Judicial Council *of* California

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# REPORT TO THE JUDICIAL COUNCIL

*Item No.: 23-188*
For business meeting on November 17, 2023

**Title**
Jury Instructions: Civil Jury Instructions (Release 44)

**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**
November 17, 2023

**Date of Report**
October 5, 2023

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## Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approval of new and revised civil jury instructions, verdict forms, and user guide content 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 on implicit or unconscious bias and reasonable accommodation for pregnancy, childbirth, and related conditions. Upon Judicial Council approval, the instructions will be published in the official 2024 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 November 17, 2023, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court:

1. The addition of 3 new instructions: CACI Nos. 2580, *Pregnancy Discrimination—Failure to Accommodate—Essential Factual Elements*; 2581, *Pregnancy Discrimination—"Reasonable Accommodation" Explained*; and 5030, *Implicit or Unconscious Bias*;

2. Revisions to 14 instructions and verdict forms: CACI Nos. 113, 2547, 2549, VF-2700, VF-2701, VF-2702, VF-2706, VF-2707, VF-2708, VF-2709, 3070, 3905A, 4603, and 4702; and

3. Revisions to the Guide for Using Judicial Council of California Civil Jury Instructions (user guide) concerning revision dates.

A table of contents and the proposed new and revised civil jury instructions, verdict forms, and user guide are attached at pages 6–57.

## 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 *CACI* 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 44 of *CACI*. The council approved release 43 at its May 2023 meeting.

## Analysis/Rationale

A total of 17 instructions and verdict forms are presented in this release, along with a revision to the user guide. In addition, at its meeting on October 11, 2023, the Judicial Council's Rules Committee approved changes to 15 other instructions under a delegation of authority from the council to the Rules Committee.[2]

The recommended revisions and additions to the instructions are 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.

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[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.

### New instructions

**Pregnancy Discrimination.** The Court of Appeal in *Lopez v. La Casa de Las Madres*[3] stated the essential elements of a failure-to-accommodate claim for employees affected by pregnancy. Drawing on similar instructions for disability and religion in the Fair Employment and Housing Act series, the committee recommends two new instructions: CACI No. 2580, stating the essential elements of a claim, and CACI No. 2581, explaining "reasonable accommodation" as it relates to pregnancy, childbirth, and related conditions.

**Implicit or Unconscious Bias.** The California Judges Association (CJA) submitted a proposed implicit bias jury instruction to both the Advisory Committee on Civil Jury Instructions and the Advisory Committee on Criminal Jury Instructions, which prepares the *Judicial Council of California Criminal Jury Instructions* (*CALCRIM*). The submission letter noted that CJA's Committee on the Elimination of Bias and Inequality in the Justice System spent more than a year researching and drafting language for an instruction addressing implicit bias. The letter urged the council's two advisory committees on jury instructions either to expand existing instructions to include language related to implicit bias or to create a new standalone instruction to address the issues of implicit bias more substantively. Included in CJA's submission was a packet of information containing sample implicit bias jury instructions from other jurisdictions.

The Advisory Committee on Criminal Jury Instructions acted first on CJA's proposal, recommending a new standalone instruction on implicit bias, which the council approved in September 2023.[4] This committee agreed that an instruction in the Concluding Instructions series that is virtually identical to CALCRIM No. 209 would be an important addition to *CACI*. The committee shared the view of its sister committee that the instruction would be most effective if it provided tools to help jurors identify, understand, and potentially avoid implicit bias affecting their deliberations.

Several commenters expressed support for the new instruction or agreed with the proposal if modified, offering minor suggestions. One attorney objected to adopting CACI No. 5030, arguing that it will not be successful in addressing bias and that it would not be as effective as permitting lawyers to conduct voir dire of potential jurors.[5] The committee has been persuaded to recommend a new instruction based on the work of the *CALCRIM* committee and the resources from other jurisdictions supplied with the CJA's proposal. On this important subject, the committee did endeavor to achieve harmonization with *CALCRIM*'s new instruction on the

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[3] *Lopez v. La Casa de Las Madres* (2023) 89 Cal.App.5th 365, 370–371 [305 Cal.Rptr.3d 824].

[4] See CALCRIM No. 209, approved by the council at its September 19, 2023, meeting. *See* Judicial Council of Cal., Advisory Com. Rep., *Jury Instructions: Criminal Jury Instructions (2023 Supplement)* (Aug. 18, 2023), pp. 32–33, *https://jcc.legistar.com/View.ashx?M=F&ID=12246010&GUID=43578DC7-EA49-47A2-B04E-F9CA39500D2F*.

[5] That attorney did express some support for CACI No. 113, *Bias*, in the Pretrial series. The committee recommends expanding No. 113 to provide a definition of bias and to explain more fully what implicit or unconscious bias is and how it operates.

subject, but with the benefit of public comment, the committee recommends minor refinements to the language to improve clarity.

### Revised instructions and user guide content

**User Guide.** Each instruction in *CACI* includes a date line showing the original date of approval and all subsequent revision dates. For the last twenty years, an instruction has been considered as having been revised if it underwent a nontechnical change to the title, instruction text, or Directions for Use. All such changes have required the addition of a revision date after the instruction's text (for example, *New May 2020; Revised November 2023*). A trial judge user suggested that revisions to content other than the instruction text should be treated differently than revisions to instruction text. The committee agrees and recommends—beginning with this release—adding an asterisk to revision date entries of instructions whose instruction text doesn't change.[6] This addition will allow users to confirm more quickly that a jury instruction's content has not changed. Commenters agreed with this proposed change.

**Language referring to persons with disabilities (CACI Nos. 2547, 2549, 3070, and 4702).** In the previous release, the committee recommended language updates to six instructions to replace outdated language with more respectful terms. The committee continues that effort in this release by recommending updates to language in four more instructions, even though the existing statutory language is not person-first, because the changes do not affect the legal meaning.

In 1990, the federal government passed the Americans with Disabilities Act (ADA), which prohibits discrimination against individuals with disabilities in all areas of public life.[7] The ADA National Network (ADANN) provides information, guidance, and training on implementing the ADA to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." [8] The ADANN has published *Guidelines for Writing About People With Disabilities*, which encourages the use of language consistent with the principles of the ADA, including "portraying individuals with disabilities in a respectful and balanced way by using language that is accurate, neutral and objective."[9]

The guidelines provide that, generally, the person should be referred to first and the disability second: "People with disabilities are, first and foremost, people. Labeling a person equates the person with a condition and can be disrespectful and dehumanizing. A person isn't a disability, condition or diagnosis; a person *has* a disability, condition or diagnosis. This is called Person-First Language."[10] For example, instead of writing that a person "is mentally ill," write that a

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[6] For example, in this release see CACI Nos. 2549, VF-2700, VF-2701, VF-2702, VF-2706, VF-2707, VF-2708, VF-2709, and 3905A.

[7] See 42 U.S.C. § 12101 et seq.

[8] See ADA National Network, *https://adata.org/national-network*.

[9] ADA National Network, *Guidelines for Writing About People With Disabilities* (2018), *https://adata.org/factsheet/ADANN-writing*.

[10] *Id.* at guideline no. 3, original italics.

person "has a mental health condition"; instead of "[d]isabled person," write "[p]erson with a disability."[11]

### Policy implications

The committee endeavors to express the law in plain English. Except for language choices, there are generally no policy implications. With respect to the language referring to persons with disabilities, modernizing the language of *CACI*'s instructions is also consistent with the *Strategic Plan for California's Judicial Branch*, specifically the goals of Access, Fairness, Diversity, and Inclusion (Goal I) and Quality of Justice and Service to the Public (Goal IV).[12]

### Comments

The proposed additions and revisions in *CACI* circulated for comment from August 1 through September 7, 2023. Comments were received from 6 commenters: the California Judges Association, 2 lawyers, 2 bar associations (Orange County Bar Association and California Lawyers Association), and a professional organization (Association of Southern California Defense Counsel). Most commenters submitted comments on multiple instructions and verdict forms. No particular instruction garnered any unusual attention or opposition.

The committee evaluated all comments and, as a result, refined some of the instructions and verdict forms in this release. A chart of the comments received and the committee's responses is attached at pages 58–81.

### Alternatives considered

Rules 2.1050(e) 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 from members of the legal community that did not result in recommendations for this release. Some suggestions were deferred for further consideration; others were declined for lack of support.

## Fiscal and Operational Impacts

No implementation costs are associated with this proposal.

## Attachments and Links

1. CACI User Guide and Nos. 113, 2547, 2549, 2580, 2581, VF-2700, VF-2701, VF-2702, VF-2706, VF-2707, VF-2708, VF-2709, 3070, 3905A, 4603, 4702, and 5030, at pages 6–57
2. Chart of comments, at pages 58–81

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[11] *Id.* at guideline nos. 3 & 11.

[12] California Courts, "The Strategic Plan for California's Judicial Branch" (July 2019), *www.courts.ca.gov/3045.htm*.

# TABLE OF CONTENTS
# CIVIL JURY INSTRUCTIONS
# Release 44; November 2023

# Guide for Using Judicial Council of California Civil Jury Instructions

## USER GUIDE

Ease of understanding by jurors, without sacrificing accuracy, is the primary goal of these Judicial Council instructions. A secondary goal is ease of use by lawyers. This guide provides an introduction to the instructions, explaining conventions and features that will assist in the use of both the print and electronic editions.

**Jury Instructions as a Statement of the Law:** While jury instructions are not a primary source of the law, they are a statement or compendium of the law, a secondary source. That the instructions are in plain English does not change their status as an accurate statement of the law.

**Instructions Approved by Rule of Court:** Rule 2.1050 of the California Rules of Court provides: "The California jury instructions approved by the Judicial Council are the official instructions for use in the state of California … The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law … Use of the Judicial Council instructions is strongly encouraged."

**Absence of Instruction:** The fact that there is no CACI instruction on a claim, defense, rule, or other situation does not indicate that no instruction would ever be appropriate.

Using the Instructions

**Revision Dates:** The original date of approval and all revision dates of each instruction are presented. An instruction is considered as having been revised if there is a nontechnical change to the title, instruction text, or Directions for Use. Additions or changes to the Sources and Authority and Secondary Sources do not generate a new revision date. Beginning with the 2024 edition (instructions approved November 2023), revision dates marked with an asterisk indicate that changes were to the Directions for Use or title, with no change to the instruction text.

**Directions for Use:** The instructions contain Directions for Use. The directions alert the user to special circumstances involving the instruction and may include references to other instructions that should or should not be used. In some cases the directions include suggestions for modifications or for additional instructions that may be required. Before using any instruction, reference should be made to the Directions for Use.

**Sources and Authority:** Each instruction sets forth the primary sources that present the basic legal principles that support the instruction. Applicable statutes are listed along with quoted material from cases that pertain to the subject matter of the instruction. Authorities are included to support the text of the instruction, the burden of proof, and matters of law and of fact.

Cases included in the Sources and Authority should be treated as a digest of relevant citations. They are not meant to provide a complete analysis of the legal subject of the instruction. Nor does the inclusion of an excerpt necessarily mean that the committee views it as binding authority. Rather, they provide a starting point for further legal research on the subject. The standard is that the committee believes that the excerpt would be of interest and relevant to CACI users.

Secondary Sources are also provided for treatises and practice guides from a variety of legal

publishers.

**Instructions for the Common Case:** These instructions were drafted for the common type of case and can be used as drafted in most cases. When unique or complex circumstances prevail, users will have to adapt the instructions to the particular case.

**Multiple Parties:** Because jurors more easily understand instructions that refer to parties by name rather than by legal terms such as "plaintiff" and "defendant," the instructions provide for insertion of names. For simplicity of presentation, the instructions use single party plaintiffs and defendants as examples. If a case involves multiple parties or cross-complaints, the user will usually need to modify the parties in the instructions. Rather than naming a number of parties in each place calling for names, the user may consider putting the names of all applicable parties in the beginning and thereafter identifying them as "plaintiffs," "defendants," "cross-complaints," etc. Different instructions often apply to different parties. The user should only include the parties to whom each instruction applies.

**Personal Pronouns:** Many CACI instructions include an option to insert the personal pronouns "he/she/*nonbinary pronoun*," "his/her/*nonbinary pronoun*," or "him/her/*nonbinary pronoun*." It is the policy of the State of California that intersex, transgender, and nonbinary people are entitled to full legal recognition and equal treatment under the law. In accordance with this policy, attorneys and courts should take affirmative steps to ensure that they are using individuals' correct personal pronouns. Although the advisory committee acknowledges a trend for the use of "they," "their," and "them" as singular personal pronouns, the committee also recognizes these same pronouns have plural denotations with the potential to confuse jurors. For clarity in the jury instructions, the committee recommends using an individual's name rather than a personal nonbinary pronoun (such as "they") if the pronoun's use could result in confusion.

