Wage & Hour Update
eLunch

July 18, 2018

WINSTON & STRAWN LLP

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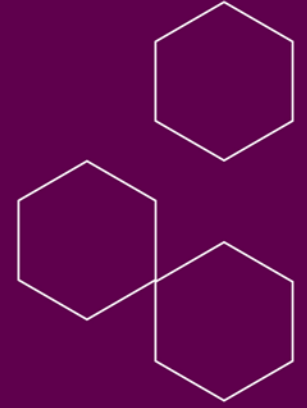
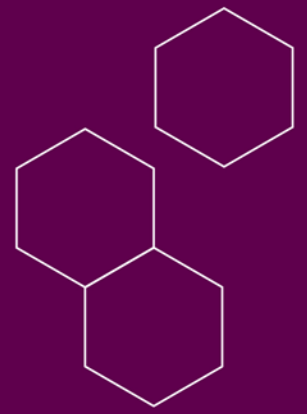
Supreme Court Decisions





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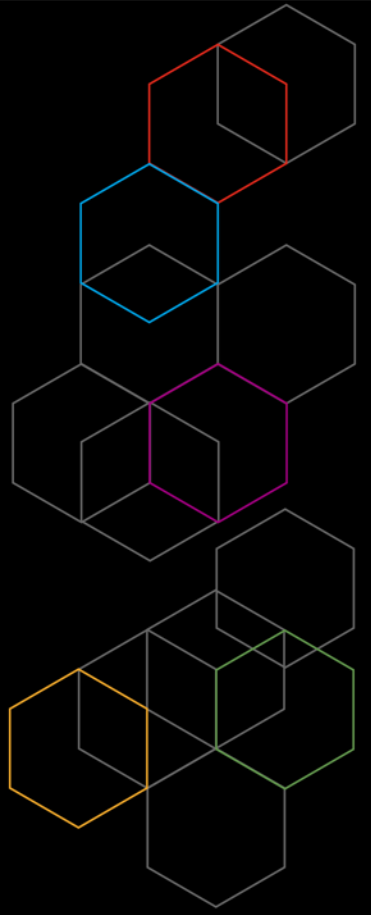
Arbitration Agreements
Epic Systems Corp. v. Lewis (May 21, 2018)

- Sixth, Seventh, and Ninth Circuits had held that arbitration agreements with class action waivers violated Section 7 of the National Labor Relations Act (NLRA) and were thus unenforceable under the Federal Arbitration Act (FAA)
- Supreme Court held:
  - FAA mandates the enforcement of arbitration agreements
  - Right to pursue class or collective relief is not a protected concerted activity under Section 7 of the NLRA



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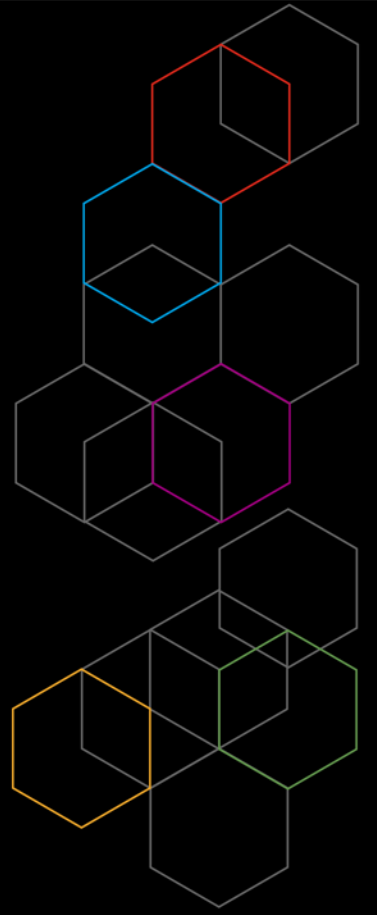
Key Takeaways

- Employers' use of arbitration agreements with class action waivers will likely increase significantly
- 2017 study found that 56 % of nonunionized private-sector workers — about 60 million people — were subject to mandatory arbitration in employment contracts
- California employees will likely seek relief under PAGA to circumvent *Epic*
- In pending cases, courts will likely enforce appropriately drafted class action waivers and send cases to individual arbitration
- Plaintiff's bar threatening hundreds of individual arbitrations



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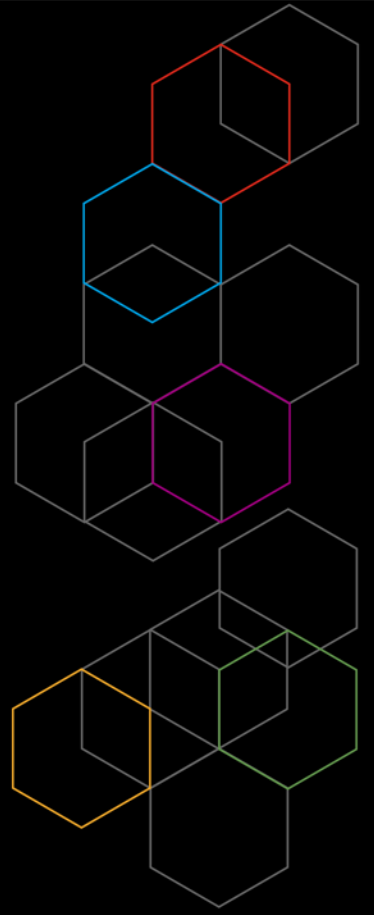
Class Action Tolling
China Agritech v. Resh (U.S. Mar. 2018)

- *American Pipe* tolling = claims of putative class members are tolled from the time of the filing of a class action until denial of class certification

- Held: No class action "piggybacking"
  - *American Pipe* does not permit the maintenance of follow-on class action past the expiration of a the statute of limitations
  - The tolling only applies to individuals joining an existing suit or filing an individual action

- Efficiency favors early assertion of competing class representative claims
- Concerns with a "limitless" time for filing successive class actions



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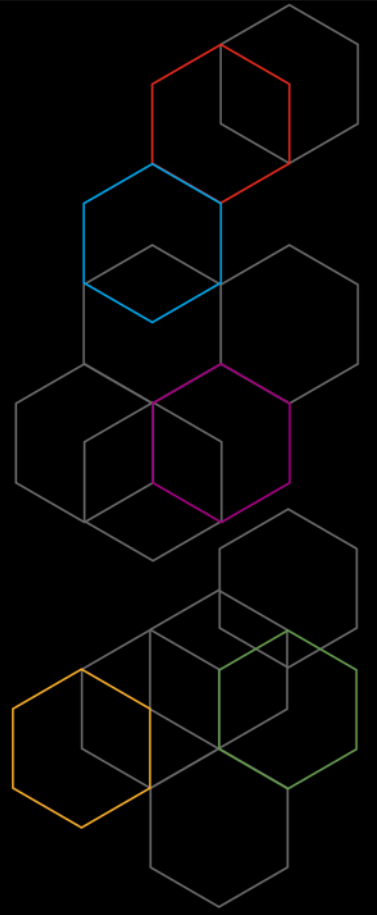
Standard for Construing FLSA Exemptions *Encino Motorcars, LLC v. Navarro* (U.S. April 2018)

- Application of exemption under FLSA for certain employees engaged in selling or servicing automobiles
- Held: Service advisors are exempt because they are salesmen and are primarily engaged in servicing automobiles

- Rejected the principle that exemptions should be construed narrowly
- Instead: Give exemptions "a fair reading"

- Effect?



