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## **WRONGFUL TERMINATION OUTLINE**

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### **I. THE CONCEPT OF "WRONGFUL TERMINATION"**

**A. Is There Such a Claim?**

**B. Various Legal Claims to Explore**

1. Breach of Contract
2. Breach of the Covenant of Good Faith and Fair Dealing
3. Termination in Violation of Public Policy
4. Other Various and Sundry Torts
  - a. Intentional/negligent infliction of emotional distress
  - b. Misrepresentation
  - c. Invasion of privacy/constitutional and tortious
  - d. Defamation
5. Statutory Claims

- C. Is There a “Termination,” Constructive Termination or Demotion?
1. Most wrongful termination claims involve firings.
  2. Claims may involve layoffs if the particular layoff violates a contractual agreement and/or was pretextual. *Wood v. Loyola Marymount Univ.* (1990) 218 Cal.App.3d 661. See generally, *Clutterham v. Coachman Indus., Inc.* (1985) 169 Cal.App.3d 1223.
  3. Constructive termination claims must meet a demanding standard. A constructive termination is a resignation due to actions and conditions so intolerable at the time of the resignation that a reasonable person in the position would resign. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238; *Brady v. Elixir Indus.* (1987) 196 Cal.App.3d 1299. The employee must prove that the employer intentionally created or knowingly permitted the conditions. *Turner, supra*; *Gibson v. ARO Corp.* (1995) 32 Cal.App.4th 1628 (demotion alone is not enough); *Casenas v. Fujisawa USA* (1997) 58 Cal.App.4th 101 (resignation due to unfair performance reviews and no career advancement not enough).
  4. It is easier to prove a constructive termination if an employee is required to do something illegal or the conduct involves discrimination. *Lane v. Hughes Aircraft Co.* (1997) 56 Cal.App.4th 1038. Being a victim of sex discrimination alone does not necessarily mean that the conditions were sufficiently intolerable to constitute a constructive termination (but even if not a constructive termination, in limited circumstances there may be damages after resignation). *Cloud v. Western Atlas, Inc.* (1999) 76 Cal.App.4th 895.
  5. A constructive termination requires looking at the totality of the circumstances. In *McFetters v. Amplicon, Inc.* (2000) 82 Cal.App.4th 200 an assault and battery six months before the construction termination, along with other conditions, was sufficient evidence.
  6. *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156 held that a continuous pattern of adverse working conditions, such as attempting to thwart the plaintiff’s work by continuous harassment and intimidation, constituted a constructive termination. The pattern included yelling at the plaintiff and putting her in fear that she was about to be struck.

7. Where an employer indicates it intends to terminate an employee, reorganizes the department, and treats the employee poorly, a fast quest is created on the issue of constructive termination. *Colores v. Board of Trustees of the California State University* (2003) 105 Cal.App.4th 1293.
8. The California Supreme Court held that a demotion B in violation of a contractual agreement B constitutes a claim for breach of contract. *Scott v. Pacific Gas & Elec. Co.* (1995) 11 Cal.4th 454. Thus, there may be a claim for wrongful demotion. However, as a practical matter, damages for a wrongful demotion claim may be small.

## II. BREACH OF CONTRACT

- A. “At will” is the law, contract is the exception, but how wide is the exception? Cal. Labor Code § 2922.
- B. A contract is an agreement between the parties, express or implied in fact, usually with terms of just cause and progressive discipline for termination.
  1. Express contracts.
    - a. Express contracts are oral or written agreements. Usually the contracts are to employ a person for a certain (or indefinite) period of time. Usually the contracts have terms of firing only for just cause.
    - b. Written integrated contracts are clearer, and easier to prove, than oral contracts.
    - c. Is there a meeting of minds between the parties according to the objective evidence?
    - d. What are the reasonable expectations of the parties?
    - e. What are the terms of the contract?
    - f. Is this a contract or just vague expectations, platitudes and hopes?
    - g. A cause of action for a breach of an oral contract can be stated by alleging explicit words by which the parties agree to

the terms of the contract. There are no mandatory buzz words. *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654.

2. There are various statutes which assist with the interpretation of a contract, such as the following:
  - a. Cal. Civ. Code § 1636, which requires interpretation of a contract to give effect to the mutual intention of the parties at the time of the contract;
  - b. Cal. Civ. Code § 1638, which requires that the language in the contract governs the interpretation if it is clear;
  - c. Cal. Civ. Code § 1639, which requires an interpretation of the contract based upon the writing in the contract alone, if possible;
  - d. Cal. Civ. Code § 1649, which requires interpretation of terminology in the contract using the ordinary and popular sense of words;
  - e. Cal. Civ. Code § 1654, which requires that if the terms of the contract are uncertain, they should be interpreted most strongly against the party who caused the uncertainty to exist;
    - (1) *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384 held that language in a written contract stating, “[t]he employer has the right to terminate your employment at any time . . . .” is unambiguously at will language, even without explicitly stating with or without cause, and thus no extrinsic evidence shall be admitted to interpret the contract.
3. Implied in Fact Contracts
  - a. Under *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, the test is whether, under all the circumstances, by words or conduct, it is reasonable for the parties to conclude that the employee will be terminated only for just cause. *Id.* at 681.
  - b. The factors to look for in *Foley* are as follows:
    - (1) personnel policies or practices of the employer;

- (2) the employee's longevity of service;
  - (3) actions or communications by the employer reflecting assurances of continued employment;
  - (4) the practice of the industry in which the employee is engaged.
- c. The plaintiff's testimony as to his or her reasonable understanding and expectations, and what was conveyed and known to the employer, is critical.
  - d. Whether there is an implied in fact contract is generally a question of fact. See generally, *Foley* at 681-682.
4. An implied in fact contract is not possible if the employment relationship is "at will" as a matter of law.
- a. An examination of all written documents to see whether there is an integrated, or not integrated, "at will" situation is required.
  - b. Employment is at will as a matter of law if there is an integrated at will writing, signed by the plaintiff, containing unambiguous at will language and the other significant terms of employment. *Wagner v. Glendale Adventist Medical Center* (1989) 216 Cal.App.3d 1379.
  - c. The California Supreme Court has recently raised the bar to overcome at will language in employer policies and procedures.
    - (1) The California Supreme Court case of *Guz v. Bechtel* (2000) 24 Cal.4th 317 has made it clear that a plaintiff faces a substantial burden to overcome at will language in policies and procedures to prove that there is a contractual relationship.
    - (2) The California Supreme Court warned that the *Foley* factors "shaken together in a bag" do not overcome an at will relationship. *Guz* at 337.
    - (3) According to *Guz*, the courts are to interpret the actual

understanding of the parties. This understanding must be mutual. Thus, it is probably likely that most at will language will result in a bar to a plaintiff bringing an implied-in-fact contract claim. *Id.* This is a fundamentally contractual analysis. *Id.* at 336-337.

