting the illustrative cases from the Sources and Authorities of CACI No. 470 because the cases do not involve *coparticipants*, the subject of the instruction. Most of the cases are included in the Sources and Authorities of CACI Nos. 471 or 472.
471. Primary Assumption of Risk—Exception to Nonliability—Instructors, Trainers, or Coaches (Revise)	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
472. Primary Assumption of Risk—Exception to Nonliability—Facilities Owners and Operators and Event Sponsors (Revise)	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
2500. Disparate Treatment—Essential Factual Elements (Gov.	Orange County Bar Association by Mei Tsang, President	Agree	No response required.

Instruction(s)	Commenter	Comment	Committee Response
Code, § 12940(a)) (Revise)			
2501. Affirmative Defense—Bona fide Occupational Qualification (Revise)	California Employment Lawyers Association (CELA) by Barbara Figari Cowan Chair	We respectfully request that the Judicial Council revise the instruction to replace "characteristic" with "characteristic or combination of characteristics" in order to align with the phrasing used in other CACI instructions and to ensure clarity in cases where multiple protected statuses are at issue. The proposed language would read as follows (changes in bold): "[Name of defendant] claims that [his/her/nonbinary pronoun/its] decision [to discharge/[other adverse employment action]] [name of plaintiff] was lawful because [he/she/nonbinary pronoun/it] was entitled to consider [protected status—for example, race, gender, or age **characteristic or combination of characteristics**] as a job requirement. To succeed, [name of defendant] must prove all of the following: 1. That the job requirement was reasonably necessary for the operation of [name of defendant]'s business; 2. That [name of defendant] had a reasonable basis for believing that substantially all [members of protected group] are unable to safely and efficiently perform that job; 3. That it was impossible or highly impractical to consider whether each [applicant/employee] was able to safely and efficiently perform the job; and	The committee considered and rejected the change suggested because the BFOQ defense is unlikely to involve a combination of characteristics. If case law develops to address the issue, the committee will consider appropriate changes. For now, the committee recommends replacing the word "status" with the word "characteristic" to be consistent with the phrasing across the instructions.

Instruction(s)	Commenter	Comment	Committee Response
		4. That it was impossible or highly impractical for [name of defendant] to rearrange job responsibilities to avoid using [protected status **characteristic or combination of characteristics**] as a job requirement." We also request that the "Directions for Use" section be revised to reflect this change: "An employer may assert the bona fide occupational qualification (BFOQ) defense where the employer has a practice that on its face excludes an entire group of individuals because of their protected status **characteristic or combination of characteristics**. Modifications will be necessary if the BFOQ defense is raised in a case involving allegations of failure to accommodate an employee who is pregnant, recovering from childbirth, or having related medical conditions. (Gov. Code, § 12945(a).)" This revision promotes consistency across jury instructions, avoids confusion where multiple protected statuses may be implicated, and better reflects the statutory framework.	No further response required.
	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
2502. Disparate Impact—Essential Factual Elements (Gov.	Orange County Bar Association by Mei Tsang, President	Agree	No response required.

Instruction(s)	Commenter	Comment	Committee Response
Code, § 12940(a)) (Revise)			
2512. Limitation on Remedies—Same Decision (Revise)	California Employment Lawyers Association (CELA) by Barbara Figari Cowan Chair	We applaud the Council for amending the instruction to refers to "characteristics or combination of characteristics," to reflect the recognition of intersectionality claims upon the enactment of SB 1137. However, in reviewing the revised instruction, it became apparent that the first paragraph is inconsistent with the burden of proof articulated in *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203. Right now, there are two burdens of proof, "because of" *and* "substantial motivating reason" included in the first paragraph. The second paragraph and the rest of the instruction correctly use the "substantial motivating reason" standard, but the opening paragraph currently suggests a lower burden of proof. To avoid confusion for jurors and ensure consistency throughout, we recommend revising the first paragraph to align with the *Harris* standard by omitting the language as noted below: "[Name of plaintiff] claims that ~~[he/she/nonbinary pronoun] was [discharged/[other adverse employment action]] because~~ [his/her/nonbinary pronoun] [protected status characteristic or combination of characteristics, or action, e.g., race, gender, or age] was a substantial motivating reason for the decision, which is an unlawful [discriminatory/retaliatory] reason. [Name of defendant] claims that [name of	This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle.

