MurphyAustin ATTORNEYS

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Welcome to the Fall Edition of **Murphy Austin's Employment Law News**. Fall has finally arrived, and we are enjoying the cooler temperatures. As the year starts to wind down, be sure to save the date for the Labor and Employment Year-End Update seminar, December 8, where we will review new employment laws taking effect January 1, 2023.

In COVID-19 news, be aware that the California COVID-19 paid sick leave law, originally scheduled to expire on September 30, 2022, was extended to December 31, 2022. There are no changes in the law, other than the extension of the expiration date. Covered employers (those who have 26 or more employees) should post the **updated required poster**.

In this quarter's newsletter, we provide you with updates on employer's vicarious liability and arbitration agreements; a review of individual liability for overtime wages; and highlights of the surprisingly helpful information employers can find on the Department of Industrial Relations web site.

Sincerely,

**Shawn M. Joost, Partner**
Murphy Austin Labor and Employment Law Team

## *COVID-19 Update*

### COVID-19 Definition of "Close Contact" Amended

By Shawn M. Joost


The California Department of Public Health amended the definition of a "close contact" for COVID-19 exposure with a **new order issued October 13, 2022**. The amended definition provides additional clarity on the June 2022 change to defining exposure based on shared indoor air space, with standards for larger and smaller spaces.

Employers should read the entire order. But, the new definition of close contact is:

***"Close Contact" means the following:***

*In indoor spaces 400,000 or fewer cubic feet per floor (such as home, clinic waiting room, airplane etc.), a close contact is defined as sharing the same indoor airspace for a cumulative total of 15 minutes or more over a 24-hour period (for example, three separate 5-minute exposures for a total of 15 minutes) during an infected person's (confirmed by COVID-19 test or clinical diagnosis) infectious period.*

*In large indoor spaces greater than 400,000 cubic feet per floor (such as open-floor-plan offices, warehouses, large retail stores, manufacturing, or food processing facilities), a close contact is defined as being within 6 feet of the infected person for a cumulative total of 15 minutes or more over a 24-hour period during the infected person's infectious period.*

*Spaces that are separated by floor-to-ceiling walls (e.g., offices, suites, rooms, waiting areas, bathrooms, or break or eating areas that are separated by floor-to-ceiling walls) must be considered distinct indoor airspaces.*

# *CHANGES IN EMPLOYMENT LAW*

## Arbitration Agreement Change – Again

By Charles R. Hellstrom


For the fourth time in a year, California law on employee arbitration agreements has shifted again.

As you may recall from prior editions of this newsletter, on January 1, 2020, California enacted Labor Code section 432.6, which prohibits California employers from requiring employees to sign arbitration agreements as a condition of employment. The U.S. Chamber of Commerce and other business groups filed a lawsuit in federal district court challenging this law, contending that it was preempted by the Federal Arbitration Act (FAA). The federal district court issued a preliminary injunction that temporarily blocked enforcement of the law, and the State of California then intervened to appeal the federal district court's injunction to the Ninth Circuit.

In September 2021, the Ninth Circuit lifted the injunction, which allowed most of Labor Code section 432.6 to go into effect. Shortly thereafter, the U.S. Chamber of Commerce filed a petition asking the Ninth Circuit for a rehearing.

In response, last month the Ninth Circuit withdrew its opinion and will be resetting the matter for rehearing. As such, the federal district court's preliminary injunction blocking the full enforcement of AB 51 is once again in

effect. While the end result remains uncertain pending the rehearing and possible appeal to the U.S. Supreme Court, employers are not currently prohibited from requiring an arbitration agreement as a condition of employment. We recommend that you review your arbitration agreements accordingly.

## When are employers liable for their employee's tortious conduct?

By Shawn M. Joost

Employers are generally aware that they may face liability for conduct of their employees that causes injury. But the parameters of an employer's liability are not always clear. The recent case of *Musgrove v. Silver* (2022) 82 Cal. App. 5th 694 provided a useful overview of the "tests" courts apply to determine if an employer is vicariously liable for their employee's conduct.

When an employer is "vicariously liable," it means the employer is liable without regard to the employer's fault. Since no fault is required, employers are liable for employee conduct only when the employee is acting within the scope of employment when he engages in the negligent or wrongful conduct. But what is the test to determine whether an employee is acting within the scope of employment?

