ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

LOS ANGELES

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A SEA CHANGE? C.C.P. § 1283.05 AMENDMENT BROADENS DISCOVERY RIGHTS FOR LITIGANTS IN ARBITRATION



Michael Alfera

Effective January 1, 2025, California Code of Civil Procedure[1] section 1283.05 was amended to provide that, in arbitrations conducted pursuant to the California Arbitration Act, discovery is available to the same extent as it would be in a California civil trial court. Some commentators have described this amendment as a "sea change" in California arbitration law, though at present there is no published California authority addressing the effects of this change. This article explores the amended statute and issues affecting its application, including the incorporation of ADR provider rules, the applicability of the FAA, the effect of choice-of-law clauses, and retroactivity. While many of these

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[1] All undesignated statutory references are to the California Code of Civil Procedure.

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STATEMENTS OF DECISION: NEW RULES ARE COMING; LEARN THEM NOW



Hon. John L. Segal



Stefan C. Love

Pretend it's January 2027. You just finished a three-day court trial. Should you request a statement of decision?

If you answered, *It depends on whether I win or lose*—you're wrong, and you're about to forfeit your request. Because on January 1, 2027, the rules governing statements of decision will change.

On that date, the current versions of Code of Civil Procedure sections 632 and 664 (Old § 632, Old § 664) will be replaced by new versions (New § 632, New § 664). The Judicial Council will also enact new rules of court to implement the new statutes, replacing the current rule 3.1590. (See New § 632, subd. (h)(1).)

Let's talk about what's the same and what's different in the new rules.

Same: Effect on appeal.

The most important thing about statements of decision remains the same: what they mean for your and your opponent's appeal. Statements of decision matter because of two equal and opposite rules:

1. "'[T]he reviewing court must infer, following a bench trial, that the trial court impliedly made every factual finding necessary to support its decision'"—the doctrine of

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2026 PRESIDENT'S MESSAGE



Amy Lucas

As this is my final message to you as your ABTL President, I find myself reflecting on the people who made the job worth doing. From our first Board meeting through our Joint Board Retreat and every program in between, what has stayed with me is how diverse our membership is and how generously the members of both bench and bar have given their time to ABTL. I am grateful to everyone who took time out of their busy schedules to contribute to this organization—whether by serving as a speaker, planning an event, writing an article, or simply taking the afternoon or evening off to attend. I have had the pleasure of getting to know so many of you this year, and I have been struck by how many different roads lead to this profession. No one took the precise route I did, and no two of you took the same one as each other. That we nevertheless all ended up here together, in the same organization and in service of the same work and ideals, is remarkable. Thank you for making this year such a privilege.

Following our February program that highlighted LA28's work planning the 2028 Olympics and our April program When Civility Breaks Down: Protecting Judges and The Rule of Law, in June, we gathered for our Annual Members-Only Judicial Mixer, and it was once again a highlight of the year. There is no substitute for the kinds of conversations that happen when attorneys and judges can step out of the courtroom and talk candidly, without a morning calendar to get through or a ruling to fret over. Watching the courtyard fill up, listening to our members tell old stories, and seeing them introduce one another and strike up new friendships was a reminder that those conversations are the entire point of this organization.

In September, we hosted Lights, Camera, Actions: Running Litigation for Netflix, a fireside chat with Wade Gentz, Senior Director and Head of Litigation for the U.S. and Canada at Netflix, and Mindy LeMoine, Director of Litigation at Netflix. Wade and Mindy walked us through how a litigation department scales alongside a company that has gone from a quirky startup to a major studio producing content on nearly every continent. They were engaging, candid, and genuinely useful, and I am grateful to both of them for sharing their time, insights, and war stories so freely—all the more so in a room that included both lawyers who may one day sue them and judges who may one day hear those cases.

Our 52nd Annual Seminar took place October 8–11 at the Park Hyatt Aviara in Carlsbad, California. The Annual Seminar remains the best opportunity we have all year to gather as a statewide community, learn from one another, and spend unhurried time with colleagues from across the state. My thanks to the entire Planning Committee for the extraordinary work behind this program. I'm happy to have seen so many of you there.

Looking forward, we're thrilled to host the November 5 dinner at the Omni Los Angeles Hotel on The Business of Barbie: Protecting, Promoting and Monetizing IP in Today's Entertainment Landscape. Mattel Executive VP and Chief Legal Officer Jonathan Anschell will join us for a discussion of Mattel's experiences in the IP entertainment landscape.

I want to close with a note of gratitude to our members of the judiciary. A number of esteemed judges have retired from the bench in the past year or so—you all know who you are—and these departures are a fitting occasion to say what too rarely gets said out loud. To every member of the judiciary, current and former, who dedicates their days—and often their nights and weekends—to ensuring the parties before them are fairly heard: Thank you. Your work is frequently invisible, almost never easy, and inevitably half of your audience thinks you are wrong. That you do it impartially and faithfully anyway, without fanfare, matters more than we say often enough. I am equally grateful to the judiciary for its continued insistence on bringing civility in our profession into sharper focus. This is not just a matter of manners. Civility is about how we choose to show up, and showing up with courtesy and respect leads to the best outcomes for clients, colleagues, and opponents alike: It is what allows disputes to be resolved on the merits rather than consumed by needless conflicts that drain everyone's resources. That requires a profession willing to hold itself to the highest standards of civility—and a bench willing to expect it of us.

It has been an honor to serve as your President. Thank you for your support of ABTL, and I look forward to seeing all of you soon.

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NAVIGATING FINRA ARBITRATION: LESSONS FROM THE TRENCHES



Kathy J. Huang



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Robia Amjad

If California state court is the "wild west" of litigation forums, FINRA arbitration is the last frontier. For attorneys accustomed to courtroom practice, FINRA arbitration presents a different procedural landscape, which affects case strategy at every stage. This article highlights the key differences between FINRA arbitration and California state court litigation and offers practical strategies for litigators navigating the FINRA forum.

While litigators in California may be familiar with arbitrations proceeding before JAMS or the AAA, securities-related disputes often proceed through the Financial Industry Regulation Authority ("FINRA"), which operates one of the largest dispute resolution forums in the country. *See* FINRA, Dispute Resolution Statistics, https://www.finra.org/arbitration-mediation/dispute-resolution-statistics (last visited Aug. 9, 2026). FINRA is a private, not-for-profit organization that operates under the oversight of the U.S. Securities and Exchange Commission (SEC). *See* FINRA, About Us, https://www.finra.org/about (last visited Aug. 9, 2026). It writes and enforces rules to ensure broker-dealers comply with federal law and FINRA's rules. *Id*. Broker-dealers who sell securities to the public must be SEC-registered and members of FINRA. *See* 15 U.S.C. § 78o(b)(8) (conditioning effectiveness of SEC broker-dealer registration on membership in a registered securities association).

FINRA describes itself as more efficient and less complex than litigating in court, and the volume of cases reflects how central this forum has become to securities disputes. *See* FINRA, Arbitration & Mediation, https://www.finra.org/arbitration-mediation (last visited Aug. 4, 2026). In 2024 alone, FINRA closed 3,607 arbitration and mediation cases nationwide. *Id*.

Arbitrator Selection Versus Judge or Jury

One of the most consequential procedural distinctions is how the decision-maker is chosen. In state court, litigants face a randomly assigned judge and often a jury of laypersons. For customer disputes in FINRA arbitration, panels may consist of one to three arbitrators. *See* FINRA Rule 12401. In cases involving claims of more than $100,000 or non-monetary claims, the panel can consist of three arbitrators: two "public" arbitrators (generally those who have no securities industry affiliation) and one "non-public" arbitrator. *See* FINRA Rule 12403. Parties may strike all non-public arbitrators, often resulting in an all-public panel. Each party receives a computer-generated, random list of potential arbitrators who are available for the selected hearing, with disclosure reports detailing each arbitrator's background. Id. For a customer dispute with three arbitrators for a FINRA arbitration proceeding in downtown Los Angeles, that list could generate more than 30 names: 10 arbitrators from the non-public roster, 15 from the public roster, and 10 public arbitrators from the chairperson roster. *Id*. The parties then select the arbitrators through a process of striking and ranking: each separately-represented party may strike arbitrators for any reason, and then rank their remaining preferences in order. *Id*.

