

LITIGATION



September 1, 2021

Via E-mail: civiljuryinstructions@jud.ca.gov.

Mr. Eric Long
Advisory Committee on Civil Jury Instructions
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102

re: Invitation to Comment—CACI 21-02

Dear Mr. Long:

The Jury Instructions Committee of the California Lawyers Association’s Litigation Section has reviewed the proposed revisions to civil jury instructions (CACI 21-02) and appreciates the opportunity to submit these comments.

1. CACI No. 2334. Bad Faith (Thirty Party)—Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements

Agree.

2. CACI Nos. 2521A, 2521B, 2521C, 2522A, 2522B & 2522C and VF-2506A, 2506B, 2506C, 2507A, 2507B & 2507C

Agree.

3. CACI No. 2702. Nonpayment of Overtime Compensation—Essential Factual Elements

Agree.

4. CACI No. 2704. Waiting Time Penalty for Nonpayment of Wages

a. We believe a waiting time penalty is a separate claim, and this instruction states the essential factual elements, so we would add “Essential Factual Elements” to the title.

b. We would reorder the first two sentences of the instruction so it begins, “[*Name of plaintiff*] claims . . .” Other instructions stating the essential factual elements begin this way, and this makes it clear that this is a separate claim. We would delete the language “I have determined that” as unnecessary and unhelpful.

c. Labor Code section 203 states that an employee who avoids or refuses payment of wages is not entitled to a waiting time penalty. We would add a reference to this provision to the Directions for Use.

5. CACI No. 2705. Independent Contractor—Affirmative Defense—Worker Was Not Hiring Entity’s Employee (Lab. Code, § 2775)

a. We suggest adding the words “*hiring entity*” after “*Name of defendant*” and “*worker*” after “*name of plaintiff*” within the brackets in the first sentence for greater clarity.

b. As stated in the User Guide, elements of causes of action and affirmative defenses are listed by numbers, and factors to be considered by the jury are listed by letters. We believe the elements of this instruction should be listed as 1, 2, 3, rather than a, b, c.

c. The citation to *Dynamex* for the rule that the court decides as a matter of law whether an employment relationship exists seems inapt. Instead, we would cite *Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 342-342, which states this rule more clearly.

6. CACI No. 2750. Failure to Compensate for Necessary Expenditures or Losses—Essential Factual Elements (Lab. Code, § 2802(a))

a. We would substitute “Reimburse” for “Compensate” in the title because we believe reimbursement for expenses is different from compensation for wages. (See Labor Code, § 200, subd. (a).)

b. We would modify the instruction for greater clarity, to consistently refer to reimbursement rather than compensation, and to avoid overemphasis by repetition of the requirement that the expenses be “necessary,” as shown below.

c. We would revise the final paragraph for greater clarity and make it optional because in many cases the issue may not arise.

d. Accordingly, we suggest the following:

“[*Name of plaintiff*] claims that [*name of defendant*] ~~owes~~ failed to reimburse [*him/her/nonbinary pronoun*] ~~compensation~~ for necessary [~~expenditures~~ expenses] [and] [*losses*] made

as a direct consequence of [his/her/nonbinary pronoun] employment with [name of defendant]. To establish this claim, [name of plaintiff] must prove all of the following:

“1. That [name of plaintiff] incurred necessary [expenditures] [and] [losses] ~~in~~ as a direct consequence of ~~the discharge of~~ [his/her/nonbinary pronoun] employment job duties/obedience to the directions of [name of defendant];

“2. That the ~~necessary~~ [expenditures] [and] [losses] were reasonable in amount;

“3. That [name of defendant] failed to reimburse [name of plaintiff] for the full amount of the ~~necessary~~ [expenditures] [and] [losses]; and

“4. The amount of the [expenditures] [and] [losses] that [name of defendant] failed to ~~compensate~~ reimburse.

“‘Necessary [expenditures] [and] [losses]’ may include [expenditures] [and] [losses] [name of plaintiff] would have incurred even if [he/she/nonbinary pronoun] did not also incur them in direct consequence of the discharge of [his/her/nonbinary pronoun] employment duties or obedience to the direction of [name of defendant].”

“The fact that [name of plaintiff] would have incurred the [expenses] [and] [losses] anyway cannot prevent you from finding that [name of plaintiff] incurred the [expenses] [and] [losses] as a direct consequence of [discharging [his/her/nonbinary pronoun] job duties/obeying the directions of [name of defendant]].”

