



**Alexa L. Morgan**  
315 University Avenue  
Los Gatos, CA 95030  
Direct Dial: (408) 844-2380  
Direct Facsimile: (408) 844-2351  
E-mail: [amorgan@foxwangmorgan.com](mailto:amorgan@foxwangmorgan.com)  
[www.foxwangmorgan.com](http://www.foxwangmorgan.com)

## INDEPENDENT CONTRACTOR MISCLASSIFICATION

**October 26, 2015**

**Alexa L. Morgan**  
**John C. Fox**  
**Jay J. Wang**

**Alexa L. Morgan, Esq.** is a founder and Partner of Fox, Wang & Morgan P.C. Ms. Morgan's practice focuses on virtually all areas of employment law before both state and federal courts, as well as administrative agencies. She regularly handles employment litigation matters involving complex wage and hour class action issues, workplace discrimination, sexual harassment, and wrongful termination. Ms. Morgan regularly counsels employers on various preventative measures in order to decrease their exposure to employment litigation. She also reviews and drafts employment-related policies and agreements, such as employee handbooks, employment agreements, severance agreements, and trade secret/confidentiality agreements. In addition, Ms. Morgan conducts internal workplace misconduct investigations and advises clients on appropriate responses to employee misconduct. Prior to founding Fox, Wang & Morgan, Ms. Morgan was an Associate at Manatt, Phelps & Phillips, LLP and at Gibson, Dunn & Crutcher LLP.

**John C. Fox, Esq.** is the President, a founder and a Senior Partner of Fox, Wang & Morgan P.C., headquartered in San Jose, California in the heart of the Silicon Valley. Mr. Fox is an across-the-board employment lawyer who leads large and complex litigation matters in state and federal courts, in cases involving trade secrets, wage-hour and discrimination class actions, employee misclassification, wrongful termination, corporate investigations, OFCCP audits and the use of statistics in employment matters. He also provides business and strategic advice for a wide range of companies nationwide relating to their employment practices and helps build employment systems in a way designed to minimize legal risk. Mr. Fox was previously Executive Assistant to the Director of OFCCP, where he was in charge of all policy and enforcement matters.

**Jay J. Wang, Esq.**, is a founder of Fox, Wang & Morgan P.C. Mr. Wang is a graduate of the Georgetown University Law Center. Mr. Wang's practice focuses on employment counseling and litigation, including civil claims involving wrongful termination, harassment, wage-hour issues, and trade secret misappropriation. Mr. Wang is a frequent lecturer on employment law matters at the Santa Clara County Bar Association. Mr. Wang currently serves on the Santa Clara County Bar Association's Board of Trustees. Mr. Wang is also the immediate past Chairman of the Santa Clara County Bar Association's Labor & Employment Executive Committee.

**THIS OUTLINE IS MEANT TO ASSIST IN A GENERAL UNDERSTANDING OF THE CURRENT LAW RELATING TO CONTINGENT WORKFORCE ISSUES. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. COMPANIES OR INDIVIDUALS WITH PARTICULAR QUESTIONS SHOULD SEEK ADVICE OF COUNSEL.**

## TABLE OF CONTENTS

	<b>Page(s)</b>
I. INTRODUCTION .....	1
A. Why Is This Topic Important? .....	1
B. “Employment” Status Beneficial To Prove “Work for Hire” .....	2
C. The Federal and State Governments are Attacking the Use of Independent Contractors .....	4
D. The IRS Voluntary Classification Settlement Program (VCSP) is Attractive, But Has Collateral Problems.....	5
E. New Penalties Seek to Ensure California Employers Properly Understand Independent Contractor Classification.....	8
F. The Essence of The Work Governs Who is What .....	9
G. Protection Of Employees From Non-Employee Harassment Now Firmly Embedded In California’s Fair Employment And Housing Act (“FEHA”)......	10
H. Attachments .....	11
II. HOW TO DETERMINE WHETHER YOUR INDEPENDENT CONTRACTORS ARE REALLY YOUR EMPLOYEES .....	11
A. Determining whether a “worker” is an “employee” or an “independent contractor” requires a fact-intensive review of a multi-part legal test which, as a matter of law, may not be subject to Summary Judgment. ....	12
B. The Common Law Test: “Control/Right of Control” .....	13
C. The Twenty-Factor IRS Test.....	15
D. The “Economic Realities Test” .....	19
E. Massachusetts Statutory Test .....	27
F. California’s Borello Test.....	29
G. Discrimination Tests .....	31
H. The National Labor Relations Act (NRLA).....	38
I. California EDD’s Special Provisions For Workers In The Computer Services Industry .....	41
J. The Immigration Reform and Control Act (“IRCA”).....	43
K. Worker Adjustment and Retraining Notification Act (“WARN”).....	44
L. California Unemployment Insurance .....	45
M. Workers’ Compensation Laws.....	46
N. Workers’ Compensation vs. The “Peculiar Risk” Doctrine .....	47
III. JOINT EMPLOYER DOCTRINE.....	50
IV. UNPAID INTERNS AND VOLUNTEERS.....	52
V. MEDICAL RESIDENTS .....	53
VI. STUDENT RESEARCH ASSISTANTS.....	54
VII. PARTNERS, EXECUTIVES, AND BOARD MEMBERS .....	54
VIII. WRONGFUL DISCHARGE LIABILITY .....	56
VI. EMPLOYMENT LAWS THAT APPLY (OR MAY APPLY) TO INDEPENDENT CONTRACTORS .....	57
A. Prohibited Forms of Discrimination.....	57
B. Sexual Harassment.....	58
C. Discriminatory Harassment.....	59
D. W-2 Reporting of Contractor’s Income Could Trigger “Employee” Status .....	60
E. EDD Reporting Requirements .....	61
VII. PROCEDURES IF THE WORKER’S STATUS IS NOT CLEAR.....	61
VIII. PRACTICAL TIPS TO MINIMIZE RISK OR DRAFT AN INDEPENDENT CONTRACTOR AGREEMENT.....	62
IX. MANAGING THE RISK OF A CONTINGENT WORKFORCE.....	63
A. Legal Framework For Analysis.....	64