Before ranking arbitrators, it is important to review their FINRA disclosure reports (which detail professional background, prior arbitration experience, and disclosed conflicts), and research their publicly available biographical information online and their award history in FINRA's online database. Use all available information to identify panelists whose professional experience and track record align with your case theory.

While this process is purported to provide litigants with more control over selecting decision-makers, in practice, given the large panelist pool and the number of parties potentially ranking and striking, you may end up with arbitrators for the panel who are wild cards.

Leverage Limited Discovery

FINRA arbitration is designed to move quickly. FINRA does not provide for interrogatories, requests for admission, or depositions as of right. Depositions, in particular, are "strongly discouraged," and require approval from the panel. *See* FINRA Rule 12510. Instead of these tools, FINRA relies mainly on document exchange, with the FINRA Discovery Guide

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providing lists of presumptively discoverable documents. *See* FINRA Rule 12506.

Litigators should not equate an expedited process with a light discovery burden. These document lists can themselves be surprisingly expansive. For example, for customer disputes, Document Production List 1 of the FINRA Discovery Guide lists the 22 categories of documents the FINRA firm/associated person is expected to produce, many of which seek large categories of documents, such as: "[a]ll notes the firm/associated persons made relating to the customer parties and/or the customer parties' claims, accounts, transactions, or products or types of products at issue, including, but not limited to, entries in any diary or calendar, relating to the claims or products at issue." *See* FINRA Discovery Guide, Document Production List 1 (Customer Cases), available at https://www.finra.org/arbitration-mediation/rules-case-resources/discovery-guide (last visited Aug. 9, 2026). List 2 sets forth the documents the customer parties have to produce. *See* FINRA Discovery Guide, Document Production List 2 (Customer Cases), available at https://www.finra.org/arbitration-mediation/rules-case-resources/discovery-guide (last visited Aug. 9, 2026).

Additionally, FINRA Rule 12507 allows parties to serve written requests for additional documents or information beyond the Discovery Guide's lists. *See* also FINRA Rule 13506 (for industry disputes). These requests must generally be limited to identifying individuals, entities, and time periods related to the dispute, should be reasonable in number, and cannot require narrative answers or fact-finding. As such, state court-style interrogatories remain generally unavailable in FINRA arbitration. *See* FINRA Rule 12507.

Because depositions are generally unavailable, the FINRA Discovery Guide's lists of discoverable documents are the primary tool for obtaining evidence. Where the opposing party resists production of discoverable documents, file a motion to compel promptly. FINRA panels generally enforce the Discovery Guide's presumptions.

Do not assume the expedited timeline means discovery disputes will resolve themselves. Disputes over the completeness of a production can resurface well into the hearing if they are not tested and resolved beforehand, so raise gaps promptly rather than waiting to litigate them in front of the panel.

If a discovery motion is necessary, keep it concise and focused: identify the specific request, explain its relevance, and state the relief sought without burying the panel in unnecessary briefing or lengthy declarations with numerous exhibits. Once the hearing begins, do not expect the panel to entertain late motions to reopen discovery that should have been completed.

Motion Practice and Pre-Hearing Briefs

FINRA has no broad equivalent to demurrer or summary judgment; however, Rule 12504 permits narrow motions to dismiss. Under FINRA Rule 12504, motions to dismiss prior to the conclusion of a party's case-in-chief are strongly disfavored. The panel may deny a pre-hearing motion to dismiss, and the movant must obtain the panel's permission to re-file the motion later.

Even where arbitrators have legal or industry experience, their familiarity with particular products, regulatory concepts, or industry practices may vary. A pre-hearing brief can be an effective way to explain industry terminology, regulatory concepts, and product features clearly to the panel in advance of any opening presentation or witness testimony.

Focus on presenting a clear timeline, highlighting the most important documents, and explaining why the facts support your client's position. Resist the urge to over-brief legal issues. Arbitrators often appreciate a more straightforward presentation of the evidence.

Manage the Hearing Schedule

FINRA's efficient design does not guarantee a short hearing schedule. Multiple respondents, witness scheduling difficulties, and additional motions even after the hearing has commenced can extend a case well beyond the parties' original estimate, so build flexibility into trial preparation and witness scheduling accordingly.

Hearings can go for one or two weeks, pause for a week or more while the panel and counsel attend to other commitments, and then resume for additional hearing days. Litigators should plan for this kind of intermittent, extended schedule rather than assuming a single continuous block, and should build in the flexibility to keep witnesses, exhibits, and case themes organized and readily accessible across gaps in the hearing calendar. Identify your strongest witnesses and evidence early, organize exhibits for maximum efficiency, and prepare focused direct and cross-examinations.

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Keep the Exhibit Record Clean and Complete

Although the forum is less formal than court in many respects, the panel still needs a clean, accessible record. Counsel should not assume that electronic exhibit systems, shared folders, or hearing binders will work smoothly simply because the materials were exchanged before the hearing. Missing exhibits, inconsistent exhibit lists, incomplete binders, and confusion over what has actually been admitted can slow the hearing and distract from the merits.

Before the hearing begins, confirm that all exhibits are Bates stamped, consistently labeled, and available in the same form to the panel, opposing counsel, witnesses, and any remote participants. Even in this technological age, physical exhibit binders are very helpful to the panel. In a document-heavy FINRA case, managing the exhibits and giving clear directions to the arbitrators about the evidence can be a major advantage. Consider assigning each party a different exhibit numbering system (for example, Claimant will have 1-1999, Respondent No. 1 will have 2000-2999, etc.).

Treat the Hearing Like a Trial

FINRA Rule 12604 provides that arbitrators are not bound by state or federal rules of evidence. *See also* FINRA Rule 13604 (for industry disputes). In practice, panels often apply evidentiary rules flexibly, but admissibility remains within the panel's discretion. As a result, more evidence might be admitted at the hearing than would be in a state court proceeding. The arbitrators will assess what weight to give witness testimony and exhibits. However, counsel may effectively limit witness testimony and documentary evidence by asserting well-placed objections. For example, while FINRA arbitrators may be disinclined to grant a motion to exclude an expert witness outright, they will confine testifying experts through well-placed objections to relevance and scope, essentially limiting the expert testimony in real-time.

A PowerPoint presentation can be an effective aid for opening and closing statements. Well-designed visual aids, including timelines that put forth your narrative, slides citing key exhibits, and charts of damages calculations, can help simplify complex issues and serve as valuable references throughout the hearing and deliberations. Finally, use the research done on the arbitrators when selecting the panel to emphasize the themes, evidence, and level of industry detail that appear to resonate with the panel based on each panel member's work experience and background.

Stay Flexible and Ready

FINRA hearings can evolve quickly. Due to the fact that there are no depositions, witness testimony during the hearing itself is the first occasion for the parties and their counsel to hear the other side's version of events. A party's theory of the case, for example, may differ from what is alleged in their complaint or in any pre-hearing briefing. Be ready to prepare witnesses (and client representatives) in real time for this possibility, and take advantage of planned breaks in the proceedings to strategize about how best to adapt to any significant changes. For example, if the Claimant does not put forward any evidence to support their claims against an individual defendant, be ready to make an oral motion for non-suit. The panel may be willing to grant such a motion on the spot without requiring briefing.

Moreover, witness availability, panel questions, overlapping expert testimony, and time constraints may require counsel to adjust strategy in real time. Counsel should be prepared to make judgment calls about whether to shorten an examination, withdraw duplicative testimony, or reserve an issue for post-hearing briefing.

***

Although FINRA arbitration shares many similarities with traditional litigation, its rules and procedures create a fundamentally different strategic environment. The limited discovery, restricted motion practice, and relaxed evidentiary standards place greater emphasis on preparation, flexibility, and hearing advocacy. Those who understand the forum's unique procedures and tailor their strategy accordingly will be better equipped to present their case effectively and achieve favorable results for their clients.