**Reference to "Harm" in Place of "Damage" or "Injury":** In many of the instructions, the word harm is used in place of damage, injury, or other similar words. The drafters of the instructions felt that this word was clearer to jurors.

**Substantial Factor:** The instructions frequently use the term "substantial factor" to state the element of causation, rather than referring to "cause" and then defining that term in a separate instruction as a "substantial factor." An instruction that defines "substantial factor" is located in the Negligence series. The use of the instruction is not intended to be limited to cases involving negligence.

**Listing of Elements and Factors:** For ease of understanding, elements of causes of action or affirmative defenses are listed by numbers (e.g., 1, 2, 3) and factors to be considered by jurors in their deliberations are listed by letters (e.g., a, b, c).

**Uncontested Elements:** Although some elements may be the subject of a stipulation that the element has been proven, the instruction should set forth all of the elements and indicate those that are deemed to have been proven by stipulation of the parties. Omitting uncontested elements may leave the jury with an incomplete understanding of the cause of action and the plaintiff's full burden of proof. It is better to include all the elements and then indicate the parties have agreed that one or more of them has been established and need not be decided by the jury. One possible approach is as follows:

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

1. That [plaintiff] and [defendant] entered into a contract (which is not disputed in this case);

2. That [plaintiff] did all, or substantially all, of the significant things that the contract required it to do;

3. That all conditions required for [defendant]'s performance had occurred (which is also not disputed in this case).

**Irrelevant Factors:** Factors are matters that the jury might consider in determining whether a party's burden of proof on the elements has been met. A list of possible factors may include some that have no relevance to the case and on which no evidence was presented. These irrelevant factors may safely be omitted from the instruction.

**Burdens of Proof:** The applicable burden of proof is included within each instruction explaining a cause of action or affirmative defense. The drafters felt that placing the burden of proof in that position provided a clearer explanation for the jurors.

**Affirmative Defenses:** For ease of understanding by users, all instructions explaining affirmative defenses use the term "affirmative defense" in the title.

Titles and Definitions

**Titles of Instructions:** Titles to instructions are directed to lawyers and sometimes use words and phrases not used in the instructions themselves. Since the title is not a part of the instruction, the titles may be removed before presentation to the jury.

**Definitions of Legal Terms:** The instructions avoid separate definitions of legal terms whenever possible. Instead, definitions have been incorporated into the language of the instructions. In some instances (e.g., specific statutory definitions) it was not possible to avoid providing a separate definition.

Evidence

**Circumstantial Evidence:** The words "indirect evidence" have been substituted for the expression "circumstantial evidence." In response to public comment on the subject, however, the drafters added a sentence indicating that indirect evidence is sometimes known as circumstantial evidence.

**Preponderance of the Evidence:** To simplify the instructions' language, the drafters avoided the phrase preponderance of the evidence and the verb preponderate. The instructions substitute in place of that phrase reference to evidence that is "more likely to be true than not true."

Using Verdict Forms

**Verdict Forms are Models:** A large selection of special verdict forms accompanies the instructions. Users of the forms must bear in mind that these are models only. Rarely can they be

used without modifications to fit the circumstances of a particular case.

**Purpose of Verdict Forms:** The special verdict forms generally track the elements of the applicable cause of action. Their purpose is to obtain the jury's finding on the elements defined in the instructions. "The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law." (Code Civ. Proc., § 624; *see Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285 [73 Cal.Rptr.2d 596].) Modifications made to the instructions in particular cases ordinarily will require corresponding modifications to the special verdict form.

**Multiple Parties:** The verdict forms have been written to address one plaintiff against one defendant. In nearly all cases involving multiple parties, the issues and the evidence will be such that the jury could reach different results for different parties. The liability of each defendant should always be evaluated individually, and the damages to be awarded to each plaintiff must usually be determined separately. Therefore, separate special verdicts should usually be prepared for each plaintiff with regard to each defendant. In some cases, the facts may be sufficiently simple to include multiple parties in the same verdict form, but if this is done, the transitional language from one question to another must be modified to account for all the different possibilities of yes and no answers for the various parties.

**Multiple Causes of Action:** The verdict forms are self-contained for a particular cause of action. When multiple causes of action are being submitted to the jury, it may be better to combine the verdict forms and eliminate duplication.

**Modifications as Required by Circumstances:** The verdict forms must be modified as required by the circumstances. It is necessary to determine whether any lesser or greater specificity is appropriate. The question in special verdict forms for plaintiff's damages provides an illustration. Consistent with the jury instructions, the question asks the jury to determine separately the amounts of past and future economic loss, and of past and future noneconomic loss. These four choices are included in brackets. In some cases it may be unnecessary to distinguish between past and future losses. In others there may be no claim for either economic or noneconomic damages. In some cases the court may wish to eliminate the terms "economic loss" and "noneconomic loss" from both the instructions and the verdict form. Without defining those terms, the court may prefer simply to ask the jury to determine the appropriate amounts for the various components of the losses without categorizing them for the jury as economic or noneconomic. The court can fix liability as joint or several under Civil Code sections 1431 and 1431.2, based on the verdicts. A more itemized breakdown of damages may be appropriate if the court is concerned about the sufficiency of the evidence supporting a particular component of damages. Appropriate special verdicts are preferred when periodic payment schedules may be required by Code of Civil Procedure section 667.7. (*Gorman v. Leftwich* (1990) 218 Cal.App.3d 141, 148–150 [266 Cal. Rptr. 671].)

~~December 2022~~November 2023

Hon. Adrienne M. Grover
Chair, Judicial Council Advisory Committee on Civil Jury Instructions

## 113. Bias

**Each one of us has biases about or certain perceptions or stereotypes of other people. ~~We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.~~**

**Bias is a tendency to favor or disfavor a person or group of people. We may be aware of some of our biases, though we may not ~~share~~ reveal them ~~with~~ to others. We may not be fully aware of some of our other biases. We refer to ~~those~~ biases that we are not fully aware of as "implicit" or "unconscious." They may be based on stereotypes we would reject if they were brought to our attention. Implicit or unconscious biases can affect how we perceive others and how we make decisions, without our being aware of the effect of these biases on those decisions.**

**Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, and whom we believe or disbelieve~~, and how we make important decisions~~. We may favor or be more likely to believe people whom we see as similar to us or with whom we identify. Or we may disfavor or be less likely to believe people whom we see as different from us.**

**As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against parties or witnesses because of their race, national origin, ethnicity, disability, gender, gender identity, gender expression, ~~race,~~ religion, ~~ethnicity,~~ sexual orientation, age, ~~national origin,~~ [or] socioeconomic status[, or [***insert any other impermissible form of bias***]].**

**Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.**

*New June 2010; Revised December 2012, May 2020, November 2023*

### Directions for Use

The court in consultation with the parties may add categories in paragraph 4 as relevant to the case.

### Sources and Authority

- ~~Conduct Exhibiting Bias Prohibited~~Duty to Prevent Bias and Ensure Fairness. Standard 10.20(~~a~~b)(1), (2) of the California Standards of Judicial Administration.
- Judge Must Perform Duties Without Bias. Canon 3(b)(5) of the California Code of Judicial Ethics.

***Secondary Sources***

Witkin, California Procedure (5th ed. 2008) Trial, §§ ~~132~~145–146

1 California Trial Guide, Unit 10, *Voir Dire Examination*, §§ 10.03[1], 10.21[2], 10.50, 10.80, 10.100, 10.110 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 6, *Jury Selection*, § 6.21

## 2547. Disability-Based Associational Discrimination—Essential Factual Elements

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**[***Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her/***nonbinary pronoun***] based on [his/her/***nonbinary pronoun***] association with a ~~disabled~~ person with a disability. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **That [***name of plaintiff***] was [***specify basis of association or relationship, e.g., the brother of [name of ~~disabled person~~ associate]***], who had [a] [***e.g., physical condition***];**

4. [**That [***name of ~~disabled person~~ associate***]'s [***e.g., physical condition***] was costly to [***name of defendant***] because [***specify reason, e.g., [name of ~~disabled person~~ associate] was covered under [plaintiff]'s employer-provided health care plan***];]**

   **[or]**

   **[That [***name of defendant***] feared [***name of plaintiff***]'s association with [***name of ~~disabled person~~ associate***] because [***specify, e.g., [name of ~~disabled person~~ associate] has a disability with a genetic component and [name of plaintiff] may develop the disability as well***];]**

   **[or]**

   **[That [***name of plaintiff***] was somewhat inattentive at work because [***name of ~~disabled person~~ associate***]'s [***e.g., physical condition***] requires [***name of plaintiff***]'s attention, but not so inattentive that to perform to [***name of defendant***]'s satisfaction [***name of plaintiff***] would need an accommodation;]**

   **[or]**

   **[[***Specify other basis for associational discrimination***];]**

5. **That [***name of plaintiff***] was able to perform the essential job duties;**

6. **[That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];]**

   **[***or***]**

   **[That [***name of defendant***] subjected [***name of plaintiff***] to an adverse employment action;]**

   **[***or***]**

**[That [*name of plaintiff*] was constructively discharged;]**

7. **That [*name of plaintiff*]'s association with [*name of ~~disabled person~~ associate*] was a substantial motivating reason for [*name of defendant*]'s [decision to [discharge/refuse to hire/[*other adverse employment action*]] [*name of plaintiff*]/conduct];**

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

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

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*New December 2014; Revised May 2017, May 2020, November 2023*

**Directions for Use**

Give this instruction if plaintiff claims that the plaintiff was subjected to an adverse employment action because of the plaintiff's association with a ~~disabled~~ person with a disability or perceived to have a disability. Discrimination based on an employee's association with a person who is (or is perceived to be) disabled is an unlawful employment practice under the FEHA. (See Gov. Code, § 12926(o).)

Select a term to use throughout to describe the source of the ~~disabled~~ person's ~~limitations~~disability. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Three versions of disability-based associational discrimination have been recognized, called "expense," "disability by association," and "distraction." (See *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655–660 [163 Cal.Rptr.3d 392] [claim for "disability-based associational discrimination" adequately pled].) Element 4 sets forth options for the three versions, ~~. But the versions~~ which are illustrative rather than exhaustive; therefore, an "other" option is provided. (See *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1042 [207 Cal.Rptr.3d 120].)

An element of a disability discrimination case is that the plaintiff must be otherwise qualified to do the job, with or without reasonable accommodation. (*Green v. State of California* (2007) 42 Cal.4th 254, 262 [64 Cal.Rptr.3d 390, 165 P.3d 118] (see element 5).) However, the FEHA does not expressly require reasonable accommodation for association with a ~~disabled~~ person with a disability. (Gov. Code, § 12940(m) [employer must reasonably accommodate applicant or employee].) Nevertheless, one court has suggested that such a requirement may exist, without expressly deciding the issue. (See *Castro-Ramirez, supra,* 2 Cal.App.5th at pp. 1038−1039.) A reference to reasonable accommodation may be added to element 5 if the court decides to impose this requirement.

Read the first option for element 6 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained*, if ~~whether there was~~ the existence of an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 6 and

also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 7 if either the second or third option is included for element 4.

Element 7 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; *Castro-Ramirez, supra,* 2 Cal.App.5th at p. 1037; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

If the ~~existence~~ question of ~~the associate's~~ whether the associate has a disability is disputed, additional instructions defining "medical condition," "mental disability," and "physical disability~~,~~" may be required. (See Gov. Code, § 12926(i), (j), (m).)

## Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- Association With ~~Disabled~~ Person Who Has or Is Perceived to Have a Disability Protected. Government Code section 12926(o).
- " 'Three types of situation are, we believe, within the intended scope of the rarely litigated … association section. We'll call them "expense," "disability by association," and "distraction." They can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) ("expense") his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) ("disability by association") the employee's homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) ("distraction") the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours.' " (*Rope, supra,* 220 Cal.App.4th at p. 657.)
- "We agree with *Rope* [*supra*] that *Larimer* [*Larimer v. International Business Machines Corp.* (7th Cir. 2004) 370 F.3d 698] provides an illustrative, rather than an exhaustive, list of the kinds of circumstances in which we might find associational disability discrimination. The common thread among the *Larimer* categories is simply that they are instances in which the 'employer has a motive to discriminate against a nondisabled employee who is merely associated with a disabled person.' As we discuss above, this is an element of a plaintiff's prima facie case—that the plaintiff's association with

a disabled person was a substantial motivating factor for the employer's adverse employment action. *Rope* held the alleged facts in that case could give rise to an inference of such discriminatory motive. Our facts do not fit neatly within one of the *Larimer* categories either, but a jury could reasonably infer the requisite discriminatory motive." (*Castro-Ramirez, supra,* 2 Cal.App.5th at p. 1042, internal citation omitted.)

