JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

CACI 22-02

Title
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions

Proposed Rules, Forms, Standards, or Statutes
Add and revise jury instructions and verdict forms

Proposed by
Advisory Committee on Civil Jury Instructions
Justice Martin J. Tangeman, Chair

Action Requested
Review and submit comments by September 9, 2022

Proposed Effective Date
November 18, 2022

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

Executive Summary and Origin

The Advisory Committee on Civil Jury Instructions seeks public comment on proposed additions and revisions to the Judicial Council of California Civil Jury Instructions (CACI). Under California Rules of Court, rule 10.58, the advisory committee is responsible for regularly reviewing case law and statutes affecting jury instructions and making recommendations to the Judicial Council for updating, revising, and adding topics to the council's civil jury instructions. On approval by the Judicial Council, all changes will be published in the 2023 edition of the official LexisNexis Matthew Bender CACI publication.

Attachments and Links

1. Table of Contents, Civil Jury Instructions (CACI 22-02), page 2
2. Proposed new and revised instructions and verdict forms, pages 3–55

CIVIL JURY INSTRUCTIONS (CACI 22-02)
TABLE OF CONTENTS

601. ~~Negligent Handling of Legal Matter~~Legal Malpractice—Causation

To recover damages from [*name of defendant*], [*name of plaintiff*] must prove that [he/she/*nonbinary pronoun*/it] would have obtained a better result if [*name of defendant*] had acted as a reasonably careful attorney. [*Name of plaintiff*] was not harmed by [*name of defendant*]'s conduct if the same harm would have occurred anyway without that conduct.

New September 2003; Revised June 2015, May 2020, November 2022

Directions for Use

In cases involving professionals other than attorneys, this instruction would need to be modified by inserting the type of the professional in place of "attorney." (See, e.g., *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 829−830 [60 Cal.Rptr.2d 780] [trial-within-a-trial method was applied to accountants].)

The plaintiff must prove that *but for* the attorney's negligent acts or omissions, the plaintiff would have obtained a more favorable ~~judgment or settlement in the underlying action~~ result. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, ~~1241~~1244 [135 Cal.Rptr.2d 629, 70 P.3d 1046].) The second sentence expresses this "but for" standard.

Sources and Authority

- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 749−750 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)

- "In the legal malpractice context, the elements of causation and damage are particularly closely linked." (*Namikas v. Miller* (2014) 225 Cal.App.4th 1574, 1582 [171 Cal.Rptr.3d 23].)

- "In a client's action against an attorney for legal malpractice, the client must prove, among other things, that the attorney's negligent acts or omissions caused the client to suffer some financial harm or loss. When the alleged malpractice occurred in the performance of transactional work (giving advice or preparing documents for a business transaction), must the client prove this causation element according to the 'but for' test, meaning that the harm or loss would not have occurred without the attorney's malpractice? The answer is yes." (*Viner, supra,* 30 Cal.4th at p. 1235.)

- "[The trial-within-a-trial method] is the most effective safeguard yet devised against speculative and conjectural claims in this era of ever expanding litigation. It is a standard of proof designed to limit damages to those actually *caused* by a professional's malfeasance." (*Mattco Forge Inc., supra,* 52 Cal.App.4th at p. 834.)

- " 'Damage to be subject to a proper award must be such as follows the act complained of *as a legal certainty* … .' Conversely, ' " '[t]he mere probability that a certain event would have happened, upon which a claim for damages is predicated, will not support the claim or furnish the foundation of an action for such damages.' " ' " (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 165−166 [149 Cal.Rptr.3d 422], original italics, footnote and internal citations omitted.)

- "One who establishes malpractice on the part of his or her attorney *in prosecuting a lawsuit* must also prove that careful management of it would have resulted in a favorable judgment and collection thereof, as there is no damage in the absence of these latter elements." (*DiPalma v. Seldman* (1994) 27 Cal.App.4th 1499, 1506−1507 [33 Cal.Rptr.2d 219], original italics.)

- "[W]hen an attorney breaches the duty of care by failing to advise the client of reasonably foreseeable risks of litigation before a complaint is filed, the client need not prove the subsequently filed litigation would have been successful to establish the causation element of his professional negligence claim. Rather, the client can demonstrate he 'would have obtained a more favorable result', by proving that, but for the attorney's negligence, he would not have pursued the litigation and thus would not have incurred the damages attributable to the foreseeable risks that the attorney negligently failed to disclose. In other words, to answer the 'crucial causation inquiry' articulated in *Viner*—'what would have happened if the defendant attorney had not been negligent'—the client may respond with evidence showing he would not have filed the litigation in the first place and he would have been better off as a result." (*Mireskandari v. Edwards Wildman Palmer LLP* (2022) 77 Cal.App.5th 247, 262 [-- Cal.Rptr. --], internal citations omitted.)

- " 'The element of collectibility requires a showing of the debtor's solvency. " ['W]here a claim is alleged to have been lost by an attorney's negligence, … to recover more than nominal damages it must be shown that it was a valid subsisting debt, *and that the debtor was solvent*.' [Citation.]" The loss of a collectible judgment "by definition means the lost opportunity to collect a money judgment from a solvent [defendant] and is certainly legally sufficient evidence of actual damage." ' " (*Wise v. DLA Piper LLP (US)* (2013) 220 Cal.App.4th 1180, 1190 [164 Cal.Rptr.3d 54], original italics, internal citations omitted.)

- "Collectibility is part of the plaintiff's case, and a component of the causation and damages showing, rather than an affirmative defense which the Attorney Defendants must demonstrate." (*Wise, supra,* 220 Cal.App.4th at p. 1191.)

- "Because of the legal malpractice, the original target is out of range; thus, the misperforming attorney must stand in and submit to being the target instead of the former target which the attorney negligently permitted to escape. This is the essence of the case-within-a-case doctrine." (*Arciniega v. Bank of San Bernardino* (1997) 52 Cal.App.4th 213, 231 [60 Cal.Rptr.2d 495].)

- "Where the attorney's negligence does not result in a total loss of the client's claim, the measure of damages is the difference between what was recovered and what would have been recovered but for the attorney's wrongful act or omission. [¶] Thus, in a legal malpractice action, if a reasonably competent attorney would have obtained a $3 million recovery for the client but the negligent attorney obtained only a $2 million recovery, the client's damage due to the attorney's negligence would be $1 million-the difference between what a competent attorney would have obtained and what

the negligent attorney obtained." (*Norton v. Superior Court* (1994) 24 Cal.App.4th 1750, 1758 [30 Cal.Rptr.2d 217].)

- "[A] plaintiff who alleges an inadequate settlement in the underlying action must prove that, if not for the malpractice, she would *certainly* have received more money in settlement or at trial. [¶] The requirement that a plaintiff need prove damages to 'a legal certainty' is difficult to meet in any case. It is particularly so in 'settle and sue' cases … ." (*Filbin, supra,* 211 Cal.App.4th at p. 166, original italics, internal citation omitted.)

- "[W]e conclude the applicable standard of proof for the elements of causation and damages in a 'settle and sue' legal malpractice action is the preponderance of the evidence standard. First, use of the preponderance of the evidence standard of proof is appropriate because it is the 'default standard of proof in civil cases' and use of a higher standard of proof 'occurs only when interests " 'more substantial than mere loss of money' " are at stake.' " (*Masellis v. Law Office of Leslie F. Jensen* (2020) 50 Cal.App.5th 1077, 1092 [264 Cal.Rptr.3d 621].)

- "In a legal malpractice action, causation is an issue of fact for the jury to decide except in those cases where reasonable minds cannot differ; in those cases, the trial court may decide the issue itself as a matter of law." (*Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 187 [164 Cal.Rptr.3d 309].)

- "For purposes of determining whether a more favorable outcome would have been obtained, the object of the exercise is not to ' "recreate what a particular judge or fact finder would have done. Rather, the [finder of fact's] task is to determine what a reasonable judge or fact finder would have done … ." ' " (*O'Shea v. Lindenberg* (2021) 64 Cal.App.5th 228, 236 [278 Cal.Rptr.3d 654].)

- "If the underlying issue originally was a factual question that would have gone to a tribunal rather than a judge, it is the jury who must decide what a reasonable tribunal would have done. The identity or expertise of the original trier of fact (i.e., a judge or an arbitrator or another type of adjudicator) does not alter the jury's responsibility in the legal malpractice trial-within-a-trial." (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 357–358 [89 Cal.Rptr.3d 710].)

Secondary Sources

1 Witkin, California Procedure (5th ed. 2008) Attorneys, §§ ~~319–322~~330–331, 333

Vapnek et al., California Practice Guide: Professional Responsibility, Ch. 6-E, *Professional Liability*, ¶ 6:322 (The Rutter Group)

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.~~10 et seq.~~30 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, § 76.50 et seq. (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.20 et seq. (Matthew Bender)

730. Emergency Vehicle Exemption (Veh. Code, § 21055)

[*Name of defendant*] claims that [*name of public employee*] was not required to comply with Vehicle Code section [*insert section number*] because [he/she/*nonbinary pronoun*] was operating an authorized emergency vehicle and was responding to an emergency at the time of the accident.

To establish that [*name of public employee*] was not required to comply with section [*insert section number*], [*name of defendant*] must prove all of the following:

1. **That [*name of public employee*] was operating an authorized emergency vehicle;**

2. **That [*name of public employee*] was responding to an emergency situation at the time of the accident; and**

3. **That [*name of public employee*] sounded a siren when reasonably necessary and displayed front red warning lights.**

If you decide that [*name of defendant*] proved all of these things, then you cannot find it negligent for a violation of section [*insert section number*]. However, even if you decide that [*name of defendant*] proved all of these things, you may find it negligent if [*name of public employee*] failed to operate [his/her/*nonbinary pronoun*] vehicle with reasonable care, taking into account the emergency situation.

New September 2003; Revised November 2022

Directions for Use

This instruction assumes that the public employer is the only defendant. Change the "it" pronouns in the final paragraph if there are other defendants in the case (e.g., if the public employee is also a defendant).

For a definition of "emergency," see CACI No. 731, *Definition of "Emergency."*

Sources and Authority

- Authorized Emergency Vehicle Exemption. Vehicle Code section 21055.
- "Authorized Emergency Vehicle" Defined. Vehicle Code section 165.
- Authorized Emergency Vehicle: Public Employee Immunity. Vehicle Code section 17004.
- Emergency Vehicle Drivers: Duty Regarding Public Safety. Vehicle Code section 21056
- "The purpose of the statute is to provide a 'clear and speedy pathway' for these municipal vehicles on their flights to emergencies in which the entire public are necessarily concerned." (*Peerless Laundry*

Services v. City of Los Angeles (1952) 109 Cal.App.2d 703, 707 [241 P.2d 269].)