## TABLE OF CONTENTS

	Page(s)
B. Employer Responsibility For Third Party Recruiters, “Temp Agencies” And “Headhunters” 65	
C. Does Either The “Host” Or “Supplier” Company Enjoy A Right Of Indemnity, As A Matter Of Law?.....	71
X. CONDUCTING AN INDEPENDENT CONTRACTOR SELF-AUDIT.....	72
A. Self-Critical Analysis Privilege.....	73
B. Attorney-Client Privilege.....	74
C. Attorney Work Product.....	75

## ATTACHMENTS

<b>Attachment A:</b> Independent Contractor Models .....	78
<b>Attachment B:</b> Comparison Of IRS Twenty-Factor Tests To Three-Part Borello Tests .....	79
<b>Attachment C:</b> Employer Risks Of Misclassifying Employees As Independent Contractors .....	84
<b>Attachment D:</b> Model Independent Contractor Audit Form.....	88
<b>Attachment E:</b> Model Independent Contractor Agreement.....	98

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<u>Abrahamson v. NME Hospitals, Inc.</u> , 195 Cal. App. 3d 1325 (1987) .....	56
<u>Abron v. Black &amp; Decker</u> , 654 F.2d 951 (4th Cir. 1981) .....	65
<u>Aceves v. Regal Pale Brewing Co.</u> , 24 Cal. 3d 502 (1979) .....	47, 48
<u>Adcock v. Chrysler Corp.</u> , 166 F.3d 1290 (9th Cir. 1999) .....	35
<u>Alexander v. Avera St. Luke's Hosp.</u> , 2013 U.S. Dist. LEXIS 92826 (D.S.D. July 2, 2013).....	35
<u>Alexander v. FedEx Ground Package Sys.</u> , 765 F.3d 981 (9th Cir. Cal. 2014).....	15
<u>Ali v. U.S.A. Cab, Ltd.</u> , 176 Cal. App.4 <sup>th</sup> 1333 (2009).....	31
<u>Allis-Chalmers Corp. v. Superior Court</u> , 168 Cal. App. 3d 1155 (1985) .....	72
<u>American Motorcycle Assn. v. Superior Court</u> , 20 Cal. 3d 578 (1978).....	71
<u>Amro v. St. Luke's</u> , 39 Fair Empl. Prac. Cas. (BNA) 1574 (E.D.Pa. 1986).....	33
<u>Anfinson v. FedEx Ground Package System</u> , 159 Wn. App. 35 (2012).....	20
<u>Antelope Valley Press v. Poizner</u> , 2008 Cal. App. LEXIS 657 (2008) .....	31
<u>Aparacor, Inc. v. U.S.</u> , 556 F.2d 1004 (Ct.Cl. 1977) .....	18
<u>ARA Leisure Services, Inc. v. N.L.R.B.</u> , 782 F.2d 456 (4th Cir. 1986) .....	40
<u>Armbruster v. Quinn</u> , 711 F.2d 1332 (6th Cir. 1983) .....	34
<u>Armstrong v. Department of Employment</u> , Precedent Tax Decision No. P-T-404 (1979).....	45
<u>Associated Indian Services, Inc. v. Employment Development Department</u> , Precedent Tax Decision No. P-T-450 (1986).....	45
<u>Astrowsky v. First Portland Mortgage Corp.</u> , 887 F. Supp. 332 (D. Me. 1995).....	52
<u>Athol Daily News v. Bd. Of Review of Employment and Training</u> , 439 Mass. 171 (2003) [interpreting G. L. c. 151A, § 2].....	28
<u>Baker v. Barnard Const.</u> , 146 F.3d 1214 (10th Cir. 1998).....	23
<u>Bamgbose v. Delta-T Group, Inc.</u> , 2010 U.S. Dist. LEXIS 10681 (E.D. Penn. February 8, 2010).....	50
<u>Barlow v. C.R. Eng., Inc.</u> , 2013 U.S. Dist. LEXIS 104485 (D. Colo. July 25, 2013) .....	57
<u>Barnhart v. New York Life Insurance Co.</u> , 141 F.3d 1310 (9th Cir. 1998) .....	37
<u>Bartels v. Birmingham</u> , 329 U.S. 711 (1947) .....	25
<u>Barton v. Clancy</u> , 632 F.3d 9 (1st Cir. 2011).....	55
<u>Bay Development Ltd. v. Superior Court</u> , 50 Cal. 3d 1012 (1990) .....	71
<u>Baystate Alternative v. Reich</u> , 163 F.3d 668 (1st Cir. 1998) .....	23
<u>Bender v. Suburban Hosp.</u> , 998 F. Supp. 631 (D.Md. 1998) .....	35
<u>Benton v. Cousins Props., Inc.</u> , 2002 U.S. Dist. LEXIS 23056, at *71 (N.D. Ga. 2002) .....	57
<u>Beuff Enterprises Florida, Inc. v. Villa Pizza, LLC</u> , 2008 U.S. Dist. LEXIS 50591 at p. 28 (D.N.J. 2008) .....	32
<u>Blankenship v. Western Union Tel. Co.</u> , 161 F.2d 168 (4th Cir. 1947) .....	20
<u>Bonnette v. California Health and Welfare Agency</u> , 704 F.2d 1465 (9th Cir. 1983) .....	51
<u>Bradley v. Department of Corrections &amp; Rehabilitation</u> , 158 Cal. App. 4th 1612 (2008) .....	60
<u>Braun v. County of San Mateo</u> , 2001 U.S. Dist. LEXIS 13769 (N.D. Cal. 2001).....	31
<u>Brock v. Mr. W Fireworks, Inc.</u> , 814 F.2d 1042 (5th Cir.), cert. denied, 484 U.S. 924 (1987) .....	23, 24
<u>Broussard v. L. H. Bossier, Inc.</u> , 789 F.2d 1158 (5th Cir. 1986) .....	35
<u>Brown v. J. Kaz, Inc.</u> , No. 08-2713, 2009 U.S. App. LEXIS 20293 (3d Cir. Sept. 11, 2009).....	58
<u>Bryson v. Middlefield Volunteer Fire Depart., Inc. and Scott Anderson</u> , 656 F. 3d 348 (6 <sup>th</sup> Cir. Sept. 2, 2011) .....	33
<u>C.f. Myers v. AMS/Breckenridge/Equity Grp. Leasing</u> , DOL ARB, No. 10-144 (August	

