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# Hot New Developments in California Labor and Employment Law

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**July 16, 2014**

**Presenters:**

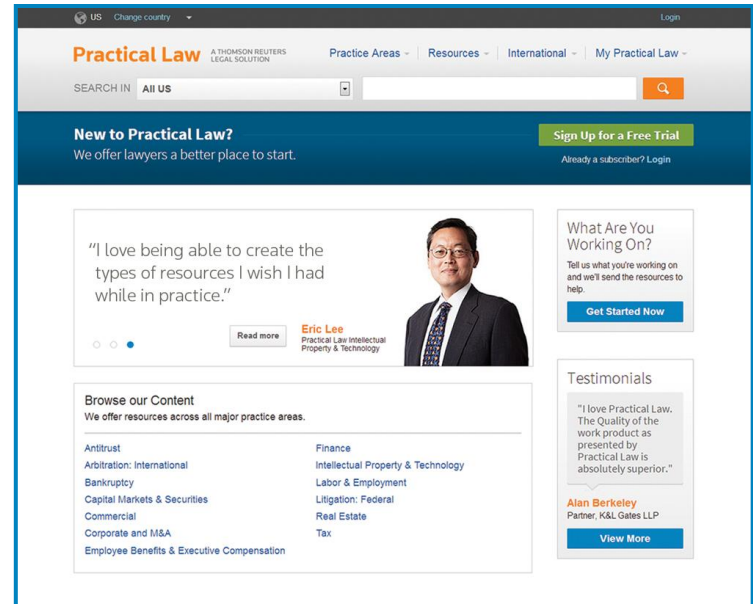
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# *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, (2014)

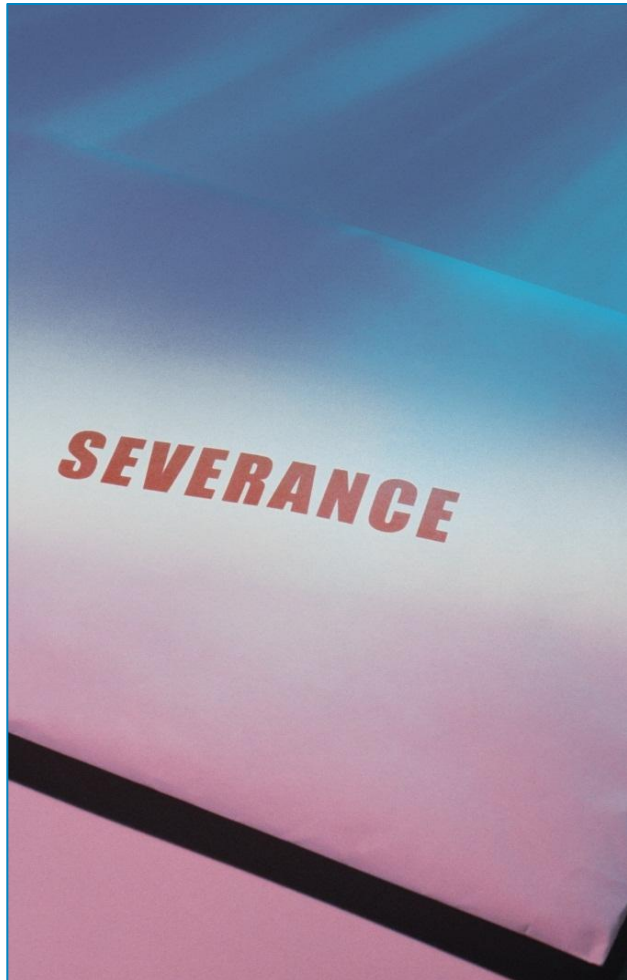
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- Time spent donning and doffing protective gear was time spent “changing clothes” under section of FLSA allowing parties to collectively bargain over compensability of time spent changing clothes at the beginning or end of the workday.