- (4) *Guz* can be expected to tighten up contract claims. More summary judgment motions by employers can be anticipated. It is important, therefore, that plaintiffs explore and put forward all evidence of a contractual understanding between the parties. *Guz*, for example, noted that evidence must demonstrate a tendency in reason to prove the existence of a mutual understanding of a contract. *Guz* at 336-337.
- (5) *Guz* made clear that certain factors alone, will not give rise to an implied-in-fact contract. Other indicia of intent is required. *Guz* at 337.
- (6) “The more clear, prominent, complete, consistent and all-encompassing the disclaimer language, the greater the likelihood that workers could not form any reasonable contrary understanding.” *Guz* at 341, fn.11.
- (7) The difference between *Guz* and *Foley* is that the plaintiff in *Guz* simply relied on general policies and procedures which contained at will language, and the plaintiff in *Foley* had “repeated oral assurance of job security.” *Guz* at 343.
- (8) *Guz* dismissed the testimony of the defendant-employer’s president, that the company only terminated for good cause, by holding that there was no evidence that employees were aware of this, and it “flies in the face of Bechtel’s general disclaimer.” *Guz* at 345. Thus, evidence presented should focus on what is known and relied upon by both the employer and employee.
- (9) Whether or not there is an implied-in-fact contract depends upon the “totality of the circumstances.” All the factors must be examined. *Foley* at 681; *Guz* at 337.

- d. *Guz* has left open claims for breaches of the employer's own policies and procedures. *Guz* at 348.
  - (1) The *Guz* court suggested that even where there is an at will relationship, the plaintiff may prove that the employer made and breached specific, enforceable promises.
  - (2) The *Guz* court remanded that case to determine whether the employer's policies and procedures promising that with a layoff, there would be objective ranking for the layoff and placement assistance, were contractual agreements that were violated.
  - (3) Given the other limitations in *Guz*, this alternative claim should be carefully examined.

C. Was the Contract Breached?

- 1. The test is whether the employee was fired with or without good cause. BAJI 10.13; CACI 2404. "In determining whether there was good cause, you must balance the employer's interest in operating the business efficiently and profitably with the interest of the employee in maintaining employment." BAJI 10.13; CACI 2404.
- 2. "Good cause" is usually not a clear cut issue, but involves a factually specific determination.
  - a. The term "good cause" is relative, and dependent upon the facts in each case. *Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994.
  - b. Whether or not there is good cause is usually to be determined by the factfinder. *Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 733.
  - c. No good cause to terminate the employment of an employee under the Immigration Reform and Control Act as employee was not currently authorized to work in United States but should and could be given opportunity to obtain different work authorization. *Incalza v. Fendi North America, Inc.* (9th Cir. 207) 479 F.3d 1005).

3. Good cause should be judged by:
  - a. Did the employer act in good faith?
  - b. Did the decision follow an appropriate investigation, under the particular factual circumstances?
  - c. Did the employer have reasonable grounds for believing that the employee engaged in the misconduct? *Cotran v. Rollins* (1998) 17 Cal.4th 93, as set forth in *Silva v. Lucky Stores* (1998) 65 Cal.App.4th 256, 263.
4. *Cotran* is replete with flowery dicta extolling the virtues of “management discretion.”
5. *Cotran* does not clearly define what constitutes an adequate investigation, which is perhaps a new concept in wrongful termination law. The case gives plaintiffs grounds to argue that an employer must conduct an adequate investigation, and give the employee an opportunity to respond, before firing an employee.

D. Can Terms of an Employment Relationship Be Unilaterally Changed by the Employer?

1. Yes, if the change is to an employment policy which is changed after a reasonable period of time (here two years), the employees are given reasonable notice, and the change does not interfere with vested rights. *Asmus v. Pacific Bell* (2000) 23 Cal.App.4th 1. In this case no additional consideration was required.
2. With an at-will relationship, an employer can change the future terms and conditions. An employee's continued employment is read to be assent to the changes. *Digiacinto v. Ameriko-Omserv Corp.* (1997) 59 Cal.4th 629.

### III. COVENANT OF GOOD FAITH AND FAIR DEALING

- A. In every contract is a covenant that neither party will engage in conduct for the purpose of denying or frustrating to the other the benefits of the contract. If done so, for reasons extraneous to the contract, based upon bad faith or malice, there is a breach of this duty.



- B. *Guz v. Bechtel* (2000) 24 Cal.4th 317 stated that an example of this would be to deprive the other party of actual compensation already earned. It can be anticipated that this claim may be brought by those with stock options who are terminated to deprive them of the vesting of their options.
- C. Historically, this legal claim was brought, as it would entitle the plaintiff to tort damages. These damages were eliminated by *Foley*.
- D. *Guz v. Bechtel* (2000) 24 Cal.4th 317, clarified that in order to bring a covenant claim, the employee must prove the existence of the contract. *Guz*, at 349-350. Query as to whether a contract for specified promises, other than a good cause contract, is sufficient.

#### IV. PUBLIC POLICY CLAIMS

- A. When an employee is fired for reasons that violate what is considered “public policy.”
- B. Such claims are limited to where there is “a duty which inures to the benefit of the public at large rather than a particular employer or employee.” *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654; *Stevenson v. Superior Court* (1997) 16 Cal.4th 880.
  - 1. Cal. Labor Code § 232, which prohibits actions against an employee for disclosing the amount of her wages, inures to the benefit of the public. This is because it is similar to federal and state statutes which inure to the benefit of the public, such as the National Labor Relations Act (NLRA), 29 USC 141 et seq., and Cal. Labor Code § 923 (public policy to protect workers’ freedom of association), *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361.
  - 2. Similarly, terminating an employee to avoid payment of wages due and owing, violates public policy. *Gould v Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137; *Sinclair v. ServiceMaster Co.* 2007 WL 225448. See, Cal. Labor Code § 201 and § 227.3. However, termination in order to avoid paying *future* wages does not violate public policy and thus is not illegal. *Sinclair, supra*.
- C. The basis of this public policy must be found in federal or state constitutions or statutes. *Gantt v. Sentry Ins.* (1992) 1 Cal.4th 1083; *Stevenson*.

1. Public policy protecting private employer's right to free speech isn't found in First Amendment to U.S. Constitution, which only limits what the government (not a private employer) can do. *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72.
    - a. Note that *Grinzi* did not properly preserve the issue of whether California Constitution Art. I § 2 ("Every person may speak freely . . .") created a fundamental public policy.
  2. Although access to courts is a public policy, as guaranteed by federal and state constitutions, firing employee who sued a customer is permitted and does not violate public policy as the particular right isn't clearly established. *Jersey v. John Muir Medical Center* (2002) 97 Cal.App.4th 814.
- D. The public policy must be fundamental (or perhaps "substantial" and well established, according to *Stevenson*).
1. Public policies are mostly thought of as whistle blowing types of activities, but are actually broader than this, and may include a large assortment of policies. According to *Gantt* at 1090-91, they include refusing to violate a statute, performing a statutory obligation, exercising a statutory right or privilege, and reporting an alleged violation of a statute of public importance.
  2. Examples are reporting health and safety violations to OSHA or some other public entity, reporting public corruption, firing for reasons that invade one's constitutional right to privacy, one's fundamental right to engage in political activity, firing based on one's sex, firing based on the refusal to commit perjury, or firing based on violations of various Cal. Labor Code provisions. *Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290 (health and safety); *Rojo v. Kliger* (1990) 52 Cal.3d 65 (sex discrimination); *Gould v. Maryland Sound Indus.* (1995) 31 Cal.App.4th 1137 (retaliation for reporting overtime wage violations); *Stevenson v. Superior Court* (1997) 16 Cal.4th 880 (age discrimination); *Carmichael v. Alfano Temporary Personnel* (1991) 233 Cal.App.3d 1126, 1132 (race); *D'Sa v. Playhut, Inc.* (2002) 85 Cal.App.4th 927, and *Walia v. Aetna, Inc.* (2001) 93 Cal.App.4th 1213 (terminations for refusal to sign unenforceable covenant not to compete); *Gelini v. Tishgart* (1999) 77 Cal.App.4th 219 (termination for retaining an attorney); *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361 (termination for discussing fairness of employer's bonus system)

violates public policy as embodied in Labor Code § 232, which prohibits firing employee for discussion amount of wages); *Freund v. Nycomed Amersham* (9th Cir. 2003) 336 F.3d 1070 (complaints regarding employee safety or health pursuant to Labor Code § 6310(a)(1); *Ali v. L.A. Focus Publication* (2003) 112 Cal.App.4th 1477 (Cal. Labor Code § 1101 and 1102 create fundamental public policy to engage in political activity); .