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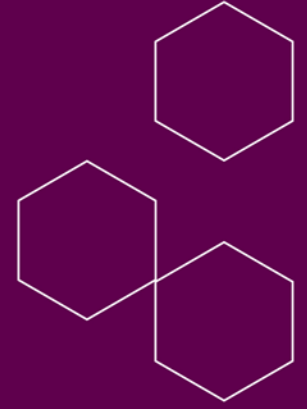
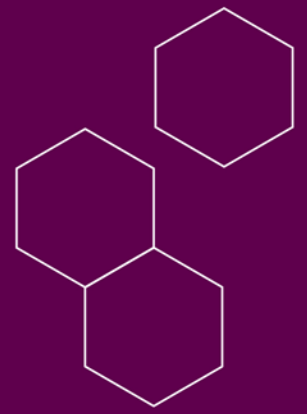
Exemption Salary Threshold





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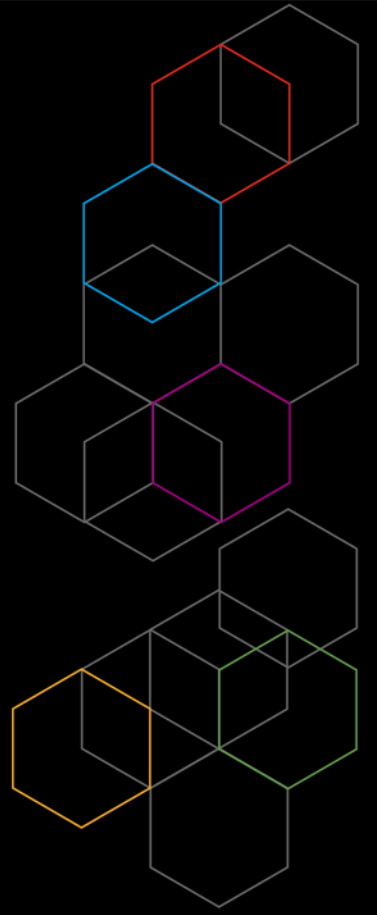
Exemption Salary Threshold

- Federal threshold
  - The new overtime rule that was scheduled to be implemented in Dec. 2016 was halted by a federal judge in Dec. 2016
  - The federal salary threshold for exempt employees rests at $455 per week/$23,660 annually
  - Currently the outcome is still uncertain
  - Many states have local salary thresholds rising in 2018
- States may have higher thresholds
  - Ex: CA requires that exempt employees make at least twice the wages of a minimum wage employee for full time employment
  - Cal minimum wage for employers with over 25 employees = $11/hr
  - Salary threshold = $45,760 annually
  - This is scheduled to increase over the next several years



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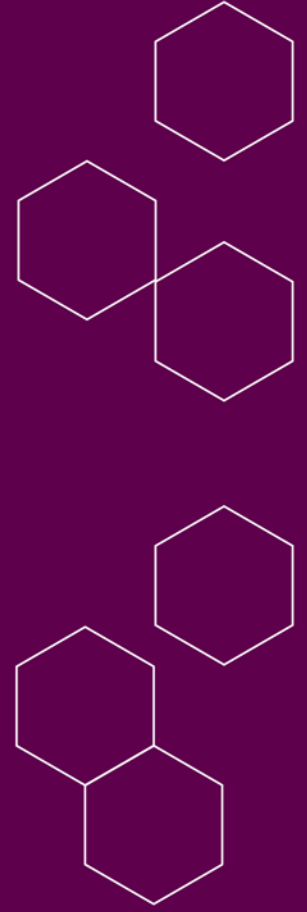
FLSA Decisions



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Conditional Certification of FLSA Claims
Brown v. Barnes & Noble, Inc. (S.D.N.Y. June 2018)

- Court denied plaintiffs motion to conditionally certify collective action
- Café managers at B&N alleged they performed primarily non-exempt duties and were misclassified as exempt
- They contended that B&N maintained policies and procedures controlling how they performed their duties
- Court held that manager's evidence too thin to satisfy burden for conditional certification
- Insufficient evidence to establish nexus between managers' personal experiences and managers nationwide
- Managers
  - Provided vague descriptions of duties and did not allege that B&N trained them to engage in non exempt work
  - Stated that certain non managerial tasks were their primary duties because they spent the majority of their time performing these duties.
    - Court held amount of time spent on certain duties is not the sole test
  - Stated that they did not perform hiring, firing, promoting or setting rates of pay duties but did not provide a list of other managerial duties that they performed
  - Did not provide copies or content of alleged uniform company policies that were in violation of FLSA

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FLSA Decertification Denied
Prince v. Cato Corp. (N.D. Ala. June 2018)

- Motion to decertify denied
- Retail store managers filed action alleging misclassification under FLSA
- Court conditionally certified action
- Store managers showed each had same job title, were salaried, and classified as exempt.
- Court note that defendant's policy manual applied to every store manager regardless of the size or location of the store
- Court also found that the managers' primary duty was customer service/sales and that most executive decisions were made by district managers, suggesting that store managers had minimal discretion
  - Although store managers had authority to hire a sales associated, they had to get district manager approval first
  - Defendant argued that some store managers were managed by district managers less than others but the court found that the defendants were trying to make the argument that the plaintiffs were not identical which is not the standard for similarly situated
- Defendant argued that executive exemption is fact intensive and requires individual inquiries, but court held that this does not compel decertification

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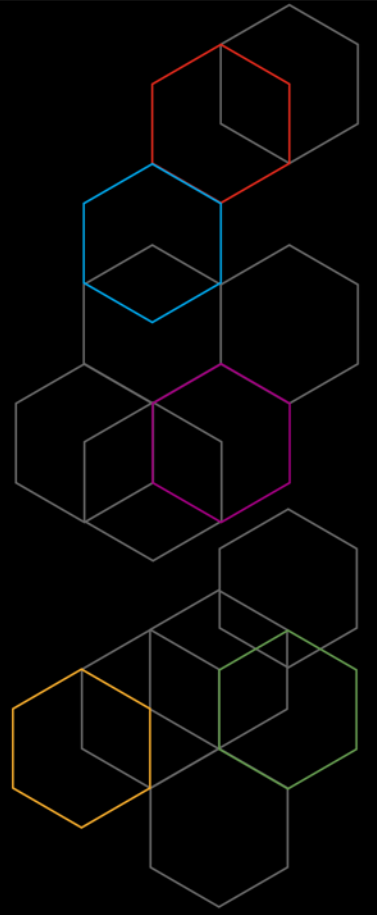
FLSA Decertification Denied
Drake v. Steak N Shake Operations, Inc. (E.D. Miss. Dec. 2017)

- Court denied motion to decertify collective action and granted motion to certify class
  - Although standards for a collective action and a class action differ, courts tend to allow either both actions or neither to proceed on a collective basis
- Managers filed a Rule 23 class action alleging that defendant misclassified them as exempt
- Exempt classification turns on employees' primary duties, amount of time spent on exempt duties, employees' relative freedom from direct supervision
  - All 18 plaintiffs stated they spent most of the time on non-management duties, had little independence or discretion and their work was tightly controlled by policy
- Plaintiffs established a company-wide policy that violated FLSA
- Although some individual defenses existed, the individual fact finding necessary for those defenses was easily ascertainable and did not compel decertification
  - Ex. Determining which plaintiffs signed certain forms



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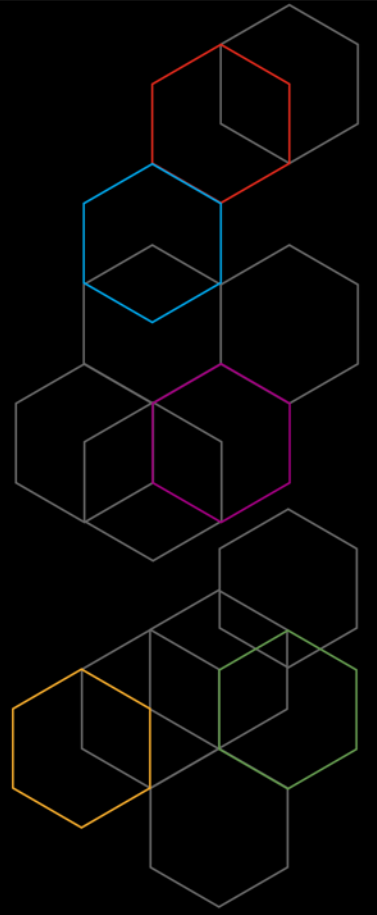
FLSA Decerification Denied (for the most part) *Kutzback v. LMS Intellibound, LLC* (W.D. Tenn. Mar. 2018)

- Case could proceed collectively for full time opt-in employees
- Majority of plaintiffs raised very similar complaints
- Defendant maintained a one system wide training location with training, operating procedures and manuals being overseen by one human resources director
- Two common means of depriving employees of time worked:
  - Forcing employees to work off the clock
  - Improperly editing time sheets
- Defendant also brought summary judgment motions, which also were denied