# *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395 (2014)

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- Severance payments constituted “wages” for which employer was required to withhold FICA tax

# *Lawson v. FMR LLC*, 134 S. Ct. 1158 (March 4, 2014)

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- Whistleblower protections of the Sarbanes-Oxley Act (18 USC §1514A(a)) extend not only to employees of public companies, but also to employees of contractors and subcontractors of public companies



# *Lane v. Franks*, 2014 WL 2765285 (June 19, 2014)

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- First Amendment prohibits state entity from firing an employee on the basis of that employee's truthful testimony in a trial when the employee was acting outside his ordinary job duties



# *N.L.R.B. v. Noel Canning*, 2014 WL 2882090 (June 26, 2014)

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- President's recess appointments to NLRB, made in three-day period between two pro forma sessions of the Senate, were not valid.



## *Duran v. U.S. Bank Nat. Assn.*, 59 Cal. 4th 1, (May 29, 2014)

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- A trial plan that relies on statistical sampling must be developed with expert input and must afford the defendant an opportunity to impeach the model or otherwise show its liability is reduced.
- Statistical sampling may provide an appropriate means of proving liability and damages in some wage and hour class actions.



## ***Iskanian v. CLS Transp. Los Angeles, LLC*, 2014 WL 2808963 (Cal. June 23, 2014)**

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- Federal Arbitration Act preempts California law holding class action waivers are contrary to public policy
- Class action waiver did not violate NLRA
- Waiver of employees' right to representative action under Private Attorney General Act (PAGA) violated public policy



## *Paratransit, Inc. v. Unemployment Ins. Appeals Bd.*, 2014 WL 2988013 (Cal. July 3, 2014)

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- Employee's refusal to sign the disciplinary notice was not misconduct but was, at most, a good faith error in judgment that does not disqualify him from unemployment benefits.



# *Salas v. Sierra Chem. Co.*, 2014 WL 2883878 (Cal. June 26, 2014)

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- Undocumented workers who obtain employment using falsified immigration documents may recover damages – including back pay – under California’s Fair Employment and Housing Act



# *Ayala v. Antelope Valley Newspapers, Inc.*, 2014 WL 2924954 (Cal. June 30, 2014)

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- Denial of class certification in action by workers claiming they were misclassified as independent contractors was error
- What matters is not how much control a hirer exercises, but how much control the hirer retains the right to exercise.



## *Peabody v. Time Warner Cable* (SC S204804 7/14/14)

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- An employer may not attribute commission wages paid in one pay period to other pay periods in order to satisfy California's compensation requirements
- Whether the minimum earnings prong of an exemption is satisfied depends on the amount of wages *actually* paid in a pay period. An employer may not attribute wages paid in one pay period to a prior pay period to cure a shortfall



# *Ruiz v. Affinity Logistics Corp.*, 2014 WL 2695534 (9th Cir. 2014)

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- Home delivery drivers were employees, rather than independent contractors, because the drivers' employer had the right to control the details of their work, and that additional, secondary factors also weighed in favor of a finding that the drivers were employees.

# *Ambat v. City & County of San Francisco,* 2014 WL 2959634 (9th Cir. 2014)

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- Male deputies prohibited from supervising female inmates could proceed with sex discrimination case

## *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236 (9th Cir. 2014)

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- Employee who expressly declined to take FMLA leave was properly denied relief under the statute.



## *Dzakula v. McHugh*, 746 F.3d 399 (9th Cir. 2014)

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- Clarifies that plaintiffs who fail to list employment law claims in bankruptcy filings can be barred from bringing those claims
- Compare *Quin v. County of Kauai Dep't of Transp.*, 733 F.3d 267 (9th Cir. 2013)

# *Rea v. Michaels Stores, Inc.*, 742 F.3d 1234 (9th Cir. 2014)

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- Certified overtime class action was properly removed to federal court under CAFA even though:
  - (1) class counsel stipulated seeking less than \$5 Million; and
  - (2) certified class is significantly smaller than proposed class and, as such, not possible to recover \$5 Million.
- Post-removal developments do not defeat jurisdiction if jurisdiction was properly invoked as of the time of removal.



