JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No. 22-186
For business meeting on December 2, 2022

Title
Jury Instructions: Civil Jury Instructions (Release 42)

Rules, Forms, Standards, or Statutes Affected
Judicial Council of California Civil Jury Instructions (CACI)

Recommended by
Advisory Committee on Civil Jury Instructions
Hon. Adrienne M. Grover, Chair

Agenda Item Type
Action Required

Effective Date
December 2, 2022

Date of Report
November 9, 2022

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Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approval of new and revised civil jury instructions prepared by the committee. Among other things, these changes bring the instructions up to date with developments in the law over the previous six months and add new instructions in the Labor Code Actions series. Upon Judicial Council approval, the instructions will be published in the official 2023 edition of the *Judicial Council of California Civil Jury Instructions* (*CACI*).

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective December 2, 2022, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court the following civil jury instructions prepared by the committee:

1. Addition of 12 new jury instructions and verdict forms in the Labor Code Actions series: CACI Nos. 2760, 2761, 2762, 2765, 2766A, 2766B, 2767, 2770, 2771, 2775, VF-2706, and VF-2707; and

2. Revisions to 9 instructions and verdict forms: CACI Nos. 601, 730, 1004, 1007, 2525, 4603, 4604, VF-4601, and VF-4602.

A table of contents and the proposed new and revised civil jury instructions and verdict forms are attached at pages 6–64.

Relevant Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.58 of the California Rules of Court, which established the advisory committee and its charge.[1] At that meeting, the council approved the *CACI* instructions under what is now rule 2.1050 of the California Rules of Court. Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CACI* to ensure that the instructions remain clear, accurate, current, and complete.

This is release 42 of *CACI*. The council approved release 41 at its July 2022 meeting.

Analysis/Rationale

A total of 21 instructions and verdict forms are presented in this release. The Judicial Council's Rules Committee has also approved, at its meeting on August 23, 2022, changes to 14 additional instructions under a delegation of authority from the council to the Rules Committee.[2]

The instructions were revised and added based on comments or suggestions from justices, judges, attorneys, and bar associations; proposals by staff and committee members; and recent developments in the law. Below is a summary of the more significant additions and changes recommended to the council.

New instructions and verdict forms

The committee recommends further expansion in the Labor Code Actions series. The committee has been considering the possibility of new instructions since the Supreme Court issued its decision in *Brinker Restaurant Group v. Superior Court*.[3] Wage and hour litigation in California,

[1] Rule 10.58(a) states: "The committee regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council's civil jury instructions."

[2] At its October 20, 2006, meeting, the Judicial Council delegated to the Rules Committee (formerly called the Rules and Projects Committee or RUPRO) the final authority to approve nonsubstantive technical changes and corrections and minor substantive changes to jury instructions unlikely to create controversy. The council also gave the Rules Committee the authority to delegate to the jury instructions advisory committees the authority to review and approve nonsubstantive grammatical and typographical corrections and other similar changes to the jury instructions, which the Rules Committee has done.

Under the implementing guidelines that the Rules Committee approved on December 14, 2006, which were submitted to the council on February 15, 2007, the Rules Committee has the final authority to approve (among other things) additional cases and statutes cited in the Sources and Authority and additions or changes to the Directions for Use.

[3] (2012) 53 Cal.4th 1004 [139 Cal.Rptr.3d 315, 273 P.3d 513].

especially claims related to meal and rest breaks, have only become more common in the past decade. Last spring following the Supreme Court's decisions in *Donohue v. AMN Services, LLC*,[4] the committee circulated for public comment five new instructions in this area. The committee deferred a recommendation on adopting new instructions due to the number of detailed comments it received from commenters.

The committee has now implemented many of the commenters' previous suggestions and has made further refinements based on additional comments received during this comment cycle. The committee is mindful that the law in this area is complex and sometimes involves industry-specific exceptions. As noted in the *Guide for Using Judicial Council of California Civil Jury Instructions*, the absence of a *CACI* instruction on a claim, defense, rule, or other situation does not indicate that no instruction would ever be appropriate. These new instructions are a start. The committee will continue to consider augmenting the meal and rest break instructions and adding more new wage and hour instructions as appropriate.

Rest break violations, CACI Nos. 2760, 2761, 2762, and VF-2706. The committee recommends adoption of three new jury instructions and one new verdict form on rest break violations under the Labor Code and several Industrial Welfare Commission wage orders. Consistent with its charge to express the law accurately and in plain English, the committee has chosen to use "rest break" instead of the legal term, "rest period," used in the wage orders and many cases.

The new instructions include an introductory instruction on the basic requirements of rest breaks (CACI No. 2760), an instruction on the essential elements of a rest break violation (CACI No. 2761), and an instruction on calculating the pay owed for any violations proved (CACI No. 2762). These three instructions are the basis for the proposed new verdict form (CACI No. VF-2706).

Meal break violations, CACI Nos. 2765, 2766A, 2766B, 2767, 2770, 2771, and VF-2707. The committee recommends adoption of six new jury instructions and one new verdict form in the meal break context. The instructions include an introductory instruction on the basic requirements of meal breaks (CACI No. 2765), an instruction on the essential elements (CACI No. 2766A), and an instruction on calculating the pay owed for any violations proved (CACI No. 2767). These three instructions are the basis for the proposed new verdict form (CACI No. VF-2707).

The committee also recommends an instruction addressing the rebuttable presumption of a meal break violation based on employer records (CACI No. 2766B). The instruction also addresses calculating any pay owed for any violations that have been established. One commenter suggested a new verdict form based on CACI No. 2766B, which the committee will consider in a future release cycle.

[4] (2021) 11 Cal.5th 58 [275 Cal.Rptr.3d 422, 481 P.3d 661].

Finally, the committee recommends two affirmative defense instructions involving waiver of certain meal breaks (CACI No. 2770) and consent to off-duty meal breaks (CACI No. 2771).

Revised instructions

Premises liability, CACI Nos. 1004 and 1007. An attorney questioned why these two instructions in the Premises Liability series offered different variable text options ("owner/lessor/occupier/one who controls the property" in CACI No. 1004 versus "An owner of/A lessee of/An occupier of/One who controls" in CACI No. 1007). The committee examined the authority underlying both instructions and concluded that both instructions would be accurate without retaining either "lessor" or "lessee" in the optional text. The committee also believes that these terms are commonly confused by jurors. For consistency and clarity, the committee recommends deleting these terms without any intended change to the substance of the instructions.

Policy implications

The committee endeavors to express the law in plain English; there are no policy implications.

Comments

The proposed additions and revisions in *CACI* circulated for comment from July 26 through September 9, 2022. Comments were received from 7 different commenters. All commenters submitted comments on multiple instructions and verdict forms.[5] For the 21 instructions and verdict forms in this release, the committee evaluated all comments and proposes refining some of the instructions in light of the comments received. New instructions on rest breaks and meal breaks generated a relatively large number of comments that were generally supportive.

A chart of the comments received on all instructions and the committee's responses is attached at pages 65–142.

Alternatives considered

Rules 2.1050(d) and 10.58(a) of the California Rules of Court require the committee to update, revise, and add topics to *CACI* on a regular basis and to submit its recommendations to the council for approval. There are no alternative actions for the committee to consider. The committee did, however, consider suggestions received from members of the legal community that did not result in recommendations for this release. Some suggestions were deferred for further consideration while others were declined for lack of support.

Fiscal and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will publish the official 2023 edition of *CACI* and

[5] The committee received one additional comment from a member of the public who did not comment on any jury instruction or any of the proposals circulated for comment. That irrelevant comment has been excluded from the comment chart.

pay royalties to the Judicial Council. Other licensing agreements with other publishers generate additional royalties. The official publisher will also make the revised content available free of charge to all judicial officers in both print and online.

Attachments and Links

1. Jury instructions, at pages 6–64
2. Chart of comments, at pages 65–142

TABLE OF CONTENTS
CIVIL JURY INSTRUCTIONS
Release 42; December 2022

WHISTLEBLOWER PROTECTION

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

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

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

Directions for Use

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

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

Sources and Authority

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

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

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

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

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

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

- "[W]hen an attorney breaches the duty of care by failing to advise the client of reasonably foreseeable risks of litigation before a complaint is filed, the client need not prove the subsequently filed litigation would have been successful to establish the causation element of his professional negligence claim. Rather, the client can demonstrate he 'would have obtained a more favorable result', by proving that, but for the attorney's negligence, he would not have pursued the litigation and thus would not have incurred the damages attributable to the foreseeable risks that the attorney negligently failed to disclose. In other words, to answer the 'crucial causation inquiry' articulated in *Viner*—'what would have happened if the defendant attorney had not been negligent'—the client may respond with evidence showing he would not have filed the litigation in the first place and he would have been better off as a result." (*Mireskandari v. Edwards Wildman Palmer LLP* (2022) 77 Cal.App.5th 247, 262 [292 Cal.Rptr.3d 410], internal citations omitted.)

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

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

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

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

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

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

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

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

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

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

Secondary Sources

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

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

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

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

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

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

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

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

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

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

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

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

New September 2003; Revised December 2022

Directions for Use

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

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

Sources and Authority

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

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

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

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

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

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

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

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

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

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

Secondary Sources

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

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

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

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

1004. Obviously Unsafe Conditions

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

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

New September 2003; Revised May 2018, December 2022

Directions for Use

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

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

Sources and Authority

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

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

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

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

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

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

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

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

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

Secondary Sources

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

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

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

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

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

1007. Sidewalk Abutting Property

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

New September 2003; Revised December 2022

Sources and Authority

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

- "It is the general rule that in the absence of a statute a landowner is under no duty to maintain in a safe condition a public street abutting upon his property. There is, however, an exception to this rule … . It has been held that an abutting owner is liable for the condition of portions of the public sidewalk which he has altered or constructed for the benefit of his property and which serve a use independent of and apart from the ordinary and accustomed use for which sidewalks are designed." (*Sexton v. Brooks* (1952) 39 Cal.2d 153, 157 [245 P.2d 496], internal citation omitted.)~~.~~

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

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

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

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

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

Secondary Sources

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

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

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

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

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

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

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

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

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

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

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

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

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

Directions for Use

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

Sources and Authority

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

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

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

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

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

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

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

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol, supra,* 50 Cal.App.4th at p. 1331.)

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

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

Secondary Sources

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

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

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

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

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

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

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

2760. Rest Break Violations—Introduction (Lab. Code, § 226.7)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her/***nonbinary pronoun***] pay because [***name of defendant***] did not authorize and permit one or more paid rest breaks.**

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

An employer must relieve the employee of all work duties and relinquish control over how the employee spends time during each 10-minute rest break. This includes not requiring employees to remain on call or on-site during rest breaks. An employer, however, does not have an obligation to keep records of employee rest breaks or to ensure that an employee takes each rest break.

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

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

New December 2022

Directions for Use

Give this instruction with CACI No. 2761, *Rest Break Violations—Essential Factual Elements*.

This instruction is intended for use by nonexempt employees subject to section 12(C) of Industrial Welfare Commission wage orders 1-2001 through 11-2001, 13-2001 through 15-2001, and 17-2001. Other wage orders contain exceptions to the common rule. Different rest period rules apply to certain employees of emergency ambulance providers; do not give this instruction in a case involving those employees. (See Lab. Code, §§ 880–890, added by initiative, Gen. Elec. (Nov. 6, 2018), commonly known as Prop. 11.) Different on-call rest period rules apply to security officers employed in the security services industry. (See Lab. Code, § 226.7(f).) This instruction should be modified in a case involving security officers.

Specify in the second paragraph which breaks the plaintiff claims to have missed if there is uniformity in that allegation. Rest break claims can also involve noncompliant timing. If so, specify the noncompliant

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

The definition of "workday" may be omitted if it is included in another instruction.

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

Sources and Authority

- Right of Action for Missed Meal and Rest and Recovery Periods. Labor Code section 226.7.
- "Workday" Defined. Labor Code section 500.
- Rest Periods. Cal. Code Regs., tit. 8, § 11010 et seq., subd. 12.
- "An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not—if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required—it has violated the wage order and is liable. No issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline to take it." (*Brinker Restaurant Corp., supra,* 53 Cal. 4th at p. 1033.)
- "What we conclude is that state law prohibits on-duty and on-call rest periods. During required rest periods, employers must relieve their employees of all duties and relinquish any control over how employees spend their break time." (*Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 260 [211 Cal.Rptr.3d 634, 385 P.3d 823], abrogated in part by Lab. Code, § 226.7(f)(5).)
- "[O]ne cannot square the practice of compelling employees to remain at the ready, tethered by time and policy to particular locations or communications devices, with the requirement to relieve employees of all work duties and employer control during 10-minute rest periods." (*Augustus, supra,* 2 Cal.5th at p. 269, abrogated in part by Lab. Code, § 226.7(f)(5).)
- "Because rest periods are 10 minutes in length (Wage Order 4, subd. 12(A)), they impose practical limitations on an employee's movement. That is, during a rest period an employee generally can travel at most five minutes from a work post before returning to make it back on time. Thus, one would expect that employees will ordinarily have to remain on site or nearby.

This constraint, which is of course common to all rest periods, is not sufficient to establish employer control." (*Augustus, supra,* 2 Cal.5th at p. 270.)

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

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

Secondary Sources

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

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

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

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

2761. Rest Break Violations—Essential Factual Elements (Lab. Code, § 226.7)

To establish a rest break violation, [*name of plaintiff***] must prove both of the following:**

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

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

New December 2022

Directions for Use

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

The jury must also decide how much pay is owed for any rest break violations. (See CACI No. 2762, *Rest Break Violations—Pay Owed*.)

Sources and Authority

- Right of Action for Missed Meal and Rest and Recovery Periods. Labor Code section 226.7.
- Rest Periods. Cal. Code Regs., tit. 8, § 11010 et seq., subd. 12.
- "An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not—if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required—it has violated the wage order and is liable. No issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline to take it." (*Brinker Restaurant Corp., supra,* 53 Cal.4th at p. 1033.)

Secondary Sources

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

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

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

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

2762. Rest Break Violations—Pay Owed

For each workday on which [*name of plaintiff***] has proved one or more rest break violations, [***name of defendant***] must pay one additional hour of pay at [***name of plaintiff***]'s regular rate of pay. You must determine the amount of pay owed for the rest break violations that [***name of plaintiff***] has proved.**

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

New December 2022

Directions for Use

Give this instruction with CACI No. 2760, *Rest Break Violations—Introduction*, and CACI No. 2761, *Rest Break Violations—Essential Factual Elements*.

Regular rate of pay includes the employee's base hourly rate of pay and all other forms of nondiscretionary compensation earned during the same pay period, including, for example, nondiscretionary bonuses, commissions, and shift differentials. (See *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 878 [280 Cal.Rptr.3d 783, 489 P.3d 1166] [holding that "the term 'regular rate of compensation' in [Labor Code] section 226.7(c) has the same meaning as 'regular rate of pay' in [Labor Code] section 510(a) and encompasses not only hourly wages but all nondiscretionary payments for work performed by the employee"].) The regular rate of pay may be different over different periods of time. The court must determine the method for calculating plaintiff's regular rate of pay. If different regular rates of pay are at issue, define the plaintiff's regular rate of pay for all relevant date ranges.

An employer must pay a premium wage of one hour of pay at the employee's regular rate of compensation for any rest breaks not provided. (Lab. Code, § 226.7(c).) This instruction may need to be modified if there is evidence of an employer's paying premium wages for any rest break violations.

The definition of "regular rate of pay" may be omitted if it is included in another instruction.

Sources and Authority

- Right of Action for Missed Meal and Rest and Recovery Periods. Labor Code section 226.7.
- Rest Periods. Cal. Code Regs., tit. 8, § 11010 et seq., subd. 12.
- "[W]e hold that the term 'regular rate of compensation' in section 226.7(c) has the same meaning as 'regular rate of pay' in section 510(a) and encompasses not only hourly wages but all nondiscretionary payments for work performed by the employee. This interpretation of section

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

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

Secondary Sources

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

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

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

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

California Civil Practice: Employment Litigation, §§ 4.1, 4.74, 4.76 (Thomson Reuters)

2765. Meal Break Violations—Introduction (Lab. Code, §§ 226.7, 512)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her/***nonbinary pronoun***] pay because [***name of defendant***] did not provide one or more meal breaks.**

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

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

1. **Provides a reasonable opportunity to take uninterrupted 30-minute meal breaks on time;**
2. **Does not impede the employee from taking 30-minute meal breaks;**
3. **Does not discourage the employee from taking 30-minute meal breaks;**
4. **Relieves the employee of all duties during 30-minute meal breaks; and**
5. **Relinquishes control over the employee's activities during 30-minute meal breaks, including not requiring the employee to stay on the premises.**

An employer, however, is not required to police meal breaks, ensure that an employee takes a meal break, or ensure that an employee does no work during a meal break.