Instruction(s)	Commenter	Comment	Committee Response
		plaintiff] [was discharged/[other adverse employment action]] because of [specify reason, e.g., plaintiff's poor job performance], which is a lawful reason." This revision ensures that the instruction uses a consistent and accurate standard throughout, avoids jury confusion, and faithfully reflects California law under *Harris.*	
		In addition, we would like to respectfully suggest that the instruction *keep* in language that provides examples, and question why the example of "e.g., race, gender, or age" is stricken. We propose that instead of striking this language, we add an example of an intersectional category as well as keep the current examples. An example that could be put in in, for example, is "Hispanic female."	The committee concluded that the information requested by the bracket is clear to users without the existing examples. The committee declines the commenter's invitation to add an example for intentionality, which may be construed by users to be limiting rather than illustrative.
	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
2521A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or	California Employment Lawyers Association (CELA) by Barbara Figari Cowan Chair	We recommend the proposed language on element four so that it is consistent with the phrasing used in the preceding elements. Specifically, it should reference "characteristic or protected characteristics" rather than "protected group." The proposed language would read as follows:	The committee appreciates CELA's interest in using consistent language in the instruction. To that end, the committee recommends revising element 2 to use

Instruction(s)	Commenter	Comment	Committee Response
Entity Defendant (Gov. Code, §§ 12923, 12940(j)) (Revise)		4. That a reasonable [describe member of protected group, **e.g., person with the same characteristic or protected characteristics]** in [name of plaintiff]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive. This change is important because the current reference to "group" creates confusion. The earlier elements clearly frame the claim in terms of a "characteristic or combination of characteristics." By shifting to "group," the instruction seems to introduce a different standard, as if the jury must identify a defined collective rather than focus on the plaintiff's protected characteristic(s). This inconsistency risks misleading jurors into thinking that harassment must be tied to membership in a larger group, instead of recognizing that harassment can occur based on an individual's particular combination of protected traits. Using the consistent phrasing "characteristic or protected characteristics" eliminates this ambiguity and ensures the jury evaluates the claim under the same framework throughout.	"based on," which is consistent with the introductory paragraph, rather than "because of." However, in context, element 4 does not make sense if the bracketed content asks users to refer to a characteristic or characteristics. The committee is not concerned about ambiguity or juror confusion because the bracketed content calls for information from users. The jury should not hear the phrase "protected group" because the phrase is a prompt for specific case information.
		In addition, in the proposed changes to the "Directions for Use," the paragraph beginning with "Modify element 2" discusses *discrimination* when the instruction is about *harassment*. The two instances where the term "discrimination" is used in these proposed changes needs to be replaced with "harassment."	The committee has made the suggested change to the Directions for Use.
	Orange County Bar Association	Agree	No response required.

Instruction(s)	Commenter	Comment	Committee Response
	by Mei Tsang, President		
2521B. Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j)) (Revise)	California Employment Lawyers Association (CELA) by Barbara Figari Cowan Chair	We strongly recommend revising the phrasing in element 5 to remove the words "because of." As currently drafted, the proposed instruction states: 5. That [name of plaintiff] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward **<u>others because of</u>** [e.g., women protected characteristic or combination of characteristics]; Including "because of" improperly suggests a causation burden that is inconsistent with the case law governing harassment claims. The standard is whether the plaintiff experienced a hostile, intimidating, offensive, oppressive, or abusive environment in connection with their protected characteristic(s), not whether they can prove that the environment was hostile "because of" a protected trait. Inserting "because of" risks misleading jurors into applying a higher burden of proof—closer to a discrimination standard—rather than the correct harassment standard. The inclusion of the "because of" language is also deeply disturbing in light of the fact that there is no explanation for its inclusion in any revised Directions for Use, nor is there any case which has held this to be the standard when proving harassment based upon conduct directed at others sharing the characteristic or group of protected characteristics as the plaintiff employee.	The committee recommends rephrasing element 5 to say "… offensive, oppressive, or abusive toward other [*describe protected group*]". The revised language eliminates the use of "because of." Based on CELA's comment (and its comment on CACI No. 2512, above), the committee will examine its FEHA instructions globally in a future release to consider if any additional rephrasing is necessary or appropriate. The committee also recommends refining the bracketed language to be consistent with element 4. The bracketed content does not ask users to refer to a characteristic or characteristics, which do does not make sense in the context of elements 4 and 5. The committee is not concerned about ambiguity or juror confusion because the bracketed content calls

