JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 21-088
For business meeting on: May 21, 2021

Title
Jury Instructions: Civil Jury Instructions (Release 39)

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

Recommended by
Advisory Committee on Civil Jury Instructions
Hon. Martin J. Tangeman, Chair

Agenda Item Type
Action Required

Effective Date
May 21, 2021

Date of Report
April 19, 2021

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Executive Summary

The Advisory Committee on Civil Jury Instructions recommends revocation of two civil jury instructions and approval of new and revised civil jury instructions prepared by the committee. These changes bring the instructions up to date with developments in the law over the previous six months. On Judicial Council approval, the instructions will be published in the official supplement to the 2021 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 May 21, 2021, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court the following civil jury instructions prepared by the committee:

1. Revocation of 2 instructions: CACI Nos. 2613 and 2630;

2. Addition of 5 new instructions and verdict forms: CACI Nos. 1305B, VF-1303B, 3055, 4329, 4562; and

3. Revisions to 25 instructions and verdict forms: CACI Nos. 440, 702, 1010, 1305A (renumbered from 1305), VF-1303A (renumbered from VF-1303), VF-2506A, VF-2506B, VF-2506C, VF-2507A, VF-2507B, VF-2507C, 2600, 2601, 2602, 2603, 2620, 2705, 3050, 3704, 3904A, 4302, 4303, 4308, 4560, and 4561.

A table of contents and the proposed new, revised, and revoked civil jury instructions and verdict forms are attached at pages 6–111.

Relevant Previous Council Action

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

This is release 39 of *CACI*. The council approved release 38 at its November 2020 meeting.

Analysis/Rationale

A total of 32 instructions are presented in this release. The Judicial Council's Rules Committee has also approved changes to 17 additional instructions under a delegation of authority from the council to the Rules Committee.[2]

The instructions were revised and added based on comments or suggestions from justices, judges, and attorneys; 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.

Revoked instructions

CACI Nos. 2613, *Affirmative Defense—Key Employee*, and 2630, *Violation of New Parent Leave Act—Essential Factual Elements*. The committee proposes revocation of two instructions

[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.

in the California Family Rights Act (CFRA) series due to statutory changes. Senate Bill 1383 (Stats. 2020, ch. 86), effective January 1, 2021, repealed the New Parent Leave Act, and repealed and replaced the CFRA to expand coverage (including adding provisions that made the New Parent Leave Act unnecessary). The expanded CFRA also eliminated an employer's ability to deny reinstatement to a "key employee." Considering this new legislation, the committee believes these two instructions are no longer supported by law. The committee, however, does recommend revisions to other instructions in the CFRA series to reflect accurately the expanded scope of the CFRA, discussed below.

New instructions

CACI No. 1305B, *Battery by Peace Officer (Deadly Force)—Essential Factual Elements*, and VF-1303B, *Battery by Peace Officer (Deadly Force)*. Assembly Bill 392 (Stats. 2019, ch. 170), effective January 1, 2020, amended Penal Code section 835a, which is the basis for this new battery instruction. The statutory amendments principally relate to the use of deadly force by a peace officer. Former CACI No. 1305, *Battery by Peace Officer—Essential Factual Elements*, had served as the battery instruction for both deadly and nondeadly force cases. In the last release, the council approved revisions to similar instructions in the negligence series. The committee now proposes a new battery instruction (No. 1305B) and an accompanying verdict form (No. VF-1303B) addressing battery based on a peace officer's use of deadly force.

CACI No. 3055, *Rebuttal of Retaliatory Motive*. In *Nieves v. Bartlett*,[3] the Supreme Court held that the so-called *Mt. Healthy* test applies in section 1983 retaliation cases. Under the *Mt. Healthy* test, if a plaintiff shows that the defendant's retaliation was a substantial or motivating factor behind the defendant's retaliatory conduct (like an arrest or other state action) then "the defendant can prevail only by showing that the [arrest or other state action] would have been initiated without respect to retaliation."[4] The committee recommends a new instruction that sets out a defendant's burden to rebut a plaintiff's retaliation claim under section 1983.

Revised instructions

CACI No. 1010, *Affirmative Defense—Recreation Immunity—Exceptions*. In the invitation to comment posted on January 26, 2021 (CACI 21-01), the committee proposed changes mainly, but not solely, supported by a new appellate decision, *Hoffmann v. Young*.[5] On February 10, 2021, the California Supreme Court granted a petition for review.[6] Because the appellate opinion is no longer binding authority (Cal. Rules of Court, rule 8.1115(e)(1)), the committee now withdraws the proposed revisions for which the new appellate decision was the only authority. The committee's proposed change to the third exception stated in the instruction, however, has

[3] (2019) __ U.S. __ [139 S.Ct. 1715, 204 L.Ed.2d 1].

[4] 139 S.Ct. at p. 1725.

[5] (2020) 56 Cal.App.5th 1021 [271 Cal.Rptr.3d 33], rehg. denied (Nov. 18, 2020), review granted Feb. 10, 2021, S266003.

[6] (Feb. 10, 2021, S266003) __ Cal.5th __ [2021 Cal. LEXIS 931, at *1].

other support, so the committee recommends deleting the phrase "for the recreational purpose" from the third exception of the instruction, and adding a case quote in the Sources and Authority that supports this change.

CACI No. 1305A, *Battery by Law Enforcement Officer (Nondeadly Force)—Essential Factual Elements*. As noted above, CACI No. 1305 had addressed battery by a peace officer generally. That instruction included a use note advising that modification may be necessary depending on whether the case involves deadly or nondeadly force. At the urging of several commenters in the last public comment cycle, the committee recommends revising the instruction to address Penal Code section 835a. Due to the new deadly force battery instruction, No. 1305B, the committee also recommends renumbering No. 1305 as No. 1305A.

Two commenters observed that a statement in the Directions for Use about the type of officer this claim may be brought against was not supported by clear authority. To address these concerns, the committee has revised the Directions for Use to express the potential issue created by Penal Code section 835a's use of the term "peace officer" in its deadly force provisions. The Directions for Use now state, "It would appear that a battery claim involving nondeadly force does not depend on whether the individual qualifies as a peace officer under the Penal Code."

CACI Nos. 2600 et seq. (California Family Rights Act series). Senate Bill 1383 (Stats. 2020, ch. 86) replaced the existing CFRA, expanding it to apply to employers having as few as five employees. The expanded CFRA extends leave rights to employees who care for grandparents, grandchildren, siblings, and adult children with serious medical conditions, and includes leave for bonding with a child and leave for reasons related to certain military exigencies (i.e., deployment or other military activities). So that the instructions accurately reflect the legislative changes to the CFRA, the committee recommends revisions to CACI Nos. 2600, 2601, 2602 (retitled), 2603, and 2620.

CACI Nos. 4302*, Termination for Failure to Pay Rent—Essential Factual Elements*, and 4303*, Sufficiency and Service of Notice of Termination for Failure to Pay Rent*. The COVID-19 Tenant Relief Act of 2020 (Assem. Bill 3088), effective August 31, 2020, provides, among other things, certain protections to residential tenants being terminated for failure to pay rent due from March 1, 2020, through January 31, 2021. Recognizing that the pandemic was likely to lead to additional changes in unlawful detainer law, the committee cautiously recommended adding only a use note alerting users that modification would be necessary due to this new legislation. While the public comment period was open, the Legislature enacted additional urgency legislation (Sen. Bill 91; Stats. 2021, ch. 2) that, among other things, extended the relevant time period from January 31, 2021, to June 30, 2021.

Commenters suggested including references to the newest legislation and more information about the modifications necessary under the two new statutes, and even proposed new instructions for use in cases under these statutes. Based on these comments, the committee recommends expanding the Directions for Use to address the new urgency legislation, and to

give an example of a modification necessary under these laws. The committee will consider the commenter's proposals for alternative instructions in the next release cycle.

Policy implications

Jury instructions express the law; there are no policy implications.

Comments

The proposed additions, revisions, and revocations in *CACI* circulated for comment from January 26 through March 3, 2021. Comments were received from nine different commenters. All nine commenters submitted comments on multiple instructions. No instruction or issue generated a particularly large number of comments, and few comments indicated serious substantive opposition to any of the proposed changes.

The committee evaluated all comments and revised some of the instructions in light of the comments received. A chart summarizing the comments received on all instructions and the committee's responses is attached at pages 112–164.

Alternatives considered

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

Fiscal and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will publish the 2021 supplement of *CACI* and pay royalties to the Judicial Council. Other licensing agreements with other publishers provide additional royalties. The official publisher will also make the revised content available free of charge to all judicial officers in both print and online document assembly software.

Attachments and Links

1. Jury instructions, at pages 6–111
2. Chart of comments, at pages 112–164

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CIVIL JURY INSTRUCTIONS
Release 39: May 2021

CONSTRUCTION LAW

440. Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements

A law enforcement officer may use reasonable force to [arrest/detain/ [,/or] prevent escape of/ [,/or] overcome resistance by] a person when the officer has reasonable cause to believe that that person has committed or is committing a crime. However, the officer may use only that degree of force necessary to [arrest/detain/ [,/or] prevent escape of/ [,/or] overcome resistance by] the person. [Even if the officer is mistaken, a person being arrested or detained has a duty not to use force to resist the officer unless the officer is using unreasonable force.]

[*Name of plaintiff***] claims that [***name of defendant***] was negligent in using unreasonable force to [arrest/detain/ [,/or] prevent escape of/ overcome resistance by] [him/her/***nonbinary pronoun***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] used force to [arrest/detain/ [,/or] prevent escape of/ [,/or] overcome resistance by] [***name of plaintiff***];**

2. **That the amount of force used by [***name of defendant***] was unreasonable;**

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

4. **That [***name of defendant***]'s use of unreasonable force was a substantial factor in causing [***name of plaintiff***]'s harm.**

In deciding whether [*name of defendant***] used unreasonable force, you must consider the totality of the circumstances ~~of the [arrest/detention/ [,/or] prevent escape of/ [,/or] overcome resistance by] and~~ to determine what amount of force a reasonable [***insert type of officer***] in [***name of defendant***]'s position would have used under the same or similar circumstances. "Totality of the circumstances" means all facts known to the officer at the time, including the conduct of [***name of defendant***] and [***name of plaintiff***] leading up to the use of force. Among the factors to be considered are the following:**

(a) Whether [*name of plaintiff***] reasonably appeared to pose an immediate threat to the safety of [***name of defendant***] or others;**

(b) The seriousness of the crime at issue; [and]

(c) Whether [*name of plaintiff***] was actively resisting [arrest/detention] or attempting to avoid [arrest/detention] by flight[; and/.]**

[(d) [*Name of defendant***]'s tactical conduct and decisions before using force on [***name of plaintiff***].]**

[An ~~peace~~ officer who makes or attempts to make an arrest does not have to retreat or stop because the person being arrested is resisting or threatening to resist. Tactical repositioning or other deescalation tactics are not retreat. An ~~peace~~ officer does not lose the right to self-defense by using

objectively reasonable force to [arrest/detain/ [,/or] prevent escape of/ [,/or] overcome resistance by] the person.]

New June 2016; Revised May 2020, November 2020, May 2021

Directions for Use

Use this instruction if the plaintiff makes a negligence claim under state law arising from the force used in effecting an arrest or detention. Such a claim is often combined with a claimed civil rights violation under 42 United States Code section 1983. See CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements*. It might also be combined with a claim for battery. See CACI No. 1305, *Battery by Peace Officer—Essential Factual Elements*. For additional authorities on excessive force by a law enforcement officer, see the Sources and Authority to these two CACI instructions.

By its terms, Penal Code section 835a's deadly force provisions apply to "peace officers." It would appear that a negligence claim involving nondeadly force does not depend on whether the individual qualifies as a peace officer under the Penal Code. (See Pen. Code, § 835a; see also Pen. Code, § 830 et seq. [defining peace officer].) For cases involving the use of deadly force by a peace officer, use CACI No. 441, *Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements*. (Pen. Code, § 835a.) This instruction and CACI No. 441 may require modification if the jury must decide whether the force used by the defendant was deadly or nondeadly force~~, or if the jury must decide whether the defendant was a peace officer~~.

Include the last bracketed sentence in the first paragraph only if there is evidence the person being arrested or detained used force to resist the officer.

Factors (a), (b), and (c) are often referred to as the "*Graham* factors." (See *Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are to be applied under California negligence law. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr. 3d 1, 207 P.3d 506].) They are not exclusive (see *Glenn v. Wash. County* (9th Cir. 2011) 673 F.3d 864, 872); additional factors may be added if appropriate to the facts of the case. If negligence, civil rights, and battery claims are all involved, the instructions can be combined so as to give the *Graham* factors only once. A sentence may be added to advise the jury that the factors apply to multiple claims.

Factor (d) is bracketed because no reported California state court decision has held that an officer's tactical decisions before using nondeadly force can be actionable negligence. It has been held that liability can arise if the officer's earlier tactical conduct and decisions show, as part of the totality of circumstances, that the ultimate use of deadly force was unreasonable. (*Hayes v. County of San Diego* (2014) 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252].) In this respect, California negligence law differs from the federal standard under the Fourth Amendment. (*Hayes, supra,* 57 Cal.4th at p. 639 ["[T]he state and federal standards are not the same, which we now confirm~~.~~"]; cf. *Vos v. City of Newport Beach* (9th Cir. 2018) 892 F.3d 1024, 1037 ["To determine police liability [under state law negligence], a court applies tort law's 'reasonable care' standard, which is distinct from the Fourth Amendment's

'reasonableness' standard. The Fourth Amendment is narrower and 'plac[es] less emphasis on preshooting conduct.' ".)

Include the final bracketed paragraph only if the defendant claims that the person being arrested resisted arrest or threatened resistance.

Sources and Authority

- Legislative Findings re Use of Force by Law Enforcement. Penal Code section 835a(a).
- Use of Objectively Reasonable Force to Arrest. Penal Code section 835a(b).
- When Peace Officer Need Not Retreat. Penal Code section 835a(d).
- Definitions. Penal Code section 835a(e).
- "There is an abundance of authority permitting a plaintiff to go to the jury on both intentional and negligent tort theories, even though they are inconsistent. It has often been pointed out that there is no prohibition against pleading inconsistent causes of action stated in as many ways as plaintiff believes his evidence will show, and he is entitled to recover if one well pleaded count is supported by the evidence." (*Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 586 [86 Cal.Rptr. 465, 468 P.2d 825].)
- "The evidence relevant to negligence and intentional tort overlaps here and presents a case similar to *Grudt*. … [¶] This court held it was reversible error to exclude the negligence issue from the jury even though plaintiff also had pled intentional tort. The court pointed to the rule that a party may proceed on inconsistent causes of action unless a nonsuit is appropriate." (*Munoz v. Olin* (1979) 24 Cal.3d 629, 635 [156 Cal.Rptr. 727, 596 P.2d 1143].)
- "Consistent with these principles and the factors the high court has identified, the federal court in this case did not instruct the jury to conduct some abstract or nebulous balancing of competing interests. Instead, as noted above, it instructed the jury to determine the reasonableness of the officers' actions in light of 'the totality of the circumstances at the time,' including 'the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or attempting to escape.' The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence law. Moreover, California's civil jury instructions specifically direct the jury, in determining whether police officers used unreasonable force for purposes of tort liability, to consider the same factors that the high court has identified and that the federal court's instructions in this case set forth. (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 1305.) Thus, plaintiffs err in arguing that the federal and state standards of reasonableness differ in that the former involves a fact finder's balancing of competing interests." (*Hernandez, supra,* 46 Cal.4th at p. 514, internal citation omitted.)
- "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of ' "the nature and quality of the intrusion on the individual's Fourth Amendment interests" ' against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or

threat thereof to effect it. Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra,* 490 U.S. at p. 396, internal citations omitted.)

- "The most important of these [*Graham* factors, above] is whether the suspect posed an immediate threat to the officers or others, as measured objectively under the circumstances." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [141 Cal.Rptr.3d 553].)

- "Plaintiff must prove unreasonable force as an element of the tort." (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272 [74 Cal.Rptr.2d 614].)

- " ' "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. … [T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. …" ' In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required." (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527–528 [89 Cal.Rptr.3d 801], internal citations omitted.)

- " '[A]s long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he or she choose the "most reasonable" action or the conduct that is the least likely to cause harm and at the same time the most likely to result in the successful apprehension of a violent suspect, in order to avoid liability for negligence.' " (*Hayes, supra,* 57 Cal.4th at p. 632.)

- "The California Supreme Court did not address whether decisions before non-deadly force can be actionable negligence, but addressed this issue only in the context of 'deadly force.' " (*Mulligan v. Nichols* (9th Cir. 2016) 835 F.3d 983, 991, fn. 7.)

- "[T]here is no right to use force, reasonable or otherwise, to resist an unlawful detention ... ." (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)

- "[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer *unless* excessive force is used or threatened; excessive force in that event triggers the individual's right of self-defense." (*Evans, supra,* 22 Cal.App.4th at p. 331, original italics, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 496

3 Levy et al., California Torts, Ch. 41, *Assault and Battery,* § 41.24 seq. (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.22 (Matthew Bender)

702. Waiver of Right-of-Way

A [driver/pedestrian] who has the right-of-way may give up that right and let ~~[another vehicle/a pedestrian]~~ another person go first. If the other person ~~a [driver/pedestrian]~~ reasonably believes that a [driver/pedestrian] ~~[[another/a] driver/a pedestrian]~~ has given up the right-of-way, then the other person ~~[the driver/the pedestrian]~~ may go first.

New September 2003; Revised May 2020, May 2021

Sources and Authority

- "[I]f one who has the right of way 'conducts himself in such a definite manner as to create a reasonable belief in the mind of another person that the right-of-way has been waived, then such other person is entitled to assume that the right of way has been given up to him ...'." (*Hopkins v. Tye* (1959) 174 Cal.App.2d 431, 433 [344 P.2d 640].)

- "A conscious intentional act of waiver of the right of way by the pedestrian is not required. Whether there is a waiver depends upon the acts of the pedestrian. If they are such that a driver could reasonably believe that the pedestrian did not intend to assert her right of way, a waiver occurs." (*Cohen v. Bay Area Pie Company* (1963) 217 Cal.App.2d 69, 72–73 [31 Cal.Rptr. 426], internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1010, 1011

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.15

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.68[1][c] (Matthew Bender)

1010. Affirmative Defense—Recreation Immunity—Exceptions (Civ. Code, § 846)

[*Name of defendant***] is not responsible for [***name of plaintiff***]'s harm if [***name of defendant***] proves that [***name of plaintiff***]'s harm resulted from [his/her/***nonbinary pronoun/name of person causing injury's***] entry on or use of [***name of defendant***]'s property for a recreational purpose. However, [***name of defendant***] may be still responsible for [***name of plaintiff***]'s harm if [***name of plaintiff***] proves that**

[*Choose one or more of the following three options*:]

[[*name of defendant***] willfully or maliciously failed to protect others from or warn others about a dangerous [condition/use/structure/activity] on the property.]**

[**or**]

[a charge or fee was paid to [*name of defendant/***the owner] for permission to enter the property for a recreational purpose.]**

[**or**]

[[*name of defendant***] expressly invited [***name of plaintiff***] to enter the property ~~for the recreational purpose~~.]**

If you find that [*name of plaintiff***] has proven one or more of these three exceptions to immunity, then you must still decide whether [***name of defendant***] is liable in light of the other instructions that I will give you.**

New September 2003; Revised October 2008, December 2014, May 2017, November 2017, May 2021

Directions for Use

This instruction sets forth the statutory exceptions to recreational immunity. (See Civ. Code, § 846.) In the opening paragraph, if the plaintiff was not the recreational user of the property, insert the name of the person whose conduct on the property is alleged to have caused plaintiff's injury. Immunity extends to injuries to persons who are neither on the property nor engaged in a recreational purpose if the injury was caused by a recreational user of the property. (See *Wang v. Nibbelink* (2016) 4 Cal.App.5th 1, 17 [208 Cal.Rptr.3d 461].)

Choose one or more of the optional exceptions according to the facts. Depending on the facts, the court could instruct that the activity involved was a "recreational purpose" as a matter of law. For a comprehensive list of "recreational purposes," refer to Civil Code section 846.

Whether the term "willful or malicious failure" has a unique meaning under this statute is not entirely clear. One court construing this statute has said that three elements must be present to raise a negligent

act to the level of willful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril. (See *New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689−690 [217 Cal.Rptr. 522].)

For the second exception involving payment of a fee, insert the name of the defendant if the defendant is the landowner. If the defendant is someone who is alleged to have created a dangerous condition on the property other than the landowner, select "the owner." (See *Pacific Gas & Electric Co. v. Superior Court* (2017) 10 Cal.App.5th 563, 566 [216 Cal.Rptr.3d 426].)

Federal courts interpreting California law have addressed whether the "express invitation" must be personal to the user. The Ninth Circuit has held that invitations to the general public do not qualify as "express invitations" within the meaning of section 846. In *Ravell v. United States* (9th Cir. 1994) 22 F.3d 960, 963, the Ninth Circuit held that California law requires a personal invitation for a section 846 invitation, citing *Johnson v. Unocal Corp*. (1993) 21 Cal.App.4th 310, 317 [26 Cal.Rptr.2d 148]. However, the issue has not been definitively resolved by the California Supreme Court.

Sources and Authority

- Recreational Immunity. Civil Code section 846.

- "[A]n owner of ... real property owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give recreational users warning of hazards on the property, unless: (1) the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity; (2) permission to enter for a recreational purpose is granted for a consideration; or (3) the landowner expressly invites rather than merely permits the user to come upon the premises." (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1099–1100 [17 Cal.Rptr.2d 594, 847 P.2d 560].)

- "Generally, whether one has entered property for a recreational purpose within the meaning of the statute is a question of fact, to be determined through a consideration of the 'totality of the facts and circumstances, including ... the prior use of the land. While the plaintiff's subjective intent will not be controlling, it is relevant to show purpose.' " (*Ornelas, supra,* 4 Cal.4th at p. 1102, internal citation omitted.)

- "The phrase 'interest in real property' should not be given a narrow or technical interpretation that would frustrate the Legislature's intention in passing and amending section 846." (*Hubbard v. Brown* (1990) 50 Cal.3d 189, 196 [266 Cal.Rptr. 491, 785 P.2d 1183].)

- "[D]efendants' status as business invitees of the landowner does not satisfy the prerequisite that the party seeking to invoke the immunity provisions of section 846 be '[a]n owner of any estate or any other interest in real property, whether possessory or nonpossessory.' Although such invitee may be entitled to be present on the property during such time as the work is being performed, such presence does not convey any estate or interest in the property." (*Jenson v. Kenneth I. Mullen, Consulting Engineers, Inc.* (1989) 211 Cal.App.3d 653, 658 [259 Cal.Rptr. 552].)

- "Subpart (c) of the third paragraph of section 846 is not limited to injuries to persons on the premises and therefore on its face encompasses persons off-premises such as [plaintiff] and her husband. It is not limited to injuries to recreational participants. Had the Legislature wanted to narrow the third paragraph's immunity to injured recreational users, it could have done so, as it did in the first paragraph." (*Wang, supra,* 4 Cal.App.5th at p. 17.)

- "The concept of willful misconduct has a well-established, well-defined meaning in California law. 'Willful or wanton misconduct is intentional wrongful conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results.' " (*New, supra,* 171 Cal.App.3d at p. 689, internal citations omitted.)

- "Clearly, consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities. There are many amusement facilities in government-owned parks that charge admission fees and a consideration in this or a similar context was intended." (*Moore v. City of Torrance* (1979) 101 Cal.App.3d 66, 72 [166 Cal.Rptr. 192], disapproved of on other grounds in *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 707 [190 Cal.Rptr. 494, 660 P.2d 1168].)

- "We conclude that the consideration exception to recreational use immunity does apply to [defendant] even though [plaintiff]'s fee for recreational access to the campground was not paid to it … . We hold that the payment of consideration in exchange for permission to enter a premises for a recreational purpose abrogates the section 846 immunity of any nonpossessory interest holder who is potentially responsible for the plaintiff's injuries, including a licensee or easement holder who possesses only a limited right to enter and use a premises on specified terms but no right to control third party access to the premises. The contrary interpretation urged by [defendant], making immunity contingent not on payment of consideration but its receipt, is supported neither by the statutory text nor the Legislature's purpose in enacting section 846, which was to encourage free public access to property for recreational use. It also would lead to troubling, anomalous results we do not think the Legislature intended. At bottom, construing this exception as applying only to defendants who receive or benefit from the consideration paid loses sight of the fact that recreational immunity is merely a tool. It is the Legislature's chosen means, not an end unto itself." (*Pacific Gas & Electric Co., supra,* 10 Cal.App.5th at p. 566.)

- "A landowner must gain some immediate and reasonably direct advantage, usually in the form of an entrance fee, before the exception to immunity for consideration under section 846 comes into play." (*Johnson, supra,* 21 Cal.App.4th at p. 317.)

- "The purpose of section 846 is to encourage landowners to permit people to use their property for recreational use without fear of reprisal in the form of lawsuits. The trial court should therefore construe the exceptions for consideration and express invitees narrowly. (*Johnson, supra,* 21 Cal.App.4th at p. 315.)

- "The language of section 846, item (c), which refers to '*any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner*' (italics added) does not say a person must be invited for a *recreational* purpose. The exception instead defines a person who is 'expressly invited' by distinguishing this person from one who is 'merely permitted' to come onto the

land." (*Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 114 [96 Cal.Rptr.2d 394], original italics.)

