Judicial Council *of* California

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 23-091
For business meeting on: May 12, 2023

Title
Jury Instructions: Civil Jury Instructions (Release 43)

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

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

Agenda Item Type
Action Required

Effective Date
May 12, 2023

Date of Report
April 6, 2023

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Executive Summary

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

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective May 12, 2023, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court the following civil jury instructions prepared by the committee:

1. Addition of 2 new verdict forms in the Labor Code Actions series: CACI Nos. VF-2708 and VF-2709; and

2. Revisions to 9 instructions: CACI Nos. 403, 512, 513, 904, 1010, 2508, 2541, 2600, and 4603.

A table of contents and the proposed new and revised civil jury instructions and verdict forms are attached at pages 6–44.

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 43 of *CACI*. The council approved release 42 at its December 2022 meeting.

Analysis/Rationale

A total of 11 instructions and verdict forms are presented in this release. The Judicial Council's Rules Committee has also approved, at its meeting on April 5, 2023, changes to 23 additional instructions under a delegation of authority from the council to the Rules Committee.[2]

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

New verdict forms

Meal break violations. The committee recommends two new verdict forms based on CACI No. 2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records*. Along with the adoption of new instructions in the meal break area in the last release, the committee recommended companion verdict forms. At that time, the committee did not recommend a verdict form for meal break claims involving employer records and the rebuttable presumption of a violation based on those records (CACI No. 2766B). A commenter suggested during public

[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.

comment that the committee develop another new verdict form for meal break violations based on employee records. The committee now recommends two verdict forms for different scenarios: employer records showing noncompliance (VF-2708) and employer records that are inaccurate or missing (VF-2709). The committee acknowledges that claims involving both scenarios may be common. The committee will continue to monitor the law as it develops in this area and will propose additional instructions and verdict forms and revisions to existing content as appropriate. The committee welcomes suggestions from the bench and bar, especially those suggestions that follow from a jury trial.[3]

Revised instructions

Language referring to persons with disabilities (CACI Nos. 403, 512, 513, 904, 2508, and 2541). In 1990, the federal government passed the Americans with Disabilities Act (ADA), which prohibits discrimination against individuals with disabilities in all areas of public life.[4] The ADA National Network (ADANN) provides information, guidance, and training on implementing the ADA to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." [5] The ADANN has published *Guidelines for Writing About People With Disabilities*, which encourages the use of language consistent with the principles of the ADA, including "portraying individuals with disabilities in a respectful and balanced way by using language that is accurate, neutral and objective."[6]

The guidelines provide that, generally, the person should be referred to first and the disability second: "People with disabilities are, first and foremost, people. Labeling a person equates the person with a condition and can be disrespectful and dehumanizing. A person isn't a disability, condition or diagnosis; a person *has* a disability, condition or diagnosis. This is called Person-First Language."[7] For example, instead of writing that a person is "mentally ill," write that a person "has a mental health condition"; instead of "[d]isabled person," write "[p]erson with a disability."[8]

Based principally on these guidelines, the committee recommends removing outdated or disfavored terms in several instructions and replacing them with more respectful language. The committee received only comments agreeing with the proposed person-first replacement language.

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[3] Suggestions and proposals for new model jury instructions may be emailed to *civiljuryinstructions@jud.ca.gov*.

[4] See 42 U.S.C. § 12101 et seq.

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

[6] The guidelines may be accessed at *https://adata.org/factsheet/ADANN-writing*.

[7] ADA National Network, *Guidelines for Writing About People With Disabilities* (2018), guideline no. 3, *https://adata.org/factsheet/ADANN-writing*, original italics.

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

CACI No. 1010, *Affirmative Defense—Recreation Immunity—Exceptions*.[9] The committee recommends changes to the Directions for Use to reflect the holding of the Supreme Court in *Hoffmann v. Young*.[10] The court in *Hoffmann* clarified that an invitation to enter property from someone other than the landowner does not abrogate the immunity of the landowner unless that person is an agent of the landowner.

CACI No. 2600, *Violation of CFRA Rights—Essential Factual Elements*. Effective January 1, 2023, an employee's right to take protected leave under the California Family Rights Act (CFRA) includes leave to care for a "designated person" who may or may not be a family member. Assembly Bill 1041 adds a definition of designated person as "any individual related by blood or whose association with the employee is the equivalent of a family relationship."[11] The committee recommends a fourth alternative option for element 2 to address leave for a designated individual who has a serious health condition.

CACI No. 4603, *Whistleblower Protection—Essential Factual Elements*. The committee recommends adding additional information to the introductory paragraph about the plaintiff's burden of proof for establishing the essential factual elements of a whistleblower protection claim. To establish the claim, an employee must prove all elements by a preponderance of the evidence. This standard is expressed as "more likely true than not true." The committee believes including this information is appropriate for this claim because a different standard of proof applies if the employer seeks to prove that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. The committee also recommends adding a definition of "contributing factor" derived from the Supreme Court's decision in *Lawson v. PPG Architectural Finishes, Inc.*[12]

Policy implications

The committee endeavors to express the law in plain English. Except for language choices, there are generally no policy implications. With respect to the language referring to persons with disabilities, modernizing the language of *CACI*'s instructions is also consistent with *The Strategic Plan for California's Judicial Branch*, specifically the goals of Access, Fairness, Diversity, and Inclusion (Goal I) and Quality of Justice and Service to the Public (Goal IV).[13]

Comments

The proposed additions and revisions in *CACI* circulated for comment from February 1 through March 14, 2023. Comments were received from 7 commenters: a lawyer, a law firm, 2 bar

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[9] The version of CACI No. 1010 that circulated for public comment showed content that the council had already approved in May 2021 as proposed changes. That inadvertent designation has been corrected in the instruction attached to this report.

[10] (2022) 13 Cal.5th 1257, 1270 [297 Cal.Rptr.3d 607, 515 P.3d 635].

[11] Stat. 2022; ch. 748, *https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1041*.

[12] (2022) 12 Cal.5th 703, 718 [289 Cal.Rptr.3d 572, 503 P.3d 659].

[13] The council's strategic plan may be accessed at *https://www.courts.ca.gov/3045.htm*.

associations, and 3 other organizations. Most commenters submitted comments on multiple instructions and verdict forms. No particular instruction garnered any unusual attention or opposition.

The committee evaluated all comments and, as a result, refined some of the instructions and verdict forms in this release. A chart of the comments received and the committee's responses is attached at pages 45–77.

Alternatives considered

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

Fiscal and Operational Impacts

No implementation costs are associated with this proposal.

Attachments and Links

1. Jury instructions, at pages 6–44
2. Chart of comments, at pages 45–77

TABLE OF CONTENTS
CIVIL JURY INSTRUCTIONS
Release 43; May 2023

403. Standard of Care for ~~Physically Disabled~~ Person with a Physical Disability

A person with a physical disability is required to use the amount of care that a reasonably careful person who has the same physical disability would use in the same situation.

New September 2003; Revised May 2023

Directions for Use

By "same" disability, this instruction is referring to the effect of the disability, not the cause.

Sources and Authority

- Liability of Person of "Unsound Mind." Civil Code section 41.

- "[A] person [whose faculties are impaired] is bound to use that care which a person of ordinary prudence with faculties so impaired would use in the same circumstances."
- ~~Restatement Second of Torts, section 283C, provides: "If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability." (See also~~ *Conjorsky v. Murray* (1955) 135 Cal.App.2d 478, 482 [287 P.2d 505].~~);~~

- "The jury was properly instructed that negligence is failure to use ordinary care and that ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs. A person with faculties impaired is held to the same degree of care and no higher. He is bound to use that care which a person of ordinary prudence with faculties so impaired would use in the same circumstances." (*Jones v. Bayley* (1942) 49 Cal.App.2d 647, 654 [122 P.2d 293].)

- "We conclude sudden mental illness may not be posed as a defense to harmful conduct and that the harm caused by such individual's behavior shall be judged on the objective reasonable person standard in the context of a negligence action as expressed in Civil Code section 41." ~~Persons with mental illnesses are not covered by the same standard as persons with physical illnesses.~~ (~~See~~ *Bashi v. Wodarz* (1996) 45 Cal.App.4th 1314, 1323 [53 Cal.Rptr.2d 635].)

- ~~Restatement Second of Torts, section 283B, provides: "Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances."~~

~~As to contributory negligence, the courts agree with the Restatement's position that mental deficiency that falls short of insanity does not excuse conduct that is otherwise contributory negligence. (*Fox v. City and County of San Francisco* (1975) 47 Cal.App.3d 164, 169 [120 Cal.Rptr. 779]; Rest.2d Torts, § 464, com. g.~~

- Restatement Second of Torts, section 283B, provides: "Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform

to the standard of a reasonable man under like circumstances."

- Restatement Second of Torts, section 283C, provides: "If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability."

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.20

33 California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender)

512. Wrongful Birth—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] was negligent because [*name of defendant*] failed to inform [him/her/*nonbinary pronoun*] of the risk that [he/she/*nonbinary pronoun*] would have a ~~[genetically impaired/disabled]~~ child with a [genetic impairment/disability]. To establish this claim, [*name of plaintiff*] must prove all of the following:

[1. That [*name of defendant*] negligently failed to [diagnose/ [or] warn [*name of plaintiff*] of] the risk that [*name of child*] would be born with a [genetic impairment/disability];]

[*or*]

[1. That [*name of defendant*] negligently failed to [perform appropriate tests/advise [*name of plaintiff*] of tests] that would more likely than not have disclosed the risk that [*name of child*] would be born with a [genetic impairment/disability];]

2. That [*name of child*] was born with a [genetic impairment/disability];

3. That if [*name of plaintiff*] had known of the [genetic impairment/disability], [*insert name of mother*] would not have conceived [*name of child*] [or would not have carried the fetus to term]; and

4. That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*] to have to pay extraordinary expenses to care for [*name of child*].

New September 2003; Revised April 2007, May 2023

Directions for Use

The general medical negligence instructions on the standard of care and causation (see CACI Nos. 500–502) may be used in conjunction with this instruction. Read also CACI No. 513, *Wrongful Life—Essential Factual Elements*, if the parents' cause of action for wrongful birth is joined with the child's cause of action for wrongful life.

In element 1, select the first option if the claim is that the defendant failed to diagnose or warn the plaintiff of a possible genetic impairment. Select the second option if the claim is that the defendant failed to order or advise of available genetic testing. In a testing case, there is no causation unless the chances that the test would disclose the impairment were at least 50 percent. (See *Simmons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696, 702–703 [260 Cal.Rptr. 772].)

Sources and Authority

- "Claims for 'wrongful life' are essentially actions for malpractice based on negligent genetic counseling and testing." (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 883 [22

Cal.Rptr.2d 819].) ~~Since the wrongful life action corresponds to the wrongful birth action, it is reasonable to conclude that this principle applies to wrongful birth actions.~~

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- ~~Regarding wrongful-life actions, courts have observed:~~ "[A]s in any medical malpractice action, the plaintiff must establish: '(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence.' " (*Gami, supra,* 18 Cal.App.4th at p. 877.)