- ~~Vehicle Code section 21056 provides: "Section 21055 does not relieve the driver of a vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor protect him from the consequences of an arbitrary exercise of the privileges granted in that section."~~

- "The effect of Vehicle Code sections 21055 and 21056 is: where the driver of an authorized emergency vehicle is engaged in a specified emergency function he may violate certain rules of the road, such as speed and right of way laws, if he activates his red light and where necessary his siren in order to alert other users of the road to the situation. In such circumstances the driver may not be held to be negligent solely upon the violation of specified rules of the road, but may be held to be negligent if he fails to exercise due regard for the safety of others under the circumstances. Where the driver of an emergency vehicle fails to activate his red light, and where necessary his siren, he is not exempt from the rules of the road even though he may be engaged in a proper emergency function, and negligence may be based upon the violation of the rules of the road." (*City of Sacramento v. Superior Court* (1982) 131 Cal.App.3d 395, 402–403 [182 Cal.Rptr. 443], internal citations omitted.)

- "Notwithstanding [Vehicle Code section 17004], a public entity is liable for injuries proximately caused by negligent acts or omissions in the operation of any motor vehicle by an employee of the public entity, acting within the scope of his or her employment." (*City of San Jose v. Superior Court* (1985) 166 Cal.App.3d 695, 698 [212 Cal.Rptr. 661], internal citations omitted.)

- "If the driver of an authorized emergency vehicle is responding to an emergency call and gives the prescribed warnings by red light and siren, a charge of negligence against him may not be predicated on his violation of the designated Vehicle Code sections; but if he does not give the warnings, the contrary is true; and in the event the charged negligence is premised on conduct without the scope of the exemption a common-law standard of care is applicable." (*Grant v. Petronella* (1975) 50 Cal.App.3d 281, 286 [123 Cal.Rptr. 399], internal citations omitted.)

- "Where the driver of an emergency vehicle responding to an emergency call does not give the warnings prescribed by section 21055, the legislative warning policy expressed in that section dictates the conclusion [that] the common-law standard of care governing his conduct does not include a consideration of the emergency circumstances attendant upon his response to an emergency call." (*Grant, supra,* 50 Cal.App.3d at p. 289, footnote omitted.)

- ~~The exemption created by section 21055 is an affirmative defense, and the defendant must prove compliance with the conditions.~~ "It will be remembered that the exemption provided by section 454 [from which section 21055] of the Vehicle Code [was derived] was available to appellant as an affirmative defense, and upon appellant rested the burden of proving the necessary compliance with its provisions." (*Washington v. City and County of San Francisco* (1954) 123 Cal.App.2d 235, 242 [266 P.2d 828].)

- "In short the statute exempts the employer of such a driver from liability for negligence attributable to his failure to comply with specified statutory provisions, but it does not in any manner purport to exempt the employer from liability due to negligence attributable to the driver's failure to maintain that standard of care imposed by the common law." (*Torres v. City of Los Angeles* (1962) 58 Cal.2d

35, 47 [22 Cal.Rptr. 866, 372 P.2d 906].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ ~~358,~~ 394–398

2 Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 11.140-11.144

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.55 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 246, *Emergency Vehicles*, § 246.13 (Matthew Bender)

1004. Obviously Unsafe Conditions

If an unsafe condition of the property is so obvious that a person could reasonably be expected to observe it, then the [owner/~~lessor/~~occupier/one who controls the property] does not have to warn others about the dangerous condition.

However, the [owner/~~lessor/~~occupier/one who controls the property] still must use reasonable care to protect against the risk of harm if it is foreseeable that the condition may cause injury to someone who because of necessity encounters the condition.

New September 2003; Revised May 2018, November 2022

Directions for Use

Give this instruction with CACI No. 1001, *Basic Duty of Care,* if it is alleged that the condition causing injury was obvious. The first paragraph addresses the lack of a duty to warn of an obviously unsafe condition. (*Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 447 [221 Cal.Rptr.3d 701].)

The second paragraph addresses when there may be a duty to take some remedial action. Landowners may have a duty to take precautions to protect against the risk of harm from an obviously unsafe condition, even if they do not have a duty to warn. (*Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 121–122 [273 Cal.Rptr. 457].)

Sources and Authority

- "Foreseeability of harm is typically absent when a dangerous condition is open and obvious. 'Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition.' In that situation, owners and possessors of land are entitled to assume others will 'perceive the obvious' and take action to avoid the dangerous condition." (*Jacobs, supra,* 14 Cal.App.5th at p. 447, internal citations omitted.)

- "[T]here may be situations 'in which an obvious hazard, for which no warning is necessary, nonetheless gives rise to a duty on a landowner's part to remedy the hazard because knowledge of the hazard is inadequate to prevent injury.' This is so when, for example, the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that, under the circumstances, a person might choose to encounter the danger." (*Johnson v. The Raytheon Co., Inc.* (2019) 33 Cal.App.5th 617, 632 [245 Cal.Rptr.3d 282], internal citation omitted.)

- "[I]t is foreseeable that even an obvious danger may cause injury, if the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger. The foreseeability of injury, in turn, when considered along with various other policy considerations such as the extent of the burden to

the defendant and consequences to the community of imposing a duty to remedy such danger may lead to the legal conclusion that the defendant 'owes a duty of due care "to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." ' " (*Osborn, supra,* 224 Cal.App.3d at p. 121, internal citation omitted.)

- "[W]hen a worker, whose work requires him or her to encounter a danger which is obvious or observable, is injured, '*[t]he jury [is] entitled to balance the [plaintiff's] necessity against the danger, even if it be assumed that it was an apparent one. This [is] a factual issue.* [Citations.]' In other words, under certain circumstances, an obvious or apparent risk of danger does not automatically absolve a defendant of liability for injury caused thereby." (*Osborn, supra,* 224 Cal.App.3d at p. 118, original italics, internal citations omitted.)

- "[T]he obvious nature of a danger is not, in and of itself, sufficient to establish that the owner of the premises on which the danger is located is not liable for injuries caused thereby, and that although obviousness of danger may negate any duty to warn, it does not necessarily negate the duty to remedy." (*Osborn, supra,* 224 Cal.App.3d at p. 119.)

- "The issue is whether there is any evidence from which a trier of fact could find that, as a practical necessity, [plaintiff] was foreseeably required to expose himself to the danger of falling into the empty pool." (*Jacobs, supra,* 14 Cal.App.5th at p. 447.)

- ~~In~~ "It is incorrect to instruct a jury categorically that a business owner cannot be held liable for an injury resulting from an obvious danger. There may be a duty to remedy a dangerous condition, even though there is no duty to warn thereof, if the condition is foreseeable. [¶] … The jury was free to consider whether [the business owner] was directly negligent in failing to correct any foreseeable, dangerous condition of the cables which may have contributed to the cause of [the plaintiff's] injuries." (*Felmlee v. Falcon Cable TV* (1995) 36 Cal.App.4th 1032, ~~1039~~ 1040 [43 Cal.Rptr.2d 158]~~, the court found that an instruction stating that the defendant "owed no duty to warn plaintiff of a danger which was obvious or which should have been observed in the exercise of ordinary care" was proper: "The jury was free to consider whether Falcon was directly negligent in failing to correct any foreseeable, dangerous condition of the cables which may have contributed to the cause of Felmlee's injuries." (*Id.* at p. 1040~~.)

- "[T]he 'obvious danger' exception to a landowner's ordinary duty of care is in reality a recharacterization of the former assumption of the risk doctrine, i.e., where the condition is so apparent that the plaintiff must have realized the danger involved, he assumes the risk of injury even if the defendant was negligent. ... [T]his type of assumption of the risk has now been merged into comparative negligence." (*Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658, 665 [20 Cal.Rptr.2d 148], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1233, 1267–1269

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.04[4] (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, §§ 381.20, 381.32 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.14 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.25 et seq. (Matthew Bender)

1007. Sidewalk Abutting Property

[An owner of/~~A lessee of~~/An occupier of/One who controls] property must avoid creating an unsafe condition on the surrounding public streets or sidewalks.

New September 2003; Revised November 2022

Sources and Authority

~~Generally, absent statutory authority to the contrary, a landowner is under no duty to maintain in a safe condition a public street or sidewalk abutting his property~~

- "It is the general rule that in the absence of a statute a landowner is under no duty to maintain in a safe condition a public street abutting upon his property." (*Sexton v. Brooks* (1952) 39 Cal.2d 153, 157 [245 P.2d 496]).

- ~~However,~~ "~~[a]~~An abutting owner has always had a duty to refrain from ~~affirmative conduct~~ doing an affirmative act which would render the sidewalk dangerous to the public." (*Selger v. Steven Brothers, Inc.* (1990) 222 Cal.App.3d 1585, 1592 [272 Cal.Rptr. 544], internal citations omitted.)

- ~~The occupier must maintain his or her land in a manner so as not to injure the users of an abutting street or sidewalk.~~ "[A] landowner may face liability for injury to another, incurred outside of the former's property (on an adjacent street), if the injury is found to be caused by a traffic obstruction in the form of shrubbery growing from the property." (*Swanberg v. O'Mectin* (1984) 157 Cal.App.3d 325, 330 [203 Cal.Rptr. 701]~~;~~.

- "The occupier of real property owes a duty to exercise ordinary care in the use and management of his or her land. The occupier must maintain such land in a manner as to not injure the users of an abutting street or sidewalk." (*Lompoc Unified School Dist. v. Superior Court* (1993) 20 Cal.App.4th 1688, 1693 [26 Cal.Rptr.2d 122], internal citations omitted.)

- "An ordinance requiring the abutting landowner to maintain the sidewalk would be construed to create a duty of care to third persons only if the ordinance clearly and unambiguously so provided." (*Selger, supra,* 222 Cal.App.3d at p. 1590, internal citations omitted.)

- "Persons who maintain walkways—whether public or private—are not required to maintain them in absolutely perfect condition. 'The duty of care imposed on a property owner, even one with actual notice, does not require the repair of minor defects.' The rule is no less applicable in a privately owned townhome development. Moreover, what constitutes a minor defect may be a question of law." (*Cadam v. Somerset Gardens Townhouse HOA* (2011) 200 Cal.App.4th 383, 388–389 [132 Cal.Rptr.3d 617], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1231–1234

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

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-B, *Landlord Liability For Injuries From Acts Of Others*, ¶ 6:48 et seq. (The Rutter Group)

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.03[4] (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.03 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.29 (Matthew Bender)

2525. Harassment—"Supervisor" Defined (Gov. Code, § 12926(t))

[*Name of alleged harasser***] was a supervisor of [***name of defendant***] if [he/she/***nonbinary pronoun***] had any of the following:**

a. The authority to hire, transfer, promote, assign, reward, discipline, [or] discharge [or] [*insert other employment action***] ~~[*name of plaintiff*]~~ other employees [or effectively to recommend any of these actions];**

b. The responsibility to act on ~~[*name of plaintiff*]'s~~ other employees' grievances [or effectively to recommend action on grievances]; or

c. The responsibility to direct ~~[*name of plaintiff*]'s~~ other employees' daily work activities.