Kathy J. Huang, Gillian H. Clow, and Robia Amjad of Alston & Bird LLP

OVERVIEW OF THE WORKERS' COMPENSATION SYSTEM



Brad Pauley



Emma Wine

This article provides an overview of California's workers' compensation system for general civil practitioners. It focuses on how the workers' compensation system intersects with the tort system and the common challenges and procedural pitfalls relating to that intersection.

I. The Workers' Compensation Act provides an exclusive remedy for job-related injuries when the conditions of compensation are met.

California's Workers' Compensation Act (the Act) is a statutory system of remedies for job-related injuries. The Act provides employees the sole and exclusive remedy against their employers for on-the-job injuries if the "conditions of compensation" exist, subject to certain exceptions. (Lab. Code, § 3602, subd. (a).) The "conditions of compensation" are (1) at the time of injury both the employee and employer are subject to the Act, (2) at the time of injury the employee is performing services arising out of and incidental to his or her employment and is acting within the course of his or her employment, and (3) the injury is proximately caused by the employment. (Lab. Code, § 3600, subd. (a)(1)–(3); Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2025) ¶ 15:507.) If these conditions are met, the employee may not bring a civil action against the employer because the Act provides exclusive jurisdiction to the Workers' Compensation Appeals Board (WCAB). (Chin et al., *supra*, ¶ 15:505.) The Act should be liberally construed to extend coverage for workers' injuries, which means it likewise should be construed broadly to bar tort claims against an employer even if the employee is seeking to avoid the jurisdiction of the WCAB in order to pursue possible tort remedies. (2 Eskenazi, Cal. Civil Practice: Workers' Compensation, § 15:1.)

The Act creates strict liability for workplace injuries where the conditions of compensation are satisfied; an employee does not need to prove fault on the part of the employer. (Chin et al., Cal. Practice Guide: Employment Litigation, supra, ¶ 15:508.) The public policy behind the workers' compensation system—a specific form of the Hobbesian social contract known as the workers' compensation "bargain"—is that an employer assumes liability for employees' industrial injuries without regard to fault in exchange for limitations on the amount of liability. (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16.) Employees then receive payment of benefits more quickly without having to prove their employer's fault but, in exchange, employees relinquish the larger range of damages that may be available in tort. (*Ibid*.)

II. In a civil action, the defendant employer generally bears the burden of pleading and proving workers' compensation exclusivity as an affirmative defense.

When sued in tort, the defendant employer generally bears the burden of pleading and proving workers' compensation exclusivity as an affirmative defense. (*Gibbs v. American Airlines, Inc*. (1999) 74 Cal.App.4th 1, 11 (*Gibbs*); *Coca-Cola Bottling Co. v. Superior Court* (1991) 233 Cal.App.3d 1273, 1283–1284.) An exception to that rule exists, however, when the plaintiff's civil complaint alleges facts indicating workers' compensation coverage. In such cases, the employer is relieved of pleading requirements for raising exclusivity as an affirmative defense. (*Gibbs*, at p. 11; *Coca-Cola Bottling*, at p. 1285.) In *Gibbs*, the court held that where the former employee alleged facts establishing an employment relationship and injuries arising from the course of employment, the employer was not required to prove at trial that it had purchased workers' compensation insurance to successfully assert the exclusivity defense. (*Gibbs*, at p. 11.)

Importantly, evidence of the defendant employer's workers' compensation insurance coverage has been held unnecessary to establishing an exclusivity defense. As the California Court of Appeal noted in *Gibbs*, "[p]roof of insurance coverage is not expressly listed as a 'condition of compensation' prerequisite to application of workers' compensation provisions. Instead, the relevant condition of compensation is that, 'at the time of the injury, both the employer and the employee are subject to the compensation provisions' of workers' compensation law." (*Gibbs, supra*, 74 Cal.App.4th at pp. 11–12, quoting Lab. Code, § 3600, subd. (a)(1).) *Gibbs* went on to express skepticism that courts even should allow jurors to hear evidence of workers' compensation insurance coverage. (*Gibbs*, at p. 12.)

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III. For the Act to apply to a workplace injury, the parties must be subject to the Act and the injury must arise out of and in the course of the employment.

For an injury to be subject to the Act, an employer-employee relationship must exist.

For an injury to be subject to the Act, an employer-employee relationship must exist. Most persons "in the service of an employer under any . . . contract of hire" are considered employees, excluding those found to be independent contractors. (*Lara v. Workers' Comp. Appeals Bd.* (2010) 182 Cal.App.4th 393, 398, internal quotation marks omitted.) In *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (Borello), the California Supreme Court stated the test of whether an employment relationship exists is " 'whether the person to whom the service is rendered has the right to control the manner and means of accomplishing the result desired.' " (*Id.* at p. 350; *People v. Czirban* (2021) 67 Cal.App.5th 1073, 1092–1093.) Although this is the principal test, other factors also are relevant to whether a person is an employee or independent contractor. These include whether the type of work is typically done under direction of the principal, the principal provides the tools, the length of time the services are to be performed, and whether the payment is by time (indicating the claimant is an employee) or by the job (indicating independent contractor status). (*Borello*, at p. 350.)

In *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, the California Supreme Court used the "suffer or permit to work" test—the so-called ABC test—to determine whether a person is an independent contractor or an employee. That test is applied in claims under California's Industrial Welfare Commission Wage Orders. (*Becerra v. McClatchy Co.* (2021) 69 Cal.App.5th 913, 946.) In 2020, the Legislature adopted the "ABC" standard for purposes of the entire Labor Code. (Lab. Code, § 2775.) However, there are carveouts for portions of the Code—such as those pertaining to workers' compensation—that have their own definitions of employee and independent contractor. (Lab. Code, § 2775, subd. (b)(2); *id*., §§ 3351 [defining employee], 3353 [defining independent contractor].) The factors set forth in *Borello* therefore continue to be used to determine whether a person is an independent contractor or an employee within the workers' compensation context. (*See*, e.g., *Becerra*, at p. 946.)

The injury must be an incident of employment to qualify as "arising out of" the employment.

The second condition of compensation has two requirements, the injury must "aris[e] out of" and occur "in the course of" the employment (workers' compensation practitioners often refer to this statutory requirement by the shorthand of "AOE/COE"). (*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 624.) "Arising out of" typically refers to the origin of the injury and the causal element. (*Scott v. Pacific Coast Borax Co.* (1956) 140 Cal.App.2d 173, 178; see *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 733–734.) It must " 'occur by reason of a condition or incident of [the] employment.' " (*Sunderland v. Lockheed Martin Aeronautical Systems Support Co.* (2005) 130 Cal.App.4th 1, 9.) The injury must be linked to the employment in a causal way. (*Ibid.*) This requirement is not the same as the causation standard required in tort. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291, 297–300.) It is sufficient if the employment is a contributing cause without which the injury would not have occurred. (*Weber v. United Parcel Service, Inc.* (2003) 107 Cal.App.4th 801, 806.)

The injury must be an outgrowth of the employment to "occur in the course of the employment."

The requirement that an injury occurs "in the course of employment" refers to the time, place, and circumstances of the injury. (*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1982) 133 Cal.App.3d 643, 652.) For this requirement to be satisfied, at the time of injury the employee must be engaged in an action that is an "outgrowth" of the employment and "the risk of injury must be inherent in the workplace, or typical of or broadly incidental to the employer's enterprise." (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1008.) The employee must be generally engaged in the type of work he or she was hired to perform. (*Georgia-Pacific Corp. v. Workers' Comp. Appeals Bd.* (1983) 144 Cal. App.3d 72, 75.)