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<u>3, 2012).....</u>	52
<u>Campbell v. BNSF Ry.</u> , 600 F.3d 667 (6th Cir. 2010) .....	15
<u>Caplan v. St. Joseph's Hospital</u> , 188 Cal. App. 3d 1193 (1987).....	56
<u>Carrell v. Sunland Const., Inc.</u> , 998 F.2d 330 (5th Cir. 1993).....	23
<u>Carter v. Dep't of Veterans Affairs</u> , 121 Cal. App.4th 840 (2004).....	10
<u>Castillo v. Givens</u> , 704 F.2d 181 (5th Cir.), cert. denied, 464 U.S. 850 (1983).....	24
<u>Catani v. Chiodi</u> ,2001 U.S. Dist. LEXIS 17023 (D. Minn. 2001) .....	25
<u>Chaffin v. United States</u> , 176 F.3d 1208 (9th Cir. 1999).....	50
<u>Charted Services of California</u> , Precedent Tax Decision No. P-T-406 (1979).....	45
<u>Chase Mfg., Inc. v. United States</u> , 446 F. Supp. 698 (E.D.Mo. 1978).....	17
<u>Chaves v. King Arthur's Lounge, Inc.</u> , 2009 Mass. Super. LEXIS 298 at p. 8 (2009).....	29
<u>City Cab Company of Orlando, Inc.</u> ,285 N.L.R.B. 1191, 129 L.R.R.M. (BNA) 1246 (1987) .....	41
<u>Clackamas Gastroenterology Associates, P.C. v. Wells</u> , 538 U.S. 440 (2003) .....	54
<u>Clarke v. American Commerce Nat'l Bank</u> , 974 F.2d 127, reh'g denied, 977 F.2d 1533 (9th Cir. 1992) .....	75
<u>Cobb v. Sun Papers, Inc.</u> , 673 F.2d 337, reh'g denied, 679 F.2d 253 (11th Cir.), cert. denied, 459 U.S. 874 (1982).....	36
<u>Cogan v. Harford Memorial Hosp.</u> ,843 F. Supp. 1013 (D. Md. 1994).....	57
<u>Community of Creative Non-Violence v. Reid</u> , 490 U.S. 730 (1989).....	3, 38
<u>Compare Sheppard v. Consolidated Edison Co.</u> , 893 F. Supp. 6 (E.D.N.Y. 1995).....	73
<u>Container Transit, Inc.</u> , 281 N.L.R.B. 1039, 124 L.R.R.M. (BNA) 1349 (1986).....	41
<u>County of Alameda v. Fair Employment &amp; Housing Com.</u> , 153 Cal. App. 3d 499 (1984).....	33
<u>Coverall North America, Inc. v. Commissioner of the Division of Unemployment Assistance</u> , 447 Mass. 852, 858 (2006) .....	29
<u>Cox v. Master Lock Co.</u> , 815 F. Supp. 844 (E.D. Pa. 1993), aff'd, 14 F.3d 46 (3rd Cir. 1993).....	32
<u>Crouch, et al. v. Guardian Angel Nursing, Inc.</u> , 2009 U.S. Dist. LEXIS 103831 at p. 15 (M.D. Tenn. 2009).....	20
<u>Danco, Inc. v. Wal-Mart Stores, Inc.</u> , 178 F.3d 8 (1st Cir. 1999), modified, 79 FEP 1737 (1st Cir. 1999), cert. denied, 145 L. Ed. 2d 712 (1999).....	57
<u>Demers v. Adams Homes of Northwest Florida, Inc.</u> , 2009 U.S. App. LEXIS 5844 (11th Cir. 2009).....	34
<u>Dial-A-Mattress Operating Corp.</u> , 326 N.L.R.B. No. 75, 159 L.R.R.M. (BNA) 1166 (1998) .....	40
<u>Diggs v. Harris Hospital-Methodist, Inc.</u> , 847 F.2d 270 (5th Cir.), cert. denied, 488 U.S. 956 (1988) .....	35
<u>District Attorney for Sacramento County v. Sacramento County Civil Service Commission</u> , 449 U.S. 811 (1980) .....	33
<u>Dixon v. Burman</u> , 593 F. Supp. 6 (N.D.Ind. 1983), aff'd without opinion, 742 F.2d 1459 (7th Cir. 1984) .....	36
<u>Doan ex. rel. Doan v. City of Bismarck</u> , 632 N.W.2d 815 (N.D. 2001).....	14
<u>Doe v. Cin-Lan, Inc.</u> , 2008 U.S. Dist. LEXIS 107802 at p. 18 (E.D. Mich. 2008) .....	20
<u>Donovan v. Brandel</u> , 736 F.2d 1114 (6th Cir. 1984) .....	25
<u>Donovan v. DialAmerica Marketing, Inc.</u> ,757 F.2d 1376 (3d Cir.), cert. denied, 474 U.S. 919 (1985) .....	25
<u>Donovan v. Sureway Cleaners</u> ,656 F.2d 1368 (9th Cir. 1981).....	24
<u>Donovan v. Tehco, Inc.</u> , 642 F.2d 141 (5th Cir. 1981).....	24