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

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

New December 2022

Directions for Use

This instruction assumes a nonexempt employee who is entitled to one or more meal breaks. It should be read before the other meal break instructions. (See CACI No. 2766A, *Meal Break Violations—Essential Factual Elements*, and CACI No. 2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records*.) It may need to be modified in certain limited circumstances, for example, if waiver of meal

breaks is at issue. (See CACI No. 2770, *Affirmative Defense—Meal Breaks—Waiver by Mutual Consent*, and CACI No. 2771, *Affirmative Defense—Meal Breaks—Written Consent to On-Duty Meal Breaks*.)

Specify the meal breaks at issue and any scheduling requirements in the second paragraph.

Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code and a series of 18 wage orders, adopted by the Industrial Welfare Commission. (See *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 838 [182 Cal.Rptr.3d 124, 340 P.3d 355].) Different meal period rules apply to certain employees of emergency ambulance providers; do not give this instruction in a case involving those employees. (See Lab. Code, §§ 880–890, added by initiative, Gen. Elec. (Nov. 6, 2018), commonly known as Prop. 11.) Other exceptions to the meal period rules exist, which may require modifying this instruction. For example, persons employed in the motion picture and broadcasting industries are entitled to a meal break after six hours of work. (See Lab. Code, § 512(d); Wage Order 12-2001.) Other exceptions to the meal period rules include most instances where the Industrial Welfare Commission authorized adoption of a working condition order permitting a meal period to commence after six hours of work, certain commercial drivers, certain workers in the wholesale baking industry, and workers covered by collective bargaining agreements that meet specified requirements. (Lab. Code, § 512(b)–(e).)

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

The definition of "workday" may be omitted if it is included in another instruction.

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

Sources and Authority

- Right of Action for Meal and Rest and Recovery Period Violations. Labor Code section 226.7.
- Meal Periods. Labor Code section 512.
- Meal Periods. Cal. Code Regs., tit. 8, § 11010 et seq., subd. 11.
- Employer Duty to Keep Time Records. Cal. Code Regs., tit. 8, §§ 11010–11030, 11060–11110, 11150, ¶ 11(C), 11040–11050 & 11130–11140, ¶ 11(A), § 11120, ¶ 11(B), § 11160, ¶ 10(D).
- "Workday" Defined. Labor Code section 500.
- "An employer's duty with respect to meal breaks under both section 512, subdivision (a) and Wage Order No. 5 is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. What will suffice may vary from industry to industry, and we cannot

in the context of this class certification proceeding delineate the full range of approaches that in each instance might be sufficient to satisfy the law." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040 [139 Cal.Rptr.3d 315, 273 P.3d 513].)

- "[U]nder the relevant statute and wage order, an employee becomes entitled to premium pay for missed or noncompliant meal and rest breaks precisely because she was required to work when she should have been relieved of duty: required to work too long into a shift without a meal break; required in whole or part to work through a break; or, as was the case here, required to remain on duty without an appropriate agreement in place authorizing on-duty meal breaks." (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 106–107 [293 Cal.Rptr.3d 599, 509 P.3d 956].)

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

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

Secondary Sources

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

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

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

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

2766A. Meal Break Violations—Essential Factual Elements (Lab. Code, §§ 226.7, 512)

To establish a meal break violation, [*name of plaintiff*] must prove both of the following:

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

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

New December 2022

Directions for Use

If the case involves allegedly untimely meal breaks or more than one meal break, select either or both of the bracketed options in element 2.

Do not give this instruction for any meal break claims involving the rebuttable presumption of a violation based on an employer's records. (See CACI No. 2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records*.)

The jury must also decide how much pay is owed for any meal break violations. (See CACI No. 2767, *Meal Break Violations—Pay Owed*.)

Sources and Authority

- Right of Action for Meal and Rest and Recovery Period Violations. Labor Code section 226.7.
- Meal Periods. Labor Code section 512.
- Meal Periods. Cal. Code Regs., tit. 8, § 11010 et seq., subd. 11.

Secondary Sources

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

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

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

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*,

§ 250.14 (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4.1, 4.4 (Thomson Reuters)

2766B. Meal Break Violations—Rebuttable Presumption—Employer Records

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

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

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

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

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

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

5. **That [***name of defendant***] relinquished control over [***name of plaintiff***]'s activities during 30-minute meal breaks.**

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

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

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

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

New December 2022

Directions for Use

Employer records showing noncompliant meal breaks raise a rebuttable presumption of a meal break violation. (See *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 61 [275 Cal.Rptr.3d 422, 481 P.3d 661] ["time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations"].) Note that employers need not record meal breaks during which all operations cease. (See, e.g., Cal. Code Regs., tit. 8, § 11010, subd. 7(A)(1).)

Regular rate of pay includes the employee's base hourly rate of pay and all other forms of non-discretionary compensation earned during the same pay period, including, for example, nondiscretionary bonuses, commissions, and shift differentials. (See *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 878 [280 Cal.Rptr.3d 783, 489 P.3d 1166] [holding that "the term 'regular rate of compensation' in [Labor Code] section 226.7(c) has the same meaning as 'regular rate of pay' in [Labor Code] section 510(a) and encompasses not only hourly wages but all nondiscretionary payments for work performed by the employee"].) The regular rate of pay may be different over different periods of time. The court must determine the method for calculating plaintiff's regular rate of pay. If different regular rates of pay are at issue, define the plaintiff's regular rate of pay for all relevant date ranges.

An employer must pay a premium wage of one hour of pay at the employee's regular rate of compensation for any meal breaks not provided. (Lab. Code, § 226.7(c).) This instruction may need to be modified if there is evidence of an employer's paying premium wages for any meal breaks.

The definition of "regular rate of pay" may be omitted if it is included in another instruction.

Sources and Authority

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

regulatory scheme that encompasses the meal period provisions is concerned with small amounts of time. For example, we have 'requir[ed] strict adherence to' the Labor Code's requirement that employees receive two daily 10-minute rest periods and 'scrupulously guarded against encroachments on' these periods. The same vigilance is warranted here. Given the relatively short length of a 30-minute meal period, the potential incursion that might result from rounding is significant." (*Donohue, supra,* 11 Cal.5th at p. 68, internal citations omitted.)

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

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

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

- "[W]e construe the Legislature's use of the disjunctive as permitting an additional hour of pay for each work day that either type of break period is violated. We agree with the district court in *Marlo* [*v. United Parcel Service, Inc.*] that allowing an employee to recover one additional hour of pay for each type of violation per work day is not contrary to the 'one additional hour' and 'per work day' wording in subdivision (b). [¶] We further agree with *Marlo* that construing section 226.7, subdivision (b), as permitting one premium payment for each type of break violation is in

accordance with and furthers the public policy behind the meal and rest break mandates." (*United Parcel Service Wage & Hour Cases* (2011) 196 Cal.App.4th 57, 69 [125 Cal.Rptr.3d 384].)

Secondary Sources

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

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

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

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

California Civil Practice: Employment Litigation, §§ 4.4, 4.21 (Thomson Reuters)

2767. Meal Break Violations—Pay Owed

For each workday on which [*name of plaintiff***] has proved one or more meal break violations, [***name of defendant***] must pay one additional hour of pay at [***name of plaintiff***]'s regular rate of pay. You must determine the amount of pay owed for the meal break violations that [***name of plaintiff***] has proved.**

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

New December 2022

Directions for Use

Give this instruction with CACI No. 2765, *Meal Break Violations—Introduction*, and CACI No. 2766A, *Meal Break Violations—Essential Factual Elements*. Do not give this instruction for any meal break claims involving the rebuttable presumption of a violation based on an employer's records. (See CACI No. 2766B, *Meal Breaks Not Provided—Rebuttable Presumption—Employer Records*.)

Regular rate of pay includes the employee's base hourly rate of pay and all other forms of nondiscretionary compensation earned during the same pay period, including, for example, nondiscretionary bonuses, commissions, and shift differentials. (See *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 878 [280 Cal.Rptr.3d 783, 489 P.3d 1166] [holding that "the term 'regular rate of compensation' in [Labor Code] section 226.7(c) has the same meaning as 'regular rate of pay' in [Labor Code] section 510(a) and encompasses not only hourly wages but all nondiscretionary payments for work performed by the employee"].) The regular rate of pay may be different over different periods of time. The court must determine the method for calculating plaintiff's regular rate of pay. If different regular rates of pay are at issue, define the plaintiff's regular rate of pay for all relevant date ranges.

An employer must pay a premium wage of one hour of pay at the employee's regular rate of compensation for any meal breaks not provided. (Lab. Code, § 226.7(c).) This instruction may need to be modified if there is evidence of an employer's paying premium wages for any meal breaks.

The definition of "regular rate of pay" may be omitted if it is included in another instruction.

Sources and Authority

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

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

- "Section 226.7 missed-break premium pay does differ from these examples in that it aims to remedy a legal violation. The law permits an employer to allow an employee to work overtime hours, or to work a split shift, provided the employee is paid extra for it, but the law generally does not permit an employer to deprive an employee of a meal or rest break. But why should this difference matter? That missed-break premium pay serves as a remedy for a legal violation does not change the fact that the premium pay also compensates for labor performed under conditions of hardship. One need not exclude the other." (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 108 [293 Cal.Rptr.3d 599, 509 P.3d 956].)

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

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

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

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

Secondary Sources

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

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

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

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

California Civil Practice: Employment Litigation, §§ 4.1, 4.4, 4.21, 4.74, 4.76 (Thomson Reuters)

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

[*Name of defendant***] claims that there was no meal break violation because [***name of plaintiff***] gave up [his/her/***nonbinary pronoun***] right to a meal break on one or more workdays. This is called "waiver." To succeed on this defense, [***name of defendant***] must prove all of the following:**

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

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

[*or***]**

[*Name of defendant***] claims that there was no meal break violation because [***name of plaintiff***] gave up [his/her/***nonbinary pronoun***] right to a second meal break on one or more workdays. This is called "waiver." To succeed on this defense, [***name of defendant***] must prove all of the following:**

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

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

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

New December 2022

Directions for Use

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

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

Sources and Authority

- Meal Periods. Labor Code section 512.
- Meal Periods. Cal. Code Regs., tit. 8, §§ 11010–11030, 11060–11110, 11130–11150, ¶ 11, § 11160, ¶ 10, § 11170, ¶ 9.

- "Workday" Defined. Labor Code section 500.

- "An employer's assertion that it did relieve the employee of duty, but the employee waived the opportunity to have a work-free break, is not an element that a plaintiff must disprove as part of the plaintiff's case-in-chief. Rather, as the Court of Appeal properly recognized, the assertion is an affirmative defense, and thus the burden is on the employer, as the party asserting waiver, to plead and prove it." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1052–1053 [139 Cal.Rptr.3d 315, 273 P.3d 513], internal citations omitted (conc. opn. of Werdegar, J.), approved in *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 74–75 [275 Cal.Rptr.3d 422, 481 P.3d 661].)

Secondary Sources

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

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

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

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

California Civil Practice: Employment Litigation, § 4:4

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

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[*Name of defendant*] claims that there was no meal break violation because [*name of plaintiff*] agreed in writing to be on duty during meal breaks. To succeed on this defense, [*name of defendant*] must prove the following:

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

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

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

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

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

New December 2022

Directions for Use

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

Persons employed in the motion picture industry are entitled to a meal break after six hours of work (Wage Order 12-2001), rather than the five-hour rule applicable in other industries. Select the appropriate option in element 1 depending on the industry's applicable wage order.

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

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

Sources and Authority

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

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

- "[The on-duty meal period] exception is exceedingly narrow, applying only when (1) 'the nature of the work prevents an employee from being relieved of all duty' and (2) the employer *and* employee have agreed, in writing, to the on-duty meal period. Even then, the employee retains the right to 'revoke the agreement at any time.' These narrow terms undercut the argument that the provision creates, by implication, a broad rest period exception permitting employers to unilaterally require that employees take on-duty rest breaks without receiving additional compensation." (*Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 266–267 [211 Cal.Rptr.3d 634, 385 P.3d 823], original italics, internal citation omitted.)

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

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

Secondary Sources

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

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

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

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

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

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

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

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

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

[*or***]**

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

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

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

New December 2022

Directions for Use

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

If the court has determined that the defendant's rounding method was fair and neutral on its face, use only the second option for element 1. (See *AHMC Healthcare, Inc. v. Superior Court* (2018) 24 Cal.App.5th 1014, 1028 [234 Cal.Rptr.3d 804]; *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 907 [148 Cal.Rptr.3d 690].) The jury will need to resolve any factual disputes concerning (1) whether the rounding method consistently resulted in failure to pay all employees or a subset of employees to which plaintiff belonged for all hours worked and (2) whether the plaintiff has lost wages over time as a result of the defendant's rounding method.

Sources and Authority

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

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

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

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

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

- "[T]he regulation does not require that every employee gain or break even over every pay period or set of pay periods analyzed; fluctuations from pay period to pay period are to be expected under a neutral system. We further agree with the court in *See's I* and *See's II* that a system is fair and neutral and does not systematically undercompensate employees where it results in a net surplus of compensated hours and a net economic benefit to employees viewed as a whole." (*AHMC Healthcare, Inc., supra,* 24 Cal.App.5th at pp. 1027–1028.)

Secondary Sources

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

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

California Civil Practice: Employment Litigation, §§ 4.1, 4.21 (Thomson Reuters)

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

We answer the questions submitted to us as follows:

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

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

2. **Did [*name of plaintiff*] prove at least one rest break violation?**
   ____ Yes ____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **On how many workdays did one or more rest break violations occur?**

   ____ workdays

   Answer question 4.

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

Signed: _____
Presiding Juror

Dated: _____

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

New December 2022

Directions for Use

This verdict form is based on CACI No. 2760, *Rest Break Violations—Introduction*, CACI No. 2761, *Rest Break Violations—Essential Factual Elements*, and CACI No. 2762, *Rest Break Violations—Pay Owed*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

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

We answer the questions submitted to us as follows:

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

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

2. Did [*name of plaintiff*] prove at least one meal break violation?
____ Yes ____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. On how many workdays did one or more meal break violations occur?

____ workdays

Answer question 4.

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

Signed: _____
Presiding Juror

Dated: _____

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

New December 2022

Directions for Use

This verdict form is based on CACI No. 2765, *Meal Break Violations—Introduction*, CACI No. 2766A, *Meal Break Violations—Essential Factual Elements*, and CACI No. 2767, *Meal Break Violations—Pay Owed*.

The special verdict forms in this section are intended only as models. They may need to be modified

depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

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

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

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

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

   [*or***]**

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

   [*or***]**

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

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

   [*or***]**

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

   [*or***]**

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

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

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

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

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

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

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

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

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

Directions for Use

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

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

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

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

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

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

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

Sources and Authority

- Retaliation Against Whistleblower Prohibited. Labor Code section 1102.5.

- ~~Affirmative Defense: Same Decision. Labor Code section 1102.6.~~

- "[W]e now clarify that section 1102.6, and not *McDonnell Douglas*, supplies the applicable framework for litigating and adjudicating section 1102.5 whistleblower claims." (*Lawson, supra,* 12 Cal.5th at p. 712.)

- "By its terms, section 1102.6 describes the applicable substantive standards and burdens of proof for both parties in a section 1102.5 retaliation case: First, it must be 'demonstrated by a preponderance of the evidence' that the employee's protected whistleblowing was a 'contributing factor' to an adverse employment action. Then, once the employee has made that necessary threshold showing, the employer bears 'the burden of proof to demonstrate by clear and convincing evidence' that the alleged adverse employment action would have occurred 'for legitimate, independent reasons' even if the employee had not engaged in protected whistleblowing activities." (*Lawson, supra,* 12 Cal.5th at p. 712, internal citation omitted.)

- ~~"The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. [¶] We are concerned here with the first element of a section 1102.5(b) retaliation claim, establishing a prima facie case of retaliation. To do that, a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two." (*Patten, supra,* 134 Cal.App.4th at p. 1384, internal citations omitted.)~~

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

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

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

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

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

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

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

italics.)

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

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

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

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

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

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

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

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

Secondary Sources

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

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

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

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

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

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

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

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

Directions for Use

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

Sources and Authority

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

omitted.)

- "[W]hen we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision *at the time it made its actual decision*." (*Harris, supra,* 56 Cal.4th at p. 224, original italics.)