Importantly, despite the similarity of language, the Act's "course of employment" requirement for an employee's injury is not coterminous with the similarly worded common law test for respondeat superior liability. Under that test, for an employer to be liable for an employee's tort, the employee's tortious conduct must occur in "the course and scope of employment." (*Hinman v. Westinghouse Elec. Co.* (1970) 2

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issues remain unsettled, it is clear that new section 1283.05 embodies a decreased emphasis on efficiency in favor of making all relevant evidence available to the arbitrating parties.

1. Prior Law

Prior to January 1, 2025, former sections 1283.05 and 1283.1 allowed parties to specify in their arbitration agreements that discovery in the arbitration would be coextensive with discovery in California civil trial court. However, other than in personal injury and wrongful death cases, to which section 1283.05 applied as a matter of law pursuant to former section 1283.1, subdivision (a), parties were required to expressly reference section 1283.05 in their arbitration agreements in order to avail themselves of that statute's expansive discovery rights under former section 1283.1, subdivision (b). Absent such "magic words," discovery would proceed according to the parties' agreement, which could be express language in the arbitration agreement regarding the scope of discovery or incorporation of the rules of a particular ADR provider such as the AAA or JAMS.

The results of the previous statutory scheme were predictable. Where the parties to an arbitration agreement possessed unequal bargaining power in connection with the agreement, as often happens in the consumer or employment context, the resulting arbitration agreements rarely referenced section 1283.05. This is because the party with greater bargaining power (employers, website operators, and others subject to suit by consumers in arbitration), who typically drafts the agreement and presents it on a take-it-or-leave-it basis, also typically possesses more information and evidence and therefore stands to benefit from rules narrowing the availability of discovery in arbitration. Because expanded discovery in arbitration would typically benefit the employee- or consumer-plaintiff who had little if any ability to negotiate the terms of the arbitration agreement, the party imposing the agreement had little incentive to include a reference to section 1283.05.

2. New Law as of January 1, 2025

As of January 1, 2025, California SB 940 (2024) repealed section 1283.1 and amended section 1283.05 to provide that parties in all arbitrations have "the right to take depositions and to obtain discovery regarding the subject matter of the arbitration, and, to that end, to use and exercise all of the same rights, remedies, and procedures, and be subject to all of the same duties, liabilities, and obligations in the arbitration with respect to the subject matter thereof, as provided in [the Civil Discovery Act and additional subpoena statutes], as if the subject matter of the arbitration were pending before a superior court of this state in a civil action other than a limited civil case, subject to the limitations as to depositions set forth in subdivision (e) of this section."[2] (Code Civ. Proc., § 1283.05, subd. (a).) SB 940 also amended Code of Civil Procedure section 1282.6 to clarify that third-party subpoenas and subpoenas duces tecum for the purposes of discovery shall now be issued as a matter of course in all CAA-governed arbitrations.

These amendments preserved one key limitation on discovery in arbitration: that "[d]epositions for discovery" still require permission from the arbitrator. (Code Civ. Proc., § 1283.05, subd. (e).)

3. Applicability Issues

Practitioners who arbitrate in California will need to understand the effect of new section 1283.05 on issues that regularly arise in disputes over arbitrability. This section explores several such issues from the perspective of each side of the issue. For the remainder of this article, parties to arbitration are divided into two conceptual groups: "Narrowers," that is, parties seeking to narrow the scope of discovery and make it less available; and "Expanders," that is, parties seeking to expand the scope of discovery and make it more available.

As discussed, in employee arbitrations, consumer arbitrations, and most other arbitrations where there is unequal bargaining power, the party with greater bargaining power typically imposes the agreement, has an information advantage, and is the respondent in arbitration who benefits from that information advantage. Not surprisingly, these parties are in the Narrower camp. It follows that the claimant, often an employee or consumer, is typically an Expander.

Where there is parity of bargaining power, which side, if any, is a Narrower or an Expander will depend heavily on the particular facts of each dispute.

Express Incorporation of ADR Provider Rules

For arbitration agreements that expressly incorporate the rules of an ADR provider such as the AAA or JAMS, an immediate question is whether new section 1283.05 overrides the express incorporation of a specified ADR provider's rules. Under JAMS rules, parties are allowed only one deposition by right, and interrogatories, requests for production, and requests for admission are permitted only upon a showing of good cause. The AAA commercial arbitration rules likewise do not

[2] SB 940 also made changes to consumer arbitrations and imposed new obligations on neutrals and ADR providers. These changes, while important, are outside the scope of this article.

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A SEA CHANGE? C.C.P. § 1283.05 AMENDMENT BROADENS DISCOVERY RIGHTS FOR LITIGANTS IN ARBITRATION...continued from Page 8

set forth any detailed scheme for discovery in arbitration but instead vest the arbitrator with broad discretion to "manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute" and allow depositions only in "exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration." These rules provide for significantly narrower discovery than the Civil Discovery Act, so this question has case-altering implications for arbitrations where the agreement explicitly incorporates an ADR provider's rules.

Some early commentators have suggested that under the new scheme, parties to California-seated arbitration retain the ability to contract out of the discovery-broadening provisions of section 1283.05 by referring to and incorporating the published rules of a designated ADR provider or including express limitations on discovery in the arbitration agreement itself.

There is good reason, however, to believe that courts will interpret the new law as overriding any contrary contractual terms. Under the previous scheme, former section 1283.1, subdivision (a) indicated that "[a]ll of the provisions of Section 1283.05 shall be conclusively deemed to be incorporated into, made a part of, and shall be applicable to, every agreement to arbitrate any dispute, controversy, or issue arising out of or resulting from any injury to, or death of, a person caused by the wrongful act or neglect of another." This provision "govern[ed] *all* arbitrations arising out of or resulting from injury or wrongful death." (*Miranda v. 21st Century Ins. Co.* (2004) 117 Cal.App.4th 913, 925, original italics; s*ee Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1475–1476 & fn. 3; *Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal. App.4th 1790, 1802, fn. 10 [right to discovery in such cases is "statutorily conferred"].) The new amendment effectively extends this rule of full discovery to all arbitrations, while also repealing the tort-specific section 1283.1, subdivision (a) as redundant. As a result, all arbitrations, including personal injury and wrongful death arbitrations, are now governed the same statutory provision: new section 1283.05.

However, this observation creates an inconvenient result for the Narrowers, who will argue that parties to arbitration agreements retain the ability to contract around new section 1283.05. Their argument is bolstered somewhat by the fact that former section 1283.1, subdivision (a) said section 1283.05 was "conclusively deemed" a part of all agreements to arbitrate covered tort disputes, while section 1283.05 as amended contains no such language. At the same time, however, if the Narrowers are correct on this point, then parties to personal injury and wrongful death arbitrations, who are now subject to new section 1283.05 like everyone else, just *lost* a significant right they had before 2025: the right to full discovery in arbitration, with no ability to opt out by referring to an ADR provider's rules or contracting to impose express discovery limitations.

The legislative history of new section 1283.05 indicates that this was not the Legislature's intent. To the contrary, the stated intent was to make full discovery available in all arbitrations, to the same extent previously available in personal injury and wrongful death arbitrations. (Sen. Rules Com., Off. of Sen. Floor Analyses, Sen. Bill 940 (2023-2024 Reg. Sess.), as amended Aug. 20, 2024, at pp. 7–8 ["This bill instead allows for depositions to be taken in any arbitration, not just ones resulting from any injury to, or death of, a person caused by the wrongful act or neglect of another, and also allows discovery to be conducted as provided under Section 1283.05"].)

Thus, there is scant basis to conclude that the Legislature meant with SB 940 to curtail the statutory discovery rights of parties arbitrating personal injury and wrongful death claims and override prior authority prohibiting parties from contracting out of those rights. Yet, if the Narrowers' arguments are correct, this is the result. At the same time, it is also hard to believe that the Legislature meant with SB 940 to entirely strip sophisticated parties with equal bargaining power of the ability to write express limitations on discovery in arbitration into their agreements. It thus remains to be seen how courts and arbitrators address this problem and whether the sophistication of the parties will turn out to be a judicially developed factor to be considered in the analysis.