- ~~The negligent failure to administer a test that had only a 20 percent chance of detecting Down syndrome did not establish a reasonably probable causal connection to the birth of a child with this genetic abnormality.~~ "A mere 20 percent chance does not establish a 'reasonably probable causal connection' between defendants' negligent failure to provide [a genetic] test and plaintiffs' injuries. A less than 50-50 possibility that defendants' omission caused the harm does not meet the requisite reasonable medical probability test of proximate cause." (*Simmons, supra*, 212 Cal.App.3d at pp. 702–703.)

- ~~Both parent and child may recover damages to compensate for~~ "[W]e conclude that while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child—like his or her parents—may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment." (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 239 [182 Cal.Rptr. 337, 643 P.2d 954].)

- ~~In wrongful-birth actions, parents are permitted to recover the medical expenses incurred on behalf of a disabled child. The child may also recover medical expenses in a wrongful-life action, though both parent and child may not recover the same expenses.~~ "Although the parents and child cannot, of course, both recover for the same medical expenses, we believe it would be illogical and anomalous to permit only parents, and not the child, to recover for the cost of the child's own medical care." (*Turpin, supra,* 31 Cal.3d at pp. 238~~–239~~.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1112–1118

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.21–9.22

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.15, 31.50 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.17 (Matthew Bender)

513. Wrongful Life—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] was negligent because [he/she/*nonbinary pronoun*] failed to inform [*name of plaintiff*]'s parents of the risk that [he/she/*nonbinary pronoun*] would be born with a [genetic~~ally impaired~~impairment/~~disabled~~disability]. To establish this claim, [*name of plaintiff*] must prove all of the following:

[1. That [*name of defendant*] negligently failed to [diagnose/ [or] warn [*name of plaintiff*]'s parents of] the risk that [*name of plaintiff*] would be born with a [genetic impairment/disability];]

[*or*]

[1. That [*name of defendant*] negligently failed to [perform appropriate tests/advise [*name of plaintiff*]'s parents of tests] that would more likely than not have disclosed the risk that [*name of plaintiff*] would be born with a [genetic impairment/disability];]

2. That [*name of plaintiff*] was born with a [genetic impairment/disability];

3. That if [*name of plaintiff*]'s parents had known of the risk of [genetic impairment/disability], [his/her/*nonbinary pronoun*] mother would not have conceived [him/her/*nonbinary pronoun*] [or would not have carried the fetus to term]; and

4. That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s parents to have to pay extraordinary expenses for [*name of plaintiff*].

New September 2003; Revised April 2007, April 2008, November 2019, May 2023

Directions for Use

The general medical negligence instructions on the standard of care and causation (see CACI Nos. 500–502) may be used in conjunction with this instruction. Read also CACI No. 512, *Wrongful Birth—Essential Factual Elements*, if the parents' cause of action for wrongful birth is joined with the child's cause of action for wrongful life.

In element 1, select the first option if the claim is that the defendant failed to diagnose or warn the plaintiff of a possible genetic impairment. Select the second option if the claim is that the defendant failed to order or advise of available genetic testing. In a testing case, there is no causation unless the chances that the test would disclose the impairment were at least 50 percent. (See *Simmons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696, 702–703 [260 Cal.Rptr. 772].)

In order for this instruction to apply, the genetic impairment must result in a physical or mental disability. This is implied by the fourth element in the instruction.

Sources and Authority

- No Wrongful Life Claim Against Parent. Civil Code section 43.6(a).

- "[I]t may be helpful to recognize that although the cause of action at issue has attracted a special name—'wrongful life'—plaintiff's basic contention is that her action is simply one form of the familiar medical or professional malpractice action. The gist of plaintiff's claim is that she has suffered harm or damage as a result of defendants' negligent performance of their professional tasks, and that, as a consequence, she is entitled to recover under generally applicable common law tort principles." (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 229 [182 Cal.Rptr. 337, 643 P.2d 954].)

- "Claims for 'wrongful life' are essentially actions for malpractice based on negligent genetic counseling and testing." (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 883 [22 Cal.Rptr.2d 819].)

- ~~General damages are not available:~~ "[W]e conclude that while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child—like his or her parents—may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment." (*Turpin, supra,* 31 Cal.3d at p. 239.)

- ~~A child may not recover for loss of earning capacity in a wrongful-life action.~~ "There is no loss of earning capacity caused by the doctor in negligently permitting the child to be born with a genetic defect that precludes earning a living." (*Andalon v. Superior Court* (1984) 162 Cal.App.3d 600, 614 [208 Cal.Rptr. 899].)

- ~~The negligent failure to administer a test that had only a 20 percent chance of detecting Down syndrome did not establish a reasonably probable causal connection to the birth of a child with this genetic abnormality.~~ "A mere 20 percent chance does not establish a 'reasonably probable causal connection' between defendants' negligent failure to provide [a] test and plaintiffs' injuries. A less than 50-50 possibility that defendants' omission caused the harm does not meet the requisite reasonable medical probability test of proximate cause." (*Simmons, supra,* 212 Cal.App.3d at pp. 702–703, internal citations omitted.)

- "Wrongful life claims are actions brought on behalf of children, while wrongful birth claims refer to actions brought by parents. California courts do recognize a wrongful life claim by an 'impaired' child for special damages (but not for general damages), when the physician's negligence is the proximate cause of the child's need for extraordinary medical care and training. No court, however, has expanded tort liability to include wrongful life claims by children born without any mental or physical impairment." (*Alexandria S. v. Pac. Fertility Medical Ctr.* (1997) 55 Cal.App.4th 110, 122 [64 Cal.Rptr.2d 23], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1112–1123

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.21–9.22

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.15, 31.50 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.11 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.70 (Matthew Bender)

904. Duty of Common Carrier Toward ~~Disabled/Infirm~~ Passengers With Illness or Disability

If a common carrier voluntarily accepts ~~an ill or a disabled~~ a person with an illness or a disability as a passenger and is aware of that person's condition, it must use as much additional care as is reasonably necessary to ensure the passenger's safety.

New September 2003; Revised May 2023

Sources and Authority

- ~~If a carrier voluntarily accepts an ill or disabled person as a passenger and is aware of the passenger's condition, it must exercise as much care as is reasonably necessary to ensure the safety of the passenger, in view of his mental and physical condition.~~ "[I]f the company voluntarily accepts a person as a passenger, without an attendant, whose inability to care for himself is apparent or made known to its servants and renders special care and assistance necessary, the company is negligent if such assistance is not afforded. In such case it must exercise the degree of care commensurate with the responsibility which it has thus voluntarily assumed, and that care must be such as is reasonably necessary to insure the safety of the passenger, in view of his mental and physical condition. This is a duty required by law as well as the dictates of humanity." (*McBride v. Atchison, Topeka & Santa Fe Ry. Co.* (1955) 44 Cal.2d 113, 119–120 [279 P.2d 966], internal citation omitted.)

Secondary Sources

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.02[6] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender)

2A California Points and Authorities, Ch. 33, *Carriers* (Matthew Bender)

California Civil Practice: Torts § 28:6 (Thomson Reuters)

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.]

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, May 2023

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], disapproved on other grounds in *Hoffmann v. Young* (2022) 13 Cal.5th 1257, 1270, fn. 13 [297 Cal.Rptr.3d 607, 515 P.3d 635].)

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~~ nonexhaustive 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].)

For the third exception involving an express invitation onto the property, "a qualifying invitation under [Civil Code] section 846(d)(3) may be made by a landowner's authorized agent who issued the invitation on the landowner's behalf." (*Hoffmann, supra,* 13 Cal.5th at pp. 1276–1277.) The plaintiff bears the burden of proving the invitation was made by a properly authorized agent or otherwise making "the showing that a nonlandowner's invitation operates as an invitation by the landowner." (*Id.* at p. 1275, 1277, fn. 16.) In some cases, it may be necessary to modify the third exception to identify the person who extended the invitation on behalf of the defendant.~~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.~~ California law, however, does not require a "direct, personal request" from the landowner to the injured entrant. (*Id.* at p. 1270, fn. 13.)

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.)

- "To the extent plaintiff suggests that 'jogging' is not an activity with a recreational purpose because it is not specifically enumerated in section 846, subdivision (b), her suggestion is plainly without merit,

as section 846, subdivision (b) is an illustrative, not exhaustive, list." (*Rucker v. WINCAL, LLC* (2022) 74 Cal.App.5th 883, 889 [290 Cal.Rptr.3d 56].)

- "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, disapproved on other grounds in *Hoffmann, supra,* 13 Cal.5th at p. 1270, fn. 13.)

- "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, disapproved on other grounds in *Hoffmann, supra,* 13 Cal.5th at p. 1270, fn. 13.)

- "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*' 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].)

- "[W]e hold that a plaintiff may rely on the exception and impose liability if there is a showing that a landowner, or an agent acting on his or her behalf, extended an express invitation to come onto the property. (*Hoffmann, supra,* 13 Cal.5th at p. 1263.)

- "[T]he general rule of section 846(a) relieves a landowner of any duty to keep his or her premises safe for recreational users. Section 846(d)(3) creates an exception to the rule of section 846(a) for those persons who are expressly invited to come upon the premises by the landowner. Plaintiff seeks the shelter of this exception. Accordingly, she should bear the burden of persuasion on the point." (*Hoffmann, supra,* 13 Cal.5th at p. 1275.)

- "[W]e do not foreclose other ways that a plaintiff might 'make the showing that a nonlandowner's invitation operates as an invitation by the landowner.' Rather, we 'conclude that *one way* for a plaintiff invoking section 846(d)(3) to meet [the burden of showing the exception applies] would be to rely on agency principles.' " (*Hoffmann, supra,* 13 Cal.5th at p. 1277, fn. 16, original italics, second alteration original, internal citations omitted.)

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)

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

2508. Failure to File Timely Administrative Complaint ~~(Gov. Code, § 12960(e))~~—Plaintiff Alleges Continuing Violation (Gov. Code, § 12960(e))

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit may not proceed because [***name of plaintiff***] did not timely file a complaint with the ~~Department of Fair Employment and Housing (DFEH)~~ California Civil Rights Department (CRD). A complaint is timely if it was filed within three years of the date on which [***name of defendant***]'s alleged unlawful practice occurred.**

[*Name of plaintiff***] filed a complaint with the ~~DFEH~~ CRD on [***date***]. [***Name of plaintiff***] may recover for acts of alleged [***specify the unlawful practice, e.g., harassment***] that occurred before [***insert date three years before the ~~DFEH~~ CRD complaint was filed***], only if [he/she/***nonbinary pronoun***] proves all of the following:**

1. **That [***name of defendant***]'s [***e.g., harassment***] that occurred before [***insert date three years before the ~~DFEH~~ CRD complaint was filed***] was similar or related to the conduct that occurred on or after that date;**

2. **That the conduct was reasonably frequent; and**

3. **That the conduct had not yet become permanent before that date.**

"Permanent" in this context means that the conduct has stopped, [*name of plaintiff***] has resigned, or [***name of defendant***]'s statements and actions would make it clear to a reasonable employee that any further efforts to resolve the issue internally would be futile.**

New June 2010; Revised December 2011, June 2015, May 2019, May 2020, May 2023

Directions for Use

Give this instruction if the plaintiff relies on the continuing -violation doctrine in order to avoid the bar of the limitation period of three years within which to file an administrative complaint. (See Gov. Code, § 12960(e).) Although the continuing -violation doctrine is labeled an equitable exception, it may involve triable issues of fact. (See *Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 723–724 [85 Cal.Rptr.3d 705].)