- "Civil Code section 846's liability shield does not extend to acts of vehicular negligence by a landowner or by the landowner's employee while acting within the course of the employment. We base this conclusion on section 846's plain language. The statutory phrase 'keep the premises safe' is an apt description of the property-based duties underlying premises liability, a liability category that does not include vehicular negligence. Furthermore, a broad construction of that statutory phrase would render superfluous another provision of section 846 shielding landowners from liability for failure to warn recreational users about hazardous conditions or activities on the land." (*Klein v. United States of America* (2010) 50 Cal.4th 68, 72 [112 Cal.Rptr.3d 722, 235 P.3d 42].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1245–1253

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.22 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.30 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.21 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.130 et seq. (Matthew Bender)

~~1~~ California Civil Practice: Torts § 16:34 (Thomson Reuters)

1305A. Battery by ~~Peace~~ Law Enforcement Officer (Nondeadly Force)—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her/***nonbinary pronoun***] by using unreasonable force to [arrest/detain [him/her/***nonbinary pronoun***]/ [,/or] prevent [his/her/***nonbinary pronoun***] escape/ [,/or] overcome [his/her/***nonbinary pronoun***] resistance~~/[*insert other applicable action*]~~]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] intentionally touched [***name of plaintiff***] [or caused [***name of plaintiff***] to be touched];**

2. **That [***name of defendant***] used unreasonable force ~~to [arrest/detain/ [,/or] prevent the escape of/ [,/or] overcome the resistance of~~/*insert other applicable action*~~]~~ on [***name of plaintiff***];**

3. **That [***name of plaintiff***] did not consent to the use of that force;**

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

5. **That [***name of defendant***]'s use of unreasonable force was a substantial factor in causing [***name of plaintiff***]'s harm.**

[A/An] [*insert type of ~~peace~~ officer***] may use reasonable force to [arrest/detain/ [,/or] prevent the escape of/ [,/or] overcome the resistance of] a person when the officer has reasonable cause to believe that that person has committed a crime. [Even if the officer is mistaken, a person being arrested or detained has a duty not to use force to resist the officer unless the officer is using unreasonable force.] ~~[A peace officer may use deadly force only if a reasonable officer in the same situation would have believed, based on the totality of the circumstances known to or perceived by [*name of defendant*] at the time, that it was necessary in defense of human life.]~~**

In deciding whether [*name of defendant***] used unreasonable force, you must consider the totality of the circumstances and determine ~~the~~ what amount of force ~~that would have appeared~~ a reasonable ~~to [a/an]~~ [***insert type of ~~peace~~ officer***] in [***name of defendant***]'s position would have used under the same or similar circumstances. "Totality of the circumstances" means all facts known to the officer at the time, including the conduct of [***name of defendant***] and [***name of plaintiff***] leading up to the use of force. You should consider, among other factors, the following:**

~~(a) The seriousness of the crime at issue;~~

~~(b)~~ **Whether [***name of plaintiff***] reasonably appeared to pose an immediate threat to the safety of [***name of defendant***] or others;**

(b) The seriousness of the crime at issue; and

(c) Whether [*name of plaintiff***] was actively resisting [arrest/detention] or attempting to**

evade [arrest/detention].

[[~~A~~/An~~]~~ [~~*insert type of peace*~~ officer~~]~~ who makes or attempts to make an arrest does not have to retreat or stop because the person being arrested resists or threatens to resist. Tactical repositioning or other deescalation tactics are not retreat. An ~~peace~~ officer does not lose the right to self-defense by using objectively reasonable force to [arrest/detain/ [,/or] prevent escape/ [,/or] overcome resistance.]

New September 2003; Revised December 2012, May 2020, November 2020; Renumbered from CACI No. 1305 and Revised May 2021

Directions for Use

~~Include the first bracketed sentence in cases involving the use of deadly force by a peace officer. Penal Code section 835a will require further modifications to the instruction. For example, if the defendant claims that the use of deadly force was justified because it was necessary in defense of human life, modify the instruction to include the second paragraph in CACI No. 441, *Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements*. Select one or both options from the second paragraph depending on the justification(s) claimed.~~

See CACI No. 1302, *Consent Explained*, and CACI No. 1303, *Invalid Consent*, if there is an issue concerning the plaintiff's consent.

For additional authorities on excessive force, see the Sources and Authority for CACI No. 440, *Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*, CACI No. 441, *Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements*, and CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements*.

By its terms, Penal Code section 835a's deadly force provisions apply to "peace officers." It would appear that a battery claim involving nondeadly force does not depend on whether the individual qualifies as a peace officer under the Penal Code. (See Pen. Code, § 835a; see also Pen. Code, § 830 et seq. [defining peace officer].) For cases involving the use of deadly force by a peace officer, use CACI No. 1305B, *Battery by Peace Officer (Deadly Force)—Essential Factual Elements*. (Pen. Code, § 835a.) This instruction and CACI No. 1305B may require modification if the jury must decide whether the force used by the defendant was deadly or nondeadly.

Include the bracketed sentence in the second paragraph only if the defendant claims that the person being arrested or detained resisted the officer.

Factors (a), (b), and (c) are often referred to as the "*Graham* factors." (See *Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are not exclusive (see *Glenn v. Wash. County* (9th Cir. 2011) 673 F.3d 864, 872); additional factors may be added if appropriate to the facts of the case.

Include the final bracketed paragraph only if the defendant claims that the person being arrested resisted arrest or threatened resistance.

Sources and Authority

- Use of Objectively Reasonable Force to Arrest. Penal Code section 835a.

- Duty to Submit to Arrest. Penal Code section 834a.

- "Plaintiff must prove unreasonable force as an element of the tort." (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272 [74 Cal.Rptr.2d 614].)

- " ' "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. … [T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. …" ' In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required." (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527–528 [89 Cal.Rptr.3d 801], internal citations omitted.)

- ~~"A police officer's use of deadly force is reasonable if ' " 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.' …" …' " (*Brown, supra*, 171 Cal.App.4th at p. 528.)~~

- "[T]here is no right to use force, reasonable or otherwise, to resist an unlawful detention ... ." (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)

- "[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer *unless* excessive force is used or threatened; excessive force in that event triggers the individual's right of self-defense." (*Evans, supra,* 22 Cal.App.4th at p. 331, original italics, internal citation omitted.)

- "Consistent with these principles and the factors the high court has identified, the federal court in this case did not instruct the jury to conduct some abstract or nebulous balancing of competing interests. Instead, as noted above, it instructed the jury to determine the reasonableness of the officers' actions in light of 'the totality of the circumstances at the time,' including 'the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or attempting to escape.' The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence law. Moreover, California's civil jury instructions specifically direct the jury, in determining whether police officers used unreasonable force for purposes of tort liability, to consider the same factors that the high court has identified and that the federal court's instructions in this case set forth. (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 1305.) Thus, plaintiffs err in arguing that the federal and state standards of reasonableness differ in that the former involves a fact finder's balancing of competing interests." (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr.3d 1, 207 P.3d 506], internal citation omitted.)

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2020) §§ 13-14

4 Witkin & Epstein, California Criminal Law (4th ed. 2020) § 39

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 496

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.24 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, §§ 58.22, 58.61, 58.92 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.20 et seq. (Matthew Bender)

California Civil Practice: Torts § 12:22 (Thomson Reuters)

1305B. Battery by Peace Officer (Deadly Force)—Essential Factual Elements

A peace officer may use deadly force only when necessary in defense of human life. [*Name of plaintiff***] claims that [***name of defendant***] unnecessarily used deadly force on [him/her/***nonbinary pronoun/*name of decedent***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. That [*name of defendant***] intentionally touched [***name of plaintiff/decedent***] [or caused [***name of plaintiff/decedent***] to be touched];**

2. That [*name of defendant***] used deadly force on [***name of plaintiff/decedent***];**

3. That [*name of defendant***]'s use of deadly force was not necessary to defend human life;**

4. That [*name of plaintiff/decedent***] was [harmed/killed]; and**

5. That [*name of defendant***]'s use of deadly force was a substantial factor in causing [***name of plaintiff/decedent***]'s [harm/death].**

[*Name of defendant***]'s use of deadly force was necessary to defend human life only if a reasonable officer in the same situation would have believed, based on the totality of the circumstances known to or perceived by [***name of defendant***] at the time, that deadly force was necessary [***insert one or both of the following:***]**

[to defend against an imminent threat of death or serious bodily harm to [*name of defendant***] [or] [to another person][; or/.]]**

[to apprehend a fleeing person for a felony, when all of the following conditions are present:

i. The felony threatened or resulted in death or serious bodily injury to another;

ii. [*Name of defendant***] reasonably believed that the person fleeing would cause death or serious bodily injury to another unless immediately apprehended; and**

iii. If practical under the circumstances, [*name of defendant***] made reasonable efforts to identify [himself/herself/***nonbinary pronoun***] as a peace officer and to warn that deadly force would be used, unless the officer had objectively reasonable grounds to believe the person is aware of those facts.]**

[A peace officer must not use deadly force against a person based only on the danger that person poses to [himself/herself/*nonbinary pronoun***], if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person.]**

[A person being [arrested/detained] has a duty not to use force to resist the peace officer unless the peace officer is using unreasonable force.]

"Deadly force" means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm.

A threat of death or serious bodily injury is "imminent" when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.

"Totality of the circumstances" means all facts known to the peace officer at the time, including the conduct of [*name of defendant***] and [***name of plaintiff/decedent***] leading up to the use of deadly force. In determining whether [***name of defendant***]'s use of deadly force was necessary in defense of human life, you must consider [***name of defendant***]'s tactical conduct and decisions before using deadly force on [***name of plaintiff/decedent***] and whether [***name of defendant***] used other available resources and techniques as [an] alternative[s] to deadly force, if it was reasonably safe and feasible to do so. [You must also consider whether [***name of defendant***] knew or had reason to know that the person against whom [he/she/***nonbinary pronoun***] used force was suffering from a physical, mental health, developmental, or intellectual disability [that may have affected the person's ability to understand or comply with commands from the officer[s]].]**

[A peace officer who makes or attempts to make an arrest does not have to retreat or stop because the person being arrested is resisting or threatening to resist. Tactical repositioning or other deescalation tactics are not retreat. A peace officer does not lose the right to self-defense by use of objectively reasonable force to effect the arrest or to prevent escape or to overcome resistance. A peace officer does, however, have a duty to use reasonable tactical repositioning or other deescalation tactics.]

New May 2021

Directions for Use

Use this instruction for a claim of battery using deadly force by a peace officer. If a plaintiff alleges battery by both deadly and nondeadly force, or if the jury must decide whether the amount of force used was deadly or nondeadly, this instruction may be used along with the CACI No. 1305A, *Battery by Law Enforcement Officer (Nondeadly Force)—Essential Factual Elements*.

By its terms, Penal Code section 835a's deadly force provisions apply to "peace officers," a term defined by the Penal Code. (See Pen. Code, § 835a; see also Pen. Code, § 830 et seq. [defining peace officer].) That the defendant is a peace officer may be stipulated to or decided by the judge as a matter of law. In such a case, the judge must instruct the jury that the defendant was a peace officer. If there are contested issues of fact on this issue, include the specific factual findings necessary for the jury to determine whether the defendant was acting as a peace officer.

In the paragraph after the essential factual elements, select either or both bracketed options depending on

the asserted justification(s) for the use of deadly force.

"Deadly force" means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm. (Pen. Code, § 835a(e)(1).) Note that this definition does not require that the encounter result in the death of the person against whom the force was used. If there is no dispute about the use of deadly force, the court should instruct the jury that deadly force was used.

In the "totality of the circumstances" paragraph, do not include the final optional sentence or its optional clause unless there is evidence of a disability or evidence of the person's ability to comprehend or comply with the officer's commands.

Include the final bracketed paragraph only if the defendant claims that the person being arrested resisted arrest or threatened resistance.

In a wrongful death or survival action, use the name of the decedent victim where applicable and further modify the instruction as appropriate.

Sources and Authority

- Legislative Findings re Use of Force by Law Enforcement. Penal Code section 835a(a).
- When Use of Deadly Force is Justified. Penal Code section 835a(c).
- When Peace Officer Need Not Retreat. Penal Code section 835a(d).
- Definitions. Penal Code section 835a(e).
- "Peace Officer" Defined. Penal Code section 830 et seq.
- "[T]here is no right to use force, reasonable or otherwise, to resist an unlawful detention ... ." (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)
- "[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer *unless* excessive force is used or threatened; excessive force in that event triggers the individual's right of self-defense." (*Evans, supra,* 22 Cal.App.4th at p. 331, original italics, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 427, 993

3 Levy et al., California Torts, Ch. 41, *Assault and Battery,* § 41.24 seq. (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery,* § 58.22 (Matthew Bender)

California Civil Practice: Torts § 12:22 (Thomson Reuters)

VF-1303A. Battery by ~~Peace~~ Law Enforcement Officer (Nondeadly Force)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] intentionally touch [***name of plaintiff***] [or cause [***name of plaintiff***] to be touched]?**
   ____ 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***] use unreasonable force ~~in [arresting/preventing the escape of/overcoming the resistance of/[***insert other applicable action***]]~~ on [***name of plaintiff***]?**
   ____ Yes ____ No

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

3. **Did [***name of plaintiff***] consent to the use of that force?**
   ____ Yes ____ No

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

4. **Was [***name of defendant***]'s use of unreasonable force a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ Yes ____ No

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

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

   [a. Past economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**
[other past economic loss	**$ _____]**

   Total Past Economic Damages: $ _____]

   [b. Future economic loss

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, December 2016; Renumbered from VF-1303 and Revised May 2021

Directions for Use

This verdict form is based on CACI No. 1305A, *Battery by ~~Peace~~ Law Enforcement Officer (Nondeadly Force)—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 specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If

different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] intentionally touch [***name of plaintiff/decedent***] [or cause [***name of plaintiff/decedent***] to be touched]?**
____ 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***] use deadly force that was not necessary in defense of human life on [***name of plaintiff/decedent***]?**
____ 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. Was [*name of defendant***]'s use of deadly force a substantial factor in causing [harm/death] to [***name of plaintiff/decedent***]?**
____ 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. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**
[other past economic loss	**$ _____]**

Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**
[other future economic loss	**$ _____]**

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New May 2021

Directions for Use

This verdict form is based on CACI No. 1305B, *Battery by Peace Officer (Deadly Force)—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 specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

2303. Affirmative Defense—Insurance Policy Exclusion

[*Name of defendant***] claims that [***name of plaintiff***]'s [liability/loss] is not covered because it is specifically excluded under the policy. To succeed, [***name of defendant***] must prove that [***name of plaintiff***]'s [liability/loss] [arises out of/is based on/occurred because of] [***state exclusion under the policy***]. This exclusion applies if [***set forth disputed factual issues that jury must determine***].**

New September 2003; Revised October 2008, June 2014, May 2021

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

Give this instruction if the court has determined that an exclusionary clause in an insurance policy might apply to foreclose coverage, but the applicability turns on a question of fact. Identify with specificity the disputed factual issues the jury must resolve to determine whether the exclusion applies.

This instruction can be used in cases involving either a third party liability or a first party loss policy. Use CACI No. 2306, *Covered and Excluded Risks—Predominant Cause of Loss*, rather than this instruction, if a first party loss policy is involved and there is evidence that a loss was caused by both covered and excluded perils.

Sources and Authority

- "The burden of bringing itself within any exculpatory clause contained in the policy is on the insurer." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 880 [151 Cal.Rptr. 285, 587 P.2d 1098].)
- "The burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage. And, once an insured has made this showing, the burden is on the insurer to prove the claim is specifically excluded." (*Aydin Corp. v. First State Insurance Co.* (1998) 18 Cal.4th 1183, 1188 [77 Cal.Rptr.2d 537, 959 P.2d 1213].)
- Once the insurer proves that the specific exclusion applies, the insured "should bear the burden of *establishing* the exception because 'its effect is to reinstate coverage that the exclusionary language otherwise bars.' " (*Aydin Corp.*, *supra*, 18 Cal.4th at p. 1188.)
- "The interpretation of an exclusionary clause is an issue of law subject to this court's independent determination." (*Marquez Knolls Property Owners Assn., Inc. v. Executive Risk Indemnity, Inc.* (2007) 153 Cal.App.4th 228, 233 [62 Cal.Rptr.3d 510].)
- "[T]he question of what caused the loss is generally a question of fact, and the loss is not covered if the covered risk was only a remote cause of the loss, or the excluded risk was the efficient proximate,

or predominate cause." (*State Farm Fire & Casualty Co. v. Von Der Lieth* (1991) 54 Cal.3d 1123, 1131−1132 [2 Cal.Rptr.2d 183, 820 P.2d 285].)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Insurance, §§ 85, 88

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 15-I, *Trial*, ¶¶ 15:911–15:912 (The Rutter Group)

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Analyzing Coverage: Reading and Interpreting Insurance Policies, § 3.63

4 California Insurance Law and Practice, Ch. 41, *Liability Insurance in General*, § 41.11 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.502 (Matthew Bender)

VF-2506A. Work Environment Harassment—Conduct Directed at Plaintiff—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***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***] subjected to harassing conduct because [he/she/***nonbinary pronoun***] was [***protected status, e.g., a woman***]?**
   ____ 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. **Was the harassment severe or pervasive?**
   ____ 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. **Would a reasonable [***e.g., woman***] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ 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. **Did [***name of plaintiff***] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ Yes ____ No

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

6. Did [*name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] know or should [he/she/***nonbinary pronoun***/it/they] have known of the harassing conduct?**

____ Yes ____ No

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

7. Did [*name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] fail to take immediate and appropriate corrective action?**

____ Yes ____ No

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

8. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff***]?**

____ Yes ____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

[a. Past economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]

Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2506 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021

Directions for Use

This verdict form is based on CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

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.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521A. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

Modify question 2 if the plaintiff was not actually a member of the protected class, but alleges harassment because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

VF-2506B. Work Environment Harassment—Conduct Directed at Others—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***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***] personally witness harassing conduct that took place in [his/her/***nonbinary pronoun***] immediate work environment?**
   ____ 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. **Was the harassment severe or pervasive?**
   ____ 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. **Would a reasonable [***describe member of protected group, e.g.,* **woman] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ 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. **Did [***name of plaintiff***] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [***e.g., women***]?**
   ____ Yes ____ No

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

6. Did [*name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] know or should [he/she/***nonbinary pronoun***/it/they] have known of the harassing conduct?**

____ Yes ____ No

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

7. Did [*name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] fail to take immediate and appropriate corrective action?**

____ Yes ____ No

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

8. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff***]?**

____ Yes ____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2506 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021

Directions for Use

This verdict form is based on CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.*

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.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521B. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

VF-2506C. Work Environment Harassment—Sexual Favoritism—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***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 there sexual favoritism in the work environment?**
   ____ 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. **Was the sexual favoritism severe or pervasive?**
   ____ 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. **Would a reasonable [***describe member of protected group, e.g.,* **woman] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ 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. **Did [***name of plaintiff***] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism?**
   ____ Yes ____ No

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

6. **Did [***name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents]**

know or should [he/she/*nonbinary pronoun*/it/they] have known of the sexual favoritism?
____ Yes ____ No

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

7. Did [*name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] fail to take immediate and appropriate corrective action?**
____ Yes ____ No

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

8. Was the sexual favoritism a substantial factor in causing harm to [*name of plaintiff***]?**
____ Yes ____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

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

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

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

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2506 December 2007; Revised December 2010, December 2016, May 2020, May 2021

Directions for Use

This verdict form is based on CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*.

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.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521C. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

VF-2507A. Work Environment Harassment—Conduct Directed at Plaintiff—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of employer***]?**
   ____ Yes ____ No

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

2. **Was [***name of plaintiff***] subjected to harassing conduct because [he/she/***nonbinary pronoun***] was [***protected status, e.g., a woman***]?**
   ____ 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. **Was the harassment severe or pervasive?**
   ____ 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. **Would a reasonable [***e.g., woman***] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ 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. **Did [***name of plaintiff***] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ Yes ____ No

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

6. Did [*name of defendant***] [participate in/assist/ [or] encourage] the harassing conduct?**
____ Yes ____ No

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

7. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff***]?**
____ Yes ____ No

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

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

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

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021

Directions for Use

This verdict form is based on CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.*

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.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2522A.

Modify question 2 if the plaintiff was not actually a member of the protected class, but alleges harassment because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

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

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

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

VF-2507B. Work Environment Harassment—Conduct Directed at Others—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of employer***]?**
   ____ Yes ____ No

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

2. **Did [***name of plaintiff***] personally witness harassing conduct that took place in [his/her/***nonbinary pronoun***] immediate work environment?**
   ____ 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. **Was the harassment severe or pervasive?**
   ____ 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. **Would a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ 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. **Did [***name of plaintiff***] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [***e.g., women***]?**
   ____ Yes ____ No

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

6. Did [*name of defendant***] [participate in/assist/ [or] encourage] the harassing conduct?**
____ Yes ____ No

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

7. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff***]?**
____ Yes ____ No

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

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

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

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

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

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

TOTAL $ _____

Signed: _____

Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021

Directions for Use

This verdict form is based on CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*.

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.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*.

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

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

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

VF-2507C. Work Environment Harassment—Sexual Favoritism—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of employer***]?**
   ____ Yes ____ No

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

2. **Was there sexual favoritism in the work environment?**
   ____ 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. **Was the sexual favoritism severe or pervasive?**
   ____ 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. **Would a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ 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. **Did [***name of plaintiff***] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism?**
   ____ Yes ____ No

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

6. **Did [***name of defendant***] [participate in/assist/ [or] encourage] the sexual favoritism?**

____ Yes ____ No

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

7. Was the sexual favoritism a substantial factor in causing harm to [*name of plaintiff***]?**
____ Yes ____ No

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

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

[a. Past economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**
[other past economic loss	**$ _____]**

Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**
[other future economic loss	**$ _____]**

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, December 2014, December 2016, May 2020, May 2021

Directions for Use

This verdict form is based on CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant*.

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.

Relationships other than employer/employee can be substituted in question 1, as in element 1 in CACI No. 2521C. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

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

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

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

2600. Violation of CFRA Rights—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [refused to grant [him/her/***nonbinary pronoun***] [family care/medical] leave] [refused to return [him/her/***nonbinary pronoun***] to the same or a comparable job when [his/her/***nonbinary pronoun***] [family care/medical] leave ended] [***other violation of CFRA rights***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was eligible for [family care/medical] leave;**

2. **That [***name of plaintiff***] [requested/took] leave [***insert one of the following:***]**

   [for the birth of [*name of plaintiff***]'s child or bonding with the child;]**

   [for the placement of a child with [*name of plaintiff***] for adoption or foster care;]**

   [to care for [*name of plaintiff***]'s [child/parent/spouse/domestic partner /grandparent/grandchild/sibling] who had a serious health condition;]**

   [for [*name of plaintiff***]'s own serious health condition that made [him/her/***nonbinary pronoun***] unable to perform the functions of [his/her/***nonbinary pronoun***] job with [***name of defendant***];]**

   [for [*specify qualifying military exigency related to covered active duty or call to covered active duty of a spouse, domestic partner, child, or parent, e.g., [name of plaintiff]'s spouse's upcoming military deployment on short notice***];]**

3. **That [***name of plaintiff***] provided reasonable notice to [***name of defendant***] of [his/her/***nonbinary pronoun***] need for [family care/medical] leave, including its expected timing and length. [If [***name of defendant***] notified [his/her/***nonbinary pronoun***/its] employees that 30 days' advance notice was required before the leave was to begin, then [***name of plaintiff***] must show that [he/she/***nonbinary pronoun***] gave that notice or, if 30 days' notice was not reasonably possible under the circumstances, that [he/she/***nonbinary pronoun***] gave notice as soon as possible];**

4. **That [***name of defendant***] [refused to grant [***name of plaintiff***]'s request for [family care/medical] leave/refused to return [***name of plaintiff***] to the same or a comparable job when [his/her/***nonbinary pronoun***] [family care/medical] leave ended/***other violation of CFRA rights***];**

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

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

New September 2003; Revised October 2008, May 2021

Directions for Use

This instruction is intended for use when an employee claims violation of the CFRA (Gov. Code, § 12945.1 et seq.). In addition to a qualifying employer's refusal to grant CFRA leave, CFRA violations include failure to provide benefits as required by CFRA and loss of seniority.

The second-to-last bracketed option in element 2 does not include leave taken for disability on account of pregnancy, childbirth, or related medical conditions. (Gov. Code, § 12945.2(b)(4)(C).) If there is a dispute concerning the existence of a "serious health condition," the court must instruct the jury as to the meaning of this term. (See Gov. Code, § 12945.2~~(c)(8)~~(b)(12).) If there is no dispute concerning the relevant individual's condition qualifying as a "serious health condition," it is appropriate for the judge to instruct the jury that the condition qualifies as a "serious health condition."

The last bracketed option in element 2 requires a qualifying exigency for military family leave related to the covered active duty or call to covered active duty of the employee's spouse, domestic partner, child, or parent in the Armed Forces of the United States. That phrase is defined in the Unemployment Insurance Code. (See Unemployment Ins. Code, § 3302.2.)

Give the bracketed sentence under element 3 only if the facts involve an expected birth, placement for adoption, or planned medical treatment, and there is evidence that the employer required 30 days' advance notice of leave. (See Cal. Code Regs., tit. 2, § 11091(a)(2).)

Sources and Authority

- California Family Rights Act. Government Code section 12945.2.
- "Employer" Defined. Government Code section 12945.2(b)(3).
- "Serious Health Condition" Defined. Government Code section 12945.2(b)(12).
- "~~The CFRA entitles eligible employees to take up to 12 unpaid workweeks in a 12-month period for family care and medical leave to care for their children, parents, or spouses, or to recover from their own serious health condition.~~ An employee who takes CFRA leave is guaranteed that taking such leave will not result in a loss of job security or other adverse employment actions. Upon an employee's timely return from CFRA leave, an employer must generally restore the employee to the same or a comparable position. An employer is not required to reinstate an employee who cannot perform her job duties after the expiration of a protected medical leave." (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 487 [130 Cal.Rptr.3d 350], footnote and internal citations omitted, superseded on other grounds by statute.)
- "A CFRA interference claim ' "consists of the following elements: (1) the employee's entitlement to CFRA leave rights; and (2) the employer's interference with or denial of those rights." ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 601 [210 Cal.Rptr.3d 59].)

- "[C]ourts have distinguished between two theories of recovery under the CFRA and the FMLA. 'Interference' claims prevent employers from wrongly interfering with employees' approved leaves of absence, and 'retaliation' or 'discrimination' claims prevent employers from terminating or otherwise taking action against employees because they exercise those rights." (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 920 [182 Cal. Rptr. 3d 644, 341 P.3d 438].)

- "An interference claim under CFRA does not invoke the burden shifting analysis of the *McDonnell Douglas* test. Rather, such a claim requires only that the employer deny the employee's entitlement to CFRA-qualifying leave. A CFRA interference claim 'consists of the following elements: (1) the employee's entitlement to CFRA leave rights; and (2) the employer's interference with or denial of those rights.' " (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 250 [206 Cal.Rptr.3d 841], internal citations omitted.)

- "The right to reinstatement is unwaivable but not unlimited." (*Richey, supra,* 60 Cal.4th at p. 919.)

- "It is not enough that [plaintiff's] mother had a serious health condition. [Plaintiff's] participation to provide care for her mother had to be 'warranted' during a 'period of treatment or supervision ... .' " (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 995 [94 Cal.Rptr.2d 643], internal citation and footnote omitted.)