Secondary Sources

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

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

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

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

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

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

We answer the questions submitted to us as follows:

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

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

2. **Did [***name of plaintiff***]'s communication [disclose/ [or] demonstrate an intention to disclose] evidence of [an improper governmental activity/ [or] a condition that could significantly threaten the health or safety of employees or the public]?**
   ____ Yes ____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff***] make this communication in good faith [for the purpose of remediating the health or safety condition]?**
   ____ Yes ____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] [discharge/~~*specify*~~ *other adverse action*] [***name of plaintiff***]?**
   ____ Yes ____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [***name of plaintiff***]'s communication a contributing factor in [***name of defendant***]'s decision to [discharge/***other adverse action***] [him/her/***nonbinary pronoun***]?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [*name of defendant*] prove by clear and convincing evidence that [*name of defendant*] ~~W~~would ~~[*name of defendant*]~~ have [discharged/~~*specify*~~ *other adverse action*] [*name of plaintiff*] anyway at that time~~,~~ for legitimate, independent reasons?
____ Yes ____ No

If your answer to question 7 is no, then answer question 8. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff*]'s damages?

[a. Past economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]
$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]
$ _____]

TOTAL $ _____

Signed: _____

Presiding Juror

Dated: _____

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

New December 2015; Revised December 2016, December 2022

Directions for Use

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

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

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

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

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

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

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

We answer the questions submitted to us as follows:

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

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

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

[or]

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

[or]

[Did [*name of plaintiff*] refuse to [*specify activity in which plaintiff refused to participate*]?]
____ Yes ____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

[or]

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

[or]

[Would [*name of plaintiff*]'s participation in [*specify activity*] result in [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation]?]
____ Yes ____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

4. **Did [*name of defendant*] [discharge/~~*specify*~~ *other adverse action*] [*name of plaintiff*]?**
____ Yes ____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of plaintiff*]'s [disclosure of information/refusal to [*specify*]]/[*name of defendant*]'s belief that [*name of plaintiff*] [had disclosed/might disclose]] information] a contributing factor in [*name of defendant*]'s decision to [discharge/*other adverse action*] [him/her/*nonbinary pronoun*]?**
____ Yes ____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**
____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. **Did [*name of defendant*] prove by clear and convincing evidence that [*name of defendant*] ~~W~~would ~~[*name of defendant*]~~ have [discharged/~~*specify*~~ *other adverse action*] [*name of plaintiff*] anyway at that time~~,~~ for legitimate, independent reasons?**
____ Yes ____ No

If your answer to question 7 is no, then answer question 8. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. **What are [*name of plaintiff*]'s damages?**

[a. Past economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]
$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]
$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

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

Directions for Use

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

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

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

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

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

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

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

	Instruction	Commenter	Comment	Committee Response
1.	601. Legal Malpractice—Causation (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	Agree	No response required.
		Orange County Bar Association by Daniel S. Robinson, President	Agree	No response required.
2.	730. Emergency Vehicle Exemption (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	Agree	No response required.
		Consumer Attorneys of California by Saveena Takhar, Senior Legislative Counsel	PAGE 7: ~~"Vehicle Code section 21056 provides: "Section 21055 does not relieve the driver of a vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor protect him from the consequences of an arbitrary exercise of the privileges granted in that section."~~ Comment: **We disagree that the above language in the sources and authority section should be struck. This language should be preserved.** It is a clear message that the driver of an emergency vehicle is not relieved of responsibility to drive with "due regard for the safety of all persons"	The committee appreciates the commenter's concern, but the entry contains a quotation from a statute, which is no longer the format used for statutes in the Sources and Authority of the *Judicial Council of California Civil Jury Instructions* (*CACI*) publication. Applicable statutes are listed at the beginning of the Sources and Authority without quoting statutory language. (CACI includes quotes from cases, not statutes. To the extent quotes from statutes remain in some instructions, when the instruction is next considered, the committee will recommend updating any out-of-format entries as it has done here.)

	Instruction	Commenter	Comment	Committee Response
			merely because they are operating the vehicle with lights and siren. It is also the singular use instruction that clearly and without disassembling makes this statement. The other use instructions stress the driver is immune unless they fail to activate the red lights or siren, etc.	
		Orange County Bar Association by Daniel S. Robinson, President	Agree	No response required.
3.	1004. Obviously Unsafe Conditions (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	Agree	No response required.
		Bruce Greenlee Attorney Richmond	No authority is provided for deleting "lessor" from the instruction. On the other hand, there's no authority for why "lessor" was ever there to begin with. Why is this change proposed?	The committee believes that the terms "lessor" and "lessee" commonly are misunderstood by jurors, and that the instruction accurately states the law without the inclusion of lessor as an option.
		Orange County Bar Association by Daniel S. Robinson, President	Disagree. The Judicial Council's proposal to remove the word "lessor" from the actual jury instruction is without any supporting authority or basis. Further, several CACI jury instructions including CACI 1000 (Premises Liability – Essential Factual Elements) and 1001 (Basic Duty of Care) reference holding a defendant liable for "leasing" a property.	The committee believes that unlike the term "leasing," which is used in other instructions in this series, the terms "lessor" and "lessee" commonly are misunderstood by jurors, and that the instruction accurately states the law without the inclusion of lessor as an option.

	Instruction	Commenter	Comment	Committee Response
			As such, removing "lessor" from CACI 1004 could cause confusion as to the liability of a lessor or lessee.	
			The revisions to the Sources and Authority citation of *Felmlee v. Falcon Cable TV* (1995) 36 Cal.App.4th 1032, 1039-1040, should indicate "internal citations omitted" because the quote attributed to *Felmlee* comes from another case that was specifically cited: *Osborn v. Mission Ready Mix* (1990) 224 Cal. App. 3d 104 [273 Cal. Rptr. 457].	The committee agrees and recommends adding the notation "internal citation omitted" to the entry in the Sources and Authority.
4.	1007. Sidewalk Abutting Property (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	Agree	No response required.
		Consumer Attorneys of California by Saveena Takhar, Senior Legislative Counsel	PAGE 12: "Sources and Authority" Bullet #1: It is the general rule that in the absence of a statute a landowner is under no duty to maintain in a safe condition a public street abutting upon his property. " (Sexton v. Brooks (1952) 39 Cal.2d 153,157 [245 P.2d 496]). COMMENT: The first citation under sources and authority is to Sexton v. Brooks (1952) 39 Cal.2d 153.We recommend the addition of the rest of that citation, so that the complete citation reads as follows (Note: Proposed	The committee agrees and has added more language from *Sexton v. Brooks* content to the Sources and Authority.

	Instruction	Commenter	Comment	Committee Response
			additional language from Sexton added in blue bold italics.) It is the general rule that in the absence of a statute a landowner is under no duty to maintain in a safe condition a public street abutting upon his property. ***There is, however, an exception to this rule [i.e.] . . . that an abutting owner is liable for the condition of portions of the public sidewalk which he has altered or constructed for the benefit of his property and which serve a use independent of and apart from the ordinary and accustomed use for which sidewalks are designed.* Sexton, *supra*, 157.**	
		Bruce Greenlee Attorney Richmond	No authority is provided for deleting "lessee" from the instruction. On the other hand, there's no authority for why "lessee" was ever there to begin with. Why is this change proposed?	See the committee's response to CACI No. 1004, above, which also applies to the deletion of "a lessee of" from this instruction.
		Orange County Bar Association by Daniel S. Robinson, President	Disagree. The Judicial Council's proposal to remove the words "a lessee of" from the actual jury instruction is without any supporting authority or basis. Further, several CACI jury instructions including CACI 1000 (Premises Liability – Essential Factual Elements) and 1001 (Basic Duty of Care) reference holding a defendant liable for "leasing" a property. As such, removing "a lessee of" from	See the committee's response to CACI No. 1004, above, which also applies to the deletion of "a lessee of" from this instruction.

	Instruction	Commenter	Comment	Committee Response
			CACI 1007 could cause confusion as to the liability of a lessor or lessee.	
5.	2525. Harassment—"Supervisor" Defined (Revise)	California Employment Lawyers Association by Laura L. Horton, Chair	We at the California Employment Lawyers Association ("CELA") write to comment on the additional CACI 22-02 proposals for wage-and-hour jury instructions. CELA is a statewide organization of more than 1,200 private attorneys who practice primarily employment law on behalf of workers. CELA was established to assist California lawyers representing employees and unions in matters related to employment. CELA's mission is to help our members protect and expand the legal rights of workers through litigation, education, and advocacy. Today, CELA submits comments on the proposals for 2760, 2765A, 2765B, 2766, VF-2706, and VF-2707. CELA also provides an additional model verdict form for your consideration. We have reviewed the remaining wage-and-hour proposed instructions and believe that they are appropriate for adoption in current form without further revisions.	No response required. See the committee's responses to the substantive comments, below.
			CELA strongly supports the proposed revision to this instruction, and also respectfully suggests a minor modification to ensure that the goal of the Judicial Council is achieved. Specifically,	The committee does not believe that the suggested modification is supported by the statute, or that it would be sufficiently clear to use and/or in the instruction's text.

	Instruction	Commenter	Comment	Committee Response
			CELA proposes that the proposed language be modified slightly to state "[plaintiff] and/or [other employees]." Otherwise, it might be confusing to the jury in situations where the supervisor supervised only the plaintiff, when it is clear that the goal of the Judicial Council is to ensure that this instruction is reflective the current state of the law. As explained in prior comments, while Government Code section 12926(t) defines a supervisor as an individual "having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline *other employees*…," CACI 2525 currently imposes a new requirement that the individual engaging in the harassing conduct be the supervisor of *the plaintiff*. Gov Code section 2940(j)(1) does not require that the harasser be the supervisor of *the plaintiff* in order for a defendant to face strict liability. Rather, the statute refers to "an agent or supervisor," not an agent of supervisor of *the plaintiff*. "The case and statutory authority set forth three clear rules. First, … a supervisor who personally engages in sexually harassing conduct is personally liable under the FEHA. Second, … if the supervisor participates in the sexual harassment or substantially assists or encourages	

	Instruction	Commenter	Comment	Committee Response
			continued harassment, the supervisor is personally liable under the FEHA as an aider and abettor of the harasser. Third, under the FEHA, the employer is vicariously and strictly liable for sexual harassment by a supervisor." *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1327. Ever since *Kelly-Zurian v. Wohl*, the California Supreme Court has consistently held that Government Code section 12940(j)(1) imposes strict liability for the harassing conduct of any supervisory employee. "[A]ll that needed to be shown was Lawicki's position as a supervisor." *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 416. "Because the FEHA imposes [a] negligence standard only for harassment 'by an employee other than an agent or supervisor' by implication the FEHA makes the employer strictly liable for harassment by a supervisor." *State Dept. of Health Services v. Superior Court*, 31 Cal.4th 1026, 1040-41 (2003) (emphasis added). For these reasons, we strongly support the proposed revision that clarifies that the FEHA's definition of "supervisor" also expressly refers to authority and responsibility over "other employees," and/or the plaintiff.	

	Instruction	Commenter	Comment	Committee Response
		California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	a. We agree with the proposed revisions to the instruction.	No response required.
			b. We would delete the words "not just the plaintiff" in the proposed new sentence in the Directions for Use as superfluous and potentially inaccurate. We believe "other employees" in Government Code section 12926, subdivision (t) refers to employees other than the supervisor rather than employees other than the plaintiff.	The committee agrees that the phrase is not necessary and has deleted it from the Directions from Use.
		Consumer Attorneys of California by Saveena Takhar, Senior Legislative Counsel	PAGE 14: [Name of alleged harasser] was a supervisor of [name of defendant] if [he/she/nonbinary pronoun] had any of the following: a. The authority to hire, transfer, promote, assign, reward, discipline, [or] discharge [or] [insert other employment action] ~~[name of plaintiff]~~ **other employees** [or effectively to recommend any of these actions]; b. The responsibility to act on ~~[name of plaintiff]~~'s **other employees'** grievances [or effectively to recommend action on grievances]; or c. The responsibility to direct ~~[name of plaintiff]'s~~ **other employees'** daily work activities. [Name of alleged harasser]'s exercise of this authority or responsibility must not be	See the committee's responses to the substantive comments, below.

	Instruction	Commenter	Comment	Committee Response
			merely routine or clerical, but must require the use of independent judgment.	
			Comment: CAOC strongly supports this revision to include "other employees" with one modification. Rather than deleting the "[name of plaintiff]" we recommend that the language read "[plaintiff and/or other employees]." Only naming the plaintiff could cause confusion for the jury that the supervisor only supervised the plaintiff.	The committee does not believe that the suggested modification is supported by the statute, or that it would be sufficiently clear to use and/or in the instruction's text.
			Further, the definition of "supervisor" also contributes to this confusion. The instruction seems to conflict with the "Directions for Use" section below it. For one to qualify as a "Supervisor", do they need to supervise plaintiff *AND* other employees, or just other employees (which may not include plaintiff)? That is an open question under this instruction as phrased.	The committee believes the instruction as proposed is consistent with the statute. Based on the comment (above) of the California Lawyers Association, the committee has revised the Directions for Use to eliminate the potential for confusion noted.
		Orange County Bar Association by Daniel S. Robinson, President	Agree	No response required.
6.	2760. Rest Break Violations—Essential Factual Elements (New) [separated into two new instructions	Association of Southern California Defense Counsel (ASCDC) by Eric C. Schwettmann Ballard Rosenberg Golper & Savitt, LLP	We write on behalf of the Association of Southern California Defense Counsel (ASCDC) to comment on the proposed changes to the Employment Law-related CACI instructions. These jury instructions address rest breaks, meal breaks, and	No response required.

	Instruction	Commenter	Comment	Committee Response
	after public comment: 2760. Rest Break Violations—Introduction, and 2761. Rest Break Violations—Essential Factual Elements.]		affirmative defenses and verdict forms relating thereto. ASCDC submits this comment as the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. Its members include over 1,100 attorneys in Central and Southern California, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. ASCDC appears often as amicus curiae in appellate matters of interest to its members, and has similarly weighed in on proposed legislation, rules changes, and jury instructions affecting matters of civil procedure and other aspects of ASCDC members' practices. ASCDC agrees with some of the proposed changes to these important instructions, but requests clarification, correction, and/or submits proposals as to the employment instructions as set forth herein.	No response required. See the committee's responses to ASCDC's substantive comments below.
			Nos. 2760, 2761, and VF-2706 – Re: Rest Break Violations First, these instructions and related verdict form appear to take an improper and overly expansive interpretation of the *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257 case. Augustus does not stand for the proposition that	The committee agrees in part. "During required rest periods, employers must relieve their employees of all duties and relinquish any control over how employees spend their break time." (*Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 260 [211 Cal.Rptr.3d 634, 385 P.3d 823].) The committee agrees that practical considerations may prevent an employee from leaving the work site during a 10-minute rest break, but an

	Instruction	Commenter	Comment	Committee Response
			employees cannot be required to stay "on-site." We submit, respectfully, that it stands for the proposition that they cannot be required to be "tethered to a particular location" at the employer's premises. The Supreme Court did not explicitly address whether an employee can be required to remain on the premises during a rest break. It instead said that an employee should be allowed to take a walk during a break. An employee cannot be tethered to a location but is allowed to remain "on-site." An instruction that allows an employee to leave the work site entirely would, in practicality, trigger violations in almost every instance since a paid rest break is only 10 minutes. In most instances, an employee could not practicably fully leave the workplace and return in 10 minutes. The requirement that an employee not be "tethered to a particular location" is consistent with how federal court rulings have interpreted Augustus.	employer's prohibition on an employee's movement is different from a practical limitation. The committee believes the instruction (as refined) accurate states the law. The committee has added an entry to the Sources and Authority on the practical constraints of a 10-minute rest break.
			Second, requirement that the "rest breaks must be ***scheduled***, if practical under the circumstances" is an overly expansive and unworkable reading of *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012). In *Brinker*, the California Supreme Court ruled that employers are "subject to a duty to make a good faith effort to authorize and permit rest breaks	The committee agrees that "scheduled" may confuse jurors and has rephrased the requirement.