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<u>Doty v. Elias</u> , 733 F.2d 720 (10th Cir. 1984).....	21, 23
<u>Dunn v. Washington County Hospital</u> , 429 F.3d 689 (7th Cir. 2005) .....	10
<u>E.L. White, Inc. v. City of Huntington Beach</u> , 21 Cal. 3d 497 (1978) .....	72
<u>Eberline v. Media Net LLC</u> , S.D. Miss, 1:13CV100 (July 10, 2013).....	20
<u>Eldredge v. Carpenters 46 Northern Cal. Counties Joint Apprenticeship and Training Ctte.</u> , 833 F.2d 1334 (9th Cir. 1987) .....	67
<u>Elizondo v. Podgorniak</u> , 70 F. Supp. 2d 758 (E.D.Mich. 1999) .....	25
<u>Eren v. Commissioner of Internal Revenue</u> , 180 F.3d 594 (4th Cir. 1999) .....	17
<u>Estate of Suskovich v. Anthem Health Plans of VA, Inc.</u> , 53 F.3d 559 (7th Cir. 2009).....	14, 19
<u>Ewens &amp; Miller, Inc. v. Comm'r</u> , 117 T.C. 263 (2001).....	17
<u>Far West Financial Corp. v. D&amp;S Co.</u> , 46 Cal. 3d 796 (1988) .....	72
<u>FedEx Home Delivery v. NLRB</u> , 2009 U.S. App. LEXIS 8272 (D.C. Cir. 2009) .....	14, 40
<u>Fichman v. Media Ctr.</u> , 512 F.3d 1157 (9th Cir. 2008) .....	55
<u>Figueredo v. Precision Surgical, Inc.</u> , Case No.10-4449 (3rd Cir., April 12, 2011).....	1
<u>First Legal Support Services</u> , 2002 NLRB LEXIS 231 (2001) .....	39
<u>Foley v. Interactive Data Corp.</u> , 47 Cal. 3d 654 (1988).....	56, 57
<u>Frederick v. Carpenters &amp; Joiners of Am. Local 926</u> , 2d Cir., No. 13-1013 .....	55
<u>Garrett v. Phillips Mills, Inc.</u> , 721 F.2d 979 (4th Cir. 1983).....	37
<u>Gate Guard Service, L.P. v. Solis</u> , 2013 WL 593418 (S.D. Tex., Feb. 13, 2013) .....	26
<u>Glascock v. Lynn County Emergency Med.</u> , PC, No. 12-1311 (8th Cir. 2012) .....	33
<u>Gomez v. Alexian Bros. Hosp. of San Jose</u> , 698 F.2d 1019 (9th Cir. 1983) .....	33
<u>Gonzales v. Workers' Comp. Appeals Bd.</u> , 46 Cal. App. 4th 1584 (1995).....	31, 46
<u>Governale v. Airborne Express, Inc.</u> , 1997 U.S. Dist. LEXIS 7562 (E.D.N.Y. 1997) .....	74
<u>Hardy v. New York News, Inc.</u> , 114 F.R.D. 633 (S.D.N.Y. 1987) .....	74
<u>Harper v. Healthsource N.H., Inc.</u> , 674 A.2d 962 (N.H. 1996) .....	57
<u>Hart, et al. v. Rick's Cabaret Int'l, Inc., et al.</u> , 1:09-cv-03043, September 10, 2013 .....	22
<u>Harvey v. Care Initiatives, Inc.</u> , 634 N.W.2d 681(Iowa 2001) .....	57
<u>Heath v. Perdue Farms, Inc.</u> , 87 F. Supp. 2d 452 (D. MI. 2000) .....	23
<u>Henry v. Warner Music Group Corp.</u> , Index No. 155527/2013 (N.Y. Sup. Ct. June 17, 2013).....	53
<u>Hickey v. Arkla Industries, Inc.</u> , 699 F.2d 748 (5th Cir. 1983) .....	38
<u>Hickman v. Taylor</u> , 329 U.S. 495 (1947).....	75
<u>Hodgson v. Griffin and Brand of McAllen, Inc.</u> , 471 F.2d 235 (5th Cir. 1973), <u>cert. denied</u> , 414 U.S. 819 (1973).....	52
<u>Holt v. Winpisinger</u> , 811 F.2d 1532 (D.C.Cir. 1987) .....	13, 20, 73
<u>Howard v. City of Kansas City</u> , 2010 Mo. App. LEXIS 134 (February 9, 2010) .....	32, 34
<u>IRS Chief Counsel Advice Memorandum</u> , 1999 IRS CCA LEXIS 239; IRS CCA 199948001 (1999) .....	16
<u>John K. Weir v. Holland &amp; Knight, LLP, et al.</u> , 2011 NY Slip Opinion 52439(U), 603204/07, Supreme Court, New York County (Dec. 9, 2011) .....	36
<u>Juino v. Livingston Parish Fire Dist. No. 5</u> , 717 F.3d 431 (5th Cir. La. 2013).....	34
<u>Justmed, Inc. v. Byce</u> , 2010 U.S. App. LEXIS 6976 (9 <sup>th</sup> Cir. April 5, 2010).....	14
<u>Karenza Clincy, et al. v. Galardi S. Enters, Inc. d/b/a The Onyx, et al.</u> , N.D. Ga. (Atlanta Division), Civil Action No. 1:09-CV-2082-RWS (Sept. 7, 2011) .....	21
<u>Kramer v. Cash Link Sys.</u> , 715 F.3d 1082 (8th Cir. Iowa 2013) .....	13
<u>La Salle Investment Co., Ltd.</u> , 280 N.L.R.B. 379, 122 L.R.R.M. (BNA) 1281 (1986).....	41
<u>Lam v. Univ. of Hawaii</u> , 40 F.3d 1551(9th Cir. 1994) .....	67
<u>Lancaster Symphony Orchestra and The Greater Lancaster Federation of Musicians</u> ,	