- " '[A]n employer who discriminates against an employee because of the latter's association with a disabled person is liable even if the motivation is purely monetary. But if the disability plays no role in the employer's decision … then there is no *disability* discrimination.' " (*Rope, supra,* 220 Cal.App.4th at p. 658, original italics.)

- "A prima facie case of disability discrimination under FEHA requires a showing that (1) the plaintiff suffered from a disability, (2) the plaintiff was otherwise qualified to do his or her job, with or without reasonable accommodation, and (3) the plaintiff was subjected to adverse employment action because of the disability. Adapting this [disability discrimination] framework to the associational discrimination context, the 'disability' from which the plaintiff suffers is his or her association with a disabled person. … [T]he disability must be a substantial factor motivating the employer's adverse employment action." (*Castro-Ramirez, supra,* 2 Cal.App.5th at p. 1037.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra,* 56 Cal.4th at p. 232, original italics.)

- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a 'but for' cause." (*Harris, supra,* 56 Cal.4th at p. 229.)

- "[W]hen section 12940, subdivision (m) requires employers to reasonably accommodate 'the known physical … disability of an applicant or employee,' read in conjunction with other relevant provisions, subdivision (m) may reasonably be interpreted to require accommodation based on the employee's association with a physically disabled person." (*Castro-Ramirez, supra,* 2 Cal.App.5th at pp. 1038–1039.)

***Secondary Sources***

8 Witkin, Summary of California Law (111th ed. 2017) Constitutional Law, §§ 1045~~, 1046, 1049~~–1051

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, California Fair Employment And Housing Act (FEHA), ¶¶ 9:2213–9:2215 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment*

*Opportunity Laws*, § 41.32[2], [4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ ~~115.14,~~ 115.10, 115.23, 115.34 (Matthew Bender)

## 2549. Disability Discrimination—Refusal to Permit Reasonable Modification to Housing Unit (Gov. Code, § 12927(c)(1))

**[***Name of plaintiff***] claims that [***name of defendant***] refused to permit reasonable modifications of [***name of plaintiff***]'s [***specify type of housing, e.g., apartment***] necessary to afford [***name of plaintiff***] full enjoyment of the premises. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [***specify defendant's source of authority to provide housing, e.g., owner***] of [a/an] [***e.g., apartment building***];**

2. **That [***name of plaintiff***] [sought to rent/was living in/[***specify other efforts to obtain housing***]] the [***e.g., apartment***];**

3. **That [***name of plaintiff***] had [a history of having] [a] [***select term to describe basis of limitations, e.g., physical disability***] [that limited [***insert major life activity***]];**

4. **That [***name of defendant***] knew of, or should have known of, [***name of plaintiff***]'s disability;**

5. **That in order to afford [***name of plaintiff***] an equal opportunity to use and enjoy the [***e.g., apartment***], it was necessary to [***specify modification(s) required***];**

6. **That it was reasonable to expect [***name of defendant***] to [***specify modification(s) required***];**

7. **That [***name of plaintiff***] agreed to pay for [this/these] modification[s]; [and]**

8. **[That [***name of plaintiff***] agreed that [he/she/***nonbinary pronoun***] would restore the interior of the unit to the condition that existed before the modifications, other than for reasonable wear and tear; and]**

9. **That [***name of defendant***] refused to permit [this/these] modification[s].**

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*New May 2017; Revised May 2020, November 2023**

### Directions for Use

This instruction is for use in a case alleging discrimination in housing based on a failure to permit reasonable modifications to a living unit to accommodate a disability. Under the Fair Employment and Housing Act, "discrimination" includes the refusal to permit, at the expense of the ~~disabled~~ person with a disability, reasonable modifications of existing premises occupied or to be occupied by the ~~disabled~~ person with a disability, if the modifications may be necessary to afford the ~~disabled~~ person full enjoyment of the premises. (Gov. Code, § 12927(c)(1).)

In element 2, if the plaintiff encountered a barrier before actually submitting an application, such as discovering a policy that would make it impossible to live in the unit, specify what the plaintiff did to

obtain the housing.

In element 3, select a term to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

In element 3, select the bracketed language on "history" of disability if the claim of discrimination is based on a history of disability rather than a current actual disability.

Modify element 3 if the plaintiff ~~was not actually disabled~~ did not have a disability or ~~had~~ a history of a disability, but alleges denial of accommodation because the plaintiff was perceived to ~~be disabled~~ have a disability or associated with someone who has, or is perceived to have, a disability. (See Gov. Code, § 12926(o); see also Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].)

In element 5, specify the modifications that are alleged to be needed.

Element 7 may not apply if section 504 of the Rehabilitation Act of 1973 (applicable to federal subsidized housing) or Title II of the Americans With Disabilities Act requires the landlord to incur the cost of reasonable modifications.

In the case of a rental, the landlord may, if it is reasonable to do so, condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification (other than for reasonable wear and tear). (Gov. Code, § 12927(c)(1).) Include element 8 if the premises to be physically altered is a rental unit, and the plaintiff agreed to restoration. If the parties dispute whether restoration is reasonable, presumably the defendant would have to prove reasonableness. (See Evid. Code, § 500 [party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that s/he is asserting].)

## Sources and Authority

- Discrimination Defined Regarding Housing Disability Accommodations. Government Code section 12927(c)(1).
- "Disability" Defined for Housing Discrimination. Government Code section 12955.3.
- "Housing" Defined. Government Code section 12927(d).
- " 'FEHA in the housing area is thus intended to conform to the general requirements of federal law in the area and may provide greater protection against discrimination.' In other words, the FHA provides a minimum level of protection that FEHA may exceed. Courts often look to cases construing the FHA, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 when interpreting FEHA." (*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 [18 Cal.Rptr.3d 669], internal citations omitted.)

- "[T]he basic principles applicable in employment cases should also apply in the housing context." (*Brown v. Smith* (1997) 55 Cal.App.4th 767, 782 [64 Cal.Rptr.2d 301].)

- "We note that, currently, section 12955.3 explicitly states that 'disability' includes 'any physical or mental disability as defined in Section 12926.' That statute in turn defines 'mental disability' to include "any mental or psychological disorder or condition … that limits a major life activity', that is, 'makes the achievement of the major life activity difficult.' 'Major life activities' is to be broadly construed, and includes 'physical, mental, and social activities and working.' " (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1592, internal citations omitted.)

- " 'If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue.' This obligation to 'open a dialogue' with a party requesting a reasonable accommodation is part of an interactive process in which each party seeks and shares information." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1598, internal citation omitted.)

***Secondary Sources***

Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Modifications Under the Fair Housing Act* (March 5, 2008), www.hud.gov/sites/documents/reasonable_modifications_mar08.pdf

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1063

7 California Real Estate Law and Practice, Ch. 214, *Government Regulation and Enforcement*, §§ 214.41, 214.43 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117, *Civil Rights: Housing Discrimination*, § 117.14 (Matthew Bender)

## 2580. Pregnancy Discrimination—Failure to Accommodate—Essential Factual Elements (Gov. Code, § 12945(a)(3)(A))

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**[***Name of plaintiff***] claims that [***name of defendant***] failed to reasonably accommodate a condition related to [pregnancy/[,/or] childbirth/[,/or] [a related medical condition]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was an employer;**

2. **That [***name of plaintiff***] was an employee of [***name of defendant***];**

3. **That [***name of plaintiff***] had a condition related to [pregnancy/[,/or] childbirth [,/or] [a related medical condition]];**

4. **That [***name of plaintiff***] requested accommodation of this condition with the advice of a health care provider;**

5. **That [***name of plaintiff***]'s employer refused to provide a reasonable accommodation;**

6. **That [***name of plaintiff***], with the reasonable accommodation, could have performed the essential functions of the job;**

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

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

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*New November 2023*

### Directions for Use

Although this instruction is titled *Pregnancy Discrimination—Failure to Accommodate—Essential Factual Elements*, the requirement to provide a requested reasonable accommodation because of pregnancy under this provision of FEHA includes pregnancy, childbirth, or any related medical condition. (Gov. Code, § 12945(a)(3)(A).)

For an instruction defining "reasonable accommodation" in this context, see CACI No. 2581, *Pregnancy Discrimination—"Reasonable Accommodation" Explained*.

### Sources and Authority

- Pregnancy Accommodation Required Under Fair Employment and Housing Act. Government Code section 12945(a).

- "Condition related to pregnancy, childbirth, or a related medical condition" Defined. Cal. Code

Regs., tit. 2, § 11035.

- "Drawing from the statutory language and applicable regulatory law, as well as pertinent FEHA case law, we conclude a cause of action under section 12945(a)(3)(A) requires proof that: (1) the plaintiff had a condition related to pregnancy, childbirth, or a related medical condition; (2) the plaintiff requested accommodation of this condition, with the advice of her health care provider; (3) the plaintiff's employer refused to provide a reasonable accommodation; and (4) with the reasonable accommodation, the plaintiff could have performed the essential functions of the job." (*Lopez v. La Casa de Las Madres* (2023) 89 Cal.App.5th 365, 370–371 [305 Cal.Rptr.3d 824].)

- "We agree that section 12945 affords important protections to employees affected by pregnancy, over and above the protections of section 12940. These additional protections include a right to up to four months of pregnancy-disability leave, and a right to temporary transfer to a less strenuous job if such a 'transfer can be reasonably accommodated'. Section 12945(a)(3)(A) also protects a right to reasonable accommodation for a condition associated with pregnancy or childbirth, even when this condition does not rise to the level of a formally recognized disability. Section 12945(a)(3)(A) is, in this regard, broader than section 12940(m), which addresses an employer's obligation to accommodate 'disability.' But none of these provisions entitles an employee to a job she cannot perform." (*Lopez, supra,* 89 Cal.App.5th at pp. 381–382, internal citations omitted.)

***Secondary Sources***

8 Witkin Summary of California Law (11th ed. 2017) Constitutional Law, § 1034

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.22 (Matthew Bender)

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, §§ 8.10–8.12 (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *California Fair Employment and Housing Act*, § 43.01 (Matthew Bender)

## 2581. Pregnancy Discrimination—"Reasonable Accommodation" Explained

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**A "reasonable accommodation" is a reasonable change to the work environment or the way a job is usually done that allows an employee with a condition related to [pregnancy/[,/or] childbirth/[,/or] [related conditions]] to perform the essential duties of the job.**

**Reasonable accommodations may include the following:**

**a. Changing work schedules;**

**b. Providing furniture like a stool or chair or modifying equipment or devices;**

**c. Permitting longer or more frequent breaks;**

**d. Changing workplace practices or policies;**

**e. Reassigning the employee temporarily to an open position that is less strenuous or less hazardous;**

**f. Changing job responsibilities; [or]**

**g. Providing a reasonable amount of break time and a private space for lactation[./; or]**

**[h. [***Specify other reasonable accommodation particular to the case***].]**

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*New November 2023*

### Directions for Use

Give this instruction to explain "reasonable accommodation" as used in CACI No. 2580, *Pregnancy Discrimination—Failure to Accommodate —Essential Factual Elements*.

### Sources and Authority

- Employer Obligation to Make Reasonable Accommodation. Government Code section 12945(a).
- "Reasonable Accommodation" Defined. Government Code section 12926(p).
- "Reasonable Accommodation" Defined. Cal. Code Regs., tit. 2, §§ 11035(s), 11040.

***Secondary Sources***

8 Witkin Summary of California Law (11th ed. 2017) Constitutional Law, § 1034

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.22 (Matthew Bender)

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, §§ 8.10–8.12 (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *California Fair Employment and Housing Act*, § 43.01 (Matthew Bender)

## VF-2700. Nonpayment of Wages (Lab. Code, §§ 201, 202, 218)

**We answer the questions submitted to us as follows:**

1. **Did [*name of plaintiff*] perform work for [*name of defendant*]?**
   **____ 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. **Does [*name of defendant*] owe [*name of plaintiff*] wages under the terms of the employment?**
   **____ 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. **What is the amount of unpaid wages? $_____**

**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 September 2003; Revised December 2005, December 2010, December 2016, November 2023**

### Directions for Use

This verdict form is based on CACI No. 2700, *Nonpayment of Wages—Essential Factual Elements.*

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.~~
This verdict form may be augmented for the jury to make any factual findings that are required for the court to calculate the amount of prejudgment interest due for nonpayment of wages. (Lab. Code, § 218.6.)