	Instruction	Commenter	Comment	Committee Response
			in the middle of each work period." The court stated that "in the context of an eight hour shift, [a]s a general matter, one rest break should fall on either side of the meal break ... ." Employers are given latitude and may "deviate from that preferred course where practical considerations render it infeasible." Further, the language in the Wage Orders states: "Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period." There is no obligation to "schedule" a rest break for an employee. The instruction should be consistent with the "authorize and permit" language of Brinker and not include mandatory language such as "must be scheduled," which is not supported by authority. From a practical perspective, requiring a rest break to be "scheduled" would imply that it would need to actually show up on the employee's daily schedule. Thus, it would be mandatory for an employee's schedule to read, as an example, 8:30-10, 10-10:10 (rest break), 10:10 to 12:30, 12:30-1 (lunch), 1-3:30, 3:30-3:40 (rest break), 3:40-5. This is not the law, is not workable, and would unquestionably lead	

	Instruction	Commenter	Comment	Committee Response
			to a multitude of class action and PAGA actions. Further, again from a practical perspective, the time that rest breaks are going to be taken varies from day to day depending on the ordinary course of business. It might be taken earlier or later than "scheduled" for a variety of reasons. In sum, the only constraint on the timing of rest periods requires that they fall in the middle of work periods "insofar as practicable." So long as the employee is authorized and permitted a10-minute rest break during every four-hour work period, or major faction thereof, which falls in the middle of the four hour work period "insofar as practicable" the employer is in compliance with the Labor Code and Wage Orders. There is no mandatory requirement to "schedule" a rest break.	
		California Employment Lawyers Association by Laura L. Horton, Chair	In Sources and Authority, the *Naranjo* decision of the California Supreme Court from May 2022 should be included. We suggest: • "[M]issed-break premium pay constitutes wages for purposes of Labor Code section 203. Thus, waiting time penalties are available under that statute if the premium pay is not timely paid." *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 117 [293 Cal.Rptr.3d 599, 615, 509 P.3d 956, 969]	This comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in a future release.

	Instruction	Commenter	Comment	Committee Response
			Given *Naranjo*, we suggest including a direction to use CACI No. 2704, Waiting-Time Penalty for Nonpayment of Wages, in cases where there is a Labor Code § 203 claim that defendant failed to pay rest-break premium wages upon separation from employment.	
			In Sources and Authority, point-citing *Rodriguez v. E.M.E. Inc.* (2016) 246 Cal.App.4th 1027, 1040 ("Although section 12(a) of Wage Order…") seems misplaced. It is appropriate for 2760, not 2761.	The committee agrees that the entry is appropriate for the Sources & Authority of CACI No. 2760. (It has been deleted from CACI No. 2762's Sources & Authority.)
		California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	a. We believe jurors would better understand this instruction if the employer's rest break obligations were explained prior to listing the elements. We suggest a separate instruction on required rest breaks be given prior to an instruction on the essential factual elements. Our proposed separate instruction is shown below.	The committee agrees and has separated the proposed instruction into two new instructions: Introduction and Essential Factual Elements.
			b. We would delete the language "as required by law" in the introductory paragraph. All instructions state the law. Referring to "the law" in some instructions but not others might suggest that some instructions are more important than others. Explaining the law before listing the elements, as we propose, would	The committee has deleted the phrase as suggested.

	Instruction	Commenter	Comment	Committee Response
			make clear what rest breaks the employee is entitled to and avoid for the need for "as required by law" or any similar reference.	
			c. We would revise the explanation of the number and timing of rest breaks to which an employee is entitled for greater clarity as shown below. This also avoids the need to include the optional and opaque language "major fraction thereof."	The committee has refined the explanation to rephrase "thereof."
			d. We would explain the nature of a rest break without characterizing that explanation as a definition of "authorizes and permits." We believe framing this as a definition unnecessarily complicates rather than simplifies this instruction.	The committee agrees and has refined the paragraph as suggested.
			e. We believe "An employer has no obligation" is more direct and preferable to "An employer does not, however, have an obligation."	The committee does not agree that the suggested phrasing is clearer or more direct. The committee has refined the sentence by moving "however" after "An employer."
			f. We propose the following language as a separate instruction to be given prior to instructing on the essential factual elements: **CACI No. _____. Rest Break Violations—Employer's Obligation** **[***Name of plaintiff***] claims that [***name of defendant***] owes [him/her/***nonbinary pronoun***] pay because [***name of	The committee thanks the commenter for preparing draft language for a separate instruction and has made: (1) CACI No. 2760, an introductory instruction for rest break claims, (2) CACI No. 2761, an essential elements instruction, and (3) CACI No. 2762, a pay owed instruction.

	Instruction	Commenter	Comment	Committee Response
			defendant] **did not authorize and permit one or more paid rest breaks.** **Over the course of a workday, an employee who works at least 3½ hours is entitled to a paid 10-minute rest break, an employee who works more than 6 hours is entitled to a second paid 10-minute rest break, and an employee who works more than 10 hours is entitled to a third paid 10-minute rest break. [Rest breaks must be scheduled, if practical under the circumstances, in the middle of each four-hour work period. [***Specify any additional timing requirement(s) of the rest breaks at issue if delay is at issue.***]]** **An employer must relieve the employee of all work duties and relinquish control over how the employee spends time during each 10-minute rest break. An employer cannot require employees to remain on-call or on-site during rest breaks. An employer has no obligation to keep records of employee rest breaks or to ensure that an employee takes each rest break.** **"Workday" means any consecutive 24-hour period beginning at the same time each calendar day.**	

	Instruction	Commenter	Comment	Committee Response
			g. We would revise the essential factual elements instruction as follows: ~~**[***Name of plaintiff***] claims that [***name of defendant***] owes [him/her/***nonbinary pronoun***] pay because [***name of defendant***] did not authorize and permit one or more paid rest breaks as required by law.**~~ **To establish a rest break violation, [***name of plaintiff***] must prove both of the following:** **1. That [***name of plaintiff***] worked for [***name of defendant***] on one or more workdays for at least three and one-half hours; and** **2. That [***name of defendant***] did not authorize and permit [***name of plaintiff***] to take one or more 10-minute rest breaks to which [***name of plaintiff***] was entitled.** ~~**An employer "authorizes and permits" a rest break only when it both relieves the employee of all work duties and relinquishes control over how the employee spends time during each 10-minute rest break. This includes not requiring employees to remain on-call or on-site during rest breaks. An employer does not, however, have an obligation to keep records of employee**~~	The committee thanks the commenter for preparing an instruction showing the suggested revisions. The committee has made several refinements as noted above.

	Instruction	Commenter	Comment	Committee Response
			~~**rest breaks or to ensure that an employee takes each rest break.**~~ ~~**An employee is entitled to a paid 10-minute rest break during every four-hour work period[. / , or major fraction thereof.] [However, an employee is not entitled to a rest break if the total daily work time is less than three and one-half hours.] This means that over the course of a workday [***name of plaintiff***] was due [***specify which rest breaks are at issue, e.g., a paid 10-minute rest break after working longer than three and one-half hours and a second paid 10-minute rest break after working more than six hours but no more than ten hours***]. [Rest breaks must be scheduled, if practical under the circumstances, in the middle of each four-hour work period. [***Specify any additional timing requirement(s) of the rest breaks at issue if delay is at issue.***]]**~~ ~~**"Workday" means any consecutive 24-hour period beginning at the same time each calendar day.**~~ **[Rest breaks, which are paid, and meal breaks, which are unpaid, have different requirements. You should consider claims for rest break violations separately from claims for meal break violations. A rest break**	

	Instruction	Commenter	Comment	Committee Response
			cannot be combined with a meal break or with another 10-minute rest break. For example, providing an unpaid meal break does not satisfy the employer's obligation to authorize and permit a paid 10-minute rest break.]	
		Bruce Greenlee Attorney Richmond	Third paragraph: Can we get rid of "thereof?" How about: "or major fraction of four hours?"	The committee agrees that replacing the adverb "thereof" with the unit of time mentioned earlier in the sentence is clearer and has made the suggested change.
		Lewis, Brisbois, Bisgaard, & Smith LLP's California Wage and Hour Jury Instruction Committee by William C. Sung, Attorney	As currently contemplated, CACI 2760 (draft) provides, in relevant part, the following: [Name of plaintiff] claims that [name of defendant] owes [him/her/nonbinary pronoun] pay because [name of defendant] did not authorize and permit one or more paid rest breaks as required by law. To establish a rest break violation, [name of plaintiff] must prove both of the following: 1. That [name of plaintiff] worked for [name of defendant] on one or more workdays for at least three and one-half hours; and 2. That [name of defendant] did not authorize and permit [name of plaintiff] to take one or more 10-minute rest breaks to which [name of plaintiff] was entitled.	No response required.
			CACI 2760 (draft) does not factor in an employer's payment of premium pay for any rest period not provided. Further, CACI 2760 (draft) appears to provide for	See the committee's responses to the specific comments below.

	Instruction	Commenter	Comment	Committee Response
			liability regardless of whether the employer knew or should have known that an employee worked through a rest period. In addition, CACI 2760 (draft) states, "paid 10-minute rest break after working longer than three and one-half hours and a second paid 10-minute rest break after working more than six hours but no more than ten hours]." Also, CACI 2760 (draft) uses the term "workday." At the same time, one item that is conspicuously absent is guidance reflecting governing law that an employee who waives a rest period does not trigger employer liability. Lastly, CACI 2760 (draft) forbids employers from "requiring employees to remain … on-site during rest breaks."	
			We believe each of these items has room for improvement, including room to be brought into harmony with existing law. For one, an employer's liability for failing "to provide" a rest period can be ameliorated by the payment of a premium wage of one hour of pay at the employee's regular rate of compensation. Cal. Lab. Code § 226.7(c). CACI 2760 (draft) must acknowledge that by adding to the *prima facie* elements whether the employer paid the requirement premium pay in order to be brought in harmony with governing law, to avoid confusion, and to continue to incentivize employers	The committee acknowledges that a rest break violation can be ameliorated by the employer's payment of a premium wage. The committee, however, is unaware of any authority for including as an essential element that the employer failed to pay a premium wage. The committee, however, will add a sentence to the Directions for Use in CACI No. 2762 (Rest Break Violations—Pay Owed) about the potential need for modification if payment of a premium wage is at issue.

	Instruction	Commenter	Comment	Committee Response
			to provide premium pay when properly due.	
			In addition, an employer's liability has always remained contingent on proof the employer knew or should have known of non-compliant rest periods. *Brinker Restaurant Corp. v. Superior Court,* 53 Cal.4th 1004, 1051 (2012). CACI 2760 (draft) is defective because it does not contain this critical boundary.	The authority cited relates to off-the-clock meal breaks, not rest breaks. Moreover, the employee has the burden to prove that the employer did not authorize and permit a rest break to which the employee was entitled.
			Further, CACI 2760 (draft) use of the term "workday" is in disharmony with governing Wage Orders, which uses the term "daily," not "workday."	Labor Code section 226.7 uses "workday," which the committee has used in this instruction.
			CACI 2760 (draft) should also be clarified by specifying the rule under governing law that an employee who voluntarily waives or does not take a "provided" rest period does not trigger the employer's liability.	The proposed instruction states that an employer does not have an obligation to ensure that an employee takes a rest break.
			Another issue presents with respect to CACI 2760 (draft)'s attempt to render an otherwise "provided" rest period non-compliant if an employer "requir[es] employees to remain … on-site during rest breaks." In *Augustus v. ABM Security Services, Inc.,* 2 Cal. 5th 257, 270 (2016), the California Supreme Court held that security guards, who were on-call during rest period by virtue of being required to listen to radio calls for security incidents,	The committee agrees that practical considerations may prevent an employee from leaving the work site during a 10-minute rest break, but an employer's prohibition on an employee's movement is different from a practical limitation. The committee believes the instruction (as refined) accurate states the law. The committee has added an entry to the Sources and Authority on the practical constraints of a 10-minute rest break.

	Instruction	Commenter	Comment	Committee Response
			were not provided compliant rest periods. The court used the example—among others—of an employee who could not take a brief walk away from the worksite as one indicia of "employer control" reflecting a non-compliant rest period. *Id.* Our concern is that CACI 2760 (draft) appears to conflate an on-call rest period with a rest period featuring reasonable limitations on an employee, such as not leaving the work area. *Augustus* arose in the context of employees undeniably on "on-call" rest periods but the court also recognized "practical limitations on an employee's movement" because of the 10 minute length of time. *Id.* "That is, during a rest period an employee generally can travel at most five minutes from a work post before returning to make it back on time. Thus, one would expect that employees will ordinarily have to remain f or nearby." *Id.* Crucially, *Augustus* then held that "[t]his constraint, which is of course common to all rest periods, is not sufficient to establish employer control" and thus transmute the rest period from a compliant one to a non-complaint one. *Id.* To be sure, *Augustus* used an example of an employee who could not take a brief walk—however, the inability of employees in *Augustus* to take brief walks was only a one factor among a constellation of others that combined to transform the policy into one that imposed	

	Instruction	Commenter	Comment	Committee Response
			a "broad and intrusive degree of control" over employees. *Augustus,* 2 Cal. 5th, at 269. Nothing suggests the *Augustus* court presupposed that employees were entitled to use their rest periods to go off-premises.	
			Lastly, the derivative verdict form, VF-2706 (draft) requires updating to match the foregoing edits.	The committee has refined the corresponding verdict form based on suggestions from commenters.
		Orange County Bar Association by Daniel S. Robinson, President	In the instruction, delete "or on-site" from the second sentence in the second paragraph. This revision is being requested because it is unsettled whether a rest policy requiring employees to stay on site is facially invalid. In *Augustus v. ABM Security Services*, 2 Cal. 5th 257 (2016), the California Supreme Court provided that because rest breaks are only 10-minutes, there are "practical limitations on an employee's movement." The Court continued, "Thus, one would expect that employee will ordinarily have to remain on site or nearby. This constraint, which is of course common to all rest periods, is not sufficient to establish employer control." *Id.* at 832; *see also Hubbs v. Big Lots Stores* 2018 U.S. Dist. LEXIS 226096 (C.D. Cal., July 11, 2018) (rejecting the argument that a policy requiring employees to remain on the premises during the 10-minute rest break reflects the exercise of employer	The committee agrees that practical considerations may prevent an employee from leaving the work site during a 10-minute rest break, but an employer's prohibition on an employee's movement is different from a practical limitation. The committee believes the instruction (as refined) accurate states the law. The committee has added an entry to the Sources and Authority on the practical constraints of a 10-minute rest break.

	Instruction	Commenter	Comment	Committee Response
			control that qualifies the time as on-duty work.); *Schmidtberger v. W. Ref. Retail* 2021 U.S. Dist. LEXIS 201935 (C.D. Cal., Sep. 28, 2021) (rejecting Plaintiff's contention that a policy of requiring employees stay on the premises during rest breaks is invalid facially; *Ritenour v. Carrington Mortg. Servs*. 2018 U.S. Dist. LEXIS 226668 (C.D. Cal., Sept. 12, 2018): *Rodriguez v. Wal-Mart Assocs*. 2020 U.S. Dist. LEXIS 247004 (C.D.Cal., Oct. 8, 2020): *Bowen v. Target Corp*. 2020 U.S. Dost. LEXIS 118914 (C.D. Cal., Mar. 27, 2020).	
7.	2761. Rest Break Violations—Pay Owed (New) [Renumbered after public comment as 2762.]	California Employment Lawyers Association by Laura L. Horton, Chair	In the instruction, we recommend an addition to the end of the first paragraph: "**You must determine the amount of pay owed for rest break violations.**"	The committee agrees and has added a sentence like the one suggested. The corresponding verdict form already asked the jury to make this determination.
		California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	a. We would delete the first sentence of this instruction as unnecessary, verbose, and not helpful. The instruction on essential factual elements given prior to this instruction explains what is required to establish a rest break violation. We would begin this instruction with the second sentence, stating that the plaintiff is entitled to damages for each workday in which there was a rest break violation.	To improve clarity and to simplify the instruction, the committee has deleted the proposed first sentence.
			b. The language in the first sentence "did not authorize and permit at least one rest break to which [*name of plaintiff*] was entitled" could be misconstrued to mean	This comment is moot because the committee has deleted the sentence as suggested.

	Instruction	Commenter	Comment	Committee Response
			that the employer must have failed to allow any rest breaks at all to be liable (i.e., allowing "at least one rest break" avoids a violation). We would find "did not authorize and permit a rest break to which plaintiff was entitled" clearer. In any event, we would delete this sentence, as stated.	
			c. We would delete the words "for the workday" in the second sentence of the instruction as repetitive and unnecessary in a sentence beginning "For each workday."	The committee has deleted the phrase from the sentence.
			d. We would delete the second paragraph of the instruction, defining workday. This instruction will be given with CACI No. 2760, as stated in the Directions for Use. No. 2760 defines "workday," so there is no need to define it here.	The committee has deleted the paragraph.
			e. The "regular rate of pay" that will be multiplied by the number of workdays must be expressed in dollars per hour (i.e., one additional hour of pay per workday). We would change "[*insert applicable formula*]" in the last paragraph to "[*insert hourly pay rate*]" to make plain what is needed here. We would add language to the Directions for Use noting that the instruction may be modified if there is a factual dispute regarding the hourly pay rate.	The committee disagrees. Depending on the facts of the case, there may be forms of compensation other than an hourly pay rate that will need to be factored in to determine the regular rate of pay.