Instruction(s)	Commenter	Comment	Committee Response
		The more accurate phrasing would be: 6. That [name of plaintiff] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward **other** [protected characteristic or combination of characteristics]. This formulation keeps the instruction in line with the statutory language and controlling precedent, while avoiding language that could improperly influence the jury's analysis.	for information from users. The jury should not hear the phrase "protected group" because the phrase is a prompt for specific case information.
	Orange County Bar Association by Mei Tsang, President	To conform the change in paragraph 5 with paragraph 4: Current: "That a reasonable [describe member of protected group] in [name of plaintiff]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;" Modification to Conform: "That a reasonable [describe member 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;"	The committee recommends refining the bracketed language in paragraph 5 to be consistent with element 4's existing language. The references to a protected groups are more consistent with the phrasing of these elements.
2521C. Work Environment Harassment—Sexual Favoritism— Essential Factual Elements—Employer or Entity Defendant (Gov. Code,	California Employment Lawyers Association (CELA) by Barbara Figari Cowan Chair	We recommend the proposed language on element four so that it is consistent with the phrasing used in the preceding elements. Specifically, it should reference "characteristic or protected characteristics" rather than "protected group." The proposed language would read as follows:	The committee appreciates CELA's interest in using consistent language in the instruction. However, in context, element 4 does not make sense if the bracketed content asks users to refer

Instruction(s)	Commenter	Comment	Committee Response
§§ 12923, 12940(j)) (Revise)		4. That a reasonable [describe member of protected group, **e.g., person with the same characteristic or protected characteristics]** in [name of plaintiff]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive. This change is important because the current reference to "group" creates confusion. The earlier elements clearly frame the claim in terms of a "characteristic or combination of characteristics." By shifting to "group," the instruction seems to introduce a different standard, as if the jury must identify a defined collective rather than focus on the plaintiff's protected characteristic(s). This inconsistency risks misleading jurors into thinking that harassment must be tied to membership in a larger group, instead of recognizing that harassment can occur based on an individual's particular combination of protected traits. Using the consistent phrasing "characteristic or protected characteristics" eliminates this ambiguity and ensures the jury evaluates the claim under the same framework throughout.	to a characteristic or characteristics. The committee is not concerned about ambiguity or juror confusion because the bracketed content calls for information from users. The jury should not hear the phrase "protected group" because the phrase is a prompt for specific case information.
	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
2522A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual	California Employment Lawyers Association (CELA) by Barbara Figari Cowan Chair	Including "because of" in element 3 improperly suggests a causation burden that is inconsistent with the case law governing harassment claims. The standard is whether the plaintiff experienced a hostile, intimidating, offensive, oppressive, or abusive environment in	The committee recommends using "based on" instead of the suggested "based upon" to conform the language to the

Instruction(s)	Commenter	Comment	Committee Response
Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j)) (Revise)		connection with their protected characteristic(s), not whether they can prove that the environment was hostile "because of" a protected trait. Inserting "because of" risks misleading jurors into applying a higher burden of proof—closer to a discrimination standard—rather than the correct harassment standard. The prior version of the instruction, and the corresponding verdict forms (VF-2506A, VF-2506B), asked jurors if the plaintiff was subjected to harassing conduct because he/she/nonbinary program was a protected status. The proposed jury instruction and verdict form improperly seeks to change the burden of proof as to this entire cause of action. The current proposed language is as follows: 3. That [name of plaintiff] was subjected to harassing conduct because **~~[he/she/nonbinary pronoun] was~~ of [his/her/nonbinary pronoun]** [protected **~~status, e.g., a woman~~ characteristic or combination of characteristics];** The inclusion of the "because of" language is also deeply disturbing in light of the fact that there is no explanation for its inclusion in any revised Directions for Use, nor is there any case which has held this to be the standard when proving harassment based upon conduct directed at others sharing the characteristic or group of protected characteristics as the plaintiff employee. The more accurate phrasing would be:	introductory paragraph and to be more conversational. The change addresses the concern raised. The committee also recommends that alternative language in the questions of the two related verdict forms.