## VF-2701. Nonpayment of Minimum Wage (Lab. Code, § 1194)

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**We answer the questions submitted to us as follows:**

1. **Did [*name of plaintiff*] perform work for [*name of defendant*]?**
   **____ 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. **Was [*name of plaintiff*] paid less than the minimum wage by [*name of defendant*] for some or all hours worked?**
   **____ 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. **How many hours was [*name of plaintiff*] paid less than the minimum wage?**
   **____ hours**

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

**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.**

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*New September 2003; Revised June 2005, December 2010, December 2016, November 2023**

### Directions for Use

This verdict form is based on CACI No. 2701, *Nonpayment of Minimum Wage—Essential Factual Elements.*

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.~~
This verdict form may be augmented for the jury to make any factual findings that are required for the court to calculate the amount of prejudgment interest due for nonpayment of wages. (Lab. Code, § 218.6.)

## VF-2702. Nonpayment of Overtime Compensation (Lab. Code, § 1194)

**We answer the questions submitted to us as follows:**

1. **Did [***name of plaintiff***] perform work for [***name of defendant***]?**
   **____ 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***] work overtime hours?**
   **____ 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 defendant***] know, or should [***name of defendant***] have known, that [***name of plaintiff***] had worked overtime hours?**
   **____ 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. **Was [***name of plaintiff***] paid at a rate lower than the legal overtime compensation rate for any overtime hours that [he/she/***nonbinary pronoun***] worked for [***name of defendant***]?**
   **____ 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. **What is the amount of wages owed? $_____**

**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 September 2003; Revised December 2010, June 2015, December 2016, November 2023**

## Directions for Use

This verdict form is based on CACI No. 2702, *Nonpayment of Overtime Compensation—Essential Factual Elements.*

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.~~
This verdict form may be augmented for the jury to make any factual findings that are required for the court to calculate the amount of prejudgment interest due for nonpayment of wages. (Lab. Code, § 218.6.)

## 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.**

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*New December 2022; Revised November 2023**

### 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*.

The court may determine if prejudgment interest is awardable and, if so, whether it is discretionary or mandatory. (Civ. Code, §§ 3287, 3288.) 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.~~ This verdict form may be augmented for the jury to make any factual findings that are required 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.**

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*New December 2022; Revised November 2023**

### 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.~~
The court may determine if prejudgment interest is awardable and, if so, whether it is discretionary or mandatory. (Civ. Code, §§ 3287, 3288.) If the jury is 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 be augmented for the jury to make any factual findings that are required to calculate the amount of prejudgment interest.

## VF-2708. Meal Break Violations—Employer Records Showing Noncompliance (Lab. Code, §§ 226.7, 512)

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**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. **Do [*name of defendant*]'s records show any missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday?**
   **____ 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. **How many meal breaks do the records show as missed, less than 30 minutes, or taken too late in a workday?**

   **____ meal breaks**

   **Answer question 4.**

4. **For each meal break included in your answer to question 3, did [*name of defendant*] prove [he/she/*nonbinary pronoun*/it] provided a meal break that complies with the law?**

   **____ Yes ____ No**

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

5. **Considering by workday the meal breaks determined in question 3, for how many workdays did [*name of defendant*] fail to prove that [he/she/*nonbinary pronoun*/it] provided meal breaks that comply with the law?**

   **____ workdays**

   **Answer question 6.**

**6. For the workdays determined in question 5, 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.**

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*New May 2023; Revised November 2023**

## Directions for Use

This verdict form is based on CACI No. 2765, *Meal Break Violations—Introduction*, and CACI No. 2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records*. Use this verdict form if the plaintiff's meal break claims involve the rebuttable presumption of a violation based on an employer's records showing missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday. See also verdict form CACI No. VF-2707, *Meal Break Violations*.

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 asked to determine prejudgment interest for any meal or rest break violations (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 121–122 [293 Cal.Rptr.3d 599, 509 P.3d 956]), this verdict form may be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.~~
The court may determine if prejudgment interest is awardable and, if so, whether it is discretionary or mandatory. (Civ. Code, §§ 3287, 3288.) If the jury is 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 be augmented for the jury to make any factual findings that are required to calculate the amount of prejudgment interest.

## VF-2709. Meal Break Violations—Inaccurate or Missing Employer Records (Lab. Code, §§ 226.7, 512)

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**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 defendant*] keep [accurate] records of the start and end times for meal breaks?**
   **____ Yes ____ No**

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

3. **For how many meal breaks were [accurate] records of the start and end times for meal breaks not kept?**

   **____ meal breaks**

   **Answer question 4.**

4. **For each meal break included in your answer to question 3, did [*name of defendant*] prove [he/she/*nonbinary pronoun*/it] provided a meal break that complies with the law?**

   **____ Yes ____ No**

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

5. **Considering by workday the meal breaks determined in question 3, for how many workdays did [*name of defendant*] fail to prove that [he/she/*nonbinary pronoun*/it] provided meal breaks that comply with the law?**

   **____ workdays**

   **Answer question 6.**

**6. For the workdays determined in question 5, 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.**

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*New May 2023; Revised November 2023**

## Directions for Use

This verdict form is based on CACI No. 2765, *Meal Break Violations—Introduction*, and CACI No. 2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records*. Use this verdict form if the plaintiff's meal break claims involve the rebuttable presumption of a violation based on an employer's inaccurate or missing records. If only missing records are at issue, omit "accurate" from questions 2 and 3. See also verdict form CACI No. VF-2707, *Meal Break Violations*.

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 asked to determine prejudgment interest for any meal or rest break violations (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 121–122 [293 Cal.Rptr.3d 599, 509 P.3d 956]), this verdict form may be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.~~
The court may determine if prejudgment interest is awardable and, if so, whether it is discretionary or mandatory. (Civ. Code, §§ 3287, 3288.) If the jury is 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 be augmented for the jury to make any factual findings that are required to calculate the amount of prejudgment interest.

## 3070. Disability Discrimination—Access Barriers to Public Facility—Construction-Related Accessibility Standards Act—Essential Factual Elements (Civ. Code, §§ 54.3, 55.56)

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**[***Name of defendant***] is the owner of [a/an] [***e.g., restaurant***] named [***name of business***] that is open to the public. [***Name of plaintiff***] is a ~~disabled~~ person with a disability who [***specify disability that creates accessibility problems***].**

**[***Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was denied full and equal access to [***name of defendant***]'s business on a particular occasion because of physical barriers. To establish this claim, [***name of plaintiff***] must prove both of the following:**

1. **That [***name of defendant***]'s business had barriers that violated construction-related accessibility standards in that [***specify barriers***]; and [either]**

2. **[That [***name of plaintiff***] personally encountered the violation on a particular occasion.]**

   **[or]**

   **[That [***name of plaintiff***] was deterred from accessing [***name of defendant***]'s business on a particular occasion.]**

**[A violation that [***name of plaintiff***] personally encountered may be sufficient to cause a denial of full and equal access if [he/she/***nonbinary pronoun***] experienced difficulty, discomfort, or embarrassment because of the violation.]**

**[To prove that [***name of plaintiff***] was deterred from accessing [***name of defendant***]'s business on a particular occasion, [he/she/***nonbinary pronoun***] must prove both of the following:**

1. **That [***name of plaintiff***] had actual knowledge of one or more violations that prevented or reasonably dissuaded [him/her/***nonbinary pronoun***] from accessing [***name of defendant***]'s business, which [***name of plaintiff***] intended to patronize on a particular occasion.**

2. **That the violation(s) would have actually denied [***name of plaintiff***] full and equal access if [he/she/***nonbinary pronoun***] had tried to patronize [***name of defendant***]'s business on that particular occasion.]**

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*New December 2014; Revised December 2016, May 2020, November 2023*

### Directions for Use

Use this instruction if a plaintiff seeks statutory damages based on a construction-related accessibility claim under the Disabled Persons Act (DPA) or the Unruh Civil Rights Act. (See Civ. Code, § 55.56(a).) Do not give this instruction if actual damages are sought. CACI No. 3067, *Unruh Civil Rights Act—Damages*, may be given for claims for actual damages under the Unruh Act and adapted for use under the

DPA.

The DPA provides ~~disabled~~ persons with disabilities or medical conditions with rights of access to public facilities. (See Civ. Code, §§ 54, 54.1.) Under the DPA, a ~~disabled~~ person with a disability who encounters barriers to access at a public accommodation may recover minimum statutory damages for each particular occasion on which the ~~disabled~~ person with a disability was denied access. (Civ. Code, §§ 54.3, 55.56(f).) However, the ~~Construction~~ Construction-Related Accessibility Standards Compliance Act ~~(CRASA)~~ requires that, before statutory damages may be recovered, the ~~disabled~~ person with a disability must have either ~~have~~ personally encountered the violation on a particular occasion or ~~have~~ been deterred from accessing the facility on a particular occasion. (See Civ. Code, § 55.56(b).) Also, specified violations are deemed to be merely technical and are presumed to not cause a person difficulty, discomfort, or embarrassment for the purpose of an award of minimum statutory damages. (See Civ. Code, § 55.56(e).)

Give either or both options for element 2, depending on whether the plaintiff personally encountered the barrier or was deterred from patronizing the business because of awareness of the barrier. The next-to-last paragraph is explanatory of the first option, and the last paragraph is explanatory of the second option.

**Sources and Authority**

- Disabled Persons Act: Right of Access to Public Facilities. Civil Code sections 54, 54.1.
- Action for Interference With Admittance to or Enjoyment of Public Facilities. Civil Code section 54.3.
- Construction-Related Accessibility Standard Act. Civil Code section 55.56.
- "Part 2.5 of division 1 of the Civil Code, currently consisting of sections 54 to 55.3, is commonly referred to as the "'Disabled Persons Act,'" although it has no official title. Sections 54 and 54.1 generally guarantee individuals with disabilities equal access to public places, buildings, facilities and services, as well as common carriers, housing and places of public accommodation, while section 54.3 specifies remedies for violations of these guarantees, including a private action for damages." (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 674 fn. 8 [94 Cal.Rptr.3d 685, 208 P.3d 623], internal citations omitted.)
- "[L]egislation (applicable to claims filed on or after Jan. 1, 2009 ([Civ. Code,] § 55.57)) restricts the availability of statutory damages under sections 52 and 54.3, permitting their recovery only if an accessibility violation actually denied the plaintiff full and equal access, that is, only if 'the plaintiff personally encountered the violation on a particular occasion, or the plaintiff was deterred from accessing a place of public accommodation on a particular occasion' (§ 55.56, subd. (b)). It also limits statutory damages to one assessment per occasion of access denial, rather than being based on the number of accessibility standards violated. (*Id.,* subd. (e).)" (*Munson, supra,* 46 Cal.4th at pp. 677−678.)
- " '[S]ection 54.3 imposes the standing requirement that the plaintiff have suffered an actual denial of equal access before any suit for damages can be brought. … [A] plaintiff cannot recover

damages under section 54.3 unless the violation actually denied him or her access to some public facility. [¶] Plaintiff's attempt to equate a denial of equal access with the presence of a violation of federal or state regulations would nullify the standing requirement of section 54.3, since any disabled person could sue for statutory damages whenever he or she encountered noncompliant facilities, regardless of whether that lack of compliance actually impaired the plaintiff's access to those facilities. Plaintiff's argument would thereby eliminate any distinction between a cause of action for equitable relief under section 55 and a cause of action for damages under section 54.3.' " (*Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1223 [99 Cal.Rptr.3d 746].)

- "We do not read *Reycraft* and *Urhausen* for the proposition that plaintiffs may not sue someone other than the owner or operator of the public facility described in section 54, for violating a plaintiff's rights under the DPA. A defendant's ability to control a particular location may ultimately be relevant to the question of liability, that is, whether the defendant interfered with the plaintiff's admission to or enjoyment of a public facility. But nothing in the language of section 54.3 suggests that damages may not be recovered against nonowners or operators. To the contrary, section 54.3 broadly and plainly provides: '[a]ny person or persons, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities as specified in [s]ections 54 and 54.1 or otherwise interferes with the rights of an individual with a disability under [s]ections 54, 54.1 and 54.2 is liable for … actual damages … .' " (*Ruiz v. Musclewood Investment Properties, LLC* (2018) 28 Cal.App.5th 15, 24 [238 Cal.Rptr.3d 835].)

- "In our view, *Reycraft* does not require that a plaintiff who sues for interference of his rights must present himself to *defendant's* business, with the intent to utilize *defendant's* services. Instead, a plaintiff who seeks damages for a violation of section 54.3 must establish that he 'presented himself' to a 'public place' with the intent of 'utilizing its services in the manner in which those … services are typically offered to the public and was actually denied' admission or enjoyment (or had his admission or enjoyment interfered with) on a particular occasion. Here, as alleged, plaintiff presented himself at a public place (the sidewalk) with the intent of using it in the manner it is typically offered to the public (walking on it for travel), and actually had his enjoyment interfered with on six occasions. Plaintiff therefore has standing to sue for damages." (*Ruiz, supra,* 28 Cal.App.5th at p. 24, original italics, internal citation omitted.)