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<u>Local 294, AFM, AFL-CIO</u> , Case 4-RC-21311, 357 NLRB No. 152 (Dec. 27, 2011) .....	39
<u>Language Line Services v. Language Select of Burbank</u> , (N.D. Calif, San Jose Division). ....	1
<u>Layton v. DHL Express</u> , 2012 U.S. App. LEXIS 13978 (11th Cir. July 9, 2012).....	51
<u>Lerohl v. Friends of Minnesota Sinfonia</u> , 322 F.3d 486 (8th Cir. 2003) .....	32
<u>Lewis Lee Neighbours v. Buzz Oates Enterprises</u> , 217 Cal. App. 3d 325 (3rd Dist. 1990).....	47
<u>Los Angeles County Dept. of Parks &amp; Recreation v. Civil Service Commission</u> , 8 Cal. App. 4th 273 (1992), <u>review denied</u> , 1992 Cal. LEXIS 5104 (1992).....	33
<u>Lutcher v. Musicians Union Local 47</u> , 633 F.2d 880 (9th Cir. 1980).....	36
<u>MacDougall v. Weichert</u> , 677 A.2d 162 (N.J. Sup. Ct. 1996) .....	57
<u>Magalhaes v. Lowe's Home Centers, Inc.</u> , No. 1:13-cv-10666 (D.Mass. March 10, 2014) .....	13
<u>Mares v. Marsh</u> , 777 F.2d 1066 (5th Cir. 1985) .....	35
<u>Mariotti v. Mariotti Building Products, Inc.</u> , No. 11-3148, 2013 WL 1789440 (3d Cir. April 29, 2013) .....	36, 55
<u>Marshall v. Truman Arnold Dist. Co.</u> , 640 F.2d 906 (8th Cir. 1981) .....	24
<u>Martinez v. Transportation Management, LLC</u> , 2008 U.S. Dist. LEXIS 96175 at p. 16-17 (C.D. Cal. 2008) .....	29
<u>Mayfield v. County of Merced</u> , 2014 U.S. Dist. LEXIS 158648 (E.D. Cal. Nov. 10, 2014) .....	15
<u>Mayo Foundation for Medical Education and Research et al. v. U.S.</u> , 562 U.S. __ (2011) .....	53
<u>McLaughlin v. Seafood, Inc.</u> , 867 F.2d 875 (5th Cir. 1989).....	23
<u>Mednick v. Albert Enterprises</u> , 508 F.2d 297 (5th Cir. 1975) .....	24
<u>Merry Oldsmobile, Inc.</u> , 287 N.R.L.B. 847, 127 L.R.R.M. (BNA) 1175 (1987) .....	40
<u>Mitchell v. Frank R. Howard Memorial Hosp.</u> , 853 F.2d 762 (9th Cir. 1988), <u>cert. denied</u> , 489 U.S. 1013 (1989) .....	34
<u>Monk v. Virgin Islands Water &amp; Power Auth.</u> , 53 F.3d 1381 (3rd Cir. 1995), <u>cert. denied</u> , 516 U.S. 914 (1995) .....	50
<u>Moskowitz v. City of Chicago</u> , 1993 U.S. Dist LEXIS 16402, *10-11 (N.D. Ill. 1993) .....	66
<u>Murray v. Principal Financial Group</u> , 613 F.3d 943 (9th Cir. 2010) .....	13, 32, 33, 36
<u>N.L.R.B. v. Hearst Publications</u> , 322 U.S. 111 (1944), <u>reh'g denied</u> , 322 U.S. 769 (1944) .....	1, 38, 40
<u>Narayan v. ELG Inc.</u> , 2010 WL 3035487, No. 07-16487 (9th Cir. July 13, 2010) .....	12, 31
<u>Nationwide Mut. Ins. Co. v. Darden</u> , 503 U.S. 318 (1992) .....	13, 32, 38, 54
<u>Nattell v. Curry County</u> , 2013 U.S. Dist. LEXIS 137640, 28-29 (D. Or. Aug. 28, 2013).....	14
<u>New Horizons Elecs. Mktg., Inc. v. Clarion Corp. of Am.</u> , 561 N.E.2d 283 (Ill. App. Ct. 1990).....	57
<u>North American Van Lines, Inc. v. N.L.R.B.</u> , 869 F.2d 596 (D.C.Cir. 1989) .....	41
<u>Northwestern University and College Athletes Players Association (CAPA)</u> , Case 12-RC- 121359 (March 26, 2014) .....	39
<u>Ost v. West Suburban Travelers Limousine, Inc.</u> , 88 F.3d 435 (7th Cir. 1996) .....	35
<u>Ostrander v. Farm Bureau Mut. Ins. Co.</u> , 851 P.2d 946 (Idaho 1993).....	56
<u>Padilla v. Pomona College</u> , 166 Cal. App.4th 661 (2008).....	48
<u>Patel v. Quality Inn South</u> , 846 F.2d 700 (11th Cir. 1988), <u>cert. denied</u> , 489 U.S. 1011 (1989) .....	23
<u>Pflasher v. Consultants for Architects, Inc.</u> , Case No. 99-C-6700, 2000 U.S. Dist. LEXIS 1772 (N.D.Ill. Feb. 8, 2000) .....	13
<u>Plaso v. IJKG, LLC</u> , 2014 U.S. App. LEXIS 1105 (3d Cir. N.J. Jan. 21, 2014) .....	34
<u>Price v. Civil Service Com.</u> , 26 Cal. 3d 257 .....	33
<u>Privette v. Superior Court</u> , 5 Cal. 4th 689 (1993) .....	48, 49
<u>Purdham v. Fairfax County School Board</u> , 4 <sup>th</sup> Cir., No. 10-1048 (March 10, 2011).....	53
<u>Real v. Driscoll Strawberry Associates, Inc.</u> , 603 F.2d 748 (9th Cir. 1979).....	52