3. Encompassing discrimination complaints.
  - a. A public policy claim can sometimes encompass discrimination claims that otherwise are procedurally defective, or statutory violations that are not self-enacting and otherwise would not state a cause of action.
  - b. *Stevenson v. Superior Court* (1997) 16 Cal.4th 880 (plaintiff can bring public policy claim for age discrimination even though she failed to exhaust her administrative remedies);
  - c. *Badih v. Myers* (1995) 36 Cal.App.4th 1289 (pregnancy discrimination can be brought as violation of public policy as it violates California Constitution Article I, § 1, prohibition against sex discrimination, even where employer doesn't employ five employees, and thus the Fair Employment and Housing Act is not violated).
  - d. But see, *Jennings v. Marralle* (1994) 8 Cal.4th 121 (no public policy age discrimination claim [where less than five employees] as there was no preexisting right protecting against age discrimination).
4. Public policies can be embodied in administrative regulations. *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66 (federal safety regulations constitute public policy). See also, *Parada v. City of Colton* (1994) 24 Cal.App.4th 356 (local building codes, enacted pursuant to statutory authority, can create the basis for a public policy claim), *Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702 (student-teacher ratios in administrative regulations affect society at large, and are intended to protect the children of the State of California).
5. Unfair, unlawful and fraudulent business practices, as defined in Business and Professions Code § 17200, can violate public policy.

- a. *McFetters v. Amplicon, Inc.* (2000) 82 Cal.App.4th 200. This opens the door to a large variety of improper actions as the basis for a public policy claim.
6. Public policy claim can be established where employer fired employee whom employer believed “intended” to file workplace safety complaint.
  - a. *Lujan v. Minagar* (2004) 124 Cal.App.4th 1040, analyzes a Cal. Labor Code § 6310 claim, but its logic should be equally applicable to a public policy claim. (Cal. Labor Code § 6310 prohibits termination or discrimination against an employee who make an employee health or safety complaint with the Labor Commission, or other associated activities.)
7. Legal use of marijuana under the Compassionate Use Act as a basis for failure to hire and/or termination
  - a. The California Supreme Court has declared that there is no public policy claim for an employee fired due to use of marijuana under the Compassionate Use Act, because the drug use is still illegal under federal law and the Court interpreted the intent of the voters as merely protecting users and caregivers from criminal liability. *Ross v. Ragingwire Telecommunications, Inc.* (2008) 42 Cal.4th 920.

E. Causation

1. Employee must prove that a reason for his termination is linked to public policy or was protected activity, such as reporting illegal conduct. Mere speculation that an employer may have been motivated by reasons contrary to public policy, is not enough. *Rivera v. National Passenger Railroad Corp.* (9th Cir. 2003) 331 F.3d 1074.

F. Complaints must Be in Good Faith, but Need Not Be Correct

1. Complaints must be made in good faith, but need not be correct. *Freund v. Nycomed Amersham* (9th Cir. 2003) 336 F.3d 1070;
2. Complaints need not identify an actual violation. *Freund; Cabesuela v. Browning-Ferris Industries of California, Inc.* (1998)

68 Cal.App.4th 101,109.

G. Some Statutes Have their Own Retaliation Provisions

1. For example, the Sarbanes-Oxley Act, 18 USC Section 1514A(a)(1) prohibits discrimination against an employee for providing information regarding any conduct which the employee reasonably believes violates the statute, i.e., constitutes securities fraud. See, *Van Asdale v International Game Technology v. Irvin* (9th Cir. 2009) 2009 Lexis 18037.

V. OTHER FREQUENTLY PLED CLAIMS

A. Fraud, Negligent Misrepresentation and Cal. Labor Code § 970

1. An intentional misrepresentation or fraud is a knowing misrepresentation of a material fact (including the intent to act in the future) which is justifiably relied upon and results in damages in *Lazar v. Superior Court* (1996) 12 Cal.4th 631; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.App.4th 951, Cal. Civ. Code § 1709.
2. This includes intentionally false/reckless misrepresentation of fact (*Seubert v. McKesson Corp.* (1990) 223 Cal.App.3d 1514; Cal.Civ.Code § 1710(1)); concealment of facts (Cal.Civ.Code § 1710(3)); and a false promise without the intent to perform it. (Cal.Civ.Code § 1710(4); *Bondi v. Jewels by Edwar Ltd.* (1968) 267 Cal.App.2d 672; *O'Mary v. Mitsubishi Elees, Am* (1997) 59 Cal.App.4th 563.
3. There are also claims for negligent misrepresentation, which standard is lower. *Sabbo v. Deitsch* (1997) 755 Cal.App.4th 823. However, damages are more limited. Clearly, there are no punitive damages. In addition, a misrepresentation as to one's intent to act in the future is not ground for negligent misrepresentation.
4. Cal. Labor Code § 970 prohibits any action to influence an employee to change his or her locale by knowingly misrepresenting the kind, character, existence of work, length of time, sanitation or housing conditions, existence or non-existence of a strike, etc. This statutory violation has special remedies in addition to tort remedies including double damages. This legislation was originally enacted to protect agricultural workers, but covers all employees. *Tyco v. Industries,*

*Inc. v. Superior Court* (1985) 164 Cal.App.3d 148, 155; *Seubert v. McKesson Corp.* (1990) 223 Cal.App.3d 1514, 1521.

5. Courts have required very specific facts to be pled and proven for a claim of misrepresentation. *Shapiro v. Wells Fargo Realty Advisors* (1984) 152 Cal.App.3d 467.
6. There is an argument that workers compensation preempts fraud claims, but this is not so if it involves fraud-in-the-inducement, i.e., fraudulent misrepresentations to induce an employee to accept a job, or fraud before the employment relationship commences. *Lazar v. Superior Court* (1996) 12 Cal.4th 631.
7. It is difficult to prove that the defendant intended to deceive the plaintiff at the time the promise was made. Some courts have held that failure to honor the promise itself is some circumstantial evidence of intent. *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 30.
8. Under California law, an employer has a duty to disclose material facts to a prospective employee. *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337.
9. Damages can include future lost income if not remote or speculative. *Helmer v. Bingham Toyota* (2005) 29 Cal.Rptr.3d 136.
10. Promissory estoppel should also be looked at.
  - a. This requires: (1) representation or concealment of a material fact; (2) made with knowledge, (3) to a party ignorant of the truth; (4) with the intent that the latter act upon it; and (5) the party must have been induced to act upon it. *Hill v. Aetna* (1982) 130 Cal.App.3d 188, 195.
  - b. Promissory estoppel provides that “a promise which the promissor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.” Restatement 2nd Contracts, § 90(1). See also, Witkin, Summary of Cal. Law (9th ed.), Contracts, § 248.