- "[T]he relevant inquiry is whether a serious health condition made [plaintiff] unable to do her job at defendant's hospital, not her ability to do her essential job functions 'generally' … ." (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 214 [74 Cal.Rptr.3d 570, 180 P.3d 321].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1060, 1061

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-A, *Overview Of Key Statutes*, ¶ 12:32 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:146, 12:390, 12:421, 12:857, 12:1201, 12:1300 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Other Employee Rights Statutes, §§ 4.18–4.20

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, §§ 8.25[2], 8.30[1], [2], 8.31[2], 8.32 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][a], [b] (Matthew Bender)

California Civil Practice: Employment Litigation § 5:40 (Thomson Reuters)

2601. Eligibility

To show that [he/she/*nonbinary pronoun*] was eligible for [family care/medical] leave, [*name of plaintiff*] must prove all of the following:

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

2. ~~**That [*name of defendant*] employed 50 or more employees within 75 miles of [*name of plaintiff*]'s workplace;**~~**That [*name of defendant*] directly employed five or more employees for a wage or salary;**

3. **That at the time [*name of plaintiff*] [requested/began] leave, [he/she/*nonbinary pronoun*] had more than 12 months of service with [*name of defendant*] and had worked at least 1,250 hours for [*name of defendant*] during the previous 12 months; and**

4. **That at the time [*name of plaintiff*] [requested/began] leave [*name of plaintiff*] had taken no more than 12 weeks of family care or medical leave in the 12-month period [*define period*].**

New September 2003; Revised June 2011, May 2021

The CFRA applies to employers who directly employ five or more employees (and to the state and any political or civil subdivision of the state and cities of any size). (Gov. Code, § 12945.2(b)(3).) Include element 2 only if there is a factual dispute about the number of people the defendant directly employed for a wage or salary.

Sources and Authority

- Right to Family Care and Medical Leave. Government Code section 12945.2(a).
- ~~"Employer" Defined. Government Code section 12945.2(c)(2).~~
- ~~Limitation on Scope. Government Code section 12945.2(b).~~

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-A, *Overview of Key Leave Laws*, ¶ 12:32 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family and Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶, 12:87, 12:125, 12:390, 12:421, 12:1201, 12:1300 (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][c] (Matthew Bender)

2602. Reasonable Notice by Employee of Need for CFRA Leave

For notice of the need for leave to be reasonable, [*name of plaintiff*] must make [*name of defendant*] aware that [he/she/*nonbinary pronoun*] needs [family care/medical] leave, when the leave will begin, and how long it is expected to last. The notice can be verbal or in writing and does not need to mention the law. An employer cannot require disclosure of any medical diagnosis, but should ask for information necessary to decide whether the employee is entitled to leave.

New September 2003; Revised May 2021

Sources and Authority

- Reasonable Notice Required. Government Code section 12945.2~~(h)~~(g).
- Additional Requirements. Government Code section 12945.2(h)–(j).
- CFRA Notice Requirements. ~~Title 2~~ California Code of Regulations, title 2, section 11091.
- "In enacting CFRA 'the Legislature expressly delegated to [California's Fair Employment and Housing] Commission the task of "adopt[ing] a regulation specifying the elements of a reasonable request" for CFRA leave.' The regulation adopted by the commission provides, in part, to request CFRA leave an employee 'shall provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under CFRA or FMLA, or even mention CFRA or FMLA, to meet the notice requirement; however, the employee must state the reason the leave is needed, such as, for example, the expected birth of a child or for medical treatment. … The employer should inquire further of the employee if necessary to determine whether the employee is requesting CFRA leave and to obtain necessary information concerning the leave (i.e., commencement date, expected duration, and other permissible information).' The regulation further provides, 'Under all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as CFRA or CFRA/FMLA qualifying, based on information provided by the employee … , and to give notice of the designation to the employee.' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 602–603 [210 Cal.Rptr.3d 59], quoting Cal. Code Regs., tit. 2, § 11091(a)(1), internal citations omitted.)
- "The employee must 'provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA-qualifying leave, and the anticipated timing and duration of the leave. The employer in turn is charged with responding to the leave request "as soon as practicable and in any event no later than ten calendar days after receiving the request.' " (*Olofsson v. Mission Linen Supply* (2012) 211 Cal.App.4th 1236, 1241 [150 Cal.Rptr.3d 446], internal citations omitted.)
- "[Cal. Code Regs., tit. 2, § 11091(a)(1)] appears to presume the existence of circumstances in which an employee is able to provide an employer with notice of the need for leave. Indeed, the regulation permits employers to 'require that employees provide at least 30 days' advance notice before CFRA

leave is to begin *if the need for the leave is foreseeable* based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or a family member.' However, the regulations provide that this 30-day general rule is inapplicable when the need for medical leave is not foreseeable: 'If 30 days' notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, *notice must be given as soon as practicable*.' Further, '[a]n employer shall not deny a CFRA leave, the need for which is an emergency or is otherwise unforeseeable, on the basis that the employee did not provide advance notice of the need for the leave, *so long as the employee provided notice to the employer as soon as practicable*.' " (*Bareno v. San Diego Community College Dist.* (2017) 7 Cal.App.5th 546, 563 [212 Cal.Rptr.3d 682], original italics; see Cal. Code Regs.. tit. 2, § 11091(a)(2)~~–(a)~~(4).)

- "When viewed as a whole, it is clear that CFRA and its implementing regulations envision a scheme in which employees are provided reasonable time within which to request leave for a qualifying purpose, and to provide the supporting certification to demonstrate that the requested leave was, in fact, for a qualifying purpose, particularly when the need for leave is not foreseeable or when circumstances have changed subsequent to an initial request for leave." (*Bareno, supra,* 7 Cal.App.5th at p. 565.)

- "[A]n employer bears a burden, under CFRA, to inquire further if an employee presents the employer with a CFRA-qualifying reason for requesting leave." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 249 [206 Cal.Rptr.3d 841].)

- "Whether notice is sufficient under CFRA is a question of fact." (*Soria, supra,* 5 Cal.App.5th at p. 603.)

- "That plaintiff called in sick was, by itself, insufficient to put [defendant] on notice that he needed CFRA leave for a serious health condition." (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1255 [82 Cal.Rptr.3d 440].)

- "The regulations thus expressly contemplate that an employee may be out on CFRA-protected leave *prior* to providing medical certification regarding that leave." (*Bareno, supra,* 7 Cal.App.5th at p. 568, original italics; see Cal. Code Regs., tit. 2, § 11091(b)(3).)

- "CFRA establishes that a certification issued by an employee's health provider is sufficient if it includes '[t]he date on which the serious health condition commenced'; '[t]he probable duration of the condition'; and '[a] statement that, due to the serious health condition, the employee is unable to perform the function of his or her position.' " (*Bareno, supra,* 7 Cal.App.5th at pp. 569–570.)

- "[A]n employee need not share his or her medical condition with the employer, and a certification need not include such information to be considered sufficient: 'For medical leave for the employee's own serious health condition, this certification *need not,* but may, at the employee's option, identify the serious health condition involved.' " (*Bareno, supra,* 7 Cal.App.5th at p. 570, fn. 18, original italics.)

- "Under the CFRA regulations, the employer has a duty to respond to the leave request within 10 days,

but clearly and for good reason the law does not specify that the response must be tantamount to approval or denial." (*Olofsson, supra,* 211 Cal.App.4th at p. 1249.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA),* ¶¶ 12:852–12:853, 12:855–12:857 (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* § 115.32[6][e] (Matthew Bender)

2603. "Comparable Job" Explained

"Comparable job" means a job that is the same or close to the employee's former job in responsibilities, duties, pay, benefits, working conditions, and schedule. It must be at the same location or a ~~nearby worksite~~ similar geographic location.

New September 2003; Revised May 2021

Directions for Use

Give this instruction only if comparable job is an issue under the plaintiff's CFRA claim.

Sources and Authority

- Comparable Position. Government Code section 12945.2~~(c)(4)~~(b)(5).
- Comparable Position. Cal. Code Regs., tit. 2, § 11087(g).
- "[W]hile we will accord great weight and respect to the [Fair Employment and Housing Commission]'s regulations that apply to the necessity for leave, along with any applicable federal FMLA regulations that the Commission incorporated by reference, we still retain ultimate responsibility for construing [CFRA]." (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 994-995 [94 Cal.Rptr.2d 643].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family and Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:1138–12:1139, 12:1150, 12:1154–12:1156 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.30[1]–[2] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][h] (Matthew Bender)

2613. Affirmative Defense—Key Employee

Revoked May 2021. See California Family Rights Act (Sen. Bill 1383; Stats. 2020, ch. 86), amending, repealing, and adding Government Code section 12945.2.

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] was not required to return [***name of plaintiff***] to work in the same or a comparable job following [family care/medical] leave because [he/she/***nonbinary pronoun***] was employed in a highly paid, essential position. To succeed on this claim, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] was a salaried employee and among the highest paid 10 percent of [***name of defendant***]'s employees [employed within 75 miles of [his/her/***nonbinary pronoun***] workplace];**

2. **That [***name of defendant***]'s refusal to return [***name of plaintiff***] to work in the same or a comparable job was necessary to prevent severe economic injury to [***name of defendant***]'s [business] operations; [and]**

3. **That when [***name of defendant***] decided that [***name of plaintiff***] would not be allowed to return to [his/her/***nonbinary pronoun***] job or a comparable position, [***name of defendant***] notified [***name of plaintiff***] of that decision; [and]**

[4. That [*name of defendant***] gave [***name of plaintiff***] a reasonable opportunity to return to work after notifying [***name of plaintiff***] of [his/her/***nonbinary pronoun***/its] decision.]**

New September 2003

Directions for Use

Element 4 is applicable only when the employer notifies the employee of its decision to refuse to reinstate plaintiff after family care or medical leave has commenced.

Sources and Authority

- Limitation on Right to Reinstatement: Key Employee. Government Code section 12945.2(r).

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family and Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:1167–12:1169, 12:1171, 12:1174 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.30[5] (Matthew Bender)

2620. CFRA Rights Retaliation—Essential Factual Elements (Gov. Code, § 12945.2~~(l)~~(k))

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her/***nonbinary pronoun***] for [[requesting/taking] [family care/medical] leave/[***other protected activity***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was eligible for [family care/medical] leave;**

2. **That [***name of plaintiff***] [[requested/took] [family care/medical] leave/[***other protected activity***]];**

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

4. **That [***name of plaintiff***]'s [[request for/taking of] [family care/medical] leave/[***other protected activity***]] was a substantial motivating reason for [discharging/[***other adverse employment action***]] [him/her/***nonbinary pronoun***];**

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

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

New September 2003; Revised December 2012, June 2013, May 2018, May 2021

Directions for Use

Use this instruction in cases of alleged retaliation for an employee's exercise of rights granted by the California Family Rights Act (CFRA). (See Gov. Code, § 12945.2~~(l)~~(k).) The instruction assumes that the defendant is plaintiff's present or former employer, and therefore it must be modified if the defendant is a prospective employer or other person.

~~This instruction may also be given for a claim of retaliation under the New Parent Leave Act.~~ The "other protected activity" option of the opening paragraph and elements 2 and 4 could be providing information or testimony in an inquiry or a proceeding related to CFRA rights. (Gov. Code, § 12945.2(k). ~~may be used to assert what is protected from retaliation under this act. (See Gov. Code, § 12945.6(g), (h).) In element 1, use "new parent" leave instead of "family care" or "medical."~~

~~Both statutes~~ The CFRA reaches a broad range of adverse employment actions short of actual discharge. (See Gov. Code, §§ 12945.2~~(l)~~(k)~~, 12945.6(g)~~.) Element 3 may be modified to allege constructive discharge or adverse acts other than actual discharge. See CACI No. 2509, *"Adverse Employment Action" Explained*, and CACI No. 2510, *"Constructive Discharge" Explained*, for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

Element 4 uses the term "substantial motivating reason" to express both intent and causation between the employee's exercise of a CFRA right and the adverse employment action. "Substantial motivating reason" has been held to be the appropriate standard under the discrimination prohibitions of the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether this standard applies to CFRA retaliation cases has not been addressed by the courts.

Sources and Authority

- Retaliation Prohibited Under California Family Rights Act. Government Code section 12945.2~~(l)~~(k), ~~(t)~~(q).

- ~~Retaliation Prohibited Under New Parent Leave Act. Government Code section 12945.6(g), (h).~~

- Retaliation Prohibited Under Fair Employment and Housing Act. Government Code section 12940(h).

- "The elements of a cause of action for retaliation in violation of CFRA are " '(1) the defendant was an employer covered by CFRA; (2) the plaintiff was an employee eligible to take CFRA [leave]; (3) the plaintiff exercised her right to take leave for a qualifying CFRA purpose; and (4) the plaintiff suffered an adverse employment action, such as termination, fine, or suspension, because of her exercise of her right to CFRA [leave]." ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 604 [210 Cal.Rptr.3d 59].)

- "Similar to causes of action under FEHA, the *McDonnell Douglas* burden shifting analysis applies to retaliation claims under CFRA." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 248 [206 Cal.Rptr.3d 841].)

- " 'When an adverse employment action "follows hard on the heels of protected activity, the timing often is strongly suggestive of retaliation." ' " (*Bareno v. San Diego Community College Dist.* (2017) 7 Cal.App.5th 546, 571 [212 Cal.Rptr.3d 682].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1058–1060

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:1300, 12:1301 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Other Employee Rights Statutes, §§ 4.18–4.20

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.32 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §

115.37[3][c] (Matthew Bender)

2630. Violation of New Parent Leave Act—Essential Factual Elements (Gov. Gode, § 12945.6)

Revoked May 2021. See California Family Rights Act (Sen. Bill 1383; Stats. 2020, ch. 86), amending and repealing Government Code section 12945.6.

[*Name of plaintiff***] claims that [***name of defendant***] refused to [grant [him/her***/nonbinary pronoun***] parental leave/return [him/her***/nonbinary pronoun***] to the same or a comparable job when [his/her***/nonbinary pronoun***] parental leave ended]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] employs at least 20 employees within 75 miles of the site where [***name of plaintiff***] worked;**

2. **That [***name of plaintiff***] worked for [***name of defendant***] for more than a year, and for at least 1,250 hours during the previous 12 months;**

3. **That [***name of plaintiff***] requested leave to bond with a new child within one year of the child's [birth/adoption/foster care placement];**

4. **That [***name of defendant***] refused to [grant [***name of plaintiff***]'s request for parental leave/return [***name of plaintiff***] to the same or a comparable job when [his/her***/nonbinary pronoun***] parental leave ended];**

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

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

[If before the leave began, [*name of defendant***] did not guarantee [***name of plaintiff***] employment in the same or a comparable position on return from the leave, then [***name of defendant***] is considered to have refused to grant [***name of plaintiff***]'s request for parental leave.]**

New May 2018

Directions for Use

The New Parent Leave Act (Gov. Code, § 12945.6) extends some of the rights provided to employees by the California Family Rights Act (CFRA; Gov. Code, § 12945.2) to employees of employers with 20 or more employees. (See Gov. Code, § 12945.6(a)(1); cf. Gov. Code, § 12945.2(b) [CFRA applies to employers with 50 or more employees].). The New Parent Leave Act allows employees to take up to 12 weeks of parental leave to bond with a new child within one year of the child's birth, adoption, or foster care placement. The act also requires the employer, before the leave begins, to guarantee employment in the same or a comparable position on the termination of the leave. (Gov. Code, § 12945.6(a)(1).) The employer must maintain the employee's health care coverage during the leave. (Gov. Code, §

~~12945.6(a)(2).)~~

~~Elements 1 and 2 set forth the eligibility requirements for employer and employee under the act. (See Gov. Code, § 12945.6(a)(1).) These elements may be omitted if there are no disputed facts over the act's applicability to the parties.~~

~~For an instruction that can be modified for use for a claim of retaliation under the New Parent Leave Act (see Gov. Code, § 12945.6(h)), see CACI No. 2620, *CFRA Rights Retaliation—Essential Factual Elements*.~~

~~Sources and Authority~~

~~• New Parent Leave Act. Government Code section 12945.6.~~

~~Secondary Sources~~

~~8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1060, 1061~~

~~Chin et al., California Practice Guide: Employment Litigation, Ch. 12-A, *Overview Of Key Statutes*, ¶ 12:32 (The Rutter Group)~~

~~Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:146, 12:390, 12:421, 12:852–12:857, 12:1201, 12:1300 (The Rutter Group)~~

~~2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)~~

~~3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)~~

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

~~California Civil Practice: Employment Litigation § 5:40 (Thomson Reuters)~~

2705. Affirmative Defense to Labor Code, Unemployment Insurance Code, and Wage Order Violations—Plaintiff Was Not Defendant's Employee (Lab. Code, § ~~2750.3~~ 2775)

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] is not liable for [***specify violation(s) of the Labor Code, the Unemployment Insurance Code, and/or wage order(s), e.g., failure to pay minimum wage***] because [***name of plaintiff***] was not [his/her/***nonbinary pronoun***/its] employee, but rather an independent contractor. To establish this defense, [***name of defendant***] must prove all of the following:**

a. That [*name of plaintiff***] is under the terms of the contract and in fact free from the control and direction of [***name of defendant***] in connection with the performance of the work that [***name of plaintiff***] was hired to do;**

b. That [*name of plaintiff***] performs work for [***name of defendant***] that is outside the usual course of [***name of defendant***]'s business; and**

c. That [*name of plaintiff***] is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed for [***name of defendant***].**

New November 2018; Revised May 2020, May 2021

Directions for Use

This instruction may be needed if there is a dispute as to whether the defendant was the plaintiff's employer for purposes of a claim covered by the Labor Code, the Unemployment Insurance Code, or a California wage order. (Lab. Code, § ~~2750.3~~ 2775; see *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 913–914, & fn. 3 [232 Cal.Rptr.3d 1, 416 P.3d 1].) The defendant has the burden to prove independent contractor status. (Lab. Code, § ~~2750.3~~ 2775(b)(1); *Dynamex, supra,* 4 Cal.5th at p. 916.) This instruction may not be appropriate if the defendant claims independent contractor status based on Proposition 22 (Bus. & Prof. Code, § 7451) or one of the many exceptions listed in Labor Code section~~s 2750.3(b)–(h)~~2776–2784. For an instruction on employment status under the *Borello* test, see CACI No. 3704, *Existence of "Employee" Status Disputed*.

The rule on employment status has been that if there are disputed facts, it's for the jury to decide whether one is an employee or an independent contractor. (*Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 342 [221 Cal.Rptr.3d 1].) However, on undisputed facts, the court may decide that the relationship is employment as a matter of law. (*Dynamex, supra,* 4 Cal.5th at p. 963.) The court may address the three factors in any order when making this determination, and if the defendant's undisputed facts fail to prove any one of them, the inquiry ends; the plaintiff is an employee as a matter of law and the question does not reach the jury.

If, however, there is no failure of proof as to any of the three factors without resolution of disputed facts,

the determination of whether the plaintiff was defendant's employee should be resolved by the jury using this instruction. If the court concludes based on undisputed facts that the defendant *has* proved one or more of the three factors, that factor (or factors) should be removed from the jury's consideration and the jury should only consider whether the employer has proven those factors that cannot be determined without further factfinding.

Sources and Authority

- Worker Status: Employees ~~and Independent Contractors~~. Labor Code section ~~2750.3~~ 2775.

- "The ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity's business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." (*Dynamex, supra,* 4 Cal.5th at pp. 955–956.)

- "A business that hires any individual to provide services to it can always be said to knowingly 'suffer or permit' such an individual to work for the business. A literal application of the suffer or permit to work standard, therefore, would bring within its reach even those individuals hired by a business--including unquestionably independent plumbers, electricians, architects, sole practitioner attorneys, and the like--who provide only occasional services unrelated to a company's primary line of business and who have traditionally been viewed as working in their own independent business." (*Dynamex, supra,* 4 Cal.5th at pp. 948–949.)

- "A multifactor standard--like the economic reality standard or the *Borello* standard--that calls for consideration of all potentially relevant factual distinctions in different employment arrangements on a case-by-case, totality-of-the-circumstances basis has its advantages. A number of state courts, administrative agencies and academic commentators have observed, however, that such a wide-ranging and flexible test for evaluating whether a worker should be considered an employee or an independent contractor has significant disadvantages, particularly when applied in the wage and hour context." (*Dynamex, supra,* 4 Cal.5th at p. 954.)

- "Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company, or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes, the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the

workers to provide services as employees. In the latter settings, the workers' role within the hiring entity's usual business operations is more like that of an employee than that of an independent contractor." (*Dynamex, supra,* 4 Cal.5th at pp. 959–960, internal citations omitted.)

- "A company that labels as independent contractors a class of workers who are not engaged in an independently established business in order to enable the company to obtain the economic advantages that flow from avoiding the financial obligations that a wage order imposes on employers unquestionably violates the fundamental purposes of the wage order. The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself." (*Dynamex, supra,* 4 Cal.5th at p. 962.)

- "The trial court's determination of employee or independent contractor status is one of fact if it depends upon the resolution of disputed evidence or inferences and, as such, must be affirmed on appeal if supported by substantial evidence. The question is one of law only if the evidence is undisputed. 'The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.' " (*Espejo, supra,* 13 Cal.App.5th at pp. 342–343.)

- "It bears emphasis that in order to establish that a worker is an independent contractor under the ABC standard, the hiring entity is required to establish the existence of each of the three parts of the ABC standard. Furthermore, inasmuch as a hiring entity's failure to satisfy any one of the three parts itself establishes that the worker should be treated as an employee for purposes of the wage order, *a court* is free to consider the separate parts of the ABC standard in whatever order it chooses. Because in many cases it may be easier and clearer for *a court* to determine whether or not part B or part C of the ABC standard has been satisfied than for *the court* to resolve questions regarding the nature or degree of a worker's freedom from the hiring entity's control for purposes of part A of the standard, the significant advantages of the ABC standard--in terms of increased clarity and consistency--will often be best served by first considering one or both of the latter two parts of the standard in resolving the employee or independent contractor question." (*Dynamex, supra,* 4 Cal.5th at p. 963, italics added.)

- "An entity that controls the business enterprise may be an employer even if it did not 'directly hire, fire or supervise' the employees. Multiple entities may be employers where they 'control different aspects of the employment relationship.' 'This occurs, for example, when one entity (such as a temporary employment agency) hires and pays a worker, and another entity supervises the work.' 'Supervision of the work, in the specific sense of exercising control over how services are performed, is properly viewed as one of the "working conditions" … .' " (*Castaneda v. Ensign Group, Inc.* (2014) 229 Cal.App.4th 1015, 1019 [177 Cal.Rptr.3d 581].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 29A

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-B, Coverage and Exemptions—In

General, ¶ 11:115 et seq. (The Rutter Group)

Wilcox, California Employment Law, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.13 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 1, *Overview of Wage and Hour Laws*, § 1.04 (Matthew Bender)

3050. Retaliation—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her/***nonbinary pronoun***] for exercising a constitutional right. ~~[By [*specify conduct*], [*name of plaintiff*] was exercising [his/her/*nonbinary pronoun*] constitutionally protected right of [*insert right, e.g., privacy*].]~~ To establish retaliation, [***name of plaintiff***] must prove all of the following:**

1. ~~[~~That [he/she/*nonbinary pronoun*] was engaged in a constitutionally protected activity[, which I will determine after you, the jury, decide certain facts];~~]~~

[2. That [*name of defendant*] did not have probable cause for the [arrest/prosecution][, which I will determine after you, the jury, decide certain facts];]

~~2~~3. That [*name of defendant*] [*specify alleged retaliatory conduct*];

~~3~~4. That ~~[*name of defendant*]'s acts were motivated, at least in part, by~~ [*name of plaintiff*]'s constitutionally protected activity was a substantial or motivating factor for [*name of defendant*]'s acts;

~~4~~5. That [*name of defendant*]'s acts would likely have deterred a person of ordinary firmness from engaging in that protected activity; and

~~5~~6. That [*name of plaintiff*] was harmed as a result of [*name of defendant*]'s conduct.

~~[~~The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] has proven [element 1] [and] [element 2] above.

[But before I can do so, you must decide whether [*name of plaintiff*] has proven the following:

[*~~l~~List all factual disputes that must be resolved by the jury.*]]

[*or*]

[The court has determined that ~~B~~by [*specify conduct*], [*name of plaintiff*] was exercising [his/her/*nonbinary pronoun*] constitutionally protected right of [*insert right, e.g., privacy*].]

[*or*]

[The court has determined that [*name of defendant*] did not have probable cause for the [arrest/prosecution].]

New June 2010; Revised December 2010, Renumbered from CACI No. 3016 and Revised December 2012; Revised June 2013, May 2020, May 2021

Directions for Use

Give this instruction along with CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements*, if the claimed civil rights violation is retaliation for exercising constitutionally protected rights, including exercise of free speech rights as a private citizen. For a claim by a public employee who alleges that they suffered an adverse employment action in retaliation for their speech on an issue of public concern, see CACI No. 3053, *Retaliation for Exercise of Free Speech Rights—Public Employee—Essential Factual Elements*.

The retaliation should be alleged generally in element 1 of CACI No. 3000. The constitutionally protected activity refers back to the right alleged to have been violated in element 3 of CACI No. 3000.

Element 2 applies only in retaliatory arrest and prosecution cases. Omit element 2 if the retaliation alleged is not based on an arrest or prosecution.

Whether plaintiff was engaged in a constitutionally protected activity and, if applicable, whether probable cause for arrest or prosecution was absent (or whether the no-probable-cause requirement does not apply because of an exception) will usually have been resolved by the court as a matter of law before trial. (See *Nieves v. Bartlett* (2019) __ U.S. __ [139 S.Ct. 1715, 1724, 1727, 204 L.Ed.2d 1] [requiring a plaintiff to plead and prove the absence of probable cause for arrest but stating an exception to the no-probable-cause requirement "when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been"].) ~~If so, include the optional statement in the opening paragraph and omit element 1.~~ If there is a question of fact that the jury must resolve ~~with regard to the constitutionally protected activity~~, include the optional bracketed language with element 1 and/or element 2, and give the first bracketed option of the final paragraph, ~~include element 1 and give the last part of the instruction~~identifying with specificity all disputed factual issues the jury must resolve for the court to determine the contested element or elements. If the court has determined element 1 or element 2, omit the optional bracketed language of the element and instruct the jury that the element has been determined as a matter of law by giving the second and/or third optional sentence(s) in the final paragraph.

~~Element 2 only applies in retaliatory arrest and prosecution cases. Omit element 2 if the retaliation alleged is not based on an arrest or prosecution.~~ If there are contested issues of fact regarding the exception to the no-probable-cause requirement, this instruction may be augmented to include the specific factual findings necessary for the court to determine whether the exception applies.