In *Musgrove*, the employer, a Hollywood producer, brought his executive assistant with his family and entourage to a wedding at a resort in Bora Bora. Late one windy evening, the producer's personal chef met the executive assistant and provided her with alcohol and cocaine. When the executive assistant returned alone to her overwater bungalow, she decided to descend the ladder from her bungalow and go for a late-night swim, which she was well-known for doing. Tragically, she drowned during the swim. Her parents sued the producer, claiming he was vicariously liable for the negligence of the chef in supplying her with drugs and alcohol while knowing of her propensity for late-night swims.

The court reviewed the four main tests to determine vicarious liability, which are sometimes used in conjunction with one another.

1. **Risk-focused test**. Was the risk caused by the chef's alleged negligent conduct "inherent in the working environment?"

2. **Foreseeability-focused test.** Was the chef's alleged negligent conduct an action that the producer could have reasonably foreseen?

3. **Benefit and custom-focused test.** Did the chef's alleged negligent act amount to conduct that provided some benefit to the employer or conduct that had become a "customary incident" of the employment relationship?

4. **Public policy-focused test.** Would finding the producer vicariously liable for the chef's conduct support the policies underlying the doctrine of vicarious liability? In particular, would it help prevent further tortious conduct; would it give greater assurance of compensation to victims; and,

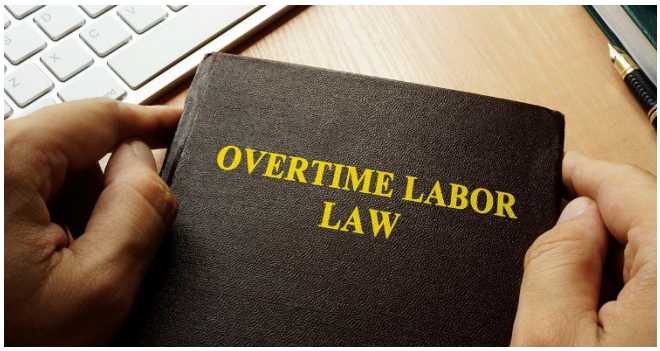
would it ensure that the victim's losses are equitably borne by those who benefit from the business that gave rise to the injury?

In *Musgrove,* the court found that, under any of the four tests, the producer was not vicariously liable for the chef's alleged negligence. The chef's conduct was supplying the assistant with drugs and alcohol and allowing her to return to her bungalow alone on a windy night, knowing she often went for late-night swims. This conduct was not engendered by his job as chef. His conduct was not a foreseeable risk of his employment as a chef because it was outside the type of duties he had as a chef. The producer received no benefit from the chef's conduct. There was no evidence that anything like placing the assistant in peril had happened before, so the conduct had not become a customary incident of the employment relationship. Finally, the chef's conduct was too attenuated from his job duties to make it equitable to hold the producer responsible for his conduct.

While the producer was not liable for his chef's conduct, it is helpful for employers to understand the broad possible scope of vicarious liability. In particular, it is important to note that an employee can be acting within the scope of employment under any of these tests even if: 1) the employer did not authorize the employee's conduct; 2) the employee acted without any motive of serving the employer's interest; and, 3) the employee engaged in intentional – or even criminal – conduct.

## Individual Liability for Overtime Wages

By Charles R. Hellstrom




On January 1, 2016, California enacted California Labor Code section 558.1, which states:

"Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation."

However, the language of section 558.1 leaves many things unclear, including: 1) whether section 558.1 provides a "private right of action" for employees to pursue this personal liability through a lawsuit; 2) the factors that determine whether an individual "caused to be violated" one of the Labor Code sections; and, 3) whether the court has discretion to determine whether to impose individual liability under section 558.1.

Recently, the court provided some clarity in *Seviour-Iloff v. LaPaille* (2022) 80 Cal. App. 5th 427. In *Seviour-Iloff,* the plaintiff employees proposed and then entered into an employment agreement where they would receive free rent instead of wages in exchange for their labor. After the employees sued their employer as well as its CEO/CFO for unpaid wages and Labor Code violations, the court confirmed, among other things, that Labor Code section 558.1 does provide a private right of action for employees to pursue the enumerated Labor Code violations against their employer's managing individuals. The court also found that section 558.1 does not provide courts with discretion as to whether to impose individual liability, explaining that the use of "may" in section 558.1 does not give the *court* discretion whether to find personal liability under the statute. Instead, it gives the *employee* the discretion to pursue wages from the individuals, if the employees are unable to collect from the employer.