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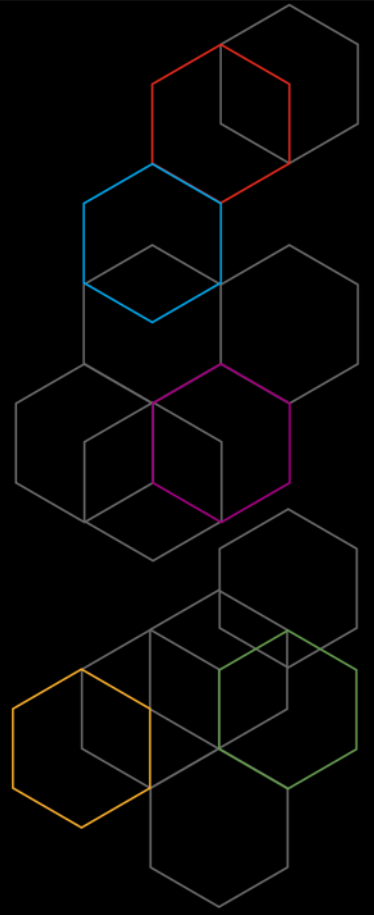
FLSA Decertification Granted
Harris v. Express Courier Int'l, Inc. (W.D. Ark. Nov. 2017)

- FLSA action decertified; Rule 23 certification denied
- Couriers claimed misclassification as independent contractors
- Individualized inquiries needed to determine if couriers met the economic realities test – no "one size fits all" decision possible
- Evidence that the company exerted control over couriers in different ways and paid them differently
- Actual control over putative employee is more important than right to control



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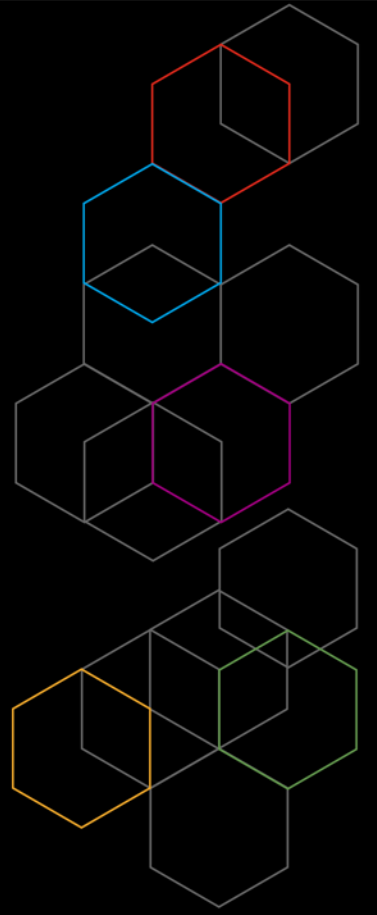
FLSA Decertification Granted
Barker v. US Bancorp (S.D. Cal. Oct. 2017)

- Bank branch managers alleged misclassification.
- Regardless of collective size, no substantial evidence of a companywide, uniformly enforced policy of misclassification
- Plaintiffs presented 29 “fill in the blank” declarations
  - Provided little insight into actual duties and experiences
  - Presented credibility issues
- Bank presented deposition testimony of bank managers showing differences, including in staffing and hours
- Also individualized inquiries in determining:
  - Each opt-in plaintiff’s “primary duty”
  - Amount of overtime worked
  - Credibility



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Settlements

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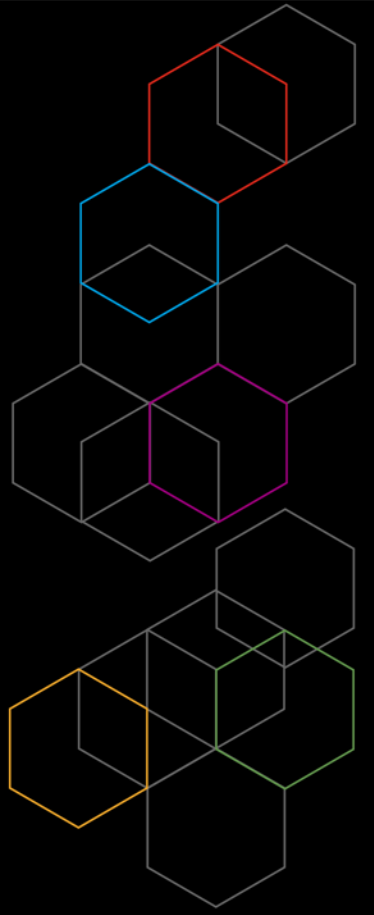
National Overview - 2017

- Workplace class action settlements totaled $2.72 billion
  - Increase from $1.75 billion in 2016
- Wage and hour settlements were $525 million of total
- Class certifications were highest in wage and hour litigation, a 73 %success rate, compared to ERISA and employment discrimination cases



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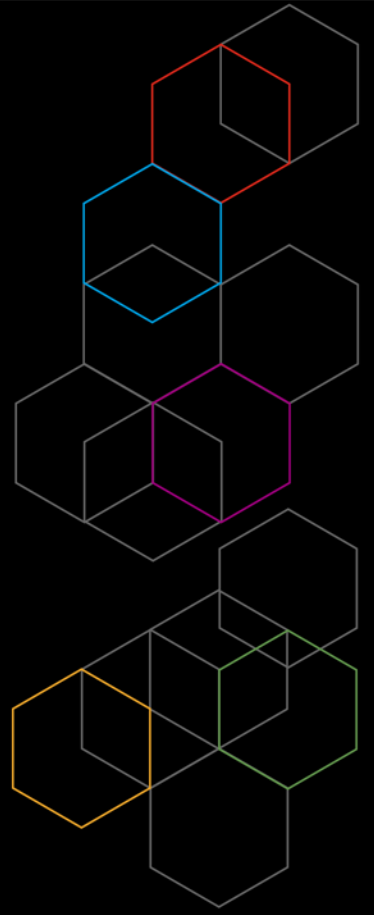
In re FedEx Ground Package System Inc., Employment Practices Litigation, No. 05-MD-527 (N.D. Ind. April 28, 2017)

- Cases first filed beginning in 2005; settlement more than 10 years later
- Deal: More than $227 M for long-running lawsuits brought by drivers in 19 states who claimed FedEx misclassified them as independent contractors
  - Settlement divided among 12,627 drivers who will receive payouts from $250 to more than $116,000.
- In 2016, FedEx reached a separate $226 M settlement with 2,016 California-based delivery drivers, who alleged misclassified as independent contractors



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Wilson v. Tesla, Inc., No. 3:17-CV-03763-JSC, (N.D. Cal. 2018)

- Class action alleging misclassification of California owner advisors and sales advisors as exempt under commissioned sales exemption
  - Parties reached a $1 M deal to settle suit in May 2018 for 253 employees
  - Parties acknowledged that employees had arbitration agreements with class action waivers, and Epic was not yet decided by the Supreme Court. The parties decided to settle in light of uncertainty with Epic.
- In June 2018, court denied preliminary approval of the settlement citing problems with class notice and the eligibility requirements
  - “It’s 2018. You are not representing the class if you say, ‘If you want information, you have to find it.’ That's just burdensome”

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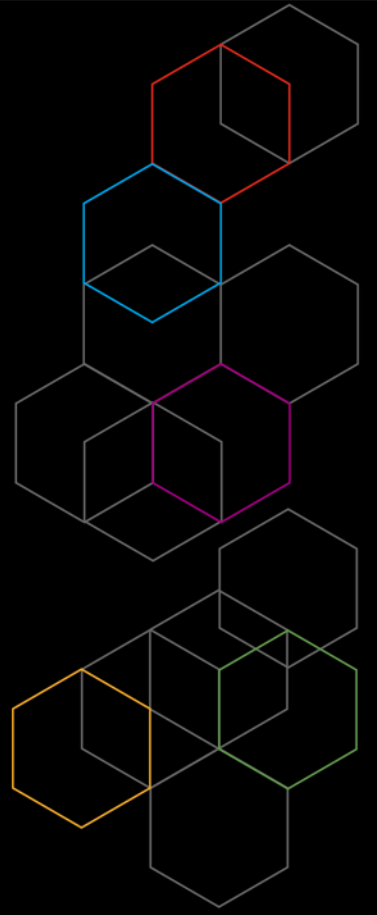
Augustus v. Am. Commercial Sec. Servs., Inc., 2 Cal. 5th 257 (2016)

- $110 M settlement to resolve claims that 15,000 guards were required to carry radios and remain “on call” during breaks, which violated California Labor Code.
  - Settlement preliminarily approved on April 6, 2017
  - Class members will receive an average of $4,700 each
- Litigation began in 2005 and class was certified in 2009
- The California Supreme Court held that the Labor Code and Wage Order 4 , “requires employers to provide their employees with rest periods that are free from duties or employer control.”