	Instruction	Commenter	Comment	Committee Response
			f. We would delete the optional fourth paragraph of the instruction distinguishing rest breaks from meal breaks. The same optional language appears in No. 2760, so it is unnecessary here.	The committee has deleted the paragraph.
			g. We would revise this instruction as follows: ~~**To recover pay for a rest break violation, [***name of plaintiff***] must prove the number of workdays during which [***name of defendant***] did not authorize and permit at least one rest break to which [***name of plaintiff***] was entitled.**~~ **For each workday that [***name of plaintiff***] has proved one or more rest break violations, [***name of defendant***] must pay one additional hour of pay ~~for the workday~~ at [***name of plaintiff***]'s regular rate of pay.** ~~**"Workday" means any consecutive 24-hour period beginning at the same time each calendar day.**~~ **The "regular rate of pay" for [***name of plaintiff***] from [***insert beginning date***] to [***insert ending date***] was [***insert applicable formula***]. [***Repeat as necessary for date ranges with different regular rates of pay***.] Multiply the regular rate of pay by the number of workdays that [***name of plaintiff***] has proved one or more rest break violations.**	The committee thanks the commenter for preparing a mark-up of the instruction with revisions. See the committee's responses to California Lawyers Association's substantive comments above.

	Instruction	Commenter	Comment	Committee Response
			~~[Rest breaks, which are paid, and meal breaks, which are unpaid, have different requirements. You should consider claims for rest break violations separately from claims for meal break violations. A rest break cannot be combined with a meal break or with another 10-minute rest break. For example, providing an unpaid meal break does not satisfy the employer's obligation to authorize and permit a paid 10-minute rest break.]~~	
			g. We would modify the third paragraph in the Directions for Use accordingly: The definitions ~~of "workday and~~ "regular rate of pay" may be omitted if ~~they are~~ it is included in another instructions.	The committee has refined the Directions for Use to omit "workday."
		Bruce Greenlee Attorney Richmond	The last paragraph is not needed. You won't give 2761 unless you are also giving 2760.	The committee has deleted the paragraph.
			In the [Directions for Use] you note that the definition of "workday" may be omitted *if* it is included in other instructions. But there's no "if" here. 2760 will be given and the definition of "workday" is in 2760. No need to define "workday" again in 2761.	The committee has refined the Direction for Use to omit "workday."
			Change "non-discretionary" to "nondiscretionary."	The committee has made the suggested change.

	Instruction	Commenter	Comment	Committee Response
		Lewis, Brisbois, Bisgaard, & Smith LLP's California Wage and Hour Jury Instruction Committee by William C. Sung, Attorney	CACI 2761 (draft) current states: To recover pay for a rest break violation, [name of plaintiff] must prove the number of workdays during which [name of defendant] did not authorize and permit at least one rest break to which [name of plaintiff] was entitled. For each workday that [name of plaintiff] has proved one or more rest break violations, [name of defendant] must pay one additional hour of pay for the workday at [name of plaintiff]'s regular rate of pay.	No response required. See the committee's responses to the substantive comment, below.
			In CACI 2761 (draft)'s "Direction for Use," "regular rate of pay" is defined as the "employee's base hourly rate of pay and all other forms of nondiscretionary compensation earned during the same pay period, including for example non-discretionary bonuses, commissions, and shift differentials." But this is overbroad and fails to reflect governing law. For example, the "regular rate" does not include sums paid as gifts or on special occasions (such as Christmas) and rewards for service (where the amounts are not measured by or dependent on hours worked, production, or efficiency). 29 CFR § 778.212. These and other forms of payment that are excluded the "regular rate" should be reflected in the final version of CACI 2761 (draft) with the limiting language "unless statutorily excluded," i.e., "'regular rate of pay'	The language used in the Directions for Use is taken from the Supreme Court's decision in *Ferra*, which is addressing nondiscretionary compensation. The committee does not believe the commenter's concerns about including gifts and other discretionary items in that calculation are well-founded. The committee, however, has added a short parenthetical description of the holding.

	Instruction	Commenter	Comment	Committee Response
			means the employee's base hourly rate of pay and all other forms of nondiscretionary compensation earned during the same pay period *unless statutorily excluded*, including for example non-discretionary bonuses, commissions, and shift differentials."	
		Orange County Bar Association by Daniel S. Robinson, President	Agree	No response required.
8.	2765A. Meal Break Violations—Essential Factual Elements (New) [Separated into two instructions after public comment: (1) 2765. *Meal Break Violations—Introduction*, and (2) 2766A. *Meal Break Violations—Essential Factual Elements*.]	Association of Southern California Defense Counsel (ASCDC) by Eric C. Schwettmann Ballard Rosenberg Golper & Savitt, LLP	**Nos. 2765A, 2765B, 2766, 2770, 2771 and VF-2708 Re: Meal Break Violations** First, it might be useful and further instructive to expand on the Directions for Use note about exceptions to the general meal period rules. Notably absent from the instruction is reference to IWC Wage Order 1. [Footnote omitted.] Wage Order 1 applies to manufacturing employers, providing an exception to recordkeeping requirements and does not require employers to record a meal break when all "operations cease" during the break.	The committee has added a sentence in the Directions for Use of 2766B about the exception.
			Second, the same considerations and concerns regarding a "scheduled" rest break noted above apply equally here in this meal break context. An employer is required to provide an uninterrupted 30-minute meal break for each period of work lasting longer more than 5 hours. It	The committee agrees and has rephrased the instruction to avoid using "scheduled" and has added the language from *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 explaining that an employer is not required to police meal breaks.

	Instruction	Commenter	Comment	Committee Response
			can be taken earlier, or not at all, in the employee's discretion and/or with a proper waiver (discussed below). An employer satisfies its obligation if it (1) relieves employees of all duty; (2) relinquishes control over their activities; (3) permits them a reasonable opportunity to take an uninterrupted 30-minute break; and (4) does not impede or discourage them from doing so. The language from *Brinker* explaining that an employer is not required to police meal breaks should be added to the 4th paragraph starting with "The law, however, does not require…." to make clear what the employer is required to do in addition to what the employer is not required to do.	
		California Employment Lawyers Association by Laura L. Horton, Chair	We understand that 2765A and 2765B are intended as alternative instructions and comment accordingly.	No response required.
			For 2765A, for the most part, we agree with the instruction. However, the phrase "properly scheduled" incorrectly implies that proper scheduling by the employer is part of the test of compliance when it is not. A "proper schedule" is neither required nor sufficient for an employer to provide a meal break. We ask for deletion of "properly scheduled."	The committee agrees with the commenter's concern and has deleted "properly scheduled" from the introductory instruction.
			It is necessary to recognize the timeliness aspect of meal-break compliance. We recommend the addition of "on time" to	The committee agrees in part. Adding "on time" once adequately addresses the timeliness requirement for a

	Instruction	Commenter	Comment	Committee Response
			elements i, ii, and iii. Those elements should read: **i. provides a reasonable opportunity to take uninterrupted 30-minute meal breaks on time;** **ii. does not impede the employee from taking 30-minute meal breaks on time;** **iii. does not discourage the employee from taking 30-minute meal breaks on time;**	meal break. The committee believes it fits best in the first element.
		California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	a. We believe jurors would better understand this instruction and No. 2765B if the employer's meal break obligations were explained prior to listing the elements. We suggest a separate instruction on required meal breaks be given prior to an instruction on the essential factual elements or rebuttable presumption. Our proposed separate instruction is shown below.	The committee agrees and has separated the instruction into an introductory instruction (CACI No. 2765) that will be given with both CACI No. 2766A and CACI No. 2766B. CACI No. 2766A now contains the essential factual elements of a meal break violation.
			b. We would delete the language "as required by law" in the introductory paragraph. All instructions state the law. Referring to "the law" in some instructions but not others might suggest that some instructions are more important than others. Explaining the law before listing the elements, as we propose, would make clear what meal breaks the employee is entitled to and avoid for the need for "as required by law" or any similar reference.	The committee has deleted the phrase as suggested.

	Instruction	Commenter	Comment	Committee Response
			c. We would revise the explanation of the number and timing of meal breaks to which an employee is entitled for greater clarity as shown below.	The committee has not endorsed the suggestion. Given the complexities of meal break requirements, the committee believes it is preferable for the court and the parties to tailor the requirements included to the facts of the case. Otherwise, the instruction will provide a detailed explanation of all possible parameters for meal breaks, many of which may not be at issue in the case. To avoid confusion, the committee recommends a tailored explanation of the number and timing of meal breaks.
			d. We would delete "The law requires" in the same paragraph (which we would move to a separate instruction) for the same reasons stated above regarding "as required by law."	The committee has deleted the phrase as suggested.
			e. We would refer to "one or more" meal breaks in explaining the employer's meal breaks obligations, as in the rest breaks instruction.	The committee has referred to "one or more" meal breaks.
			f. We would delete "In this case" in the same paragraph as unnecessary.	The committee disagrees. As noted above, the committee believes meal break requirements are complex and that a tailored explanation of what is at issue in the case is preferable to giving the jury every possible detail.
			g. We would revise the language in the instruction beginning "A properly scheduled meal break" to eliminate references to "the law" and eliminate the numbered list of 5 items in favor of a more narrative paragraph.	The committee agrees in part and has deleted the reference to "properly scheduled" and "the law." The committee disagrees with respect to using a narrative paragraph for the elements of a compliant meal break. The requirements are complex. The committee believes that "complies with the law" is the most accurate and useful phrasing for the requirements of a meal break without repeating them. The committee has intentionally retained that phrasing and used an enumerated list of the

	Instruction	Commenter	Comment	Committee Response
				components of a meal break that complies with the law because it is clearer than a narrative paragraph.
			h. We propose the following language as a separate instruction: **CACI No. _____. Meal Break Violations—Employer's Obligation** **[***Name of plaintiff***] claims that [***name of defendant***] owes [him/her/***nonbinary pronoun***] pay because [***name of defendant***] did not provide one or more meal breaks.** **Over the course of a workday, an employee who works more than 5 hours is entitled to an unpaid 30-minute meal break, and an employee who works more than 10 hours is entitled to a second unpaid 30-minute meal break.** **An employer must provide a reasonable opportunity for an employee to take [an] uninterrupted 30-minute meal break[s] and cannot impede or discourage the employee from taking [a] 30-minute meal break[s]. An employer must relieve an employee of all duties during a meal break and must relinquish control over an employee's activities during a meal break, including allowing the employee to leave the premises.**	The committee appreciates the commenter's submission of an instruction with revisions.

	Instruction	Commenter	Comment	Committee Response
			An employer need not ensure that an employee takes a meal break or ensure that an employee does no work during a meal break.	
			i. We would delete "that complies with the law as described below" at the end of element 2 as unnecessary.	The committee has deleted the phrase.
			j. We would revise this instruction as follows assuming an introductory instruction as set forth above: ~~**[***Name of plaintiff***] claims that [***name of defendant***] owes [him/her/***nonbinary pronoun***] pay because [***name of defendant***] did not provide one or more meal breaks as required by law.**~~ **To establish a meal break violation, [***name of plaintiff***] must prove both of the following:** **1. That [***name of plaintiff***] worked for [***name of defendant***] for one or more workdays for a period lasting longer than five hours; and** **2. That [***name of defendant***] did not provide [***name of plaintiff***] with the opportunity to take [a/an] [timely] uninterrupted meal break of at least 30**	See the committee's responses to the substantive comments above.

	Instruction	Commenter	Comment	Committee Response
			minutes [for each five-hour period worked] ~~that complies with the law as described below~~. **~~The law requires the employer to provide meal breaks at specified times during a workday.~~ [~~*Specify any scheduling requirement(s) of the meal breaks at issue if delay or interruption is at issue.*~~] In this case, [~~*name of plaintiff*~~] ~~was entitled to a 30-minute unpaid meal break for each period of work lasting longer than five hours. This means that over the course of a workday,~~ [~~*name of plaintiff*~~] was due [~~*specify which meal breaks are at issue, e.g., a first meal break that starts after no more than five hours of work and a second meal break to start after no more than ten hours of work.*~~]** **~~A properly scheduled meal break complies with the law if the employer does all of the following:~~** **~~i. provides a reasonable opportunity to take uninterrupted 30-minute meal breaks;~~** **~~ii. does not impede the employee from taking 30-minute meal breaks;~~** **~~iii. does not discourage the employee from taking 30-minute meal breaks;~~**	

	Instruction	Commenter	Comment	Committee Response
			~~**iv. relieves the employee of all duties during 30-minute meal breaks; and**~~ ~~**v. relinquishes control over the employee's activities during 30-minute meal breaks, including allowing the employee to leave the premises.**~~ ~~**The law, however, does not require an employer to ensure that an employee takes a meal break or to ensure that an employee does no work during a meal break.**~~ **"Workday" means any consecutive 24-hour period beginning at the same time each calendar day.** **[Meal breaks, which are unpaid, and rest breaks, which are paid, have different requirements. You should consider claims for meal break violations separately from claims for rest break violations. For example, providing an unpaid meal break does not satisfy the employer's obligation to provide an employee with a paid 10-minute rest break.]**	
		Bruce Greenlee Attorney Richmond	Replace roman numerals with letters (a) for list of factors.	The list contains required elements of a compliant meal break, so letters are not appropriate. Letters are for use only with factors. The committee has renumbered them as 1–5 for improved clarity.

	Instruction	Commenter	Comment	Committee Response
			Same point with last paragraph. You will always be giving 2760 (both rest and meal breaks at issue), so you don't need to give the last paragraph twice.	The committee believes that the distinction is worthy of noting in both meal break and rest break contexts.
			Sources and Authority: *Naranjo* excerpt: margin error	The formatting of the bulleted entries will be standardized by the official publisher.
		Lewis, Brisbois, Bisgaard, & Smith LLP's California Wage and Hour Jury Instruction Committee by William C. Sung	As drafted, CACI 2765A (draft) provides: To establish a meal break violation, [name of plaintiff] must prove both of the following: 3. That [name of plaintiff] worked for [name of defendant] for one or more workdays for a period lasting longer than five hours; and 4. That [name of defendant] did not provide [name of plaintiff] with the opportunity to take [a/an] [timely] uninterrupted meal break of at least 30 minutes [for each five-hour period worked] that complies with the law as described below.	No response required.
			Our comments here are similar to those provided above as to CACI 2760 (draft). As there, CACI 2765A (draft) must add to the *prima facie* elements whether the employer paid a meal period premium because liability would not attach unless the employer failed to pay the premium for any meal period not "provided." Likewise, CACI 2765A (draft) must contain the "knew or should have known"	The committee disagrees for the reasons stated in the committee's response for CACI No. 2760.

	Instruction	Commenter	Comment	Committee Response
			standard pursuant to *Brinker*. And further like our comments to CACI 2760 (draft), CACI 2765A (draft) should clarify that an employee who voluntarily waives a meal period does not trigger employer liability.	
			In addition, CACI 2765A (draft) provides liability by reference to "each five-hour period worked." This is sharply inconsistent with governing law. Section 512 of the California Labor Code and related Wage Orders only authorize two meal periods when employees work more than 10 hours. There is no requirement to provide additional meal periods, and the concept of a "rolling five" hour requirement to provide meal periods (which is what this language is stating) was specifically disaffirmed in *Brinker*.	The committee disagrees. The instruction does not endorse a " 'rolling five' hour requirement." The instruction recognizes that the number of meal breaks will depend on the facts of the case, and is written to apply to one or two meal breaks.
			Moreover, CACI 2765 (draft) use of "workday" is out of sync with governing Wage Orders, which uses the term "daily," in lieu of "workday."	The committee has chosen "workday" as the term for daily work because Labor Code section 226.7 uses "workday," and section 512 uses "work period per day." Moreover, the Wage Orders do not use the term "daily" with respect to meal periods.
			Further, CACI 2765A (draft) identifies one requirement of a "properly scheduled meal break" is one where the employer "relinquishes control over the employee's activities during 30-minute meal breaks, including allowing the employee to leave the premises." But the notion that employers must "allow[] the employee to leave the premises" should be harmonized	The committee agrees and has refined element 5 to note that employers may not require employees to stay on the premises.

	Instruction	Commenter	Comment	Committee Response
			with the standard as to rest periods, that is, that employers must merely not require employees to remain on premises.	
			Finally, the derivative verdict form, VF-2707 (draft) requires updating to match the foregoing edits.	The committee has refined the corresponding verdict form in response to suggestions from other commenters. See the committee's responses below.
		Orange County Bar Association by Daniel S. Robinson, President	Agree	No response required.
9.	2765B. Meal Break Violations—Rebuttable Presumption—Employer Records (New) [Renumbered as 2766B after public comment.]	California Employment Lawyers Association by Laura L. Horton, Chair	For 2765B to stand on its own as an alternative to 2765A, more background on the rules is necessary. The first four paragraphs of 2765A should be added to 2765B. We also recommend a few additional changes to improve accuracy. Please see Attachment A, our redlined version of the complete 2765B. **[***Name of plaintiff***] claims that [***name of defendant***] owes [him/her/***nonbinary pronoun***] pay because [***name of defendant***] did not provide one or more meal breaks as required by law. To establish a meal break violation, [***name of plaintiff***] must prove both of the following:** **1. That [***name of plaintiff***] worked for [***name of defendant***] for one or more**	The committee has proposed an introductory instruction to be given before CACI No. 2766A and CACI 2766B and has refined the instruction based on some of CELA's suggestions.