Instruction(s)	Commenter	Comment	Committee Response
		3. That [name of plaintiff] was subjected to harassing conduct **based upon ~~of~~ [his/her/nonbinary pronoun]** [protected **~~status, e.g., a woman~~ characteristic or combination of characteristics];** This formulation keeps the instruction in line with the statutory language and controlling precedent, while avoiding language that could improperly influence the jury's analysis.	
		In addition, in the proposed changes to the "Directions for Use," the paragraph beginning with "Modify element 3" discusses *discrimination* when the instruction is about *harassment*. The two instances where the term "discrimination" is used in these proposed changes needs to be replaced with "harassment." In the same paragraph, the language of "because of" should be replaced with "based upon" for the reasons articulated above.	The committee has made the change suggested except it has used "based on" rather than "based upon" to be more conversational.
	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
2522B. Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j)) (Revise)	California Employment Lawyers Association (CELA) by Barbara Figari Cowan Chair	We proposed that elements 5 and 6 be modified to omit reference to groups. We propose the elements instead state as follows: 5. That a reasonable [***identify characteristic or combination of characteristics*** ~~describe member of protected group, e.g., woman~~] in [name of plaintiff]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;	The committee appreciates CELA's interest in using consistent language in the instruction. However, in context, elements 5 and 6 do not make sense if the bracketed content asks users to refer to a characteristic or characteristics. Using the

Instruction(s)	Commenter	Comment	Committee Response
		6. That [name of plaintiff] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [**identify characteristic or protected characteristic, e.g. women or Hispanic women** ~~e.g., women describe protected group~~]; This change is important because the current reference to "group" creates confusion. The earlier elements clearly frame the claim in terms of a "characteristic or combination of characteristics." By shifting to "group," the instruction seems to introduce a different standard, as if the jury must identify a defined collective rather than focus on the plaintiff's protected characteristic(s). This inconsistency risks misleading jurors into thinking that harassment must be tied to membership in a larger group, instead of recognizing that harassment can occur based on an individual's particular combination of protected traits. Using the consistent phrasing "characteristic or protected characteristics" eliminates this ambiguity and ensures the jury evaluates the claim under the same framework throughout.	example provided, "women" is not a characteristic. The committee is not concerned about ambiguity or juror confusion because the bracketed content calls for information from users. The jury should not hear the phrase "protected group" because the phrase is a prompt for specific case information.
	Orange County Bar Association by Mei Tsang, President	1. To conform with paragraph 5 of CACI 2521B, paragraph 6 of CACI 2522B should be changed. Proposed: "That [name of plaintiff] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [describe protected group]." Modification to Conform: "That [name of plaintiff] considered the work environment to be hostile,	The committee recommends refining the language of element 6 as was done in CACI No. 2521A, above. The committee does not recommend eliminating protected group from the bracketed language for the reasons stated above.

Instruction(s)	Commenter	Comment	Committee Response
		intimidating, offensive, oppressive, or abusive toward another/others because of that person's/their [protected characteristic or combination of characteristics]." 2. To conform paragraph 5 with the proposed change to paragraph 6, Current: "That a reasonable [describe member of protected group, e.g., woman] in [name of plaintiff]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;" Modification to Conform: "That a reasonable [describe member 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;"	
2522C. Work Environment Harassment—Sexual Favoritism— Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j)) (Revise)	California Employment Lawyers Association (CELA) by Barbara Figari Cowan Chair	This proposed change again uses the "group" language and also omits an example of what a protected group would look like, and we respectfully suggest that examples be kept in, as they assist the parties and the Courts in crafting final jury instructions for each particular case. We propose the following language: 5. That a reasonable [**identify characteristic or protected characteristic, e.g. woman or Hispanic woman]** 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;	The committee disagrees. Element 5 does not make sense if the bracketed content asks users to refer to a characteristic or characteristics. The committee is not concerned about ambiguity or juror confusion because the bracketed content calls for information from users. The jury should not hear the phrase "protected group" because the phrase is a prompt for specific case information. With respect to the example, the