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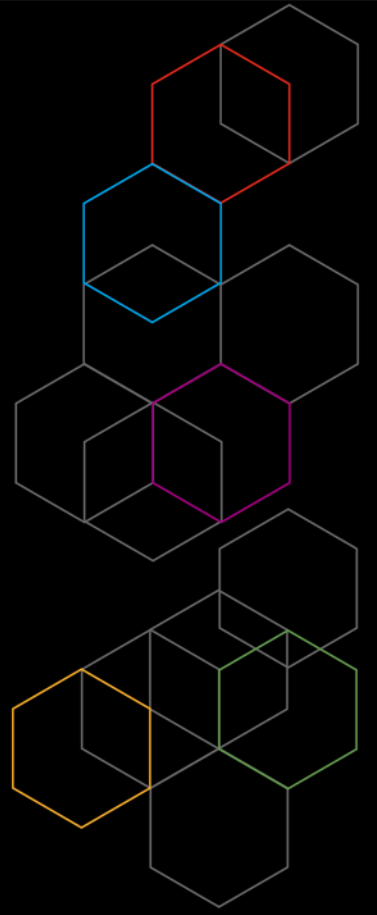
Abdullah v. U.S. Sec. Assocs., Inc., 731 F.3d 952 (9th Cir. 2013)

- $21 Msettlement between U.S. Security Associates and a class of 17,000 guards accusing the company of failing to give meal breaks.
  - Each class member is expected to receive about $1,235
  - Litigation began in 2009, class was certified in 2011
- Preliminary approval was granted on Aug. 14, 2017
- The settlement agreement states that Plaintiffs viewed the total value of all the claims, including the PAGA claims, as being $41,654,408.



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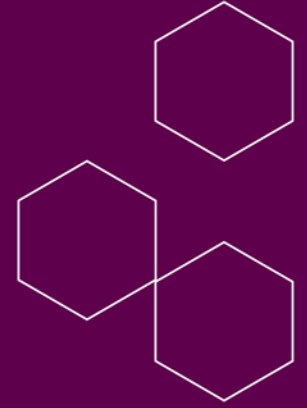
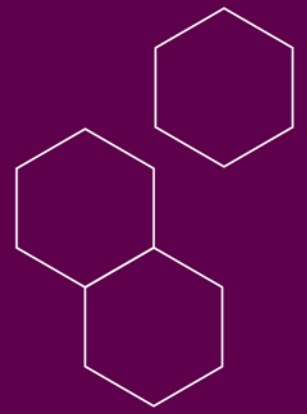
Bonuses and Overtime





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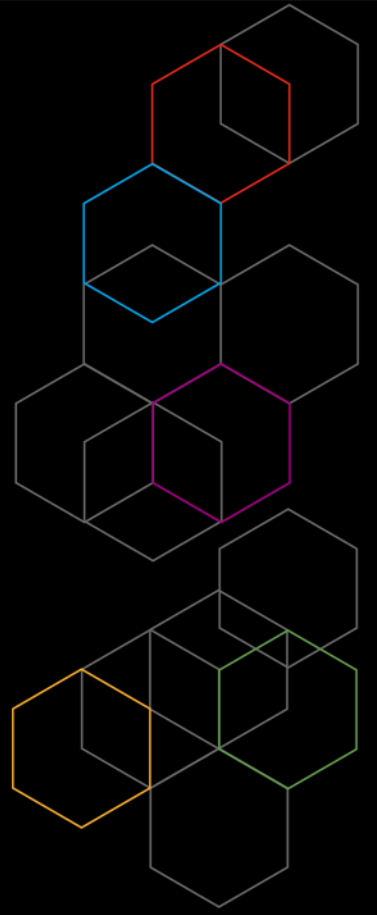
When to Pay Overtime on a Payment?

- **What must be included in the "regular rate of pay":**
  - Pay for hours worked or performing a duty
  - Regular hourly rate, piece commissions, non-discretionary bonuses, and the fair value of meals and lodging.

- **What can be excluded in the "regular rate of pay":**
  - Gifts
  - Discretionary bonuses
  - PTO/vacation/sick pay
  - Expense reimbursements
  - Overtime pay

29 U.S.C. 203(e); 29 CFR §§ 778.202–778.224; CA DLSE Manual § 49.1.2.3, 49.1.2.4



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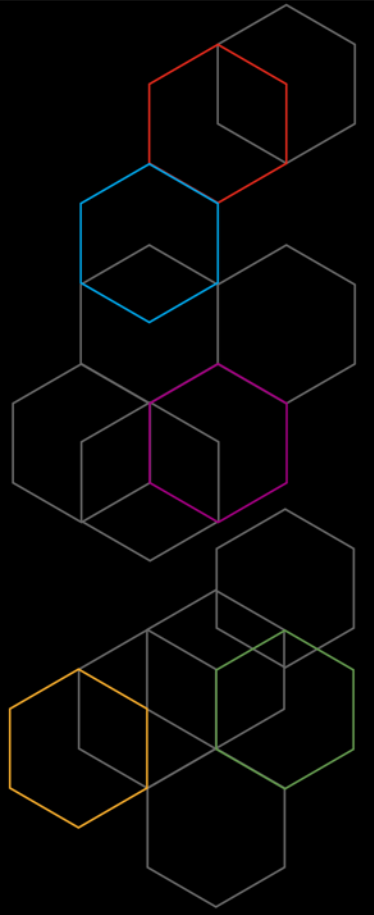
Discretionary vs. Non-Discretionary Bonuses

- Discretionary bonuses include sums paid as gifts at a holiday or other special occasions, such as a reward for good service, which are based on no objective criteria and are not routine
  - The employer must retain discretion both as to:
    - The fact of payment
    - The amount of the payment. 29 U.S.C. § 207(e); 29 C.F.R. § 778.211
  - Not made pursuant to a promise causing the employee to expect such payments regularly

- Non-Discretionary bonuses include sums paid pursuant to any prior agreement or otherwise based on objective criteria
  - Bonuses given to incentivize productivity or reduce absenteeism
  - Signing bonuses or retention bonuses



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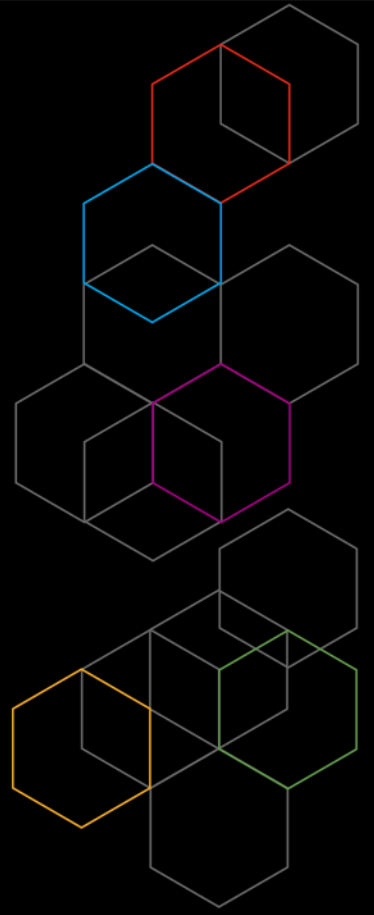
Spot Bonuses as Discretionary

- *Shiferaw v. Sunrise Senior Living* (C.D. Cal. March 2016)
  - Although spot bonuses were based on measurable criteria, “the decisions of when, for what reason, and in what amount . . . to award a spot bonus [were] left to the discretion of the decision-makers at the individual Sunrise communities.”
- *Alonzo v. Maximus, Inc.* (C.D. Cal. Dec. 2011)
  - Employer awarded bonuses to employees who made “unique or extraordinary efforts.” Bonus awards were available for immediate disbursement to deserving staff
  - The bonuses were determined at the sole discretion of the employer, “at or near the time of payment and [were] not made pursuant to any prior contract or promise . . . .”