FAA Preemption

Relatedly, what happens when the parties agree that their disputes will be governed by the Federal Arbitration Act's procedural rules along with the rules of their ADR provider? The FAA does not provide for party or third-party discovery, and the arbitrator's subpoena power is limited to the power to require attendance of witnesses (with or without documents) at the merits hearing. (9 U.S.C. § 7; *CVS Health Corp. v. Vividus, LLC* (9th Cir. 2017) 878 F.3d 703, 706.) Thus, section 1283.05 is potentially of great consequence to parties whose arbitration agreements adopt the FAA's procedural rules.

The respondent in *Hohenshelt v. Superior Court* (2025) 18 Cal.5th 310, presented this issue for review, but the Court did not reach it. (18 Cal.5th at pp. 349-350 (conc. opn. of Groban, J.) [agreeing with majority's decision not to reach this issue as petitioner did not properly raise it in the court below].) One plaintiff in the Central District of California recently raised a related argument: that an arbitration agreement was fatally

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unconscionable because it was governed by the FAA and therefore did not allow necessary party and nonparty discovery. The Court rejected the plaintiff's argument in that context. (*League v. Guidehouse, Inc.* (C.D.Cal. Oct. 3, 2024, No. CV 23-10151-MWF (JPRx)) 2024 WL 5311157, at p. *3.) For the time being, parties should carefully analyze the extent to which the language in their arbitration agreements incorporates the FAA and avail themselves of any language that suggests broad FAA incorporation (for Narrowers) or limited FAA incorporation (for Expanders).

What if the agreement (assuming it involves interstate commerce) is silent on procedural rules altogether? The Expanders will argue that under *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* (1989) 489 U.S. 468 and *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, when a California state court is asked to compel a case to arbitration, California's procedural law—including section 1283.05—governs, and the FAA does not directly conflict with section 1283.05.[3] The Narrowers will argue that section 1283.05 is preempted because it directly conflicts with the FAA's policy of efficient arbitration of disputes. One of the Expanders' rebuttals would be that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." (*Volt, supra*, 489 U.S. at p. 476.) As of the publication of this article, it does not appear that this precise issue has been presented to any appeals court.

Choice of Law

New section 1283.05 is likely to implicate myriad choice-of-law issues; this section briefly surveys just a few. To begin with: drafters of arbitration agreements should be aware that by indicating that California law "governs" the arbitration agreement, the California Arbitration Act, including the new provisions enacted by SB 940, will apply, even if the agreement also refers to and incorporates the rules of a specified ADR provider. (*Mastick v. TD Ameritrade, Inc.* (2012) 209 Cal. App.4th 1258, 1264–1265.)

Another question is whether section 1283.05 will apply when an arbitration takes place in California but the arbitration agreement states that the agreement or the arbitration shall be governed by the laws of a different state with less permissive arbitration discovery statutes. It appears again that the forum is key. On this issue, the Narrowers will benefit from California authority providing that a general choice-of-law provision invokes a state's arbitration rules. (*Cronus, supra*, 35 Cal.4th at p. 393.) The Expanders, by contrast, will benefit from federal common law providing that a general choice-of-law provision does not operate to invoke that state's arbitration rules. (*Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, 63–64; *Wolsey, Ltd. v. Foodmaker, Inc.* (9th Cir. 1998) 144 F.3d 1205, 1213.) Thus, another issue that may arise is which body of law—state or federal—an arbitrator should use to make a choice-of-law determination.

Drafters whose arbitrations may take place in California and who wish to avoid the effect of section 1283.05 may be able to strengthen their position by expressly indicating that a particular state's arbitration procedures apply. Even with careful effort, however, under California law a court (or arbitrator) may choose not to enforce a choice-of-law clause if the result is contrary to public policy.

Retroactivity

The main retroactivity issue arises when an arbitration agreement was signed before January 1, 2025, and the arbitration is initiated after January 1, 2025. The Expanders generally have the stronger position on this issue based on the plain language of the first sentence of section 1283.05. Nevertheless, the Narrowers are not without arguments and should also explore whether they have any constitutional arguments based on the Contracts Clause under the facts of their case. (Cf. *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234.)

CONCLUSION

While it remains to be seen whether new section 1283.05 is truly a sea change, what is clear is that the new law moves the needle significantly with respect to two competing policy considerations. The first is that arbitration should provide for efficient and economical resolution of disputes. The second is that arbitration should allow for parties to develop a complete record, so that cases are decided based on all available relevant evidence. It appears that new section 1283.05 embodies a policy that de-emphasizes the former and emphasizes the latter.

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[3]The rule is not the same in federal court, where parties may find it easier to argue that the FAA applies and therefore limits discovery. Thus, the enactment of SB 940 may profoundly impact the desirability of federal court for parties to arbitration, with the Narrowers potentially gaining greater incentive to file in federal court or remove before compelling arbitration.

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"'implied findings'" (*Kaushansky v. Stonecroft Attorneys, APC* (2025) 109 Cal.App.5th 788, 799);

2. "'When the record clearly demonstrates what the trial court did,'" including in a statement of decision, the Court of Appeal "'will not presume it did something different'" (*Paterno v. State of California* (2003) 113 Cal.App.4th 998, 1015).

The appellate court, in other words, presumes the trial court resolved any given issue in the prevailing party's favor, in any way that is consistent with the statement of decision.

For example, suppose the plaintiff prevails at trial having argued that the defendant was liable on two distinct theories, A and B. And suppose on appeal, the defendant argues, correctly, that binding case law negates theory B.

If the statement of decision did not address the theories of liability separately, the Court of Appeal will affirm based on theory A. But if the trial court issued a statement of decision adopting theory B as the basis for liability, the Court of Appeal will reverse. (See *Cortina v. North American Title Co.* (2026) 120 Cal.App.5th 1030, 1127-1130 [no implied findings in favor of judgment where statement of decision showed court adopted party's erroneous legal standards].)

Same: A statement of decision is available "upon the trial of a question of fact by the court."

New section 632, like the old version, provides that a statement of decision is available "upon the trial of a question of fact by the court." (New § 632, subd. (a).) The word "trial" is key. It will remain the case that not every decision of a question of fact entitles the parties to a statement of decision.

"The requirement of a written statement of decision generally does not apply to an order on a motion, even if the motion involves an evidentiary hearing and even if the order is appealable." (*Lien v. Lucky United Properties Investment, Inc.* (2008) 163 Cal.App.4th 620, 623–624.) For example, statements of decision are not required in connection with rulings on motions for preliminary injunctions (*Santa Clara Valley Water Dist. v. Eisenberg* (2025) 117 Cal.App.5th 714, 742), or on special motions to strike under Code of Civil Procedure section 435.16 (*Lien*, at p. 625; cf., *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 564 [statement of decision required if determination on the second step of the anti-SLAPP analysis is "based on evidence" and granting motion will "result[] in a judgment striking the complaint"]).

On the other hand, a statement of decision may be available in connection with certain arbitration rulings, if appealable and involving a factual determination (see Code Civ. Proc., § 1291); certain proceedings identified by statute (see, e.g., Fam. Code, § 2127; Prob. Code, § 1962); and in some other contexts (see, e.g., *Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 659-662 [alter ego finding under Code of Civil Procedure section 187]). And the trial court always has discretion to issue a statement of decision even if not required (see *In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1497), and even if not requested (New § 632, subd. (c)).

Different: You must request a statement of decision before the matter is submitted.

If you remember only one thing about the new rules, remember this: You must always request a statement of decision "prior to the submission of the matter for decision." (New § 632, subd. (a), italics added.)

If a court reporter is present, the request may be oral. However, even when not required, it is always best to file a written request. A written request forces you to think more carefully about the scope of the issues and makes it easier to challenge the trial court's ruling in objections and posttrial motions or on appeal.

Old section 632 allowed you to make the request within 10 days of the court's "tentative decision," except in short-cause matters. (See Old § 632, subd. (a).) This allowed you to decide whether to request a statement of decision based on the tentative decision. As of January 1, you must forget all that.