Instruction(s)	Commenter	Comment	Committee Response
			committee concluded that the information requested by the bracket is clear to users without the existing examples. The committee declines the commenter's invitation to add an example for intersectionality, which may be construed by users to be limiting rather than illustrative.
	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
2527. Failure to Prevent Harassment, Discrimination, or Retaliation— Essential Factual Elements— Employer or Entity Defendant (Gov. Code, § 12940(k)) (Revise)	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
2528. Failure to Prevent Harassment by Nonemployee (Gov. Code, § 12940(j)) (Revise)	California Employment Lawyers Association (CELA) by Barbara Figari Cowan Chair	We also request that the use note be revised so that it refers to a plaintiff's "status" rather than "status position." The current draft states: Modify references to employment in elements 2 and 3 as necessary if the plaintiff's status position is other than an employee.	For consistency, the committee recommends keeping "status" instead of making the change to "position" that was circulated for comment.

Instruction(s)	Commenter	Comment	Committee Response
		The insertion of the word "position" is unnecessary and confusing. The FEHA provisions at issue (Gov. Code, § 12940(j)(1)) make clear that the statute applies based on an individual's "status" as an employee, applicant, unpaid intern, volunteer, or contract worker. The term "position" is not used in the statute and does not add clarity. In fact, in the employment context, "position" is commonly understood to mean job title or role, which could mislead jurors into thinking the instruction is limited to a particular job classification rather than to the broader category of "status" protected under the statute. The use note should therefore read: Modify references to employment in elements 2 and 3 as necessary if the plaintiff's status is other than an employee. This keeps the directions for use consistent with the statutory language and avoids unnecessary terminology that could be misconstrued.	
	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements (Revise)	California Employment Lawyers Association (CELA) by Barbara Figari Cowan Chair	We further recommend that the alternate language currently placed in the use note regarding "regarded as" disability claims be moved into the body of the instruction itself. The draft note presently provides:	This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle.

Instruction(s)	Commenter	Comment	Committee Response
		Modify elements 3 and 6 if the plaintiff was not actually disabled or had a history of disability, but alleges discrimination because the plaintiff was perceived to have a disability. (See 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].) This can be done with language in element 3 that the employer "treated [name of plaintiff] as if [he/she/nonbinary pronoun] …" and with language in element 6 "That [name of employer]'s belief that …" Leaving this guidance only in the use notes risks inconsistent application, because courts and practitioners often rely most heavily on the actual instruction text in preparing for trial. Courts need clear, concrete instruction, not just commentary. By embedding the alternate phrasing directly into the instruction as bracketed options, judges will have immediate, usable language to select when the claim arises under a "regarded as" theory. This approach also provides jurors with examples that help them understand how the claim operates in practice. The statutory provisions explicitly recognize "being regarded as" disabled as a basis for liability, and including it in the instruction text ensures that jurors are not left to guess or overlook this form of discrimination. Moving the alternate language into the instruction itself promotes accuracy, consistency, and fairness across cases.	
	Orange County Bar Association by Mei Tsang,	Agree	No response required.

Instruction(s)	Commenter	Comment	Committee Response
	President		
2547. Disability-Based Associational Discrimination—Essential Factual Elements (Revise)	California Employment Lawyers Association (CELA) by Barbara Figari Cowan Chair	Currently, the "directions for use" state that the instruction should be given if the plaintiff alleges discrimination based on association with a person who "has, or is perceived to have, a disability." But keeping this language in the notes risks it being overlooked or inconsistently applied. Courts need clear, jury-ready text in the actual instruction. A proposal is as follows: We suggest incorporating the language stating the "association with a person who has, or is perceived to have, a disability" option directly into element 3 as bracketed language so that judges have immediate, concrete options that reflect the statutory protections under Gov. Code § 12926(o). Jurors are also given a clear framework for analyzing the claim, avoiding unnecessary confusion or omission of a recognized type of liability under the FEHA.	This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle.
	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
2548. Disability Discrimination—Refusal to Make Reasonable Accommodation in Housing (Gov. Code, § 12927(c)(1)) (Revise)	California Employment Lawyers Association (CELA) by Barbara Figari Cowan Chair	For the reasons articulated above, the alternative language in the "directions for use" should be incorporated as actual alternative language in brackets in the actual instruction, so that there is no ambiguity as to what language to put in the instruction when those cases arise.	This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle.