# *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117 (9th Cir. 2014)

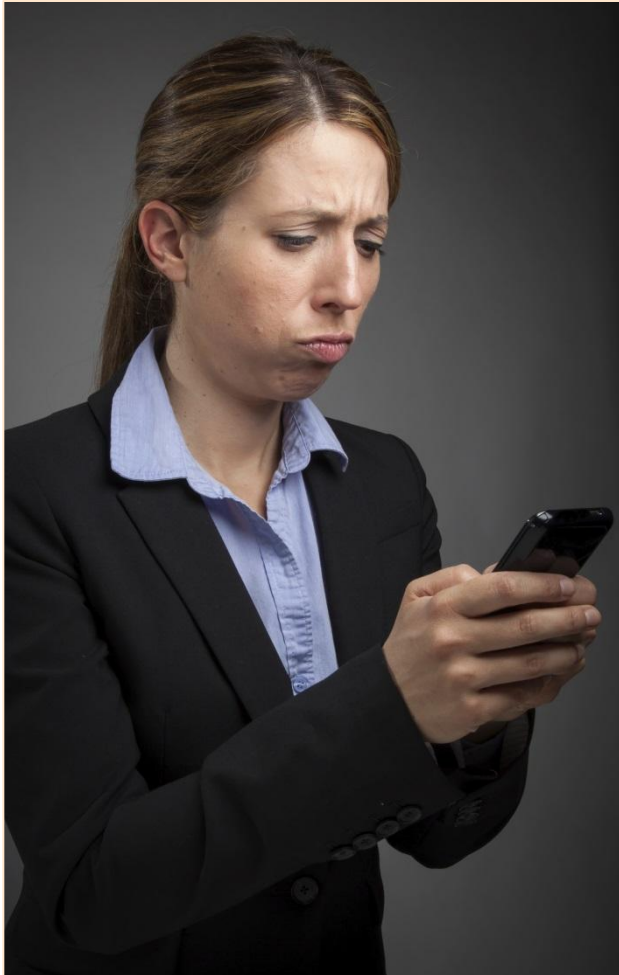
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- District court could not exercise jurisdiction over removed PAGA action under Class Action Fairness Act (“CAFA”)

# *Stenehjem v. Sareen*, 2014 WL 2646729 (Cal. Ct. App. 2014)

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- Employee's threat to file false criminal complaint against former employer was extortion

# *Jong v. Kaiser Found. Health Plan, Inc.*, 226 Cal. App. 4th 391 (2014)

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- Summary judgment was properly granted in favor of employer in off-the-clock overtime case

## **Malone v. Superior Court, 173 Cal. Rptr. 3d 241 (Cal. Ct. App. 2014)**

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- A "delegation" clause, permitting arbitrator to determine disputed issues regarding enforceability of the arbitration agreement itself, was not unenforceable where clause was applicable to both parties, did not provide for a biased decision-maker, and was clearly and conspicuously stated.