If the case involves multiple claims of FEHA violations, replace "lawsuit" in the opening sentence with reference to the particular claim or claims to which the continuing -violation rule may apply.

In the second paragraph, insert the date on which the administrative complaint was filed and the dates on which both sides allege that the complaint requirement was triggered. The verdict form should ask the jury to specify the date that it finds that the requirement accrued. If there are multiple claims with different continuing -violation dates, repeat this paragraph for each claim.

The plaintiff has the burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with the ~~DFEH~~ CRD. (*Kim v. Konad USA Distribution, Inc.* (2014) 226

Cal.App.4th 1336, 1345 [172 Cal.Rptr.3d 686].) (Use "Department of Fair Employment and Housing" or "DFEH" as appropriate if the case was filed before the agency's name change.) This burden of proof extends to any excuse or justification for the failure to timely file, such as the continuing -violation exception. (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1402 [194 Cal.Rptr.3d 689].)

Sources and Authority

- Administrative Complaint for FEHA Violation. Government Code section 12960.

- "At a jury trial, the facts are presented and the jury must decide whether there was a continuing course of unlawful conduct based on the law as stated in CACI No. 2508." (*Jumaane, supra,* 241 Cal.App.4th at p. 1401.)

- "Under the FEHA, the employee must exhaust the administrative remedy provided by the statute by filing a complaint with the Department of Fair Employment and Housing (Department) and must obtain from the Department a notice of right to sue in order to be entitled to file a civil action in court based on violations of the FEHA. The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA. As for the applicable limitation period, the FEHA provides that no complaint for any violation of its provisions may be filed with the Department 'after the expiration of one year from the date upon which the alleged *unlawful practice* or refusal to cooperate *occurred*,' with an exception for delayed discovery not relevant here." (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 63 [105 Cal.Rptr.2d 652], original italics, internal citations omitted.)

- "[I]t is 'plaintiff's burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with [CRD, formerly known as DFEH] and obtaining a right-to-sue letter.' " (*Kim, supra,* 226 Cal.App.4th at p. 1345.)

- "[W]hen defendant has asserted the statute of limitation defense, plaintiff has the burden of proof to show his or her claims are timely under the continuing violation doctrine." (*Jumaane, supra,* 241 Cal.App.4th at p. 1402.)

- "Under the continuing violation doctrine, a plaintiff may recover for unlawful acts occurring outside the limitations period if they continued into that period. The continuing violation doctrine requires proof that (1) the defendant's actions inside and outside the limitations period are sufficiently similar in kind; (2) those actions occurred with sufficient frequency; and (3) those actions have not acquired a degree of permanence." (*Wassmann v. South Orange County Community College Dist.* (2018) 24 Cal.App.5th 825, 850–851 [234 Cal.Rptr.3d 712] , internal citations omitted.)

- " '[P]ermanence' in the context of an ongoing process of accommodation of disability, or ongoing disability harassment, should properly be understood to mean the following: that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile. [¶] Thus, when an employer engages in a continuing course of unlawful conduct under the FEHA by refusing reasonable accommodation of a disabled employee or engaging in disability harassment, and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run, not

necessarily when the employee first believes that his or her rights may have been violated, but rather, either when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, or when the employee is on notice that further efforts to end the unlawful conduct will be in vain. Accordingly, an employer who is confronted with an employee seeking accommodation of disability or relief from disability harassment may assert control over its legal relationship with the employee either by accommodating the employee's requests, or by making clear to the employee in a definitive manner that it will not be granting any such requests, thereby commencing the running of the statute of limitations." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823–824 [111 Cal.Rptr.2d 87, 29 P.3d 175], internal citations omitted.)

- "[T]he *Richards* court interpreted section 12960 to mean that when a continuing pattern of wrongful conduct occurs partly in the statutory period and partly outside the statutory period, the limitations period begins to accrue once an employee is on notice of the violation of his or her rights and on notice that 'litigation, not informal conciliation, is the only alternative for the vindication of his or her rights.' " (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1412 [159 Cal.Rptr.3d 749].)

- "A continuing violation may be established by demonstrating 'a company wide policy or practice' or 'a series of related acts against a single individual.' 'The continuing violation theory generally has been applied in the context of a continuing policy and practice of discrimination on a company-wide basis; a plaintiff who shows that a policy and practice operated at least in part within the limitation period satisfies the filing requirements. "[A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions." ' The plaintiff must demonstrate that at least one act occurred within the filing period and that 'the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." … The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and a persistent, on-going pattern.' " (*Morgan, supra,* 88 Cal.App.4th at p. 64, internal citations omitted.)

- "[A] continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable diligence would have known, [the plaintiff] was being discriminated against at the time the earlier events occurred." (*Morgan, supra,* 88 Cal.App.4th at p. 65.)

- "The Supreme Court has extended the continuing violation doctrine to retaliation claims. And the doctrine also applies to racial harassment claims. Indeed, as we observed in *Morgan v. Regents of University of California, supra,* 88 Cal.App.4th 52, 65: 'Cases alleging a hostile work environment due to racial or sexual harassment are often found to come within the continuing violations framework.' " (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 270 [100 Cal.Rptr.3d 296], internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1065

3 Witkin, California Procedure (5th ed. 2008) Actions, § 564

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:561.1, 7:975 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 16-A, *Failure To Exhaust Administrative Remedies*, ¶ 16:85 (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.51[1] (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.59 (Matthew Bender)

2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements (Gov. Code, § 12940(m))

[*Name of plaintiff***] claims that [***name of defendant***] failed to reasonably accommodate [his/her/***nonbinary pronoun***] [***select term to describe basis of limitations, e.g., physical condition***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. **That [[***name of plaintiff***] had/[***name of defendant***] treated [***name of plaintiff***] as if [he/she/***nonbinary pronoun***] had] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];**

4. **[That [***name of defendant***] knew of [***name of plaintiff***]'s [***e.g., physical condition***] [that limited [***insert major life activity***]];]**

5. **That [***name of plaintiff***] was able to perform the essential duties of [[his/her/***nonbinary pronoun***] current position or a vacant alternative position to which [he/she/***nonbinary pronoun***] could have been reassigned/the position for which [he/she/***nonbinary pronoun***] applied] with reasonable accommodation for [his/her/***nonbinary pronoun***] [***e.g., physical condition***];**

6. **That [***name of defendant***] failed to provide reasonable accommodation for [***name of plaintiff***]'s [***e.g., physical condition***];**

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

8. **That [***name of defendant***]'s failure to provide reasonable accommodation was a substantial factor in causing [***name of plaintiff***]'s harm.**

[In determining whether [*name of plaintiff***]'s [***e.g., physical condition***] limits [***insert major life activity***], you must consider the [***e.g., physical condition***] [in its unmedicated state/without assistive devices/[***describe mitigating measures***]].]**

New September 2003; Revised April 2007, December 2007, April 2009, December 2009, June 2010, December 2011, June 2012, June 2013, May 2019, May 2023

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, §

12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

This instruction is for use by both an employee and a job applicant. Select the appropriate options in elements 2 and 5 depending on the plaintiff's status.

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit "that limited [*insert major life activity*]" in elements 3 and 4 and do not include the last paragraph. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (m) [no requirement that medical condition limit major life activity].)

In a case of perceived disability, include "[*name of defendant*] treated [*name of plaintiff*] as if [he/she/*nonbinary pronoun*] had" in element 3, and delete optional element 4. (See Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) In a case of actual disability, include "**[***name of plaintiff*] had" in element 3, and give element 4.

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

The California Supreme Court has held that under Government Code section 12940(a), the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job with or without reasonable accommodation. (See *Green v. State of California* (2007) 42 Cal.4th 254, 260 [64 Cal.Rptr.3d 390, 165 P.3d 118].) While the court left open the question of whether the same rule should apply to cases under Government Code section 12940(m) (see *id.* at p. 265), appellate courts have subsequently placed the burden on the employee to prove that he or she would be able to perform the job duties with reasonable accommodation (see element 5). (See *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 766 [123 Cal.Rptr.3d 562]; *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 973–979 [83 Cal.Rptr.3d 190].)

There may still be an unresolved issue if the employee claims that the employer failed to provide the employee with other suitable job positions that the employee might be able to perform with reasonable accommodation. The rule has been that the employer has an affirmative duty to make known to the employee other suitable job opportunities and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to any other ~~disabled or nondisabled~~ employees or has a policy of offering such assistance or benefit to any other employees. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950–951 [62 Cal.Rptr.2d 142]; see also *Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 745 [151 Cal.Rptr.3d 292]; *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837]; *Hanson v. Lucky Stores* (1999) 74 Cal.App.4th 215, 226 [87 Cal.Rptr.2d 487].) In contrast, other courts have said that it is the employee's burden to prove that a

reasonable accommodation could have been made, i.e., that the employee was qualified for a position in light of the potential accommodation. (See *Nadaf-Rahrov, supra,* 166 Cal.App.4th at p. 978; see also *Cuiellette, supra,* 194 Cal.App.4th at p. 767 [plaintiff proves he or she is a qualified individual by establishing that he or she can perform the essential functions of the position to which reassignment is sought].) The question of whether the employee has to present evidence of other suitable job descriptions and prove that a vacancy existed for a position that the employee could do with reasonable accommodation may not be fully resolved.

No element has been included that requires the plaintiff to specifically request reasonable accommodation. Unlike Government Code section 12940(n) on the interactive process (see CACI No. 2546, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process*), section 12940(m) does not specifically require that the employee request reasonable accommodation; it requires only that the employer know of the disability. (See *Prilliman, supra,* 53 Cal.App.4th at pp. 950–951.)

Sources and Authority

- Reasonable Accommodation Required. Government Code section 12940(m).
- "Reasonable Accommodation" Explained. Government Code section 12926(p).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- "Substantial" Limitation Not Required. Government Code section 12926.1(c).
- "There are three elements to a failure to accommodate action: '(1) the plaintiff has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position); and (3) the employer failed to reasonably accommodate the plaintiff's disability. [Citation.]' " (*Hernandez v. Rancho Santiago Cmty. College Dist.* (2018) 22 Cal.App.5th 1187, 1193–1194 [232 Cal.Rptr.3d 349].)
- "Under the FEHA, 'reasonable accommodation' means 'a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired.' " (*Cuiellette, supra,* 194 Cal.App.4th at p. 766.)
- "Reasonable accommodations include '[j]ob restructuring, part-time or modified work schedules, *reassignment to a vacant position,* … and other similar accommodations for individuals with disabilities.' " (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 968 [181 Cal.Rptr.3d 553], original italics.)
- "The examples of reasonable accommodations in the relevant statutes and regulations include reallocating nonessential functions or modifying how or when an employee performs an essential

function, but not eliminating essential functions altogether. FEHA does not obligate the employer to accommodate the employee by excusing him or her from the performance of essential functions." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 375 [184 Cal.Rptr.3d 9].)

- "A term of leave from work can be a reasonable accommodation under FEHA, and, therefore, a request for leave can be considered to be a request for accommodation under FEHA." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 243 [206 Cal.Rptr.3d 841], internal citation omitted.)