	Instruction	Commenter	Comment	Committee Response
			workdays for a period lasting longer than five hours; and **2. That [***name of defendant***] did not provide [***name of plaintiff***] with the opportunity to take [a/an] [timely] uninterrupted meal break of at least 30 minutes [for each five-hour period worked] that complies with the law as described below.** **The law requires the employer to provide meal breaks at specified times during a workday. [***Specify any scheduling requirement(s) of the meal breaks at issue if delay or interruption is at issue.***] In this case, [***name of plaintiff***] was entitled to a 30-minute unpaid meal break for each period of work lasting longer than five hours. This means that over the course of a workday, [***name of plaintiff***] was due [***specify which meal breaks are at issue, e.g., a first meal break that starts after no more than five hours of work and a second meal break to start after no more than ten hours of work***.]** **An employer must keep accurate records of the start and end times of each meal break. [***Specify noncompliance in records that gives rise to rebuttable presumption of meal break violation, e.g., missing time records, use of rounding or other inaccurate***	

	Instruction	Commenter	Comment	Committee Response
			recordkeeping methods, records showing missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday may prove a meal break violation.] **If you decide that [***name of plaintiff***] has proved that [[***name of defendant***] did not keep accurate records of compliant meal breaks/[***name of defendant***]'s records show [missed/ [,/or] shortened/ [,/or] delayed] meal breaks], then ~~your decision on [*name of plaintiff*]'s meal break claim must be for [*name of plaintiff*] unless [*name of defendant*] proves~~** [*name of plaintiff*] has proven those meal break violations, unless [*name of defendant*] disproves the violations by proving **all of the following:** 1. **That [***name of defendant***] provided [***name of plaintiff***] a reasonable opportunity to take uninterrupted 30-minute meal breaks on time;** 2. **That [***name of defendant***] did not impede [***name of plaintiff***] from taking 30-minute meal breaks on time;**	

	Instruction	Commenter	Comment	Committee Response
			3. That [*name of defendant*] did not discourage [*name of plaintiff*] from taking 30-minute meal breaks on time; **4. That [*name of defendant*] relieved [*name of plaintiff*] of all duties during 30-minute meal breaks; and** **5. That [*name of defendant*] relinquished control over [*name of plaintiff*]'s activities during 30-minute meal breaks[, including allowing [him/her/*nonbinary pronoun*] to leave the premises].** **If you decide that [*name of defendant*] has proved all of the above for each meal break in each workday, then there have been no meal break violations and your decision must be for [*name of defendant*].** **However, if you decide that [*name of defendant*] has not proved all of the above for each meal break, then you must still decide how many workdays [*name of defendant*] did not prove all of the above, and you must determine the amount of pay owed.**	

	Instruction	Commenter	Comment	Committee Response
			[*Name of defendant***] must pay one additional hour of pay at [***name of plaintiff***]'s regular rate of pay for each workday that [***name of defendant***] did not prove all of the above.** **"Workday" means any consecutive 24-hour period beginning at the same time each calendar day.** **The "regular rate of pay" for [***name of plaintiff***] from [***insert beginning date***] to [***insert ending date***] was [***insert applicable formula***]. [***Repeat as necessary for date ranges with different regular rates of pay***.] Multiply the regular rate of pay by the number of workdays that [***name of defendant***] did not prove all of the above.]** **[Meal breaks, which are unpaid, and rest breaks, which are paid, have different requirements. You should consider claims for meal break violations separately from claims for rest break violations. For example, providing an unpaid meal break does not satisfy the employer's obligation to provide an employee with a paid 10-minute rest break.]**	
		California Lawyers Association, Litigation	a. This instruction does not expressly describe the plaintiff's claim. The first sentence in No. 2765A ("[*Name of*	The committee has adopted the suggestion for an introductory instruction for meal break violations.

	Instruction	Commenter	Comment	Committee Response
		Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	*plaintiff*] claims that . . .") is absent here. The reference to "compliant meal breaks" in the second paragraph of this instruction seems out of place without a prior explanation of the employer's obligation regarding meal breaks. The reference to plaintiffs' "meal break claim" in the second paragraph has no prior referent. An introductory instruction (set forth above) describing the plaintiff's claim and explaining the employer's meal break obligation would provide helpful context to this instruction.	
			b. This instruction requires the employer to rebut the presumption by proving that it allowed the employer to take compliant meal breaks. But an employer can also rebut the presumption by presenting evidence that the employee was compensated for noncompliant meal periods. (*Donohue*, 11 Cal.5th at p. 77.) We would revise the instruction to include this option.	The committee agrees in part. The committee has added to the Direction for Use a note about the potential need for modification if there is evidence that the employer has paid premium pay.
			c. The paragraph beginning "However" and the subsequent paragraph are about damages. We believe they belong in a separate instruction.	The committee disagrees. A separate instruction would needlessly lead to two instructions on pay owed in the meal break context. The committee believes that including pay owed in this instruction is preferable to another instruction on pay owed.
			d. We would revise this instruction as follows assuming there is an introductory instruction as set forth above:	The committee agrees with many of the suggested changes but does not believe that the shorthand of "provided compliant meal breaks/compensated plaintiff

	Instruction	Commenter	Comment	Committee Response
			An employer must keep accurate records of the start and end times of each meal break. [*Specify noncompliance in records that gives rise to rebuttable presumption of meal break violation, e.g., missing time records, records showing missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday may prove a meal break violation.***]** **If you decide that [***name of plaintiff***] has proved that [[***name of defendant***] did not keep accurate records of compliant meal breaks/[***name of defendant***]'s records show [missed/ [,/or] shortened/ [,/or] delayed] meal breaks], then ~~your decision on [***~~*name of plaintiff*~~***]'s meal break claim must be for [***~~*name of plaintiff*~~***]~~ <u>you must find that [*name of defendant*] committed a meal break violation</u> unless [***name of defendant***] proves ~~all of the following:~~** ~~**1. That [***name of defendant***] provided [***name of plaintiff***] a reasonable opportunity to take uninterrupted 30-minute meal breaks;**~~ ~~**2. That [***name of defendant***] did not impede [***name of plaintiff***] from taking 30-minute meal breaks;**~~	for all noncompliant meal breaks" adequately informs the jury of the defendant's burden.

	Instruction	Commenter	Comment	Committee Response
			~~**3. That [***name of defendant***] did not discourage [***name of plaintiff***] from taking 30-minute meal breaks;**~~ ~~**4. That [***name of defendant***] relieved [***name of plaintiff***] of all duties during 30-minute meal breaks; and**~~ ~~**5. That [***name of defendant***] relinquished control over [***name of plaintiff***]'s activities during 30-minute meal breaks[, including allowing [him/her/***nonbinary pronoun***] to leave the premises].**~~ ~~**If you decide that [***name of defendant***] has proved all of the above for each meal break, then there have been no meal break violations and your decision must be for [***name of defendant***].**~~ **that** [*name of defendant*] **[provided compliant meal breaks for all meal breaks to which [***name of plaintiff***] was entitled/compensated [***name of plaintiff***] for all noncompliant meal breaks.** ~~**However, if you decide that [***name of defendant***] has not proved all of the above for each meal break, then you must still decide how many workdays [***name of defendant***] did not prove all of the above.**~~	

	Instruction	Commenter	Comment	Committee Response
			~~**[***Name of defendant***] must pay one additional hour of pay at [***name of plaintiff***]'s regular rate of pay for each workday that [***name of defendant***] did not prove all of the above.**~~ ~~**"Workday" means any consecutive 24-hour period beginning at the same time each calendar day.**~~ ~~**The "regular rate of pay" for [***name of plaintiff***] from [***insert beginning date***] to [***insert ending date***] was [***insert applicable formula***]. [***Repeat as necessary for date ranges with different regular rates of pay***.] Multiply the regular rate of pay by the number of workdays that [***name of defendant***] did not prove all of the above.]**~~ ~~**[Meal breaks, which are unpaid, and rest breaks, which are paid, have different requirements. You should consider claims for meal break violations separately from claims for rest break violations. For example, providing an unpaid meal break does not satisfy the employer's obligation to provide an employee with a paid 10-minute rest break.]**~~	
			e. *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58 held that the rebuttable presumption applies on summary	The excerpt suggested is already included in the Sources and Authority.

	Instruction	Commenter	Comment	Committee Response
			judgment. We believe this suggests the rebuttable presumption applies at trial as well, and language in Donohue seems to suggest this. We would add that language to the Sources and Authority: "[W]e hold that time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations, including at the summary judgment stage." (*Donohue*, at p. 61.)	
		Bruce Greenlee Attorney Richmond	Same point about last paragraph not being needed, since 2760 will be given.	The committee believes that the distinction between meal breaks and rest breaks is worthy of repetition in both instructions.
		Lewis, Brisbois, Bisgaard, & Smith LLP's California Wage and Hour Jury Instruction Committee by William C. Sung, Attorney	As drafted, CACI 2765B (draft) outlines the requirements on employers to keep accurate records of the start and end times of each meal periods and that non-compliance as to that obligation leads to a rebuttable presumption of meal period violations. But to clarify that the "rebuttable presumption" is not boundless, CACI 2765B (draft) should include the following clarifying language: "The law, however, does not require an employer to ensure that an employee takes a meal break or to ensure that an employee does no work during a meal break." This standard should also be revised to encompass the exception in the IWC Wage Orders that meal periods need not be recorded if all work stops on the	The requested clarifying language is included in the proposed separate introductory instruction (CACI No. 2765) to be given in all meal break cases. To the extent the commenter seeks inclusion of an exception to record keeping for work stoppages, the committee has added a sentence to the Directions for Use noting that employers are not required to record meal breaks during which all operations cease. The committee, however, does not believe that this exception affects the employer's general obligation to keep adequate time records or the rebuttable presumption addressed in the instruction.

	Instruction	Commenter	Comment	Committee Response
			jobsite. See, e.g., IWC Wage Order 16-2001 § 6(A)(1).	
		Orange County Bar Association by Daniel S. Robinson, President	Agree	No response required.
10.	2766. Meal Break Violations—Pay Owed (New) [Renumbered as 2767 after public comment]	Association of Southern California Defense Counsel (ASCDC) by Eric C. Schwettmann Ballard Rosenberg Golper & Savitt, LLP	Third, No. 2766 should include language for the jury to consider whether an employer has already paid the premium of one additional hour of pay already. This is commonplace for many California employers given the number of wage and hour and PAGA claims filed every year. Language to this effect would deter or prevent a situation where an employer is still found in a violation when it has already paid a premium, i.e. in essence a double pay violation.	The committee agrees in part. The committee has added information in the Directions for Use about the potential need for modification of the instruction depending on the facts of the case.
		California Employment Lawyers Association by Laura L. Horton, Chair	In the instruction, we recommend adding to the end of the first paragraph: "You must determine the amount of pay owed for rest break violations."	The committee agrees and has added a sentence like the one suggested. The corresponding verdict form already asked the jury to make this determination.
			In Sources and Authority, the May 2022 *Naranjo* decision of the California Supreme Court should be referenced. As in 2760, we suggest: • "[M]issed-break premium pay constitutes wages for purposes of Labor Code section 203, and so waiting time	This comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in a future release.

	Instruction	Commenter	Comment	Committee Response
			penalties are available under that statute if the premium pay is not timely paid." *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 117 [293 Cal.Rptr.3d 599, 615, 509 P.3d 956, 969] Given *Naranjo*, we suggest including a direction to use CACI No. 2704, Waiting-Time Penalty for Nonpayment of Wages in cases where there is a Labor Code § 203 claim that defendant failed to pay meal break premium wages upon separation from employment.	
		California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	a. This instruction is designed for use with No. 2765A only. We would revise it for use with No. 2765B as well. We would delete the first sentence as duplicative of prior instructions and unnecessary. This instruction should briefly explain how to calculate damages based on those meal break violations established under other instructions without repeating or summarizing any prior instruction.	The committee disagrees. An employer may in certain cases successfully rebut the presumption of a meal break violation for some but not all meal break violations. The explanation necessary for a jury to understand the determinations they must make in those cases is already complicated. The committee prefers a more standard meal break pay owed instruction for use with CACI No. 2766A only.
			b. One of the reasons this instruction only works with No. 2765A is that it repeatedly refers to plaintiff's burden of proof. Nos. 2765A and 2765B explain the burden of proof, so there is no need to say anything about the burden of proof in this instruction. In the second sentence, we would change "For each workday that [*name of plaintiff*] has proved one or more	The committee has streamlined the introductory language of CACI No. 2767.

	Instruction	Commenter	Comment	Committee Response
			meal break violations" to "For each workday in which you find one or more meal break violations."	
			c. We would delete the words "for the workday" in the second sentence of the instruction as repetitive and unnecessary in a sentence beginning "For each workday."	The committee has deleted the phrase "for the workday" from the sentence.
			d. Nos. 2765A and 2765B both define "workday," so there is no need to define it in this instruction.	The committee has deleted the definition from the instruction.
			e. The "regular rate of pay" that will be multiplied by the number of workdays must be expressed in dollars per hour (i.e., one additional hour of pay per workday). We would change "[*insert applicable formula*]" in the last paragraph to "[*insert hourly pay rate*]" to clarify what is needed here. We would add language to the Directions for Use noting that the instruction may be modified if there is a factual dispute regarding the hourly pay rate.	The committee disagrees. An hourly rate must be determined, but it will depend on the facts of the case. There may be other forms of nondiscretionary compensation that must be factored in to determine the regular rate of pay beyond the hourly wage.
			f. In the final sentence, we would change "number of workdays that [*name of plaintiff*] has proved one or more meal break violations" to "number of workdays in which you find one or more meal break violations" for the same reasons stated above regarding burden of proof.	The committee does not find the suggested phrasing clearer.

	Instruction	Commenter	Comment	Committee Response
			g. We would revise this instruction as follows: **~~To recover pay for a meal break violation, [*name of plaintiff*] must prove the number of workdays during which [*name of defendant*] did not provide the opportunity for one or more uninterrupted 30-minute meal breaks as required by law.~~ For each workday ~~that [*name of plaintiff*] has proved~~ <u>in which you find</u> one or more meal break violations, [*name of defendant*] must pay one additional hour of pay for the workday at [*name of plaintiff*]'s regular rate of pay.** **~~"Workday" means any consecutive 24-hour period beginning at the same time each calendar day.~~** **The "regular rate of pay" for [*name of plaintiff*] from [*insert beginning date*] to [*insert ending date*] was [*insert ~~applicable formula~~ <u>hourly pay rate</u>*]. [*Repeat as necessary for date ranges with different regular rates of pay.*] Multiply the regular rate of pay by the number of workdays that [*name of plaintiff*] has proved <u>in which you find</u> one or more meal break violations.**	The committee thanks the commenter for preparing draft language and has refined the instruction as noted in the committee's responses both above and below.
			h. The last sentence in the Directions for use should be revised to reflect the deletion of the "workday" definition: The definition~~s~~ of ~~"workday" and~~ "regular rate	The committee has deleted the definition from the instruction.