- c. Promissory estoppel claim established where false promises resulted in resignation from at will employment. *Toscano v. Greene Music* (2004) 124 Cal.App.4th 685.
- d. Promissory estoppel is an equitable remedy. *C & K Engineering Contractors v. Amber Steel Co., Inc.* (1978) 23 Cal.3d 1, 8.
  - (1) Employee can receive reliance damages if not speculative or remote. Employee should put on evidence that would have continued in prior job. *Toscano v. Greene Music* (2004) 124 Cal.App.4th 685.

B. Slander/Libel and Labor Code § 1051

- 1. Primarily consists of false or unprivileged statements that tend to injure one in regard to his or her profession or occupation, including allegations in regard to dishonesty. See Cal. Civ. Code §§ 45 and 46. Also see, BAJI 7.00; CACI 1700.
- 2. There is a tort that has arisen which is defined as “self defamation”, which is what occurs when one is forced to repeat defamatory and false reasons about one’s firing when going to apply for a new job. *McKinney v. County of Santa Clara* (1980) 110 Cal.App.3d 787; *Schneider v. United Airlines, Inc.* (1989) 208 Cal.App.3d 71, 75; *Live Oak Publishing v. Cohagan* (1991) 234 Cal.App.3d 1277, 1285. Does not apply where republication and/or self defamation has not occurred yet but which are reasonably certain to occur. *Dibble v. Haight Ashbury Free Clinics* (2009) 170 Cal.App.4th 843
- 3. Cal. Labor Code § 1050 specifically prohibits misrepresentations which attempt to prevent, or prevent, an employee from obtaining new employment. It has special remedies provisions.
- 4. The publisher of defamation remark is also liable for republication; i.e., subsequent reports of the defamation, if the defendant could have reasonably foreseen that republication would occur *DiGiorgio Corp. v. Valley Labor Citizen* (1968) 260 Cal.App.2d 268, 273.
- 5. The employer may be liable for the false statements of its employees, including co-workers, made within the scope of employment, even if the employer was not aware of the statements and the statements were not made for the benefit of the employer.

The question is whether the statements are typical of, or broadly incidental to, the employer's business. *Rivera v. National Passenger Railroad Corp.* (9th Cir. 2003) 331 F.3d 1074.

C. Right to Privacy

1. Article I, § 1 of the California Constitution has a self-enacting constitutional protection against invasion of privacy. *Hill v. National Collegiate Athletic Ass'n* (1994) 7 Cal.4th 1.
  - a. What constitutes a privacy right and privacy violation depends upon social norms, common-law developments, a balancing of competing rights and obligations, etc. *Hill, supra*; *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (August 27, 2007) 2007 CDOS 10046.
  - b. No invasion of privacy where an employer videotaped employees' workspace, but did so at night in order to catch someone else using employees' computers at night when employees were not there, and employees were not seen on the video. Here there was a reasonable expectation of privacy but the intrusion was not highly offensive nor an egregious breach of social norms. *Herndandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272.
  - b. Query as to whether, and under what circumstances, this prohibits or limits drug testing. See, for example, *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal.App.3d 1034; *Semore v. Pool* (1990) 217 Cal.App.3d 1087; *Edgerton v. State Board of Personnel* (2000) 83 Cal.App.4th 1350.
2. Dating or sexual intimacy as protected by the constitutional right to privacy.
  - a. The case of *Rulon-Miller v. International Business Machs. Corp.* (1984) 162 Cal.App.3d 241 was not brought as a constitutional privacy claim, but could be. *Rulon-Miller* held that an employee who was fired for dating an employee of a competitor was wrongfully fired.
  - b. Right to date or have an intimate relationship may very well be protected by a constitutional right to privacy, but there was



no reasonable expectation of privacy in dating a subordinate where the employer had a policy requiring disclosure of such relationships, the employer has an interest in requiring disclosure of such conduct and the factual circumstances would not suggest privacy in this area. *Barbee v. Household Automotive Finance Corp.* (2003) 113 Cal.App.4th 525, 531-533.

3. There are also various tort causes of action for invasion of privacy, including unreasonable intrusion into the solitude or seclusion of an individual (i.e., eavesdropping, investigating off the job behavior, etc.). *Vescovo v. New Way Enters., Ltd.* (1976) 60 Cal.App.3d 582; placing the plaintiff in false light, Restatement 2d, Torts, § 652(e); public disclosure of private embarrassing facts, *Porten v. USF* (1976) 64 Cal.App.3d 825; and commercial appropriation of plaintiff's person or name, Restatement 2d, Torts, § 652(c).
4. Invasion of privacy where employer announced plaintiff's discipline at a meeting with employees who had no need to know (and distributed minutes of the meeting). *Operating Engineers Local 3 v. Johnson* (2003) 110 Cal.App.4th 180.
  - a. No workers compensation preemption here because the tort akin to defamation, which is not a personal injury.
5. Cal. Labor Code § 96(k) prohibits an employer from demoting, suspending or discharging an employee for an employee's *lawful* conduct off the job and off the employer's premises and Labor Code § 98.6 incorporates said rights.
  - a. However case law has held that this provision solely provides a procedure by which the Labor Commission may assert such claims, but does not create any substantive rights. *Barbee v. Household Automotive Finance Corporation* (2003) 113 Cal.App.4th 525, 533-535 (interpreting Labor Code §98.6); *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72 (interpreting both provisions).
6. The right to privacy can form the basis of a public policy claim. *Semore v. Pool* (1990) 217 Cal. App.3d 1087, 1098.

D. Intentional and Negligent Infliction of Emotional Distress

1. Intentional infliction of emotional distress requires extreme and outrageous conduct with severe emotional distress. See 4 Witkin, *Summary of California Law*, Torts, § 234. Certain racial epithets, profanities, etc. have systematically been held to be extreme and outrageous. *Agarwal v. Johnson* (1979) 25 Cal.3d 932. See also, BAJI 12.74 et seq.
2. But be aware of potential preemption by the Fair Employment and Housing Act and the Workers Compensation Act.
3. In order to defeat a defense of Workers Compensation Act preemption, this conduct must be very egregious and of a type which normally does not occur within the workplace. See *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148 and its progeny.
4. Most courts will consider negligent infliction of emotional distress to be preempted by the Workers Compensation Act.

E. Assault and Battery

1. Assault and battery is a harmful or offensive touching or putting an individual in apprehension of the same. Restatement 2d, Torts, §§ 18-20; BAJI 7.5 et seq.
2. Claims brought against an employer for assault and battery where the employer joined in the assault or ratified it, are actionable. *Iverson v. Atlas Pacific Engineering* (1983) 143 Cal.App.3d 219. However, claims against employers for assault and battery by co-workers, are generally barred by the Workers Compensation Act. *Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478.

F. Intentional Interference with Contract or Prospective Economic Advantage

1. Interference with a contract requires a valid contract with knowledge of the contract, intention to induce breach of the contract, breach and damages. 4 Witkin, *Summary of California Law*, Torts, § 384 et seq.
2. Interference with prospective advantage is a more inclusive cause of action, as it does not require a valid contract. It requires an economic relationship, knowledge of the relationship, intent to cause a breach of the relationship. Witkin at § 393.

There are various important privileges and defenses to this cause of action, both in statutes and common law.