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<u>Rinaldi v. Workers' Compensation Appeals Board</u> , 196 Cal. App. 3d 571 (1987).....	46, 47
<u>Roadway Package System, Inc.</u> , 326 N.L.R.B. No. 72, 159 L.R.R.M. (BNA) 1153 (1998).....	39, 40
<u>Rodriguez v. McDonnell Douglas Corp.</u> , 87 Cal. App. 3d 626 (1978) .....	71
<u>Ruiz v. Affinity Logistics Corp.</u> , 2010 U.S. Dist. LEXIS 26765 (S.D. Cal. March 22, 2010).....	15
<u>Rutherford Food Corp. v. McComb</u> , 331 U.S. 722 (1947), <u>reh'g denied</u> , 332 U.S. 785 (1947) .....	21
<u>S.G. Borello &amp; Sons v. Department of Industrial Relations</u> , 48 Cal. 3d 341 (1989) .....	passim
<u>Safeway Stores, Inc. v. Nest-Kart</u> , 21 Cal. 3d 322 (1978).....	72
<u>Sam v. U.S.</u> , 2002 U.S. Dist. LEXIS 24243 (D. Md. 2002) .....	18
<u>Santa Cruz Transp. Co. v. Unempl. Ins. Appeals Bd.</u> , 235 Cal. App. 3d 1363 (1991).....	45
<u>Santos v. Puerto Rico Children's Hosp.</u> , D.P.R., cv-11-1539 (September 28, 2012).....	10
<u>Savage v. PG&amp;E</u> , 21 Cal. App. 4th 434 (1993) .....	65
<u>Scantland v. Jeffy Knight, Inc.</u> , No. 12-12614, slip. op. at 22 (11th Cir. Jul. 16, 2013).....	20, 22
<u>Scott v. City of Topeka Police and Fire Civil Service Comm'n</u> , 739 F. Supp. 1434, 1438 (D. Kan. 1990).....	66
<u>Seabright Ins. Co. v. U.S. Airways, Inc.</u> , 258 P. 3d 737, 52 Cal. 4 <sup>th</sup> 590).....	49
<u>Seaman's Direct Buying Service, Inc. v. Standard Oil Co.</u> , 36 Cal. 3d 752 (1984) .....	56, 65
<u>Sec. of Labor v. Lauritzen</u> , 835 F.2d 1529 (7th Cir. 1987).....	12, 19
<u>Simms v. Ctr. for Corr. Health &amp; Policy Studies</u> , 794 F. Supp. 2d 173 (D.D.C. 2011) .....	55
<u>Simpson v. Ernst &amp; Young</u> , 100 F.3d 436 (6th Cir. 1996) .....	36
<u>Siracusa Moving &amp; Storage Service Co.</u> , 291 N.L.R.B. 143, 130 L.R.R.M. (BNA) 1062 (1988) .....	39
<u>Sistare-Meyer v. Young Men's Christian Ass'n</u> , 58 Cal. App. 4th 10 (1997), <u>review denied</u> (1998).....	57
<u>Six Grand Jury Witnesses</u> , 979 F.2d 939 (2nd Cir. 1992) .....	75
<u>Solis v. International Detective &amp; Protective Service, Ltd.</u> , 2011 WL 2038734 (N.D.III.2011).....	22
<u>Somers v. Converged Access, Inc.</u> , 454 Mass. 582 (2009).....	29
<u>Speen v. Crown Clothing Corp.</u> , 102 F.3d 625 (1st Cir. 1996), <u>cert. denied</u> , 520 U.S. 1276 (1997) .....	21
<u>Spyridakis v. Riesling Grp., Inc.</u> , 398 F. App'x 793, 798 (3d Cir. Oct. 1, 2010).....	57
<u>Strother v. Southern Cal. Permanente Med. Group</u> , 79 F.3d 859 (9th Cir. 1996) .....	58
<u>Terbovitz v. Fiscal Court of Adair County</u> , 825 F.2d 111, 116 (6th Cir. 1987) .....	67
<u>Teri v. Oxford Mgmt. Servs., Inc.</u> , 2013 BL 297877, E.D.N.Y., No. 05-02777 (Oct. 28, 2013).....	50
<u>Thibault v. BellSouth Telecommunications Inc.</u> , 2010 U.S. App. LEXIS 15267 (5th Cir. 2010).....	26
<u>Time Auto Transportation, Inc.</u> , 2002 NLRB LEXIS 628, 338 NLRB No. 75 (2002).....	39
<u>Toland v. Sunland Housing Group, Inc.</u> , 18 Cal. 4th 253 (1998) .....	49
<u>Tony &amp; Susan Alamo Foundation v. Sec'y of Labor</u> , 471 U.S. 290 (1985) .....	20, 33
<u>Town of South Whitley v. Cincinnati Ins. Co.</u> , 724 F. Supp. 599 (N.D. Ind. 1989).....	67
<u>Travelers Ins. Co. v. Workers' Comp. Appeals Bd.</u> , 147 Cal. App. 3d 1033 (1983) .....	35, 47
<u>Tremalio v. Demand Shoes, LLC</u> , 2013 U.S. Dist. LEXIS 140983 (D. Conn. Sept. 30, 2013).....	38
<u>Tristate Developers Inc. v. U.S.</u> , 549 F.2d 190 (Ct.Cl. 1977).....	18
<u>Tverberg v. Fillner Construction, Inc.</u> , 202 Cal. 202 Cal. App. 4th 1439 (January 26, 2012).....	49