	Instruction	Commenter	Comment	Committee Response
			of pay" may be omitted if ~~they are~~ it is included in another instruction~~s~~.	
		Bruce Greenlee Attorney Richmond	Since 2765A will be given, you don't need the definition of "workday."	The committee has deleted the paragraph.
		Lewis, Brisbois, Bisgaard, & Smith LLP's California Wage and Hour Jury Instruction Committee by William C. Sung, Attorney	CACI 2766 (draft) describes the meal period premium pay. But similar to the defects outlined earlier in CACI 2671 (draft), not all non-hourly forms of non-discretionary compensation. As a further example, payments for vacation or illnesses are not part of the "regular rate." 29 CFR §§ 778.212–778.224. We believe CACI 2766 (draft) could be strengthened and better reflect governing law if it were to include the limiting language "unless statutorily excluded," e.g., "'regular rate of pay' means the employee's base hourly rate of pay and all other forms of nondiscretionary compensation earned during the same pay period *unless statutorily excluded*, including for example non-discretionary bonuses, commissions, and shift differentials."	The committee has used the phrasing used by the Supreme Court in *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 878 [280 Cal.Rptr.3d 783, 489 P.3d 1166], and has added a short parenthetical description of the holding.
		Orange County Bar Association by Daniel S. Robinson, President	Agree	No response required.
11.	2770. Affirmative Defense—Meal	Association of Southern California Defense Counsel (ASCDC)	Fourth, the "Affirmative Defense – Meal Breaks – Waiver By Mutual Consent" instruction states: "That [name of	The committee disagrees. The committee is concerned that jurors may not understand the meaning of "mutual

	Instruction	Commenter	Comment	Committee Response
	Breaks—Waiver by Mutual Consent (New)	by Eric C. Schwettmann Ballard Rosenberg Golper & Savitt, LLP	plaintiff] and [name of defendant] freely, knowingly, and mutually consented to waiving the meal break of that workday." This instruction is very vaguely worded insofar as "freely" and "knowingly" are concerned. Freely seems to be the same as mutually consented but is subject to different interpretations. "Knowingly" is not particularly neutral in nature as any employee could say, in almost every instance, that they "did not know" what they signed. Put slightly differently, an employee could say they did not know the legal effect in his or her lawsuit and readily defeat this defense. If the employee seeks to challenge whether or not a wavier is valid, i.e. a binding contract, he or she can do so accordingly. It is unclear to us where the words "freely" and knowingly" came from. The Wage Order says: "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee." Likewise, Labor Code section 512(a) provides: "512. (a) An employer shall not	consent" unless they are advised that the agreement must be free and knowing. The committee includes "freely and knowingly" because those terms are commonly used to explain waiver (see, e.g., CACI No. 336, *Affirmative Defense—Waiver*) and because Justice Werdegar referenced similar phrasing in her concurrence describing the employer's burden to prove waiver. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1053, fn.1 [139 Cal.Rptr.3d 315, 273 P.3d 513], conc. opn. of Werdegar, J. ["knowingly and voluntarily decided not to take the meal period"], concurrence adopted in full with respect to the discussion of the rebuttable presumption in *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 75 [275 Cal.Rptr.3d 422, 481 P.3d 661].)

	Instruction	Commenter	Comment	Committee Response
			employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer shall not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived." Thus, the mutual consent language tracks both the Wage Order and the Labor Code and the "freely" and "knowingly" are superfluous and seem to slant unfairly towards the plaintiff.	
		California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	a. We would insert language in the instruction to make it clear that the effect of the defense is to negate a meal break violation. We believe use of the words "meal break violation" here as in other instructions would enhance continuity and understanding. **[***Name of defendant***] claims that <u>there was no meal break violation because</u>**	The committee agrees and has added the suggested phrase to both paragraphs.

	Instruction	Commenter	Comment	Committee Response
			[*name of plaintiff*] gave up [his/her/*nonbinary pronoun*] right to a [first/second] meal break on one or more workdays. This is called "waiver." To succeed on this defense, [*name of defendant*] must prove all of the following: . . . **[*Name of defendant*] claims that <u>there was no meal break violation because</u> [*name of plaintiff*] gave up [his/her/*nonbinary pronoun*] right to a second meal break on one or more workdays. This is called "waiver." To succeed on this defense, [*name of defendant*] must prove all of the following:**	
		Bruce Greenlee Attorney Richmond	Can this instruction be given with both 2765A and B? Need to address in [the Directions for Use].	The committee intends for the instruction to be used in the meal break context and given with CACI No. 2766A or 2766B. The committee, however, believes that it would be premature to offer guidance in the Directions for Use on how an affirmative defense of waiver might work with a rebuttable presumption based on an employer's records. The committee will continue to monitor the law as it develops and reconsider the instruction as appropriate.
			Same point about not needing to define "workday" as it will be defined in a 2765 instruction.	The committee has deleted the paragraph.
		Lewis, Brisbois, Bisgaard, & Smith LLP's California Wage and Hour Jury Instruction Committee	We propose revising the language for the first meal period, element two and the second meal period, element three as follows:	The committee disagrees. The committee is concerned that jurors may not understand "mutual consent" unless they are advised that the agreement must be free and knowing.

	Instruction	Commenter	Comment	Committee Response
		by William C. Sung, Attorney	*2. That [name of plaintiff] and [name of defendant]~~, freely, knowingly, and~~ mutually consented to waiving the meal break of that workday.* . . . *3. That [name of plaintiff] and [name of defendant]~~, freely, knowingly, and~~ mutually consented to waiving the second meal break.*	
			Labor Code section 512 states that a "meal period may be waived by mutual consent of both the employer and employee." (Cal. Lab. Code §512). Eliminating "freely" and "knowingly" from the instruction more accurately reflects the statutory language.	The committee disagrees for the reasons stated above.
			We propose adding the following to the Sources and Authorities section: If an employer authorizes and permits its employee to take a compliant meal break and the employee continues to work through the break without the employer's knowledge, the employer will not be liable for premium pay. "If work does continue, the employer will not be liable for premium pay. At most, it will be liable for straight pay, and then only when the employer "knew or reasonably should have known that the worker was working through the authorized meal period."	The committee does not believe the footnote content referenced relates to waiver of off-duty meal breaks, which is the subject of this instruction.

	Instruction	Commenter	Comment	Committee Response
			(Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1040, fn. 19). Similarly, the employee must show that the employer knew or should known that the employee worked more than six or twelve hours in violation of the terms of the meal period waiver.	
			Further, "workday" is in disharmony with governing Wage Orders, which uses the term "daily," not "workday."	The committee disagrees for the reasons stated above.
			In the directions for use, we would indicate that there are other lawful exceptions and meal period waivers. The instructions should be modified in accordance with those lawful exceptions. These exceptions include but are not limited to the following: Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code and a series of 18 wage orders, adopted by the Industrial Welfare Commission. (See *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 838.) Different meal period rules apply to certain employees of emergency ambulance providers; do not give this instruction in a case involving those employees. (See Lab. Code, §§ 880–890, added by initiative, Gen. Elec. (Nov. 6, 2018), commonly known as Prop. 11.) Other exceptions to the meal period rules exist, which may require modifying this	This information is already located in the Directions for Use of the introductory meal break violation instruction. The committee believes that is adequate because the jury will not be instructed on waiver without being instructed on meal break violations generally. The committee, however, has added a cross-reference to the waiver instructions in the Directions for Use of CACI No. 2765.

	Instruction	Commenter	Comment	Committee Response
			instruction. For example, persons employed in the motion picture and broadcasting industries are entitled to a meal break after six hours of work. (See Lab. Code, § 512(d); Wage Order No. 12-2001.) Other exceptions to the meal period rules include: most instances where the Industrial Welfare Commission authorized adoption of a working condition order permitting a meal period to commence after six hours of work; certain commercial drivers; certain workers in the wholesale baking industry; and workers covered by collective bargaining agreements that meet specified requirements. (Lab. Code, § 512(b)–(e).)	
		Orange County Bar Association by Daniel S. Robinson, President	Agree	No response required.
12.	2771. Affirmative Defense—Meal Breaks—Written Consent to On-Duty Meal Breaks (New)	Association of Southern California Defense Counsel (ASCDC) by Eric C. Schwettmann Ballard Rosenberg Golper & Savitt, LLP	In the same vein, the "Affirmative Defense – Meal Breaks – Written Consent to On-Duty Meal Breaks" instruction states "That [name of plaintiff] and [name of defendant] freely, knowingly, and mutually consented in writing to on-duty meal breaks during which [he/she/nonbinary pronoun] would not be relieved of all duties; [and]…" In addition to and as noted above, the applicable Wage Order provides: "Unless	The committee disagrees for the reasons stated in the committee's response to CACI No. 2770. To the extent the commenter is suggesting an additional element, that the written waiver included a right to revoke the waiver, the committee does not believe the element is necessary to establish consent to an on-duty meal break.

	Instruction	Commenter	Comment	Committee Response
			the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked. An 'on duty' meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time." Also, it is worth considering whether or not the fact that revocation of the written consent is appropriate. We would suggest adding a new paragraph 4 stating "That the written agreement given to [his/her/nonbinary pronoun] regarding [his/her/nonbinary pronoun's] right to be relieved of all job duties during meal breaks advised [name of plaintiff] that the agreement could be revoked at any time. Thus, existing paragraphs 4 and 5 would become 5 and 6. It is also worth considering whether this instruction should indicate that where a standing waiver is applicable, it is valid unless and until revoked.	
		California Lawyers Association, Litigation Section, Jury Instructions Committee	a. We would insert language in the instruction to make it clear that the effect of the defense is to negate a meal break violation. We believe use of the words	The committee has added the suggested phrase to the sentence.

	Instruction	Commenter	Comment	Committee Response
		by Reuben A. Ginsburg, Chair	"meal break violation" here as in other instructions would enhance continuity and understanding.	
			b. We would simplify and clarify the language stating that the employee agreed to be on duty.	The committee has made the suggested change.
			c. We would revise this instruction as follows: *Name of defendant*] **claims that <u>there was no meal break violation because</u> [***name of plaintiff***] agreed in writing to ~~give up [his/her/*nonbinary pronoun*] right to be relieved of all job duties~~ <u>be on duty</u> during meal breaks. To succeed on this defense, [***name of defendant***] must prove the following:**	The committee has made the suggested changes.
		Bruce Greenlee Attorney Richmond	[Directions for Use] first paragraph: Unless CACI has been deLatinized, Use "See, e.g.," instead of "See, for example."	The committee has made the change suggested.
		Lewis, Brisbois, Bisgaard, & Smith LLP's California Wage and Hour Jury Instruction Committee by William C. Sung, Attorney	We propose replacing the term "Regular Rate of Pay" with "Base Rate of Pay." The Wage Order does not make any indication that the "Regular Rate of Pay" should be used. Rather, the "Base Rate of Pay" should be used when compensating an employee for an on-duty meal period.	The committee is not aware of any authority for using the term "base rate of pay" in this context.
			The California Supreme Court, in *Naranjo v. Spectrum Security Services, Inc.*, held that premiums are intended to provide compensation for both the missed meal period and the work the employee	The committee generally agrees with the commenter's summary of the holding in *Naranjo*, but the committee is not aware of any authority for using the term "base rate of pay" in this context.

	Instruction	Commenter	Comment	Committee Response
			performed during the break. (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 107.) The premium is paid at the employee's "Regular Rate of Pay." On the other hand, the compensation the employer provides for lawful on-duty meal periods is only meant to compensate the employee for the work performed during the on-duty break. As such, "Base Rate of Pay" should be used instead of "Regular Rate of Pay" or "Regular Rate of Compensation."	
			The Regular Rate of Pay is used when an employee is denied a proper meal period or lacks a lawful waiver or on-duty meal period agreement. When a meal period is authorized and permitted and an employee consented to the on-duty meal period, the Base Rate of Pay the employee receives for the other hours worked during their shift should extend to the lawful on-duty meal period. Meal periods are unpaid if properly taken. Requiring the Regular Rate of Pay for lawful on-duty meal period agreements would not only complicate the employers wage statement obligations but it would likely result in confusion, unnecessary litigation, and penalize employers who are engaging in a mutually agreeable and lawful practice.	The committee appreciates the commenter's concerns, but as noted above, the committee is not aware of any authority for using the term "base rate of pay" in this context. Further, the Labor Commissioner's office has stated that on-duty meal breaks are paid at the regular rate of pay: https://www.dir.ca.gov/dlse/FAQ_MealPeriods.html [as of Oct. 11, 2022]. Absent authority to the contrary, the committee believes "regular rate of pay" is accurate in this context.

	Instruction	Commenter	Comment	Committee Response
			Further, "workday" is in disharmony with governing Wage Orders, which uses the term "daily," not "workday."	The committee disagrees for the reasons stated above.
		Orange County Bar Association by Daniel S. Robinson, President	Agree	No response required
13.	2775. Nonpayment of Wages Under Rounding System—Essential Factual Elements (New)	Association of Southern California Defense Counsel (ASCDC) by Eric C. Schwettmann Ballard Rosenberg Golper & Savitt, LLP	**No. 2775 (Rounding Instruction)** has many issues. It does not tell the jury that just because there may be some under compensation does not mean the rounding policy is invalid. In fact, it says the opposite which is not consistent with the law. Specifically, the instruction "[That, over time, [name of defendant]'s method of rounding resulted in failure to pay its [employees/specify subset of employees to which plaintiff belonged] for all time actually worked]" does reflect the applicable legal standard.	The committee believes the instruction accurately states the law. There are two options for element 1.
			In the Directions for Use, it should be noted that a grace period is different than a rounding practice. See *See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889 (2012) [Employee whose schedule had been programmed into the timekeeping system could voluntarily punch in up to 10 minutes prior to his/her scheduled start time and 10 minutes after his/her scheduled end time; called a "grace period." Employees were not	The Sources and Authority include an excerpt from *See's Candy Shops*. The committee is not persuaded that the court's discussion of a grace period would be helpful in the Direction for Use, as the instruction does not address "grace periods."

	Instruction	Commenter	Comment	Committee Response
			permitted to work during that time, but could use it for personal activities. Since employees were not supposed to be working during the grace period, if an employee punched in during the grace period, the employee was paid based on scheduled start/stop time, rather than the punch time.] This is an important distinction that should be noted.	
			Also, in the Directions for Use, reference to the recent *Ferra v. Loews Hollywood Hotel* case should be added. In that case, the Court held that rounding can be "fair and neutral" even where most workers lose pay as a result. Ferra v. Loews Hollywood Hotel, 40 Cal. App. 5th 1239, 1253 (2019), rev'd on other grounds, 11 Cal. 5th 858 (2021). In *Ferra*, the plaintiff alleged that employees were underpaid because of a policy that rounded time punches up or down to the nearest quarter-hour.356 The plaintiff had shown that the rounding policy resulted in her losing time in 55.1% of her shifts, and that a separate sample group of employees lost time in 54.6% of their shifts.357. *Ferra* held that "[t]his is not sufficient to show that the rounding policy 'systematically undercompensate[s] employees.'"	The committee does not believe the specific facts of the court of appeal's decision in *Ferra v. Loews Hollywood Hotel* would be helpful to users in the Directions for Use.
		California Lawyers Association, Litigation	Agree	No response required.

	Instruction	Commenter	Comment	Committee Response
		Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair		
		Lewis, Brisbois, Bisgaard, & Smith LLP's California Wage and Hour Jury Instruction Committee by William C. Sung, Attorney	We propose adding the following to the Sources and Authorities: "[T]he regulation does not require that every employee gain or break even over every pay period or set of pay periods analyzed." (*AHMC Healthcare, Inc. v. Superior Court* (2018) 24 Cal.App.5th 1014, 1027.) "[R]ounding contemplates the possibility that in any given time period some employees will have net overcompensation and some will have net undercompensation." (*Ibid*.) A rounding system is invalid if it "'systematically undercompensate[s] employees.'" (*Id*. at p. 1021.) "A 'fair and neutral' rounding policy does not require that employees be overcompensated, and a system can be fair or neutral even where a small majority loses compensation." (*Id*. at p. 1024.)	The committee has added an additional quote from *AHMC Healthcare, Inc. v. Superior Court*, as suggested. The second and third quotes suggested have not been added because they are parenthetical quotes from another case or language not found in *AHMC Healthcare, Inc.*
			"The overall loss of 0.26 percent in compensation over the relevant time period is statistically meaningless." (*David v. Queen of Valley Medical Center* (2020) 51 Cal.App.5th 653, 665, citing *Ferra v. Loews Hollywood Hotel, LLC* (2019) 40 Cal.App.5th 1239,1253–1254 [rounding system neutral even where the	No response required.

	Instruction	Commenter	Comment	Committee Response
			plaintiff lost time in 55.1 percent of shifts].)	
			"[A] slight majority (52.1 percent) lost an average of 2.33 minutes per employee shift. But where the system is neutral on its face and overcompensates employees overall by a significant amount to the detriment of the employer, the plaintiff must do more to establish systematic undercompensation than show that a bare majority of employees lost minor amounts of time over a particular period. (*AHMC Healthcare, Inc. v. Superior Court*, *supra*, at p. 1028 [rounding system neutral, even though some employees lost 2.33 minutes per shift].)	No response required.
			We would clarify this requirement in the language of the instruction by adding a new second paragraph: "A rounding policy is lawful if, on average and over time, the employees are paid for all the time they actually worked, even if some individual employees are undercompensated while others are overcompensated. A rounding policy is unlawful if it consistently results in failure to pay the employees for time actually worked."	The committee believes the instruction accurately states the law.
			We would revise element 1 accordingly: 1. That, over time, [name of defendant]'s method of rounding led to a reduction in [name of plaintiff]'s wages consistently	The committee does not see improved clarity in the suggested change.