[*Name of alleged harasser***]'s exercise of this authority or responsibility must not be merely routine or clerical, but must require the use of independent judgment.**

New September 2003; Revised June 2006, December 2015, November 2022

Directions for Use

The FEHA's definition of "supervisor" refers to the "authority" for factor (a) and the "responsibility" for factors (b) and (c). The difference, if any, between "authority" and "responsibility" as used in the statute is not clear. The FEHA's definition of "supervisor" also expressly refers to authority and responsibility over "other employees," not just the plaintiff. (Gov. Code, § 12926(t).) The statute further requires that "the exercise of that *authority* is not of a merely routine or clerical nature, but requires the use of independent judgment." (See Gov. Code, § 12926(t) [emphasis added].) However, at least one court has found the independent-judgment requirement to be applicable to the *responsibility* for factor (c). (See *Chapman v. Enos* (2004) 116 Cal.App.4th 920, 930−931 [10 Cal.Rptr.3d 852] [emphasis added].) Therefore, the last sentence of the instruction refers to "authority or responsibility."

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Supervisor" Defined. Government Code section 12926(t).
- "The FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. This is a negligence standard. Because the FEHA imposes this negligence standard only for harassment 'by an employee other than an agent or supervisor' by

implication the FEHA makes the employer strictly liable for harassment by a supervisor." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal. 4th 1026, 1040−1041 [6 Cal. Rptr. 3d 441, 79 P.3d 556], internal citations omitted.)

- "Unlike discrimination in hiring, the ultimate responsibility for which rests with the employer, sexual or other harassment perpetrated by a supervisor with the power to hire, fire and control the victimized employee's working conditions is a particularly personal form of the type of discrimination which the Legislature sought to proscribe when it enacted the FEHA." (*Matthews v. Superior Court* (1995) 34 Cal.App.4th 598, 605−606 [40 Cal.Rptr.2d 350].)

- "This section has been interpreted to mean that the employer is strictly liable for the harassing actions of its supervisors and agents, but that the employer is only liable for harassment by a coworker if the employer knew or should have known of the conduct and failed to take immediate corrective action. Thus, characterizing the employment status of the harasser is very significant." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1046 [58 Cal.Rptr.2d 122], internal citations omitted.)

- "The case and statutory authority set forth three clear rules. First, . . . a supervisor who personally engages in sexually harassing conduct is personally liable under the FEHA. Second, . . . if the supervisor participates in the sexual harassment or substantially assists or encourages continued harassment, the supervisor is personally liable under the FEHA as an aider and abettor of the harasser. Third, under the FEHA, the employer is vicariously and strictly liable for sexual harassment by a supervisor." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1327 [58 Cal.Rptr.2d 308].)

- "[W]hile an employer's liability under the [FEHA] for an act of sexual harassment committed by a supervisor or agent is broader than the liability created by the common law principle of respondeat superior, respondeat superior principles are nonetheless relevant in determining liability when, as here, the sexual harassment occurred away from the workplace and not during work hours." (*Doe, supra,* 50 Cal.App.4th at pp. 1048–1049.)

- "The FEHA does not define 'agent.' Therefore, it is appropriate to consider general principles of agency law. An agent is one who represents a principal in dealings with third persons. An agent is a person authorized by the principal to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal. A supervising employee is an agent of the employer." (*Fiol, supra,* 50 Cal.App.4th at p. 1328, internal citations omitted.)

- "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.)

- "[W]hile full accountability and responsibility are certainly indicia of supervisory power, they are not *required* elements of … the FEHA definition of supervisor. Indeed, many supervisors with responsibility to direct others using their independent judgment, and whose supervision of employees is not merely routine or clerical, would not meet these additional criteria though they would otherwise be within the ambit of the FEHA supervisor definition." (*Chapman, supra,* 116 Cal.App.4th at p. 930, footnote omitted.)

- "Defendants take the position that the court's modified instruction is, nonetheless, accurate because the phrase 'responsibility to direct' is the functional equivalent of being 'fully accountable and responsible for the performance and work product of the employees. …' In this, they rely on the dictionary definition of 'responsible' as 'marked by accountability.' But as it relates to the issue before us, this definition is unhelpful for two reasons. First, one can be accountable for one's own actions without being accountable for those of others. Second, the argument appears to ignore the plain language of the statute which *itself* defines the circumstances under which the exercise of the responsibility to direct will be considered supervisory, i.e., 'if … [it] is not of a merely routine or clerical nature, but requires the use of independent judgment.' " (*Chapman, supra,* 116 Cal.App.4th at pp. 930−931.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-A, *Sources Of Law Prohibiting Harassment*, ¶ 10:17 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-D, *Employer Liability For Workplace Harassment*, ¶¶ 10:308, 10:310, 10:315–10:317, 10:321, 10:322 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-E, *Harasser's Individual Liability*, ¶ 10:499 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual and other Harassment, § 3.21

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § ~~41.81~~41.80 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.20, 115.36, 115.54 (Matthew Bender)

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

2760. Rest Break Violations—Essential Factual Elements (Lab. Code, § 226.7)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her/***nonbinary pronoun***] pay because [***name of defendant***] did not authorize and permit one or more paid rest breaks as required by law. To establish a rest break violation, [***name of plaintiff***] must prove both of the following:**

1. **That [***name of plaintiff***] worked for [***name of defendant***] on one or more workdays for at least three and one-half hours; and**

2. **That [***name of defendant***] did not authorize and permit [***name of plaintiff***] to take one or more 10-minute rest breaks to which [***name of plaintiff***] was entitled.**

An employer "authorizes and permits" a rest break only when it both relieves the employee of all work duties and relinquishes control over how the employee spends time during each 10-minute rest break. This includes not requiring employees to remain on-call or on-site during rest breaks. An employer does not, however, have an obligation to keep records of employee rest breaks or to ensure that an employee takes each rest break.

An employee is entitled to a paid 10-minute rest break during every four-hour work period[. / , or major fraction thereof.] [However, an employee is not entitled to a rest break if the total daily work time is less than three and one-half hours.] This means that over the course of a workday [*name of plaintiff***] was due [***specify which rest breaks are at issue, e.g., a paid 10-minute rest break after working longer than three and one-half hours and a second paid 10-minute rest break after working more than six hours but no more than ten hours***]. [Rest breaks must be scheduled, if practical under the circumstances, in the middle of each four-hour work period. [***Specify any additional timing requirement(s) of the rest breaks at issue if delay is at issue.***]]**

"Workday" means any consecutive 24-hour period beginning at the same time each calendar day.

[Rest breaks, which are paid, and meal breaks, which are unpaid, have different requirements. You should consider claims for rest break violations separately from claims for meal break violations. A rest break cannot be combined with a meal break or with another 10-minute rest break. For example, providing an unpaid meal break does not satisfy the employer's obligation to authorize and permit a paid 10-minute rest break.]

New November 2022

Directions for Use

This instruction is intended for use by nonexempt employees subject to Section 12(C) of Industrial Welfare Commission wage orders 1-2001 through 11-2001, 13-2001 through 15-2001, and 17-2001. Other Wage Orders contain exceptions to the common rule. Different rest period rules apply to certain employees of emergency ambulance providers; do not give this instruction in a case involving those employees. (See Lab. Code, §§ 880–890, added by initiative, Gen. Elec. (Nov. 6, 2018), commonly

known as Prop. 11.) Different on-call rest period rules apply to security officers employed in the security services industry. (See Lab. Code, § 226.7(f).) This instruction should be modified in a case involving security officers.

Element 1 states the minimum shift length for a rest break. Depending on the length of the shift, multiple rest breaks could be at issue. Element 1 can be modified to cover longer shifts and multiple rest breaks.

Specify in the third paragraph which breaks the plaintiff claims to have missed if there is uniformity in that allegation. Rest break claims can also involve noncompliant timing or scheduling. If so, specify the noncompliant timing or scheduling issue in the third paragraph. Rest breaks are based on "the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof." (See, e.g., Cal. Code Regs., tit. 8, § 11010, subd. 12(A).) The wage orders' language means that "[e]mployees are entitled to 10 minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1029 [139 Cal.Rptr.3d 315, 273 P.3d 513].) Include the bracketed phrase "or major fraction thereof" in the third paragraph only if it will assist the jury in understanding the scheduling of rest breaks. "Though not defined in the wage order, a 'major fraction' long has been understood—legally, mathematically, and linguistically—to mean a fraction greater than one-half." (*Brinker Restaurant Corp., supra,* 53 Cal.4th at p. 1028.)

The definition of "workday" may be omitted if it is included in other instructions.

Give the optional final paragraph only if both rest breaks and meal breaks are at issue in the case.

The jury must also decide how much pay is owed for any rest break violations. (See CACI No. 2761, *Rest Break Violations—Pay Owed*.)

Sources and Authority

- Right of Action for Missed Meal and Rest and Recovery Periods. Labor Code section 226.7.
- "Workday" Defined. Labor Code section 500.
- Rest Periods. Cal. Code Regs., tit. 8, § 11010 et seq., subd. 12.
- "An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not—if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required—it has violated the wage order and is liable. No issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline to take it." (*Brinker Rest. Corp., supra,* 53 Cal. 4th at p. 1033.)
- "What we conclude is that state law prohibits on-duty and on-call rest periods. During required rest periods, employers must relieve their employees of all duties and relinquish any control over how employees spend their break time." (*Augustus v. ABM Security Services, Inc.* (2016) 2

Cal.5th 257, 260 [211 Cal.Rptr.3d 634, 385 P.3d 823], abrogated in part by Lab. Code, § 226.7(f)(5).)

- "[O]ne cannot square the practice of compelling employees to remain at the ready, tethered by time and policy to particular locations or communications devices, with the requirement to relieve employees of all work duties and employer control during 10-minute rest periods." (*Augustus, supra,* 2 Cal.5th at p. 269, abrogated in part by Lab. Code, § 226.7(f)(5).)

- "Although section 12(A) of Wage Order 1–2001 does not describe the considerations relevant to such a justification, we conclude that a departure from the preferred schedule is permissible only when the departure (1) will not unduly affect employee welfare and (2) is tailored to alleviate a material burden that would be imposed on the employer by implementing the preferred schedule." (*Rodriguez v. E.M.E., Inc.* (2016) 246 Cal.App.4th 1027, 1040 [201 Cal.Rptr.3d 337].)

- "[W]e hold that the Court of Appeal erred in construing section 226.7 as a penalty and applying a one-year statute of limitations. The statute's plain language, the administrative and legislative history, and the compensatory purpose of the remedy compel the conclusion that the 'additional hour of pay' is a premium wage intended to compensate employees, not a penalty." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1114 [56 Cal.Rptr.3d 880, 155 P.3d 284], internal citation omitted.)