## VI. DAMAGES

- A. Contract damages are limited to lost wages and benefits for a reasonable period of time that plaintiff's employment would have continued but for the breach. This usually includes salary, bonuses, pensions, etc. BAJI 10.15. If damages are substantial, or difficult to calculate, an economist is often of assistance, especially to present the damages to a jury.
1. An employee must use due diligence to mitigate his or her damages by looking for "comparable" employment. It is the employer's obligation to prove failure to mitigate. *Parker v. Twentieth Century Fox Film Corp.* (1970) 3 Cal.3d 176; BAJI 10.15; CACI 2406.
  2. An employee can also prove his or her inability to search for/find work was due to the wrongful conduct of the employer, and thus is a part of his or her damages.
  3. A recently litigated area of the law is whether or not receipt of disability benefits automatically bars a claim for lost wages. *Mayer v. Multistate Legal Studies* (1997) 52 Cal.App.4th says it does not bar such a claim. Whether or not there is a bar may depend upon exactly what an applicant/plaintiff said, and the context of the statement. *Drain v. Betz* (1999) 69 Cal.App.4th 950 (bar where claim totally disabled); *Lujan v. Pacific Maritime Assn.* (9th Cir. 1999) 165 F.3d 738 (no bar as claim that disabled has different meaning under SSA); *Colores v. Board of Trustees of the California State University* (2003) 105 Cal.App.4th 1293 (medical reports establishing disability for a disability claim do not bar a constructive termination claim because no determination as to nexus between working conditions and health problems, and physicians not capable of making this legal determination).
  4. Aliens who are not here legally may not be entitled to all remedies.
    - a. The United States Supreme Court held that illegal aliens are not entitled to back pay as a remedy, under the NLRA. *Hoffman Plastic Company v. NLRB* (2002) 535 U.S. 137, 152-153.
    - b. There have been some attempts to limit the remedies of

illegal immigrants in other contexts such as wrongful termination.

- c. The after acquired evidence doctrine may limit such remedies.
  - d. The Ninth Circuit, in denying discovery of Title VII plaintiffs' immigration status, noted (in dicta) that it was unlikely that *Hoffman Plastics* applied to a Title VII claim. *Rivera v. NIBCO* (9th Cir. 2004) 364 F.3d 1057, 1067.
  - e. Cal. Civ. Code § 3339, enacted in 2003, provides that illegal immigrants shall be provided with all rights and remedies under state law except for reinstatement.
    - (1) Holds that immigration status is irrelevant to liability.
    - (2) Establishes that discovery of immigration status only if "clear and convincing evidence that this inquiry is necessary in order to comply with federal immigration law." Cal. Civ. Code § 3339(b).
    - (3) The interaction of this law with other case law has not yet been determined, and *Rivera* did not discuss it.
- B. Breach of the covenant of good faith and fair dealing is also limited to contract damages only.
- C. Termination in violation of public policy is a tort, permitting contract damages (as listed above), general damages (for emotional distress), and punitive damages. *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1101; BAJI 10.43; CACI 2422.
- 1. Be aware that Cal. Civ. Code § 3294.5 requires that 75% of punitive damages for cases filed after August 16, 2004 until July 1, 2006 escheat to the state.
- D. There are generally no attorney's fees under any of the claims listed in this outline.
- E. There is generally no injunctive relief available, except with constitutional violations.

- F. Specific statutory claims sometimes contain their own remedies in the statute.

## VII. DEFENSES

### A. The Statute of Limitations

1. Most government tort claims, which require the filing of a notice with a government agency, must be filed within six months, pursuant to Cal. Govt. Code § 911.2. This is different than the statute of limitations, but equally important.
2. The statute of limitations for written contracts is four years. C.C.P. § 337(1).
3. The statute of limitations for oral contracts is two years. C.C.P. § 339(1).
4. The general statute of limitations for personal injuries or torts is two years. C.C.P. § 335.1.
  - a. Slander, privacy, intentional infliction of emotional distress, and assault and battery are employment-related torts.
  - b. Public policy claims are two years.
  - c. Covenant of good faith and fair dealing is two years.
5. Misrepresentation
  - a. Negligent misrepresentation is two years.
  - b. Intentional misrepresentation is three years.
6. Under some circumstances, the statute of limitations is equitably tolled, such as when the plaintiff is prevented from asserting a claim by the wrongful conduct of the defendant or by extraordinary circumstances beyond the plaintiff's control that made it impossible to file a timely claim *Stoll v. Runyon* (9th Cir. 1999) 165 F.3d 1238. A mental incapacity is one example, but the proof required is often very high. *Grant v. McDonnell Douglas Corp.* (9th Cir. 1998) 163 F.3d 1136.

B. Preemption or Failure to Exhaust Administrative Remedies

1. ERISA
2. Workers Compensation Act
3. NLRA
  - a. There are few civil remedies available to union employees. Generally, they are expected to arbitrate their claims. This generally preempts all contract claims. It does not preempt discrimination or other statutory claims, or public policy claims.
4. FEHA or Title VII
5. Government Employees
  - a. May be expected to exhaust their administrative remedies.
  - b. May not apply if process is futile. *Dixon v. Regents of University of California* (2003) 112 Cal.App.4th 1062.
    - (1) May differ if a discrimination claim or not.

C. After-Acquired Evidence

1. After-acquired evidence is a doctrine which stands for the proposition that evidence of wrongdoing, discovered after an employee's termination, which would have resulted in the employee's firing, if known, defeats a claim. The United States Supreme Court rejected this analysis, stating that the doctrine does not bar liability, although it may likely affect the remedies available to a plaintiff. *McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352. *O'Day v. McDonnell Douglas* (9th Cir. 1996) 79 F.3d 756 (theft of papers, riffling through desk and showing co-workers confidential documents limits remedies).
2. Resume fraud may or may not constitute after-acquired evidence.
  - a. *Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal.App.4th 614 (minor resume fraud does not bar claim).

- b. *Camp v. Jeffers, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620 (claim barred by resume fraud where fraud goes to heart of the requirements of the job).
3. *Thompson v. Tracor Flight Systems, Inc.* (2002) 86 Cal.App.4th 1156 held that a defendant had not proven after acquired evidence where a plaintiff took home papers after she resigned, but the jury could have found that she acted within the prior scope of her authority, and that she would have been disciplined, but not fired.
4. After-acquired evidence doctrine does not justify discovery of plaintiff's immigration status in Title VII case because, inter alia, district court properly barred defendant from "using discovery process to engage in wholesale searches for evidence that might serve to limit its damages . . ." *Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F.3d 1057.

#### D. Arbitration Agreements

##### 1. Procedural Issues

- a. An employee should determine if he/she believes an arbitration agreement is not enforceable because it is substantively and procedurally unconscionable. See §§ 4, 5, below.
- b. If an employee determines arbitration is not enforceable, employee should file a lawsuit in state or federal court.
- c. The employer will then probably move to compel arbitration.
  - (1) So far, federal courts have been more likely to hold that an arbitration agreement is not enforceable.
  - (2) An arbitrator has the right to stay an arbitration to permit a court to determine the legality of an arbitration agreement. *Hotel Nevada v. Bridge Banc* (2005) 130 Cal.App.4th 1431.
- d. An employee who objects to an arbitration must raise all the specific objections as soon as he/she is aware of them. *Cummings v. Future Nissan* (2005) 128 Cal.App.4th 321.