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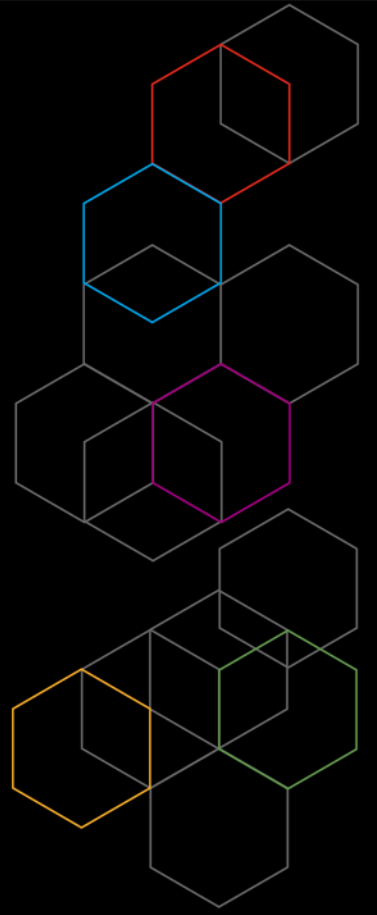
Spot Bonuses/Award Point Program as Non-Discretionary

- *Harris v. Best Buy* (N.D. Cal. Aug. 2016, Feb. 2018)
  - Points-based award system; managers could award points to be used for products, services, and gift cards
  - Employer treated bonuses as non-discretionary and included it into the regular rate
- *Provine v. Office Depot, Inc.*, 2012 WL 2711085 (N.D. Cal. July 6, 2012)
  - Managers could award “Bravo Cards” for entry in a drawing to receive a $50 cash prize paid in the winning employee’s next paycheck
  - Court found these non-discretionary because they were always fixed at $50



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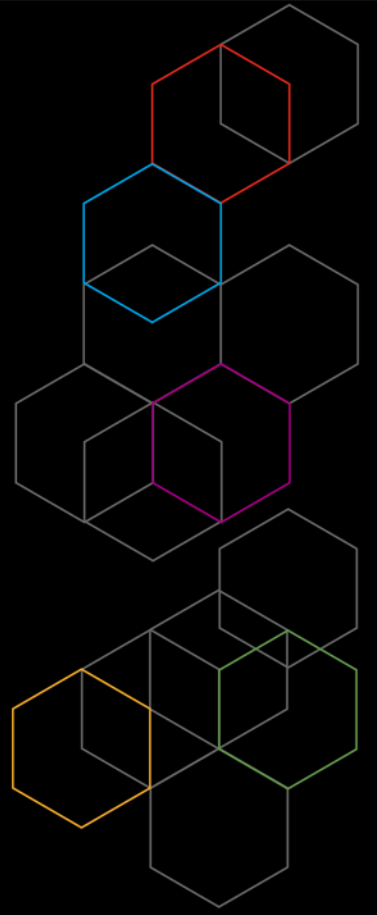
One-Off Payments – Bonus or Gift?

- Promising to pay in advance = abandoning the discretion
  - 29 CFR §778.211(b)

- DOL Opinion Letter FLSA2008-12
  - Bonus that had to go through a union's approval process was still discretionary
- *Chavez v. City of Albuquerque*, 2007 WL 8043104 (D.N.M. Aug. 10, 2007)
  - Although the bonus was flat-rate and across-the-board, neither of those facts transformed the bonus into a nondiscretionary payment.



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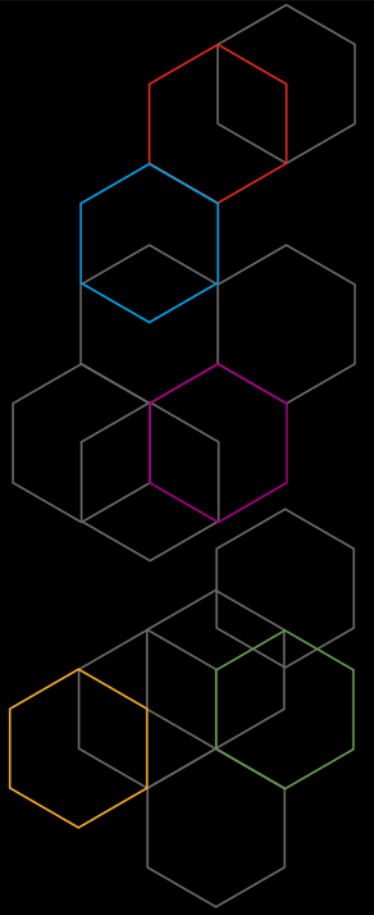
Awards for Activities Not Normally Part of the Job

- 29 C.F.R. § 778.332 – a "prize" awarded for activities outside of customary working hours and beyond scope of customary duties
- Factors used:
  - The amount of time spent on the activity
  - The relationship between the activities and the usual work of the employee
  - Whether the activity involves work usually performed by other employees for employers,
  - Whether an employee is specifically urged to participate or led to believe that he will not merit promotion or advancement unless he participates in the activity



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Referral Bonuses

- DOL Opinion letter re health care industry has determined that referral bonuses are properly excluded from the regular rate calculation if:
    1. Participation is strictly voluntary
    2. Recruitment efforts do not involve significant time
    3. The activity is limited to after-hours solicitation done only among friends, relatives, neighbors and acquaintances as part of the employees' social affairs

- Referral bonuses may still be an attractive target to plaintiffs' attorneys
- *Shiferaw v. Sunrise Senior Living* (C.D. Cal. March 2016)
    - Denying summary judgment. Found a question of fact as to whether the activities were limited to after-hours solicitation done only among friends
- *Ogle v. Restoration Hardware, Inc.*, (Cal. App. April 26, 2017)
    - Alleged several wage and hour claims, including that referral bonuses should have been factored into employees' regular rates of pay.
    - Court of Appeal affirmed trial court's denial of class certification

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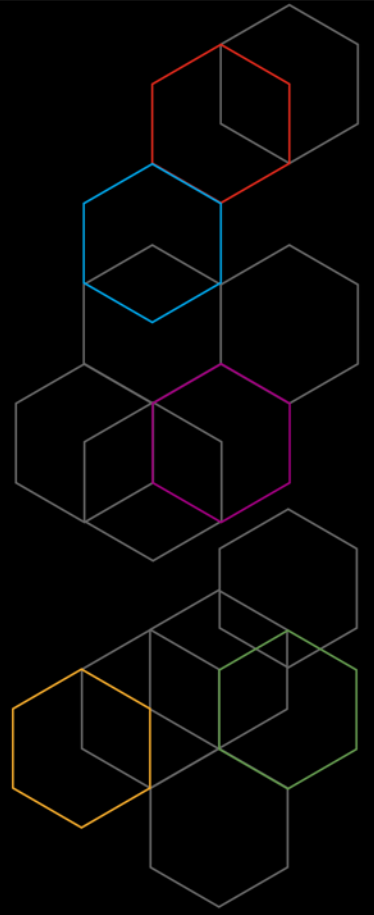
Calculating Overtime On Bonuses - FLSA

- Fair Labor Standards Act (FLSA) requires that employers pay non-exempt employees an overtime premium for working more than 40 hours in a workweek
  - Under the FLSA overtime pay is calculated based on an employee's "regular rate" of pay, which includes all compensation earned during a workweek.
  - Ex. Hourly non-exempt employee works 40 straight time and 15 overtime hours during the week and receives a weekly bonus of $400 in addition to straight and overtime pay.
    - Step One: Divide $400 bonus by 55 (40 straight time plus 15 overtime) hours = $7.27272727 bonus regular rate
    - Step Two: Multiply $7.27272727 bonus regular rate by 0.5 OT rate = $3.63636363
    - Step Three: Multiply $3.63636363 by 15 OT hours worked to get total bonus OT owed = $54.5454545. Round up (or down) only at the end = $54.55