Secondary Sources

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

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

1 Wilcox, California Employment Law, Ch. 3, *Determining Hours Worked*, § 3.01 (Matthew Bender)

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

Draft—Not Approved by Judicial Council

2761. Rest Break Violations—Pay Owed

To recover pay for a rest break violation, [*name of plaintiff*] must prove the number of workdays during which [*name of defendant*] did not authorize and permit at least one rest break to which [*name of plaintiff*] was entitled. For each workday that [*name of plaintiff*] has proved one or more rest break violations, [*name of defendant*] must pay one additional hour of pay for the workday at [*name of plaintiff*]'s regular rate of pay.

"Workday" means any consecutive 24-hour period beginning at the same time each calendar day.

The "regular rate of pay" for [*name of plaintiff*] from [*insert beginning date*] to [*insert ending date*] was [*insert applicable formula*]. [*Repeat as necessary for date ranges with different regular rates of pay*.] Multiply the regular rate of pay by the number of workdays that [*name of plaintiff*] has proved one or more rest break violations.

[Rest breaks, which are paid, and meal breaks, which are unpaid, have different requirements. You should consider claims for rest break violations separately from claims for meal break violations. A rest break cannot be combined with a meal break or with another 10-minute rest break. For example, providing an unpaid meal break does not satisfy the employer's obligation to authorize and permit a paid 10-minute rest break.]

New November 2022

Directions for Use

Give this instruction after CACI No. 2760, *Rest Break Violations—Essential Factual Elements*.

Regular rate of pay includes the employee's base hourly rate of pay and all other forms of non-discretionary compensation earned during the same pay period, including for example non-discretionary bonuses, commissions, and shift differentials. (See *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 878 [280 Cal.Rptr.3d 783, 489 P.3d 1166].) The regular rate of pay may be different over different periods of time. The court must determine the method for calculating plaintiff's regular rate of pay. If different regular rates of pay are at issue, define the plaintiff's regular rate of pay for all relevant date ranges.

The definitions of "workday" and "regular rate of pay" may be omitted if they are included in other instructions.

Give the optional final paragraph only if both rest breaks and meal breaks are at issue in the case.

Sources and Authority

- Right of Action for Missed Meal and Rest and Recovery Periods. Labor Code section 226.7.
- "Workday" Defined. Labor Code section 500.

- Rest Periods. Cal. Code Regs., tit. 8, § 11010 et seq., subd. 12.

- "Although section 12(A) of Wage Order 1–2001 does not describe the considerations relevant to such a justification, we conclude that a departure from the preferred schedule is permissible only when the departure (1) will not unduly affect employee welfare and (2) is tailored to alleviate a material burden that would be imposed on the employer by implementing the preferred schedule." (*Rodriguez v. E.M.E., Inc.* (2016) 246 Cal.App.4th 1027, 1040 [201 Cal.Rptr.3d 337].)

- "[W]e hold that the term 'regular rate of compensation' in section 226.7(c) has the same meaning as 'regular rate of pay' in section 510(a) and encompasses not only hourly wages but all nondiscretionary payments for work performed by the employee. This interpretation of section 226.7(c) comports with the remedial purpose of the Labor Code and wage orders and with our general guidance that the 'state's labor laws are to be liberally construed in favor of worker protection.' " (*Ferra, supra,* 11 Cal.5th at p. 878.)

- "[W]e hold that the Court of Appeal erred in construing section 226.7 as a penalty and applying a one-year statute of limitations. The statute's plain language, the administrative and legislative history, and the compensatory purpose of the remedy compel the conclusion that the 'additional hour of pay' is a premium wage intended to compensate employees, not a penalty." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1114 [56 Cal.Rptr.3d 880, 155 P.3d 284], internal citation omitted.)

Secondary Sources

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

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

1 Wilcox, California Employment Law, Ch. 3, *Determining Hours Worked*, § 3.01 (Matthew Bender)

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

2765A. Meal Break Violations—Essential Factual Elements (Lab. Code, §§ 226.7, 512)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her/***nonbinary pronoun***] pay because [***name of defendant***] did not provide one or more meal breaks as required by law. To establish a meal break violation, [***name of plaintiff***] must prove both of the following:**

1. **That [***name of plaintiff***] worked for [***name of defendant***] for one or more workdays for a period lasting longer than five hours; and**

2. **That [***name of defendant***] did not provide [***name of plaintiff***] with the opportunity to take [a/an] [timely] uninterrupted meal break of at least 30 minutes [for each five-hour period worked] that complies with the law as described below.**

The law requires the employer to provide meal breaks at specified times during a workday. [*Specify any scheduling requirement(s) of the meal breaks at issue if delay or interruption is at issue.***] In this case, [***name of plaintiff***] was entitled to a 30-minute unpaid meal break for each period of work lasting longer than five hours. This means that over the course of a workday, [***name of plaintiff***] was due [***specify which meal breaks are at issue, e.g., a first meal break that starts after no more than five hours of work and a second meal break to start after no more than ten hours of work***.]**

A properly scheduled meal break complies with the law if the employer does all of the following:

i. **provides a reasonable opportunity to take uninterrupted 30-minute meal breaks;**

ii. **does not impede the employee from taking 30-minute meal breaks;**

iii. **does not discourage the employee from taking 30-minute meal breaks;**

iv. **relieves the employee of all duties during 30-minute meal breaks; and**

v. **relinquishes control over the employee's activities during 30-minute meal breaks, including allowing the employee to leave the premises.**

The law, however, does not require an employer to ensure that an employee takes a meal break or to ensure that an employee does no work during a meal break.

"Workday" means any consecutive 24-hour period beginning at the same time each calendar day.

[Meal breaks, which are unpaid, and rest breaks, which are paid, have different requirements. You should consider claims for meal break violations separately from claims for rest break violations. For example, providing an unpaid meal break does not satisfy the employer's obligation to provide an employee with a paid 10-minute rest break.]

New November 2022

Directions for Use

This instruction assumes a nonexempt employee who is entitled to one or more meal breaks. Depending on the length of the shift, multiple meal breaks could be at issue. If the case involves allegedly untimely meal breaks or more than one meal break, select either or both of the bracketed options in element 2.

Specify the meal breaks at issue and any scheduling requirements in the second paragraph. Do not give this instruction for any meal break claims involving the rebuttable presumption of a violation based on an employer's records. (See CACI No. 2765B, *Meal Break Violations—Employer Records*.)

Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code and a series of 18 wage orders, adopted by the Industrial Welfare Commission. (See *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 838 [182 Cal.Rptr.3d 124, 340 P.3d 355].) Different meal period rules apply to certain employees of emergency ambulance providers; do not give this instruction in a case involving those employees. (See Lab. Code, §§ 880–890, added by initiative, Gen. Elec. (Nov. 6, 2018), commonly known as Prop. 11.) Other exceptions to the meal period rules exist, which may require modifying this instruction. For example, persons employed in the motion picture and broadcasting industries are entitled to a meal break after six hours of work. (See Lab. Code, § 512(d); Wage Order No. 12-2001.) Other exceptions to the meal period rules include: most instances where the Industrial Welfare Commission authorized adoption of a working condition order permitting a meal period to commence after six hours of work; certain commercial drivers; certain workers in the wholesale baking industry; and workers covered by collective bargaining agreements that meet specified requirements. (Lab. Code, § 512(b)–(e).)

The Labor Code and the wage orders exempt certain employees from receiving premium pay for meal period violations (for example, executives). The assertion of an exemption from wage and hour laws is an affirmative defense, which presents a mixed question of law and fact. (See *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2].)

The definition of "workday" may be omitted if it is included in other instructions.

Give the optional final paragraph only if both meal breaks and rest breaks are at issue in the case.

The jury must also decide how much pay is owed for any meal break violations. (See CACI No. 2766, *Meal Break Violations—Pay Owed*.)

Sources and Authority

- Right of Action for Meal and Rest and Recovery Period Violations. Labor Code section 226.7.
- Meal Periods. Labor Code section 512.
- Meal Periods. Cal. Code Regs., tit. 8, § 11010 et seq., subd. 11.
- Employer Duty to Keep Time Records. Cal. Code Regs., tit. 8, §§ 11010–11030, 11060–11110,

11150, ¶ 11(C), 11040–11050 & 11130–11140 ¶ 11(A), § 11120, ¶ 11(B), & § 11160, ¶ 10(D).

- "Workday" Defined. Labor Code section 500.

- "An employer's duty with respect to meal breaks under both section 512, subdivision (a) and Wage Order No. 5 is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. What will suffice may vary from industry to industry, and we cannot in the context of this class certification proceeding delineate the full range of approaches that in each instance might be sufficient to satisfy the law." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040 [139 Cal.Rptr.3d 315, 273 P.3d 513].)

    - "[U]nder the relevant statute and wage order, an employee becomes entitled to premium pay for missed or noncompliant meal and rest breaks precisely because she was required to work when she should have been relieved of duty: required to work too long into a shift without a meal break; required in whole or part to work through a break; or, as was the case here, required to remain on duty without an appropriate agreement in place authorizing on-duty meal breaks." (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 106–107 [-- Cal.Rptr.3d --, 509 P.3d 956].)

- "Accordingly, we conclude that Wage Order No. 5 imposes no meal timing requirements beyond those in section 512. Under the wage order, as under the statute, an employer's obligation is to provide a first meal period after no more than five hours of work and a second meal period after no more than 10 hours of work." (*Brinker Restaurant Corp., supra,* 53 Cal.4th at p. 1049.)

- "An employee who remains on duty during lunch is providing the employer services; so too the employee who works without relief past the point when permission to stop to eat or rest was legally required. Section 226.7 reflects a determination that work in such circumstances is worth more—or should cost the employer more—than other work, and so requires payment of a premium." (*Naranjo, supra,* 13 Cal.5th at p. 107.)