- "Failure to accommodate claims are not subject to the *McDonnell Douglas* burden-shifting framework." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 926 [227 Cal.Rptr.3d 286].)

- "The question now arises whether it is the employees' burden to prove that a reasonable accommodation could have been made, i.e., that they were qualified for a position in light of the potential accommodation, or the employers' burden to prove that no reasonable accommodation was available, i.e., that the employees were not qualified for any position because no reasonable accommodation was available. [¶¶] Applying *Green's* burden of proof analysis to section 12940(m), we conclude that the burden of proving ability to perform the essential functions of a job with accommodation should be placed on the plaintiff under this statute as well. First, … an employee's ability to perform the essential functions of a job is a prerequisite to liability under section 12940(m). Second, the Legislature modeled section 12940(m) on the federal reasonable accommodation requirement (adopting almost verbatim the federal statutory definition of 'reasonable accommodation' by way of example). Had the Legislature intended the employer to bear the burden of proving ability to perform the essential functions of the job, contrary to the federal allocation of the burden of proof, … it could have expressly provided for that result, but it did not. Finally, general evidentiary principles support allocating the burden of proof on this issue to the plaintiff." (*Nadaf-Rahrov, supra,* 166 Cal.App.4th at pp. 977–978, internal citations omitted.)

- " 'If the employee cannot be accommodated in his or her existing position and the requested accommodation is reassignment, an employer must make affirmative efforts to determine whether a position is available. [Citation.] A reassignment, however, is not required if "there is no vacant position for which the employee is qualified." [Citations.] "The responsibility to reassign a disabled employee who cannot otherwise be accommodated does 'not require creating a new job, moving another employee, promoting the disabled employee or violating another employee's rights … .' " [Citations.] "What is required is the 'duty to reassign a disabled employee if an already funded, vacant position at the same level exists.' [Citations.]" [Citations.]' " (*Furtado, supra,* 212 Cal.App.4th at p. 745.)

- "[A]n employee's probationary status does not, in and of itself, deprive an employee of the protections of FEHA, including a reasonable reassignment. The statute does not distinguish between the types of reasonable accommodations an employer may have to provide to employees on probation or in training and those an employer may have to provide to other employees. We decline to read into FEHA a limitation on an employee's eligibility for reassignment based on an employee's training or probationary status. Instead, the trier of fact should consider whether an employee is on probation or in training in determining whether a particular reassignment is comparable in pay and status to the

employee's original position." (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 724 [214 Cal.Rptr.3d 113], internal citations omitted.)

- "[A] disabled employee seeking reassignment to a vacant position 'is entitled to preferential consideration.' " (*Swanson, supra,* 232 Cal.App.4th at p. 970.)

- " 'Generally, " '[t]he employee bears the burden of giving the employer notice of the disability.' " ' An employer, in other words, has no affirmative duty to investigate whether an employee's illness might qualify as a disability. ' " '[T]he employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it. Nor is an employer ordinarily liable for failing to accommodate a disability of which it had no knowledge.' " ' " (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1167 [217 Cal.Rptr.3d 258], internal citations omitted.)

- " '[A]n employer "knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation." ' … [¶] 'While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the *only* reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations under the [FEHA]." ' " (*Featherstone, supra,* 10 Cal.App.5th at p. 1167, internal citations omitted.)

- "In other words, so long as the employer is aware of the employee's condition, there is no requirement that the employer be aware that the condition is considered a disability under the FEHA. By the same token, it is insufficient to tell the employer merely that one is disabled or requires an accommodation." (*Cornell, supra,* 18 Cal.App.5th at p. 938, internal citation omitted.)

- " ' " 'This notice then triggers the employer's burden to take "positive steps" to accommodate the employee's limitations. … [¶] … The employee, of course, retains a duty to cooperate with the employer's efforts by explaining [his or her] disability and qualifications. [Citation.] Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the [employee's] capabilities and available positions.' " ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 598 [210 Cal.Rptr.3d 59].)

- "Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an 'undue hardship.' " (*Prilliman*, *supra,* 53 Cal.App.4th at p. 947.)

- " 'Ordinarily the reasonableness of an accommodation is an issue for the jury.' " (*Prilliman*, *supra*, 53 Cal.App.4th at p. 954, internal citation omitted.)

- "[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA." (*Bagatti, supra,* 97 Cal.App.4th at p. 362.)

- "[A]n employer is relieved of the duty to reassign a disabled employee whose limitations cannot be

reasonably accommodated in his or her current job only if reassignment would impose an 'undue hardship' on its operations … ." (*Atkins, supra,* 8 Cal.App.5th at p. 721.)

- "The question whether plaintiffs could perform the essential functions of a position to which they sought reassignment is relevant to a claim for failure to accommodate under section 12940, subdivision (m) … ." (*Atkins, supra,* 8 Cal.App.5th at p. 717.)

- "On these issues, which are novel to California and on which the federal courts are divided, we conclude that employers must reasonably accommodate individuals falling within any of FEHA's statutorily defined 'disabilities,' including those 'regarded as' disabled, and must engage in an informal, interactive process to determine any effective accommodations." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 55 [43 Cal.Rptr.3d 874].)

- "While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Moore, supra,* 248 Cal.App.4th at p. 242.)

- "[A] pretextual termination of a perceived-as-disabled employee's employment in lieu of providing reasonable accommodation or engaging in the interactive process does not provide an employer a reprieve from claims for failure to accommodate and failure to engage in the interactive process." (*Moore, supra,* 248 Cal.App.4th at p. 244.)

- "Appellant also stated a viable claim under section 12940, subdivision (m), which mandates that an employer provide reasonable accommodations for the known physical disability of an employee. She alleged that she was unable to work during her pregnancy, that she was denied reasonable accommodations for her pregnancy-related disability and terminated, and that the requested accommodations would not have imposed an undue hardship on [defendant]. A finite leave of greater than four months may be a reasonable accommodation for a known disability under the FEHA." (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1341 [153 Cal.Rptr.3d 367].)

- "To the extent [plaintiff] claims the [defendant] had a duty to await a vacant position to arise, he is incorrect. A finite leave of absence may be a reasonable accommodation to allow an employee time to recover, but FEHA does not require the employer to provide an indefinite leave of absence to await possible future vacancies." (*Nealy, supra,* 234 Cal.App.4th at pp. 377−378.)

- "While 'a finite leave can be a reasonable accommodation under FEHA, provided it is likely that at the end of the leave, the employee would be able to perform … her duties,' a finite leave is not a reasonable accommodation when the leave leads directly to termination of employment because the employee's performance could not be evaluated while she was on the leave." (*Hernandez, supra,* 22 Cal.App.5th at p. 1194.)

Secondary Sources

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

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And*

Housing Act (FEHA), ¶¶ 9:2250–9:2285, 9:2345–9:2347 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.32[2][c], 41.51[3] (Matthew Bender)

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

California Civil Practice: Employment Litigation § 2:50 (Thomson Reuters)

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;]**

   [to care for an individual designated by [*name of plaintiff***] [who is a blood relative/whose association to [***name of plaintiff***] is equivalent to a family relationship] 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, May 2023

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.

In the fourth bracketed option of element 2, if the plaintiff's relationship or association with the designated individual is contested, select either a blood relative or an associated person, or both, as applicable. (Gov. Code, § 12945.2(b)(2).) Omit both options if the plaintiff's relationship or association with the designated individual is not contested.

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)~~(5)(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(b)~~(12)~~(13).) 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 Unemp. 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.
- "Designated Person" Defined. Government Code section 12945.2(b)(2).
- "Employer" Defined. Government Code section 12945.2(b)~~(3)~~(4).
- "Parent" Defined. Government Code section 12945.2(b)~~(10)~~(11) (Assem. Bill 1033; Stats. 2021, ch. 327) [adding parent-in-law to the definition of parent].
- "Serious Health Condition" Defined. Government Code section 12945.2(b)~~(12)~~(13).

- "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)

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

We answer the questions submitted to us as follows:

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

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

2. **Do [*name of defendant*]'s records show any missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday?**
   ____ Yes ____ No

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

3. **How many meal breaks do the records show as missed, less than 30 minutes, or taken too late in a workday?**

   ____ meal breaks

   Answer question 4.

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

   ____ Yes ____ No

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

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

   ____ workdays

   Answer question 6.

6. For the workdays determined in question 5, what is the amount of pay owed?

$ _____

Signed: _____
Presiding Juror

Dated: _____

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

New May 2023

Directions for Use

This verdict form is based on CACI No. 2765, *Meal Break Violations—Introduction*, and CACI No. ~~2566B~~2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records*. Use this verdict form if the plaintiff's meal break claims involve the rebuttable presumption of a violation based on an employer's records showing missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday. See also verdict form CACI No. VF-2707, *Meal Break Violations*.

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

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

~~If the jury is 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*.~~

If the jury is asked to determine prejudgment interest for any meal or rest break violations (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 121–122 [293 Cal.Rptr.3d 599, 509 P.3d 956]), this ~~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-2709. Meal Break Violations—Inaccurate or Missing Employer Records (Lab. Code, §§ 226.7, 512)

We answer the questions submitted to us as follows:

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

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

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

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

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

   ____ meal breaks

   Answer question 4.

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

   ____ Yes ____ No

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

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

   ____ workdays

   Answer question 6.

6. For the workdays determined in question 5, what is the amount of pay owed?

$ _____

Signed: _____
Presiding Juror

Dated: _____

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

New May 2023

Directions for Use

This verdict form is based on CACI No. 2765, *Meal Break Violations—Introduction*, and CACI No. ~~2566B~~2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records*. Use this verdict form if the plaintiff's meal break claims involve the rebuttable presumption of a violation based on an employer's inaccurate or missing records. If only missing records are at issue, omit "accurate" from questions 2 and 3. See also verdict form CACI No. VF-2707, *Meal Break Violations*.

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

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

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

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

[*Name of plaintiff***] claims that [***name of defendant***] [discharged/[***other adverse employment action***]] [him/her/***nonbinary pronoun***] in retaliation for [his/her/***nonbinary pronoun***] [disclosure of information of/refusal to participate in] an unlawful act. To establish this claim, [***name of plaintiff***] must prove all of the following are more likely true than not true:**

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

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

   [*or***]**

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

   [*or***]**

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

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

   [*or***]**

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

   [*or***]**

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

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

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

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

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

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

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

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

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

New December 2012; Revised June 2013, December 2013; Revoked June 2014; Restored and Revised December 2014; Renumbered from CACI No. 2730 and Revised June 2015; Revised June 2016, November 2019, May 2020, December 2022, May 2023

Directions for Use

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

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

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

unlawful.

It has been held that a report of publicly known facts is not a protected disclosure. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858 [136 Cal.Rptr.3d 259].) Another court, however, has held that protection is not necessarily limited to the first public employee to report unlawful acts to the employer. (*Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548−1553 [176 Cal.Rptr.3d 268], disapproved on other grounds by *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 718 [289 Cal.Rptr.3d 572, 503 P.3d 659]; see Lab. Code, § 1102.5(b), (e).)