Though the timing will be different, what happens after a party requests a statement of decision will stay the same. If a party timely requests a statement of decision, the court may order a party or parties to prepare a draft or the court may draft the statement. (New § 632, subd. (d).) As under the current rules, a party should welcome the chance to draft the statement of decision—and should be wary of its opponent's draft—as the statement of decision can be a devastating weapon on appeal.

Same: The statement of decision must address "each of the principal controverted issues."

Under the new section 632, as under the old, the statement of decision must address "each of the principal controverted issues at trial." (New § 632, subd. (a).) Your request for a statement of decision must specify the issues you want the court to decide. (*Ibid*.)

The requirement to address "each of the principal controverted

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issues" is not as broad as you might think. Yes, the court needs to "explain[ ] the factual and legal basis for its decision as to each of the principal controverted issues." (New § 632, subd. (a).) But this could amount to as little as a single, high-level finding and a citation to a single case or statute.

And the court needs to address only the principal controverted issues, not every issue in dispute. The principal issues are the ultimate questions—"Did the driver breach a duty of care by running the yellow light?"—rather than the detail questions—"How long had the light been yellow when the driver entered the intersection?" (See *In re Marriage of Williamson* (2014) 226 Cal.App.4th 1303, 1318 ["[t]he court is required only to state the ultimate rather than evidentiary facts"; the decision need only "'state the grounds upon which the judgment rests, without necessarily specifying the particular evidence'"].)

Different: No more "tentative decision."

Under New section 632, if none of the parties requests a statement of decision before the matter is submitted, "the court may announce its ruling on all relief sought without a statement of decision"—orally or in writing, and in brief or at length. (New § 632, subd. (c).)

The old statute provided that following a trial that lasted more than a day, courts would "announce[] a tentative decision." (Old § 632, subd. (a).) Like great musicians playing a jazz standard, each judge interpreted this provision differently. The best part of the new statute is to do away with "tentative decisions" as a formalized step on the way to statements of decision.

Different: Objections and finality.

Under New section 632, the court serves "the statement of decision," and this triggers a 10-day deadline to object. (New § 632, subd. (e)(1), italics added.) (There is no longer any "proposed" statement of decision or other half-measure, and this 10-day deadline is shorter than the current 15-day deadline.) If there are no objections, the statement of decision becomes final upon expiration of the time to object.

The grounds to object to the statement of decision remain as before. A party may object that the statement of decision fails to address a "principal controverted issue" (see above), that it is contradictory, or that it commits a genuine error of fact or law. As before, you should not use objections to reargue an issue, explain why the court is wrong, criticize the judge or your opponent, or list secondary issues the court should have decided. Objecting on these improper grounds will only make it harder for the court to appreciate any valid grounds for objection you raise. Also, though it may be unlikely the trial court will change its decision, your real audience is the Court of Appeal.

The trial court may, but need not, set a hearing on objections. The statement of decision becomes final when the court rules on the objections, or the later of 30 days after the time to object has expired or 30 days after any hearing on the objections. (New § 632, subd. (e)(4)–(5).)

Different: Proposed and final judgment.

Under New section 632, "before or after the statement of decision is final," the court may prepare and serve a proposed judgment or order a party to do so. (New § 632, subd. (f)(1).) Objections to the proposed judgment are due within 10 days of service. (New § 632, subd. (f)(2).)

This timeline runs into the hard requirement, under the new section 664, for the clerk to enter judgment within 30 days after the statement of decision is final. (New § 664, subd. (b).) Or, absent a statement of decision, the clerk must enter judgment within 30 days "after the filing of the court's decision." (*Ibid.*)

The new statutes do not detail the court's procedure for signing and filing the final judgment. (Cf. Cal. Rules of Court, rule 3.1590(l).) We anticipate the new rules of court will address these issues.

Conclusion: Why these rules matter.

The fate of a judgment following a court trial usually depends on the statement of decision. What the trial court says, and doesn't say, about its decision and reasoning could make the judgment appeal-proof—or could expose errors and invite reversal. Learn the new rules; review them before every "trial of a question of fact by the court." The day will come when they save your client's case.

Hon. John L. Segal is an Associate Justice, Second Appellate District, Division Seven

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Cal.3d 956, 962, fn. 3 (*Hinman*).) The scope of the common law test for respondeat superior liability is more restrictive than the "in the course of employment" test in workers' compensation. (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal. App.4th 458, 468, citing *Saala v. McFarland* (1965) 63 Cal.2d 124, 128–129, fn. 3 (*Saala*); *Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1562 ["the test for workers' compensation liability is broader than that for respondeat superior"].) An employee can suffer an injury that is compensable under workers' compensation and, at the same time, not have been acting within the course and scope of employment under the doctrine of respondeat superior. (*Munyon v. Ole's Inc.* (1982) 136 Cal.App.3d 697, 703.)

For example, in *Saala*, an employee was injured when a co-employee struck her with a car in their employer's parking lot. (*Saala*, *supra*, 63 Cal.2d at p. 125.) The employee received workers' compensation benefits for her injuries under "the established rule that 'injuries sustained by an employee while . . . on premises owned and controlled by his employer are generally deemed to have arisen out of and in the course of the employment.' " (*Id.* at p. 126.) When the employee sued the coemployee, the coemployee argued she should be immune from suit because the employer is vicariously liable under respondeat superior. (*Id.* at p. 127.) The court disagreed that the Legislature intended to exempt all employee actions causing harm to coemployees from the common law liability retained in Labor Code section 3852 to the same extent that an employer is exempt from civil liability because of its workers' compensation provision. (*Saala*, at p. 128.) The court held the employer was not vicariously liable for the coemployee's tort under respondeat superior because the defendant was not "still serving her employer when she was in the act of removing her automobile from the parking lot after completing her work shift." (*Id.* at p. 129.)

Subject to certain exceptions, under the "going and coming" rule an employee's injury sustained on an ordinary work commute does not occur in the course of employment and is not compensable.

Under the "going and coming" rule, an employee's injuries are not considered to have occurred within the course of employment—and thus are not compensable under the Act—if, at the time, the employee is traveling to or from work on an ordinary commute. (*Hinojosa v. Workmen's Comp. Appeals Bd*. (1972) 8 Cal.3d 150, 157.) When applying this rule the employment relationship typically begins when the employee enters the employer's premises. (*Jones v. Regents of University of California* (2023) 97 Cal.App.5th 502, 508.)

Because some courts have found the "going and coming" rule harsh upon application, they have crafted recognized exceptions. (S*anta Rosa Junior College v. Workers' Comp.* Appeals Bd. (1985) 40 Cal.3d 345, 354–358.) Under the "travel expense" exception, for example, when an employer compensates an employee for the commuting time there is an implied agreement that the employment relationship shall continue during the period of "going and coming." (*Kobe v. Industrial Acc. Commission* (1950) 35 Cal.2d 33, 35.) Under the "required transportation" exception an employee is within the course of employment while traveling to or from work if the employer requires the employee to bring his or her automobile to work for the benefit of the employer. (*Smith v. Workmen's Compensation Appeals Bd.* (1968) 69 Cal.2d 814, 815–816.) If the employee is off premises but is traveling on a special errand done at the request of the employer, the employee is in the course of employment under the "special mission" exception. (*Dimmig v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 860, 868.)

Under the "home as a second jobsite" exception, "[w]ork done at home may exempt an injury occurring during a regular commute from the "going and coming" rule," thereby rendering it compensable under the Act, "if circumstances of the employment–and not mere dictates of convenience to the employee–make the home a second jobsite." (*Wilson v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 181, 184.) In *Wilson*, a teacher was injured during her regular commute. (*Ibid*.) She argued that because she had brought work home the previous night, the injury fell into the "home as a second jobsite" exception. (*Ibid*.) The California Supreme Court did not agree. (*Ibid*.) The performance of a "tidbit of work" at home will not avoid the "going and coming" rule. (*Bramall v. Workers' Comp. Appeals Bd.* (1978) 78 Cal.App.3d 151, 158.) If the home becomes a second jobsite then an injury sustained while traveling between work and home is compensable. (*Wilson*, at p. 184.)