Secondary Sources

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

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

1 Wilcox, California Employment Law, Ch. 3, *Determining Hours Worked*, § 3.01 (Matthew Bender)

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

2765B. Meal Break Violations—Rebuttable Presumption—Employer Records

An employer must keep accurate records of the start and end times of each meal break. [*Specify noncompliance in records that gives rise to rebuttable presumption of meal break violation, e.g., missing time records, records showing missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday may prove a meal break violation.***]**

If you decide that [*name of plaintiff***] has proved that [[***name of defendant***] did not keep accurate records of compliant meal breaks/[***name of defendant***]'s records show [missed/ [,/or] shortened/ [,/or] delayed] meal breaks], then your decision on [***name of plaintiff***]'s meal break claim must be for [***name of plaintiff***] unless [***name of defendant***] proves all of the following:**

1. **That [***name of defendant***] provided [***name of plaintiff***] a reasonable opportunity to take uninterrupted 30-minute meal breaks;**

2. **That [***name of defendant***] did not impede [***name of plaintiff***] from taking 30-minute meal breaks;**

3. **That [***name of defendant***] did not discourage [***name of plaintiff***] from taking 30-minute meal breaks;**

4. **That [***name of defendant***] relieved [***name of plaintiff***] of all duties during 30-minute meal breaks; and**

5. **That [***name of defendant***] relinquished control over [***name of plaintiff***]'s activities during 30-minute meal breaks[, including allowing [him/her/***nonbinary pronoun***] to leave the premises].**

If you decide that [*name of defendant***] has proved all of the above for each meal break, then there have been no meal break violations and your decision must be for [***name of defendant***].**

However, if you decide that [*name of defendant***] has not proved all of the above for each meal break, then you must still decide how many workdays [***name of defendant***] did not prove all of the above.**

[*Name of defendant***] must pay one additional hour of pay at [***name of plaintiff***]'s regular rate of pay for each workday that [***name of defendant***] did not prove all of the above.**

"Workday" means any consecutive 24-hour period beginning at the same time each calendar day.

The "regular rate of pay" for [*name of plaintiff***] from [***insert beginning date***] to [***insert ending date***] was [***insert applicable formula***]. [***Repeat as necessary for date ranges with different regular rates of pay***.] Multiply the regular rate of pay by the number of workdays that [***name of defendant***] did not prove all of the above.]**

[Meal breaks, which are unpaid, and rest breaks, which are paid, have different requirements. You should consider claims for meal break violations separately from claims for rest break violations.

For example, providing an unpaid meal break does not satisfy the employer's obligation to provide an employee with a paid 10-minute rest break.]

New November 2022

Directions for Use

Employer records showing noncompliant meal breaks raise a rebuttable presumption of a meal break violation. (See *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 61 [275 Cal.Rptr.3d 422, 481 P.3d 661] ["time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations"].)

Regular rate of pay includes the employee's base hourly rate of pay and all other forms of non-discretionary compensation earned during the same pay period, including for example non-discretionary bonuses, commissions, and shift differentials. (See *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 878 [280 Cal.Rptr.3d 783, 489 P.3d 1166].) The regular rate of pay may be different over different periods of time. The court must determine the method for calculating plaintiff's regular rate of pay. If different regular rates of pay are at issue, define the plaintiff's regular rate of pay for all relevant date ranges.

The definitions of "workday" and "regular rate of pay" may be omitted if they are included in other instructions.

Give the optional final paragraph only if both meal breaks and rest breaks are at issue in the case.

Sources and Authority

- Right of Action for Missed Meal and Rest and Recovery Periods. Labor Code section 226.7.
- Meal Periods. Labor Code section 512.
- Meal Periods. Cal. Code Regs., tit. 8, § 11010 et seq., subd. 11.
- Employer Duty to Keep Time Records. Cal. Code Regs., tit. 8, §§ 11010–11030, 11060–11110, 11150, ¶ 11(C), 11040–11050 & 11130–11140 ¶ 11(A), § 11120, ¶ 11(B), & § 11160, ¶ 10(D).
- "[W]e hold that time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations, including at the summary judgment stage." (*Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 61 [275 Cal.Rptr.3d 422, 481 P.3d 661].)
- "The practice of rounding time punches for meal periods is inconsistent with the purpose of the Labor Code provisions and the IWC wage order. The text of Labor Code section 512 and Wage Order No. 4 sets precise time requirements for meal periods. Each meal period must be 'not less than 30 minutes,' and no employee shall work 'more than five hours per day' or 'more than 10 hours per day' without being provided with a meal period. These provisions speak directly to the calculation of time for meal period purposes. [¶] The precision of the time requirements set out in

Labor Code section 512 and Wage Order No. 4—'not less than 30 minutes' and 'five hours per day' or '10 hours per day'—is at odds with the imprecise calculations that rounding involves. The regulatory scheme that encompasses the meal period provisions is concerned with small amounts of time. For example, we have 'requir[ed] strict adherence to' the Labor Code's requirement that employees receive two daily 10-minute rest periods and 'scrupulously guarded against encroachments on' these periods. The same vigilance is warranted here. Given the relatively short length of a 30-minute meal period, the potential incursion that might result from rounding is significant." (*Donohue, supra,* 11 Cal.5th at p. 68.)

- "Because time records are required to be accurate, it makes sense to apply a rebuttable presumption of liability when records show noncompliant meal periods. If the records are accurate, then the records reflect an employer's true liability; applying the presumption would not adversely affect an employer that has complied with meal period requirements and has maintained accurate records. If the records are incomplete or inaccurate—for example, the records do not clearly indicate whether the employee chose to work during meal periods despite bona fide relief from duty—then the employer can offer evidence to rebut the presumption. It is appropriate to place the burden on the employer to plead and prove, as an affirmative defense, that it genuinely relieved employees from duty during meal periods. 'To place the burden elsewhere would offer an employer an incentive to avoid its recording duty and a potential windfall from the failure to record meal periods.' " (*Donohue, supra,* 11 Cal.5th at p. 76, internal citations omitted.)

- "[Defendant] misunderstands how the rebuttable presumption operates at the summary judgment stage. Applying the presumption does not mean that time records showing missed, short, or delayed meal periods result in 'automatic liability' for employers. If time records show missed, short, or delayed meal periods with no indication of proper compensation, then a rebuttable presumption arises. Employers can rebut the presumption by presenting evidence that employees were compensated for noncompliant meal periods or that they had in fact been provided compliant meal periods during which they chose to work. 'Representative testimony, surveys, and statistical analysis,' along with other types of evidence, 'are available as tools to render manageable determinations of the extent of liability.' Altogether, this evidence presented at summary judgment may reveal that there are no triable issues of material fact. The rebuttable presumption does not require employers to police meal periods. Instead, it requires employers to give employees a mechanism for recording their meal periods and to ensure that employees use the mechanism properly. (*Donohue, supra,* 11 Cal.5th at 77, internal citation omitted.)

- "[W]e hold that the term 'regular rate of compensation' in section 226.7(c) has the same meaning as 'regular rate of pay' in section 510(a) and encompasses not only hourly wages but all nondiscretionary payments for work performed by the employee. This interpretation of section 226.7(c) comports with the remedial purpose of the Labor Code and wage orders and with our general guidance that the 'state's labor laws are to be liberally construed in favor of worker protection.' " (*Ferra, supra,* 11 Cal.5th at p. 878.)

- "[W]e construe the Legislature's use of the disjunctive as permitting an additional hour of pay for each work day that either type of break period is violated. We agree with the district court in *Marlo* [*v. United Parcel Service, Inc.*] that allowing an employee to recover one additional hour of pay for each type of violation per work day is not contrary to the 'one additional hour' and 'per

> work day' wording in subdivision (b). [¶] We further agree with *Marlo* that construing section 226.7, subdivision (b), as permitting one premium payment for each type of break violation is in accordance with and furthers the public policy behind the meal and rest break mandates." (*United Parcel Service Wage & Hour Cases* (2011) 196 Cal.App.4th 57, 69 [125 Cal.Rptr.3d 384].)

Secondary Sources

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

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

1 Wilcox, California Employment Law, Ch. 3, *Determining Hours Worked*, § 3.01 (Matthew Bender)

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

2766. Meal Break Violations—Pay Owed

To recover pay for a meal break violation, [*name of plaintiff*] must prove the number of workdays during which [*name of defendant*] did not provide the opportunity for one or more uninterrupted 30-minute meal breaks as required by law. For each workday that [*name of plaintiff*] has proved one or more meal break violations, [*name of defendant*] must pay one additional hour of pay for the workday at [*name of plaintiff*]'s regular rate of pay.

"Workday" means any consecutive 24-hour period beginning at the same time each calendar day.

The "regular rate of pay" for [*name of plaintiff*] from [*insert beginning date*] to [*insert ending date*] was [*insert applicable formula*]. [*Repeat as necessary for date ranges with different regular rates of pay*.] Multiply the regular rate of pay by the number of workdays that [*name of plaintiff*] has proved one or more meal break violations.

New November 2022

Directions for Use

Give this instruction after CACI No. 2765A, *Meal Break Violations—Essential Factual Elements*. Do not give this instruction for any meal break claims involving the rebuttable presumption of a violation based on an employer's records. (See CACI No. 2765B, *Meal Breaks Not Provided—Rebuttable Presumption—Employer Records*.)

Regular rate of pay includes the employee's base hourly rate of pay and all other forms of non-discretionary compensation earned during the same pay period, including for example non-discretionary bonuses, commissions, and shift differentials. (See *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 878 [280 Cal.Rptr.3d 783, 489 P.3d 1166].) The regular rate of pay may be different over different periods of time. The court must determine the method for calculating plaintiff's regular rate of pay. If different regular rates of pay are at issue, define the plaintiff's regular rate of pay for all relevant date ranges.

The definitions of "workday" and "regular rate of pay" may be omitted if they are included in other instructions.

Sources and Authority

- Right of Action For Missed Meal Period. Labor Code section 226.7.
- Meal Periods. Labor Code section 512.
- "Workday" Defined. Labor Code section 500.
- "[W]e hold that the term 'regular rate of compensation' in section 226.7(c) has the same meaning as 'regular rate of pay' in section 510(a) and encompasses not only hourly wages but all

nondiscretionary payments for work performed by the employee. This interpretation of section 226.7(c) comports with the remedial purpose of the Labor Code and wage orders and with our general guidance that the 'state's labor laws are to be liberally construed in favor of worker protection.' " (*Ferra, supra,* 11 Cal.5th at p. 878.)

- "Section 226.7 missed-break premium pay does differ from these examples in that it aims to remedy a legal violation. The law permits an employer to allow an employee to work overtime hours, or to work a split shift, provided the employee is paid extra for it, but the law generally does not permit an employer to deprive an employee of a meal or rest break. But why should this difference matter? That missed-break premium pay serves as a remedy for a legal violation does not change the fact that the premium pay also compensates for labor performed under conditions of hardship. One need not exclude the other." (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 108 [___Cal.Rptr.3d ___, 509 P.3d 956].)

- "[T]he Legislature requires employers to pay missed-break premium pay on an ongoing, running basis, just like other forms of wages." (*Naranjo, supra,* 13 Cal.5th p. 110, internal citations omitted.)

- "The employee who remains on duty without a timely break has 'earned' premium pay within any ordinary sense of the word." (*Naranjo, supra,* 13 Cal.5th p. 115.)

- "[W]e construe the Legislature's use of the disjunctive as permitting an additional hour of pay for each work day that either type of break period is violated. We agree with the district court in *Marlo* [*v. United Parcel Service, Inc.*] that allowing an employee to recover one additional hour of pay for each type of violation per work day is not contrary to the 'one additional hour' and 'per work day' wording in subdivision (b). [¶] We further agree with *Marlo* that construing section 226.7, subdivision (b), as permitting one premium payment for each type of break violation is in accordance with and furthers the public policy behind the meal and rest break mandates." (*United Parcel Service Wage & Hour Cases* (2011) 196 Cal.App.4th 57, 69 [125 Cal.Rptr.3d 384].)