"Adverse employment action" is viewed the same as it is under the Fair Employment and Housing Act. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387 [37 Cal.Rptr.3d 113], disapproved on other grounds by *Lawson, supra,* 12 Cal.5th at p. 718; see CACI No. 2505, *Retaliation—Essential Factual Elements.*) Element 4 may be modified to allege constructive discharge or adverse acts that might not be obviously prejudicial. See CACI No. 2509, *"Adverse Employment Action" Explained,* and CACI No. 2510, *"Constructive Discharge" Explained,* for instructions that may be adapted for use with this instruction.

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

Sources and Authority

- Retaliation Against Whistleblower Prohibited. Labor Code section 1102.5.

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

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

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

- "To prove a claim of retaliation under this statute, the plaintiff 'must demonstrate that he or she

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

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

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

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

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

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

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

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

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

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

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

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

- "Matters such as transferring employees, writing up employees, and counseling employees are personnel matters. 'To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected

"whistleblowers" arising from the routine workings and communications of the job site. … ' " (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822 [98 Cal.Rptr.3d 281].)

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

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

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

Secondary Sources

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

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

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

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

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

ITC CACI 23-01
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
403. Standard of Care for Physically Disabled Person (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	The Jury Instructions Committee of the California Lawyers Association's Litigation Section has reviewed the proposed revisions to civil jury instructions (CACI 23-01) and appreciates the opportunity to submit these comments.	No response required.
		Agree	No response required.
	Civil Justice Association of California by Lucy Chinkezian, Counsel and American Property Casualty Insurance Association by Mark Sektnan, Vice President, State Government Relations	Thank you for the opportunity to comment on proposed revisions to California Civil Jury Instructions – CACI 23-01. Civil Justice Association of California (CJAC) is a more than 40- year-old nonprofit organization representing a broad and diverse array of businesses and professional associations. A trusted source of expertise in legal reform and advocacy, we confront legislation, laws, and regulations that create unfair litigation burdens on California businesses, employees, and communities. The American Property Casualty Insurance Association (APCIA) is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions—protecting families, communities, and businesses in the U.S. and across the globe. We have concerns about the proposed changes to CACI Sections 403, 512, 904, VF 2508, VF 2509, and 4603. We respectfully request that you address these concerns as recommended below.	See the committee's responses to CJAC's and APCIA's substantive comments below.
		CACI 403. Standard of Care for Person with a Physical Disability **Sources and Authorities**	The committee thanks the commenters for noting an issue the committee will consider in a future release, as time and resources

Instruction(s)	Commenter	Comment	Committee Response
		In this section, the Restatement Second of Torts is listed as a primary Source and Authority. In fact, Restatements are secondary sources and should be referred to as such. Accordingly, we request that the references to the Restatement Second of Torts be moved to Secondary Sources.	allow. *CACI* has included excerpts from Restatements in its Sources and Authority (see, e.g., 323, 374, 401, 403, etc.) since they were first adopted in 2003 but will revisit this position in light of the comment.
	Bruce Greenlee Attorney Richmond	Excellent job of converting general statements to exact case excerpts.	No response required.
	Orange County Bar Association by Michael A. Gregg, President	Agree	No response required.
512. Wrongful Birth—Essential Factual Elements (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree	No response required.
	Civil Justice Association of California by Lucy Chinkezian, Counsel and	**CACI 512. Wrongful Birth — Essential Factual Elements and CACI 513. Wrongful Life—Essential Factual Elements** **Sources and Authorities** Our next concern pertains to the "proximate cause" standard in the Wrongful Birth and Wrongful Life sections. The sources and authorities in both sections cite to *Simmons v. West Covina*	The committee does not clarify direct quotations from cases that are excerpted in the Sources and Authority of CACI. To the extent the commenter is asking for a clarification in the instruction, the comment is beyond the scope of the invitation to comment. The

Instruction(s)	Commenter	Comment	Committee Response
	American Property Casualty Insurance Association by Mark Sektnan, Vice President, State Government Relations	*Medical Clinic* (1989) 212 Cal.App.3d 696, 702-703 [260 Cal.Rptr. 772] to instruct that "a less than 50-50 possibility that defendants' omission caused the harm does not meet the requisite reasonable medical probability test of proximate cause." However, per *Simmons*, "a possible cause only becomes probable when in the absence of other reasonable causal explanations, it becomes *more likely than not* that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury. [Citation.]" (emphasis added). [FN 1 *Simmons*, supra, 212 Cal.App.3d at pp. 700] We recommend clarifying the proximate cause standard to be consistent with *Simmons*, particularly to address that "more likely than not" means a greater than 50-50 possibility.	committee will consider it in a future release.
	Bruce Greenlee Attorney Richmond	Excellent job of converting general statements to exact case excerpts.	No response required.
	Orange County Bar Association by Michael A. Gregg, President	Agree	No response required.
513. Wrongful Life—Essential Factual Elements (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree	No response required.
	Civil Justice Association of	**CACI 512. Wrongful Birth — Essential Factual Elements and CACI 513. Wrongful Life—Essential Factual Elements**	See the committee's response to CJAC's and APCIA's same

Instruction(s)	Commenter	Comment	Committee Response
	California by Lucy Chinkezian, Counsel and American Property Casualty Insurance Association by Mark Sektnan, Vice President, State Government Relations	**Sources and Authorities** Our next concern pertains to the "proximate cause" standard in the Wrongful Birth and Wrongful Life sections. The sources and authorities in both sections cite to *Simmons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696, 702-703 [260 Cal.Rptr. 772] to instruct that "a less than 50-50 possibility that defendants' omission caused the harm does not meet the requisite reasonable medical probability test of proximate cause." However, per *Simmons*, "a possible cause only becomes probable when in the absence of other reasonable causal explanations, it becomes *more likely than not* that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury. [Citation.]" (emphasis added). [FN 1 *Simmons*, supra, 212 Cal.App.3d at pp. 700] We recommend clarifying the proximate cause standard to be consistent with *Simmons*, particularly to address that "more likely than not" means a greater than 50-50 possibility.	comment on CACI No. 512, above.
	Bruce Greenlee Attorney Richmond	Excellent job of converting general statements to exact case excerpts.	No response required.
	Orange County Bar Association by Michael A. Gregg, President	Agree	No response required.
904. Duty of Common Carrier Toward Disabled/Infirm	California Lawyers Association, Litigation Section, Jury Instructions	Agree	No response required.

Instruction(s)	Commenter	Comment	Committee Response
Passengers (Revise)	Committee by Reuben A. Ginsburg, Chair Sacramento		
	Civil Justice Association of California by Lucy Chinkezian, Counsel and American Property Casualty Insurance Association by Mark Sektnan, Vice President, State Government Relations	**CACI 904. Duty of Common Carrier Toward Passengers With Illness or Disability** **Jury Instructions** There appears to be an inconsistency in the duty of the common carrier between the jury instruction and the authority. The jury instruction states that a common carrier must use additional care when the carrier is *aware* of a passenger's illness or disability. Yet, the cited authority states that the carrier must exercise additional care when a passenger's illness or disability is *apparent* or *made known*. Further we note that the authority addresses a common carrier's duty of care when the passenger is *without an attendant*, but the jury instruction is not similarly limited. Accordingly, we see a need to resolve the inconsistencies.	The comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle.
		Sources and Authorities Furthermore, we note that the quoted text of this section cites to a California Supreme Court case, McBride v. *Atchison, Topeka & Santa Fe Ry. Co.* (1955) 44 Cal.2d 113, 119–120 [279 P.2d 966]. Attribution should be made also to the Minnesota case – *Croom v. Chicago, M. & St. P. Ry. Co.* (1893) 52 Minn. 296, 298 [53 N.W. 1128, 1128–1129] – which is the actual source of the quote.	The committee has added "internal citation omitted" to the citation. Users may examine the case for more information.
	Bruce Greenlee Attorney Richmond	Excellent job of converting general statements to exact case excerpts.	No response required.

Instruction(s)	Commenter	Comment	Committee Response
	Orange County Bar Association by Michael A. Gregg, President	Agree	No response required.
1010. Affirmative Defense—Recreation Immunity—Exceptions (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree	No response required.
	Bruce Greenlee Attorney Richmond	1. The deletion of "for a recreational purpose" from the third exception: Add to the Directions for Use: With regard to the third exception, it has been held that the invitation need not be for a recreational purpose. [*Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 114 [96 Cal.Rptr.2d 394]. The Supreme Court has stated that if an owner expressly invites someone onto the property and the person is injured while using the land for a recreational purpose, then the general release from liability is abrogated. [*Hoffmann v. Young* (2022) 13 Cal.5th 1257, 1268-1269. 13 [297 Cal.Rptr.3d 607, 515 P.3d 635]. But a landowner owes a general duty of care to those invited onto the property regardless of the purpose of the invitation. [See Sources and Authority to CACI Nos. 1000, *Premises Liability—Essential Factual Elements*, and 1001, *Basic Duty of Care*; see also *Hoffman, supra*, 13 Cal.5th at p 1286; concurring opinion of Kruger, J., suggesting the possibility that the personal social guests of household members were never intended to fall within	The committee does not believe that further explanation is called for at this time about the third exception in the Directions for Use. The committee will continue to monitor developments in the law in this area and will refine the instruction and its Directions for Use as appropriate.

Instruction(s)	Commenter	Comment	Committee Response
		the category of recreational users or entrants to whom section 846, subdivision (a) applies in the first place]. I have previously argued …[*] that despite *Calhoon*, it makes no sense if the invitation was not for a recreational purpose as landowners are generally liable for negligently caused injuries to their guests on their property. The exception to recreational immunity is not required to establish landowner liability if the entry is not for a recreational purpose. But the above sentence from the Supreme Court's opinion suggests how a general invitation might apply. The invitation might be general, as to a weekend guest. But if I negligently shoot the guy while we are duck hunting, then the exception to recreational immunity applies because I invited him, albeit not for a recreational purpose. Still, the *Calhoon* rule is dubious because on these facts, the plaintiff doesn't need to rely on recreational immunity; I'm liable anyway, whether I shoot him negligently while duck hunting or on the patio having cocktails. Justice Kruger's concurrence gets close to addressing this issue by suggesting that a social guest may not be within the scope of the statute at all. She agrees to leave it for another day.	
	Orange County Bar Association by Michael A. Gregg, President	Agree	No response required.
2508. Failure to File Timely Administrative Complaint (Gov. Code,	California Lawyers Association, Litigation Section, Jury Instructions Committee	Agree	No response required.