- e. Courts may dismiss or stay arbitrations where party also a party to a pending court action arising out of the same or related transactions and there is a possibility of conflicting rulings. C.C.P. § 1281.2(c).
- f. An employee may be bound to an arbitration agreement even where the employee refuses to sign a later version of it. *Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal.App.4th 1236.
- g. An employee may be required to arbitrate a claim even when it is against a subsequent employer who did not sign an arbitration agreement because claims are “intertwined”. *Alliance Title Company, Inc. v. Boucher* (2005) 127 Cal.App.4th 262.

## 2. Effect of Binding Arbitration

- a. If an arbitration agreement is binding, the parties shall submit their dispute to an arbitrator, rather than having it heard in court before a judge or jury.
- b. The arbitrator’s authority and the method of the arbitration is generally set forth in the arbitration agreement, subject to some minimal due process requirements.
- c. The parties lose their right to a jury trial. The arbitrator’s decision is final in almost all circumstances and there is no right to judicial review and no appeals.

## 3. Types of Claims Subject to Arbitration

### a. Discrimination Claims

- (1) The Ninth Circuit has now joined the majority of circuits holding that an employer can generally require an employee to agree to arbitrate Title VII claims. *EEOC v. Luce, Forward, Hamilton & Scripps* (2003) 345 F.3d 742.
- (2) The same is true for FEHA claims. *Armendariz v. Foundation Psychcare* (2000) 24 Cal.4th 83.



- (3) FEHA and Title VII claims can still be prosecuted administratively. *Armendariz v. Foundation Psychcare* (2000) 24 Cal.4th 83; *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279.
  - (4) The arbitration must meet the minimum due process standard set forth in *Armendariz v. Foundation Psychcare* (2000) 24 Cal.4th 83.
- b. Arbitration of Public Policy Claims
- (1) All wrongful termination claims including contract, covenant and public policy claims are subject to arbitration agreements and the process must meet the minimum due process standards of . *Armendariz v. Foundation Psychcare* (2000) 24 Cal.4th 83. See also, *Little v. Auto Steigler, Inc.* (2003) 29 Cal.4th 1064 (public policy claims); *Fittante v. Palm Springs Motors, Inc.* (2003) Cal.App.4th 708 (Labor Code § 970 fraud claim covered because vindicates public policy).
- c. Other Tort Claims
- (1) Can be required to arbitrate tort claims which arose after termination because, according to the court, claims were “rooted in the employment relationship created by the contract.” *Buckhorn v. St. Jude Heritage Medical Group* (2004) 121 Cal.App.4th 1401, 1407, quoting *Vianna v. Doctor’s Management Co.* (1994) 27 Cal.App.4th 1186, 1190.
- d. Contract Claims
- (1) Contract claims can be subject to arbitration agreements, but unlike other claims, *Armendariz* minimum standards can be waived with a contract claim. *Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App.4th 1276
4. Standard for Whether Arbitration Agreement is Enforceable Under *Armendariz*

- a. *Armendariz v. Foundation Psychcare* (2000) 24 Cal.4th 83 establishes that where an arbitration agreement is both substantive and procedural unconscionability, it will not be enforced.
- b. *Armendariz* held that the agreement in question was so unconscionable that it could not be reformed, and thus could not be enforced at all. The question of whether the unconscionable provision(s) can be severed is a question of whether the illegality is central or collateral to the purpose of the contract. *Id.* At 89.
- c. Substantive Unconscionability as Defined in *Armendariz*
  - (1) *Armendariz* referred to certain areas that are critical to whether or not an arbitration is substantively unconscionable. These areas have become the touchstones of further case law in this area.
  - (2) *Armendariz* requires the same or equivalent legal claims and remedies as available in court.
    - (a) For example, if the same agreement limits the amount of or type of damages, it would be invalid. See also, *Stirlen v. Super Cuts* (1997) 51 Cal.App.4th 1519. *Armendariz*, at 103-104, struck down an arbitration agreement which limited remedies to back pay.
  - (3) *Armendariz* requires adequate discovery.
    - (a) This need not be the same discovery as a plaintiff would be entitled to in court. It must be enough to “vindicate” the claim.  
*Armendariz*, at 106.
  - (4) *Armendariz* requires a written award and (limited) judicial review.
  - (5) *Armendariz* requires reasonable costs and arbitration fees.

- (a) Generally an agreement should not require an employee to pay more significant costs than if he/she brought a claim in court.
    - (6) *Armendariz* requires a bilateral agreement.
      - (a) The agreement should be equally binding and applicable to the employee and employer.
      - (b) An agreement that indicates an employee must arbitrate claims but an employer can go to court would be invalid. See also, *Stirlen v. Supercuts, supra*.
    - (7) *Armendariz* requires a neutral arbitrator.
      - (a) This is essential to the integrity of the arbitration process. *Armendariz* at 103.
  - d. Procedural Unconscionability as Defined in *Armendariz*
    - (1) The analysis focuses on questions of oppression and surprise. *Armendariz*.
    - (2) Contracts of adhesion may be procedurally unconscionable, depending upon the circumstances.
      - (a) A contract of adhesion is one where it is imposed on an employee as a condition of employment with little opportunity to negotiate.
  - e. Sliding Scale
    - (1) In determining whether an arbitration agreement will be enforced, *Armendariz* used a sliding scale.
    - (2) The more procedural unconscionability found, the less substantive unconscionability necessary to invalidate the contract, and vice versa. *Id.* at 114.
5. Post-*Armendariz* Cases and Trends
- a. Procedural Unconscionability

- (1) Surprise.
  - (a) Arbitration agreement hidden in “dense, single-spaced page at end of the five-page employment application.” *Fittante v. Palm Springs Motors, Inc.* (2003) 105 Cal.App.4th 708,722-723.
- (2) Boilerplate contracts
  - (a) The Ninth Circuit found an employment contract procedurally unconscionable as a contract of adhesion. This was a standard-form contract drafted by the employer, as the party with superior bargaining power, which could not be modified. *Circuit City Stores, Inc. v. Adams* (9th Cir. 2002) 279 F.3d 889.
  - (b) Boilerplate contracts given to all employees creates a sufficient inference of procedural unconscionability. *O’Hare v. Municipal Resources Consultants* (2003) 107 Cal.App.4th 267, 283.
- (3) Undue pressure and unfair tactics
  - (a) Employee forced to sign subsequent agreement by pressure and harassment, after he was already an employee, where his employer threatened to drive him out if he did not sign. *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 172-174. This constituted procedural unconscionability of a high degree. *Id.* at 175.
- (4) Take-it-or-leave-it Agreements Versus Opt-Out Agreements
  - (a) A meaningful opportunity to opt out will save an arbitration agreement
    - (i) An employment agreement with a clearly-written 30-day opt out provision

is not procedurally unconscionable. *Circuit City Stores, Inc. v. Ahmed* (9th Cir. 2002) 283 F.3d 1198, 1199-1200; *Circuit City Stores v. Najd* (9th Cir. 2002) 294 F.3d 1104, 1108.

(b) Take-it-or-leave-it Agreement is Procedurally Unconscionable

(i) Where employee was told he would have no future with the company if he exercised the opt out agreement, the agreement is not valid because this is not a meaningful opportunity to opt out. *Circuit City Stores v. Mantor* (9th Cir. 2003) 335 F.3d 1101.

(ii) Where employee told he cannot work for employer “if [he] did not sign the document,” agreement is procedurally unconscionable. *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107.