- "[U]nder the law as enacted, 'an employee is entitled to the additional hour of pay immediately upon being forced to miss a rest or meal period.' " (*Naranjo, supra*, 13 Cal.5th p. 115.)

Secondary Sources

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

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

1 Wilcox, California Employment Law, Ch. 3, *Determining Hours Worked*, § 3.01 (Matthew Bender)

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

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

---

[*Name of defendant*] claims that [*name of plaintiff*] gave up [his/her/*nonbinary pronoun*] right to a [first/second] meal break on one or more workdays. This is called "waiver." To succeed on this defense, [*name of defendant*] must prove all of the following:

1. **That [*name of plaintiff*] worked no more than six total hours in a workday; and**

2. **That [*name of plaintiff*] and [*name of defendant*] freely, knowingly, and mutually consented to waiving the meal break of that workday.**

[*or*]

[*Name of defendant*] claims that [*name of plaintiff*] gave up [his/her/*nonbinary pronoun*] right to a second meal break on one or more workdays. This is called "waiver." To succeed on this defense, [*name of defendant*] must prove all of the following:

1. **That [*name of plaintiff*] worked no more than twelve total hours in a workday;**

2. **That [*name of plaintiff*] did not waive [his/her/*nonbinary pronoun*] first meal break of that workday; and**

3. **That [*name of plaintiff*] and [*name of defendant*] freely, knowingly, and mutually consented to waiving the second meal break.**

"Workday" means any consecutive 24-hour period beginning at the same time each calendar day.

New November 2022

Directions for Use

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

The definition of "workday" may be omitted if it is included in other instructions.

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

Sources and Authority

- Meal Periods. Labor Code section 512.

- Meal Periods. Cal. Code Regs., tit. 8, §§ 11010–11030, 11060–11110, 11130–11150, ¶ 11, § 11160, ¶ 10, & § 11170 ¶ 9.

- "Workday" Defined. Labor Code section 500.

- "An employer's assertion that it did relieve the employee of duty, but the employee waived the opportunity to have a work-free break, is not an element that a plaintiff must disprove as part of the plaintiff's case-in-chief. Rather, as the Court of Appeal properly recognized, the assertion is an affirmative defense, and thus the burden is on the employer, as the party asserting waiver, to plead and prove it." (*Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1052–1053 [139 Cal.Rptr.3d 315, 273 P.3d 513], conc. opn. of Werdegar, J., internal citations omitted.)

Secondary Sources

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

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

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

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

2771. Affirmative Defense—Meal Breaks—Written Consent to On-Duty Meal Breaks

---

[*Name of defendant***] claims that [***name of plaintiff***] agreed in writing to give up [his/her/***nonbinary pronoun***] right to be relieved of all job duties during meal breaks. To succeed on this defense, [***name of defendant***] must prove the following:**

1. **That [***name of plaintiff***] worked more than [five/six] hours in a workday;**

2. **That the nature of [***name of plaintiff***]'s work prevents [him/her/***nonbinary pronoun***] from being relieved of all duty during meal breaks;**

3. **That [***name of plaintiff***] and [***name of defendant***] freely, knowingly, and mutually consented in writing to on-duty meal breaks during which [he/she/***nonbinary pronoun***] would not be relieved of all duties; [and]**

[4. That [*name of plaintiff***] has not revoked in writing [his/her/***nonbinary pronoun***] written consent; and]**

5. **That [***name of defendant***] paid [***name of plaintiff***] at [his/her/***nonbinary pronoun***] regular rate of pay during the on-duty meal breaks.**

New November 2022

Directions for Use

This instruction sets forth an employer's affirmative defense of a written waiver of off-duty meal breaks. Give this instruction only if the defendant claims that the plaintiff freely entered into a written agreement for on-duty meal breaks. (See, for example, Cal. Code Regs., tit. 8, § 11040, 11(A).)

Persons employed in the motion picture industry are entitled to a meal break after six hours of work (Wage Order No. 12-2001), rather than the five-hour rule applicable in other industries. Select the appropriate option in element 1 depending on the industry's applicable wage order.

Omit optional element 4 if the plaintiff's revocation of written consent is not at issue.

For an instruction on waiver of meal breaks by mutual consent, see CACI No. 2770, *Affirmative Defense—Meal Breaks—Waiver by Mutual Consent.*

Sources and Authority

- Meal Periods. Labor Code section 512.
- Meal Periods. Cal. Code Reg., tit. 8, §§ 11010–11030, 11060–11110, 11150, ¶ 11(C), 11040–11050 & 11130–11140 ¶ 11(A), § 11120, ¶ 11(B), & § 11160, ¶ 10(D).

- "Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked. An 'on duty meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing revoke the agreement at any time." Cal. Code Regs., tit. 8, § 11010, 11(C).

- "[T]he [on-duty meal period] exception is exceedingly narrow, applying only when (1) 'the nature of the work prevents an employee from being relieved of all duty' and (2) the employer *and* employee have agreed, in writing, to the on-duty meal period. Even then, the employee retains the right to 'revoke the agreement at any time.' These narrow terms undercut the argument that the provision creates, by implication, a broad rest period exception permitting employers to unilaterally require that employees take on-duty rest breaks without receiving additional compensation." (*Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 266–267 [211 Cal.Rptr.3d 634, 385 P.3d 823], internal citation omitted.)

- "An on-duty meal period is one in which an employee is not 'relieved of all duty' for the entire 30-minute period." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1035 [139 Cal.Rptr.3d 315, 273 P.3d 513].)

- "[A]bsent a waiver, the statute's plain terms required [the defendant] to provide 'a meal period'—whether off-duty or on-duty—of at least 30 minutes any time an employee worked at least five hours." (*L'Chaim House, Inc. v. Department of Industrial Relations* (2019) 38 Cal.App.5th 141, 149 [250 Cal.Rptr.3d 413].)

Secondary Sources

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

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

1 Wilcox, California Employment Law, Ch. 3, *Determining Hours Worked*, § 3.01 (Matthew Bender)

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

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

2775. Nonpayment of Wages Under Rounding System—Essential Factual Elements

---

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her/***nonbinary pronoun***] wages for unpaid work time because [***name of defendant***]'s policy or practice of adjusting employees' recorded time to the nearest [***specify preset increment of time***] failed to compensate [***name of plaintiff***] for all time worked. This practice is often referred to as "rounding."**

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

1. **[That [***name of defendant***]'s rounding policy is not fair and neutral on its face];**

[OR]

[That, over time, [*name of defendant***]'s method of rounding resulted in failure to pay its [***employees/specify subset of employees to which plaintiff belonged***] for all time actually worked];**

2. **That [***name of defendant***]'s method of rounding resulted in lost compensation for [***name of plaintiff***]; and**

3. **The amount of wages owed to [***name of plaintiff***].**

New November 2022

Directions for Use

This instruction is intended for use in cases involving the rounding of time clock entries at the start or end of the workday. Do not use this instruction for cases involving the rounding of meal period time entries, which is unlawful. (See *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 68 [275 Cal.Rptr.3d 422, 481 P.3d 661] ["The practice of rounding time punches for meal periods is inconsistent with the purpose of the Labor Code provisions and the IWC wage order"].)

If the court has determined that the defendant's rounding method was fair and neutral on its face, use only the second option for element 1. (See *AHMC Healthcare, Inc. v. Superior Court* (2018) 24 Cal.App.5th 1014, 1028 [234 Cal.Rptr.3d 804]; *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 907 [148 Cal.Rptr.3d 690]). The jury will need to resolve any factual disputes concerning: (a) whether the rounding method consistently resulted in failure to pay all employees or a subset of employees to which plaintiff belonged for all hours worked; and (b) whether the plaintiff has lost wages over time as a result of the defendant's rounding method.

Sources and Authority

- Use of Time Clocks. 29 C.F.R. § 785.48(b)

- "Nothing in our analysis precludes a trial court from looking at multiple datapoints to determine whether the rounding system at issue is neutral as applied. Such analysis could uncover bias in the system that unfairly singles out certain employees. For example, as the trial court discussed, a system that in practice overcompensates lower paid employees at the expense of higher paid employees could unfairly benefit the employer." (*AHMC Healthcare, Inc., supra,* 24 Cal.App.5th at p. 1028.)

- "Although California employers have long engaged in employee time-rounding, there is no California statute specifically authorizing or prohibiting this practice." (*See's Candy Shops, Inc., supra,* 210 Cal.App.4th at p. 901.)

- "Relying on the DOL rounding standard, we have concluded that the rule in California is that an employer is entitled to use the nearest-tenth rounding policy if the rounding policy is fair and neutral on its face and 'it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.' " (*See's Candy Shops, supra,* 210 Cal.App.4th at p. 907, internal citations omitted.)

- "Whether a rounding policy will 'result in undercompensation *over time* is a factual' issue. Summary adjudication on a rounding claim may be appropriate where the employer can show the rounding policy does not systematically underpay the employee, even if the employee loses some compensation over time." (*David v. Queen of Valley Medical Center* (2020) 51 Cal.App.5th 653, 664 [264 Cal.Rptr.3d 279], internal citation omitted, original italics.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 434

1 Wilcox, California Employment Law, Ch. 3, *Determining Compensable Hours and Proper Payment Amounts*, § 3.02 (Matthew Bender)

VF-2706. Rest Break Violations (Lab. Code, § 226.7)

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] work for [*name of defendant*] on one or more workdays for at least three and one-half hours?**
   ____ Yes ____ No

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

2. **Did [*name of defendant*] fail to authorize and permit [*name of plaintiff*] to take at least one rest break to which [*name of plaintiff*] was entitled?**
   ____ 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. **How many workdays was [*name of plaintiff*] not authorized and permitted to take one or more rest breaks?**

   ____ workdays

   Answer question 4.

4. **What is the amount of pay owed? $_____**

Signed: _____
Presiding Juror

Dated: _____

After this verdict form has/After all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New November 2022

Directions for Use

This verdict form is based on CACI No. 2760, *Rest Break Violations—Essential Factual Elements*, and No. 2761, *Rest Break Violations—Pay Owed*.

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 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 being 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-2707. Meal Break Violations (Lab. Code, §§ 226.7, 512)

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] work for [*name of defendant*] for one or more workdays for a period lasting longer than five hours?**
   ____ Yes ____ No

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

2. **Did [*name of defendant*] fail to provide [*name of plaintiff*] with the opportunity to take one or more [properly scheduled] uninterrupted meal breaks of at least 30 minutes?**
   ____ 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. **How many workdays did [*name of defendant*] fail to provide one or more meal breaks?**

   ____ workdays

   Answer question 4.