Instruction(s)	Commenter	Comment	Committee Response
	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
2549. Disability Discrimination—Refusal to Permit Reasonable Modification to Housing Unit (Gov. Code, § 12927(c)(1)) (Revise)	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
VF-2500. Disparate Treatment (Gov. Code, § 12940(a)) (Revise)	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
VF-2501. Disparate Treatment—Affirmative Defense—Bona fide Occupational Qualification (Gov. Code, § 12940(a)) (Revise)	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
VF-2506A. Work Environment Harassment—Conduct Directed at Plaintiff—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j)) (Revise)	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
VF-2507A. Work Environment	Orange County Bar Association	Agree	No response required.

Instruction(s)	Commenter	Comment	Committee Response
Harassment—Conduct Directed at Plaintiff—Individual Defendant (Gov. Code, §§ 12923, 12940(j)) (Revise)	by Mei Tsang, President		
VF-2515. Limitation on Remedies—Same Decision (Revise)	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
2720. Affirmative Defense—Nonpayment of Overtime—Executive Exemption (Revise)	Orange County Bar Association by Mei Tsang, President	Typographical error in the citation. Proposed Citation: (*Rodriguez v. Parivar, Inc.* (2022) 83 Cal.App.5th 739, 753754 [299 Cal.Rptr.3d 719], internal citations omitted, original italics.) Citation Modified to Correct Typographical Error: (*Rodriguez v. Parivar, Inc.* (2022) 83 Cal.App.5th 739, **753-754** [299 Cal.Rptr.3d 719], internal citations omitted, original italics.)	The committee recommends using an en dash between the page numbers.
2721. Affirmative Defense—Nonpayment of Overtime—Administrative Exemption (Revise)	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
3060. Unruh Civil Rights Act—Essential Factual Elements (Civ. Code, §§ 51, 52) (Revise)	Orange County Bar Association by Mei Tsang, President	Agree	No response required.

Instruction(s)	Commenter	Comment	Committee Response
3061. Discrimination in Business Dealings—Essential Factual Elements (Civ. Code, § 51.5) (Revise)	California Employment Lawyers Association (CELA) by Barbara Figari Cowan Chair	We agree with the proposed changes to CACI 3060 and 3061 to reflect changes in the law that discrimination can be based on a combination of characteristics. However, we are concerned that in the first paragraph of the use note of 3061, the following language is added: "Civil Code section 51.5 requires that the discrimination be *on account of* the any protected Category characteristic listed or defined in section 51(b) or (e)." However, there is no reference to the substantial body of case law that holds that the characteristics are not limited to the specific characteristics listed in the statute. As the use note for CACI 3060 recognizes, "[t]he Act is not limited to the categories expressly mentioned in the statute. 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].)" In *Harris v. Capitol Growth Investors XIV,* 52 Cal.3d 1142, 1152 (1991) the California Supreme Court cited with approval, the case of *In re Cox* (1970) 3 Cal.3d stating, "we applied the Unruh Act to an exclusion of a patron of a business establishment for reasons not involving the specific categories listed in the Act, i.e., race, color, etc. The procedural posture of the case was unusual. A habeas corpus petitioner challenged his arrest and conviction under a municipal trespass ordinance for refusing to leave a shopping center after being directed to do so by its owner, contending in part that his conduct was protected by the Unruh Act. We held that a shopping center did not have the right to exclude the customer based only on his association	The committee does not recommend adding excerpts from *Harris*, *Cox* and *Koebke* because those cases were not decided under Civil Code 51.5, the subject of this instruction. CACI No. 3061's instructional text does contain the concept raised by including other actionable characteristic in the bracketed content and, as the commenter observes, the use note cross-refers to CACI No. 3060, which directly addresses other forms of arbitrary discrimination. To the extent CELA is recommending clarifying changes to the Directions for Use, the suggestion is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release.