The plaintiff must show that the defendant acted with a retaliatory motive and that the motive was a "but for" cause of the plaintiff's injury, i.e., that the retaliatory action would not have been taken absent the retaliatory motive. (See *Nieves*, *supra*, 139 S.Ct. at p. 1722.) A plaintiff may prove causal connection with circumstantial evidence but establishing a causal connection between a defendant's animus and a plaintiff's injury will depend on the type of retaliation case. (*Id.* at pp. 1722–1723 [distinguishing straightforward cases from more complex cases].)

If the defendant claims that the response to the plaintiff's constitutionally protected activity was prompted by a legitimate reason, the defendant may attempt to persuade the jury that the defendant would have taken the same action even in the absence of the alleged impermissible, retaliatory reason. See

CACI No. 3055, *Rebuttal of Retaliatory Motive*. (*Id.* at p. 1727.)
~~There is perhaps some uncertainty with regard to the requirement in element 3 that the retaliatory act may be motivated, *in part*, by the protected activity. While the element is so stated in *Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1062–1063 [99 Cal.Rptr.3d 661], the court also was of the view that the defendant may avoid liability by proving that, notwithstanding a retaliatory motive, it also had legitimate reasons for its actions and would have taken the same steps for those reasons alone. (*Id.* at pp. 1086–1087, finding persuasive *Greenwich Citizens Comm. v. Counties of Warren & Washington Indus. Dev. Agency* (2d Cir. 1996) 77 F.3d 26, 30.) Therefore, the fact that retaliation may have motivated the defendant only in part may not always be sufficient for liability. In the Ninth Circuit, there is authority for both a "but for" and a "substantial or motivating factor" standard. (Compare *Karl v. City of Mountlake Terrace* (9th Cir. 2012) 678 F.3d 1062, 1072 [defendant may show that: (1) the adverse employment action was based on protected and unprotected activities; and (2) defendant would have taken the adverse action if the proper reason alone had existed] with *Blair v. Bethel Sch. Dist.* (9th Cir. 2010) 608 F.3d 540, 543 [third element expressed as "there was a substantial causal relationship between the constitutionally protected activity and the adverse action"].)~~

Sources and Authority

- "Where, as here, the plaintiff claims retaliation for exercising a constitutional right, the majority of federal courts require the plaintiff to prove that (1) he or she was engaged in constitutionally protected activity, (2) the defendant's retaliatory action caused the plaintiff to suffer an injury that would likely deter a person of ordinary firmness from engaging in that protected activity, and (3) the retaliatory action was motivated, at least in part, by the plaintiff's protected activity." (*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1062–1063 [99 Cal.Rptr.3d 661]~~, *supra*, 177 Cal.App.4th at pp. 1062–1063~~.)

- "[A]ctions that are otherwise proper and lawful may nevertheless be actionable if they are taken in retaliation against a person for exercising his or her constitutional rights." (*Tichinin, supra,* 177 Cal.App.4th at p. 1084.)

- "The plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation." (*Nieves, supra,* 139 S.Ct. at p. 1725, internal citation omitted.)

- "To state a First Amendment retaliation claim, a plaintiff must plausibly allege 'that (1) he was engaged in a constitutionally protected activity, (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant's conduct.' To ultimately 'prevail on such a claim, a plaintiff must establish a "causal connection" between the government defendant's "retaliatory animus" and the plaintiff's "subsequent injury." Specifically, a plaintiff must show that the defendant's retaliatory animus was 'a "but-for" cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.' " (*Capp v. County of San Diego* (9th Cir. 2019) 940 F.3d 1046, 1053, internal citations omitted.)

- "For a number of retaliation claims, establishing the causal connection between a defendant's animus and a plaintiff's injury is straightforward. Indeed, some of our cases in the public employment context 'have simply taken the evidence of the motive and the discharge as sufficient for a circumstantial demonstration that the one caused the other,' shifting the burden to the defendant to show he would have taken the challenged action even without the impermissible motive. But the consideration of causation is not so straightforward in other types of retaliation cases." *Nieves*, *supra*, 139 S.Ct. at pp. 1722–1723.)

- "To demonstrate retaliation in violation of the First Amendment, [the plaintiff] must ultimately prove first that [defendant] took action that 'would chill or silence a person of ordinary firmness from future First Amendment activities.' " (*Skoog v. County of Clackamas* (9th Cir. 2006) 469 F.3d 1221, 1231–1232, footnote and citation omitted.)

- "The plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest." (*Nieves*, *supra*, 139 S.Ct. at p. 1724.)

- "[W]e conclude that the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." (*Nieves*, *supra*, 139 S.Ct. at p. 1727.)

- ~~"[A]n individual has a right 'to be free from police action motivated by retaliatory animus but for which there was probable cause.' " (*Ford v. City of Yakima* (9th Cir. 2013) 706 F.3d 1188, 1193.)~~

- ~~"Probable cause is not irrelevant to an individual's claim that he was booked and jailed in retaliation for his speech. Probable cause for the initial arrest can be evidence of a police officer's lack of retaliatory animus for subsequently booking and jailing an individual. However, that determination should be left to the trier of fact once a plaintiff has produced evidence that the officer's conduct was motivated by retaliatory animus." (*Ford*, *supra*, 706 F.3d at p. 1194 fn.2, internal citation omitted.)~~

- "[T]he evidence of [plaintiff]'s alleged injuries, if believed, is sufficient to support a finding that the retaliatory action against him would deter a person of ordinary firmness from exercising his or her First Amendment rights. [¶] [Defendant] argues that plaintiff did not suffer any injury—i.e., [defendant]'s action did not chill [plaintiff]'s exercise of his rights—because he continued to litigate against [defendant]. However, that [plaintiff] persevered despite [defendant]'s action is not determinative. To reiterate, in the context of a claim of retaliation, the question is not whether the plaintiff was actually deterred but whether the defendant's actions would have deterred a person of ordinary firmness." (*Tichinin*, *supra*, 177 Cal.App.4th at p. 1082.)

- "Intent to inhibit speech, which 'is an element of the [retaliation] claim,' can be demonstrated either through direct or circumstantial evidence." (*Mendocino Envtl. Ctr. v. Mendocino County* (9th Cir. 1999) 192 F.3d 1283, 1300–1301, internal citation omitted.)

- ~~"To satisfy the [causation] requirement, the evidence must be sufficient to establish that the~~

~~officers' desire to chill [plaintiff]'s speech was a but-for cause of their conduct. In other words, would [plaintiff] have been booked and jailed, rather than cited and arrested, but for the officers' desire to punish [him] for his speech?" (*Ford*, *supra*, 706 F.3d at p. 1194.)~~

- "[Defendant] may avoid liability if he shows that a 'final decision maker's independent investigation and termination decision, responding to a biased subordinate's initial report of misconduct, . . . negate[s] any causal link' between his retaliatory motive and the adverse employment action. This is because a final decision maker's wholly independent investigation and decision establish that 'the employee's protected speech was not a but-for cause of the adverse employment action.' " (*Karl* *v. City of Mountlake Terrace* (9th Cir. 2012) 678 F.3d 1062, 1072–1073~~, *supra*, 678 F.3d at pp. 1072–1073~~, internal citation omitted.)

- "While the scope, severity and consequences of [their] actions are belittled by defendants, we have cautioned that 'a government act of retaliation need not be severe . . . [nor] be of a certain kind' to qualify as an adverse action." (*Marez v. Bassett* (9th Cir. 2010), 595 F.3d 1068, 1075.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 894, 895, 978

2 Wilcox, California Employment Law, Ch. 40, *Overview of Equal Opportunity Laws*, § 40.26 (Matthew Bender)

3 Civil Rights Actions, Ch. 17, *Discrimination in Federally Assisted Programs*, ¶ 17.24B (Matthew Bender)

4 Civil Rights Actions, Ch. 21A, *Employment Discrimination Based on Race, Color, Religion, Sex, or National Origin*, ¶ 21.22(1)(f) (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.42 (Matthew Bender)

3055. Rebuttal of Retaliatory Motive

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] [***specify alleged retaliatory conduct, e.g., arrested plaintiff***] because [***specify nonretaliatory reason for the adverse action***].**

If [*name of plaintiff***] proves that retaliation was a substantial or motivating factor for [***name of defendant***]'s [***specify alleged retaliatory conduct***], you must then consider if [***name of defendant***] would have taken the same action even in the absence of [***name of plaintiff***]'s constitutionally protected activity.**

To succeed on this defense, [*name of defendant***] must prove that [he/she/***nonbinary pronoun***/it] would have [***specify alleged retaliatory conduct, e.g., arrested plaintiff***] on the basis of [***specify the defendant's stated nonretaliatory reason for the adverse action***], regardless of retaliation for [***name of plaintiff***]'s [***specify constitutionally protected activity***].**

New May 2021

Directions for Use

This instruction sets forth a defendant's response to a plaintiff's claim of retaliation. See CACI No. 3050, *Retaliation—Essential Factual Elements*. The defendant bears the burden of proving the nonretaliatory reason for the allegedly retaliatory conduct. (See *Nieves v. Bartlett* (2019) __ U.S. __ [139 S.Ct. 1715, 1725, 204 L.Ed.2d 1].

In retaliatory arrest and prosecution cases, use this instruction only if the court has determined the absence of probable cause or that an exception to the no-probable-cause requirement applies because the plaintiff presented objective evidence that otherwise similarly situated individuals not engaged in the same sort of constitutionally protected activity were not arrested or prosecuted. (See *Nieves, supra,* 139 S.Ct. at p. 1727 [stating exception to no-probable-cause requirement when otherwise similarly situated individuals were not arrested for the same conduct].)

Sources and Authority

- "[I]f the plaintiff establishes the absence of probable cause, 'then the *Mt. Healthy* test governs: The plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation.' " (*Nieves, supra,* 139 S.Ct. at p. 1725.)

Secondary Sources

4 Witkin & Epstein, California Criminal Law (4th ed. 2020) § 367

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 511

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 894–895

2 Wilcox, California Employment Law, Ch. 40, *Overview of Equal Opportunity Laws*, § 40.26 (Matthew Bender)

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.15 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

3704. Existence of "Employee" Status Disputed

[*Name of plaintiff***] must prove that [***name of agent***] was [***name of defendant***]'s employee.**

In deciding whether [*name of agent***] was [***name of defendant***]'s employee, the most important factor is whether [***name of defendant***] had the right to control how [***name of agent***] performed the work, rather than just the right to specify the result. One indication of the right to control is that the hirer can discharge the worker [without cause]. It does not matter whether [***name of defendant***] exercised the right to control.**

In deciding whether [*name of defendant***] was [***name of agent***]'s employer, in addition to the right of control, you must consider the full nature of their relationship. You should take into account the following additional factors, which, if true, may show that [***name of defendant***] was the employer of [***name of agent***]. No one factor is necessarily decisive. Do not simply count the number of applicable factors and use the larger number to make your decision. It is for you to determine the weight and importance to give to each of these additional factors based on all of the evidence.**

(a) **[***Name of defendant***] supplied the equipment, tools, and place of work;**

(b) **[***Name of agent***] was paid by the hour rather than by the job;**

(c) **[***Name of defendant***] was in business;**

(d) **The work being done by [***name of agent***] was part of the regular business of [***name of defendant***];**

(e) **[***Name of agent***] was not engaged in a distinct occupation or business;**

(f) **The kind of work performed by [***name of agent***] is usually done under the direction of a supervisor rather than by a specialist working without supervision;**

(g) **The kind of work performed by [***name of agent***] does not require specialized or professional skill;**

(h) **The services performed by [***name of agent***] were to be performed over a long period of time; [and]**

(i) **[***Name of defendant***] and [***name of agent***] believed that they had an employer-employee relationship[./; and]**

(j) **[***Specify other factor***].**

New September 2003; Revised December 2010, June 2015, December 2015, November 2018, May 2020, May 2021

Directions for Use

This instruction is based on *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354–355 [256 Cal.Rptr. 543, 769 P.2d 399] and the Restatement Second of Agency, section 220. It is sometimes referred to as the *Borello* test or the common law test. (See *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 934 [232 Cal.Rprt.3d 1, 416 P.3d 1].) It is intended to address the employer-employee relationship for purposes of assessing vicarious responsibility on the employer for the employee's acts. Most of the factors are less appropriate for analyzing other types of agency relationships, such as franchisor/franchisee. For an instruction more appropriate to these kinds of relationships, see CACI No. 3705, *Existence of "Agency" Relationship Disputed.*

Secondary factors (a)–(i) come from the Restatement section 220. (See also *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 532 [173 Cal.Rptr.3d 332, 327 P.3d 165]; Rest.3d Agency, § 7.07, com. f,) They have been phrased so that a yes answer points toward an employment relationship. Omit any that are not relevant. Additional factors have been endorsed by the California Supreme Court and may be included if applicable. (See *S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at pp. 354–355.) Therefore, an "other" option (j) has been included.

Borello was a workers' compensation case. In *Dynamex, supra,* the court, in holding that *Borello* did not control the specific wage order dispute at issue, noted that "it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue." (*Dynamex, supra,* 4 Cal.5th at p. 934.) The court also said that "[t]he *Borello* decision repeatedly emphasizes statutory purpose as the touchstone for deciding whether a particular category of workers should be considered employees rather than independent contractors for purposes of social welfare legislation." (*Id.* at p. 935.) With respondeat superior, there is no statutory provision or social welfare legislation to be considered. (Cf. Lab. Code, § ~~2750.3~~ 2775 [codifying *Dynamex* for purposes of the provisions of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission, with limited exceptions for specified occupations].)

A different test for the existence of "independent contractor" status applies to app-based rideshare and delivery drivers. (Bus. & Prof. Code, § 7451.)

Sources and Authority

- Principal-Agent Relationship. Civil Code section 2295.
- Rebuttable Presumption that Contractor Is Employee Rather Than Independent Contractor; Proof of Independent Contractor Status. Labor Code section 2750.5.
- "[S]ubject to certain policy considerations, a hirer … cannot be held vicariously liable for the negligence of his independent contractors." (*Blackwell v. Vasilas* (2016) 244 Cal.App.4th 160, 168 [197 Cal.Rptr.3d 753].)
- "Whether a common law employer-employee relationship exists turns foremost on the degree of a

hirer's right to control how the end result is achieved." (*Ayala, supra,* 59 Cal.4th at p. 528.)

- "However, the courts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the 'most important' or 'most significant' consideration, the authorities also endorse several 'secondary' indicia of the nature of a service relationship." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 350, internal citations omitted.)

- "While the extent of the hirer's right to control the work is the foremost consideration in assessing whether a common law employer-employee relationship exists, our precedents also recognize a range of secondary indicia drawn from the Second and Third Restatements of Agency that may in a given case evince an employment relationship. Courts may consider '(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.' " (*Ayala, supra,* 59 Cal.4th at p. 532.)

- " 'Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' " (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 351, internal citations omitted.)

- "[T]he Restatement guidelines heretofore approved in our state remain a useful reference." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 354.)

- "We also note the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation. Besides the 'right to control the work,' the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. [¶] As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at pp. 354–355, internal cross-reference omitted.)

- "[A]t common law the problem of determining whether a worker should be classified as an employee or an independent contractor initially arose in the tort context--in deciding whether the hirer of the worker should be held vicariously liable for an injury that resulted from the worker's actions. In the vicarious liability context, the hirer's right to supervise and control the details of the worker's actions was reasonably viewed as crucial, because ' "[t]he extent to which the employer had a right to control [the details of the service] activities was . . . highly relevant to the question whether the employer

ought to be legally liable for them . . . .” ’ For this reason, the question whether the hirer controlled the details of the worker’s activities became the primary common law standard for determining whether a worker was considered to be an employee or an independent contractor.” (*Dynamex, supra,* 4 Cal.5th at p. 927, internal citations omitted.)

- “[A]lthough we have sometimes characterized *Borello* as embodying the common law test or standard for distinguishing employees and independent contractors, it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue. In other words, *Borello* calls for application of a *statutory purpose* standard that considers the control of details and other potentially relevant factors identified in prior California and out-of-state cases in order to determine which classification (employee or independent contractor) best effectuates the underlying legislative intent and objective of the statutory scheme at issue.” (*Dynamex, supra,* 4 Cal.5th at p. 934, original italics, internal citation omitted.)

- “The trial court’s determination of employee or independent contractor status is one of fact if it depends upon the resolution of disputed evidence or inferences. ‘ “Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact … .” ’ The question is one of law only if the evidence is undisputed.” (*Linton v. DeSoto Cab Co., Inc.* (2017) 15 Cal.App.5th 1208, 1225 [223 Cal.Rptr.3d 761.)

- The burden of proving the existence of an agency rests on the one affirming its existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740].)

- “The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.” (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 349.)

- “[A]lthough the Caregiver Contract signed by Plaintiff stated she was an independent contractor, not an employee, there is evidence of other indicia of employment and Plaintiff averred in her declaration that the Caregiver Contract was presented to her ‘on a take it or leave it basis.’ ‘A party’s use of a label to describe a relationship with a worker … will be ignored where the evidence of the parties’ actual conduct establishes that a different relationship exists.’ ” (*Duffey v. Tender Heart Home Care Agency, LLC* (2019) 31 Cal.App.5th 232, 257–258 [242 Cal.Rptr.3d 460].)

- “It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship.” (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241], internal citations omitted.)

- “ ‘[W]hat matters is whether a hirer has the “legal right to control the activities of the alleged agent” … . That a hirer chooses not to wield power does not prove it lacks power.’ ” (*Duffey, supra,* 31 Cal.App.5th at p. 257.)

- “Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because ‘[t]he power of the principal to terminate the services of the agent gives him

the means of controlling the agent's activities.' " (*Ayala, supra,* 59 Cal.4th at p. 531.)

- "The worker's corresponding right to leave is similarly relevant: ' "An employee may quit, but an independent contractor is legally obligated to complete his contract." ' " (*Ayala, supra,* 59 Cal.4th at p. 531 fn. 2.)

- "A finding of employment is supported where the workers are 'a regular and integrated portion of [the] business operation.' " (*Garcia v. Seacon Logix Inc.* (2015) 238 Cal.App.4th 1476, 1487 [190 Cal.Rptr.3d 400].)

- "Where workers are paid weekly or by the hour, rather than by the job, it suggests an employment relationship." (*Garcia, supra,* 238 Cal.App.4th at p. 1488.)

- "In cases where there is a written contract, to answer that question [the right of control] without full examination of the contract will be virtually impossible. … [¶] … [T]he rights spelled out in a contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms." (*Ayala, supra,* 59 Cal.4th at p. 535.)

- "[T]he right to exercise complete or authoritative control must be shown, rather than mere suggestion as to detail. A worker is an independent contractor when he or she follows the employer's desires only in the result of the work, and not the means by which it is achieved." (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1179 [183 Cal.Rptr.3d 394].)

- " '[T]he owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect [citation], … the right to make suggestions or recommendations as to details of the work [citation], the right to prescribe alterations or deviations in the work [citation]—without changing the relationship from that of owner and independent contractor … .' " (*Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 Cal.App.4th 1138, 1143 [159 Cal.Rptr.3d 102], quoting *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790 [285 P.2d 902].)

- "Agency and independent contractorship are not *necessarily* mutually exclusive legal categories as independent contractor and servant or employee are. In other words, an agent may also be an independent contractor. One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor." (*Jackson, supra,* 233 Cal.App.4th at p. 1184, original italics, internal citations omitted].)

- "[W]hen a statute refers to an 'employee' without defining the term, courts have generally applied the common law test of employment to that statute." (*Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 586 [135 Cal.Rptr.3d 213].)

- "[A] termination at-will clause for both parties may properly be included in an independent contractor agreement, and is not by itself a basis for changing that relationship to one of an employee." (*Arnold, supra,* 202 Cal.App.4th at p. 589.)

- Restatement Second of Agency, section 220, provides: "(1) A servant is a person employed to

perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control. [¶] (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: [¶] (a) the extent of control which, by the agreement, the master may exercise over the details of the work; [¶] (b) whether or not the one employed is engaged in a distinct occupation or business; [¶] (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; [¶] (d) the skill required in the particular occupation; [¶] (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; [¶] (f) the length of time for which the person is employed; [¶] (g) the method of payment, whether by the time or by the job; [¶] (h) whether or not the work is a part of the regular business of the employer; [¶] (i) whether or not the parties believe they are creating the relation of master and servant; and [¶] (j) whether the principal is or is not in business."

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 29A

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2] (Matthew Bender)

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, §§ 248.15, 248.22, 248.51 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.13 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, §§ 100A.25, 100A.34 (Matthew Bender)

California Civil Practice: Torts §§ 3:5–3:6 (Thomson Reuters)

3904A. Present Cash Value

[*Name of defendant***] claims that [***name of plaintiff***]'s future [economic] damages for [loss of earnings/future medical expenses/lost profits/[***insert other economic damages***]], if any, should be reduced to present cash value. This is because money received now will, through investment, grow to a larger amount in the future. Present cash value is the amount of money that, if reasonably invested today, will provide [***name of plaintiff***] with the amount of [his/her/***nonbinary pronoun***/its] future damages.**

[[*Name of defendant***] must prove, through expert testimony, the present cash value of [***name of plaintiff***]'s future [economic] damages. It is up to you to decide the present cash value of [***name of plaintiff's***] future [economic] damages in light of all the evidence presented by the parties.]**

[If you decide that [*name of plaintiff***]'s harm includes future [economic] damages for [loss of earnings/future medical expenses/lost profits/[***insert other economic damages***]], then you must reduce the amount of those future damages to their present cash value. You must [use the interest rate of __ percent/ [and] [***specify other stipulated information***]] as agreed to by the parties in determining the present cash value of future [economic] damages.]**

New September 2003; Revised April 2008; Revised and renumbered from former CACI No. 3904 December 2010; Revised June 2013, May 2020, May 2021

Directions for Use

Give this instruction if future economic damages are sought and there is evidence from which a reduction to present value can be made. Include "economic" if future noneconomic damages are also sought. Future noneconomic damages are not reduced to present cash value because 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]; CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*.)

The defendant bears the burden of presenting expert evidence of an appropriate present value calculation, including the appropriate discount rate, to enable the fact finder to make a rational determination on the issue. (*Lewis v. Ukran* (2019) 36 Cal.App.5th 886, 896 [248 Cal.Rptr.3d 839].) Unless there is a stipulation, expert testimony is required to accurately establish present values for future economic losses. (*Id.*) Give the last bracketed paragraph if there has been a stipulation as to the interest rate to use or any other facts related to present cash value, and omit the second paragraph to account for the parties' stipulation.

The parties may stipulate to use present-value tables to assist the jury in making its determination of present cash value. Tables, worksheets, and an instruction on how to use them are provided in CACI No. 3904B, *Use of Present-Value Tables*.

Sources and Authority

- "The present value of a gross award of future damages is that sum of money prudently invested at the time of judgment which will return, over the period the future damages are incurred, the gross amount of the award. 'The concept of present value recognizes that money received after a given period is worth less than the same amount received today. This is the case in part because money received today can be used to generate additional value in the interim.' The present value of an award of future damages will vary depending on the gross amount of the award, and the timing and amount of the individual payments." (*Holt v. Regents of the University of California* (1999) 73 Cal.App.4th 871, 878 [86 Cal.Rptr.2d 752], internal citations omitted.)

- "[I]n a contested case, a party (typically a defendant) seeking to reduce an award of future damages to present value bears the burden of proving an appropriate method of doing so, including an appropriate discount rate. A party (typically a plaintiff) who seeks an upward adjustment of a future damages award to account for inflation bears the burden of proving an appropriate method of doing so, including an appropriate inflation rate. This aligns the burdens of proof with the parties' respective economic interests. A trier of fact should not reduce damages to present value, or adjust for inflation, absent such evidence or a stipulation of the parties." (*Lewis, supra,* 36 Cal.App.5th at p. 889.)

- "[W]e hold a defendant seeking reduction to present value of a sum awarded for future damages has the burden of presenting expert evidence of an appropriate present value calculation, including the appropriate discount rate, to enable the fact finder to make a rational determination on the issue." (*Lewis, supra,* 36 Cal.App.5th at p. 896.)

- "Exact actuarial computation should result in a lump-sum, present-value award which if prudently invested will provide the beneficiaries with an investment return allowing them to regularly withdraw matching support money so that, by reinvesting the surplus earnings during the earlier years of the expected support period, they may maintain the anticipated future support level throughout the period and, upon the last withdrawal, have depleted both principal and interest." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 521 [196 Cal.Rptr. 82].)

- "[I]t is not a violation of the plaintiff's jury trial right for the court to submit only the issue of the gross amount of future economic damages to the jury, with the timing of periodic payments—and hence their present value—to be set by the court in the exercise of its sound discretion." (*Salgado, supra,* 19 Cal.4th at p. 649, internal citation omitted.)

- "Neither party introduced any evidence of compounding or discounting factors, including how to calculate an appropriate rate of return throughout the relevant years. Under such circumstances, the 'jury would have been put to sheer speculation in determining ... "the present sum of money which ... will pay to the plaintiff ... the equivalent of his [future economic] loss ... ." ' " (*Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 877 [9 Cal.Rptr.2d 716], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1719

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.96

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.21–52.22 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

1 California Civil Practice: Torts § 5:22 (Thomson Reuters)

4302. Termination for Failure to Pay Rent—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has failed to pay the rent. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**

2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***];**

3. **That under the [lease/rental agreement/sublease], [***name of defendant***] was required to pay rent in the amount of $[***specify amount***] per [***specify period, e.g., month***];**

4. **That [***name of plaintiff***] properly gave [***name of defendant***] three days' written notice to pay the rent or vacate the property;**

5. **That as of [***date of three-day notice***], at least the amount stated in the three-day notice was due;**

6. **That [***name of defendant***] did not pay the amount stated in the notice within three days after [service/receipt] of the notice; and**

7. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

New August 2007; Revised June 2011, December 2011, December 2013, May 2021

Directions for Use

Modify this instruction as necessary for rent due on a residential tenancy between March 1, 2020, and June 30, 2021, including, but not limited to, substitution of the term "fifteen business days" wherever the term "three days" appears in the essential factual elements. (See COVID-19 Tenant Relief Act, Code Civ. Proc., § 1179.01 et seq.; Stats. 2021, ch. 2 (Sen. Bill 91), Code Civ. Proc., § 1179.02.)