4. **What is the amount of pay owed? $ _____**

Signed: _____
Presiding Juror

Dated: _____

After this verdict form has/After all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New November 2022

Directions for Use

This verdict form is based on CACI No. 2765A, *Meal Break Violations—Essential Factual Elements*, and No. 2766, *Meal Break Violations—Pay Owed*.

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 the optional bracketed content in question 2 only if proper scheduling of a meal break is at issue. 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 being 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.

4603. Whistleblower Protection—Essential Factual Elements (Lab. Code, §§ 1102.5, 1102.6)

[*Name of plaintiff*] claims that [*name of defendant*] [discharged/[*other adverse employment action*]] [him/her/*nonbinary pronoun*] in retaliation for [his/her/*nonbinary pronoun*] [disclosure of information of/refusal to participate in] an unlawful act. ~~In order t~~To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was [*name of plaintiff*]'s employer;**

2. **[That [[*name of plaintiff*] disclosed/[*name of defendant*] believed that [*name of plaintiff*] [had disclosed/might disclose]] to a [government agency/law enforcement agency/person with authority over [*name of plaintiff*]/ [or] an employee with authority to investigate, discover, or correct legal [violations/noncompliance]] that [*specify information disclosed*];]**

   [*or*]

   [That [*name of plaintiff*] [provided information to/testified before] a public body that was conducting an investigation, hearing, or inquiry;]

   [*or*]

   [That [*name of plaintiff*] refused to [*specify activity in which plaintiff refused to participate*];]

3. **[That [*name of plaintiff*] had reasonable cause to believe that the information disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

   [*or*]

   [That [*name of plaintiff*] had reasonable cause to believe that the [information provided to/testimony before] the public body disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]

   [*or*]

   [That [*name of plaintiff*]'s participation in [*specify activity*] would result in [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]

4. **That [*name of defendant*] [discharged/[*other adverse employment action*]] [*name of plaintiff*];**

5. **That [[*name of plaintiff*]'s [disclosure of information/refusal to [*specify*]]/[*name of defendant*]'s belief that [*name of plaintiff*] [had disclosed/might disclose]] information] was a contributing factor in [*name of defendant*]'s decision to [discharge/[*other adverse employment action*]] [*name of plaintiff*];**

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

7. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

[The disclosure of policies that an employee believes to be merely unwise, wasteful, gross misconduct, or the like, is not protected. Instead, [*name of plaintiff*] must have reasonably believed that [*name of defendant*]'s policies violated federal, state, or local statutes, rules, or regulations.]

[It is not [*name of plaintiff*]'s motivation for [his/her/*nonbinary pronoun*] disclosure, but only the content of that disclosure, that determines whether the disclosure is protected.]

[A disclosure is protected even though disclosing the information may be part of [*name of plaintiff*]'s job duties.]

New December 2012; Revised June 2013, December 2013; Revoked June 2014; Restored and Revised December 2014; Renumbered from CACI No. 2730 and Revised June 2015; Revised June 2016, November 2019, May 2020, November 2022

Directions for Use

The whistleblower protection statute of the Labor Code prohibits retaliation against an employee who, or whose family member, discloses information about, or refuses to participate in, an illegal activity. (Lab. Code, § 1102.5(b), (c), (h).) Liability may be predicated on retaliation by "any person acting on behalf of the employer." (Lab. Code, § 1102.5(a)−(d).) Select any of the optional paragraphs as appropriate to the facts of the case. For claims under Labor Code section 1102.5(c), the plaintiff must show that the activity in question actually would result in a violation of or noncompliance with a statute, rule, or regulation, which is a legal determination that the court is required to make. (*Nejadian v. County of Los Angeles* (2019) 40 Cal.App.5th 703, 719 [253 Cal.Rptr.3d 404].)

Modifications to the instruction may be required if liability is predicated on an agency theory and the agent is also a defendant. Modifications will also be required if the retaliation is against an employee whose family member engaged in the protected activity.

Select the first option for elements 2 and 3 for claims based on actual disclosure of information or a belief that plaintiff disclosed or might disclose information. (Cf. *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 648−649 [163 Cal.Rptr.3d 392] [under prior version of statute, no liability for anticipatory or preemptive retaliation based on fear that plaintiff might file a complaint in the future].) Select the second options for providing information to or testifying before a public body conducting an investigation, hearing, or inquiry. Select the third options for refusal to participate in an unlawful activity, and instruct the jury that the court has made the determination that the specified activity would have been unlawful.

It has been held that a report of publicly known facts is not a protected disclosure. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858 [136 Cal.Rptr.3d 259].) Another court,

however, has held that protection is not necessarily limited to the first public employee to report unlawful acts to the employer. (*Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548−1553 [176 Cal.Rptr.3d 268], disapproved on other grounds by *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 718 [289 Cal.Rptr.3d 572, 503 P.3d 659].); see Lab. Code, § 1102.5(b), (e).)

"Adverse employment action" is viewed the same as it is under the Fair Employment and Housing Act. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387 [37 Cal.Rptr.3d 113]; see CACI No. 2505, *Retaliation—Essential Factual Elements*.) Element 4 may be modified to allege constructive discharge or adverse acts that might not be obviously prejudicial. See CACI No. 2509, *"Adverse Employment Action" Explained,* and CACI No. 2510, *"Constructive Discharge" Explained,* for instructions that may be adapted for use with this instruction.

The employee must demonstrate by a preponderance of evidence that a protected activity was a contributing factor in the adverse action against the employee. (*Lawson, supra,* 12 Cal.5th at p. 718.) The employer may then attempt to prove by clear and convincing evidence that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. (See Lab. Code, § 1102.6; CACI No. 4604, *Affirmative Defense—Same Decision*.)

Sources and Authority

- Retaliation Against Whistleblower Prohibited. Labor Code section 1102.5.
- Affirmative Defense: Same Decision. Labor Code section 1102.6.
- "[W]e now clarify that section 1102.6, and not *McDonnell Douglas*, supplies the applicable framework for litigating and adjudicating section 1102.5 whistleblower claims." (*Lawson, supra,* 12 Cal.5th at p. 712.)
- "By its terms, section 1102.6 describes the applicable substantive standards and burdens of proof for both parties in a section 1102.5 retaliation case: First, it must be 'demonstrated by a preponderance of the evidence' that the employee's protected whistleblowing was a 'contributing factor' to an adverse employment action. Then, once the employee has made that necessary threshold showing, the employer bears 'the burden of proof to demonstrate by clear and convincing evidence' that the alleged adverse employment action would have occurred 'for legitimate, independent reasons' even if the employee had not engaged in protected whistleblowing activities." (*Lawson, supra,* 12 Cal.5th at p. 712, internal citation omitted.)
- ~~"The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. [¶] We are concerned here with the first element of a section 1102.5(b) retaliation claim, establishing a prima facie case of retaliation. To do that, a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two." (*Patten, supra,* 134 Cal.App.4th at p. 1384, internal citations omitted.)~~

- "In order to prove a claim under section 1102.5(b), the plaintiff must establish a prima facie case of retaliation. It is well-established that such a prima facie case includes proof of the plaintiff's employment status." (*Bennett v. Rancho California Water Dist.* (2019) 35 Cal.App.5th 908, 921 [248 Cal.Rptr.3d 21], internal citations omitted.)

- "In 1984, our Legislature provided 'whistle-blower' protection in section 1102.5, subdivision (b), stating that an employer may not retaliate against an employee for disclosing a violation of state or federal regulation to a governmental or law enforcement agency. This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. Section 1102.5, subdivision (b), concerns employees who report to public agencies. It does not protect plaintiff, who reported his suspicions directly to his employer. Nonetheless, it does show the Legislature's interest in encouraging employees to report workplace activity that may violate important public policies that the Legislature has stated. The state's whistle-blower statute includes administrative regulations as a policy source for reporting an employer's wrongful acts and grants employees protection against retaliatory termination. Thus, our Legislature believes that fundamental public policies embodied in regulations are sufficiently important to justify encouraging employees to challenge employers who ignore those policies." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 76–77 [78 Cal.Rptr.2d 16, 960 P.2d 1046].)

- "[T]he purpose of … section 1102.5(b) 'is to ' "encourag[e] workplace whistle-blowers to report unlawful acts without fearing retaliation." ' " (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 923 [180 Cal.Rptr.3d 359].)

- "Once it is determined that the activity would result in a violation or noncompliance with a statute, rule, or regulation, the jury must then determine whether the plaintiff refused to participate in that activity and, if so, whether that refusal was a contributing factor in the defendant's decision to impose an adverse employment action on the plaintiff." (*Nejadian, supra,* 40 Cal.App.5th at p. 719.)

- "As a general proposition, we conclude the court could properly craft instructions in conformity with law developed in federal cases interpreting the federal whistleblower statute. As the court acknowledged, it was not bound by such federal interpretations. Nevertheless, the court could properly conclude that the jury required guidance as to what did and did not constitute 'disclosing information' or a 'protected disclosure' under the California statutes." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 847.)

- "The court erred in failing to distinguish between the disclosure of policies that plaintiff believed to be unwise, wasteful, gross misconduct or the like, which are subject to the [debatable differences of opinion concerning policy matters] limitation, and the disclosure of policies that plaintiff reasonably believed violated federal or state statutes, rules, or regulations, which are not subject to this limitation, even if these policies were also claimed to be unwise, wasteful or to constitute gross misconduct." (*Mize-Kurzman, supra,* 202 Cal.App.4th at pp. 852–853.)

- "[I]t is not the *motive* of the asserted whistleblower, but the nature of the communication that determines whether it is covered." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 852, original

italics.)

- "[I]f we interpret section 1102.5 to require an employee to go to a different public agency or directly to a law enforcement agency before he or she can be assured of protection from retaliation, we would be encouraging public employees who suspected wrongdoing to do nothing at all. Under the scenario envisioned by the [defendant], if the employee reports his or her suspicions to the agency, … , he or she will *have to suffer any retaliatory* conduct with no legal recourse. If the employee reports suspicions to an outside agency or law enforcement personnel, he or she risks subjecting the agency to negative publicity and loss of public support which could ensue without regard to whether the charges prove to be true. At the same time, a serious rift in the employment relationship will have occurred because the employee did not go through official channels within the agency which was prepared to investigate the charges. We see no reason to interpret the statute to create such anomalous results." (*Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 243 [101 Cal.Rptr.2d 893].)

- "Labor Code section 1102.5, subdivision (b) protects employee reports of unlawful activity by third parties such as contractors and employees, as well unlawful activity by an employer. In support of our conclusion, we note that an employer may have a financial motive to suppress reports of illegal conduct by employees and contractors that reflect poorly on that employer." (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 471 [152 Cal.Rptr.3d 595], internal citation omitted.)