Instruction(s)	Commenter	Comment	Committee Response
§ 12960(e))—Plaintiff Alleges Continuing Violation (Revise)	by Reuben A. Ginsburg, Chair Sacramento		
	Orange County Bar Association by Michael A. Gregg, President	Agree	No response required.
2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree	No response required.
	Orange County Bar Association by Michael A. Gregg, President	Agree	No response required.
2600. Violation of CFRA Rights—Essential Factual Elements (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree	No response required.
	Bruce Greenlee Attorney Richmond	1. Third option for element 2: I don't see any reason to make any changes to this option. The newly added fourth option addresses "an individual designated by plaintiff" and sets forth the requirements to qualify as one. The instructions for element 2 are to pick one option only. So if you pick the new one, you will not pick the third one. And if you	To improve clarity, the committee has deleted the addition to the third option, refined the fourth option, and refined the accompanying Directions for Use to allow the new content to cover all possible variations for an individual

Instruction(s)	Commenter	Comment	Committee Response
		pick the third one and choose "an individual designated by plaintiff," you won't have the qualifying requirements. I see the point made in the Directions for Use, that you don't need the qualifying requirements unless they are contested. But the instruction is more understandable without the change to the third option, even if it means giving the qualifying requirements even though they are not contested.	designated by plaintiff, including where the relationship or association is not contested.
	Orange County Bar Association by Michael A. Gregg, President	Agree	No response required.
VF-2708. Meal Break Violations—Employer Records Showing Noncompliance (New)	California Employment Lawyers Association by Laura L. Horton, Chair Woodland Hills	We at the California Employment Lawyers Association ("CELA") write to comment on the additional CACI 23-01 proposals for wage-and-hour jury instructions. CELA is a statewide organization of more than 1,200 private attorneys who practice primarily employment law on behalf of workers. CELA was established to assist California lawyers representing employees and unions in matters related to employment. CELA's mission is to help our members protect and expand the legal rights of workers through litigation, education, and advocacy. Today, CELA submits comments on the proposals for VF-2708 and VF-2709. CELA also proposes an instruction for prejudgment interest applicable to wage and hour violations. We have reviewed the remaining proposed instructions and believe they are appropriate for adoption in current form. CELA recognizes and appreciates the Committee's consideration of our prior proposals and comments.	See the committee's responses to CELA's substantive comments, below.
		I. VF-2708 and VF-2709 Directions for Use Here in redline form we present proposed corrections.	The committee agrees that the paragraph of the Directions for Use concerning prejudgment interest, as it was circulated for

Instruction(s)	Commenter	Comment	Committee Response
		VF-2708 Directions for Use This verdict form is based on CACI No. 2765, *Meal Break Violations—Introduction*, and CACI No. 2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records*. Use this verdict form if the plaintiff's meal break claims involve the rebuttable presumption of a violation based on an employer's records showing missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday. See also verdict form CACI No. VF-2707, *Meal Break Violations*. The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, ~~replace~~ augment 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.~~ Plaintiffs who are owed meal break pay or rest break pay are entitled to prejudgment interest. *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 121-122. This verdict form may be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest, in the event of any factual disputes that affect the calculation.	public comment, does not reflect the holding of *Naranjo v. Spectrum Security Services, Inc.* The committee recommends replacing the existing paragraph, which is standard content across the verdict forms in CACI, with new content that acknowledges *Naranjo*. The committee also has updated the cross-references to CACI No. 2766B.

Instruction(s)	Commenter	Comment	Committee Response
		The Directions for Use in proposed VF-2708 and VF-2709 do not reflect the law on prejudgment interest for meal and rest break violations. An award of prejudgment interest for meal break pay is not discretionary. *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 122 [293 Cal.Rptr.3d 599, 618] established that plaintiffs prevailing on missed-break violations are entitled to prejudgment interest of 7 percent under Article XV, § 1 of the California Constitution. In resolving a dispute over whether the applicable interest rate was 10 percent or 7 percent, the California Supreme Court underscored that "[p]revailing civil parties are entitled to this interest rate in the calculation of prejudgment interest absent a statute specifying a higher rate." (*Id.* at 121.) In addition, Civil Code section 3287, not 3288, applies because the premium wage is a liquidated damage capable of being made certain. Notably, in *Naranjo,* the Court of Appeal's decision to award Civil Code section 3287 prejudgment interest as of right was not disturbed on appeal. The underlying Court of Appeal decision held that prevailing plaintiffs were entitled to a seven percent prejudgment interest under Civil Code section 3287, rejecting defendant Spectrum's position that the class was not entitled to prejudgment interest. (*Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th 444, 476, as modified on denial of reh'g (Oct. 10, 2019), aff'd in part, rev'd in part and remanded (2022) 13 Cal.5th 93 ["Civil Code section 3287 establishes a default interest rate of seven percent for litigants 'entitled to recover damages certain, or capable of being made certain,' calculated from the day that the right to recover the damages vests."]) Therefore, in no case should a court vest the jury with discretion to determine whether to award prejudgment interest	

Instruction(s)	Commenter	Comment	Committee Response
		for meal and rest break violations. At most, juries may be instructed to make factual findings necessary to resolve factual disputes that affect the mathematical calculations necessary for determination of prejudgment interest. In our experience such disputes at trial are rare.	
		Finally, we wish to bring attention to the need for correction of verdict forms VF-2700, VF-2701, VF-2702, VF-2706 and VF-2707. These existing models contain the same incorrect direction for use insofar as they suggest that juries may be given discretion to award prejudgment interest for nonpayment of wages or nonprovision of meal and rest periods. California Labor Code section 218.6 mandates a court award of interest on unpaid wages at the rate of 10 percent for the violations covered by VF-2700, VF-2701 and VF-2702. With respect to meal and rest break premium wages, as well as overtime, minimum wage and other contractual or statutory wages, the award of prejudgment interest is a nondiscretionary award. The only difference is that the 7 percent rate applies to meal and rest break premium wages awarded for the nonprovision of meal and rest periods, and the 10 percent rate applies to actions brought for nonpayment of wages. (*Naranjo*, *supra*, 13 Cal.5th 93, 122.)	This comment is beyond the scope of the invitation to comment. The committee will consider the Directions for Use of the other verdict forms mentioned (VF-2700, VF-2701, VF-2702, VF-2706 and VF-2707) in a future release cycle.
	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	a. Because damages for meal break violations are based on the number of workdays the employer failed to comply with the law rather than the number of missed or noncompliant meal breaks, the latter is unnecessary information. An unnecessary factual finding would complicate the jury's task and could support a challenge to the verdict if the finding arguably is inconsistent with another finding. We would modify question 3 to ask for the number of workdays on which there was a meal break violation rather than the number of meal break violations, as shown below.	The committee acknowledges that question 3 may be asking for more information than is necessary but the committee believes that the extra question will assist the jury in making the later determinations that are necessary, including defendant's need to prove that, despite the records, a meal break was provided and then ultimately for any meal break violations that

Instruction(s)	Commenter	Comment	Committee Response
			were not rebutted, on how many workdays did those meal break violations occur.
		b. CACI Nos. 2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records* and 2767, *Meal Break Violations—Pay Owed*, approved in December 2022, state that for each meal break violation plaintiff is entitled to one additional hour of pay at plaintiff's regular rate of pay and include optional language on "regular rate of pay." The Directions for Use for both instructions state, "The court must determine the method for calculating plaintiff's regular rate of pay. If different regular rates of pay are at issue, define the plaintiff's regular rate of pay for all relevant date ranges." Thus, according to CACI Nos. 2766B and 2767, the court determines the method for calculating the regular rate of pay. We understand the "method" to mean the "applicable formula" to be inserted in the instruction. The formula should yield a pay rate expressed in dollars per hour, which the jury then multiplies by the number of workdays on which there was a meal break violation to yield a dollar figure. Regular rate of pay must be expressed in dollars per hour if regular rate of pay times number of workdays is to yield one additional hour of pay per workday, as intended. For the jury to determine damages, the court must either instruct the jury on the pay rate (i.e., $/hr.) or instruct the jury on the formula to determine the pay rate and instruct the jury to decide the pay rate. Yet the applicable language on regular rate of pay in CACI Nos. 2766B and 2767 is optional, and there is no mandatory instruction on pay rate.	The committee does not believe an extra question on the rate of pay is appropriate.

Instruction(s)	Commenter	Comment	Committee Response
		Neither the optional language on regular rate of pay nor the Directions for Use state that the jury should calculate the pay rate using the formula, which is what the jury should do. Only then can the jury multiply the regular pay rate by the number of workdays as instructed. We would add a question to the two meal break verdict forms asking the jury to calculate the pay rate, as shown below. Although it is beyond the scope of the current invitation to comment, we believe the same question should be added to VF-2707, *Meal Break Violations* and VF-2706, *Rest Break Violations*.	
		c. We believe the language "one or more meal breaks that comply with the law" in question 5 could be misconstrued to mean there was no violation if the employer provided at least one break in each workday. We would change this language to "a meal break that complies with the law" and add language to the Directions for Use stating the language should be modified if the plaintiff claims to be entitled to more than one meal break per workday.	The committee has refined question 5 to eliminate "one or more." The Directions for Use already note that the verdict forms are intended as models and may need to be modified.
		d. Our proposed revision: **VF-2708. Meal Break Violations—Employer Records Showing Noncompliance (Lab. Code, §§ 226.7, 512)** 1. Did [*name of plaintiff*] work for [*name of defendant*] for one or more workdays for a period lasting longer than five hours? __ Yes __ No	The committee thanks the commenter for the suggested language.

Instruction(s)	Commenter	Comment	Committee Response
		If your answer to question 1 is yes, then answer question. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form. 2. Do [*name of defendant*]'s records show any missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday? __ Yes __ No If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form. ~~3. How many meal breaks do the records show as missed, less than 30 minutes, or taken too late in a workday?~~ ~~__ meal breaks~~ ~~Answer question 4.~~ 4<u>3</u>. For each meal break ~~included in your answer to question 3,~~ <u>[*name of defendant*]'s records show as missed, less than 30 minutes, or taken too late in a workday,</u> did [*name of defendant*] prove [he/she/*nonbinary pronoun*/it] provided a meal break that complies with the law? __ Yes __ No If your answer to question 4<u>3</u> is yes, stop here, answer no further questions, and have the presiding juror sign and date this form. If you answered no, then answer question ~~5~~<u>4</u>.	

Instruction(s)	Commenter	Comment	Committee Response
		~~5~~4. ~~Considering by workday the meal breaks determined in question 3, f~~For how many workdays for which [*name of defendant*]'s records show a missed meal break, meal break of less than 30 minutes, or delayed meal break did [*name of defendant*] fail to prove that [he/she/*nonbinary pronoun*/it] provided ~~one or more~~ a meal breaks that ~~comply~~ complies with the law? Answer question ~~6~~5. 5. What was the regular rate of pay for [*name of plaintiff*] from [*insert beginning date*] to [*insert ending date*]? _____ dollars/hour [*Repeat as necessary for date ranges with different regular rates of pay.*] Answer question 6. 6. For the workdays ~~determined~~ included in your answer to question ~~5~~4, what is the total amount of pay owed?	
	Civil Justice Association of California by Lucy Chinkezian, Counsel and American Property Casualty Insurance	**CACI VF-2708. Meal Break Violations—Employer Records Showing Noncompliance and CACI VF-2709. Meal Break Violations—Inaccurate or Missing Employer Records.** **Jury Instructions** The list of questions provided in the verdict form of this section do not specify whether it applies to an exempt or nonexempt employee.	The underlying meal break instructions assume that the case involves a nonexempt employee who is entitled to one or more meal breaks. (See CACI No. 2765.) If there is a dispute about the employee's exempt status, both the jury instruction and the verdict form will need to be modified. The Directions for Use of VF-2708 and VF-2709 already note that the

Instruction(s)	Commenter	Comment	Committee Response
	Association by Mark Sektnan, Vice President, State Government Relations	To align with California law, we recommend specifying that the list applies only to employees who are nonexempt in the headline of CACI VF-2708 and VF-2709 as follows: **VF-2708. Meal Break Violations—Employer Records Showing Noncompliance Toward Nonexempt Employees (Lab. Code, §§ 226.7, 512).** and **Meal Break Violations—Inaccurate or Missing Employer Records of Nonexempt Employees.**	verdict forms are intended as models and may need to be modified.
		Alternatively, we recommend adding a new question to both verdict forms about the classification of the employee, making it the first question asked and continuing with the other questions: 1. Was [name of plaintiff] a nonexempt employee? Nonexempt employees generally earn an hourly wage rather than a set salary. ____Yes____No If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form. 2. Did [name of plaintiff] work for [name of defendant] for one or more workdays for a period lasting longer than five hours? ____ Yes ____ No … Again, the new question should also be added to verdict form 2709.	See the committee's response to CJAC's and APCIA's alternative comment, above.