## *Rosenfeld v. Abraham Joshua Heschel Day School, Inc.*, 226 Cal. App. 4th 886 (2014)

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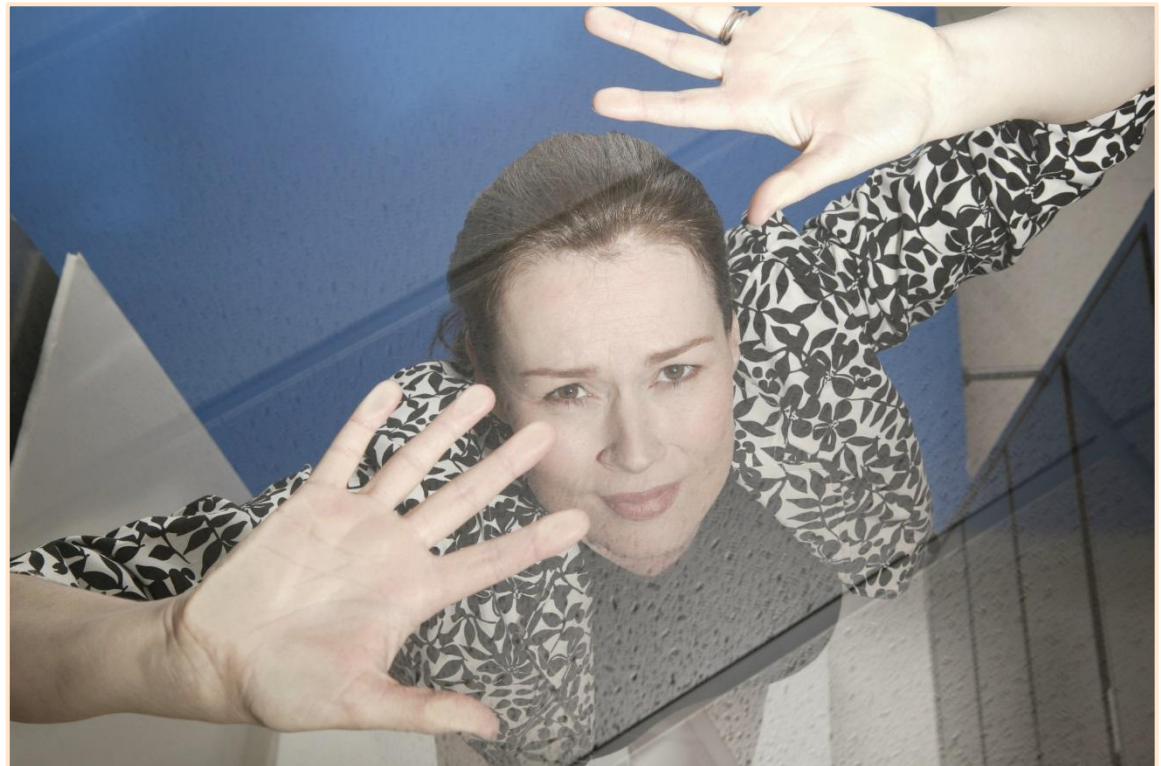
- Employee was properly limited to just one theory of age discrimination at trial



## *Von Nothdurft v. Steck*, 2014 WL 2900132 (Cal. Ct. App. 2014)

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- Resident manager of apartment building was properly compensated in part by free rent





## *Mendoza v. Western Med. Ctr. Santa Ana*, 222 Cal. App. 4th 1334 (2014)

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- Applying *Harris v. City of Santa Monica*, 56 Cal. 4th 203 (2013), “substantial motivating reason” test to wrongful termination in violation of public policy claim’
- Holding that jury may infer “retaliatory animus” from the “lack of a rigorous investigation”

## ***Robert v. Stanford Univ.*, 224 Cal. App. 4<sup>th</sup> 67 (2014)**

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- \$100,000 attorney's fees award was properly granted against employee in FEHA action
- Trial courts are required to make written findings when awarding FEHA attorneys' fees to defendants (unless such failure to do so is not prejudicial)



# *Cheal v. El Camino Hosp.*, 223 Cal.App.4th 736 (2014)

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- Reversing summary judgment in age discrimination case where plaintiff raised triable issues of fact as to whether she had performed her job competently and whether she was fired as a result of animus.
- Finding trial court improperly ignored key evidence bearing on standard for competent job performance and erred by sustaining objection to evidence of supervisor's ageist statements.

## *Kim v. Konrad USA Dist., Inc., 2014 WL 2612087 (Cal. Ct. App. 2014)*

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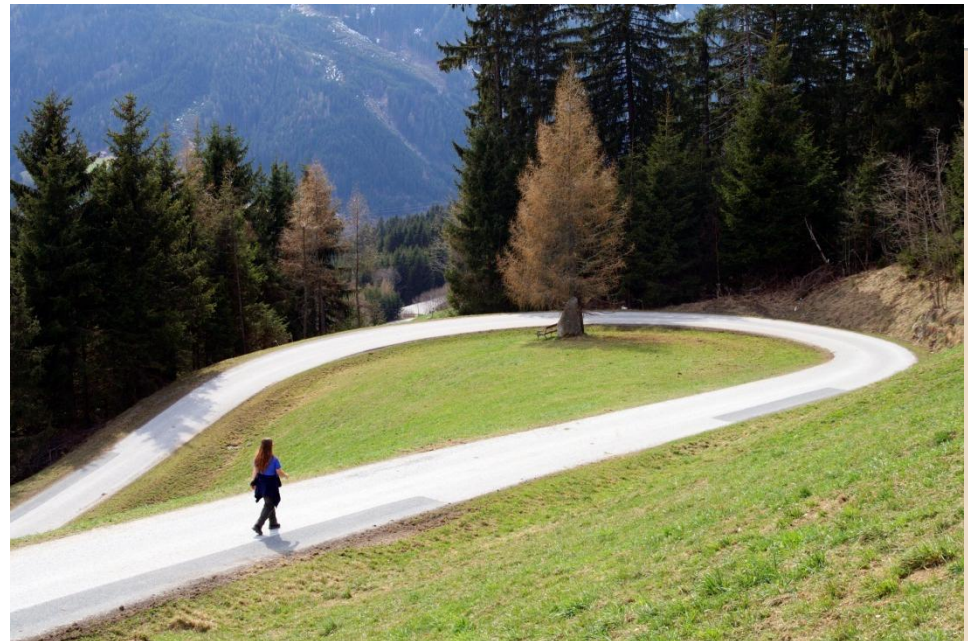