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			resulted in failure to pay the employees for all the time they actually worked; and	
			Further, "workday" is in disharmony with governing Wage Orders, which uses the term "daily," not "workday."	The committee has refined the first two sentences of the Directions for Use to eliminate the term "workday."
		Orange County Bar Association by Daniel S. Robinson, President	Agree	No response required.
14.	VF-2706. Rest Break Violations (New)	California Employment Lawyers Association by Laura L. Horton, Chair	We recommend that questions 2 and 3 be modified to read: **2. Did [name of plaintiff] prove at least one rest break violation?** **_____Yes _____No** **3. On how many workdays did one or more rest break violations occur?** **____ workdays** Because instruction 2760 already defined the rest break violation in detail, there is no need to reintroduce "authorize and permit" – a term of art – in the verdict form. Hence, questions 2 and 3 are unnecessarily complicated. Jurors can be directed back to the instruction to be reminded of what constitutes a violation.	The committee agrees and has refined the questions as suggested to simplify the verdict form.
		California Lawyers Association, Litigation	a. Question 2 could be misconstrued to ask if defendant authorized and permitted	The suggestion is moot because the committee has revised the question as suggested by CELA above.

	Instruction	Commenter	Comment	Committee Response
		Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	at least one rest break, resulting in no liability if defendant authorized and permitted at least one rest break. We would revise question 2 to clarify the point: **2. Did [***name of defendant***] fail to authorize and permit [***name of defendant***] to take ~~at least one~~ a rest break to which [***name of plaintiff***] was entitled?**	
			b. Question 3 could be misunderstood to ask on how many workdays was plaintiff not authorized and permitted to take any rest breaks, when it should ask on how many workdays was plaintiff not authorized and permitted to take a rest break to which plaintiff was entitled. We suggest this revision: **3. On ~~H~~how many workdays was [***name of plaintiff***] not authorized and permitted to take ~~one or more~~ a rest breaks ~~to which [***name of plaintiff***] was entitled~~?**	The suggestion is moot because the committee has revised the question as suggested by CELA above.
		Bruce Greenlee Attorney Richmond	I have found the inclusion of the word "authorized" in the rest break instructions to be a bit problematic, but not enough to complain until now. But in question 3, including "authorized" makes a hash of the question. It sounds like the employee needs to be "authorized" when in fact it is the employer that is authorizing the employee to take the break.	The commenter's concern is moot because the committee has revised the question as suggested by CELA above.
		Orange County Bar Association	Agree	No response required.

	Instruction	Commenter	Comment	Committee Response
		by Daniel S. Robinson, President		
15.	VF-2707. Meal Break Violations (New)	California Employment Lawyers Association by Laura L. Horton, Chair	This model form should carry an instruction indicating that it is designed for cases where there is no allegation of inaccurate meal break records.	The Directions for Use of CACI No. 2766A already contains the information requested. The Directions for Use of VF-2707A state that the verdict form is based on CACI No. 2766A, *Meal Break Violations—Essential Factual Elements*. The committee therefore does not see a need to add the information suggested to the model verdict form.
			We recommend that questions 2 and 3 be modified to read: **2. Did [name of plaintiff] prove at least one meal break violation?** **_____Yes _____No** **3. On how many workdays did one or more meal break violations occur?** **____ workdays** Instruction 2765A already defined the meal break violation in detail. There is no need to reintroduce certain terms of art.	The committee agrees and has refined the questions as suggested to simplify the verdict form.
			We would like to suggest an additional model verdict form. Our understanding is that the committee has only drafted a model form that works with CACI No. 2765A. To assist the committee further, we provide a proposal in Attachment B for a verdict form that works with CACI No. 2765B. For reference, we call it "VF-	The committee appreciates the suggested new verdict form. Because it is beyond the scope of the invitation to comment, the committee will consider it in a future release cycle.

	Instruction	Commenter	Comment	Committee Response
			2708 Meal Break Violations Involving Inaccurate Employer Records." (See Attachment B.[1])	
		California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	a. Question 2 could be misunderstood to ask if defendant provided at least one 30-minute meal break, when the question should be whether defendant failed to provide a meal break to which plaintiff was entitled. We suggest this revision:	The committee disagrees but has revised the question, as suggested by CELA above, to ask whether plaintiff has proved "at least one meal break violation."
			b. Question 2 refers to some requirements of a compliant meal break (uninterrupted and 30 minutes) but does not cover all requirements (omits unimpeded, not discouraged, relieved of all duties, and control relinquished). Rather than list all requirements or only some requirements, we believe question 2 should refer to a "compliant 30-minute meal break."	The committee has refined the question as suggested by CELA above.
			c. We would revise question 2 as follows: **2. Did [***name of defendant***] fail to provide [***name of plaintiff***] with the opportunity to take ~~one or more [properly scheduled] uninterrupted~~ a compliant 30-minute meal breaks ~~of at least 30 minutes~~ to which [***name of plaintiff***] was entitled?**	The committee has refined the question as suggested by CELA above.
			b. Question 3 could be misunderstood to ask on how many workdays did defendant fail to provide any meal breaks, when the	Question 3 has been rephrased to ask, "On how many workdays …" The commenter's other suggestions are

[1] The commenter's attachment has been omitted from the comment chart.

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			question should be on how many workdays did defendant fail to provide a meal break to which plaintiff was entitled. We suggest this revision: **3. <u>On</u> <u>Hh</u>ow many workdays did [***name of defendant***] fail to provide ~~one or more~~ <u>a</u> meal break~~s~~ <u>to which [***name of plaintiff***] was entitled</u>?**	moot because the committee has refined question 3 as suggested by CELA above.
		Bruce Greenlee Attorney Richmond	Question 3: Add "For" to the beginning of the question.	The committee has endorsed the suggestion of CELA and added "On" to the beginning of question 3.
		Orange County Bar Association by Daniel S. Robinson, President	Agree	No response required.
16.	4603. Whistleblower Protection—Essential Factual Elements (Revise)	California Employment Lawyers Association by Laura L. Horton, Chair	CELA strongly supports the revisions to CACI Instruction 4603 to codify the recent California Supreme Court opinion in *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703.	No response required.
			CELA suggests that the instruction also include the employee's burden of proof in the instruction. The reason for this is so that jurors have clear instruction that the employee's burden of proof as to the essential factual elements is by a preponderance of the evidence, whereas, as the Lawson Court held, "the employer shall have the burden of proof to demonstrate by clear and convincing	CELA's comment is beyond the scope of the invitation to comment. The committee will consider the suggestions in a future release.

	Instruction	Commenter	Comment	Committee Response
			evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5." Jurors in the trial courts have become confused regarding which burdens of proof apply to the various elements. Having the burdens clearly stated in the jury instructions will provide clear guidance to jurors, so that trial judges are not having to craft responses to juror questions regarding the various burdens of proof. CELA respectfully suggests that the instruction be modified to state as follows: "To establish this claim, [name of plaintiff] must prove all of the following by a preponderance of the evidence:"	
			CELA also respectfully suggests that the term "contributing factor" be defined either in this instruction itself or in a separate instruction that is dedicated to the definition of "contributing factor." Until the *Lawson* decision, California courts were required to rely on federal statutes and case law for this definition. However, the *Lawson* decision provided a clear and unmistakable definition for the term "contributing factor" as applied to Labor Code § 1102.5, and this should be codified in the CACI instructions as	CELA's comment is beyond the scope of the invitation to comment. The committee will consider the suggestions in a future release.

	Instruction	Commenter	Comment	Committee Response
			follows: "A contributing factor a contributing factor includes "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision. This can be proven through a variety of factors, including temporal proximity between the protected activities and the adverse actions, as well as falsity of the employer's stated reason. An employee may satisfy his burden even when other, legitimate factors also contributed to the adverse action."	
		California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	a. We believe only Labor Code section 1102.5 should be cited in the title and not section 1102.6 because this instruction is limited to the plaintiff's burden under section 1102.5. The defendant's burden under section 1102.6 is the subject of another instruction, No. 4604, not this one.	The committee agrees and recommends deleting the statute from both the title and from the Sources and Authority of this instruction (but including it in CACI No. 4604).
			b. Although it is beyond the scope of the invitation to comment, we would delete part of the quoted language from *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66 in the Sources and Authority. The statement that section 1102.5, subdivision (b) does not protect employees who report suspicions directly to their employers does not reflect current law. We would retain the last two sentences of the quotation and delete the rest.	The committee will consider the suggestion in a future release.

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			c. Although it is beyond the scope of the invitation to comment, we suggest noting *Scheer v. Regents of University of California* (2022) 76 Cal.App.5th 904 and *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703 in CACI Nos. 4601 and 4602.	The committee will consider the suggestion in a future release.
		Consumer Attorneys of California by Saveena Takhar, Senior Legislative Counsel	PAGE 41: The highlighted portions of elements 2 and 3 below. 1. That [name of defendant] was [name of plaintiff]'s employer; 2. [That [[name of plaintiff] disclosed/[name of defendant] believed that [name of plaintiff] [had disclosed/might disclose]] to a [government agency/law enforcement agency/person with authority over [name of plaintiff]/[or] an employee with authority to investigate, discover, or correct legal [violations/noncompliance]] that [specify information disclosed];] [or] [That [name of plaintiff] [provided information to/testified before] a public body that was conducting an investigation, hearing, or inquiry;] [or]	This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion for CACI No. 4603 and the corresponding verdict form in a future release.

	Instruction	Commenter	Comment	Committee Response
			[That [name of plaintiff] refused to [specify activity in which plaintiff refused to participate];] 3. [That [name of plaintiff] had reasonable cause to believe that the information disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];] [or] [That [name of plaintiff] had reasonable cause to believe that the [information provided to/testimony before] the public body disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];] [or] [That [name of plaintiff]'s participation in [specify activity] would result in [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];] COMMENT: Element 2 states that the plaintiff could have refused to engage in the activity. Element 3 could be more clearly worded to explain that although the plaintiff did not actually participate, had the plaintiff	

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			participated in the activity, that participation would result in a violation of a statute, rule or regulation. The verdict form has this same flaw where it could be interpreted to require the plaintiff to engage in the conduct.	
		Orange County Bar Association by Daniel S. Robinson, President	Agree	No response required.
17.	4604. Affirmative Defense—Same Decision (Revise)	California Employment Lawyers Association by Laura L. Horton, Chair	CELA requests that an important clarification be made to CACI Instruction 4604. In its current form, this instruction states that "[name of defendant] **is not liable** if [he/she/nonbinary pronoun/it] proves by clear and convincing evidence that [he/she/nonbinary pronoun/it] would have [discharged/[other adverse employment action]] [name of plaintiff] anyway at that time for legitimate, independent reasons." This is an incorrect statement of law which must be corrected. The text of section 1102.6 is silent on the issue of whether the same-decision defense completely relieves an employer of all liability. But the policy considerations that prompted the Legislature to enact the provisions in the first place support applying the same-decision defense the same way it is	This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release.

	Instruction	Commenter	Comment	Committee Response
			applied under the similarly employee-protective FEHA statute. The legislative history primarily speaks to the Legislature's intent to impose a higher, "clear and convincing," standard of proof on employers to prove the same-decision defense. 2-AA-154, 166, 168, 170, 176; see also *Lawson v. PPG Architectural Finishes* (2022) 12 Cal.5th 703, 712 [commenting that "much of the legislative history of section 1102.6 focuses on the employer's same-decision defense—particularly the Legislature's interest in prescribing a more demanding standard for establishing the defense"]. In the absence of a clear textual command, the CACI instructions should not absolve an employer from liability in same-decision (i.e., mixed motive) cases. The CACI instructions should construe the whistleblower provisions consistent with their broad, remedial policy purpose and consistent with FEHA, another broad, remedial statute with the same goal of rooting out unlawful employment practices. First, there is no persuasive reason to take one approach with respect to the same-decision defense under FEHA and a different approach with respect to the	

	Instruction	Commenter	Comment	Committee Response
			same-decision defense under the whistleblower provisions. If FEHA plaintiffs who establish that discrimination was a substantial motivating reason for adverse actions can obtain declaratory and/or injunctive relief, as well as fees and costs, then the same should be true for whistleblower plaintiffs who establish that protected activities contributed to the adverse actions they suffered. The same-decision defense comes into play only in mixed-motive cases whereby the employer's adverse action was attributable to both lawful and unlawful reasons. The defense should not carry different consequences as between a FEHA mixed-motive case and a whistleblower mixed-motive case. Indeed, the purposes animating both statutes—FEHA and the whistleblower provisions—support interpreting them in a uniform manner. (See e.g., *Ziesmer v. Super. Ct.* (2003) 107 Cal.App.4th 360, 366 ["Our decision is consistent with that established rule of statutory construction that similar statutes should be construed in light of one another."].) The *Harris* Court reasoned that completely relieving an employer of all liability would give short shrift to the fact that an impermissible discriminatory consideration had actually infected the	

	Instruction	Commenter	Comment	Committee Response
			employer's decision-making. (56 Cal.4th at p. 225.) While *Harris* held that damages would be an unfair windfall to a plaintiff who would have been subjected to the adverse action for legitimate reasons anyway, declaratory and injunctive relief, as well as the recovery of fees and costs, should remain available to vindicate FEHA's purpose of preventing and deterring unlawful discrimination. (*Id* at pp. 232-235.) Permitting the plaintiff to obtain these forms of relief also serves to ensure that the finding of unlawful discrimination is not relegated to "an empty gesture." (*Id.* at p. 234.) Just like FEHA, the whistleblower provisions are undergirded by a "broad public policy interest"—in this case to "encourage[e] workplace whistleblowers to report unlawful acts without fearing retaliation." (*Green, supra*, 19 Cal.4th at p. 77.) In *Lawson, supra*, 12 Cal.5th at pp. 710-711, the Supreme Court recently noted that the Legislature amended the whistleblower provisions in 2003 in response to the spate of corporate frauds at major companies like Enron and WorldCom. The goal was to make the provisions more employee friendly to "encourage earlier and more frequent reporting of wrongdoing by employees	

	Instruction	Commenter	Comment	Committee Response
			and corporate managers when they have knowledge of specified illegal acts." (*Id*. at p. 711 [quoting Assem. Com. on Judiciary, Analysis of Sen. Bill No. 777 (2003-2004 Reg. Sess.) as amended May 29, 2003, p.1].) The broad, employee-protective purposes of both FEHA and the whistleblower provisions militate in favor of holding that an employer's successful same-decision defense does not automatically absolve it of all liability under the whistleblower provisions any more than it does under FEHA. Otherwise, the purposes of both statutes will be frustrated. Plaintiffs will be less likely to bring meritorious claims, and findings that discriminatory/retaliatory factors influenced the employer's decision-making will be nothing more than an "empty gesture." (*Harris, supra*, 56 Cal.4th at p. 234.) Accordingly, CACI 4604 should be modified to state the following: "If [name of plaintiff] proves that [his/her/nonbinary pronoun/it] [disclosure of information of/refusal to participate in] an unlawful act was a contributing factor to [his/her/nonbinary pronoun/it] [discharge/[other adverse employment action]], ~~[name of defendant] is not liable if [he/she/nonbinary pronoun/it] proves~~	

	Instruction	Commenter	Comment	Committee Response
			the burden shifts to [name of defendant] to prove by clear and convincing evidence that [he/she/nonbinary pronoun/it] would have [discharged/[other adverse employment action]] [name of plaintiff] anyway at that time for legitimate, independent reasons.	
		California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	Agree	No response required.
		Orange County Bar Association by Daniel S. Robinson, President	Agree	No response required.
18.	VF-4601. Protected Disclosure by State Employee—California Whistleblower Protection Act—Affirmative Defense—Same Decision (Revise)	California Employment Lawyers Association by Laura L. Horton, Chair	CELA supports the changes to VF-4601, as they adopt the employer's burden of proof into the verdict form itself, which will provide much clearer instruction to jurors.	No response required.
		California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	Agree	No response required.
		Orange County Bar Association	Agree	No response required.

	Instruction	Commenter	Comment	Committee Response
		by Daniel S. Robinson, President		
19.	VF-4602. Whistleblower Protection—Affirmative Defense of Same Decision (Revise)	California Employment Lawyers Association by Laura L. Horton, Chair	CELA supports the changes to VF-4602, as they adopt the employer's burden of proof into the verdict form itself, which will provide much clearer instruction to jurors.	No response required.
		California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	We agree with the proposed revisions, except we would not delete "*specify*" in question 7. Instead, we would keep it as in VF-4601 question 7.	The committee believes the bracketed content that users are called to include is clear without retaining *specify* in question 7. The change is being made to conform to the content of questions 4, 5, and 7 of CACI No. VF-4602. The committee also recommends making conforming changes to the same bracketed content in CACI No. VF-4601.
		Orange County Bar Association by Daniel S. Robinson, President	Agree	No response required.