Instruction(s)	Commenter	Comment	Committee Response
	Bruce Greenlee Attorney Richmond	General Comment Regarding Pronoun Options Noticed in New Verdict Forms on Meal Breaks 1. When "it" is needed as a pronoun option because the antecedent may be a nonperson, I think it would be better if "it" preceded "*nonbinary pronoun:"* "[he/she/it/*nonbinary pronoun*]." In fact, it could be argued that in these verdict forms, "it" should go first as the majority of employers are more likely to be entities than people.	The committee prefers to offer standardized variable text options for the pronouns in all *CACI* instructions regardless of which option may be the most used.
	Orange County Bar Association by Michael A. Gregg, President	In the Directions for Use, an instruction should be added regarding question number 1 which states that if the employee worked more than five hours, but less than 6 hours, and entered into a meal period waiver with the defendant, that any such meal periods should not be included. *See* Cal. Lab. Code § 512 ("An employer shall not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer shall not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.") Similar instruction should be provided for second meal period break waivers in situations where the plaintiff worked more than 10 hours but less than 12 hours, had a meal period waiver agreement regarding second breaks, and was provided with a first meal period. *Id.*	*CACI*'s verdict forms generally do not address in the Direction for Use the substance of the underlying jury instruction. Special circumstances may require modification. As the Directions for Use state, verdict forms are intended only as models and may need to be modified depending on the facts of the case.
VF-2709. Meal Break	California Employment	We at the California Employment Lawyers Association ("CELA") write to comment on the additional CACI 23-01	See the committee's responses to CELA's comments, below.

Instruction(s)	Commenter	Comment	Committee Response
Violations—Inaccurate or Missing Employer Records (New)	Lawyers Association by Laura L. Horton, Chair Woodland Hills	proposals for wage-and-hour jury instructions. CELA is a statewide organization of more than 1,200 private attorneys who practice primarily employment law on behalf of workers. CELA was established to assist California lawyers representing employees and unions in matters related to employment. CELA's mission is to help our members protect and expand the legal rights of workers through litigation, education, and advocacy. Today, CELA submits comments on the proposals for VF-2708 and VF-2709. CELA also proposes an instruction for prejudgment interest applicable to wage and hour violations. We have reviewed the remaining proposed instructions and believe they are appropriate for adoption in current form. CELA recognizes and appreciates the Committee's consideration of our prior proposals and comments.	
		II. VF-2708 and VF-2709 Directions for Use Here in redline form we present proposed corrections. **VF-2708 Directions for Use** This verdict form is based on CACI No. 2765, *Meal Break Violations—Introduction*, and CACI No. 2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records*. Use this verdict form if the plaintiff's meal break claims involve the rebuttable presumption of a violation based on an employer's records showing missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday. See also verdict form CACI No. VF-2707, *Meal Break Violations*. The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.	See the committee's response to CELA's same comments to VF-2708, above.

Instruction(s)	Commenter	Comment	Committee Response
		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~~ augment 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.~~ Plaintiffs who are owed meal break pay or rest break pay are entitled to prejudgment interest. *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 121-122. This verdict form may be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest, in the event of any factual disputes that affect the calculation. The Directions for Use in proposed VF-2708 and VF-2709 do not reflect the law on prejudgment interest for meal and rest break violations. An award of prejudgment interest for meal break pay is not discretionary. *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 122 [293 Cal.Rptr.3d 599, 618] established that plaintiffs prevailing on missed-break violations are entitled to prejudgment interest of 7 percent under Article XV, § 1 of the California Constitution. In resolving a dispute over whether the applicable interest rate was 10 percent or 7 percent, the California Supreme Court underscored that "[p]revailing civil parties are entitled to this interest rate in the calculation of prejudgment interest absent a statute specifying a higher rate." (*Id.* at 121.)	

Instruction(s)	Commenter	Comment	Committee Response
		In addition, Civil Code section 3287, not 3288, applies because the premium wage is a liquidated damage capable of being made certain. Notably, in *Naranjo,* the Court of Appeal's decision to award Civil Code section 3287 prejudgment interest as of right was not disturbed on appeal. The underlying Court of Appeal decision held that prevailing plaintiffs were entitled to a seven percent prejudgment interest under Civil Code section 3287, rejecting defendant Spectrum's position that the class was not entitled to prejudgment interest. (*Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th 444, 476, as modified on denial of reh'g (Oct. 10, 2019), aff'd in part, rev'd in part and remanded (2022) 13 Cal.5th 93 ["Civil Code section 3287 establishes a default interest rate of seven percent for litigants 'entitled to recover damages certain, or capable of being made certain,' calculated from the day that the right to recover the damages vests."])	
		Therefore, in no case should a court vest the jury with discretion to determine whether to award prejudgment interest for meal and rest break violations. At most, juries may be instructed to make factual findings necessary to resolve factual disputes that affect the mathematical calculations necessary for determination of prejudgment interest. In our experience such disputes at trial are rare.	See the committee's response to CELA's same comments to VF-2708, above.
		Finally, we wish to bring attention to the need for correction of verdict forms VF-2700, VF-2701, VF-2702, VF-2706 and VF-2707. These existing models contain the same incorrect direction for use insofar as they suggest that juries may be given discretion to award prejudgment interest for nonpayment of wages or nonprovision of meal and rest periods. California Labor Code section 218.6 mandates a court award of interest on unpaid wages at the rate of 10 percent for the violations covered by VF-2700,	See the committee's response to CELA's same comments to VF-2708, above.

Instruction(s)	Commenter	Comment	Committee Response
		VF-2701 and VF-2702. With respect to meal and rest break premium wages, as well as overtime, minimum wage and other contractual or statutory wages, the award of prejudgment interest is a nondiscretionary award. The only difference is that the 7 percent rate applies to meal and rest break premium wages awarded for the nonprovision of meal and rest periods, and the 10 percent rate applies to actions brought for nonpayment of wages. (*Naranjo*, *supra*, 13 Cal.5th 93, 122.)	
	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Same comments as for VF-2708, above.	See the committee's response to CLA's same comments to VF-2708, above.
		Our proposed revision: **VF-2709. Meal Break Violations—Inaccurate or Missing Employer Records (Lab. Code, §§ 226.7, 512)** 1. Did [*name of plaintiff*] work for [*name of defendant*] for one or more workdays for a period lasting longer than five hours? ____ Yes ____ No If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form. 2. Did [*name of defendant*] keep [accurate] records of the start and end times for meal breaks? ____ Yes ____ No	The committee thanks the commenter for the proposed language.

Instruction(s)	Commenter	Comment	Committee Response
		If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.] ~~3. For how many meal breaks were [accurate] records of the start and end times for meal breaks not kept?~~ ~~____ meal breaks~~ ~~Answer question 4.~~ ~~4~~3. For each meal break ~~included in your answer to question 3,~~ for which [*name of defendant*] failed to keep [accurate] records of the start and end times], did [*name of defendant*] prove [he/she/*nonbinary pronoun*/it] provided a meal break that complies with the law? ____ Yes ____ No If your answer to question ~~4~~3 is yes, stop here, answer no further questions, and have the presiding juror sign and date this form. If you answered no, then answer question ~~5~~4. ~~5~~4. ~~Considering by workday the meal breaks determined in question 3, f~~For how many workdays for which [*name of defendant*] failed to keep [accurate] records of the meal break start and end times did [*name of defendant*] fail to prove [he/she/*nonbinary pronoun*/it] provided ~~one or more~~ a meal break~~s~~ that ~~comply~~ complies with the law? __ workdays Answer question ~~6~~5.	

Instruction(s)	Commenter	Comment	Committee Response
		5. What was the regular rate of pay for [*name of plaintiff*] from [*insert beginning date*] to [*insert ending date*]? _____ dollars/hour [*Repeat as necessary for date ranges with different regular rates of pay.*] Answer question 6 6. For the workdays ~~determined~~ included in your answer to question ~~5~~4, what is the amount of pay owed? $ _____	
	Civil Justice Association of California by Lucy Chinkezian, Counsel and American Property Casualty Insurance Association by Mark Sektnan, Vice President, State Government Relations	**CACI VF-2708. Meal Break Violations—Employer Records Showing Noncompliance and CACI VF-2709. Meal Break Violations—Inaccurate or Missing Employer Records.** **Jury Instructions** The list of questions provided in the verdict form of this section do not specify whether it applies to an exempt or nonexempt employee. To align with California law, we recommend specifying that the list applies only to employees who are nonexempt in the headline of CACI VF-2708 and VF-2709 as follows: **VF-2708. Meal Break Violations—Employer Records Showing Noncompliance Toward Nonexempt Employees (Lab. Code, §§ 226.7, 512).** and	See the committee's response to CJAC's and APCIA's same comments to VF-2708, above.

Instruction(s)	Commenter	Comment	Committee Response
		Meal Break Violations—Inaccurate or Missing Employer Records of Nonexempt Employees.	
		Alternatively, we recommend adding a new question to both verdict forms about the classification of the employee, making it the first question asked and continuing with the other questions: 1. Was [name of plaintiff] a nonexempt employee? Nonexempt employees generally earn an hourly wage rather than a set salary. ____Yes____No If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form. 2. Did [name of plaintiff] work for [name of defendant] for one or more workdays for a period lasting longer than five hours? ____ Yes ____ No … Again, the new question should also be added to verdict form 2709.	See the committee's response to CJAC's and APCIA's same comments to VF-2708, above.
	Bruce Greenlee Attorney Richmond	General Comment Regarding Pronoun Options Noticed in New Verdict Forms on Meal Breaks When "it" is needed as a pronoun option because the antecedent may be a nonperson, I think it would be better if "it" preceded "*nonbinary pronoun:"* "[he/she/it/*nonbinary pronoun*]." In fact, it could be argued that in these verdict forms, "it" should go first as the majority of employers are more likely to be entities than people.	See the committee's response to Mr. Greenlee's same comment for VF-2708, above.