Include the bracketed references to a subtenancy in the opening paragraph and in element 7 if persons other than the tenant-defendant are occupying the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1, "rented" in element 2, and either "lease" or "rental agreement" in element 3. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a

subtenant, select "leases" in element 1, "subleased" in element 2, and "sublease" in element 3. (Code Civ. Proc., § 1161(3).)

Defective service may be waived if defendant admits receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

If the lease specifies a time period for notice other than the three-day period, substitute that time period in elements 4, 5, and 6, provided that it is not less than three days.

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in element 6.

See CACI No. 4303, *Sufficiency and Service of Notice of Termination for Failure to Pay Rent*, for an instruction regarding proper notice.

Sources and Authority

- Unlawful Detainer for Tenant's Default in Rent Payments. Code of Civil Procedure section 1161(2).
- COVID-19 Tenant Relief Act. Code of Civil Procedure section 1179.01 et seq.
- Senate Bill 91 (Stats. 2021, ch. 2). Code of Civil Procedure section 1179.02 et seq.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- Conversion to Civil Action if Possession No Longer at Issue. Civil Code section 1952.3(a).
- "[M]ere failure of a tenant to quit the premises during the three-day notice period does not necessarily justify an unlawful detainer action. If a tenant vacates the premises and surrenders possession to the landlord prior to the complaint being filed, then no action for unlawful detainer will lie even though the premises were not surrendered during the notice

period. This is true because the purpose of an unlawful detainer action is to recover possession of the premises for the landlord. Since an action in unlawful detainer involves a forfeiture of the tenant's right to possession, one of the matters that must be pleaded and proved for unlawful detainer is that the tenant remains in possession of the premises. Obviously this cannot be established where the tenant has surrendered the premises to landlord prior to the filing of the complaint. In such a situation the landlord's remedy is an action for damages and rent." (*Briggs v. Electronic Memories & Magnetics Corp.* (1975) 53 Cal.App.3d 900, 905–906 [126 Cal.Rptr. 34], footnote and internal citations omitted.)

- "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra*, 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra, …* , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 753, 756, 758

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.35–8.45

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.17–6.37

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶¶ 5:224.3, 5:277.1 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶ 7:96 (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.22 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

Miller & Starr, California Real Estate 4th, § 19:200 (Thomson Reuters)

4303. Sufficiency and Service of Notice of Termination for Failure to Pay Rent

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[*Name of plaintiff***] contends that [he/she/***nonbinary pronoun***/it] properly gave [***name of defendant***] three days' notice to pay the rent or vacate the property. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that [he/she/***nonbinary pronoun***/it] must pay the amount due within three days or vacate the property;**

2. **That the notice stated [no more than/a reasonable estimate of] the amount due, and the name, telephone number, and address of the person to whom the amount should be paid, and**

   [*Use if payment was to be made personally:*

   the usual days and hours that the person would be available to receive the payment; and]

   [*or: Use if payment was to be made into a bank account:*

   the number of an account in a bank located within five miles of the rental property into which the payment could be made, and the name and street address of the bank; and]

   [*or: Use if an electronic funds transfer procedure had been previously established:*

   that payment could be made by electronic funds transfer; and]

3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***].**

[The three-day notice period excludes Saturdays, Sundays, and judicial holidays, but otherwise begins the day after the notice to pay the rent or vacate the property was given to [*name of defendant***].]**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s residence or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her/***nonbinary pronoun***] residence/the commercial property]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail][./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[A notice stating a reasonable estimate of the amount of rent due that is within 20 percent of the amount actually due is reasonable unless [*name of defendant***] proves that it was not reasonable. In determining the reasonableness of the estimate, you may consider whether calculating the amount of rent required information primarily within the knowledge of [***name of defendant***] and whether [***name of defendant***] accurately furnished that information to [***name of plaintiff***].]**

New August 2007; Revised December 2010; June 2011, December 2011, November 2019, May 2020, May 2021

Directions for Use

Modify this instruction as necessary for rent due on a residential tenancy between March 1, 2020, and June 30, 2021, including, but not limited to, substitution of the term "fifteen business days" wherever the term "three days" appears in the essential factual elements. (See COVID-19 Tenant Relief Act, Code Civ. Proc., § 1179.01 et seq.; Stats. 2021, ch. 2 (Sen. Bill 91), Code Civ. Proc., §§ 1179.02, 1179.03, 1179.04.)

Use the reasonable-estimate option in the first sentence of element 2 and include the final paragraph only in cases involving commercial leases. (Code Civ. Proc., § 1161.1(a); see also Code Civ. Proc., § 1161.1(e) [presumption that if amount found to be due is within 20 percent of amount stated in notice, then estimate was reasonable].)

In element 2, select the applicable manner in which the notice specifies that payment is to be made; directly to the landlord, into a bank account, or by electronic funds transfer. (Code Civ. Proc., § 1161(2).)

Select the manner of service used: personal service, substituted service by leaving the notice at the defendant's home or place of work or at the commercial rental property, or substituted service by posting on the property. (See Code Civ. Proc., § 1162.)

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second, third, and fourth bracketed options for the manner of service.

Read the paragraph that follows the elements if any of the three days of the notice period fell on a Saturday, Sunday, or judicial holiday. (See Code Civ. Proc., § 1161(2).) Judicial holidays are shown on the judicial branch website, www.courts.ca.gov/holidays.htm.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout, provided that it is not less than three days.

Defective service may be waived if defendant admits receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

The Tenant Protection Act of 2019 and/or local ordinances may impose additional notice requirements for the termination of a rental agreement. (See Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Sources and Authority

- Conclusive Presumption of Receipt of Rent Sent to Address Provided in Notice. Code of Civil Procedure section 1161(2).

- COVID-19 Tenant Relief Act. Code of Civil Procedure section 1179.01 et seq.

- Senate Bill 91 (Stats. 2021, ch. 2). Code of Civil Procedure section 1179.02 et seq.
- Commercial Tenancy: Estimate of Rent Due in Notice. Code of Civil Procedure 1161.1.
- Manner of Service of Notice. Code of Civil Procedure section 1162.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- " '[P]roper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. [Citations.]' [Citation.] 'A lessor must allege and prove proper service of the requisite notice. [Citations.] Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained. [Citations.]' " (*Borsuk v. Appellate Division of Superior Court* (2015) 242 Cal.App.4th 607, 611 [195 Cal.Rptr.3d 581].)
- "A three-day notice must contain 'the amount which is due.' A notice which demands rent in excess of the amount due does not satisfy this requirement. This rule ensures that a landlord will not be entitled to regain possession in an unlawful detainer action unless the tenant has had the opportunity to pay the delinquent rent." (*Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 697 [32 Cal.Rptr.2d 635], internal citations and footnote omitted.)
- "As compared to service of summons, by which the court acquires personal jurisdiction, service of the three-day notice is merely an element of an unlawful detainer cause of action that must be alleged and proven for the landlord to acquire possession." (*Borsuk, supra*, 242 Cal.App.4th at pp. 612–613.)
- "[W]e do not agree that a proper notice may not include anything other than technical rent. It is true that subdivision 2 of Code of Civil Procedure section 1161 relates to a default in the payment of rent. However, the subdivision refers to the 'lease or agreement under which the property is held' and requires the notice state 'the amount which is due.' The language is not 'the amount of rent which is due' or 'the rent which is due.' We think the statutory language is sufficiently broad to encompass any sums due under the lease or agreement under which the property is held." (*Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 492 [144 Cal.Rptr. 474].)
- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)
- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and*

delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)

- "We … hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra,* 138 Cal.App.3d Supp. at p. 14.)

- "We … hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra,* 226 Cal.App.3d Supp. at p. 20.)

- "An unlawful detainer action based on failure to pay rent must be preceded by a three-day notice to the tenant to pay rent or quit the premises. Failure to state the exact amount of rent due in the notice is fatal to the subsequent unlawful detainer action." (*Lynch & Freytag v. Cooper* (1990) 218 Cal.App.3d 603, 606, fn. 2 [267 Cal.Rptr. 189], internal citations omitted.)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s

> right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra*, 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 753, 755–758, 760

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.26–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.10–6.30, Ch. 8

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶¶ 5:224.3, 5:277.1 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:98.10, 7:327 (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.21 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.22 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy*, § 332.28 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.13, 236.13A (Matthew Bender)

Miller & Starr, California Real Estate 4th, §§ 34:183-34:187 (Thomson Reuters)

4308. Termination for Nuisance or Unlawful Use—Essential Factual Elements (Code Civ. Proc., § 1161(4))

[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has [created a nuisance on the property/ [or] used the property for an illegal purpose]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**

2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***];**

3. **That [***name of defendant***] [***include one or both of the following:***]**

   created a nuisance on the property by [*specify conduct constituting nuisance***];**

   [or]

   used the property for an illegal purpose by [*specify illegal activity***];**

4. **That [***name of plaintiff***] properly gave [***name of defendant***] [and [***name of subtenant***]] three days' written notice to vacate the property; and**

5. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

[A "nuisance" is anything that [[is harmful to health]/ [or] [is indecent or offensive to the senses of an ordinary person with normal sensibilities]/ [or] [is an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property]/ [or] [unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway]/[or] [is [a/an] [fire hazard/*specify other potentially dangerous condition***] to the property]].]**

New December 2010; Revised June 2011, December 2011, May 2020, November 2020, May 2021

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph and in elements 4 and 5 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1, and "rented" in element 2.

If the plaintiff is a tenant seeking to recover possession from a subtenant, include the bracketed language on subtenancy in the opening paragraph and in element 4, "leases" in element 1, and "subleased" in element 2. (Code Civ. Proc., § 1161(3).)

Include the optional last paragraph defining a nuisance if there is a factual dispute and the jury will determine whether the defendant's conduct constituted a nuisance. Omit any bracketed definitional options that are not at issue in the case. For additional authorities on nuisance, see the Sources and Authority to CACI No. 2020, *Public Nuisance—Essential Factual Elements*, and CACI No. 2021, *Private Nuisance—Essential Factual Elements*. Certain conduct or statutory violations that constitute or create a rebuttable presumption of a nuisance are set forth in Code of Civil Procedure section 1161(4). If applicable, insert the appropriate ground in element 3. (See also Health & Saf. Code, § 17922 [adopting various uniform housing and building codes].)

If the grounds for termination involve assigning, subletting, or committing waste in violation of a condition or covenant of the lease, give CACI No. 4304, *Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements*. (See Code Civ. Proc., § 1161(4).)

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 4.

For nuisance or unlawful use, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4).)

The Tenant Protection Act of 2019, local law, and/or federal law may impose additional requirements for the termination of a rental agreement based on nuisance or illegal activity. (See Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined], (b)(1)(C) [nuisance is "just cause"], (b)(1)(I) [unlawful purpose is "just cause"].) For example, if the property in question is subject to a local rent control or rent stabilization ordinance, the ordinance may provide further definitions or conditions under which a landlord has just cause to evict a tenant for nuisance or unlawful use of the property. This instruction should be modified accordingly if applicable.

See CACI No. 4309, *Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use*, for an instruction on proper written notice.

See also CACI No. 312, *Substantial Performance*.

Sources and Authority

- Unlawful Detainer Based on Tenant Conduct. Code of Civil Procedure section 1161(4).
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- "Nuisance" Defined. Civil Code section 3479.
- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 29 [341 P.2d 749].)
- "The basic concept underlying the law of nuisance is that one should use one's own property so as not to injure the property of another. An action for private nuisance is designed to redress a substantial and unreasonable invasion of one's interest in the free use and enjoyment of one's property. ' "The invasion may be intentional and unreasonable. It may be unintentional but caused by negligent or reckless conduct; or it may result from an abnormally dangerous activity for which there is strict liability. On any of these bases the defendant may be liable. On the other hand, the invasion may be intentional but reasonable; or it may be entirely accidental and not fall within any of the categories mentioned above." ' Determination whether something, not deemed a nuisance per se, is a nuisance in fact in a particular instance, is a question for the trier of fact." (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230–1231 [8 Cal.Rptr.2d 293], internal citations omitted.)
- "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)
- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a

copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra*, 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra*, 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra*, … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra*, 194 Cal.App.4th at p. 1425.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 701, 759

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.55, 8.58, 8.59

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.46, 6.48, 6.49

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶ 7:136 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.21 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 200, *Termination of Tenancies*, § 200.38 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.23

29 California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy*, § 332.28 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer,* § 236.11 (Matthew Bender)

Miller & Starr California Real Estate 4th, § 34:181 (Thomson Reuters)

4329. Affirmative Defense—Failure to Provide Reasonable Accommodation

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[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/***nonbinary pronoun***] because [***name of plaintiff***] violated fair housing laws by refusing to provide [[***name of defendant***]/a member of [***name of defendant***]'s household] [a] reasonable accommodation[s] for [his/her/***nonbinary pronoun***] disability as necessary to afford [him/her/***nonbinary pronoun***] an equal opportunity to use and enjoy [a/an] [***specify nature of dwelling or public and common use area at issue, e.g., the apartment building's mail room***].**

To establish this defense, [*name of defendant***] must prove all of the following:**

1. **That [[***name of defendant***]/a member of [***name of defendant***]'s household] has a disability;**

2. **That [***name of plaintiff***] knew of, or should have known of, [[***name of defendant***]/the member of [***name of defendant***]'s household]'s disability;**

3. **[That [[***name of defendant***]/a member of [***name of defendant***]'s household/an authorized representative of [***name of defendant***]] requested [an] accommodation[s] on behalf of [himself/herself/***nonbinary pronoun/name of defendant***] [or] [another household member with a disability]];**

4. **That [an] accommodation[s] [was/were] necessary to afford [[***name of defendant***]/a member of [***name of defendant***]'s household] an equal opportunity to use and enjoy the [***specify nature of dwelling or public and common use area at issue, e.g., the apartment building's mail room***]; and**

5. **[That [***name of plaintiff***] failed to provide the reasonable accommodation[s]]**

   [or]

   [That [*name of plaintiff***] failed to engage in the interactive process to try to accommodate the disability].**

New May 2021

Directions for Use

An individual with a disability may raise failure to provide a reasonable accommodation as an affirmative defense to an unlawful detainer action. (Cal. Code Regs., tit. 2, § 12176(c)(8)(A).) The individual with a disability seeking a reasonable accommodation must make a request for an accommodation. (Cal. Code Regs., tit. 2, § 12176(c)(1).) Such a request may be made by the individual with a disability, a family member, or someone authorized by the individual with a disability to act on the individual's behalf. (Cal. Code Regs., tit. 2, § 12176(c)(2).)

A reasonable accommodation request that is made during a pending unlawful detainer action is subject to

the same regulations that govern reasonable accommodation requests made at any other time. (Cal. Code Regs., tit. 2, § 12176(c)(8).)

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 Protected. Government Code section 12926(o).
- Reasonable Accommodations. California Code of Regulations, title 2, section 12176(a), (c).
- Reasonable Accommodation Requests in Unlawful Detainer Actions. Cal. Code Regs., tit. 2, § 12176(c)(8).

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 977, 1062–1064

3 California Real Estate Law and Practice, Ch. 63, *Duties and Liabilities of Brokers*, § 63.121 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35, 115.92 (Matthew Bender)

4560. Recovery of Payments to Unlicensed Contractor—Essential Factual Elements (Bus. & Prof. Code, § 7031(b))

[*Name of plaintiff***] claims that [***name of defendant***] did not have a valid contractor's license during all times when [***name of defendant***] was [performing services/supervising construction] for [***name of plaintiff***]. To establish this claim and recover all compensation paid for these services, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [[engaged/hired]/ [or] contracted with] [***name of defendant***] to perform services for [***name of plaintiff***];**

2. **That a valid contractor's license was required to perform these services; and**

3. **That [***name of plaintiff***] paid [***name of defendant***] for services that [***name of defendant***] performed.**

[[*Name of plaintiff***] is not entitled to recover all compensation paid if [***name of defendant***] proves that at all times while [performing/supervising] these services, [he/she/***nonbinary pronoun***/it] had a valid contractor's license as required by law.]**

New June 2016; Revised November 2020, May 2021

Directions for Use

Give this instruction in a case in which the plaintiff seeks to recover money paid to an unlicensed contractor for service performed for which a license is required. (Bus. & Prof. Code, § 7031(b).) Modify the instruction if the plaintiff claims the defendant did not perform services or supervise construction, but instead agreed to be solely responsible for completion of construction services. (See *Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 940 [29 Cal.Rptr.2d 669].) ~~It may also be modified for use if~~ For a case brought by a licensed contractor or an allegedly unlicensed contractor ~~brings a claim~~ for payment for services performed, give CACI No. 4562, *Payment for Construction Services Rendered—Essential Factual Elements*. (See Bus. & Prof. Code, § 7031(a), (e).)

The burden of proof to establish licensure or proper licensure is on the licensee. Proof must be made by producing a verified certificate of licensure from the Contractors~~'~~ State License Board. When licensure or proper licensure is controverted, the burden of proof to establish licensure or proper licensure is on the contractor. (Bus. & Prof. Code, § 7031(d).) ~~Modification to the optional paragraph may be required if substantial compliance with the licensing laws is alleged. (See Bus. & Prof. Code, § 7031(e).)~~ Omit the final bracketed paragraph if the issue of licensure is not contested.

A corporation qualifies for a contractor's license through a responsible managing officer (RMO) or responsible managing employee (RME) who is qualified for the same license classification as the classification being applied for. (Bus & Prof. Code, § 7068(b)(3).) The plaintiff may attack a contractor's license by going behind the face of the license and proving that a required RMO or RME is a sham. The

burden of proof remains with the contractor to prove a bona fide RMO or RME. (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 385−387 [70 Cal.Rptr.2d 427].) Whether an RMO or RME is a sham can be a question of fact. (*Jeff Tracy, Inc. v. City of Pico Rivera* (2015) 240 Cal.App.4th 510, 518 [192 Cal.Rptr.3d 600].)

Sources and Authority

- Action to Recover Compensation Paid to Unlicensed Contractor. Business and Professions Code section 7031(b).

- Proof of Licensure. Business and Professions Code section 7031(d).

- "Contractor" Defined. Business and Professions Code section 7026.

- "The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide building and construction services. The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business." (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995 [277 Cal.Rptr. 517, 803 P.2d 370], internal citations omitted.)

- "Because of the strength and clarity of this policy, it is well settled that section 7031 applies despite injustice to the unlicensed contractor. 'Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business *outweighs any harshness between the parties,* and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state. [Citation.] . . .' " (*Hydrotech Systems, Ltd., supra,* 52 Cal.3d at p. 995, original italics.)

- "The current legislative requirement that a contractor plaintiff must, in addition to proving the traditional elements of a contract claim, also prove that it was duly licensed at all times during the performance of the contract does not change this historical right to a jury trial." (*Jeff Tracy, Inc., supra,* 240 Cal.App.4th at p. 518, fn. 2.)

- "[T]he courts may not resort to equitable considerations in defiance of section 7031." (*Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 152 [308 P.2d 713].)

- "In 2001, the Legislature complemented the shield created by subdivision (a) of section 7031 by adding a sword that allows persons who utilize unlicensed contractors to recover compensation paid to the contractor for performing unlicensed work. Section 7031(b) provides that 'a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract' unless the substantial compliance doctrine applies." (*White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 519 [100 Cal.Rptr.3d 434], internal citation omitted.)

- "It appears section 7031(b) was designed to treat persons who have utilized unlicensed contractors

consistently, regardless of whether they have paid the contractor for the unlicensed work. In short, those who have not paid are protected from being sued for payment and those who have paid may recover all compensation delivered. Thus, unlicensed contractors are not able to avoid the full measure of the CSLL's civil penalties by (1) requiring prepayment before undertaking the next increment of unlicensed work or (2) retaining progress payments relating to completed phases of the construction." (*White, supra,* 178 Cal.App.4th at p. 520.)

- "In most cases, a contractor can establish valid licensure by simply producing 'a verified certificate of licensure from the Contractors' State License Board which establishes that the individual or entity bringing the action was duly licensed in the proper classification of contractors at all times during the performance of any act or contract covered by the action.' [Contractor] concedes that if this was the only evidence at issue, 'then—perhaps—the issue could be decided by the court without a jury.' But as [contractor] points out, the City was challenging [contractor]'s license by going behind the face of the license to prove that [license holder] was a sham RME or RMO." (*Jeff Tracy, Inc., supra,* 240 Cal.App.4th at p. 518.)

- "[T]he determination of whether [contractor] held a valid class A license involved questions of fact. '[W]here there is a conflict in the evidence from which either conclusion could be reached as to the status of the parties, the question must be submitted to the jury. [Citations.] This rule is clearly applicable to cases revolving around the disputed right of a party to bring suit under the provisions of Business and Professions Code section 7031.' " (*Jeff Tracy, Inc., supra,* 240 Cal.App.4th at p. 518.)

- "We conclude the authorization of recovery of '*all* compensation paid to the unlicensed contractor for performance of any act or contract' means that unlicensed contractors are required to return all compensation received without reductions or offsets for the value of material or services provided." (*White, supra,* 178 Cal.App.4th at pp. 520−521, original italics, internal citation omitted.)

- "[A]n unlicensed contractor is subject to forfeiture even if the other contracting party was aware of the contractor's lack of a license, and the other party's bad faith or unjust enrichment cannot be asserted by the contractor as a defense to forfeiture." (*Judicial Council of California v. Jacobs Facilities, Inc.* (2015) 239 Cal.App.4th 882, 896 [191 Cal.Rptr.3d 714].)

- "Nothing in section 7031 either limits its application to a particular class of homeowners or excludes protection of 'sophisticated' persons. Reading that limitation into the statute would be inconsistent with its purpose of ' "deterring unlicensed persons from engaging in the contracting business." ' " (*Phoenix Mechanical Pipeline, Inc. v. Space Exploration Technologies Corp.* (2017) 12 Cal.App.5th 842, 849 [219 Cal.Rptr.3d 775].)

- "By entering into the agreements to 'improve the Property' and to be '*solely responsible* for completion of' infrastructure improvements—including graded building pads, storm drains, sanitary systems, streets, sidewalks, curbs, gutters, utilities, street lighting, and traffic signals—[the plaintiff] was clearly contracting to provide construction services in exchange for cash payments by [the defendants]. The mere execution of such a contract is an act 'in the capacity of a

contractor,' and an unlicensed person is barred by section 7031, subdivision (a), from bringing claims based on the contract. [¶] ... [¶] … Section 7026 plainly states that both the person who provides construction services himself and one who does so 'through others' qualifies as a 'contractor.' The California courts have also long held that those who enter into construction contracts must be licensed, even when they themselves do not do the actual work under the contract." (*Vallejo Development Co., supra,* 24 Cal.App.4th at p. 940–941, original italics.)

- "[Contractor] has not alleged one contract, but rather a series of agreements for each separate task that it was asked to perform. It may therefore seek compensation under those alleged agreements that apply to tasks for which no license was required." (*Phoenix Mechanical Pipeline, Inc., supra,* 12 Cal.App.5th at p. 853.)

- "Section 7031, subdivision (e) states an exception to the license requirement of subdivision (a). Subdivision (e) provides in part: '[T]he court may determine that there has been substantial compliance with licensure requirements under this section if it is shown at an evidentiary hearing that the person who engaged in the business or acted in the capacity of a contractor (1) had been duly licensed as a contractor in this state prior to the performance of the act or contract, (2) acted reasonably and in good faith to maintain proper licensure, and (3) acted promptly and in good faith to remedy the failure to comply with the licensure requirements upon learning of the failure.' " (*C. W. Johnson & Sons, Inc. v. Carpenter* (2020) 53 Cal.App.5th 165, 169 [265 Cal.Rptr.3d 895].)

- "[I]t is clear that the disgorgement provided in section 7031(b) is a penalty. It deprives the contractor of any compensation for labor and materials used in the construction while allowing the plaintiff to retain the benefits of that construction. And, because the plaintiff may bring a section 7031(b) disgorgement action regardless of any fault in the construction by the unlicensed contractor, it falls within the Supreme Court's definition of a penalty: 'a recovery " 'without reference to the actual damage sustained.' " ' Accordingly, we hold that [Code Civ. Proc., §] 340, subdivision (a), the one-year statute of limitations, applies to disgorgement claims brought under section 7031(b)." (*Eisenberg Village of Los Angeles Jewish Home for the Aging v. Suffolk Construction Company, Inc.* (2020) 53 Cal.App.5th 1201, 1212 [268 Cal.Rptr.3d 334], internal citation and footnote omitted.)

- "[W]e hold that the discovery rule does not apply to section 7031(b) claims. Thus, the ordinary rule of accrual applies, i.e., the claim accrues ' "when the cause of action is complete with all of its elements." ' In the case of a section 7031(b) claim, the cause of action is complete when an unlicensed contractor completes or ceases performance of the act or contract at issue." (*Eisenberg Village of Los Angeles Jewish Home for the Aging, supra,* 53 Cal.App.5th at pp. 1214–1215, internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 491

12 California Real Estate Law and Practice, Ch. 430, *Licensing of Contractors,* § 430.70 (Matthew

Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.83 (Matthew Bender)

5 California Points and Authorities, Ch. 50A, *Contracts: Performance, Breach, and Defenses*, § 50A.52 et seq. (Matthew Bender)

29 California Legal Forms, Ch. 88, *Licensing of Contractors*, § 88.18 (Matthew Bender)

4561. Damages—All Payments Made to Unlicensed Contractor

A person who pays money ~~under a contract~~ to an unlicensed contractor may recover all compensation paid to the unlicensed contractor ~~under the contract~~.

If you decide that [*name of plaintiff***] has proved that [he/she/***nonbinary pronoun***/it] paid money to [***name of defendant***] for services ~~under the contract~~ and that [***name of defendant***] has failed to prove that [he/she/***nonbinary pronoun***/it] was licensed at all times during performance, then [***name of plaintiff***] is entitled to the return of all amounts paid, not just the amounts paid while [***name of defendant***] was unlicensed. The fact that [***name of plaintiff***] may have received some or all of the benefits of [***name of defendant***]'s performance does not affect [his/her/***nonbinary pronoun***/its] right to the return of all amounts paid.**

New June 2016; Revised May 2021

Directions for Use

Give this instruction to clarify that the plaintiff is entitled to recover all compensation paid to the unlicensed defendant regardless of any seeming injustice to the contractor. (See *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995 [277 Cal.Rptr. 517, 803 P.2d 370].)

Give CACI No. 4562, *Payment for Construction Services Rendered—Essential Factual Elements*, ~~It may be modified for use~~ if an allegedly unlicensed contractor brings a claim for payment for services performed. (See Bus. & Prof. Code, § 7031(a), (e).)

Sources and Authority

- Recovery of All Compensation Paid to Unlicensed Contractor. Business and Professions Code section 7031(b).