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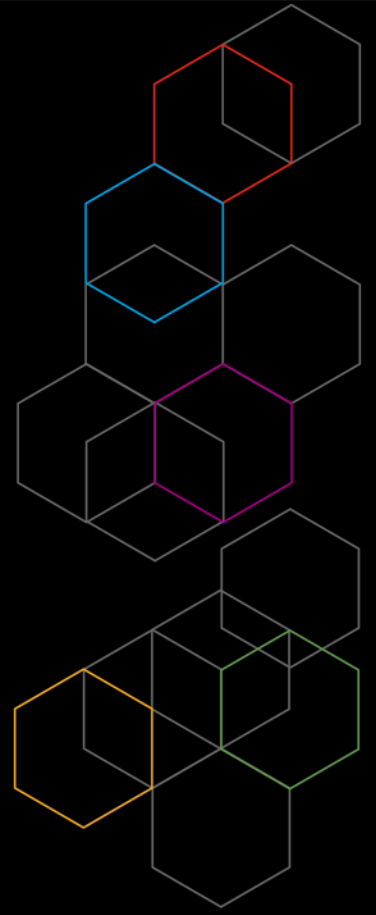
Calculating Overtime on Bonuses - California

- DLSE Manual takes two approaches
- Bonuses based on a percentage of a production or some formula other than a flat amount: Similar approach as FLSA
- Flat sum bouses: Must be divided by only the employee's actual *non-overtime* hours worked in the period covering the bonus and then multiplied by 1.5 to calculate the employee's overtime rate
  - Ex. Hourly non-exempt employee works 40 straight time and 15 overtime hours during the week and receives a weekly bonus of $400 in addition to straight and overtime pay.
    - Step One: Divide $400 bonus by 40 hours = $10 bonus regular rate
    - Step Two: Multiply $10 bonus regular rate by 1.5 OT rate = $15
    - Step Three: Multiply $15 by 15 OT hours worked to get total bonus OT owed = $225



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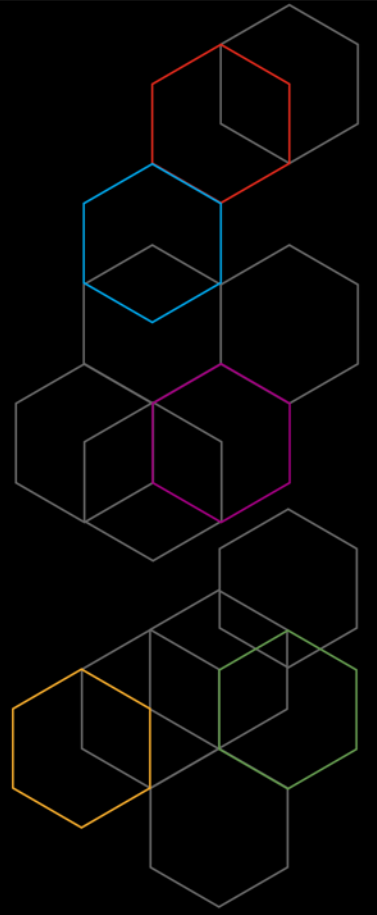
Alvarado v. Dart (Cal. March 5, 2018)

- Flat sum bonuses should be factored into an employee's regular rate of pay – adopting the DLSE's approach

- Bonus at issue = **attendance bonus** for employees who worked a weekend shift
  - The court expressly limited *Alvarado*'s reach to flat sum bonuses similar to attendance bonuses
  - For "[o]ther types of nonhourly compensation, such as a production or piecework bonus or a commission, may increase in size in rough proportion to the hours worked, including overtime hours, and therefore a different analysis may be warranted."



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California Update

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California Certification Decisions

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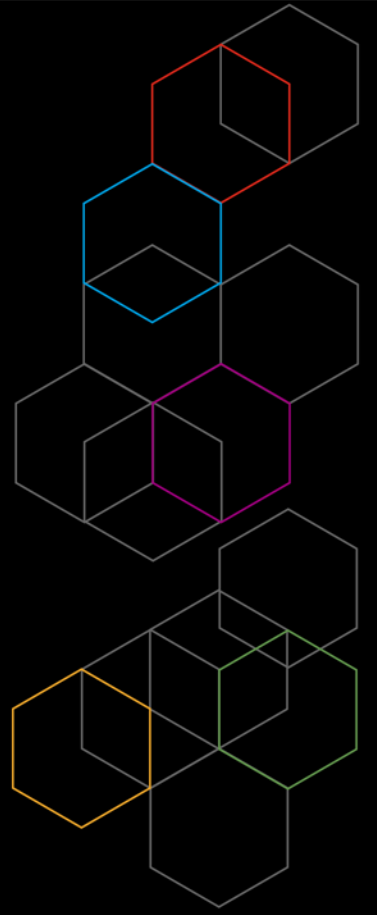
Important Class Certification Decisions

Lampe v. Queen of the Valley Med. Ctr., 19 Cal. App. 5th 832 (2018), reh'g denied (Feb. 14, 2018), review denied (Apr. 18, 2018).

- Held: Class action certification requirements were not satisfied for hospital employees who alleged failure to pay short-shift premiums and failure to provide a second meal break because the claims required individualized assessment.



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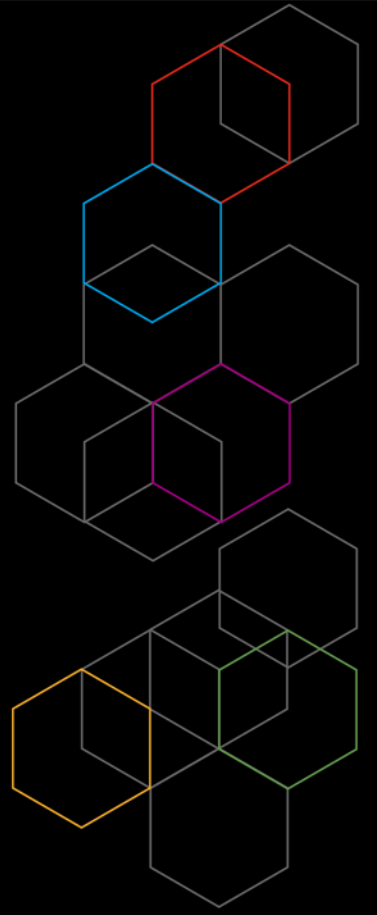
Important Class Certification Decisions

Duran v. U.S. Bank Nat'l Ass'n, 19 Cal. App. 5th 630 (2018), as modified on denial of reh'g (Feb. 9, 2018).

- Alleged misclassification of outside sales employees
- Appellate court held that class certification was properly denied.
- Trial court did not abuse discretion in finding that **Plaintiff's survey data was unreliable** as evidence of uniformity in how/where employees spent their time. (2008 survey v. 2015 survey differences significant.) Statistical methods cannot substitute for common proof where factual records indicate an absence of predominant common issues.
- Distinguished case that held court could certify if decision was whether particular task was exempt or not; different issue here, where question is whether employees worked inside or not



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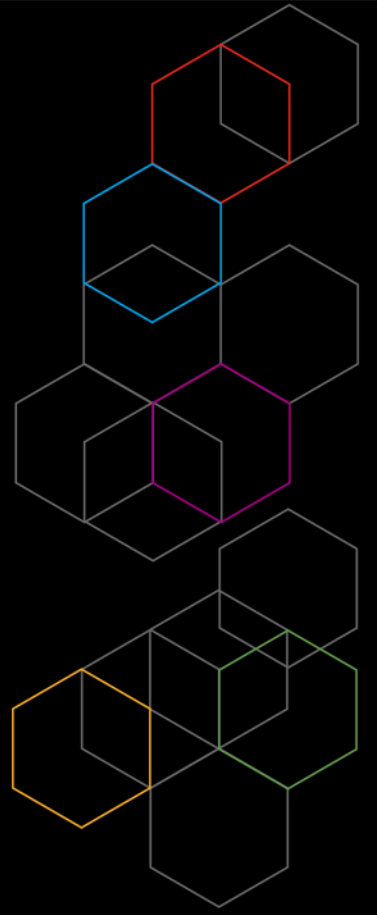
Important Class Certification Decisions

Lubin v. Wackenhut Corp., 5 Cal. App. 5th 926 (2016), reh'g denied (Dec. 14, 2016), review denied (Mar. 15, 2017).