Instruction(s)	Commenter	Comment	Committee Response
	Seyfarth Shaw LLP by Michael Afar Los Angeles	This public comment is submitted on behalf of Seyfarth Shaw for consideration by the Advisory Committee on Civil Jury Instructions, in connection with the Committee's Invitation To Comment, CACI 23-01, on proposed additions and revisions to the Judicial Council of California Civil Jury Instructions ("CACI").	See the committee's responses to Seyfarth Shaw's substantive comments, below.
		I. VF-2709 Misrepresents The Holding And Context In Donohue Regarding "Inaccurate" Meal Period Records VF-2709 creates a verdict form for meal break violations where there are purportedly "inaccurate or missing employer records." The verdict form relies on CACI jury instructions about meal breaks and a new "rebuttable presumption" created by the California Supreme Court's decision in *Donohue v. AMN Servs., LLC*, 11 Cal. 5th 58, 76 (2021). However, the *Donohue* decision did not stand for proposition that there is now a rebuttable presumption of meal period violations where an employer's records are "inaccurate." The context of the *Donohue* decision is important – it involved a situation where the employer impermissibly rounded time punches at the start and end of an employee's meal periods, which resulted in the time punches being "inaccurate." This was specifically due to the employer's rounding practices, not a general claim that time punches were inaccurate for other reasons (e.g., a manager altered time, or the employer failed to accurate keep time punches). There is simply no blanket rule from the *Donohue* decision that an employee can claim time punches are "inaccurate" – for whatever reason – to then trigger a rebuttable presumption against the employer for meal period violations. A verdict form such as VF-2709 would mean that, in addition to the *Donohue* burden-shifting that occurs when time records show	The committee appreciates the commenter's concern. The holding of *Donohue* and its scope was debated by the committee both last year when it recommended new instructions on meal breaks (CACI Nos. 2765, 2766, and 2767) and this year when proposing VF-2708 and VF-2709. The committee voted to recommend VF-2709 so that it may be used in cases involving missing records and so-called inaccurate meal break records. Although the committee believes there is room for debate on the scope of *Donohue*, the committee does not share the commenter's concern that an employee's bare allegation will automatically shift the burden to an employer. Question 2 of VF-2709 asks, "Did defendant keep accurate records of the start and end times for meal breaks?" If the answer to question 2 is Yes, then the jury is told to answer no further questions and the

Instruction(s)	Commenter	Comment	Committee Response
		that the meal period rules were not met, the burden-shifting also occurs when the records shows that the rules were satisfied – simply because an employee can make a boilerplate claim, without support, that the time records were "inaccurate." Thus, under such a jury instruction, every employer would be required to prove that every employee during the three-year statute of limitations period (or four years, if an unfair business practice is alleged) had a full and timely meal period without the ability to rely upon its own timekeeping records. Under this scenario an employer would be not better off maintaining totally accurate pay records than one who kept no records at all. Additionally, the logic of such an argument would suggest that the employer bears the burden of proof in any case, such as one involving a claim of off-the-clock work, in which the employee asserts that the employer's timekeeping records are inaccurate. There is nothing in *Donohue* or the United States Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686–87 (1946) that supports such a radical burden-shifting proposition.	rebuttable presumption does come into play. In any event, the committee will continue to monitor developments in the law in this area and will refine the instructions and verdict forms as appropriate.
		II. The "Rebuttable Presumption" Created By *Donohue* Must Be Limited To Facial Noncompliance Or Facial Nonexistence Of Meal Period Records, Not "Inaccurate" Records Nowhere in the *Donohue* Court's opinion is there any language that claims of inaccurate records also create a rebuttable presumption that shifts the burden to the employer to prove meal periods were provided. In fact, the decision mentions the word "inaccurate" only four times – and none of the references support this type of interpretation by the proposed verdict form. To the contrary, *Donohue* explicitly holds that the rebuttable presumption applies only where time records explicitly show	See the committee's response to the comment, above.

Instruction(s)	Commenter	Comment	Committee Response
		missed, short, or delayed meal periods, not where an employee otherwise claims that the time records are inaccurate: "**If time records show missed, short, or delayed meal periods with no indication of proper compensation, then a rebuttable presumption arises.** Employers can rebut the presumption by presenting evidence that employees were compensated for noncompliant meal periods or that they had in fact been provided compliant meal periods during which they chose to work. *Donohue*, 11 Cal. 5th at 77 (emphasis added). Plainly put, *Donohue* does not—and cannot—support any argument or verdict form, such as VF-2709, that an employer now has the burden of proof whenever the employee says their timecard punches are "inaccurate." The proposal offered by CACI would essentially render time punches and recordkeeping to **always** be inaccurate, based on a self-serving claim by the employee. The holding in *Donohue* is merely that "[i]If time records show **noncompliant** meal periods, then a rebuttable presumption of liability arises." *Donohue*, 11 Cal. 5th at 78 (emphasis added). This holding cannot—and should not—be expanded into an unsupported verdict form that if time records show **compliant** meal periods, a rebuttable presumption of liability also arises. To be clear, a verdict form limited to just instances of facially noncompliant or facially nonexistent meal period records would not prejudice the plaintiff or moving party. A plaintiff would not be prohibited from prosecuting their case-in-chief and claiming that the records are still somehow inaccurate – for example, by arguing that a manager unlawfully edited their time without consent – and presenting evidence to meet his or her burden. A	

Instruction(s)	Commenter	Comment	Committee Response
		plaintiff can introduce witness testimony or obtain documentary evidence like time punch audit trails, in order to support a theory of inaccurate records, if they so choose. However, the plaintiff cannot – and should not – be able to rely on a "rebuttable presumption" based on an "inaccuracy" theory of liability.	
		III. The Verdict Forms In VF-2708 And VF-2709 Create A Serious Risk Of Impermissible Duplicative Damages In addition to the significant substantive issues with VF-2709, there is also a serious risk of impermissible duplicative damages, if verdict forms VF-2708 and VF-2709 are allowed to both become final. The verdict forms contain the same general structure, with the main difference being that VF-2708 focuses on "missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late," whereas VF-2709 focuses on "inaccurate or missing" records. But these categories can inherently overlap with each other, and a plaintiff is likely to insist on presenting both verdict forms to a trier of fact. This necessarily means that a trier of fact may award duplicative damages, for the same alleged violations, without recognizing or understanding the overlap. For example, if a plaintiff claims that his time punch records inaccurately reflect that a meal period was actually taken, and that in reality he had a short meal period, this is just a single violation for a single meal period, that can only result in a singular damages recovery. But with the current structure of the two verdict forms, how is a jury layperson supposed to understand whether it falls under VF-2708 for a short break, or VF-2709 for an inaccurate break? There is a serious risk that a jury will treat this incorrectly as two violations – one under each verdict form – and award two penalty payments, when only one is allowed.	As the Directions for Use state, "[t]he 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 both theories are presented to the jury, the committee would expect the parties and the court to adapt the verdict forms as necessary to the case.

Instruction(s)	Commenter	Comment	Committee Response
		The multiple verdict forms only create confusion and an extra risk for unjustified and unsupported penalties against defendants.	
	Orange County Bar Association by Michael A. Gregg, President	Agree	No response required.
4603. Whistleblower Protection—Essential Factual Elements (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	a. We suggest adding to Sources and Authority some or all of the following quote from *Lawson v. PPG Architectural Finishes, Inc*. (2022) 12 Cal.5th 703, 713-714, to support the new language in the instruction defining "contributing factor": This means plaintiffs may satisfy their burden of proving unlawful retaliation even when other, legitimate factors also contributed to the adverse action. (See, e.g., *State Comp. Ins. Fund v. Ind. Acc. Com.* (1959) 176 Cal.App.2d 10, 17, 1 Cal.Rptr. 73 (*State Comp. Ins. Fund*) [describing a contributing factor standard as one in which the conduct at issue need not be the "exclusive cause" of the plaintiff's injuries]; *Rookaird v. BNSF Ry. Co.* (9th Cir. 2018) 908 F.3d 451, 461 (*Rookaird*) [" 'A "contributing factor" includes "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision" ' "].)	The committee agrees and recommends adding another excerpt from *Lawson v. PPG Architectural Finishes, Inc*. to the Sources and Authority.
	Civil Justice Association of California by Lucy Chinkezian, Counsel	**CACI 4603. Whistleblower Protection—Essential Factual Elements.** **Jury Instructions and Directions for Use** Our concerns about this section pertain to the "contributing factor" definition offered within the jury instruction. This	The committee believes that the definition of *contributing factor* is best located within the text of the instruction. A definition would not assist a jury if placed in the Directions for Use. To the extent the commenters have suggested

Instruction(s)	Commenter	Comment	Committee Response
	and American Property Casualty Insurance Association by Mark Sektnan, Vice President, State Government Relations	definition is best placed in the Directions for Use and/or Sources and Authorities section, consistent with the placement of other terms, such as "adverse employment action." More importantly, we urge citing to the authority for the specific definition being proposed by the committee. Alternatively, consider the following definition that makes clear that a "contributing factor" is not dispositive in nature: A "contributing factor" is any factor, which alone or in connection with other factors, tends to affect the outcome of a decision. ~~A contributing factor can be proved even when other legitimate factors also contributed to the employer's decision.~~ *A "contributing factor" is not a conclusive factor as an employer may prove by clear and convincing evidence that its action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities.* (See Lab. Code, § 1102.6; CACI No. 4604, *Affirmative Defense—Same Decision*.) For the forgoing reasons, CJAC and APCIA respectfully ask that the jury instructions be amended to address the concerns that we have raised.	adding authority to the Sources and Authority, the committee recommends adding another excerpt from *Lawson*, as suggested by the California Lawyers Association, above. Finally, the committee has not endorsed the commenters' suggestion to add content about the employer's affirmative defense, which is the subject of a separate instruction (CACI No. 4604, *Affirmative Defense—Same Decision*) that should be given as appropriate. The committee believes that the Directions for Use appropriately cross-reference CACI No. 4604.
	Bruce Greenlee Attorney Richmond	1. Opening paragraph: the addition of "are more likely true than not true:" These words merely state the "preponderance of the evidence" burden of proof. They would apply to every "must prove" throughout CACI. No need to add them here. The point is covered by CACI No. 200, *Obligation to Prove—More Likely True Than Not True*.	The committee considered not including additional detail about the preponderance of the evidence standard here for the reasons stated by the commenter, especially in light of CACI No. 200. The committee nevertheless decided that the information would be helpful to jurors for this instruction because of the shifting burdens

Instruction(s)	Commenter	Comment	Committee Response
			and different standards of proof that apply.
		2. Definition of "Contributing Factor:" Revise second sentence to say: "A factor may contribute to an outcome even if other legitimate factors also contributed to it."	The committee does not see improved clarity in the suggested language, which changes the focus to an outcome rather than the employer's decision.
		3. Sources and Authority: Why was the *Green* excerpt removed? Normally, excerpts from the Supreme Court are not deleted unless the Supremes themselves say something that makes the excerpt no longer good law.	The committee chose to remove the excerpt from *Green v. Ralee Engineering Co.* because statutory changes since 1984 have made the excerpted language no longer accurate. The committee considered using an ellipsis to excise the inaccurate language but concluded that removing the case from the Sources and Authority would create less confusion.
	Orange County Bar Association by Michael A. Gregg, President	Since "contributing factor" and "substantial factor" are both used in the instruction, both terms should be defined in the body of the instruction. CACI 430 defines substantial factor ("A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.")	The committee does not agree that the instruction would be improved by adding another definition in the body of the instruction. As stated in the User Guide, although located in the Negligence series, use of CACI No. 430 "is not intended to be limited to cases involving negligence."