- Exhaustion of Fair Employment and Housing Act remedies is not a "jurisdictional prerequisite" that plaintiff must prove at trial.
- Lack of such proof did not require reversal of judgment for plaintiff where defendants did not raise the issue prior to or at trial, and there was evidence of exhaustion in the record.

## *Ellis v. U.S. Sec. Associates*, 224 Cal. App. 4th 1213 (2014)

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- Summary judgment for employer based on statute of limitations defense reversed; six-month limitations period contained in employment application was unreasonable and contrary to public policy.



## *White v. County of Los Angeles*, 225 Cal. App. 4<sup>th</sup> 690 (2014)

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- Employer is not permitted to seek a second opinion regarding employee's fitness for work prior to restoring the employee to employment.
- However, if employer is not satisfied with the employee's health care provider's certification, the employer may restore the employee to work, but then seek its own evaluation of the employee's fitness for duty at its own expense.



# Questions

# Relevant Practical Law Resources Available with a *Free Trial* to Practical Law

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- Standard Clause, Mandatory Arbitration of Employment-related Claims (CA)
- Standard Document, Independent Contractor/Consultant Agreement (Pro-client) (CA)
- Practice Note, Defending Wage and Hour Collective Actions
- Employer Coverage under Major California Employment Laws Chart



# About the Speakers

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## **Anthony J. Oncidi, *Partner, Proskauer Rose LLP***

Anthony J. Oncidi heads the Labor & Employment Law Group in the Los Angeles office.

Tony represents employers and management in all aspects of labor relations and employment law, including litigation and preventive counseling, wage and hour matters, including class actions, wrongful termination, employee discipline, Title VII and the California Fair Employment and Housing Act, executive employment contract disputes, sexual harassment training and investigations, workplace violence, drug testing and privacy issues, Sarbanes-Oxley claims and employee raiding and trade secret protection. A substantial portion of Tony's practice involves the defense of employers in large class actions, employment discrimination, harassment and wrongful termination litigation in state and federal court as well as arbitration proceedings, including FINRA matters.

Tony is recognized as a leading lawyer by such highly respected publications and organizations as the *Los Angeles Daily Journal*, *The Hollywood Reporter*, and *Chambers USA*, which reports "Tony has an outstanding reputation" and that clients say Tony is "smart, cost-effective, appropriately aggressive and generally fabulous."

Tony is the author of the treatise titled *Employment Discrimination Depositions* (Juris Pub'g 2009; [www.jurispub.com](http://www.jurispub.com)), co-author of *Proskauer on Privacy* (PLI 2012), and, since 1990, has been a regular columnist for the official publication of the Labor and Employment Law Section of the State Bar of California and the *Los Angeles Daily Journal*.

# About the Speakers

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## **Anthony J. Oncidi (continued)**

Tony also is a regular commentator on employment-related issues for public radio station KALW-FM in San Francisco and has been a featured guest on Fox 11 News in Los Angeles. He has been interviewed and quoted by leading national media outlets such as *The National Law Journal*, *Bloomberg News*, *The New York Times*, CBS News, and *Newsweek* and *Time* magazines. Tony is a frequent speaker on employment law topics for large and small groups of employers and their counsel, including the Society for Human Resource Management ("SHRM"), PIHRA, the National CLE Conference, National Business Institute, the Employment Round Table of Southern California (Board Member), the Council on Education in Management, the Western League of Savings Institutions, the Institute for Corporate Counsel, the State Bar of California, the California Continuing Education of the Bar Program and the Los Angeles and Beverly Hills Bar Associations.