(iii) Where law firm employer gave current employees three months’ notice of arbitration policy, and thus three months to accept or reject it and seek alternative employment, without real opportunity to negotiate, there is no procedural due process. *Davis v. O’Melveny & Meyers* (9<sup>th</sup> Cir. 2007) 485 F.3d 1066.

b. Substantive Unconscionability: Does the Agreement Shock the Conscience?

(1) Cases uphold *Armendariz*’s holding that agreement must provide the employer with all legal remedies and damages.

(a) No limits on back pay, front pay or punitive damages. *Circuit City Stores, Inc. v. Adams* (9th Cir. 2002) 279 F.3d 889, 894; *Pinedo v.*

*Premium Tobacco Stores* (2001) 85  
Cal.App.4th 774, 776-779.

- (2) Cases uphold *Armendariz*'s holding that payment of costs unique to arbitration must be paid by the employer.
  - (a) The employer must pay all costs unique to arbitration. *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1085.
  - (b) Agreements cannot require that the parties split arbitration costs. *McManus v. CIBC World Markets Corp.* (2003) 109 Cal.App.4th 76,93; *O'Hare v. Municipal Resources Consultants* (2003) 107 Cal.App.4th 267, 279-280; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 181; *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165; *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 116-117. *McManus*, however, merely struck down this provision and upheld the rest of the agreement.
  - (c) The Ninth Circuit struck down an agreement that required a \$75 "filing" fee, which the employer attempted to revise by giving the employer sole discretion to grant or deny a waiver of filing fee to the employer. This was not an actual filing fee, because it was paid to the employer. *Circuit City Stores, Inc. v. Martor* (9th Cir. 2003) 335 F.3d 1101.
  - (d) If no mention of who pays costs, courts will read it to require the employer to pay. *Fittance v. Palm Springs Motors* (2003) 105 Cal.App.4th 708.
  - (e) Where contract explicitly requires parties to split costs, agreement will be struck down in its entirety. *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638. This is different

than agreements that remain silent as to the split on costs, which agreements can be reformed.

(3) Changing the statute of limitations

- (a) The Ninth Circuit however, held that changing the statute of limitations to exclude continuing violations was unconscionable. *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165.
- (b) Changing statute of limitations to six months was held substantively unconscionable by the California Court of Appeals where the right impacted was right protected by public policy, here including the right to overtime pay. *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107.
- (c) Although hard to believe, the Ninth Circuit somehow held an agreement to limit the statute of limitations to six months to be appropriate. *Soltani v. Western & Southern Life Ins. Co.* (2001) 258 F.3d 1038.
  - (i) The arbitration agreement may not require 10-day notice. *Id.*
  - (ii) This may be some odd aberration in the law, as it is so at odds with the spirit and holding of *Armendariz*.
- (d) Law firm employer's requirement that employee give notice within one year is a one year statute of limitations which shortens limitation periods for some claims and is thus unconscionable. *Davis v. O'Melveny & Meyers* (9th Cir. 2007) 485 F.3d 1066.

(4) Adequate Discovery

- (a) Agreement which tracked the California Arbitration Act upheld. *Fittante v. Palm Springs Motors, Inc.* (2003) 105 Cal.App.4th

708, 716.

- (b) Agreement limiting discovery to two depositions unless arbitrator finds compelling need (and is also mutual) struck down. *Fitz v. NCR Corporation* (2004) 118 Cal.App.4th 702.
- (c) Dicta in *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 117-118 indicates that limitation of one deposition and document request per side, “absent substantial need” is not, on its face, unconstitutional.
- (d) Repeat Player Effect
  - (i) Confidentiality agreements are not per se illegal but an agreement which is so draconian that it prohibits employees from conducting adequate investigation and discovery, by a prohibition against contacting other witnesses, is unconscionable and results in an undue advantage to the employer due to its repeat player effect. *Davis v. O’Melveny & Meyers* (9th Cir. 2007) 485 F.3d 1066.

(5) Written Arbitration Awards

- (a) Simply incorporating the California Arbitration Act, or the FAA, which provides for this (as well as neutral arbitrators, adequate discovery, and appropriate remedies) is enough. *Fittante v. Palm Springs Motors, Inc.* (2003) 105 Cal.App.4th 717.

(6) Bilateral Agreements

- (a) Excluding claims an employer is more likely to bring from the arbitration agreement means the agreement is unfairly one-sided and not bilateral.



- (i) Excluding claims for injunctive relief from arbitration is substantively unconscionable because it is the employer who is most likely to bring such claims. *Mercurio v. Superior Court* (2003) 96 Cal.App.4th 167, 176-177; *O'Hare v. Municipal Resources Consultant* (2003) 107 Cal.App.4th 267, 273-279; *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 115.
  - (ii) Arbitration agreement excluding claims such as patent infringement, unfair competition, improper use of confidential information is unfairly unilateral. *Stirlen v. Super Cuts* (1997) 51 Cal.App.4th 1519; *Mercurio v. Superior Court* (2002) 96 Cal.App.4th 167; *Fitz v. NCR Corporation* (2004) 118 Cal.App.4th 702.
  - (iii) Where the employer, but not employee, can bring court action for equitable relief for violation of attorney-client privilege/work product doctrine, or disclosure of confidentiality information, and where agreement prohibits certain government agencies from bringing administrative actions, this is not bilateral. *Davis v. O'Melveny & Meyers* (9th Cir. 2007) 485 F.3d 1066.
- (b) However, an NASD Arbitration agreement, which does exclude injunctive relief, is not unconscionable. This is because it clearly excluded all injunctive relief claims and thus is not one-sided. *McManus v. CIBC World Markets Corp.* (2003) 109 Cal.App.4th 76, 100-101.
- (c) In federal courts there is a presumption of unconscionability based upon the lack of bilaterality per se in an arbitration agreement

between an employer and employee. *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165.

(i) This is because, in reality, it is unlikely that an employer will sue an employee, an arbitration agreement really limits an employee's actions, not an employer's actions.

(ii) As such, according to the Ninth Circuit, an agreement should be presumed unconscionable unless the employer can demonstrate bilaterality vis á vis the particular plaintiff. *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, 1174.

(d) Permitting appeal only where an award is over \$50,000 isn't bilateral because only the employer would file such an appeal. *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071-1074. (This provision was struck.)

(e) A prohibition against class actions is not bilateral because only an employee would bring a class action. *Ingle, supra.*

(f) Permitting only the employer to unilaterally change or terminate an arbitration agreement isn't bilateral. *Ingle, supra.*

c. When an Arbitration Agreement will be Reformed (i.e. strike unconscionable provision and uphold) Versus Struck Down

(1) The "overarching question for the court is whether severance serves the interest of justice". *Armendariz*, at 124; *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638.

(a) The question is whether the illegality permeates the contract. *Abramson*, at 659.