- "Because of the strength and clarity of this policy, it is well settled that section 7031 applies despite injustice to the unlicensed contractor. 'Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business *outweighs any harshness between the parties*, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state. [Citation.] . . .' " (*Hydrotech Systems, Ltd., supra*, 52 Cal.3d at p. 995, original italics.)

- "[T]he courts may not resort to equitable considerations in defiance of section 7031." (*Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 152 [308 P.2d 713].)

- "[I]f a contractor is unlicensed for any period of time while delivering construction services, the contractor forfeits all compensation for the work, not merely compensation for the period when the contractor was unlicensed." (*Judicial Council of California v. Jacobs Facilities, Inc.* (2015) 239 Cal.App.4th 882, 896 [191 Cal.Rptr.3d 714].)

- "We conclude the authorization of recovery of '*all* compensation paid to the unlicensed contractor for performance of any act or contract' means that unlicensed contractors are required to return all compensation received without reductions or offsets for the value of material or services provided." (*White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 520−521 [100 Cal.Rptr.3d 434], original italics, internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 491

12 California Real Estate Law and Practice, Ch. 430, *Licensing of Contractors*, § 430.70 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.83 (Matthew Bender)

5 California Points and Authorities, Ch. 50A, *Contracts: Performance, Breach, and Defenses*, § 50A.52 et seq. (Matthew Bender)

29 California Legal Forms, Ch. 88, *Licensing of Contractors*, § 88.18 (Matthew Bender)

4562. Payment for Construction Services Rendered—Essential Factual Elements (Bus. & Prof. Code, § 7031(a), (e))

[*Name of plaintiff***] claims that [***name of defendant***] owes [***name of plaintiff***] money for construction services rendered. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [[engaged/hired]/ [or] contracted with] [***name of plaintiff***] to [***specify contractor services***];**

2. **That [***name of plaintiff***] had at all times during the performance of construction services a valid contractor's license;**

3. **That [***name of plaintiff***] performed these service[s];**

4. **That [***name of defendant***] has not paid [***name of plaintiff***] for the construction services that [***name of plaintiff***] provided; and**

5. **The amount of money [***name of defendant***] owes [***name of plaintiff***] for the construction services provided.**

New May 2021

Directions for Use

Give this instruction in a case in which the plaintiff-contractor seeks to recover compensation owed for services performed for which a license is required. (Bus. & Prof. Code, § 7031(a).)

For element 2, licensure requirements may be satisfied by substantial compliance with the licensure requirements. (Bus. & Prof. Code, § 7031(e).) If the court has determined the defendant's substantial compliance, modify element 2 accordingly, and instruct the jury that the court has made the determination.

When licensure or proper licensure is controverted, the burden of proof to establish licensure or proper licensure is on the contractor. (Bus. & Prof. Code, § 7031(d).) Proof must be made by producing a verified certificate of licensure from the Contractors State License Board.

For a case involving recovery of payment for services provided by an allegedly unlicensed contractor, give CACI No. 4560, *Recovery of Payments to Unlicensed Contractor—Essential Factual Elements*.

Sources and Authority

- Proof of Licensure. Business and Professions Code section 7031(d).

- "Contractor" Defined. Business and Professions Code section 7026.

- "[Contractor] has not alleged one contract, but rather a series of agreements for each separate task that it was asked to perform. It may therefore seek compensation under those alleged agreements that apply to tasks for which no license was required." (*Phoenix Mechanical Pipeline, Inc. v. Space Exploration Technologies Corp.* (2017) 12 Cal.App.5th 842, 853 [219 Cal.Rptr.3d 775].)

- "Section 7031, subdivision (e) states an exception to the license requirement of subdivision (a). Subdivision (e) provides in part: '[T]he court may determine that there has been substantial compliance with licensure requirements under this section if it is shown at an evidentiary hearing that the person who engaged in the business or acted in the capacity of a contractor (1) had been duly licensed as a contractor in this state prior to the performance of the act or contract, (2) acted reasonably and in good faith to maintain proper licensure, and (3) acted promptly and in good faith to remedy the failure to comply with the licensure requirements upon learning of the failure.' " (*C. W. Johnson & Sons, Inc. v. Carpenter* (2020) 53 Cal.App.5th 165, 169 [265 Cal.Rptr.3d 895].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 491

California Civil Practice: Real Property Litigation §§ 10:26–10:38 (Thomson Reuters)

12 California Real Estate Law and Practice, Ch. 430, *Licensing of Contractors,* § 430.70 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts,* § 104.83 (Matthew Bender)

5 California Points and Authorities, Ch. 50A, *Contracts: Performance, Breach, and Defenses,* § 50A.52 et seq. (Matthew Bender)

29 California Legal Forms, Ch. 88, *Licensing of Contractors,* § 88.18 (Matthew Bender)

Miller & Starr, California Real Estate 4th §§ 32:68–32:84

Instruction	Commenter	Comment	Committee Response
440. *Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements (Revise)*	Matthew Biren, Attorney, Biren Law Group Los Angeles	I think that the changes to this instruction are good as they clarify and simplify the instruction.	No response required.
	Shelley Bullen, LMFT Chico	"It appears to be an incomplete edit throughout the writing. If you take out the phrase, 'with ,reasonable force to prevent escape' on page 4, then it would follow to take the same phrase out on the top of page 5 especially if you are taking out 'peace officer.' "	The committee believes that the revisions are supported by law, and that the instruction properly includes preventing escape where appropriate.
	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We agree with the proposed revisions to the instruction.	No response required.
		We suggest adding clear authority for the statement in the Directions for Use, and the title, that this instruction can be given if the defendant is any law enforcement officer. Penal Code section 830 et seq. do not appear to support the distinction between this instruction, stated to apply to any law enforcement officer, and CACI No. 441, applicable only to peace officers.	The committee has revised the Directions for Use to express more clearly the potential issue created by Penal Code section 835a's use of the term "peace officer."
		Although it is beyond the scope of this Invitation to Comment, we suggest adding language to the Directions for Use explaining when to include the optional sentence in the first paragraph of the instruction. We suggest, "Include the bracketed sentence in the first paragraph of the instruction if there is evidence the person being arrested or detained used force to resist."	For consistency with CACI No. 1305A, the committee has added a use note similar to the one suggested.
	Bruce Greenlee, Attorney	What is the authority for the new sentence added to the Directions for Use (DforU)?	See committee response to the

Instruction	Commenter	Comment	Committee Response
	Richmond		California Lawyers Association's comment, above.
		In the last optional paragraph (and also in the paragraph preceding the factors) it really isn't necessary to specify the type of officer. You could just say "an officer" as you do in the last sentence.	The committee has revised the paragraphs as suggested by the commenter.
702. *Waiver of Right-Of-Way (Revise)*	Matthew Biren, Attorney, Biren Law Group Los Angeles	I think that the changes to this instruction are good as they clarify and simplify the instruction.	No response required.
	Shelley Bullen, LMFT Chico	I do not see why the waiver of right away is even being changed. It's a waste of time.	The committee believes the revision improves clarity and resolves a potential for confusion that existed with the bracketed options in the prior version.
	Consumer Attorneys of California, by Jacqueline Serna, Deputy Legislative Director	This instruction essentially streamlines the original CACI 702, which refers to "another" driver/pedestrian. The change clarifies the intent of the statute. However, both codes suffer from ambiguity as to what constitutes, "reasonably believes." The instruction draws on two cases to define "reasonable belief," but neither has been incorporated into the instruction itself. To clarify, it may be helpful to add the following language. PROPOSED ADDITIONAL LANGUAGE IN RED: "Reasonable belief" requires a showing that the person with the right of way has conducted himself/herself/binary identifier in such a definite manner sufficient to entitle the other person to assume that the right of way has been	This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle.

Instruction	Commenter	Comment	Committee Response
		surrendered to him/her/binary identifier." (Based on language from Hopkins v. Tye (1959) Cal.App.2d 431.	
	Bruce Greenlee, Attorney Richmond	What is the authority for the proposed change? I think that most people would consider "another person" to refer to a pedestrian, not a driver. Hence, it appears that the instruction no longer applies to waiver of right-of-way between two vehicles. Is that the intent? If so, something to that effect should be noted in the DforU. And maybe the title should be changed to something like "*Waiver of Right-of-Way between Vehicle and Pedestrian*."	The committee believes that the instruction accurately states the law and is supported by the cases in the Sources and Authority. The committee also does not share the commenter's view that "another person" would be understood by jurors to refer only to a pedestrian if the situation involved a driver's waiver of the right-of-way to another driver or a pedestrian's waiver of the right-of-way to a driver.
		The instruction would now apply to waiver of right-of-way between two pedestrians. I doubt that there is such a thing.	The committee does not believe the instruction needs to be revised further to eliminate the remote possibility that a case involving a pedestrian's waiver of right-of-way to another pedestrian

Instruction	Commenter	Comment	Committee Response
			would reach a jury. The committee, however, has refined the instruction as suggested by the Orange County Bar Association, below.
	Orange County Bar Association by Larisa M. Dinsmoor, President	The changes to the instruction are not based on any law so it is presumed the changes are proposed for purposes of clarity and understanding. The instruction as proposed does not achieve the above purposes. It is recommended that the instruction change . . . [to]: **A [driver/pedestrian] who has the right-of-way may give up that right and let another person go first. If the other person reasonably believes that the [driver/pedestrian] has given up the right-of-way, then the other person may go first.**	For improved clarity, the committee has revised the instruction as suggested.
1010. *Affirmative Defense—Recreation Immunity—Exceptions (Revise)*	Association of Southern California Defense Counsel (ASCDC), by Steven S. Fleischman, Attorney, Horvitz & Levy LLP Burbank	On February 10, 2021, the California Supreme Court granted review in *Hoffmann v. Young* (2020) 56 Cal.App.5th 1021, review granted Feb. 10, 2021, S266003. Although the Supreme Court exercised its discretion to allow the divided *Hoffmann* decision to remain citable, it is no longer binding and has no precedential effect; instead, it can be cited for "potentially persuasive value only." (Cal. Rules of Court, rule 8.1115(e)(1).) Given the grant of review, ASCDC urges the Committee to delete the two proposed citations to *Hoffmann*, and the statements that are supported by the citations to *Hoffmann*, in the Directions for Use and Sources and Authorities.	In light of the California Supreme Court's granting review in *Hoffmann v. Young*, the committee agrees that the proposed citations and the changes to the Directions for Use and Sources and Authority based on *Hoffmann* are not prudent. The committee will reconsider the instruction once the *Hoffmann* case has been resolved.

Instruction	Commenter	Comment	Committee Response
		With respect to the proposed change to the penultimate paragraph of CACI No. 1010, ASCDC agrees that this change is supported by existing case law. Toward that end, CACI may wish to consider adding citations to *Jackson v. Pacific Gas & Elec. Co.* (2001) 94 Cal.App.4th 1110, 1116 and *Pacific Gas & Electric Co. v. Superior Court* (2017) 10 Cal.App.5th 563, 588 in the Sources and Authorities to support this proposed change.	The committee has chosen to add a single case as authority for the change. The committee declines to add additional cases on the same point. CACI's Sources and Authority is not meant to be a compendium of all cases supporting an instruction.
	Matthew Biren, Attorney, Biren Law Group Los Angeles	I think that the changes to this instruction are good as they clarify and simplify the instruction.	No response required.
	Shelley Bullen, LMFT Chico	"I do not agree with taking out language 'for recreational purpose' unless it is taken out everywhere. It leaves to many gray areas. Is it charged for recreational purposes, then only invited for any reason. It[']s confusing to not have consistency in language. One must look at the section before taking out the language at all."	The case law and statute do not support the deletion proposed by the commenter.
		"I agree with being liable for your children's invitation on page 13."	See the committee's response to ASCDC's comment, above.
	California Lawyers Association, Litigation Section, Civil Jury	The California Supreme Court granted a petition for review in *Hoffman v. Young* (2000) 56 Cal.App.5th 1021, so the opinion is not binding authority. (Cal. Rules of Court, rule 8.1115(e)(1).) We would delete from the proposed revisions language for which *Hoffman* is the only authority, including the new	See the committee's response to ASCDC's comment, above.

Instruction	Commenter	Comment	Committee Response
	Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	language in the Directions for Use and citation to *Hoffman*, and the last bullet point in the Sources and Authority.	
		We agree with the deletion of "for the recreational purpose" from the instruction and with the new language in the Sources and Authority and citation to *Calhoon v. Lewis* (2000) 38 Cal.App.4th supporting this change.	No response required.
	Consumer Attorneys of California, by Jacqueline Serna, Deputy Legislative Director	The elimination of the language "for the recreational purpose" at the end of Option Three is helpful for Plaintiffs, since it means that permission to enter the property does not have to be directly tied to a recreational purpose. However, Option Two risks creating an ambiguity. It states, "a charge or fee was paid to [*name of defendant*/the owner] for permission to enter the property for a recreational purpose." This is from the original statute, but in light of the change to Option Three, it means that so long the defendant, OR the owner of the property who MAY NOT for some reason be a defendant was paid a fee or charge for permission to entry, the actual defendant is not immune. PROPOSED ADDITIONAL LANGUAGE IN RED: To maintain consistency through the options, Option Three should state: "Defendant/the owner expressly invited Plaintiff to enter the property."	As noted above, the committee is deferring the proposed change to the Directions for Use on the issue of who may offer an invitation. The committee will reconsider the issue in a future release.
	Bruce Greenlee, Attorney Richmond	I agree that all of the changes are required by *Hoffman v. Young*. *Hoffman v. Young* is not yet final (time extended to March 8). I hold out hope that it will be depublished. While I think the result is correct, the dicta criticizing CACI No. 1010 is unfortunate in my opinion. [Footnote omitted.]	See the committee's response to ASCDC's comment, above.
1305. *Battery by Peace Officer—Essential Factual Elements (Renumber as 1305A, Retitle, and Revise)*	Bruce Greenlee, Attorney Richmond	It is not necessary to revoke this instruction. CACI often has revised and renumbered an instruction to an A instruction in order to add a related B instruction. Just renumber to 1305A, change the title, and make the other edits to limit the instruction to nondeadly force.	As suggested, the committee recommends renumbering CACI No. 1305 to No. 1305A, and revising the instruction as proposed in the draft

Instruction	Commenter	Comment	Committee Response
			that was circulated for public comment as CACI No. 1305A, with additional changes discussed below.
1305A. *Battery by Law Enforcement Officer (Nondeadly Force)—Essential Factual Elements (Revisions made in 1305 after renumbering as 1305A)*	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We believe the sentence "Even if the officer is mistaken . . . unreasonable force" in the second paragraph of the instruction should be optional, in brackets, as in CACI No. 440, and language should be added to the Directions for Use stating to include this sentence if there is evidence the person being arrested or detained was using force to resist.	For consistency, the committee has added brackets to the sentence, and a use note in the Directions for Use.
		We would add an optional factor (d) to the instruction as it is in CACI No. 440: "[(d) [*Name of defendant*]'s tactical conduct and decisions before using force on [*name of plaintiff*].]" We find support for this factor in Penal Code section 835a, subdivision (d). which suggests, without expressly stating, that whether tactical repositioning or other de-escalation tactics were available is a factor to consider in deciding whether the force was reasonable. Also supporting this change are Penal Code section 835a, subdivision (a)(3) (declaration of legislative intent to "ensure that officers use force consistent with law and agency policies") and Government Code section 7286, subdivision (b)(1) (requires law enforcement agencies to maintain a policy including "A requirement that officers utilize deescalation techniques, crisis intervention tactics, and other alternatives to force when feasible").	The committee has added a use note to the Directions for Use that the factors are not exclusive. Because there is no direct authority for adding factor (d) in the context of a battery claim, the committee declines to make the suggested change to the factors.
		We would delete the optional final paragraph of the instruction. We find the first sentence duplicative of prior language to the effect that an officer may use reasonable force to overcome resistance: "[A/An [insert type of officer may use reasonable force to [arrest/detain/ [,/or] prevent the escape of/[,/or] overcome the resistance of] . . ."; "(c) Whether [*name of plaintiff*] was actively resisting . . . ."	The committee disagrees because retreat and the use of force to overcome resistance are distinct, and the language of

Instruction	Commenter	Comment	Committee Response
		The second sentence introduces a double negative that may be difficult for the jury to understand: An officer does not have to retreat; tactical repositioning is not retreat. We believe the point is that whether tactical repositioning or other de-escalation tactics were available is a factor to consider in deciding whether the force was reasonable, as stated above. We suggest adding this as factor (d), as stated, and deleting this second sentence. The third sentence seems to invoke the affirmative defense stated in CACI No. 1304. We would delete the third sentence, delete the final paragraph in the Directions for Use, and add language to the Directions for Use stating to give CACI No. 1304 if the defendant claims to have acted in self-defense.	the final paragraph is supported by Penal Code section 835a, subd. (d).
		We suggest adding clear authority for the statement in the Directions for Use, and the title, that this instruction can be given if the defendant is any law enforcement officer. Penal Code section 830 et seq. do not appear to support the distinction between this instruction, stated to apply to any "law enforcement officer," and CACI No. 1305B, stated to apply only to "peace officers."	The committee has revised the Directions for Use to express more clearly the potential issue created by Penal Code section 835a's use of the term "peace officer."
		We suggest adding language to the Directions for Use explaining that the *Graham* factors are not exclusive and that additional factors can be added: "Factors (a), (b), and (c) are often referred to as the '*Graham* factors.' (See *Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The Graham factors are not exclusive (see *Glenn v. Wash. County* (9th Cir. 2011) 673 F.3d 864, 872); additional factors may be added if appropriate to the facts of the case."	The committee has added a use note to the Directions for Use as suggested.
	Bruce Greenlee, Attorney Richmond	DforU third paragraph, first sentence: Doesn't this sentence require a citation? The sentence seems to be a statement of law that needs authority. I'm guessing that the et seq. cite to the Penal Code will tell us who qualifies as a peace officer, not that qualification under the Penal Code is not required.	The committee has revised the Directions for Use to express more clearly the potential issue created by Penal Code section

Instruction	Commenter	Comment	Committee Response
			835a's use of the term "peace officer."
		Same paragraph, last sentence: delete the last word. No need to repeat "force" in the sentence.	The committee has deleted the final "force" in the sentence.
	Tony Sain, Attorney Manning & Kass, Ellrod, Ramirez, Trester, LLP Los Angeles	The CACI 1305A and 1305B references regarding "conduct leading up to" the use of force is too vague. The Council should consider instead "conduct playing a causal role in" or "conduct that is a substantial factor cause of" the use of force. The *Hayes* cases make it clear that for officer pre-force conduct to be actionable, it must form part of the chain of causation that results in the use of force: such as the plainclothes detective who scares the plaintiff in the dead of night by knocking on a car window, provoking a car chase that result in the suspect hiding his wallet under his seat – a furtive movement that prompts the plainclothes detective to fire. Just because conduct precedes the use of force (leading up to) does NOT mean that such conduct is an actionable part of the use of force. There must be causation (also referenced as provocation). [Trial brief omitted.]	The committee disagrees. Penal Code section 835a, subd. (e)(3), provides the following definition: " 'Totality of the circumstances' means all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force." The committee believes that "conduct leading up to" is sufficiently clear and supported by the statute.
		The definition of totality of the circumstances is far too prejudicial: it should stop after "to do so."	The committee disagrees. The definition is taken from Penal Code section 835a, and the committee believes

Instruction	Commenter	Comment	Committee Response
			that it accurately states the law.
1305B. *Battery by Peace Officer (Deadly Force)—Essential Factual Elements (New)*	Bruce Greenlee, Attorney Richmond	The instruction is well done.	No response required.
		It is not necessary to use Roman numerals for factors since letters have not yet been used. Change (i) to (a) etc.	As explained in the User Guide, CACI uses letters for factors to be considered by the jury. This instruction uses lowercase roman numerals because the three items are required, and the essential factual elements of the claim are already numbered using arabic numerals. The committee prefers to use lowercase roman numerals for the three statutory conditions.
		In the optional paragraph following the factors, I don't think it is necessary to include the "if an objectively reasonable officer" language. That simply restates the otherwise applicable rules. It should be enough just to say that danger only to the victim does justify the use of deadly force.	The committee disagrees. Penal Code section 835a, subd. (c)(2), includes the phrase. The committee includes it to make clear that the danger to others must be

Instruction	Commenter	Comment	Committee Response
			considered objectively.
		I would move the definition of "deadly force" up to follow the elements.	Consistent with the related negligence instruction (CACI No. 441), the committee prefers to give the separate definitions toward the end of the instruction.
		Next-to-last paragraph: The last sentence becomes unmanageable if the language on disability is included. End this sentence after "to do so" and present the "and whether" as an optional additional sentence.	The committee has revised the paragraph as suggested, and has added a use note to the Directions for Use about when to include the optional sentence.
		DforU, second paragraph first sentence: same issue with regard to authority. Penal Code 835a does not address who qualifies as a peace officer under the statute.	The committee has revised the Directions for Use to express more clearly the potential issue created by Penal Code section 835a's use of the term "peace officer."
	California Lawyers Association, Litigation Section,	We believe this instruction should begin by stating the nature of the plaintiff's claim, as in the second sentence, rather than the defendant's potential justification. Accordingly, we would move the first sentence to the beginning	The introduction to this new instruction is consistent with the related negligence

Instruction	Commenter	Comment	Committee Response
	Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	of the second paragraph, which discusses the defendant's potential justification for using deadly force.	instruction (CACI No. 441), which is beyond the scope of the invitation to comment. The committee will consider the suggestion for both instructions in a future release cycle.
		The essence of the claim is that the defendant's use of deadly force was unlawful. We would add the word "unlawfully" to the second sentence: "[*Name of plaintiff*] claims that [*name of defendant*] [harmed/killed] [him/her/*nonbinary pronoun*/name of decedent] by unlawfully using deadly force . . . ."	The committee disagrees. Penal Code section 835a does not use the term suggested ("unlawfully"). A plaintiff must prove, among other things, that the use of deadly force was not necessary to defend human life (element 3), not that the defendant did something not permitted by law, i.e., unlawfully.
		The second sentence seems to limit the claim to use of deadly force in an arrest or detention, or to prevent escape or overcome resistance incident to an arrest or detention. The plaintiff would be required to show that the plaintiff was being arrested or detained. But deadly force may be used against persons other than arrestees or detainees, and Penal Code section 835a applies in those situations too because it applies to use of deadly force "upon another person." (Pen. Code, § 835a, subd. (c)(1).) So we would delete the words "to	The committee agrees that under Penal Code section 835a, a plaintiff does not need to show that the incident involved an arrest or detention or

Instruction	Commenter	Comment	Committee Response
		arrest/detain/ [,/or] prevent escape of/ [,/or] overcome resistance to] [him/her/*nonbinary pronoun*/*name of decedent*.]"	escape or resistance to establish a battery claim involving deadly force, and has revised the sentence.
		Element 2 states that the defendant used deadly force to arrest or detain the plaintiff, but Penal Code section 835a is not so limited, as stated above. The plaintiff should not have to prove that the plaintiff was being arrested or detained. We would modify element 2 (as in CACI No. 441): "2. That [*name of defendant*] used deadly force ~~to [arrest/detain/ [,/or] prevent the escape of/ [,/or] overcome the resistance of]~~ <u>on</u> [*name of plaintiff*/*decedent*]"	The committee agrees, and has revised element 2 as suggested.
		The duty to make reasonable efforts to identify oneself as a peace officer and warn that deadly force will be used applies only "Where feasible." (Pen. Code, § 835a, subd. (c)(1)(B).) Yet condition iii does not include this qualifier. We suggest modifying condition iii: "<u>If practical under the circumstances,</u> [Name of defendant] made reasonable efforts to identify [himself/herself/nonbinary pronoun] as a peace officer and to warn that deadly force would be used . . . ."	The committee has added the suggested qualifying language to condition iii.
		We believe the words "resources and techniques" in the penultimate paragraph of the instruction could be clearer. We would modify this sentence: ". . . used <u>tactical repositioning or other deescalation techniques</u> ~~other available resources and techniques~~ as [an] alternative[s] to deadly force, ..."	Because "resources and techniques" is used in Penal Code section 835a, subd. (a)(2), and is arguably broader than the language suggested,

Instruction	Commenter	Comment	Committee Response
			the committee declines to make this change.
		The last paragraph of the instruction seems cumbersome and difficult for jurors to understand. We would modify the first sentence for greater clarity, as shown below. We would delete the reference to self-defense because CACI No. 1304 covers self-defense and should be given if self-defense is at issue; we see no need to include the right to self-defense in this instruction. Moreover, stating that an officer can use "objectively reasonable force" without stating that the use of deadly force is limited to the circumstances stated above may be misleading. We believe the discussion of retreat in the second sentence is duplicative of the previous paragraph and should be deleted. Accordingly, we would modify this paragraph: "[A peace officer who makes or attempts to make an arrest does not have to ~~need not~~ retreat or stop because the person being arrested resists or threatens to resist ~~desist from efforts by reason of the resistance or threatened resistance and shall not lost the right to self-defense by use of objectively reasonable force to effect the arrest or to prevent escape or to overcome resistance~~. ~~Retreat does not mean tactical reposition or other deescalation tactics. A peace officer does, however, have a duty to use reasonable tactical repositionaing or other de-escalation tactics.~~]"	The committee has revised the final bracketed paragraph to state the issues more clearly.
		The reference to "two options" in the first sentence of the third paragraph of the Directions for Use could be clarified by beginning that paragraph with the words "In the second paragraph of the instruction."	The committee has added additional information to the Directions for Use to make the paragraph at issue more apparent to users.
	Orange County Bar Association by Larisa M. Dinsmoor, President	Amended Penal Code section 835a became effective January 1, 2020. The statute specifically refers to "peace officers" and accordingly, does not include all law enforcement officers. The statutory definition of "peace officer" as used by 835a is contained in Penal Code section 830 et. seq.	The committee has revised the Directions for Use to express more clearly the potential issue created

Instruction	Commenter	Comment	Committee Response
			by Penal Code section 835a's use of the term "peace officer.
		This newly proposed instruction appropriately tracks the language of 835a except as to alternative condition iii. which is for use in the case of the apprehension of a fleeing person for a felony. Condition iii. as proposed, merely requires the jury find that the officer "…*made reasonable efforts to identify [himself/herself/nonbinary pronoun] as a peace officer and to warn that deadly force would be used, unless the officer had objectively reasonable grounds to believe the person is aware of those facts.*" Section 835a(c)(1)(B) however states "…**Where feasible**, a peace officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts." By the express language of this subsection, the Legislature has provided for three possible situations by which the officer may comply with the statutory mandate. These three lawful alternative situations are: 1) Where it is neither feasible for the officer to identify themself nor has objectively reasonable grounds for believing that the person is aware of the requisite facts; or, 2) Where the officer made reasonable efforts to identify themself as a peace officer and warned that deadly force would be used; or 3) The officer did not make reasonable efforts to identify themself as a peace officer and did not warn that deadly force would be used but the officer had objectively reasonable grounds to believe the person was aware of those facts. Accordingly, Condition iii. should be modified to meet the language of 835a(c)(1)(B) and provide an instructional element option for each of the above-mentioned possible scenarios for use in a specific factual setting.	The committee has added language to condition iii that more closely tracks Penal Code section 835a, stating that the duty to make reasonable efforts to identify oneself as a peace officer and to warn that deadly force will be used applies only "where feasible." (Pen. Code, § 835a, subd. (c)(1)(B).) Because the revised language fairly states the language of the statute, the committee does not agree that the instruction needs to go further and state three possible factual scenarios, especially in an already complex jury instruction.
	Tony Sain, Attorney	The CACI 1305A and 1305B references regarding "conduct leading up to" the use of force is too vague. The Council should consider instead "conduct playing a causal role in" or "conduct that is a substantial factor cause of" the	See committee response to comment

Instruction	Commenter	Comment	Committee Response
	Manning & Kass, Ellrod, Ramirez, Trester, LLP Los Angeles	use of force. The *Hayes* cases make it clear that for officer pre-force conduct to be actionable, it must form part of the chain of causation that results in the use of force: such as the plainclothes detective who scares the plaintiff in the dead of night by knocking on a car window, provoking a car chase that result in the suspect hiding his wallet under his seat – a furtive movement that prompts the plainclothes detective to fire. Just because conduct precedes the use of force (leading up to) does NOT mean that such conduct is an actionable part of the use of force. There must be causation (also referenced as provocation). [Trial brief omitted.]	to CACI No. 1305A, above.
		The definition of totality of the circumstances is far too prejudicial: it should stop after "to do so."	See committee response to comment to CACI No. 1305A, above.
VF-1303. *Battery by Peace Officer* *(Renumber as VF-1303A, Retitle and Revise)*	Bruce Greenlee, Attorney Richmond	Again, not necessary to revoke. Just revise and renumber to VF-1303A.	As suggested, the committee recommends renumbering CACI No. VF-1303, and revising the verdict form as proposed in the draft that was circulated for public comment as CACI No. VF-1305A.