Practitioners should be aware that the "going and coming" rule can apply outside the workers' compensation context to determine whether an employee's tortious conduct occurred in

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the scope of employment. (*Hinman*, *supra*, 2 Cal.3d at p. 961.) The "going and coming" rule applies differently in that context. (*Id*. at p. 962, fn. 3.) For example, in *Anderson v. Pacific Gas & Electric Co.* (1993) 14 Cal.App.4th 254, an employee was returning home from work when he struck the plaintiff with his car. (*Id.* at p. 257.) The court held the employee was not acting within the scope of employment when the accident occurred. (*Id.* at p. 256.) Thus, the employer was not vicariously liable for the tort under the doctrine of respondeat superior. (*Ibid.*) However, because the employer paid the employee per diem travel expenses, the employee was able to recover workers' compensation benefits under the "travel expense" exception. (*Id.* at pp. 259–260, 263.)

Actions that do not benefit the employer are generally outside the "course of employment."

An employee's actions do not occur in the course of employment when the activity is personal in nature and does not yield any benefit to the employer. (*Hinkle v. Workers' Comp. Appeals Bd.* (1985) 175 Cal.App.3d 587, 591, disapproved on other grounds in *Camper v. Workers' Comp. Appeals Bd*. (1992) 3 Cal.4th 679, 690.) In *Fireman's Fund Indem. Co. v. Industrial Acc. Commission* (1952) 39 Cal.2d 529, the employee was a cook and housekeeper in the employer's home, but lived in the home. (*Id.* at p. 530.) One evening, after completing her duties, the employee took a walk and fell. (*Id.* at p. 531.) Her injury from this fall was determined not to be in the "course of employment" because it was an "act of recreational diversion of her own free choice." (*Id.* at p. 535.)

Certain personal acts may be compensable under the Act, however, through the "personal comfort" doctrine." (*Mason v. Lake Dolores Group* (2004) 117 Cal.App.4th 822, 838.) Under this doctrine certain acts are considered in the course of employment even though they are personal to the employee because they improve the employee's efficiency and therefore benefit the employer. (*Ibid.*) In *Western Greyhound Lines v. Industrial Acc. Commission* (1964) 225 Cal.App.2d 517, for example, while on a short break in the middle of a 12-hour shift, a bus driver was injured by a third party tortfeasor when she went into a restaurant across the street from the employer's premises to have some coffee. (*Id.* at pp. 518–519.) The court held the employee's injury was compensable under the Act because the employee was getting paid during this break, the continuity of employment was not interrupted, and "it was very much to the advantage of the employer for the bus driver to refresh herself with a cup of coffee at 1:45 a.m." (*Id.* at p. 520.)

That said, an employee's actions do not occur in the course of employment when the actions violate the employer's instructions or are outside the employee's duties. (*National Auto Ins. Co. v. Industrial Acc. Commission of Cal.* (1937) 8 Cal.2d 715, 718.) For example in National Auto, an employee was told to wait inside the store when he arrived to work in the morning. (*Id.* at p. 716.) Instead of following those instructions, he went out to look for his employer and was injured. (*Ibid.*) The court held his injuries were not sustained in the course of employment because he violated express instructions to stay inside the store. (*Id.* at pp. 718–719.) In this area, courts recognize a distinction between "an unauthorized departure from the course of employment" and the "performance of a duty in an unauthorized manner." (*Pacific Tel. & Tel. Co. v. Workers' Comp. Appeals Bd.* (1980) 112 Cal.App.3d 241, 245.) When an employee performs a work-related duty in an unauthorized manner, the injury is still considered within the course of employment. (*Ibid.*)

In addition, an injury is considered to have occurred in the course of employment when the action was outside of the employee's regular duties but was requested by the employer. (*Eckis v. Sea World Corp.* (1976) 64 Cal.App.3d 1, 5.) In *Eckis*, an employee was injured while riding a killer whale. (*Ibid.*) Although this was not within her regular duties, the injury was compensable under the Act because her employer requested her to ride the whale for publicity pictures. (*Ibid.*)

IV. If conditions to compensation are not met or the injury is statutorily excluded, the injury does not fall under the Act.

Injuries where the conditions of compensation are not met are excluded from the Act.

Provided that some basis of tort liability can be shown, an employee may bring a tort action against his or her employer if the conditions of compensation are not met, e.g., if the injury does not arise out of or occur in the course of employment. (2 Witkin, Summary of Cal. Law (11th ed. 2026) Workers' Compensation, § 60.)

Importantly, and rather obviously, if the employee's on-the-

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job injury is caused by a third party tortfeasor, the exclusive remedy provision does not apply to the employee's right to recover against that third party. An employee can bring a civil action against the third party because no employer-employee relationship exists between them and thus the tort duties involved are not subject to the workers' compensation bargain. (*Pacific Gas & Elec. Co. v. Morse* (1970) 6 Cal.App.3d 707, 714.) For example, if a delivery truck driver is injured in a car accident on his normal delivery route, his remedy against his employer would be for workers' compensation benefits but he can sue in tort the third party driver who may have caused the accident.

The Act also denies its protections to employers who carry no workers' compensation insurance. If an employer is not insured for workers' compensation and fails to secure the payment of benefits, the Act's exclusivity provision does not protect it from a civil suit by an injured employee. (*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 985.)

Labor Code section 3600, subdivision (a)(4)–(9) lays out other specific circumstances when conditions to compensation are not met and therefore an on-the-job injury is not compensable under the Act. (*Ibid.*) These situations include, when (1) the injury was caused by intoxication of the injured employee, (2) the injury was intentionally self-inflicted, (3) the injury arose out of an altercation in which the injured employee was the initial aggressor, (4) the injury was caused by the commission of a felony by the injured employee, and (5) the injury arose "out of a voluntary participation in an off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment." (*Ibid.*)

When determining whether an off-duty recreational activity was expected as part of employment, courts examine whether the employee subjectively believed participation in the activity was expected and whether that belief was reasonable. In *Ezzy v. Workers' Comp. Appeals Bd*. (1983) 146 Cal.App.3d 252, the employee was a law student and part time law clerk. (*Id.* at p. 263.) She joined her law firm's softball team and was injured. (*Ibid.*) The court concluded the injury resulted from the employee's participation in an activity that was a reasonable expectancy of her employment. The court noted that the employee was urged to play by one of the partners who was also a coach, the firm paid for all equipment, the firm sponsored an awards banquet that team members and other employees were invited to, the league required at least four women to play at all times, and the firm received a substantial benefit through office morale. (*Ibid.*)

Certain injuries are statutorily excluded from the Act.

Labor Code section 3602, subdivision (b), sets out circumstances when the Act does not provide the exclusive remedy and a civil tort action may be brought against the employer. (*Id.*, §3602, subd. (b)(1)–(3).) These include when, (1) the employee's injury is proximately caused by a willful physical assault by the employer, (2) the employee's injury is aggravated by the employer's fraudulent concealment of the existence of an injury and its connection with the employment, and (3) the employee's injury is proximately caused by a defective product manufactured by the employer and is sold to an independent third person and the product is thereafter provided for the employee's use by the third person. (*Ibid*.)

V. Important aspects of the Act include civil suits brought outside the system and application of the *Privette* doctrine.

An employee may try to bring a civil tort action against an individual or company with ties to the employer.

Generally, an employee who has sustained a workplace injury cannot sue an employer or coworker in tort because Labor Code section 3601 states that "where the 'conditions of compensation exist,' the right to recover compensation is 'the exclusive remedy' for injury or death of an employee against the employer or coemployee acting within the scope of employment." (*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 154.) "[A] coemployee's conduct is within the scope of his or her employment if it could be imputed to the employer under the doctrine of respondeat superior." (*Hendy v. Losse* (1991) 54 Cal.3d 723, 740.)