- (b) In reality, this standard provides no guidance to the courts and has resulted in inconsistent holdings.
- (2) Arbitration agreement reformed and unconscionable provision struck.
  - (a) More likely to be done in state court.
  - (b) Appears as if will be done with one unconscionable provision
  - (c) More likely to be done if unconscionable provision(s) can be easily severed or the problem can be cured. *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064.
  - (d) Provision in arbitration agreement allowing the appeal of awards over \$50,000 is unconscionable, but can be severed. *Little v. Auto Steigler, Inc.* (2003) 29 Cal.4th 1064.
- (3) Multiple unconscionable provisions usually result in striking down arbitration agreement
  - (a) Especially true if difficult to sever (i.e. permeates the agreement) and the employer acted in bad faith.
  - (b) *Little, supra*, noted that situations where the agreement could not be cured, with multiple unconscionable provisions and a systematic attempt to create an inferior venue for the employee, would likely result in the invalidation of the entire agreement.
  - (c) *Pinedo v. Premium Tobacco, Inc.* (2000) 85 Cal.App.4th 774 held that an arbitration agreement was unenforceable where it had multiple unconscionable provisions including limitations to recovery, precluding recovery based upon FEHA claims, required that costs be borne by the employee initially, required employees to arbitrate in one location, only

covered the employee's claims and limited damage awards to employees, but not employers.

- (d) Substantive unconscionability by a combination of one-sidedness in mandatory arbitration of claims of interest to plaintiff but not those of interest to employer; non-neutral arbitration by small number of arbitrators on panel plus "repeat player" syndrome (court warns that this is not per se unconscionable), sharing of arbitrator's fees (in-and-of-itself is unconscionable with statutory claims where statute enacted for a public reason). Court notes that the limited discovery by itself is not unconscionable. *Mercurio v. Superior Court* (2002) 96 Cal.App.4th 167.
- (e) Substantive unconscionability where agreement applies only to employee, limits amount and type of damages, requires the splitting of arbitration's fees, and limits the statute of limitations. *Circuit City Stores, Inc. v. Adams* (9th Cir. 2002) 279 F.3d 889, 894-895. Court notes that fee allocation alone would render the arbitration agreement unenforceable. *Id.* at 894.
- (f) Multiple unconscionable provisions included compelling arbitration for claims employees likely to bring, but not claims employers likely to bring, requiring employees to pay filing fees, and limited discovery that appears to favor the employer, which resulted in a tilting of the playing field. *Ferguson v. Countrywide Credit Industries, Inc.* (9th Cir. 2002) 298 F.3d 778.
- (g) Arbitration agreement both procedurally and substantively unconscionable where there was an opt out provision but employee told he'd have no future with the company if he exercised it, and contained non-bilateral terms regarding statute of limitations, class actions and the ability to change or abandon the agreement.

*Circuit City Stores, Inc. v. Mantor* (9th Cir. 2003) 335 F.3d 1101.

- (h) Where reform requires striking down two unconscionable provisions, agreement will be struck down. *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702.
- (i) Agreement should be judged as unconscionable at the time signed, not when company later agrees to make changes, because of the “chilling effect” at the time. *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 116-117. *Martinez* struck down arbitration agreement with multiple illegal provisions.
- (j) Where agreement is procedurally unconscionable and contains four substantively unconscionable provisions, agreement must be struck down. *Davis v. O’Melveny & Meyers* (9th Cir. 2007) 485 F.3d 1066.

4. Single illegality may invalidate entire contract.

- (a) Where contract explicitly requires employee to split costs (as opposed to silence in that issue) the entire contract should be struck down.

d. Behavior of Employer can invalidate the agreement

- (1) When employee attempted to initiate arbitration, employer refused to cooperate, and employee files suit in court, employer cannot then compel arbitration of an agreement that it breached. *Brown v Dillard’s, Inc.* (9th Cir. 2005) 430 F.3d 1004.

e. Other factors to examine

- (1) Whether there is a written arbitration agreement. C.C.P. § 1281. *Tri-Cor v. City of Hawthorne* (1970) 8 Cal.App.3d 134.

- (2) Whether plaintiff received and signed the agreement, *Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, *Romo v. Y-3 Holdings, Inc.* (2001) 87 Cal.App.4th 1153.
- (3) Whether the arbitration agreement covers the type of dispute at issue. Look carefully at the language of the agreement. *Baker v. Sudick* (1984) 162 Cal.App.3d 618, 623; *SEIU v. County of Napa* (1979) 99 Cal.App.3d 946, 955; *Cobbler v. Stanley, Barber, Southard, Brown & Associates* (1990) 217 Cal.App.3d 518 (agreement governing disputes “arising out of” more limited than “arising out of” or relating to this agreement).
- (4) In federal court, whether there was a knowing waiver by the employee of his or her rights. *Prudential Ins. Co. v. Lai* (9th Cir. 1994) 42 F.3d 1299. *Rentiera v. Prudential Ins.* (9th Cir. 1997) 113 F.3d 1104; *Duffield v. Robertson Stephens & Co.* (9th Cir. 1998) 144 F.3d 1182 (these are Title VII cases).
- (5) Whether the agreement covers the parties in question. Consider whether there is claim against an individual defendant, not a signatory to the agreement, especially one acting outside the course and scope of his or her employment. See, e.g., *Marsch v. Williams* (1994) 23 Cal.App.4th 250, 255, *rev. denied*; *Michaelis v. Schori* (1993) 20 Cal.App.4th 133, 139, *rev. denied*.
- (6) Whether the employee understood or could reasonably understand that the employee was agreeing to arbitrate employment disputes. See generally, *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167 (here, employee signed NASD U-4 form agreeing to arbitrate “covered” disputes in accordance with NASD constitution, by-laws and rules. Employee not given copies of the incorporated documents and was unaware from other sources that employment disputes covered. *Id.* at 171-172).

E. Release may bar claim

1. The signing of a valid release and waiver bars a claim.
  - a. The employee should be careful to read the actual language in any release of claims when receiving, for example, workers compensation or disability claims
2. The California Supreme Court held that the standard language in a preprinted form to settle a workers' compensation claim did not apply to claims in a separate civil suit. *Claxton v Waters* (2004) 34 Cal.4th 367.
  - a. The agreement released "all claims and causes of action."

F. Exhaustion of Administrative Remedies by Public Employees

1. Exhaustion of administrative remedies is generally favored as:
  - a. It may relieve the courts of an unnecessary burden by permitting the agency to redress the wrong prior to litigation;
  - b. Even partial relief may reduce the likelihood and scope of potential litigation;
  - c. It will provide a more economical and less formal forum;
  - d. The exhaustion will result in the development of a more complete factual record;
  - e. See, *Shuer v. County of San Diego* (2004) 11 Cal.Rptr. 776, 779-780, and cases cited therein.
2. In actuality, exhaustion requirements provide many hoops for an employee to jump through which seldom provide satisfactory relief. They also provide defendants with technical defenses which may defeat an otherwise legitimate defense, i.e., the employee failed to exhaust his/her administrative remedies.
3. *Palmer v. Regents of the University of California* (2003) 107 Cal.App.4th 899 (held that an employee must exhaust internal grievance procedures).

4. Note that employees need not exhaust a public entity's internal administrative procedures to prosecute a discrimination complaint under FEHA because FEHA was meant to supplement, not supplant or be supplanted by, existing remedies. *Schifardo v. City of Los Angeles* (2003) 31 Cal.4th 1074.
  - a. Employees should still be leery of res judicata and collateral estoppel issues if they pursue their claims in two venues at once.
5. It is unclear whether this requirement will be applied to the private sector.
6. An employer may be estopped from asserting a defense of exhaustion where the employer negligently or intentionally caused a party to fail to comply with the exhaustion requirement. For example, providing mistaken and misleading information about the availability of an administrative remedy results in estoppel. *Shuer v. County of San Diego* (2004) 11 Cal.Rptr. 776, 782-783.