ITC CACI 21-01
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction	Commenter	Comment	Committee Response
VF-1303A. *Battery by Law Enforcement Officer (Nondeadly Force) (Revisions made in renumbered VF-1303)*	Shelley Bullen, LMFT Chico	"Question 1 of an officer intentionally touching a person they were arresting should be deleted or changed, as it[']s realistic an officer ([defendant]) touches a suspected offender of a crime as hand cuffing, pat down, [etc.] Perhaps adding that the course of arrest is appropriate. It leaves too much for speculation and gray area in its current language. So it would disqualify many people at question 1 when it should not."	The committee disagrees. To prove a claim for battery, a plaintiff must prove an intentional touching. The element is supported by case law.

Instruction	Commenter	Comment	Committee Response
VF-1303B. *Battery by Peace Officer (Deadly Force) (New)*	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We would modify question 2 for the same reasons stated above relating to CACI No. 1305B: "Did [name of defendant] use deadly force that was not necessary in defense of human life ~~in [arresting/preventing the escape of/overcoming the resistance of]~~ <u>on</u> [*name of plaintiff/decedent*]?"	The committee agrees and has revised element 2 to require that the deadly force was used *on* the individual.

Instruction	Commenter	Comment	Committee Response
2303. *Affirmative Defense—Insurance Policy Exclusion*	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We agree with the first proposed revisions to the Directions for Use.	No response required.
		CACI No. 2306 only applies to first party insurance cases, as stated in the second paragraph of the Directions for Use for that instruction. We recommend modifying the second paragraph of the Directions for Use for this instruction to note this limitation: "If a first party loss policy is involved, ~~U~~use CACI No. 2306 . . . ."	The committee has added additional information to the Directions for Use.
	Bruce Greenlee, Attorney Richmond	It would be nice to see something in either the DforU or the SandA that would explain why the additions are proposed.	The committee disagrees with the commenter's suggestion to add either to the Directions for Use or to the Sources and Authority. The committee has not changed the substance of the instruction. Based on a proposal from a member of the bar, the committee recommends expanding the use note relating to bracketed information that CACI users must provide and adding a cross-reference to a related instruction that may be helpful to users.

Instruction	Commenter	Comment	Committee Response
VF-2506A. *Work Environment Harassment—Conduct Directed at Plaintiff—Employer or Entity Defendant (Revise)*	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We agree with the proposed revision. We note that this instruction does not include "an applicant," as in Government Code section 12940, subdivision (j)(1). Because this language should be qualified in the instruction (e.g., "an applicant for employment"), we suggest adding language to the Directions for Use stating that the statute also protects applicants and that the instruction should be modified to state the kind of applicant if applicable. We suggest the same for CACI No. 2521A, the instruction on which this verdict form is based.	Because the comment applies to the jury instruction on which this verdict form is based, the comment is beyond the scope of the invitation to comment. The comment will be considered in the next release cycle.
VF-2506B. *Work Environment Harassment—Conduct Directed at Others—Employer or Entity Defendant (Revise)*	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We agree with the proposed revision. We note that this instruction does not include "an applicant," as in Government Code section 12940, subdivision (j)(1). Because this language should be qualified in the instruction (e.g., "an applicant for employment"), we suggest adding language to the Directions for Use stating that the statute also protects applicants and that the instruction should be modified to state the kind of applicant if applicable. We suggest the same for CACI No. 2521B, the instruction on which this verdict form is based.	See committee response to CACI No. VF-2506A.
VF-2506C. *Work Environment Harassment—Sexual Favoritism—Employer or Entity Defendant (Revise)*	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We agree with the proposed revision. We note that this instruction does not include "an applicant," as in Government Code section 12940, subdivision (j)(1). Because this language should be qualified in the instruction (e.g., "an applicant for employment"), we suggest adding language to the Directions for Use stating that the statute also protects applicants and that the instruction should be modified to state the kind of applicant if applicable. We suggest the same for CACI No. 2521C, the instruction on which this verdict form is based.	See committee response to CACI No. VF-2506A.

Instruction	Commenter	Comment	Committee Response
VF-2507A. *Work Environment Harassment—Conduct Directed at Plaintiff—Individual Defendant (Revise)*	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We agree with the proposed revision. We note that this instruction does not include "an applicant," as in Government Code section 12940, subdivision (j)(1). Because this language should be qualified in the instruction (e.g., "an applicant for employment"), we suggest adding language to the Directions for Use stating that the statute also protects applicants and that the instruction should be modified to state the kind of applicant if applicable. We suggest the same for CACI No. 2522A, the instruction on which this verdict form is based.	See committee response to CACI No. VF-2506A.
VF-2507B. *Work Environment Harassment—Conduct Directed at Others—Individual Defendant (Revise)*	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We agree with the proposed revision. We note that this instruction does not include "an applicant," as in Government Code section 12940, subdivision (j)(1). Because this language should be qualified in the instruction (e.g., "an applicant for employment"), we suggest adding language to the Directions for Use stating that the statute also protects applicants and that the instruction should be modified to state the kind of applicant if applicable. We suggest the same for CACI No. 2522B, the instruction on which this verdict form is based.	See committee response to CACI No. VF-2506A.
VF-2507C. *Work Environment Harassment—Sexual Favoritism—Individual Defendant (Revise)*	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We agree with the proposed revision. We note that this instruction does not include "an applicant," as in Government Code section 12940, subdivision (j)(1). Because this language should be qualified in the instruction (e.g., "an applicant for employment"), we suggest adding language to the Directions for Use stating that the statute also protects applicants and that the instruction should be modified to state the kind of applicant if applicable. We suggest the same for CACI No. 2522C, the instruction on which this verdict form is based.	See committee response to CACI No. VF-2506A.

Instruction	Commenter	Comment	Committee Response
2600. *Violation of CFRA Rights—Essential Factual Elements (Revise)*	Consumer Attorneys of California, by Jacqueline Serna, Deputy Legislative Director	On Page 52 [of the Invitation to Comment]: the following language is being stricken: ~~"The CFRA entitles eligible employees to take up to 12 unpaid workweeks in a 12-month period for family care and medical leave to care for their children, parents, or spouses, or to recover from their own serious health condition."~~ Comment: The proposed revisions delete the length of time of CFRA leave and it is not mentioned anywhere else. Without spelling out the length of CFRA leave, this deletion may cause some confusion to jurors. We recommend not deleting this language to avoid confusion.	The committee recommends deleting this single sentence, which is a direct quote from *Rogers v. County of Los Angeles* from the Sources and Authority. Keeping the sentence for the purpose of stating the length of time of CFRA leave would not accurately state the scope of the leave allowed under the expanded CFRA. In addition, the length of CFRA leave is not at issue in CACI No. 2600, so there is no risk of confusion to jurors. However, keeping the sentence, even noting that *Rogers* has been superseded on other grounds by statute, could be misleading to CACI users.
	California Lawyers Association,	We agree with the proposed revisions to the instruction, Directions for Use, and Sources and Authority.	No response required.

Instruction	Commenter	Comment	Committee Response
	Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We suggest adding to the Directions for Use language noting that "parent-in-law" is defined in the definitions (Gov. Code, § 12945.2, subd. (b)(11)), but is not included in the list of persons for whom family care leave can be taken (*id*., 12945.2, subd. (b)(4)(B).) If the court finds that the legislative intent was to include parents-in-law, the instruction can be modified.	The committee is tracking proposed legislation that may resolve this issue. The committee will consider the suggestion in a future release cycle.
	Bruce Greenlee, Attorney Richmond	The additional ground under element 2: I had a hard time following the language. I finally realized that it refers to military deployment. I think that the problem can be fixed by including the word "military" with "covered active duty" (although the DforU does explain it).	To improve clarity, the committee has added "military" to the bracketed information in element 2—even though the CFRA does not use the term "military."
		Same: I also find the "e.g." problematic. As drafted, the element would simply say that the employee requested leave "for [the employee's] spouse's deployment." Don't you have to say more about why the deployment is an exigency for the employee? For example, that s/he must stay home to provide childcare that the spouse was previously providing. (Again, the word "military" would help to clarify "deployment.")	To improve clarity with respect to the example given, the committee has added language to the bracketed example.
2613. *Affirmative Defense—Key Employee (Revoke)*	Bruce Greenlee, Attorney Richmond	I assume that the Legislature removed this defense. In such a case, it is helpful to put the authority along with "Revoked May 2021" as a "see."	The committee has added a reference in the revoked instruction to the relevant legislative history.
2620. *CFRA Rights Retaliation—*	California Lawyers Association,	We agree with the proposed revisions, but we would modify the second paragraph of the Directions for Use to include "an inquiry." Government Code section 12945.2, subdivision (k)(2) refers to "any inquiry or proceeding related	The committee has revised the Directions for Use as suggested,

Instruction	Commenter	Comment	Committee Response
Essential Factual Elements (Revise DforU)	Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	to rights guaranteed under this section." An inquiry may be more informal than or otherwise differ from a "proceeding." "The 'other protected activity' option of the opening paragraph and elements 2 and 4 could be providing information or testimony in an inquiry or a proceeding related to CFRA rights. (Gov. Code, § 12945.2(k))."	adding "an inquiry" to the sentence referenced.
2630. *Violation of New Parent Leave Act—Essential Factual Elements (Revoke)*	Bruce Greenlee, Attorney Richmond	It would be helpful to provide some indication of why this instruction is proposed to be revoked, assuming that it is in response to some authority. If it's just because the committee decided that the instruction was ill advised or flawed, then I suppose silence is appropriate.	The committee has added a reference in the revoked instruction to the relevant legislative history.
2705. *Affirmative Defense to Labor Code, Unemployment Insurance Code, and Wage Order Violations—Plaintiff Was Not Defendant's Employee (Revise DforU)*	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We agree with the proposed revisions, but we believe it would be helpful to specify subdivision (b)(1) in citing Labor Code section 2775(b) in the second sentence of the second paragraph of the Directions for Use because subdivision (b)(1) is the specific authority for the statement.	The committee has added the specific subdivision, (b)(1), to the Direction for Use.
3050. *Retaliation—Essential*	California Lawyers Association, Litigation Section,	We believe the language "a substantial or motivating factor" in element 3 requires some explanation. Just as "substantial factor" (CACI No. 430) and "substantial motivating reason" (CACI No. 2507) are explained in CACI, we believe the jury requires an explanation of "a substantial or motivating factor."	The committee agrees that a jury's understanding of this phrasing would benefit

Instruction	Commenter	Comment	Committee Response
Factual Elements	Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento		from explanation, but the language is based on the Supreme Court's decision in *Nieves v. Bartlett* (2019) __ U.S. __ [139 S.Ct. 1715, 1725, 204 L.Ed.2d 1]. The committee will monitor cases in this area to see how the issue develops.
		We believe the sixth paragraph in the Directions for Use misstates the required causation. We would modify this paragraph to better describe the required causation: "The plaintiff must show that the defendant acted with a retaliatory motive and that the defendant's retaliatory motive ~~plaintiff's injury~~ was a 'but-for' cause of the plaintiff's injury, *i.e.*, that the retaliatory action would not have been taken without ~~absent~~ the retaliatory motive. (See *Nieves, supra*, 139 S.Ct. at p. 1722.)"	The committee has revised the sentence referenced in the Directions for Use to address the inadvertent misstatement concerning causation.
		Although it is beyond the scope of the Invitation to Comment, we believe the language "ordinary firmness" in element 5 is arcane and unhelpful. We would change "a person of ordinary firmness" to "an ordinary person."	The comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle.
	Bruce Greenlee, Attorney Richmond	Element 4: "Substantial or motivating": According to Nieves, as noted in the DforU, causation must be "but for." So element 4 should reflect Nieves: "that the retaliatory action would not have been taken absent the retaliatory motive."	The committee has added a direct quote from *Nieves* to the

Instruction	Commenter	Comment	Committee Response
		Even absent Nieves, "substantial or motivating" would not be right. The "or" connotes that "substantial" and "motivating" are two separate requirements, only one of which needs to be met. No authority is presented (and I know of none) that would support such an iteration of the causation requirement. Even for FEHA under *Harris v. City of Santa Monica*, the requirement is for a "substantial motivating" reason (no "or"). (Of course, one can argue that if it is motivating, it must also be substantial; there is no such thing as an insubstantial motivating reason.)	Sources and Authority as authority for the phrasing "substantial or motivating" in element 4. The committee is aware that this phrasing is unique, but it is the language that the United States Supreme Court has provided for this variety of retaliation under section 1983. The committee will monitor cases in this area to see how the issue develops.
		DforU: currently 4th short paragraph on Element 2: I would move this paragraph up to precede the currently third long paragraph on what to do based on whether fact-finding is needed. I think that it is best to say when element 2 is needed first, and then discuss the mechanics of how to deal with fact finding.	The committee has relocated the single-sentence paragraph concerning element 2 in the Direction for Use as suggested.
		DforU: current 5th paragraph: I don't think that this paragraph is really needed. It seems repetitious of the current third paragraph.	The committee agrees in part. The committee has revised the paragraph by deleting the first sentence and moving the final sentence regarding the no-probable-cause

Instruction	Commenter	Comment	Committee Response
			requirement to the paragraph referenced by the commenter (formerly the 5th paragraph). Because the issues are complex, the committee believes that the Directions for Use would not be improved by deleting the paragraph in its entirety.
	Orange County Bar Association by Larisa M. Dinsmoor, President	Under "Directions for Use," at what would become the sixth paragraph, first sentence, the paraphrase of Nieves is inaccurate, as a plaintiff's injury is not the "but for" cause of a defendant's motive. The causal connection to be established is between the defendant's animus and the plaintiff's injury. It is suggested the sentence be revised, perhaps, as follows: "The plaintiff must show that the defendant acted with a retaliatory motive, and that such motive was the "but for" cause of the plaintiff's injury, i.e., that absent the retaliatory motive, the retaliatory action would not have been taken."	See the committee response to the California Lawyers Association's comment, above.
		Under "Sources and Authority," due to proposed deletions, at the first item, *Tichinin* requires reference to its full citation, as does *Karl*, at what would become the tenth item.	The committee has converted these two short cites in the Sources and Authority to full citations.
3055. *Rebuttal of Retaliatory Motive (New)*	California Lawyers Association,	This proposed new instruction states an affirmative defense, so we believe the title should indicate this consistent with other affirmative defense instructions.	The new instruction states a rebuttal on which the defendant

Instruction	Commenter	Comment	Committee Response
	Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We suggest: "Affirmative Defense—Causation: Rebuttal of Retaliatory Motive."	bears the burden. The committee recommends against changing the title of the instruction as suggested.
		The second and third paragraphs seem duplicative. We would modify the second paragraph as follows and delete the third: "Even ~~If~~ if [*name of plaintiff*] proves that retaliation was a substantial or motivating reason for [*name of defendant*]'s [*specify alleged retaliatory conduct*], ~~you must then consider if~~ [*name of defendant*] is not responsible for [*name of plaintiff*]'s harm if [*name of defendant*] proves that [*name of defendant*] would have taken the same action even in the absence of [*name of plaintiff*]'s constitutionally protected activity."	The committee disagrees. Although there is some overlap in the two paragraphs, the second paragraph generally states that it's possible for a defendant to rebut a plaintiff's claim of retaliation. The third paragraph sets out the requirements of a successful rebuttal: a legitimate, nonretaliatory reason articulated by the defendant for the action, and that the same action would have been taken without respect to retaliation.
		We would delete the third paragraph of the instruction as unnecessary and to avoid using the language "stated nonretaliatory reason for the adverse action," which may be difficult for the jury to understand.	The committee agrees in part. The committee understands the cases to require a defendant

Instruction	Commenter	Comment	Committee Response
			to claim that the response to the plaintiff's constitutionally protected activity was prompted by a legitimate, nonretaliatory reason. Because "stated nonretaliatory reason for the adverse action" may be difficult for a jury to understand, the committee has revised the third paragraph to use brackets for this information to be specified.
		We would modify the first paragraph of the Directions for Use for greater clarity and because we believe there is no reason to focus on the need to prove "a nonretaliatory reason," which we view as the means, when what is really needed is to prove the result, that the defendant would have taken the same action even without plaintiff's protected activity. "This instruction sets forth a ~~defendant's response~~ defense to a plaintiff's claim of retaliation. See CACI No. 3050, *Retaliation—Essential Factual Elements*. The defendant bears the burden of proving the defense ~~non-retaliatory reason for the allegedly retaliatory conduct~~."	The committee is not aware of authority that this instruction is an "affirmative defense," but the defendant does bear the burden of showing that the response to the plaintiff's constitutionally protected activity was prompted by a legitimate, nonretaliatory reason, and that the defendant

Instruction	Commenter	Comment	Committee Response
			would have taken the action anyway.
	Bruce Greenlee, Attorney Richmond	Do not hyphenate "non-retaliatory." Prefixes don't take hyphens unless omitting the hyphen creates a different word.	For consistency with other CACI instructions, the committee has removed the hyphen from nonretaliatory (except where it is part of a direct quote).
		The basis of this instruction is problematic primarily because of the uncited statement in the first paragraph of the DforU, that the defendant bears the burden of proof on a nonretaliatory reason. This sentence is contra to the *McDonnell Douglas* test. Under *McDonnell Douglas*, once the plaintiff makes a prima facie case of an improper motive, the defense has the burden of *coming forward with evidence* of a legitimate reason for the action. But the burden of proof remains with the plaintiff to disprove that the defense's purported reason was the actual reason (i.e., that it is in fact a pretext for a discriminatory or retaliatory act).	The committee disagrees. The *McDonnell Douglas* test does not apply in this context. As the United States Supreme Court has stated, the *Mt. Healthy* test governs, and the committee believes that this instruction accurately states that test.
		The burden of proof is a different issue from what the causation standard is, although "but for" can apply to both. Again, here the instruction uses "substantial or motivating" as the standard for causation (without authority), and then gives the defense the burden of proving a "but for" (would have happened anyway). But as noted in my comments to 3050, *Nieves* says that causation is "but for," which means that the plaintiff must prove that the act would not have happened anyway.	The committee disagrees. As the quotation in the Sources and Authority evidences, there is binding authority from the United States Supreme Court on the

Instruction	Commenter	Comment	Committee Response
			causation standard. As noted above in the committee response to CACI No. 3050, the committee is aware that this phrasing is unusual. The committee also reads *Nieves* to say that the defendant must show that the retaliatory action would have happened anyway.
		The instruction also conflates the separate issues of pretext and mixed motive. In a mixed-motive case, there are two actual reasons for the challenged action, one discriminatory, the other legitimate. For example, the employee is an abrasive woman who doesn't play well with others. There's a mixed motive: prohibited gender discrimination and legitimate performance issues. In a pretext case, the employer's stated reason is bogus; to disguise the real reason, which was wholly discriminatory. This instruction would work for a mixed-motive case if there was any authority for giving the defense the burden of proof of "but for" (we would have fired her anyway) in a 1983 mixed-motive case. Under FEHA and *Harris*, if the jury accepts the plaintiff's discriminatory reason, the defense then does have the burden of proving that it would have fired the employee anyway for the legitimate reason. But no authority is provided that the same shifting of the burden of proof applies under a 1983 retaliation claim. And the DforU suggests that the defense must prove nonpretext and that the instruction may be used for that purpose, which is not the law.	The committee disagrees. The commenter's reference to FEHA, *Harris*, and issues of mixed-motives and pretext—employment law standards and concepts—are not applicable in this context.

Instruction	Commenter	Comment	Committee Response
	Orange County Bar Association by Larisa M. Dinsmoor, President	At the first paragraph of the proposed Instruction, second line, it is suggested "of" following "because" be deleted as it is unnecessary and would be, in some instances, grammatically incorrect.	The committee agrees, and has deleted "of" from the first sentence.
		At the second paragraph, first line, it is suggested "reason" be replaced with "factor" to be consistent with the proposed changes to Instruction 3050, and avoid any possible confusion for the jury which use of a different term might cause.	For consistency and to avoid possible confusion, the committee has changed *reason* to *factor*.
		At the third paragraph, second line, it is suggested "for" be replaced with "based upon" or some other word or phrase that makes clear, for example, a plaintiff was not arrested for defendant's stated reason, but <u>based upon</u> or <u>owing to</u> defendant's stated reason.	For improved clarity, the committee has revised the sentence to use "on the basis of."
		Under "Directions for Use," at the second paragraph, fourth line, while *Nieves* dealt with the issue of protected speech, as this is a paraphrase of the case, it is suggested the reference to "protected speech" be replaced with "constitutionally protected activity" to make the direction more broadly applicable and of greater assistance to users.	The committee has changed "protected speech" to "constitutionally protected activity" as suggested.
3904A. *Present Cash Value*	Bruce Greenlee, Attorney Richmond	The new sentence proposed to be added to the opening paragraph is a good one.	No response required.
4302. *Termination for Failure to Pay Rent—Essential Factual Elements (Revise DforU)*	California Apartment Association, by Heidi Palutke, Education, Policy and Compliance Counsel	CAA agrees that revisions are necessary to CACI No. 4302, but the proposed revisions are insufficient for two reasons. First, the Directions for Use refer to "rent due on a residential tenancy between March 1, 2020 and January 31, 2021" as the unpaid rent to which the necessary modification would apply. SB 91 extended this "covered time period" to June 30, 2021. Code of Civil Procedure §1179.02(a).	The committee has revised the Directions for Use to cover the recent extension of the "covered time period" resulting from the enactment of SB 91,

Instruction	Commenter	Comment	Committee Response
			urgency legislation that became effective when signed by the Governor on Friday, January 29, 2021.
		Second, the proposed instruction does not state how it is necessary to modify the instruction when the unlawful detainer action is based on non-payment of COVID-19 rental debt. The COVID-19 Tenant Relief Act (CTRA) requires that the landlord serve a 15-day notice for rent due during the covered period. Unlike the standard three-day notice to pay rent or quit, the CTRA 15-Day Notice offers the tenant three alternatives. The tenant can pay or quit – as with the three-day notice – or the tenant may preserve, at least temporarily, the tenancy by returning the Declaration of COVID-19 Related Financial Distress (and documentation if required) with 15 days. Code Civ. Proc., §1179.03.	The committee considered revising the instruction and the Directions for Use to more comprehensively state how the instruction needs to be modified to address the CTRA, but the committee decided against attempting to do so because the law in this area continues to change, e.g., the enactment of SB 91 after these instructions posted for public comment. See also the committee response to Superior Court of Los Angeles County's comment, below.
		CAA recommends that the Judicial Council provide an alternate instruction for use when the unlawful detainer action is based on the tenant's failure to pay the rent between March 1, 2020, and June 30, 2021. CAA recommends two variations of this instruction – one for use prior to July 1, 2021, and one for use on or after July 1, 2021. CTRA requires a tenant who has qualified for	The committee considered revising the instruction and the Directions for Use to more comprehensively

Instruction	Commenter	Comment	Committee Response
		eviction protections by providing the declaration of COVID-19-related financial distress (and documentation if required) to pay by June 30, 2021, 25% of the rental payments due between September 1, 2020, and June 30, 2021, to be permanently protected against eviction for non-payment of any remaining balance due for the covered period. Code Civ. Proc., §1179.03(g). Proposed Language for Alternate Instruction: **Termination for Failure to Pay Rent – Essential Factual Elements – COVID-19 Tenant Relief Act – Rent Due Between March 1, 2020, and June 30, 2021** [*Name of plaintiff*] claims that [*name of defendant*] [and [*name of subtenant*], a subtenant of [*name of defendant*],] no longer [*has/have*] the right to occupy the property because [*name of defendant*] has failed to pay the rent. To establish this claim, [*name of plaintiff*] must prove all of the following: 1. That [*name of plaintiff*] [*owns/leases*] the property; 2. That [*name of plaintiff*] [*rented/subleased*] the property to [*name of defendant*]; 3. That under the [*lease/rental agreement/sublease*], [*name of defendant*] was required to pay rent in the amount of $[*specify amount*] per [*specify period, e.g., month*]; 4. That [*name of plaintiff*] properly gave [*name of defendant*] fifteen-days' written notice to pay the rent, return the declaration of COVID-19-related financial distress [and documentation supporting the claim that the tenant has suffered COVID-19-related financial distress] [*use if the landlord properly alleged the tenant is a high-income tenant in the notice*], or vacate the property;	state how the instruction needs to be modified to address the CTRA, but the committee decided against attempting to do so because the law in this area continues to change. The committee will consider the commenter's proposed language for an alternative instruction in the next release cycle.