7. CACI No. 2752. Tip Pool Gratuities—Essential Factual Elements

a. We believe “Tip Pool Conversion” more accurately describes this claim and would modify the title accordingly.

b. The instruction refers repeatedly to “gratuities.” We believe the jury understands the nature of tips, and there is no need to use the word “gratuities,” which may be unfamiliar to some jurors. We would use the term “money” or “tips” in place of “gratuities” as shown below.

c. Element 2 makes element 1 unnecessary because if plaintiff was defendant’s employee, defendant was an employer. We would delete element 1 as unnecessary.

d. We believe that much of the information in element 3 is unnecessary and duplicative of element 4, which explains a tip pool.

e. Element 5 includes two option sentences, each of which should be bracketed.

f. We believe elements 6 and 7 are superfluous because plaintiff necessarily was harmed if defendant took or allowed someone to take money from a tip pool that plaintiff was entitled to receive (element 5), and defendant’s conduct necessarily was a substantial factor in causing plaintiff’s harm if that happened. We would delete elements 6 and 7 as unnecessary.

g. We would modify the paragraph following the elements in light of the above, as shown below.

h. We would move the final sentence of the instruction to the Directions for Use and change “gratuities” to “tips.”

i. Accordingly, we would modify the instruction as follows:

“[*Name of plaintiff*] claims that [*name of defendant*] [took ~~gratuities~~ money/allowed [*specify ineligible individual(s) or class(es) of individuals*] to take ~~gratuities~~ money] from a tip pool that [*name of plaintiff*] was entitled to receive. [The court has determined that [*specify ineligible individual(s) or class(es) of individuals*] [was/were] not eligible to receive ~~gratuities~~ money from a tip pool.]

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

“~~1. That [*name of defendant*] was a[n] [employer/[*other covered entity*]];~~

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

“~~3. That [*name of plaintiff*] was entitled to a portion of tips ~~gratuities~~ left for [*him/her/nonbinary pronoun*] as an amount over and above the actual amount due to [*name of defendant*] for [*specify services rendered or goods, food, drink, or articles sold to the patron(s)*];~~

“~~4. That [*name of defendant*] maintained a tip pool for [*his/her/nonbinary pronoun/its*] employees in which ~~gratuities~~ tips left by patrons were pooled to be distributed among employees including [*name of plaintiff*]; and~~

“~~5. [That [*name of defendant*] took money from the tip pool that [*name of plaintiff*] was entitled to receive;]~~

[or]

[That [*name of defendant*] allowed [*specify ineligible individual(s) or class(es) of individuals*] to take money from the tip pool that [*name of plaintiff*] was entitled to receive;]

“~~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.~~

“~~To establish harm, [*Name of plaintiff*] does not have to prove the exact amount of money that was taken. [*Name of plaintiff*] can establish harm by proving the taking of any amount of gratuity that [*name of plaintiff*] was entitled to receive.~~”

~~“[Name of defendant] is required to keep accurate records of all gratuities received by [him/her/nonbinary pronoun/it] for [his/her/nonbinary pronoun/its] employees.”~~

8. CACI No. 2753. Failure to Pay All Vested Vacation Time—Essential Factual Elements (Lab. Code, § 227.3)

a. We believe that an employment relationship is essential to this claim, so we would add a new element 1 stating: “1. *[Name of plaintiff]* was an employee of *[name of defendant]*.”

b. The word “vested” may be unfamiliar to some jurors. Moreover, vacation time vests as it is earned (i.e., as the labor is rendered), so there is no need to speak of vesting if what is meant is earned. The vacation time also must be unused for plaintiff to recover. We would modify the instruction as follows:

“*[Name of plaintiff]* claims that *[name of defendant]* owes *[him/her/nonbinary pronoun]* compensation for ~~unpaid, vested~~ earned, unused vacation time.

“To establish this claim, *[name of plaintiff]* must prove ~~both~~ all of the following:

“1. *[Name of plaintiff]* was an employee of *[name of defendant]*.

“~~2.~~ That *[name of defendant]* did not pay *[him/her/nonbinary pronoun]* all ~~vested~~ earned, unused vacation time at *[his/her/nonbinary pronoun]* final rate of pay in accordance with the *[contract of employment/employer policy]*; and

“3. The amount owed to *[name of plaintiff]* for ~~vested~~ earned, unused vacation time.”

c. We would modify the first bullet point in the Sources and Authority to more fully describe the statute:

“Vested Vacation Wages; Payment Upon Termination. Labor Code section 227.3”

9. CACI No. 2754. Reporting Time Pay—Essential Factual Elements

a. We would clarify the first paragraph of the instruction by summarizing the claim without stating so much detail, as shown below.

b. Element 2 makes element 1 unnecessary because if plaintiff was defendant’s employee, defendant was an employer. We would delete element 1 as unnecessary.

c. We believe that element 4 should be separated into two elements, as shown below:

d. Accordingly, we would modify the first paragraph and the elements as follows:

“*[Name of plaintiff]* claims that *[name of defendant]* ~~scheduled or otherwise required~~ *[him/her/nonbinary pronoun]* to *[report to work]* ~~[and] [report to work for a second shift]~~ but

when *[name of plaintiff]* reported to work, *[name of defendant]* ~~failed to put *[name of plaintiff]* to work~~ ~~[and] [furnished a shortened [workday/shift]]~~ failed to pay *[name of plaintiff]* for reporting to work as required. To establish this claim, *[name of plaintiff]* must prove all of the following:

“~~1.~~ That *[name of defendant]* was a[n] ~~employer/[specify other covered entity]]~~;

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

“~~3.~~ That *[name of defendant]* required *[name of plaintiff]* to report to work for one or more [workdays] [and] [second shifts]; ~~and~~

“~~4.~~ That ~~after~~ *[name of plaintiff]* reported for work; and

“~~4.~~ That *[name of defendant]* ~~failed to put *[name of plaintiff]* to work~~ [and] [furnished less than [half of the usual day’s work/ two hours of work on a second shift]].”

e. We believe that selecting the appropriate bracketed language is not modifying the instruction. Accordingly, we would modify the second paragraph of the Directions for Use as follows:

“~~Modify~~ Select the appropriate bracketed language in the introductory paragraph and elements 3 and 4 if a second shift is at issue, and ~~modify~~ in the introductory paragraph and element 4 to indicate whether the plaintiff was not provided work at all or was provided a shortened shift, or both.”

10. CACI No. 3041. Violation of Prisoner’s Federal Civil Rights—Eighth Amendment—Medical Care (42 U.S.C. § 1983)

Agree.

11. CACI No. 3046. Violation of Pretrial Detainee’s Federal Civil Rights—Fourteenth Amendment—Medical Care and Conditions of Confinement (42 U.S.C. § 1983)

Agree.

12. CACI No. 3050. Retaliation—Essential Factual Elements (42 U.S.C. § 1983)

Agree.

13. CACI No. 3709. Ostensible Agent.

a. The first sentence of the instruction names three individuals before using a personal pronoun to refer to one of those three individuals. We believe it would be clearer to refer to that person by name so as to remove any doubt:

“[*Name of plaintiff*] claims that [*name of defendant*] is responsible for [*name of agent*]’s conduct because [~~he/she/nonbinary pronoun~~] [*name of agent*] was [*name of defendant*]’s apparent [employee/agent].”

b. Although it is beyond the scope of the invitation to comment, we believe this instruction, which should be given with CACI No. 3701, *Tort Liability Asserted Against Principal—Essential Factual Elements*, should be replaced by a stand-alone instruction stating all the essential factual elements, for the reasons stated below.

14. CACI No. 3714. Physician-Hospital Relationship

a. The Directions for Use say to give this instruction with CACI No. 3701, *Tort Liability Asserted Against Principal—Essential Factual Elements*. No. 3701 states two essential elements: (1) another person was defendant’s agent, and (2) the agent was acting within the scope of agency. We believe No. 3714 relates to only element 1, the existence of an agency relationship. But No. 3714 does not make this clear. Instead, No. 3714 reads like an essential factual element instruction and appears to state a separate claim, which is incomplete because it does not include the element that the ostensible agent was acting within the scope of the ostensible agency.

We believe CACI No. 3714 should be revised to make it a separate claim (essential factual elements), including the element that the ostensible agent was acting within the scope of the ostensible agency.

b. The language “held itself out to the public as a provider of care” may be unfamiliar to some jurors. We suggest “gave the public the appearance of offering health care services.”

c. The language “looked to [*name of hospital*] for services” is not plain English. We suggest “sought health care services from [*name of hospital*] rather than from [*name of physician*].”

d. Similarly, we suggest changing the language “a hospital holds itself out to the public as a provider of care unless . . .” in the final, optional paragraph to “a hospital gives the public the appearance of offering health care services”

e. We believe the Sources and Authority should cite Civil Code section 2330 relating to the scope of actual or ostensible agency. (“An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal.”)

15. CACI No. 4304. Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements

We believe the sixth paragraph of the Directions for Use should simply refer to Tenant Protection Act of 2019, rather than refer to the use note below:

“If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 5. ~~See use note, below, concerning the Tenant Protection Act of 2019.~~ unless the Tenant Protection Act of 2019, noted below, requires otherwise. (See Civ. Code, § 1946.2, subd. (c).)”

16. CACI No. 4330. Affirmative Defense—Requested Accommodation—Denial of Accommodation

Agree.

Sincerely,

Reuben A. Ginsburg
Chair, Jury Instructions Committee of the
California Lawyers Association’s
Litigation Section