- Security guards and on duty meal period issues
- Court held that proof of an unlawful policy, on its own, could establish employer's liability even if class members had to prove their damages individually.
- Alleged invalidity of the on-duty meal agreements **could be evaluated by statistical sampling** or inspection of the agreements themselves.



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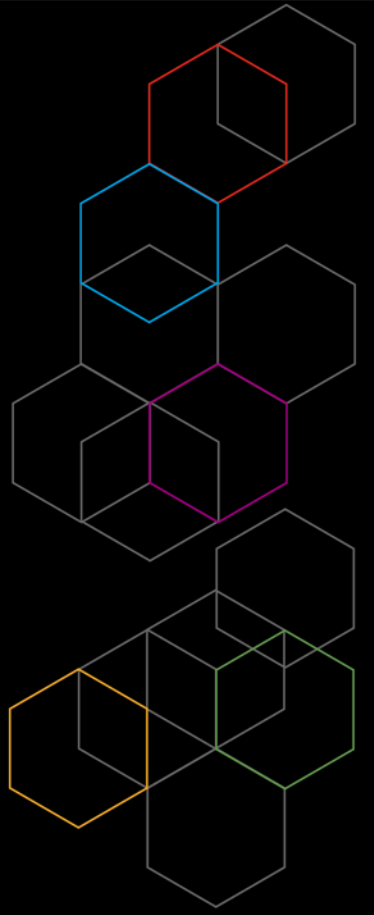
Important Class Certification Decisions (District Court)

Shaw, et al., v. AMN Healthcare Inc., No. 16-CV-02816-JCS, 2018 WL 3323882 (N.D. Cal. July 5, 2018).

- Held: Court certified 23(b)(3) class of traveling nurses based on common policy of restricting overtime and common "no policy" policy of putting pressure on nurses to forgo uninterrupted meal and rest breaks



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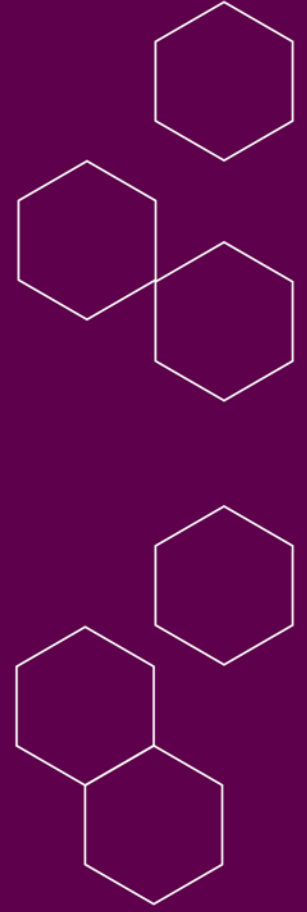
Wage Statements



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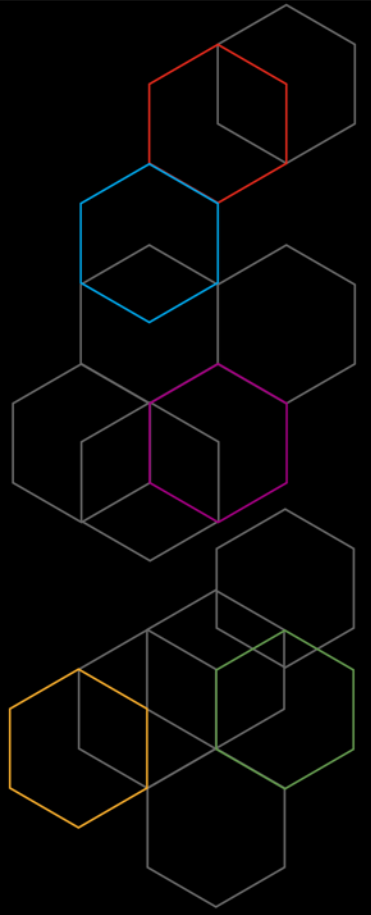
Wage Statements

Maldonado v. Epsilon Plastics, Inc., 22 Cal. App. 5th 1308 (2018)

- Held: No wage statement violation when a wage statement accurately reflects how much was paid to the employee, even if it is later found that the employee should have "earned" more



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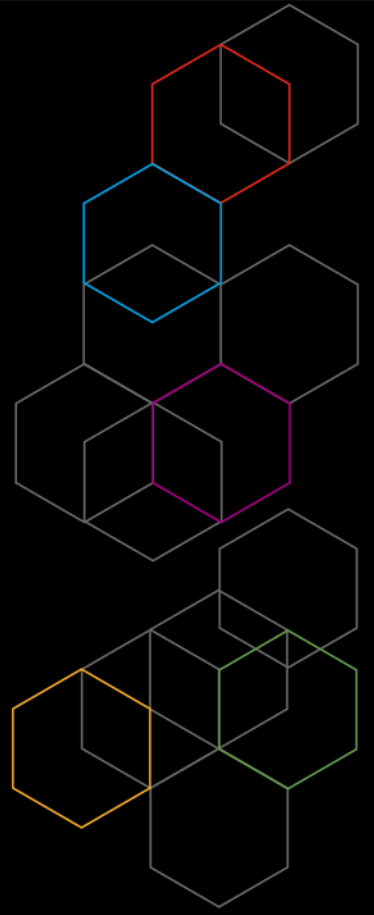
Wage Statements

Canales v. Wells Fargo Bank, N.A., No. B276127, 2018 WL 2426038 (Cal. Ct. App. May 30, 2018)

- Listing overtime for bonuses earned for work performed in earlier periods
  - Section 226(a)(9) requires the employer to list all applicable hourly rates in effect during the pay period and the corresponding number of hours
  - The overtime adjustment was for a bonus earned in an earlier period, and therefore was not "in effect during the pay period"

- Not providing an itemized wage statement at the time of an employee's termination
  - Not a violation, as long as the payment is made immediately



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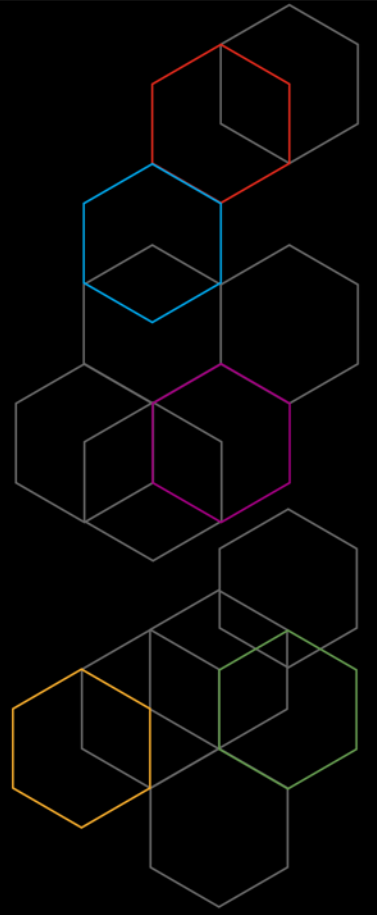
Wage Statements (District Court)

Magadia v. Wal-Mart Associates Inc. et al., No. 17-CV-00062-LHK, 2018 WL 2573585 (N.D. Cal. May 11, 2018)

- Held: Must include hourly rate information for overtime wages based on incentive pay (or make it easy for employees to determine overtime rate through simple math) as per Cal. Lab. Code § 226(a)(9)

- Held: Must include pay period start and end dates on Statement of Final Pay given on the date of termination as per Cal. Lab. Code § 226(a)

- Granted Summary Judgement for Plaintiff on PAGA claim



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Independent Contractors

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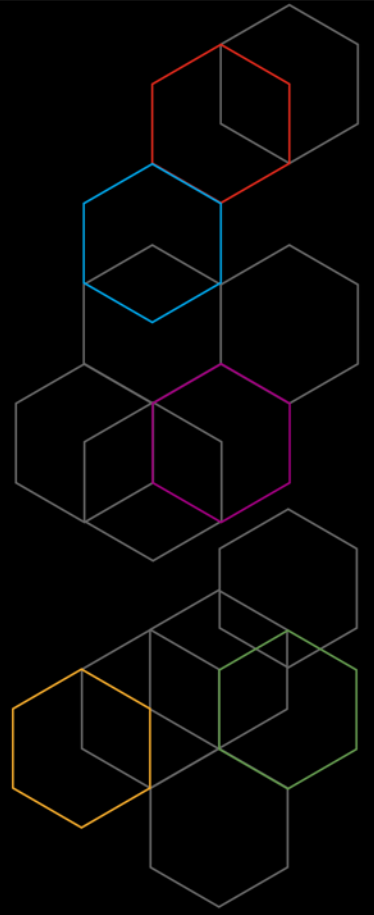
Independent Contractors

Dynamex Operations W., Inc. v. Superior Court, 4 Cal. 5th 903 (2018).