Instruction	Commenter	Comment	Committee Response
		5. That as of [*date of fifteen-day notice*], at least the amount stated in the fifteen-day notice was due; 6. That [*name of defendant*] did not pay the amount stated in the notice within fifteen days after [*service/receipt*] of the notice; 7. That [*name of defendant*] did not deliver a signed declaration of COVID-19-related financial distress to the landlord within fifteen days after [*service/receipt*] of the notice; 8. That [*name of defendant*] did not deliver documentation supporting the claim that the tenant has suffered COVID-19-related financial distress to the landlord within fifteen days after [*service/receipt*] of the notice. [*Use if the landlord properly alleged the tenant is a high-income tenant in the notice*]; 8. That [*name of defendant*] [*or subtenant* [*name of subtenant*]] is still occupying the property. [Alternative to 6 and 7 for actions filed on or after July 1, 2021] That [*name of defendant*] delivered a signed declaration of COVID-19-related financial distress (and documentation if required for high-income tenant) to the landlord within fifteen days after [*service/receipt*] of the notice but did not pay by June 30, 2021, 25 percent of each rental payment due between September 1, 2020, and June 30, 2021, demanded in the notice[s].	
	California Lawyers Association, Litigation Section, Civil Jury Instructions	We agree with the proposed revisions, but recent legislation extends the time period when the mandatory notice requirements apply to June 30, 2021, so "June 30, 2021" should replace "January 31, 2021" in the Directions for Use.	The committee has revised the Directions for Use to cover the recent extension of the "covered time period" resulting from the

Instruction	Commenter	Comment	Committee Response
	Committee by Reuben A. Ginsburg, Chair, Sacramento		enactment of SB 91, urgency legislation that became effective when signed by the Governor on Friday, January 29, 2021.
	Orange County Bar Association by Larisa M. Dinsmoor, President	The Directions for Use instructions should be modified in the first paragraph to: (1) change the dates as effective for rents due "between March 1, 2020 and June 30, 2021" [See CCP §1179.02(a)]	The committee has revised the Directions for Use to cover the recent extension of the "covered time period" resulting from the enactment of SB 91, urgency legislation that became effective when signed by the Governor on Friday, January 29, 2021.
		And (2) change the citation for the COVID-19 Tenant Relief Act of 2020 to "Code of Civil Procedure §1179.01 *et seq*" since more than the two subparagraphs are relevant and the full cite is later correctly made in the "Sources and Authority" section.	The committee has expanded the citation in the Directions for Use as noted above in the committee response to the comment of Superior Court of Los Angeles County and as suggested by the OCBA.
	Superior Court of Los Angeles	"Directions for Use	The committee has revised the Directions

Instruction	Commenter	Comment	Committee Response
	County, by Bryan Borys	The proposal is to add a Direction for Use to modify the instruction as necessary for rent due on a residential tenancy between March 1, 2020 and January 31, 2021. [The Los Angeles Superior Court (LASC)] recommends that the Direction for Use instead be revised to cover the period of March 1, 2020 and June 30, 2021 and to add to the reference list a citation to SB 91 which expanded the covered time period and the transition time period of AB 3088 to June 30, 2021."	for Use to cover the recent extension of the "covered time period" resulting from the enactment of SB 91, urgency legislation that became effective when signed by the Governor on Friday, January 29, 2021.
		"LASC also recommends that the Direction for Use specifically include a substitution of the term 'fifteen business days' wherever the term 'three days' appears in the essential elements for any case involving a failure to pay COVID rental debt, i.e., rent that came due between 3/1/20 and 6/30/21. The revised direction for use would read as follows: 'Modify this instruction as necessary for rent due on a residential tenancy between March 1, 2020, and June 30, 2021, including substitution of the term 'fifteen business days' wherever the term 'three days' appears in the essential elements. (See COVID-19 Tenant Relief Act of 2020, Code Civ. Proc., § 1179.03(b), (c); SB 91, Code Civ. Proc., § 1179.02.)' "	For the reasons stated above relating to changes in unlawful detainer law, the committee has concerns about trying to specify how the instruction should be modified. Despite these reservations, committee has revised the Directions for Use to note that the instruction should be modified to use fifteen business days instead of three days.
		"Sources and Authority LASC recommends adding a cite to SB 91 (CCP 1179.02 et seq.) to the cited authorities. The revised cite would read as follows: 'COVID-19 Tenant Relief Act of 2020. Code of Civil Procedure section 1179.01 et seq.	The committee has added the new legislation to the Sources and Authority as suggested.

Instruction	Commenter	Comment	Committee Response
		SB 91. Code of Civil Procedure section 1179.02 et seq.' "	
4303. *Sufficiency and Service of Notice of Termination for Failure to Pay Rent (Revise DforU)*	California Apartment Association, by Heidi Palutke, Education, Policy and Compliance Counsel	CAA agrees that revisions are necessary to CACI No. 4303, but the proposed revisions are insufficient for the same reasons as CACI No. 4302. First, the Directions for Use refer to "rent due on a residential tenancy between March 1, 2020 and January 31, 2021" as the unpaid rent to which the necessary modification would apply. SB 91 extended this "covered time period" to June 30, 2021. Code Civ. Proc., §1179.02(a).	The committee has revised the Directions for Use to cover the recent extension of the "covered time period" resulting from the enactment of SB 91, urgency legislation that became effective when signed by the Governor on Friday, January 29, 2021.
		Second, the proposed instruction does not state how it is necessary to modify the instruction when the notice of termination at issue is based on non-payment of COVID-19 rental debt. CTRA requires 15-Day Notice to include specific statutory text in 12-point type. The required text depends on when the rent was due and when the notice was served. The notice text in subdivision (b) of Section 1170.03 of the Code of Civil Procedure is required to be served for rent that came due between March 1, 2020, to August 31, 2020. However, for rent that came due between September 1, 2020, subdivision (c) of Section 1170.03 of the Code of Civil Procedure requires two distinct notices depending on when the notice was served. One version of the text is required for notices served prior to February 1, 2021, and different text is required for notices served on or after February 1, 2021. Code Civ. Proc., §1179.03(c)(4)&(5). CTRA also requires this statutory notice text to be provided in Spanish, Tagalog, Chinese, Korean, or Vietnamese if the rental agreement was required by law to be provided in that language. Code Civ. Proc., §1179.03(d).	The committee considered revising the instruction and the Directions for Use to more comprehensively state how the instruction needs to be modified to address the CTRA, but the committee decided against attempting to do so because the law in this area continues to change, e.g., the enactment of SB 91 after this instruction posted for public comment. See also the committee response to the Superior Court of

Instruction	Commenter	Comment	Committee Response
			Los Angeles County's comment, below.
		CTRA also allows a landlord to require "high income" tenants to provide documentation to support the Declaration of COVID-19 Related Financial Distress. Specific allegations and disclosures must be made for the documentation requirement in the notice to be effective. Code Civ. Proc., §1179.02.5(c).	No response required.
		CAA recommends that the Judicial Council provide an alternate instruction for use when the notice of termination is based on the tenant's failure to pay rent between March 1, 2020, and June 30, 2021. The proposed instruction omits the provisions applicable to commercial tenancies, since CTRA's protections only apply to residential tenants. Proposed Language for Alternate Instruction: **Sufficiency and Service of Notice of Termination for Failure to Pay Rent – COVID-19 Tenant Relief Act – Rent Due Between March 1, 2020, and June 30, 2021** [*Name of plaintiff*] contends that [he/she/*nonbinary pronoun*/it] properly gave [*name of defendant*] 15-days' notice to pay the rent or vacate the property. To prove that the notice contained the required information and was properly given, [*name of plaintiff*] must prove all of the following: 1. That the notice informed [*name of defendant*] in writing that [he/she/*nonbinary pronoun*/it] must pay the amount due within fifteen days, return the included Declaration of COVID-19 Related Financial Distress (and documentation if required), or vacate the property; 2. That the notice stated no more than the amount due, and the name, telephone number, and address of the person to whom the amount should be paid, and	The committee considered revising the instruction and the Directions for Use to more comprehensively state how the instruction needs to be modified to address the CTRA, but the committee decided against attempting to do so because the law in this area continues to change. The committee, however, will consider the commenter's proposed language for an alternative instruction in the next release cycle.

Instruction	Commenter	Comment	Committee Response
		[*Use if payment was to be made personally*: the usual days and hours that the person would be available to receive the payment; and] [*or*: *Use if payment was to be made into a bank account*: the number of an account in a bank located within five miles of the rental property into which the payment could be made, and the name and street address of the bank; and] [or: Use if an electronic funds transfer procedure had been previously established: that payment could be made by electronic funds transfer; and] 3. That the notice included a Declaration of COVID-19 Related Financial Distress in 12-point font in English or in Spanish, Tagalog, Chinese, Korean, or Vietnamese if the contract or agreement was negotiated in that language. 4. That the notice included the statutory text required by Code of Civil Procedure Section 1179.03. 5. The notice included the notice required by Code of Civil Procedure Section 1179.02.5(d) [*Use if plaintiff has evidence defendant was a high-income tenant, and plaintiff required defendant to provide documentation to support the claim that the tenant has suffered COVID-19-related financial distress by landlord properly alleging the tenant is a high-income tenant in the notice.*] 6. That the notice was given to [*name of defendant*] at least 15 days before [*insert date on which action was filed*].	

Instruction	Commenter	Comment	Committee Response
		[The fifteen-day notice period excludes Saturdays, Sundays, and judicial holidays, but otherwise begins the day after the notice to pay the rent or vacate the property was given to [*name of defendant*].] Notice was properly given if [*select one or more of the following manners of service*:] [the notice was delivered to [*name of defendant*] personally[./; or]] [[*name of defendant*] was not at [home or work], and the notice was left with a responsible person at [[*name of defendant*]'s residence or place of work], and a copy was also mailed in an envelope addressed to [*name of defendant*] at [[his/her/*nonbinary pronoun*] residence]. In this case, notice is considered given on the date the second notice was [received by [*name of defendant*]/placed in the mail][./; or]] [*name of defendant*]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [*name of defendant*]. In this case, notice is considered given on the date the second notice was [received by [*name of defendant*]/placed in the mail].]	
	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We agree with the proposed revisions, but recent legislation extends the time period when the mandatory notice requirements apply to June 30, 2021, so "June 30, 2021" should replace "January 31, 2021," in the Directions for Use.	The committee has revised the Directions for Use to cover the recent extension of the "covered time period" resulting from the enactment of SB 91, urgency legislation that became effective when signed by the

Instruction	Commenter	Comment	Committee Response
			Governor on Friday, January 29, 2021.
	Orange County Bar Association by Larisa M. Dinsmoor, President	The Directions for Use instructions should be modified in the first paragraph to: (1) change the dates as effective for rents due "between March 1, 2020 and June 30, 2021" [See CCP §1179.02(a)].	The committee has revised the Directions for Use to cover the recent extension of the "covered time period" resulting from the enactment of SB 91, urgency legislation that became effective when signed by the Governor on Friday, January 29, 2021.
		And (2) change the citation for the COVID-19 Tenant Relief Act of 2020 to "Code of Civil Procedure §1179.01 *et seq*" since more than the two subparagraphs are relevant and the full cite is later correctly made in the "Sources and Authority" section.	The committee has expanded the citation in the Directions for Use as suggested by the Orange County Bar Association and as noted in the committee response to the comment of the Superior Court of Los Angeles County, below.
	Superior Court of Los Angeles County, by Bryan Borys	"Directions for Use The proposal is to add a Direction for Use to modify the instruction as necessary for rent due on a residential tenancy between March 1, 2020 and January 31, 2021.	The committee has revised the Directions for Use to cover the recent extension of the "covered time period"

Instruction	Commenter	Comment	Committee Response
		LASC recommends that the Direction for Use instead be revised to cover the period of March 1, 2020 and June 30, 2021 and to add to the reference list a citation to SB 91 which expanded the covered time period and the transition time period of AB 3088 to June 30, 2021."	resulting from the enactment of SB 91, urgency legislation that became effective when signed by the Governor on Friday, January 29, 2021.
		"LASC also recommends that the Direction for Use specifically include a substitution of the term 'fifteen business days' wherever the term 'three days' appears in the essential elements for any case involving a failure to pay COVID rental debt, i.e., rent that came due between 3/1/20 and 6/30/21."	For the reasons stated above relating to changes in unlawful detainer law, the committee has concerns about trying to specify how the instruction should be modified. Despite these reservations, committee has revised the Directions for Use to note that the instruction should be modified to use fifteen business days instead of three days.
		"LASC also recommends that the Direction for Use include adding to the list of elements required for a sufficient notice in a COVID rental debt case proof by plaintiff that plaintiff supplied defendant with a blank form Declaration of COVID-19 Financial Distress, the mandated Notice of State Rights, separate notices to quit for failure to pay rent between 3/1/20 and 8/31/20 and between 9/1/20 and 6/30/21, and if applicable, a third notice for notice to quit served on or after 2/1/21 advising defendant of the rental assistance program.	For the reasons stated above relating to changes in unlawful detainer law, the committee has concerns about trying to specify how the Directions for Use

Instruction	Commenter	Comment	Committee Response
		The revised direction for use would read as follows: 'Modify this instruction as necessary for rent due on a residential tenancy between March 1, 2020, and June 30, 2021, including (1) substitution of the term 'fifteen business days' wherever the term 'three days' appears in the essential elements, (2) addition of the following essential element: 'That plaintiff supplied defendant with a blank form Declaration of COVID-19 Financial Distress, the mandated Notice of State Rights, separate notices to quit for failure to pay rent between 3/1/20 and 8/31/20 and between 9/1/20 and 6/30/21, and if applicable, a third notice to quit served on or after 2/1/21 advising defendant of the rental assistance program.' (See COVID-19 Tenant Relief Act of 2020, Code Civ. Proc., § 1179.03(b), (c); SB 91, Code Civ. Proc., §§ 1179.02, 1179.03, 1179.04.)' "	should be modified. The committee appreciates the suggested language, but the committee declines to add more specific information at this time.
		"Sources and Authority LASC recommends adding a cite to SB 91 (CCP 1179.02 et seq.) to the cited authorities. The revised cite would read as follows: 'COVID-19 Tenant Relief Act of 2020. Code of Civil Procedure section 1179.01 et seq. SB 91. Code of Civil Procedure section 1179.02 et seq.' "	The committee has added the new legislation to the Sources and Authority as suggested.
4308. *Termination for Nuisance or Unlawful Use—Essential Factual Elements (Revise DforU)*	California Apartment Association, by Heidi Palutke, Education, Policy and Compliance Counsel	The proposed revisions to the directions for use of CACI No. 4308, provide the following: "If the grounds for termination involved assigning, subletting, or committing waste in violation of a condition or covenant of the lease, give CACI No. 4304, *Termination for Violation of Terms of Lease/Agreement – Essential Factual Elements*. (Code Civ. Proc., §1161(4).) CACI No. 4304 fails to address AB 1482's dual notice requirement outlined in subdivision (c) of Section 1946.2 of the Civil Code (the "Dual Notice Requirement") for just cause evictions, as defined by subdivision (b) of Section 1946.2 of the Civil Code, relating to a material breach of a lease. The Dual Notice Requirement requires an owner of residential real property subject to AB 1482 to serve a second three-day notice to quit with no opportunity to cure for material lease violations that were not cured within the initial three-notice notice.	This comment is beyond the scope of the invitation to comment. The committee will consider the comment concerning the dual notice requirement and CACI No. 4304 in a future release cycle.
	Bruce Greenlee, Attorney Richmond	DforU new paragraph: Drop the citation from the title of CACI No. 4394 in the cross reference.	The committee disagrees. The citation is not in the cross-

Instruction	Commenter	Comment	Committee Response
			referenced title. It is a parenthetical citation. The committee, however, has added a See signal.
		SandA new excerpt: *Hellman* is not an unlawful detainer case. The law of nuisance is quite complex. Rather than adding one single nuisance case here, I would just cross refer to the private nuisance instruction, where the points from *Hellman* are covered.	The committee believes that adding to the Sources and Authority a commonly cited case on nuisance—albeit not an unlawful detainer case—will provide a starting point for further research on nuisance and factors determining nuisance. The committee notes that the existing Directions for Use already cross-reference the Sources & Authority of two nuisance instructions.
4329. *Affirmative Defense—Failure to Provide Reasonable Accommodation (New)*	California Apartment Association, by Heidi Palutke, Education, Policy and Compliance Counsel	California's fair housing regulations provide that an "individual with a disability may raise failure to provide a reasonable accommodation as an affirmative defense to an unlawful detainer action." Cal. Code Regs., tit 2 § 12176(c)(8). The proposed instructions require the defendant to prove:	The committee disagrees. In element 4, "necessary" is modified with phrasing that is taken directly from the regulation: "necessary to afford [the

Instruction	Commenter	Comment	Committee Response
		4. that such [an] accommodation[s][was/were] necessary to afford [[*name of defendant*]/a member of [*name of defendant*]'s household] an equal opportunity to use and enjoy the [*specify nature of dwelling at issue, e.g., apartment building*];" "Necessary" as used in this context does not have its ordinary meaning. California's fair housing regulations require a direct and logical connection ("nexus") between the accommodation requested and the disability, for an accommodation to be "necessary". Specifically, the regulations provide that "a requested accommodation may be denied if "there is no disability-related need for the requested accommodation (in other words, there is no nexus between the disability and the requested accommodation)." Cal. Code Regs., tit. 2, § 12179. Similarly, if the need for the disability is not obvious or known to the housing provider, the disabled person must establish it is necessary by demonstrating, the "relationship between the individuals' disability and how the requested accommodation is necessary to afford the individual with a disability equal opportunity to enjoy a dwelling or housing opportunity." Cal. Code Regs., tit. 2 (§12178(c)(2)). The instructions should guide the jury through making the determination whether the defendant has established that the accommodation is necessary. As with the disability of the defendant, the need for the accommodation may be apparent, or known by the plaintiff. If the need for the accommodation is unknown, it must be established by the defendant upon request by the plaintiff. CAA recommends the following addition to subpart 4 of proposed Instruction 4329: 4. "The relationship between [[*name of defendant*]/a member of [*name of defendant*]'s household]'s disability and the requested accommodation and how the requested accommodation[s][was/were] necessary to afford [[*name of defendant*]/a member of [*name of defendant*]'s household] an equal opportunity to enjoy the [*specify nature of dwelling or housing opportunity at issue, e.g., apartment building*];"	individual with the disability] an equal opportunity to use and enjoy [a dwelling or public or common use area]." To the extent the comment seeks additional language concerning a nexus between a disability and the accommodation requested, the committee will continue to monitor the law in this area.

Instruction	Commenter	Comment	Committee Response
		CAA also respectfully requests that the following cases be added to the Sources and Authority section of the instructions: *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995) (holding that accommodation is necessary if it affirmatively enhances a disabled tenant's quality of life by ameliorating the effects of the disability); *Giebeler v. M&B Assocs.*, 343 F.3d 1143, 1155 (9th Cir. 2003) (but for the accommodation the disabled person will likely be denied equal opportunity to enjoy the housing of their choice); *Auburn Woods I Homeowner's Ass'n. v. Fair Employment and Housing Commission*, 121 Cal. App. 4th 1578, 1596 (2004) (without the accommodation, a landlord's rules, policies or practices interfere with a disabled person's right to use and enjoy their dwelling.)	Because the cases suggested by the commenter do not address the provisions of the California Code of Regulations that form the basis of this new instruction, the committee declines to add these three cases to the Sources and Authority.
		Finally, CAA recommends that the Judicial Council add an instruction that covers the elements a plaintiff must prove to overcome this affirmative defense. The regulations spell out the circumstances where an accommodation can lawfully be denied. These should also be the subject of a jury instruction applicable to unlawful detainer actions. Section 12179 lists five circumstances in which an accommodation can be denied. Each of these can provide a basis for overcoming the affirmative defense. The examples raised in Section 12176(B) envision how these may apply in the unlawful detainer context – specifically the "undue financial and administrative burden" reason for denying an accommodation. Incorporation of the factors listed in Section 12179(b) would assist a jury in determining whether a landlord has or has not proven that the accommodation poses an undue financial and administrative burden.	This comment is beyond the scope of the invitation to comment. The committee will consider the possibility of adding a new instruction, as suggested, in a future release cycle.
	California Lawyers Association, Litigation Section, Civil Jury	We agree with this proposed new instruction, but we would cite authority for the second sentence in the Directions for Use: "Such a request may be made by the individual with a disability, a family member, or someone authorized by the individual with a disability to act on the individual's behalf. (Cal. Code Regs. tit. 2, § 12176(c)(2).)"	The committee has added the citation to the Directions for Use as suggested.

Instruction	Commenter	Comment	Committee Response
	Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento		
	Bruce Greenlee, Attorney Richmond	Opening paragraph: I would not capitalize "Fair Housing." I would, however, hyphenate it.	The committee agrees in part and has revised fair housing to lowercase.
		I would not use "apartment building" as an example as this defense would not apply to an entire building. Use "apartment unit."	The committee agrees in part. Under the regulation, a dwelling or a dwelling's public and common use areas may be at issue. For clarity, the committee has refined the example to specify an apartment building's mailroom.
		Element 4: I don't think you will find a single place where CACI uses "such" as a modifier. It is considered legalese, in the same manner as "said." Just say "the accommodation[s]". ("such as" or "such a," as in the DforU, are ok.)	The committee has deleted "such" from element 4.
		From the S&A, it appears that Cal. Code Regs., tit. 2, § 12176(c)(8) is the authority for the proposition that a FEHA disability accommodation violation is a defense to a UD. I would make this the first sentence of the DforU.	The committee has added a sentence and a parenthetical citation to the Directions for Use stating the basis

Instruction	Commenter	Comment	Committee Response
			for the new instruction.
4560. *Recovery of Payments to Unlicensed Contractor—Essential Factual Evidence (Revise DforU)*	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We agree with the proposed revisions. Because this instruction states the elements of a claim, we believe the title should include "Essential Factual Elements."	As noted in the User Guide, titles to CACI instructions are directed to lawyers, and are not part of the instruction. In the event that additional information would be helpful to lawyers, the committee has revised the title of the instruction to include "Essential Factual Elements."
4561. *Damages—All Payments Made to Unlicensed Contractor (Revise)*	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We agree with the proposed revisions. We would add Business and Professions Code section 7031, subdivision (b) to the Sources and Authority because the statute provides authority for recovery of "all compensation paid to the unlicensed contractor."	The committee has added the statutory citation to the Sources and Authority.
4562. *Payment for Construction Services Rendered—Essential*	California Lawyers Association, Litigation Section, Civil Jury	We agree with this proposed new instruction, but would modify the first sentence to state more clearly the nature of the claim, which is not only that defendant has not paid for services, but that plaintiff is entitled to recover the unpaid amount: "[*Name of plaintiff*] claims that [*name of plaintiff*] is entitled to	The committee agrees in part. The committee has revised the first sentence to say that the defendant *owes*

Instruction	Commenter	Comment	Committee Response
Factual Elements (Bus. & Prof. Code, § 7031(a), (e)) (New)	Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	payment for construction services that [*name of plaintiff*] provided to [*name of defendant*] ~~has not paid for [*name of plaintiff*]'s construction services~~."	*money* for construction services rendered.
		Because this instruction states the elements of a claim, we believe the title should include "Essential Factual Elements."	In the event that the suggested information would be helpful to lawyers, the committee has retitled the instruction to include "Essential Factual Elements."
	Bruce Greenlee, Attorney Richmond	I'm not sure what this instruction adds to CACI. It is only very tangentially related to B&P 7031. It's basically just a claim for damages for amounts unpaid, under either a breach of contract or quantum meruit theory, with a licensing element added.	The committee believes the new instruction is supported by law and understands that these claims are often raised by contractors in actions involving claims under Bus. & Prof. Code, § 7031.
		The instruction only seems useful if the contractor's license is at issue in the case. Otherwise, I don't think the element 2 would be needed in a straight collection case.	The instruction is intended for use when an allegedly unlicensed contractor brings a claim for money owed for construction services rendered. The Directions for Use of CACI No. 4560 had stated that the

Instruction	Commenter	Comment	Committee Response
			instruction could be modified for that situation without saying how. The committee believes that this new instruction will be helpful to users.
		I would revise the first sentence of the DforU to add "if the contractor's licensing status is at issue in the case and depends on a factual determination" (or something like that).	The committee disagrees. The Directions for Use already address licensure, and although licensure is required (or substantial compliance with licensure requirements), licensure need not be at issue.
		Query whether all of the elements of breach of contract or quantum meruit would have to be included. At least the DforU should cross refer to those instructions.	The committee believes that the instruction fairly states the law for a claim by a contractor where there is no formal contract. The quantum meruit instructions in the Construction Law series generally assume an abandoned construction contract,

Instruction	Commenter	Comment	Committee Response
			so cross-references to those instructions may not assist users.
	Orange County Bar Association by Larisa M. Dinsmoor, President	In order to comply with Bus.&Prof. Code §7031(e) and case holdings, the following should be inserted in the second paragraph of Directions for Use at the end of the first sentence before the code citation: "…if the contractor shows at an evidentiary hearing before the judge that (1) it was duly licensed prior to performing services, (2) it acted in good faith to maintain its licensure, and (3) it acted promptly and in good faith to remedy the failure upon learning thereof. Bus.&Prof. Code §7031(e)."	The committee believes that the Directions for Use's existing reference to subdivision (e) is sufficient.
		Also modify the citation at the Sources and Authority section to read "Phoenix Mechanical Pipeline Inc vs Space Exploration Technologies Corp (2017) 12 Cal.App. 5th 842, 853."	The committee has changed the short cite to a full citation.
All except as noted above	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	Agree (702, VF-1303, VF-1303A, 2601, 2602, 2603, 2613, 2630, 3704, 3904A, 4308)	No response required.
All except as noted above	Orange County Bar Association by Larisa M. Dinsmoor, President	Agree (440, 1010, 1305, 1305A, VF-1303, VF1303A, VF-1303B, 2303, VF-2506A, VF-2506B, VF-2506C, VF-2507A, VF-2507B, VF-2507C, 2600, 2601, 2602, 2603, 2613, 2620, 2630, 2705, 3704, 3904A, 4308, 4329, 4560, 4561)	No response required.