Instruction(s)	Commenter	Comment	Committee Response
		with a young man "who wore long hair and dressed in an unconventional manner." (Id. at p. 210.) Despite the listing of specific types of discrimination in the statute, we concluded that the Unruh Act prohibited all "arbitrary discrimination by a business enterprise" and that the listing was "illustrative rather than restrictive" of the kinds of discrimination prohibited by the Act. (Id. at pp. 212, 216-217.)" [emphasis added] *See also, Koebke v. Bernardo Heights Country Club* 36 Cal.4th 824, 843 (2005) ("In addition to the particular forms of discrimination specifically outlawed by the Act (sex, race, color, etc.), courts have held the Act "prohibit[s] discrimination based on several classifications which are not specifically enumerated in the statute.") Civil Code 51.5(a) states, "[n]o business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics." However, the placement of this language in the use note without the accompanying case law that the list of characteristics is illustrative rather than restrictive could result in the arbitrary limiting of the protected characteristics when the jury is instructed in a particular trial. Thus, we suggest that	

Instruction(s)	Commenter	Comment	Committee Response
		the language of the use note to CACI 3060 cited above along with the citing of *Harris, Cox* and *Koebke* should be added to prevent any misapplications of the law.	
	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
VF-3030. Unruh Civil Rights Act (Civ. Code, §§ 51, 52(a)) (Revise)	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
VF-3031. Discrimination in Business Dealings (Civ. Code, §§ 51.5, 52(a)) (Revise)	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
4106A. Intentional or Fraudulent Breach of Fiduciary Duty by 4106A. Intentional or Fraudulent Breach of Fiduciary Duty by Attorney p. 140 — Essential Factual Elements (Revise and Renumber)	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
4106B. Negligent Breach of Fiduciary Duty by Attorney —	Orange County Bar Association by Mei Tsang, President	Agree	No response required.

Instruction(s)	Commenter	Comment	Committee Response
Essential Factual Elements (New)			
4302. Termination for Failure to Pay Rent—Essential Factual Elements (Revise)	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
4303. Sufficiency and Service of Notice of Termination for Failure to Pay Rent (Revise)	Orange County Bar Association by Mei Tsang, President	The OCBA agrees generally with this proposal, but proposes two modifications: (1) in the Sources and Authorities section there should be added a bullet point at the beginning for "Unlawful Detainer. Code of Civil Procedure section 1161"; and (2) the new citation in the Sources and Authorities section to City of Alameda v. Sheehan (2024) 105 Cal.App.5th 68, 72 should be amended to better summarize this holding so as to read: "As it is undisputed that corporations and other entities, like the City, can serve as landlords (citations omitted), requiring a three-day notice to name a natural person as payee in all circumstances unnecessarily restricts a landlord's ability to provide statutory notice to a tenant in default. It is also inconsistent with the language of the statute itself[.]" (City of Alameda v. Sheehan (2024) 105 Cal.App.5th 68, 80.)	The committee acknowledges OCBA's general agreement with the proposal. The committee declines to make the two modifications suggested because the Sources and Authorities already have a citation to subdivision (2) of section 1161, and because the proposed excerpt contains the express holding of the new case.
4320. Affirmative Defense—Implied Warranty of Habitability (Revise)	Orange County Bar Association by Mei Tsang, President	Agree	No response required.
4323. Affirmative Defense—Discriminatory Eviction (Unruh Act) (Revise)	Orange County Bar Association by Mei Tsang, President	Agree	No response required.

ITC CACI 25-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are verbatim unless indicated by an asterisk (*).

Instruction(s)	Commenter	Comment	Committee Response
4350. Breach of Implied Warranty of Habitability— Essential Factual Elements (New)	Orange County Bar Association by Mei Tsang, President	The OCBA agrees that this proposed new CACI be adopted, but also recommends that pending legislation at California AB 628 be reviewed and considered prior to final adoption since that bill adds amendments to Civil Code 1941.1	The suggestion is beyond the scope of the invitation to comment. The committee will consider Assembly Bill 628 if it is enacted.
All instructions in CACI 25-01	Superior Court of Los Angeles County by Stephanie Kuo	In response to the Judicial Council of California's ITC CACI 25-02, "Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (2026 ed.)," the Court agrees with the proposal and has no other comments.	No response required.