- "Like the Unruh Civil Rights Act, the DPA incorporates the ADA to the extent that 'A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section.' (Civ. Code, § 54, subd. (c)." (*Baughman v. Walt Disney World Co.* (2013) 217 Cal.App.4th 1438, 1446 [159 Cal.Rptr.3d 825].)

***Secondary Sources***

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1073–1076

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.36 (Matthew Bender)

~~3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.20 (Matthew Bender)~~

## 3905A. Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)

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**[***Insert number, e.g.,* "1."**] [Past] [and] [future] [physical pain/mental suffering/loss of enjoyment of life/disfigurement/physical impairment/inconvenience/grief/anxiety/humiliation/emotional distress/[***insert other damages***]].**

**No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.**

**[To recover for future [***insert item of pain and suffering***], [***name of plaintiff***] must prove that [he/she/***nonbinary pronoun***] is reasonably certain to suffer that harm.**

**For future [***insert item of pain and suffering***], determine the amount in current dollars paid at the time of judgment that will compensate [***name of plaintiff***] for future [***insert item of pain and suffering***]. [This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to economic damages.]]**

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*New September 2003; Revised April 2008, December 2009, December 2011, May 2022, November 2023**

### Directions for Use

Insert the bracketed terms that best describe the damages claimed by the plaintiff.

If future noneconomic damages are sought, include the last two paragraphs. Do not instruct the jury to further reduce the award to present cash value. (See CACI No. 3904A, *Present Cash Value*, and CACI No. 3904B, *Use of Present-Value Tables*.) The amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585].) Include the last sentence only if the plaintiff is claiming both future economic and noneconomic damages.

For actions or proceedings filed on or after January 1, 2022, and before January 1, 2026 (or if granted a preference under Code of Civil Procedure section 36 before January 1, 2022), the survival action statute allows for recovery of a decedent's noneconomic damages for pain, suffering, or disfigurement. (Code Civ. Proc., § 377.34(b).) (See CACI No. 3919, *Survival Damages*.) Insert only the bracketed terms that apply in a survival action, and modify the instruction to make clear that the damages are for the decedent's pre-death pain, suffering, or disfigurement.

The jury's consideration of shortened life expectancy as an item of noneconomic damages is unsettled. (Compare, e.g., *Phipps v. Copeland Corp. LLC* (2021) 64 Cal.App.5th 319, 337 [278 Cal.Rptr.3d 688] with *Johnson v. Monsanto Co.* (2020) 52 Cal.App.5th 434, 454 [266 Cal.Rptr.3d 111]; see also *Buell-Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525, 549 [46 Cal.Rptr.3d 147], judg. vacated on other grounds *sub nom. Ford Motor Co. v. Buell-Wilson* (2007) 550 U.S. 931 [167 L.Ed.2d 1087, 127 S.Ct. 2250].) To the extent these cases refer to previous versions of this instruction (CACI No. 3905A), prior published volumes of the *Judicial Council of California Civil Jury Instructions* do not reflect that shortened life expectancy was ever previously listed or removed as an item of noneconomic damages in CACI No. 3905A.

## Sources and Authority

- Term-Limited Exception for Survival Damages. Code of Civil Procedure section 377.34(b).

- "One of the most difficult tasks imposed on a fact finder is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. The inquiry is inherently subjective and not easily amenable to concrete measurement." (*Pearl v. City of Los Angeles* (2019) 36 Cal.App.5th 475, 491 [248 Cal.Rptr.3d 508], internal citations omitted.)

- "In general, courts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. Admittedly these terms refer to subjective states, representing a detriment which can be translated into monetary loss only with great difficulty. But the detriment, nevertheless, is a genuine one that requires compensation, and the issue generally must be resolved by the 'impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence.' " (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892–893 [103 Cal.Rptr. 856, 500 P.2d 880], internal citations and footnote omitted.)

- "[N]oneconomic damages do not consist of only emotional distress and pain and suffering. They also consist of such items as invasion of a person's bodily integrity (i.e., the fact of the injury itself), disfigurement, disability, impaired enjoyment of life, susceptibility to future harm or injury, and a shortened life expectancy." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 300 [213 Cal.Rptr.3d 82].)

- " ' "Noneconomic damages compensate an injured plaintiff for nonpecuniary injuries … ." [Citation.] Such injuries include pain and suffering, emotional distress, as well as "such items as invasion of a person's bodily integrity (i.e., the fact of the injury itself), disfigurement, disability, impaired enjoyment of life, susceptibility to future harm or injury, and a shortened life expectancy." ' " (*Phipps, supra,* 64 Cal.App.5th at pp. 337–338.)

- "We accept that there may be valid policy arguments to support allowing the recovery of damages for a shortened life expectancy. But our holding rests on California law as was reflected in CACI No. 3905A, which was given to the jury without any objection to the part requiring [plaintiff] to prove he

was 'reasonably certain to suffer' the harm for which compensation was sought. By limiting future noneconomic damages to those [plaintiff] was reasonably certain to suffer, the instruction disallowed damages for years beyond his expected life expectancy at the time of trial." (*Johnson, supra,* 52 Cal.App.5th at p. 454, internal citations and footnote omitted.)

- " ' " '[T]here is no fixed or absolute standard by which to compute the monetary value of emotional distress,' " ' and a ' "jury is entrusted with vast discretion in determining the amount of damages to be awarded … ." [Citation.]' " (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1602 [146 Cal.Rptr.3d 585].)

- "Compensatory damages may be awarded for bodily harm without proof of pecuniary loss. The fact that there is no market price calculus available to measure the amount of appropriate compensation does not render such a tortious injury noncompensable. 'For harm to body, feelings or reputation, compensatory damages reasonably proportioned to the intensity and duration of the harm can be awarded without proof of amount other than evidence of the nature of the harm. There is no direct correspondence between money and harm to the body, feelings or reputation. There is no market price for a scar or for loss of hearing since the damages are not measured by the amount for which one would be willing to suffer the harm. The discretion of the judge or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation.' " (*Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1664–1665 [28 Cal.Rptr.2d 88], internal citations omitted.)

- "The general rule of damages in tort is that the injured party may recover for all detriment caused whether it could have been anticipated or not. In accordance with the general rule, it is settled in this state that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of, and in this connection mental suffering includes nervousness, grief, anxiety, worry, shock, humiliation and indignity as well as physical pain." (*Crisci v. The Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 433 [58 Cal.Rptr. 13, 426 P.2d 173], internal citations omitted.)

- "We note that there may be certain cases where testimony of an expert witness would be necessary to support all or part of an emotional distress damages claim. For example, expert testimony would be required to the extent a plaintiff's damages are alleged to have arisen from a psychiatric or psychological disorder caused or made worse by a defendant's actions and the subject matter is beyond common experience. We are not addressing such a case here. In this case, the emotional distress damages arose from feelings of anxiety, pressure, betrayal, shock, and fear of others to which [plaintiff] herself could and did testify. Expert testimony was not required." (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1099 [236 Cal.Rptr.3d 473].)

- "The law in this state is that the testimony of a single person, *including the plaintiff,* may be sufficient to support an award of emotional distress damages." (*Knutson, supra,* 25 Cal.App.5th at p. 1096, original italics.)

- "[W]here a plaintiff has undergone surgery in which a herniated disc is removed and a metallic plate inserted, and the jury has expressly found that defendant's negligence was a cause of plaintiff's injury, the failure to award any damages for pain and suffering results in a damage award that is

inadequate as a matter of law." (*Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 933 [64 Cal.Rptr.3d 920].)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount in current dollars paid at the time of judgment that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado, supra,* 19 Cal.4th at pp. 646–647.)

- "[R]ecovery for emotional distress caused by injury to property is permitted only where there is a preexisting relationship between the parties or an intentional tort." (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 203 [147 Cal.Rptr.3d 41].)

- "[W]e uphold both the economic and emotional distress damages plaintiffs recovered for trespass to personal property arising from [defendant]'s act of intentionally striking [plaintiff's dog] with a bat." (*Plotnik, supra,* 208 Cal.App.4th at p. 1608 [under claim for trespass to chattels].)

- "Furthermore, 'the *negligent* infliction of emotional distress—anxiety, worry, discomfort—is compensable without physical injury in cases involving the tortious interference with *property rights* [citations].' Thus, if [defendant]'s failure to repair the premises constitutes a tort grounded on negligence, appellant is entitled to prove his damages for emotional distress because the failure to repair must be deemed to constitute an injury to his tenancy interest (right to habitable premises), which is a species of property." (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1299 [173 Cal.Rptr.3d 159], original italics, internal citation omitted.)

- "[U]nless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests." (*Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 156 [184 Cal.Rptr.3d 26].)

***Secondary Sources***

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1850–1854

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:140 et seq. (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.68–1.74

4 Levy et al., California Torts, Ch. 51, *Pain and Suffering*, §§ 51.01–51.~~14~~51 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.44 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.145 et seq. (Matthew Bender)

California Civil Practice: Torts § 5:10 (Thomson Reuters)

## 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. To establish this claim, [***name of plaintiff***] must prove all of the following are more likely true than not true:**

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.**

**A "contributing factor" is any factor, which alone or in connection with other factors, tends to affect the outcome of a decision. A contributing factor can be proved even when other legitimate factors also contributed to the employer's decision.**

**[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.]**

**[A disclosure is protected even though the [agency/employer] already knew about the information disclosed.]**

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*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, May 2023, November 2023*

## 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).)~~

Labor Code section 1102.5(b) applies even when an employee discloses information to an employer or agency that already knew about the violation. (*People ex rel. Garcia-Brower v. Kolla's Inc.* (2023) 14 Cal.5th 719, 721 [308 Cal.Rptr.3d 388, 529 P.3d 49].)

"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], disapproved on other grounds by ~~*Lawson, supra,* 12 Cal.5th at p. 718~~ *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 718 [289 Cal.Rptr.3d 572, 503 P.3d 659]; 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.
- "[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.)

- "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.)

- "To prove a claim of retaliation under this statute, the plaintiff 'must demonstrate that he or she has been subjected to an adverse employment action that materially affects the terms, conditions, or privileges of employment.' 'Minor or relatively trivial adverse actions by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee do not materially affect the terms or conditions of employment.' This requirement " ' "guards against both "judicial micromanagement of business practices" [citation] and frivolous suits over insignificant slights." ' " (*Francis v. City of Los Angeles* (2022) 81 Cal.App.5th 532, 540–541 [297 Cal.Rptr.3d 362], internal citations omitted.)

- "[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.)

- "The question here is whether a report of unlawful activities made to an employer or agency that already knew about the violation is a protected 'disclosure' within the meaning of section 1102.5(b). We hold it is." (*People ex rel. Garcia-Brower, supra,* 14 Cal.5th at p. 721.)

- ~~"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 v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 847 [136 Cal.Rptr.3d 259]~~, *supra,* 202 Cal.App.4th at pp. 852–853~~, disapproved on other grounds in *People ex rel. Garcia-Brower, supra,* 14 Cal.5th at p. 734.)

- "[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, disapproved on other grounds in *People ex rel. Garcia-Brower, supra,* 14 Cal.5th at p. 734.)

- "[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~~ v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548−1553 [176 Cal.Rptr.3d 268], 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].)

- "Section 1102.6 requires whistleblower plaintiffs to show that retaliation was a 'contributing factor' in their termination, demotion, or other adverse action. This means plaintiffs may satisfy their burden of proving unlawful retaliation even when other, legitimate factors also contributed to the adverse action." (*Lawson, supra,* 12 Cal.5th at 713–714.)

***Secondary Sources***

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 302–307A, 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~~ 21 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, 100.60–100.61A~~ 100.33, 100.42, 100.45, 100.48, 100.60–100.61A (Matthew Bender)

## 4702. Consumers Legal Remedies Act—Statutory Damages—Senior or ~~Disabled Plaintiff~~ Person With a Disability (Civ. Code, § 1780(b))

**If you decide that [*name of plaintiff*] has proven [his/her/*nonbinary pronoun*] claim against [*name of defendant*], in addition to any actual damages that you award, you may award [*name of plaintiff*] additional damages up to $5,000 if you find all of the following:**

1. **That [*name of plaintiff*] has suffered substantial physical, emotional, or economic damage because of [*name of defendant*]'s conduct;**

2. **One or more of the following factors:**

   **(a) [*Name of defendant*] knew or should have known that [his/her/*nonbinary pronoun*/its] conduct was directed to one or more senior citizens or ~~disabled~~ persons with disabilities;**

   **(b) [*Name of defendant*]'s conduct caused one or more senior citizens or ~~disabled~~ persons with disabilities to suffer:**

      **(1) loss or encumbrance of a primary residence, principal employment, or source of income;**

      **(2) substantial loss of property set aside for retirement, or for personal or family care and maintenance; or**

      **(3) substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen or ~~disabled~~ person with a disability;**

   **or**

   **(c) One or more senior citizens or ~~disabled~~ persons with disabilities are substantially more vulnerable than other members of the public to [*name of defendant*]'s conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct;**

**and**

3. **That an additional award is appropriate.**

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*New November 2017; Revised November 2023*

**Directions for Use**

Give this instruction if the plaintiff is a senior citizen or ~~disabled~~ person with a disability seeking to obtain $5,000 in statutory damages. (See Civ. Code, § 1780(b).)