In addressing whether the individual defendant "caused" the Labor Code violations, *Seviour-Iloff* cited to *Usher v. White* (2021) 64 Cal. App. 5th 883, 894. In *Usher*, the court clarified that to be found liable under section 558.1, "an owner must either have been personally involved in the alleged Labor Code violations or, absent such personal involvement, had sufficient participation in the activities of the employer such that the owner may be deemed to have contributed to, and thus for purposes of the statute, caused a violation." The court gave as an example that an owner may have managed the supervisors responsible for alleged wage and hour violations. The court clarified that there is no "bright-line rule" for determining liability under section 558.1, and that it requires a review of the particular facts of each case.

In *Espinoza v. Hepta Run, Inc.* (2022) 74 Cal. App. 5th 44, the court applied a similar analysis, concluding that in order to "cause" a violation of the Labor Code and become liable under section 558.1, an individual "must have engaged in some affirmative action beyond his or her status as an owner, officer or director of the corporate employer." The court noted that this "does not necessarily mean the individual must have had involvement in the day-to-day operations of the company, nor is it required the individual authored the challenged employment policies or specifically approved their implementation." Rather, "to be held personally liable, he or she must have had some oversight of the company's operations or some influence on corporate policy that resulted in Labor Code violations."

Any executives, owners, or individuals who are involved in management of employees or payment of wages are potentially personally liable for Labor Code violations under section 558.1. Strict compliance with California's ever-changing wage and hour laws is more important than ever.

## The Department of Industrial Relations' website is an important – and often overlooked – resource for employers.

By Shawn M. Joost

Employers often view the Department of Industrial Relations (the "DIR") as a resource only for employees. Did you know that the **DIR website** has a host of helpful information for employers too? We encourage you to review the site, where you will find:

- The **Division of Labor Standards Enforcement Manual**, which provides the department's guidance on a wide variety of wage and hour topics;
- Discussion of the Paid Sick Leave Law, including a **Frequently Asked Questions** portion;
- The **Industrial Welfare Commission Wage Orders**, which every employer must familiarize itself with;
- Information on **required workplace postings**;
- **Frequently Asked Questions** on Hours of Work, Employment Status, Wages, COVID-19, and Working Conditions;
- Information on **Injury and Illness Prevention Plans**;
- And much more.

Check it out!

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*Created and curated by Shawn Joost, **Murphy Austin's Employment Law News** is a quarterly update focused on the top changes affecting California employers.*


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## Murphy Austin's Labor and Employment Law Team

**Shawn M. Joost** is a Partner with Murphy Austin's **Labor and Employment Law Team**. Shawn advises companies in all areas of employment law, including employment classification, employee termination, leave decisions, wage and hour matters and drafting effective and enforceable employment policies, and executive employment agreements.

**Aaron B. Silva** is a Partner and Chair of Murphy Austin's **Labor and Employment Law Team**. Aaron has an extensive background defending employers before state and federal courts and several administrative boards regarding nearly all matters employment-related, including wage and hour, discrimination, harassment, ADA, OSHA, and union relations. Aaron also produces a monthly employment law podcast, **HR Legalcast**.

**Dennis R. Murphy** is a Partner with Murphy Austin's **Labor and Employment Law Team**. Dennis's experience commenced in 1972 and includes the representation of employers in every aspect of labor and employment law. It includes both trial and appellate advocacy and counseling. He has appeared before the United States Supreme Court, before many state and federal appellate courts, in numerous jury trials and before most of the governmental agencies that handle labor and employment issues.

**Scott E. Galbreath** is Of Counsel with and leads Murphy Austin's **Employee Benefits and Executive Compensation Practice Team.** He has more than 30 years of experience representing employers in ERISA, employee benefits, and executive compensation matters. Scott also produces **The Benefit of Benefits blog**, which provides information and commentary on new legislative, regulatory, and industry developments in employee benefits and executive compensation.

**Charles R. Hellstrom** is a litigation attorney who counsels and represents clients in labor and employment matters and disputes. Charles's experience includes litigating claims under the California Labor Code and Unemployment Insurance Code in both civil litigation and administrative hearings, as well as misclassification, discrimination, and wrongful termination claims. He has also represented businesses in connection with employee misconduct, misappropriation, and embezzlement and assists businesses in revising employee handbooks and separation agreements to prevent future litigation.

**Murphy Austin** is a premier business law firm based in the Sacramento region with practices focused on Labor and Employment, Employee Benefits and Executive Compensation, Commercial Litigation, Insurance Coverage and Bad Faith Litigation, Appellate Law, Commercial Real Estate and Construction, Corporate and Business, Nonprofits, Public Contracts, Tax and Estate Planning. Murphy Austin attorneys place the highest value on meaningful client relationships. For more information, visit **www.murphyaustin.com.**