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<u>United States v. Aberdeen Aerie No. 24</u> , 148 F.2d 655 (9th Cir. 1945).....	18
<u>United States v. Kahre</u> , 737 F.3d 554 (9th Cir. Nev. 2013).....	17
<u>United States v. Polk</u> , 550 F.2d 566 (9th Cir. 1977).....	17
<u>UpJohn v. United States</u> , 449 U.S. 383 (1981).....	74, 75
<u>Usery v. Pilgrim Equipment Co. Inc.</u> , 527 F.2d 1308 (5th Cir.), <u>cert. denied</u> , 429 U.S. 826 (1976) .....	21, 24
<u>USPS v. Phelps Dodge Refining Corp.</u> , 852 F. Supp. 156 (E.D.N.Y. 1994).....	74
<u>Valley Circle Estates v. VTN Consolidated, Inc.</u> , 33 Cal. 3d 604 (1983) .....	72
<u>Velez v. Sanchez</u> , 693 F.3d 308 (E.D.N.Y. 2012).....	20
<u>Vizcaino v. Microsoft</u> , 97 F.3d 1187 (9th Cir. 1996) .....	16
<u>Walker v. Altmeyer</u> , 137 F.2d 531 (2d Cir. 1943).....	17
<u>Wallis v. Farmers Group, Inc.</u> , 220 Cal. App. 3d 718 (1990), <u>review denied</u> , 1990 Cal. LEXIS 3716 (1990) .....	57
<u>Wang v. Phoenix Satellite Television US, Inc.</u> , 2013 BL 272163, S.D.N.Y., No. 13-00218 (October 13, 2013).....	53
<u>Ware v. U.S.</u> , 67 F.3d 574 (6th Cir. 1995).....	18
<u>Webster v. Fulton County</u> , 283 F.3d 1254 (11th Cir. 2002).....	57
<u>Werner v. Bell Family Med. Ctr., Inc.</u> , 529 Fed. Appx. 541 (6th Cir. Tenn. 2013) .....	25
<u>West v. Verizon</u> , Case No. 8:08-CV-1325-T-33MAP, 2009 U.S. Dist. LEXIS 82665, at 12 (M.D. Fla. July 20, 2009) .....	13
<u>Wilde v. County of Kandiyohi</u> , 15 F.3d 103 (8th Cir. 1994).....	32
<u>Williams v. CF Med., Inc.</u> , 2009 U.S. Dist. LEXIS 19015 (N.D.N.Y. 2009).....	37
<u>Woodward-Gizienski &amp; Associates v. Geotechnical Exploration Inc.</u> , 208 Cal. App. 3d 63 (1989) .....	72
<u>Woolen v. Aerojet General Corp.</u> , 57 Cal. 2d 407 (1962) .....	47, 48
<u>Wortham v. American Family Ins. Group</u> , 385 F.3d 1139 (8th Cir. 2004) .....	32
<u>Yellow Cab Cooperative, Inc. v. Workers' Compensation Appeals Board and Richard Edwinson</u> , 226 Cal. App. 3d 1288 (1991) .....	30
<u>Youngblood v. State Ford Truck Sales</u> , 364 S.E. 2d 433 (N.C. Sup. Ct. 1988) .....	46
<u>Zebley v. Heartland Indus. of Dawson, Inc.</u> , 2008 U.S. Dist. LEXIS 68823 at p. 16 (D. N.D. 2008) .....	14
<u>Zeigler v. Anesthesia Assocs. of Lancaster, Ltd.</u> , 74 Fed. Appx. 197, 200 (3d Cir. 2003) .....	32