- Held: "ABC" test in this context replaces multi-facet, individualized, common law *economic realities t*est
- Worker considered an employee under the Wage Orders unless the employer establishes the:
  - (A) worker is free from the control and direction of the hirer;
  - (B) worker performs work that is outside the usual course of the hiring entity's business; AND
  - (C) worker is customarily engaged in an independently established trade, occupation, or business
  - If one of these elements fail, a worker is an employee



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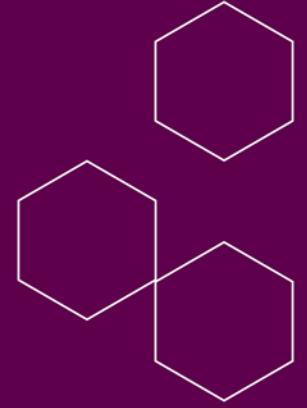
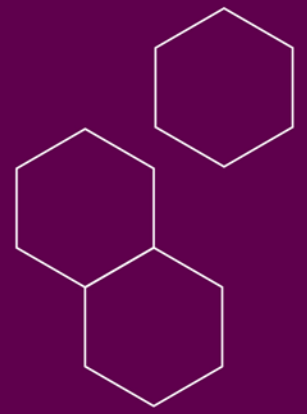
Other California Issues





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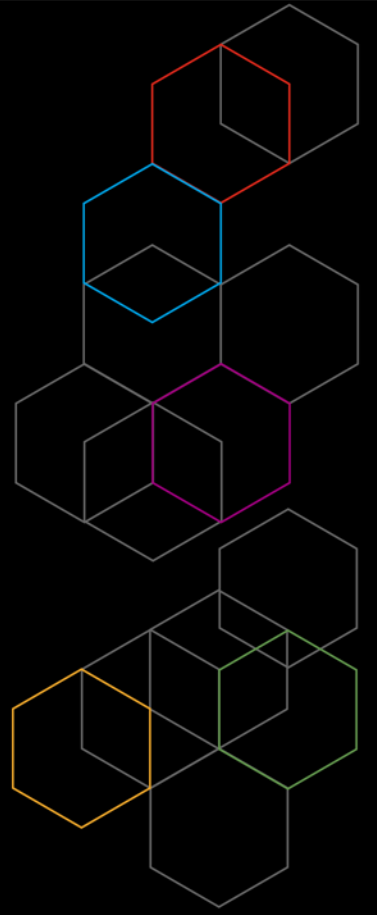
On-Call Rest Breaks Prohibited

Augustus v. ABM Sec. Servs., Inc., 2 Cal. 5th 257 (2016), *as modified on denial of reh'g* (Mar. 15, 2017)

- Held: Rest breaks must be off duty and employer may not require employees to remain “on call” during rest breaks

- Employees who must remain on call, vigilant, and at the ready do not receive an uninterrupted break



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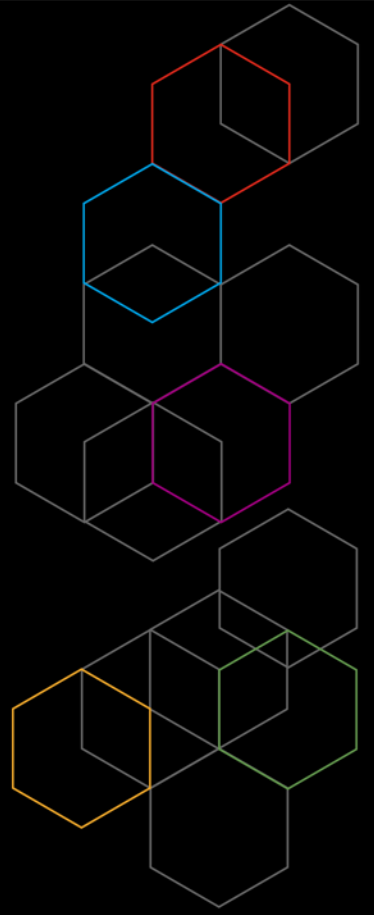
Paid Rest Breaks for Commissioned Employees

Vaquero v. Stoneledge Furniture LLC, 9 Cal. App. 5th 98 (Ct. App. 2017), *as modified* (Mar. 20, 2017), *review denied* (June 21, 2017)

- Held: commissioned sales employees must be paid separately for mandatory rest periods.



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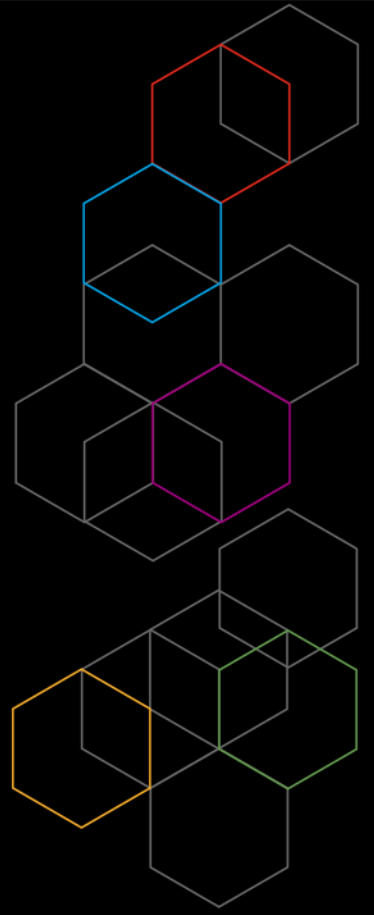
Clarification of California's Day of Rest Obligations

Mendoza v. Nordstrom, Inc., 2 Cal. 5th 1074, 393 P.3d 375 (2017)

- Held: Day of rest is guaranteed for each workweek, not for any consecutive seven-day period.

Sunday	Monday	Tuesday	Wednesday
Off	Work	Work	Work
Work	Work	Work	Work

Thursday	Friday	Saturday
Work	Work	Work
Work	Work	Off



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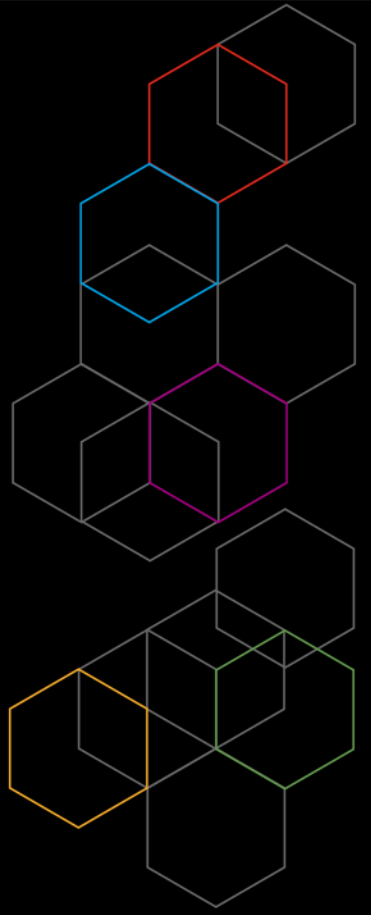
Meal/Rest Period Premiums

Stewart v. San Luis Ambulance, Inc., 878 F.3d 883 (9th Cir. 2017)

- 9th Circuit certified to Supreme Court of California→ Review Granted on March 28, 2018

- Question to the Supreme Court: Do violations of meal period regulations, which require payment of a "premium wage," give rise to claims under section 203 (waiting time penalties) and 226 (wage statement penalties) of the California Labor Code?



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Thank You.

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