Given the relatively limited monetary remedies available in the workers' compensation system, however, injured employees often pursue tort actions for workplace injuries. In the context of a joint venture, for example, an employee might argue that only one of the several venturers is the employer entitled to the protection of workers' compensation exclusivity. The employee might then argue that all other venturers are liable in tort, e.g., because they had a role in ensuring a safe workplace

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but were not technically their employer.

Another related tactic used by injured employees to bring a civil tort action is the alter ego doctrine. Injured employees have argued in the joint venture context, for example, that the owner of their employer—who should be entitled to the protections of workers' compensation exclusivity as a co-employee—is subject to liability in tort because he is also the owner, and the alleged alter ego, of related companies that might have had some role in workplace safety.

Alter ego is an extreme remedy and is rarely applied. (*Highland Springs Conference & Training Center v. City of Banning* (2016) 244 Cal.App.4th 267, 281.) There are many factors that a court takes into account when determining whether a corporate form should be disregarded. (*Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 811–812 [these factors include, but are by no means limited to: (1) commingling of funds and other assets the unauthorized diversion of corporate funds or assets to other than corporate uses; (2) the treatment by an individual of the assets of the corporation as his own; (3) the confusion of the records of the separate entities; (4) the failure to adequately capitalize a corporation; (5) the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation; (6) the concealment and misrepresentation of the identity of the responsible ownership or concealment of personal business activities; (7) the contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions].)

In order for the alter ego doctrine to be applied, "there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist." (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538.) In addition, "there must be an inequitable result if the acts in question are treated as those of the corporation alone." (Ibid.) Arguably, for such an alter ego argument by an injured employee to succeed, therefore, a court would have to find that the benefits the injured employee would receive under the Act are somehow inequitable. Given the Legislature's embrace of the workers' compensation bargain, tort plaintiffs face an uphill battle.

Under the *Privette* doctrine, a person who hires an independent contractor is generally not liable for injuries to the contractor or its employees.

Workers' compensation has some limited application beyond the direct employer-employee relationship. Under the Privette doctrine, one who hires an independent contractor is not liable for injuries sustained by the independent contractor's employees in the course of that work. (*Lopez v. C.G.M. Development, Inc.* (2002) 101 Cal.App.4th 430, 434 (*Lopez*).) There are two justifications for the Privette doctrine. One is the hirer's right to delegate workplace safety to the independent contractor. The other is the workers' compensation exclusive remedy provision. (*Ibid*.) The idea is that, " 'it would be unfair to impose liability on the hiring person when the liability of the contractor . . . is limited to providing workers' compensation coverage.' " (*Id*. at p. 439.)

The two exceptions to the Privette doctrine are the "retained control" exception and the "concealed hazard" exception.

There are two narrow exceptions to the Privette doctrine. *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 established the "retained control" exception. (*Id*. at p. 202.) In *Hooker* the court explained that if a hirer retains control over safety conditions at a worksite and negligently exercises that control in a way that affirmatively contributes to an employee's injuries, liability can be imposed on the hirer and the exclusive remedy rule would not preclude the employee from suing the hirer. (*Ibid*.) In *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, a company hired a contractor to install sound systems in stores. (*Id.* at p. 223.) The company requested that the contractor use the company's forklifts. (Id. at p. 225.) The forklifts were not properly equipped and an employee of the contractor was injured. (*Ibid.*) The court held that negligently furnishing equipment was a form of exercising retained control and that the hiring company was liable because its equipment affirmatively contributed to the injuries. (*Ibid.; Bowen v. Burns & McDonnell Engineering Co., Inc.* (2024) 103 Cal.App.5th 759, 765; Lopez, *supra*, 101 Cal.App.4th at p. 434; .)

The second exception to the *Privette* doctrine is the "concealed hazard" exception. (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 674.) Under this exception, a hirer of a contractor may be liable if (1) he or she knew or reasonably should have known of a concealed hazard, (2) the contractor did not know and could not have reasonably ascertained the condition, and

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(3) the hirer failed to warn the contractor. (*Ibid.*) In *Gravelin v. Satterfield* (2011) 200 Cal.App.4th 1209, homeowners hired DISH Network to install a satellite dish. (*Id.* at p. 1212.) DISH outsourced the job to Linkus Enterprises, Inc. (*Id.* at p. 1217.) Linkus sent an employee to install the dish at the homeowners' property. (*Ibid.*) While installing the dish, the employee fell when he attempted to access the roof using a small roof extension located between the house and carport. (*Ibid*.) The employee brought a civil action against the homeowners. (*Ibid.*) The court held the concealed hazard exception did not apply because the hazard—the danger of climbing on the roof extension—was open and obvious. (*Ibid*.) It was clear that the roof extension was not fit for a person to stand on. (*Ibid.*) If an injury does not fall into either the "retained control" exception or the "concealed hazard" exception, the exclusive remedy provision—through the *Privette* doctrine—bars a civil suit by an independent contractor's injured employee against the hirer.

VI. Appellate remedies from trial court rulings regarding workers' compensation exclusivity vary depending on when and how the trial court rules.

Trial court rulings regarding the affirmative defense of workers' compensation exclusivity often arise in the context of demurrer, a motion for judgment on the pleadings, or a motion for summary judgment. If the trial court rules that exclusivity does not apply and that the action can proceed to trial, the employer's best option may be to file a writ petition. If that is summarily denied, the employer can then raise the defense at trial and, if necessary, on appeal from an adverse judgment.

VII. Within the workers' compensation system, a party must seek reconsideration from the WCAB; if denied the party may petition the California Court of Appeal for a writ of review.

Appellate remedies relating to exclusivity work differently within the workers' compensation system, however. Under Labor Code section 5903, within 20 days after the service of any final decision by a workers' compensation judge (WCJ) any person aggrieved by the decision may petition for reconsideration by the WCAB. The petition for reconsideration must be on one of the following broadly worded grounds: (1) the appeals board or WCJ acted without or in excess of its powers, (2) the decision was procured by fraud, (3) the evidence does not justify the findings of fact, (4) petitioner has discovered new evidence material to the case, which he or she could not, with reasonable diligence, have discovered and produced at the hearing, (5) the findings of fact do not support the decision. (*Id.*, §5903, subds. (a)–(e).)

If the WCAB denies reconsideration, the aggrieved party may within 45 days petition for a writ of review in the California Court of Appeal under Labor Code section 5950. (*Nelson & Sloan v. Workers' Comp. Appeals Bd*. (1978) 79 Cal. App.3d 51, 54.) If the Court of Appeal finds such a petition has potential merit after reviewing the parties' briefing (often including briefing by the WCAB), it can issue a writ of review, set the case for oral argument, and issue an appellate decision.

To conclude, the workers' compensation system provides an expeditious vehicle for compensating injured employees while limiting employer liability. Understanding the basic principles underlying the Act, the limits of its application, and how it intersects with the tort system is critical for the general civil practitioner.

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YOUNG LAWYERS DIVISION UPDATE



Sam Donohue



Andrew Figueras



Jay Ettinger

The third quarter of 2026 has been a busy and energizing stretch for the Young Lawyers Division. We've been hard at work lining up engaging programming for the rest of the year and creating more ways for younger lawyers to connect, learn, and grow together.

On September 24, the YLD hosted a standout MCLE webinar, "Optimize, Don't Sacrifice: How Young Lawyers Can Build a Rich Career and a Rich Life." ABTL members Hon. Stephen Pfahler (Ret.) and Tiaunia Henry shared candid insights and practical advice, and the program was a resounding success. The YLD is putting together another MCLE event for later this fall to close out the year, so stay tuned for details!

On October 27, we gathered for a YLD mixer at V Wine Room in West Hollywood. We had great wine, great company, and many chances to reconnect with colleagues and meet new ones.

There's plenty more ahead, so keep an eye on the ABTL Report and your email for the latest on upcoming YLD programming. Want to help shape what comes next? We'd love to have you on board! Reach out to YLD Co-Chairs Andrew Figueras and Sam Donohue, or YLD Vice Chair Jay Ettinger, to find out how you can take part in future YLD events.

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