## **STATUTES**

26 U.S.C. § 3306(i).....	15
26 U.S.C. § 3401(c) .....	15
29 U.S.C. § 3121(d)(2) .....	15
29 U.S.C. § 1002(6) .....	32
29 U.S.C. § 152(3) .....	38
29 U.S.C. § 201 .....	20
29 U.S.C. § 2101, et seq.....	44
29 U.S.C. § 623 (a) (ADEA).....	64
29 U.S.C. § 623(a)(1).....	31
42 U.S.C. § 12112 .....	64
42 U.S.C. § 1981 .....	31, 58
42 U.S.C. § 2000 e-2(a) (Title VII).....	64
42 U.S.C. § 2000(e) .....	31
Cal. Civ. Code §§ 1549-1701.....	71

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
Cal. Civ. Code §§ 2772-2784.5.....	71
Cal. Gov't. Code § 12928 .....	61
Cal. Gov't. Code § 12940(j)(1).....	9, 59
Cal. Gov't. Code § 12940, et seq.....	30, 31
Cal. Gov't. Code, § 12940(j)(5).....	59
Cal. Lab. Code § 1141, et seq.....	30, 38
Cal. Lab. Code § 1171, et seq.....	30
Cal. Lab. Code § 1285, et seq.....	30
Cal. Lab. Code § 2750.5-6 .....	47
Cal. Lab. Code § 3351.5 .....	3
Cal. Lab. Code §§ 1101 <i>et seq.</i> .....	31
Cal. Unemp. Ins. Code § 1088.8(c).....	61
Cal. Unemp. Ins. Code § 1088.8(e).....	61
Cal. Unemp. Ins. Code § 1112 .....	19
Cal. Unemp. Ins. Code § 1113 .....	19
Cal. Unemp. Ins. Code § 1128(a).....	19
Cal. Unemp. Ins. Code § 13071 .....	19
Cal. Unemp. Ins. Code § 621(b).....	30
Cal. Unemp. Ins. Code § 686.....	3
California Code of Civil Procedure Section 1021.6.....	72
California Labor Code § 2750.5 .....	30, 79
California Unemployment Insurance Code § section 656 .....	45
Civil Code § 1668 .....	71
I.R.C. § 3102 .....	18
I.R.C. § 3301 .....	18
I.R.C. § 3402 .....	18
I.R.C. § 3509 .....	18
I.R.C. § 6601 .....	19
I.R.C. § 6672 .....	18
Labor Code Section 3351.5(c) .....	4
Mass. G. L. c. 149, §148B .....	28
Unemp. Ins. Code § 621(b).....	45

### **OTHER AUTHORITIES**

20 C.F.R. § 639.3 .....	44
29 C.F.R. § 500.20 .....	50
29 C.F.R. § 791.2 .....	50, 52
52 Fed. Reg. 16219 (1987) .....	43
54 Fed. Reg. 16042, 16045 (1989).....	44
Restatement (Second) of Torts § 413 .....	49
Restatement 2d, Agency, § 220 (1958).....	14
Section 530 of the 1978 Revenue .....	19
Title 22 Cal. Code Regs. Div. 1, Subd. 1, Div. 2.5, Chpt. 1, § 4304-4 .....	41
Title VII of the Civil Rights Act of 1964.....	31, 34

### **RULES**

Federal Rule of Civil Procedure 26(b)(3) .....	76
Rev. Rul. 75-191, C.B. 1975-1, 376 .....	19

## TABLE OF AUTHORITIES

	Page(s)
Wage-Hour Administrative Ruling, No. 781 [Transfer Binder] Lab.L.Rep. (CCH) 30,778 (1968) .....	51
Wage-Hour Administrative Ruling, No. 960 [Transfer Binder] Lab.L.Rep. (CCH) 30,975 (1969) .....	51

**To request the full publication of this material, please  
email your request to [admin@foxwangmorgan.com](mailto:admin@foxwangmorgan.com)**