He has testified as an expert witness regarding wage and hour issues as well as the California Fair Employment and Housing Act and has served as a faculty member of the National Employment Law Institute. He has served as an arbitrator in an employment discrimination matter.

Tony is an appointed Hearing Examiner for the Los Angeles Police Commission Board of Rights and has served as an Adjunct Professor of Law and a guest lecturer at USC Law School and a guest lecturer at UCLA Law School.

# About the Speakers

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## **Andrew H. Friedman, *Partner, Helmer Friedman LLP***

Andrew H. Friedman, a name partner with the law firm of Helmer & Friedman LLP, primarily represents employees in all aspects of employment law including not only individual discrimination, harassment and retaliation cases but also complex multi-party wage and hour class actions. In addition to occasionally representing employers and individual defendants, Mr. Friedman also conducts neutral fact-finding investigations into employment-related disputes. Mr. Friedman also represents clients in catastrophic personal injury, wrongful death, civil rights, and product liability cases.

Mr. Friedman received his J.D. degree from Cornell Law School and his B.A. degree in history and psychology, cum laude, from Vanderbilt University. At Cornell, Mr. Friedman was a member of the Board of Editors of the Cornell Law Review and a member of the Moot Court Board. Following law school, Mr. Friedman served as a judicial law clerk to the Honorable John T. Nixon, United States District Court for the Middle District of Tennessee. Subsequently, Mr. Friedman was trained as an employment attorney by two of the Nation's most prestigious management-side employment law firms – Paul, Hastings, Janofsky & Walker and Bryan Cave LLP.

Mr. Friedman has handled a wide range of employment-related litigation in state and federal courts. Indeed, Mr. Friedman recently prevailed (along with his law partner, Gregory D. Helmer) in a three week sexual harassment jury trial. He also settled a \$2.4 Million wage and hour class action lawsuit in federal court (U.S. District Court for the Central District of California), a \$1.575 Million class action discrimination lawsuit in the Orange County Superior Court and he recovered a \$1.5 Million settlement in federal court (U.S. District Court for the Central District of California) in a wage and hour class action

# About the Speakers

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## Andrew H. Friedman (continued)

Mr. Friedman has also had significant experience counseling employers and employees with work-related problems in an effort to resolve their disputes without the necessity of court intervention. In addition, Mr. Friedman has represented both employers and employees in matters pending with numerous governmental agencies, including the Equal Employment Opportunity Commission, the California Department of Fair Employment and Housing, and the California Division of Labor Standards Enforcement.

Friedman has received the highest possible *Martindale-Hubble* rating ("AV"), indicating that he is ranked at the highest level of professional excellence with "very high to preeminent legal ability" and "very high" ethical standards as established by confidential opinions from members of the Bar.

Law & Politics Magazine and the publishers of Los Angeles Magazine selected Mr. Friedman as a 2006, 2007, 2008, 2009, 2010, 2011, 2012 and 2013 Southern California "Super Lawyer" in the category of Labor and Employment Law.

The online legal referral service AVVO ([www.avvo.com](http://www.avvo.com)) rates Mr. Friedman a 10/10 (superb) as an employment/labor and class action attorney.

Mr. Friedman is a prolific author and editor of many employment-related publications including: Author, *Litigating Employment Discrimination Cases*, (James Publishing, 2005 - 2013); Co-Editor-In-Chief, California Employment Law Digest, (James Publishing, 2000); Co-Author, California Causes of Action, (James Publishing, 1998); Contributor, Litigating Sexual Harassment and Sex Discrimination Cases, (James Publishing, 1998).

# About the Speakers

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## **Helena Sung, *Editor, Practical Law Labor & Employment***

**Helena Sung** joined Practical Law from MTV Networks, where she was senior employment counsel providing labor and employment advice to client groups across all channels, including production teams on scripted and reality television programming. Before that, she specialized in labor and employment law as an associate at Baker & McKenzie and Kauff McClain & McGuire.