- "We are persuaded that [instructing the jury that reporting publicly known facts is not a protected disclosure] was a proper limitation on what constitutes disclosure protected by California law." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 858.)

- "The report of 'publicly known' information or 'already known' information is distinct from a rule in which only the first employee to report or disclose unlawful conduct is entitled to protection from whistleblower retaliation." (*Hager, supra,* 228 Cal.App.4th at p. 1552, disapproved on other grounds in *Lawson, supra,* 12 Cal.5th at p. 718.)

- "Protection only to the first employee to disclose unlawful acts would defeat the legislative purpose of protecting workplace whistleblowers, as employees would not come forward to report unlawful conduct for fear that someone else already had done so. The 'first report' rule would discourage whistleblowing. Thus, the [defendant]'s interpretation is a disincentive to report unlawful conduct. We see no such reason to interpret the statute in a manner that would contradict the purpose of the statute." (*Hager, supra,* 228 Cal.App.4th at p. 1550, disapproved on other grounds in *Lawson, supra,* 12 Cal.5th at p. 718.)

- "Matters such as transferring employees, writing up employees, and counseling employees are personnel matters. 'To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected "whistleblowers" arising from the routine workings and communications of the job site. … ' " (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822 [98 Cal.Rptr.3d 281].)

- " 'A wrongful termination action is viable where the employee alleges he [or she] was terminated for reporting illegal activity which could cause harm, not only to the interests of the employer but also to the public.' 'An action brought under the whistleblower statute is inherently such an action.' To preclude a whistleblower from revealing improper conduct by the government based on confidentiality would frustrate the legislative intent underlying the whistleblower statutes. For reasons of public policy, actions against a public entity for claims of discharge from or termination of employment grounded on a whistleblower claim are not barred by governmental immunity." (*Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352, 365 [225 Cal.Rptr.3d 321], internal citations omitted.)

- "Although [the plaintiff] did not expressly state in his disclosures that he believed the County was violating or not complying with a specific state or federal law, Labor Code section 1102.5, subdivision (b), does not require such an express statement. It requires only that an employee disclose information and that the employee reasonably believe the information discloses unlawful activity." (*Ross v. County of Riverside* (2019) 36 Cal.App.5th 580, 592–593 [248 Cal.Rptr.3d 696].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 302, 373, 374

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(II) A, *Retaliation Under Title VII and FEHA*, ¶ 5:1538 (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.42, ~~et seq.~~ 100.60–100.61A (Matthew Bender)

4604. Affirmative Defense—Same Decision (Lab. Code, § 1102.6)

If [*name of plaintiff*] proves that [his/her/*nonbinary pronoun*] [disclosure of information of/refusal to participate in] an unlawful act was a contributing factor to [his/her/*nonbinary pronoun*] [discharge/[*other adverse employment action*]], [*name of defendant*] is not liable if [he/she/*nonbinary pronoun*/it] proves by clear and convincing evidence that [he/she/*nonbinary pronoun*/it] would have [discharged/[*other adverse employment action*]] [*name of plaintiff*] anyway at that time for legitimate, independent reasons.

New December 2013; Renumbered from CACI No. 2731 and Revised June 2015, November 2022

Directions for Use

Give this instruction in a so-called mixed-motive case under the whistleblower protection statute of the Labor Code. (See Lab. Code, § 1102.5; CACI No. 4603, *Whistleblower Protection—Essential Factual Elements*.) A mixed-motive case is one in which there is evidence of both a retaliatory and a legitimate reason for the adverse action. Even if the jury finds that the retaliatory reason was a contributing factor, the employer may avoid liability if it can prove by clear and convincing evidence that it would have made the same decision anyway for a legitimate reason. (Lab. Code, § 1102.6.) For an instruction on the clear and convincing standard of proof, see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

Sources and Authority

- Same-Decision Affirmative Defense. Labor Code section 1102.6.
- "[W]e now clarify that section 1102.6, and not *McDonnell Douglas*, supplies the applicable framework for litigating and adjudicating section 1102.5 whistleblower claims." (*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 712 [289 Cal.Rptr.3d 572, 503 P.3d 659].)
- "By its terms, section 1102.6 describes the applicable substantive standards and burdens of proof for both parties in a section 1102.5 retaliation case: First, it must be 'demonstrated by a preponderance of the evidence' that the employee's protected whistleblowing was a 'contributing factor' to an adverse employment action. Then, once the employee has made that necessary threshold showing, the employer bears 'the burden of proof to demonstrate by clear and convincing evidence' that the alleged adverse employment action would have occurred 'for legitimate, independent reasons' even if the employee had not engaged in protected whistleblowing activities." (*Lawson, supra,* 12 Cal.5th at p. 712, internal citation omitted.)
- "[Plaintiff] points to Labor Code section 1102.6, which requires the employer to prove a same-decision defense by clear and convincing evidence when a plaintiff has proven by a preponderance of the evidence that the employer's violation of the whistleblower statute was a 'contributing factor' to the contested employment decision. Yet the inclusion of the clear and convincing evidence language in one statute does not suggest that the Legislature intended the same standard to apply to other statutes implicating the same-decision defense." (*Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 239 [152 Cal.Rptr.3d 392, 294 P.3d 49]; internal citation

omitted.)

- "[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.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 373, 374

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(II)-A, *Retaliation Under Title VII and FEHA*, ¶ 5:1538 (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.60 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.12 (Matthew Bender)

VF-4601. Protected Disclosure by State Employee—California Whistleblower Protection Act—Affirmative Defense—Same Decision (Gov. Code, § 8547.8(c))

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] [***specify protected disclosure, e.g., report waste, fraud, abuse of authority, violation of law, threats to public health, bribery, misuse of government property***]?**
   ____ Yes ____ No

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

2. **Did [***name of plaintiff***]'s communication [disclose/ [or] demonstrate an intention to disclose] evidence of [an improper governmental activity/ [or] a condition that could significantly threaten the health or safety of employees or the public]?**
   ____ 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 plaintiff***] make this communication in good faith [for the purpose of remediating the health or safety condition]?**
   ____ 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. **Did [***name of defendant***] [discharge/***specify other adverse 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 [***name of plaintiff***]'s communication a contributing factor in [***name of defendant***]'s decision to [discharge/***other adverse action***] [him/her/***nonbinary pronoun***]?**
   ____ 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. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**
____ 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*] prove by clear and convincing evidence that [*name of defendant*] ~~W~~would ~~[*name of defendant*]~~ have [discharged/*specify other adverse action*] [*name of plaintiff*] anyway at that time~~,~~ for legitimate, independent reasons?**
____ Yes ____ No

If your answer to question 7 is no, then answer question 8. If you answered yes, 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] that you are ready to present your verdict in the courtroom.

New December 2015; Revised December 2016, November 2022

Directions for Use

This verdict form is based on CACI No. 4601, *Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements,* and CACI No. 4602, *Affirmative Defense—Same Decision*.

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 a health or safety violation is presented in question 2, include the bracketed language at the end of question 3.

Questions 4 and 5 may be modified to allege constructive discharge. Questions 2 through 5 of CACI No. VF-2408, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy,* should be adapted and included in such a case.

Question 7 presents the employer's affirmative defense that it would have made the same decision anyway for legitimate reasons even though the jury finds that retaliation for whistleblowing was also a contributing factor for the adverse action. ~~Question 7 must be proved by clear and convincing evidence.~~ (See Gov. Code, § 8547.8(e).)

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 being 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-4602. Whistleblower Protection—Affirmative Defense of Same Decision (Lab. Code, §§ 1102.5, 1102.6)

We answer the questions submitted to us as follows:

1. **Was [*name of defendant*] [*name of plaintiff*]'s employer?**
____ Yes ____ No

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

2. **[Did [[*name of plaintiff*] disclose/[*name of defendant*] believe that [*name of plaintiff*] [had disclosed/might disclose]] to a [government agency/law enforcement agency/person with authority over [*name of plaintiff*]/ [or] an employee with authority to investigate, discover, or correct legal [violations/noncompliance]] that [*specify information disclosed*]?]**

[*or*]

[Did [*name of plaintiff*] [provide information to/testify before] a public body that was conducting an investigation, hearing, or inquiry?]

[*or*]

[Did [*name of plaintiff*] refuse to [*specify activity in which plaintiff refused to participate*]?]
____ 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 plaintiff*] have reasonable cause to believe that the information disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation]?]**

[*or*]

[Did [*name of plaintiff*] have reasonable cause to believe that the [information provided to/testimony before] the public body disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation]?]

[*or*]

[Would [*name of plaintiff*]'s participation in [*specify activity*] result in [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation]?]

____ 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. Did [*name of defendant***] [discharge/~~*specify*~~ *other adverse 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 [*name of plaintiff*]'s [disclosure of information/refusal to [*specify*]]/[*name of defendant*]'s belief that [*name of plaintiff*] [had disclosed/might disclose]] information] a contributing factor in [*name of defendant*]'s decision to [discharge/*other adverse action*] [him/her/*nonbinary pronoun*]?

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

____ 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*] prove by clear and convincing evidence that [*name of defendant*] ~~W~~would ~~[*name of defendant*]~~ have [discharged/~~*specify*~~ *other adverse action*] [*name of plaintiff*] anyway at that time~~,~~ for legitimate, independent reasons?

____ Yes ____ No

If your answer to question 7 is no, then answer question 8. If you answered yes, 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] that you are ready to present your verdict in the courtroom.

New December 2015; Revised December 2016, May 2020, November 2022

Directions for Use

This verdict form is based on CACI No. 4603, *Whistleblower Protection—Essential Factual Elements*, and CACI No. 4604, *Affirmative Defense—Same Decision*.

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.

~~Questions 2 and 3 may be replaced with one of the other~~ Use the appropriate options in questions 2 and 3

as used for elements 2 and 3 in CACI No. 4603. Omit question 3 entirely, however, if the plaintiff allegedly refused to participate in an activity that would result in a violation or noncompliance with a statute, rule, or regulation. (*Nejadian v. County of Los Angeles* (2019) 40 Cal.App.5th 703, 719 [253 Cal.Rptr.3d 404].) If the plaintiff allegedly refused to participate in an activity that would result in a violation or noncompliance with a statute, rule, or regulation, replace "disclosure of information" in question 5 with "refusal to [*specify activity employee refused to participate in and what specific statute, rule, or regulation would be violated by that activity*]."

Questions 4 and 5 may be modified to allege constructive discharge. Questions 2 through 5 of CACI No. VF-2408, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy*, should be adapted and included in such a case.

Question 7 presents the employer's affirmative defense that it would have made the same decision anyway for legitimate reasons even though the jury finds that retaliation for whistleblowing was also a contributing factor for the adverse action. ~~Question 7 must be proved by clear and convincing evidence.~~ (See Lab. Code, § 1102.6.)

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 being 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.