## Sources and Authority

- Consumers Legal Remedies Act: Additional Remedy for Senior Citizens and ~~Disabled~~ Persons With Disabilities. Civil Code section 1780(b).

***Secondary Sources***

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 298 et seq.

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 14(II)-B, *Elements of Claim*, ¶ 14:435 (The Rutter Group)

Cabraser, California Class Actions and Coordinated Proceedings, Ch. 4, *California's Consumer Legal Remedies Act*, § 4.02 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act*, § 504.13 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 1, *Determining the Applicable Law*, 1.33

## 5030. Implicit or Unconscious Bias

**In your role as a juror, you must not let bias influence your assessment of the evidence or your decisions.**

**I will now provide some information about how bias might affect decisionmaking. Our brains help us navigate and respond quickly to events by grouping and categorizing people, places, and things. We all do this. These mental shortcuts are helpful in some situations, but in the courtroom they may lead to biased decisionmaking.**

**Bias can affect what we notice and pay attention to, what we see and hear, what we remember, how we perceive people, and how we make decisions. We may favor or be more likely to believe people whom we see as similar to us or with whom we identify. Conversely, we may disfavor or be less likely to believe people whom we see as different from us.**

**Although we are aware of some of our biases, we may not be aware of all of them. We refer to biases that we are not aware of as "implicit" or "unconscious." They may be based on stereotypes we would reject if they were brought to our attention. Implicit or unconscious biases can affect how we perceive others and how we make decisions, without our being aware of the effect of these biases on those decisions.**

**To ensure that bias does not affect your decisions in this case, consider the following steps:**

1. **Reflect carefully and thoughtfully about the evidence. Think about why you are making each decision and examine it for bias. Resist the urge to jump to conclusions or to make judgments based on personal likes or dislikes, generalizations, prejudices, stereotypes, or biases.**

2. **Consider your initial impressions of the people and the evidence in this case. Would your impressions be different if any of the people were, for example, of a different age, gender, race, religion, sexual orientation, ethnicity, or national origin? Was your opinion affected because a person has a disability or speaks in a language other than English or with an accent? Think about the people involved in this case as individuals. Focusing on individuals can help reduce the effect of biases or stereotypes on decisionmaking.**

3. **Listen to the other jurors. Their backgrounds, experiences, and insights may be different from yours. Hearing and sharing different perspectives may help identify and eliminate biased conclusions.**

**The law demands that jurors make unbiased decisions, and these strategies can help you fulfill this important responsibility. You must base your decisions solely on the evidence presented, your evaluation of that evidence, your common sense and experience, and these instructions.**

*New November 2023*

## Directions for Use

This instruction may be given on request or sua sponte.

## Sources and Authority

- Duty to Prevent Bias and Ensure Fairness. Standard 10.20(b)(1), (2) of the California Standards of Judicial Administration.
- Judge Must Perform Duties Without Bias. Canon 3(B)(5) of the California Code of Judicial Ethics.
- "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132].)

***Secondary Sources***

Witkin, California Procedure (5th ed. 2008) Trial, §§ 145–146

1 California Trial Guide, Unit 10, *Voir Dire Examination*, §§ 10.03[1], 10.21[2], 10.50, 10.80, 10.100, 10.110 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 6, *Jury Selection*, § 6.21

**ITC CACI 23-02**
**Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions** (Add and revise jury instructions, verdict forms, and user guide)
All comments are verbatim unless indicated by an asterisk (*).

| Instruction(s) | Commenter | Comment | Committee Response |
|---|---|---|---|
| User Guide | California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento | Agree. | No response required. |
| | Orange County Bar Association by Michael A. Gregg President | Agree. | No response required. |
| 113. Bias (Revise) | California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento | Agree. | No response required. |
| | Orange County Bar Association by Michael A. Gregg President | Agree as Modified: Paragraph 2<br>Second sentence – The proposal would substitute "reveal" for "share." For better accuracy, it is suggested this sentence use the phrase "make known," and read: [w]e may be aware of some of our biases, though we may not make them known to others. | The committee does not see improved clarity in the suggested change. |
| | | Third and fourth sentences – Explicit/conscious bias has been described in the previous sentence, but not named or flagged for the juror. At these sentences, the Instruction moves into a discussion of implicit/unconscious bias, yet the language does not signal this shift from explicit to implicit bias. To highlight this transition to discussion of another type of bias and to underscore the importance of the differences, it is suggested that the third and fourth sentences be supplemented to read: [w]e may not, however, be fully aware of some of our other biases. We refer to these biases of which we are unaware as "implicit" or "unconscious." | The committee agrees and recommends refining the sentence to clarify that the sentence is about biases "that we are not fully aware of." |

| Instruction(s) | Commenter | Comment | Committee Response |
|---|---|---|---|
| | | Sixth sentence – At its final phrase, this sentence uses "their effect" when instructing the juror as to the impact of implicit/unconscious bias on his or her decisions. For clarity and to avoid confusion as to whether the effect being flagged is that of the bias or of the decision, it is suggested the final phrase read: …without our being aware of the effect of these biases on those decisions. | The committee recommends the suggested change. |
| | | Paragraph 3<br>Third and fourth sentences – Each makes use of "see" when instructing the juror as to the impact of active bias. It is suggested rather than "see," "perceive" be used in each sentence as it indicates an assessment of a person that goes beyond mere appearance. If a juror, upon hearing "see," takes it literally or construes the admonition in its most limited sense and makes an effort simply to go beyond what he or she sees with the eyes, that juror could erroneously believe he or she has checked his or her biases. | The committee disagrees with the suggested change. "See" is plain enough in this context. |
| | | Fourth sentence – In light of the use throughout the Instruction of "we" and "us," it is suggested for balance, clarity, and context, that "from us" be added at the end of the sentence to read: …or be less likely to believe people whom we see as different from us. | The committee agrees and recommends the suggested addition. |
| 113. Bias (Revise) and 5030 (New) | Committee for the Elimination of Bias and Inequality in the Justice System, California Judges Association<br>by Hon. Khymberli S. Apaloo, EBI Co-Chair | This comment is made on behalf of the California Judges Association's Committee for the Elimination of Bias and Inequality in the Justice System (the "EBI Committee"). We are in full support of modified CACI 113 and new CACI 5030. The discussion of implicit bias in these instructions is a welcome addition to our CACI series. We appreciate that you first introduced the concept in CACI | The committee acknowledges the California Judges Association's Committee for the Elimination of Bias and Inequality in the |

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| Instruction(s) | Commenter | Comment | Committee Response |
|---|---|---|---|
| | Hon. Linda Colfax, EBI Co-Chair<br>Hon. Amy Guerra, EBI Jury Instructions Subcomm. Chair | 113 and then describe implicit bias in further detail in CACI 5030. These concepts are critically important to ensure fair and impartial jury trials. We believe it is important to instruct prospective jurors on these concepts before the trial starts and at the end of the trial prior to deliberations. This is the approach taken by several of our sister states.<br>On behalf of the EBI Committee, we would like to express our sincere gratitude to the Civil Jury Instructions Advisory Committee for your efforts throughout this process. Please do not hesitate to contact us if we can be of further assistance to you. | Justice System's support for these instructions. |
| | Stuart Chandler<br>Attorney<br>Fresno | Proposed CACI 5030 should not be approved.<br><br>In concept and as drafted, I concur with the intent of proposed CACI 5030: attempting to help jurors overcome implicit or unconscious bias.<br><br>In reality, I believe the proposed instruction will seldom, if ever, move the needle on someone's bias even a fraction of a degree. I have been a trial lawyer for over 40 years. I believe that people who are biased are not going to see things from a different perspective just because a judge sitting on a bench in her or his black robe tries to "educate" them about bias. CACI 113 addresses bias about as well as it can be expressed. If the trial lawyers involved in the case believe that unconscious or implicit bias may be a factor, they are free to tee off of CACI 113 and talk about bias in their closing arguments.<br><br>Aside from proposed 5030 having no benefit, no upside, there are many downsides. For starters, jury instructions | The committee acknowledges the commenter's implied support for CACI No. 113. To the extent the commenter opposes the adoption of CACI No. 5030, the committee believes that addressing implicit bias directly and providing jurors with tactics for becoming aware of and working against them is important to ensure fair and impartial jury trials. To the extent the commenter advocates |

| Instruction(s) | Commenter | Comment | Committee Response |
|---|---|---|---|
| | | already take too long. People tune out. The more that is read to them, the less likely they will be to pay attention. This proposed instruction is way too long. Second, many jurors will be insulted by it. It is as though the judge is talking down to them, as if to say they are so naïve or stupid as to not know how ignorant (of implicit biased) they supposedly are. It is as though the judge is saying: "Now children, you don't realize just how biased you are – but by reading this little story to you, all of a sudden you will think differently than you usually do. I know I can get you to think differently because I am a smart judge in a black robe and you are stupid little peons sitting in jury box."<br><br>A better solution to help eliminate implicit or unconscious bias would be to ensure there is adequate time for the trial lawyers to conduct a thorough voir dire. I know we are in a much better position now than years ago, but it's still too often that judges unreasonably limit voir dire. In my view, the best way to ensure an unbiased verdict is to excuse biased individuals from serving on a jury in the first place. And the best way to do that is to allow a thorough voir dire. | for changes to voir dire, the council's jury instructions are not a vehicle for addressing the process of examining potential jurors. |
| 2547. Disability-Based Associational Discrimination—Essential Factual Elements (Revise) | California Lawyers Association, Litigation Section, Jury Instructions Committee<br>by Reuben A. Ginsburg, Chair<br>Sacramento | Agree. | No response required. |
| | Bruce Greenlee<br>Attorney<br>Richmond | The change from "disabled person" to "person with a disability": Why? If "disabled" is thought to be offensive in some way (it's not; I'm now disabled and not offended) then "disability" would be so also. There is absolutely no | The committee has chosen to adopt a person-first formulation of the |

| Instruction(s) | Commenter | Comment | Committee Response |
|---|---|---|---|
| | | difference in meaning between these two wordings. The English language uses adjectives to replace nouns as a word-saving device. We don't need a noun, preposition, article, and another noun, when we have a perfectly serviceable adjective to express exactly the same thing. If CACI is merely passing on a Legislative change to a statute, then the Directions for Use should point out that it is the Legislature and not the CACI committee that is messing up the English language. | phrasing in an effort to uniformly use more respectful language in *CACI*. |
| | | I disagree with the replacement of "disabled person" with "associate." "Associate" does not convey the same meaning. It has other definitions not related to disability. And in fact, used alone it has nothing to do with disability.<br><br>The word used in the instruction must convey the idea that the "associate" is disabled. While I see no burning need to change "disabled person" to "person with a disability" in the opening paragraph, "person with a disability" is far better than "associate." Use it instead. | The committee does not agree that the proposed change to the bracketed language changes the meaning of the instruction. The committee trusts that the instruction will be used only when the associate is a person with a disability because that is the nature of the associational claim. |
| | Orange County Bar Association<br>by Michael A. Gregg<br>President | Agree. | No response required. |
| 2549. Disability Discrimination—Refusal to Permit Reasonable | California Lawyers Association, Litigation Section, Jury Instructions Committee<br>by Reuben A. Ginsburg, Chair | Agree. | No response required. |

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| Instruction(s) | Commenter | Comment | Committee Response |
|---|---|---|---|
| Modification to Housing Unit (Revise) | Sacramento | | |
| | Orange County Bar Association<br>by Michael A. Gregg<br>President | Agree as Modified: The language of Government Code section 12927(c)(1) uses the term "disabled person," and not person with a disability. However, since this modification is in the Directions for Use, it can be viewed as semantics. However, the recommendation is to remove the term "qualifying" in the Directions for Use, as that could lead to confusion. The term "qualifying" is not used in either Government Code section 12927(c) or 12926(o). | The committee has chosen to adopt a person-first formulation of the phrasing in an effort to uniformly use more respectful language in *CACI*. With respect to the term "qualifying," the committee agrees that the term is not used in the statutory authority, and to avoid introducing confusion, the committee recommends against including it as proposed in the Invitation to Comment. For consistency, the committee also recommends not adding "qualifying" in CACI No. 2547's Directions for Use. |
| 2580. Pregnancy Discrimination—Failure to Accommodate— | California Lawyers Association, Litigation Section, Jury Instructions Committee<br>by Reuben A. Ginsburg, Chair<br>Sacramento | a. We suggest adding informative language from *Lopez* to Sources and Authority:<br><br>"We agree that section 12945 affords important protections to employees affected by pregnancy, over and | The committee recommends adding the suggested excerpt from *Lopez* to the |

| Instruction(s) | Commenter | Comment | Committee Response |
|---|---|---|---|
| Essential Factual Elements (New) | | above the protections of section 12940. These additional protections include a right to up to four months of pregnancy-disability leave (§ 12945(a)(1)), and a right to temporary transfer to a less strenuous job if such a 'transfer can be reasonably accommodated' (§ 12945(a)(3)). Section 12945(a)(3)(A) also protects a right to reasonable accommodation for a condition associated with pregnancy or childbirth, even when this condition does not rise to the level of a formally recognized disability. Section 12945(a)(3)(A) is, in this regard, broader than section 12940(m), which addresses an employer's obligation to accommodate 'disability.' But none of these provisions entitles an employee to a job she cannot perform." (*Lopez v. La Casa de Las Madres* (2023) 89 Cal.App.5th 365, 381-382.) | Sources and Authority. |
| | | b. Government Code section 12945, subdivision (a) prohibits certain conduct "unless based upon a bona fide occupational qualification." We believe the Advisory Committee should consider drafting an instruction based on this language, which appears to state an affirmative defense. | The suggestion is beyond the scope of the invitation to comment. The committee will consider drafting a new instruction in a future release. |
| | Bruce Greenlee<br>Attorney<br>Richmond | 1. Opening paragraph and element 3: format this way: [pregnancy/[or] childbirth/[, or] a related medical condition] | The committee does not recommend changing the brackets as suggested. The final internal brackets around "a related medical condition" are intended because that |

| Instruction(s) | Commenter | Comment | Committee Response |
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| | | | option should not be given alone, and the committee prefers to allow for use of serial commas if all three terms are selected. |
| | | 2. Element 4: "on" the advice of a health care provider (not "with") | The committee disagrees. The statute uses *with*. |
| | Orange County Bar Association<br>by Michael A. Gregg<br>President | Agree. | No response required. |
| 2581. Pregnancy Discrimination—"Reasonable Accommodation" Explained (New) | California Lawyers Association, Litigation Section, Jury Instructions Committee<br>by Reuben A. Ginsburg, Chair<br>Sacramento | We suggest adding the same language from *Lopez* quoted above to Sources and Authority. | The committee does not recommend the suggested addition. The committee has recommended adding the excerpt to CACI No. 2580. The quote does not contain information that is directly relevant to this related instruction. |
| | Bruce Greenlee<br>Attorney<br>Richmond | Same format change in opening paragraph as in 2580. | See the committee's response to CACI No. 2580, above. |

| Instruction(s) | Commenter | Comment | Committee Response |
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| | Orange County Bar Association<br>by Michael A. Gregg<br>President | Agree as Modified: Subpart (f) should be changed from "Changing job responsibilities" to "Changing non-essential job responsibilities" as the individual must still be able to perform the essential job duties of their position. *See, e.g.,* CACI 2541 (5); *Green v State of California,* 42 Cal. 4th 254, 260 (2007) ("Although section 12940 proscribes discrimination on the basis of an employee's disability, it specifically limits the reach of that proscription, excluding from coverage those persons who are not qualified, even with reasonable accommodation, to perform essential job duties.") | The committee disagrees with the suggested change to f. The regulation on which the instruction is based does not modify job responsibilities with "non-essential," and "essential duties of the job" is referenced in the introductory paragraph. |
| VF-2700. Nonpayment of Wages (Revise) | California Lawyers Association, Litigation Section, Jury Instructions Committee<br>by Reuben A. Ginsburg, Chair<br>Sacramento | Agree. | No response required. |
| | Orange County Bar Association<br>by Michael A. Gregg<br>President | Agree. | No response required. |
| VF-2701. Nonpayment of Minimum Wage (Revise) | California Lawyers Association, Litigation Section, Jury Instructions Committee<br>by Reuben A. Ginsburg, Chair<br>Sacramento | Agree. | No response required. |
| | Orange County Bar Association<br>by Michael A. Gregg<br>President | Agree. | No response required. |
| VF-2702. Nonpayment of Overtime | California Lawyers Association, Litigation Section, Jury Instructions Committee | Agree. | No response required. |

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| Instruction(s) | Commenter | Comment | Committee Response |
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| Compensation (Revise) | by Reuben A. Ginsburg, Chair<br>Sacramento | | |
| | Orange County Bar Association<br>by Michael A. Gregg<br>President | Agree. | No response required. |
| VF-2706. Rest Break Violations (Revise) | California Lawyers Association, Litigation Section, Jury Instructions Committee<br>by Reuben A. Ginsburg, Chair<br>Sacramento | We agree with the proposed revisions, but suggest that the following be added at the end of the Directions for Use to avoid confusion: "Note that under *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 121-123, the applicable prejudgment interest rate for meal and rest break claims under Labor Code section 226.7 is 7%, not 10% as stated in Civil Code section 3289 and Labor Code section 218.6." | Because the suggested note relates to the interest rate to be used by the court, which is not a jury issue, the committee does not believe the extra language is appropriate for the Directions for Use. |
| | Orange County Bar Association<br>by Michael A. Gregg<br>President | Agree. | No response required. |
| VF-2707. Meal Break Violations (Revise) | California Lawyers Association, Litigation Section, Jury Instructions Committee<br>by Reuben A. Ginsburg, Chair<br>Sacramento | Same comment as VF-2706. | See the committee's response to CACI No. VF-2706. |
| | Orange County Bar Association<br>by Michael A. Gregg<br>President | Agree. | No response required. |
| VF-2708. Meal Break Violations—Employer Records Showing | California Lawyers Association, Litigation Section, Jury Instructions Committee<br>by Reuben A. Ginsburg, Chair<br>Sacramento | Agree. | No response required. |

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| Noncompliance (Revise) | Bruce Greenlee<br>Attorney<br>Richmond | Directions for Use: Keep the citation to *Naranjo*, maybe as "see" add to the citation to the statutes:<br><br>"(Civ. Code, §§ 3287, 3288; see *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 121–122 [293 Cal.Rptr.3d 599, 509 P.3d 956 (Labor Code section 218.6 making interest on unpaid wages mandatory does not apply to meal break violations).]" | The committee does not agree with the suggested retention/addition to the Directions for Use. |
| | Orange County Bar Association<br>by Michael A. Gregg<br>President | Agree. | No response required. |
| VF-2709. Meal Break Violations—Inaccurate or Missing Employer Records (Revise) | California Lawyers Association, Litigation Section, Jury Instructions Committee<br>by Reuben A. Ginsburg, Chair<br>Sacramento | Agree. | No response required. |
| | Bruce Greenlee<br>Attorney<br>Richmond | Directions for Use: Same revision as to VF-2708. | See the committee's response to CACI No. VF-2708, above. |
| | Orange County Bar Association<br>by Michael A. Gregg<br>President | Agree. | No response required. |
| 3070. Disability Discrimination—Access Barriers to Public Facility—Construction-Related Accessibility Standards Act— | California Lawyers Association, Litigation Section, Jury Instructions Committee<br>by Reuben A. Ginsburg, Chair<br>Sacramento | Agree. | No response required. |
| | Bruce Greenlee<br>Attorney<br>Richmond | Same as for 2547: no reason to make this change. | The committee disagrees. See the committee's response |

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| Essential Factual Elements (Revise) | | | to CACI No. 2547, above. |
| | Orange County Bar Association by Michael A. Gregg President | Agree. | No response required. |
| 3905A. Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage) (Revise) | Association of Southern California Defense Counsel by Horvitz & Levy LLP, Jason R. Litt and Nicole P. Hood, Attorneys | We write on behalf of the Association of Southern California Defense Counsel (ASCDC) to comment on the proposed addition to CACI No. 3905A's Directions for Use, which states: "The jury's consideration of shortened life expectancy as an item of noneconomic damages is unsettled." ASCDC disagrees with the proposed revision and finds it misleading because the cases cited to support this statement—*Phipps v. Copeland Corporation LLC* (2021) 64 Cal.App.5th 319 (*Phipps*) and *Johnson v. Monsanto Company* (2020) 52 Cal.App.5th 434 (*Johnson*)—do not support the conclusion that is the law is unsettled. For the reasons set forth below, the proposed revision should not be adopted.<br><br>ASCDC is the nation's largest and preeminent regional organization of lawyers primarily devoted to defending civil actions in Southern and Central California. ASCDC has approximately 1,100 attorney members, who are among some of the leading trial and appellate lawyers of California's civil defense bar. ASCDC is actively involved in assisting courts on was unable issues of interest to its members, the judiciary, the bar as a whole, and the public. It is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation practice. | The committee thanks the ASCDC for the information provided. The committee agrees that *Johnson* and *Phipps* are not in direct conflict. The committee, however, disagrees that the better result would be to leave the issue unaddressed in the Directions for Use. The committee believes the issue of shortened life expectancy has not been fully resolved, and that the best course at this time is to flag the issue in the Directions for Use. |

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| | | The proposed revision to CACI No. 3905A Directions for Use adds the statement that "[t]he jury's consideration of shortened life expectancy as an item of noneconomic damages is unsettled." To support this statement, the Directions for Use compares two cases, *Phipps* and *Johnson*. Those cases, however, address different issues and do not conflict.<br><br>In *Johnson*, the defendant argued, and the appellate court agreed, that a jury cannot award future noneconomic damages for the years the plaintiff would lose as a result of his injury. At trial, the jury found that plaintiff's cancer was caused by the defendant's product. The uncontroverted evidence showed that " 'absent a miracle,' " plaintiff would live no more than two years after trial. (*Johnson, supra,* 52 Cal.App.5th at p. 452.) The jury was instructed under CACI No. 3905A that the plaintiff must prove that he was " 'reasonably certain to suffer [his] harm' " and the jury was to determine how long he was expected to suffer. (Id. at pp. 451–452, emphasis omitted.) The jury awarded $4 million for past noneconomic damages and $33 million for future noneconomic damages based on plaintiff's closing argument that the jury should award $1 million per year for the four years the plaintiff lived before trial, and an additional $1 million per year for the full 33 years the plaintiff would have been expected to live had he not been injured by the defendant's product. (Id. at pp. 446–447.) The Court of Appeal concluded that the award of future noneconomic damage was excessive *as a matter of law* because the plaintiff was entitled to recover damages only for the years he was reasonably expected to live. (Id. at pp. 451–454.) Therefore, that | |

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| | | award was not supported by evidence of Johnson's postinjury life expectancy. (Ibid.)<br><br>*Phipps* did not address the issue presented in *Johnson* because the defendant in Phipps never argued, and the Court of Appeal never addressed, whether the plaintiff could recover noneconomic damages for "lost years." [FN1: *Johnson* was decided before *Phipps*, but is not cited in *Phipps*.] In *Phipps*, the jury awarded plaintiff $20 million in future noneconomic damages. (*Phipps, supra*, 64 Cal.App.5th at p. 330.) The defendant filed a motion for new trial, arguing the noneconomic damages award was excessive. (*Ibid*.) To support this argument, defendant submitted a spreadsheet that identified verdicts in other mesothelioma cases. (*Id*. at pp. 330–331.) The trial court denied the motion and refused to consider the spreadsheet. (*Id*. at p. 331.) On appeal, defendants primarily argued that the trial court abused its discretion by not considering the spreadsheet. (*Id*. at p. 338.) The appellate court rejected this contention, concluding that the trial court was unable to consider the spreadsheet because the spreadsheet was not part of " 'the minutes of the court.' " (*Id*. at p. 339; see Code Civ. Proc., §§ 657, 658.)<br><br>The Court of Appeal in *Phipps* then addressed whether the noneconomic damages were excessive. In conducting that analysis, the court noted that as a result of the mesothelioma diagnosis, the plaintiff's life expectancy was reduced from 14.5 years to 1 or 2 years. (*Phipps, supra*, 64 Cal.App.5th at p. 343.) Based on all of the evidence, the court concluded that the jury did not act with passion and that the damages were not excessive. (*Id*. at pp. 343–345.) At no point did the court consider whether | |

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| | | the plaintiff could be awarded pain and suffering damages for the years he would lose as a result of his reduced life expectancy.<br><br>Several courts, including *Phipps*, generally cite language asserting that a plaintiff can recover noneconomic damages for injuries that " 'include pain and suffering, emotional distress, as well as "such items as invasion of a person's bodily integrity (i.e., the fact of the injury itself), disfigurement, disability, impaired enjoyment of life, susceptibility to future harm or injury, and a shortened life expectancy." ' " (*Phipps*, 64 Cal.App.5th at p. 337, quoting *Burchell v. Faculty Physicians & Surgeons of Loma Linda University School of Medicine* (2020) 54 Cal.App.5th 515, 526 (*Burchell*).) The "shortened life expectancy" language comes from *Buell-Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525, 549 (*Buell-Wilson*), judgment vacated on other grounds *sub nom*. *Ford Motor Co. v. Buell-Wilson* (2007) 550 U.S. 931 [127 S.Ct. 2250, 167 L.Ed.2d 1087]. (See, e.g., *Burchell*, at p. 526, quoting *Buell-Wilson*, at p. 549; *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 300 (*Bigler-Engler*), quoting *Buell-Wilson*, at p. 549.) *Buell-Wilson* in turn cited a purported old version of CACI No. 3905A enumerating items of injury that include "disfigurement, disability, impaired enjoyment of life, susceptibility to future harm or injury, and a shortened life expectancy." (*Buell-Wilson*, at p. 549, citing CACI No. 3905A (2003 ed.).)<br><br>None of these cases, however, state or suggest that the "shortened life expectancy" language from *Buell-Wilson* means that a jury may award pain and suffering damages | |

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| | | for years that plaintiff will no longer be alive. (See *Johnson, supra*, 52 Cal.App.5th at pp. 452–453.) To the extent a plaintiff may properly recover damages for pain and suffering caused by a "shortened life expectancy," those damages are intended to compensate a plaintiff for his distress at the prospect of a hastened death, not lost years. (See *ibid*.; accord Haning et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2022) ¶ 3:701 ["Shortened life expectancy" means "additional anxiety, worry and impairment of the ability to enjoy life" caused by injuries that diminish one's life expectancy (boldface omitted)]; see also *Rhone v. Fisher* (1961) 167 A.2d 773, 778 [" 'If . . . a shortening of life may be apprehended this may be considered in determining the extent of the injury . . . and the bodily and mental suffering which will result. But damages cannot be recovered for the loss or shortening of life.' "]; *Morrison v. State* (1973) 516 P.2d 402, 406; *Howell v. Lansing City Electric Ry. Co.* (1904) 99 N.W. 406, 437–438.)<br><br>That reading of "shortened life expectancy" is wholly consistent with the analysis and holdings of California cases that have discussed the concept. In *Buell-Wilson* itself, the court looked at the plaintiff's injuries as a whole to determine if the evidence supported the noneconomic damages award. (*Buell-Wilson*, *supra*, 141 Cal.App.4th at pp. 547–550.) The court also considered whether the damages award was excessive compared to plaintiff's *remaining* life span, and found that it was. (*Id.* at p. 550.) In *Bigler-Engler*, the court considered shortened life expectancy as just one factor among many when determining if the damages award was excessive. (*Bigler-Engler*, *supra*, 7 Cal.App.5th at p. 302.) And in *Burchell*, | |

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| | | the court found the plaintiff's injury did *not* shorten his life expectancy and concluded that plaintiff's injury would affect him for "the remainder of his life." (*Burchell*, *supra*, 54 Cal.App.5th at p. 528.) [FN2: The proposed revision to the Directions for Use includes language stating that "shortened life expectancy" was never part of CACI No. 3905A. But whether or not *Buell-Wilson* correctly cited CACI No. 3905A for that proposition is beside the point. The point is that the reference to "shortened life expectancy" in *Buell-Wilson* and other cases was never meant to suggest that juries may award noneconomic damages to compensate plaintiffs for pain and suffering during the time they will not be alive.]<br><br>In sum, *Phipps* and *Johnson* are not in conflict because those cases address different issues. *Johnson* is the only published California opinion to address whether a plaintiff can recover damages for a "shortened life expectancy" to the extent that phrase means compensating a plaintiff with noneconomic damages for "lost years." While a jury may consider a plaintiff's distress at the prospect of a shortened life when awarding damages, the jury may *not* assign a direct value to each year a plaintiff is expected to lose as a result of his injury. The proposed revision to the Directions and Use is misleading because it implies *Phipps* and *Johnson* conflict, when these cases do not address the same issue. The revision also erroneously implies that CACI No. 3905A may allow a jury to award noneconomic damages for lost years, which is impermissible. The addition will confuse courts, lawyers, and juries when using CACI No. 3905A because it claims there is a conflict in the law that does not exist. | |

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**Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions** (Add and revise jury instructions, verdict forms, and user guide)
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| | | We thank the Judicial Council and the CACI committee for their attention to this matter. | |
| | California Lawyers Association, Litigation Section, Jury Instructions Committee<br>by Reuben A. Ginsburg, Chair<br>Sacramento | a. We agree that the Directions for Use should note that *Phipps v. Copeland Corp. LLC* (2021) 64 Cal.App.5th 319, 337, and *Johnson v. Monsanto Co.* (2020) 52 Cal.App.5th 434, 454, reached different conclusions on whether shortened life expectancy is an item of noneconomic damages. We note that the Directions for Use in other instructions sometimes refer to an issue as "unsettled" and sometimes state there is a "split of authority." We suggest an effort be made to ensure the same language is used consistently if the language describes the same thing. | The committee thanks the California Lawyers Association for the observation. |
| | | b. We agree with the proposed revisions to the Sources and Authority. | No response required. |
| | Bruce Greenlee<br>Attorney<br>Richmond | 1. There is an issue with shortened life expectancy, but the added paragraph in the DforU doesn't really help all that much. It's not a "compare/with." If it were, one would expect the two cases to reach different results, but that's not the case. *Phipps* just includes life expectancy in a list of things encompassed in noneconomic damages. *Johnson* gives an interesting analysis of the issue. You don't cite anything that says that shortened life expectancy is *not* an element of noneconomic damages, so the "unsettled" is not well explained. | The committee agrees that *Johnson* and *Phipps* are not in direct conflict. The committee, nevertheless, believes that the recommended addition is accurate. |
| | | 2. *Johnson's* discussion really does suggest that CACI No. 3905A should include life expectancy. I would add it to the first paragraph in brackets. Then in the DforU I would say something like: | The committee disagrees and prefers to note the issue in the Directions for Use. To |

| Instruction(s) | Commenter | Comment | Committee Response |
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| | | "The opening paragraph presents an option to include shortened life expectancy as recoverable noneconomic damage. While not fully settled, there is authority that it may be included. [See *Johnson* (with a parenthetical quoting some of Posner's language from his dissent in *DePass:* "Although few reported cases … deal with the specific question whether a reduction in life expectancy is compensable, the trend is toward allowing recovery."); see also. *Phipps* (including shortened life expectancy in a list of items of noneconomic damages without analysis)]."<br><br>(Can you really cite *Buell-Wilson*? I would not as it doesn't really add a whole lot.)<br><br>And the last sentence about 3905A historically is more confusing than helpful. I don't think we really care about what the instruction said in the past. What's important is what the instruction says now, and it should include shortened life expectancy, at least as an option. | the extent the commenter questions the inclusion of *Buell-Wilson*, the committee believes it would be of interest to users. Finally, the committee agrees that the instruction's existing content is paramount, but because courts have placed some weight on what historically has or has not been included in CACI No. 3905A's list of options, the committee concluded that it was of some value to note the issue for users. |
| | | 2. Opening paragraph Format: [Past [and] future] | The committee disagrees. The existing formatting of the brackets is consistent with the other instructions in the Damages series. |
| | Orange County Bar Association<br>by Michael A. Gregg<br>President | Agree. | No response required. |

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| 4603. Whistleblower Protection—Essential Factual Elements (Revise) | California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento | Agree. | No response required. |
| | Orange County Bar Association by Michael A. Gregg President | Agree. | No response required. |
| 4702. Consumers Legal Remedies Act—Statutory Damages—Senior or Person With a Disability (Revise) | California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento | Agree. | No response required. |
| | Bruce Greenlee Attorney Richmond | 1. Same as for 2547: no reason to make this change, particularly since CC 1780(b) still says "disabled." | The committee disagrees. See the committee's response to CACI No. 2547. |
| | Orange County Bar Association by Michael A. Gregg President | Agree. Note that language does not track Civil Code section 1780(b) (which refers to section 1761(g)). | The committee acknowledges Orange County Bar Association's support for the change, and to the extent the language does not track the Civil Code, the committee believes the difference in language does not change the legal meaning. |

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| 5030. Implicit or Unconscious Bias (New) | California Lawyers Association, Litigation Section, Jury Instructions Committee<br>by Reuben A. Ginsburg, Chair<br>Sacramento | We enthusiastically agree. We believe this proposed new instruction is well written and consider it very important to include an instruction on implicit or unconscious bias in the concluding instructions. | The committee acknowledges the support of the California Lawyers Association, Litigation Section, Jury Instructions Committee for this new instruction. |
| | Bruce Greenlee<br>Attorney<br>Richmond | 1. Point 2: Replace "speaks in a language other than English or with an accent" with "or whose first language is one other than English and therefore speaks limited English or with an accent." | The committee does not see improved clarity in the suggested change. |
| | Orange County Bar Association<br>by Michael A. Gregg<br>President | Agree as Modified | See the committee's responses to Orange County Bar Association's specific suggestions below. |
| | | <u>Paragraph 1</u><br>It is suggested that "prejudice, or public opinion" be added after "bias" in the first line to be consistent with paragraph 4 of Instruction 113 to avoid confusion that a difference in the admonishing language as between the two Instructions might create. | The committee appreciates the commenter's concern, but the focus of CACI No. 5030 is on implicit or unconscious bias. |
| | | <u>Paragraph 2</u><br>Third sentence – It is suggested that this sentence be omitted. While it appears to have been included to make a | The committee disagrees and does not believe the sentence |

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| | | juror feel better about having prejudices and so, is consistent with the chosen "voice" for Instruction 113 and the proposed Instruction, it is unnecessary and would serve to take the judge off the bench and make her "one of the team" with the jury, rather than maintaining the appropriate separation. The other instructions the juror will hear are not written in this voice, and when coupled with such a terse assertion, it may actually lead to confusion. Too, for the juror who stops to ponder this statement and misses the reference in the subsequent sentence to such fast thinking being undesirable in the courtroom, for that juror, it may call into question the ability of the judge to be impartial. | would confuse or cause jurors to question a judge's ability to be impartial. |
| | | Paragraph 3<br>Second and third sentences - each makes use of "see" when instructing the juror as to the impact of active bias. It is suggested rather than "see," "perceive" be used in each sentence as it indicates an assessment of a person that goes beyond mere appearance. If a juror, upon hearing "see," takes it literally or construes the admonition in its most limited sense and makes an effort simply to go beyond what he or she sees with the eyes, that juror could erroneously believe he or she has checked his or her biases. | The committee disagrees with the suggested change. "See" is plain language as used in this context. |
| | | Third sentence – In light of the use throughout the Instruction of "we" and "us," it is suggested for balance, clarity, and context, that "from us" be added at the end of the sentence to read: …we may disfavor or be less likely to believe people whom we see as different from us. | The committee recommends the suggested refinement. |

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| Instruction(s) | Commenter | Comment | Committee Response |
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| | | Paragraph 4<br>Second sentence – To make clear as to what type of bias the first sentence of the paragraph refers, it is suggested that this sentence be supplemented to read: We refer to these biases of which we are unaware as "implicit" or "unconscious." | The committee recommends adding "that we are not aware of" to the sentence. |
| | | Fourth sentence - At its final phrase, this sentence uses "their effect" when instructing the juror as to the impact of implicit/unconscious bias on his or her decisions. For clarity and to avoid confusion as to whether the effect being flagged is that of the bias or of the decision, it is suggested the final phrase read: …without our being aware of the effect of these biases on those decisions. | The committee recommends the suggested refinement. |
| | | Paragraph 5 – Item 2<br>Second sentence – To be consistent and avoid possible confusion, it is suggested that all bias categories set forth in paragraph 4 of Instruction 113, be included here, together with any other impermissible form of bias inserted in Instruction 113 when given. Thus, gender identity, gender expression, and socioeconomic status should be added. If this Instruction in final form includes the option to add bias categories as relevant to the case, a Direction for Use and corresponding note should be added. | The committee disagrees. Item 2 of paragraph 5 is only setting out examples. |

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| | | Fifth sentence – To be consistent and avoid possible confusion, it is suggested that what were characterized as biases in paragraph 4 of Instruction 113 and set forth in this paragraph in previous sentences, be referenced as "biases" in addition to "stereotypes" by saying "effects of biases or stereotypes on decisionmaking." | The committee agrees and has added "biases" to the sentence. |