

PAUL  
HASTINGS

# Wage-and-Hour Update

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Annual Employment Law Update & MCLE Conference

# Agenda

- > Meal and rest periods
- > Overtime calculations
- > COVID and remote work issues
- > Independent contractors and joint employers
- > Personal liability
- > Compensation plans
- > Unlimited vacation
- > Pay stub requirements
- > Biden DOL





# Meal and Rest Periods

# Rounding and Attestations

*Donohue v. AMN Services, LLC*, 11 Cal. 5th 58 (2021)

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Rounding not permitted for meal periods

Time records showing noncompliant meal periods  
raise a rebuttable presumption of meal period violations

Employee attestations that they were offered compliant meal  
periods but voluntarily failed to comply can defeat the presumption

“In the meal period context, an employee receives the full  
amount of premium pay... regardless of the extent of the violation”

# Meal and Rest Period Premiums

“If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law,... the employer shall pay the employee one additional hour of pay at the employee’s *regular rate of compensation* for each workday that the meal or rest or recovery period is not provided.” Cal. Lab. Code § 226.7(c) (emphasis supplied).

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*Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal. 5th 858 (2021)

- ▶ **“Regular rate of compensation” = “Regular rate of pay”**
- ▶ **Catch-ups required for payments spanning periods longer than a workweek**
- ▶ **Separate formula for flat sums**
- ▶ **Retroactive application**

*Naranjo v. Spectrum Security Services, Inc.*, 40 Cal. App. 5th 444 (2019)

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Pending before California Supreme Court (S258966)

Issues presented

- ▶ Does a violation of Labor Code section 226.7 give rise to derivative claims under Labor Code sections 203 and 226?
- ▶ What is the applicable prejudgment interest rate for unpaid meal/rest period premiums?

## *Bernstein v. Virgin America, Inc.*, 3 F.4th 1127 (9th Cir. 2021)

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Application of California meal and rest break laws not barred by dormant Commerce Clause and not preempted

“[A]irlines could comply with both the FAA safety rules and California’s meal and break requirement by ‘staff[ing] longer flights with additional flight attendants in order to allow for duty-free breaks.’”

In *Sullivan v. Oracle Corporation*, 51 Cal. 4th 1191 (2011), “the California Supreme Court emphasized the California Legislature’s public policy goals in the context of California’s overtime statute... We hold that policy similarly dictates application of California’s meal and rest break requirements to both the Class and Subclass.”





# Overtime Calculations



# Overtime Calculations

There are only three moving pieces in any overtime calculation:

$$\frac{\text{(1) Pay for Work}}{\text{(2) Hours Worked}} \times \text{(3) OT Multiplier} = \text{Pay/Hours} = \text{the Regular Rate of Pay}$$

*Multiplied by 1.5 (or by 0.5 if the employer already has paid straight time for the hours worked above the statutory maximum)*

*The key is to understand what pay must be included in the numerator of the regular rate of pay calculation, what hours are included in the denominator, and what overtime multiplier applies*

# Units of Measurement

The workweek is the basic unit of measurement for all overtime

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*“The Act takes a single workweek as its standard and does not permit averaging of hours over 2 or more weeks.” 29 CFR § 778.104.*

**But,** what if a payment is earned over a period longer than a normal workweek, such as a monthly commission or annual bonus?

# Payments Spanning Longer Periods

“If it is *impossible* to allocate the bonus among the workweeks of the period in proportion to the amount of the bonus actually earned each week, some other *reasonable and equitable* method of allocation must be adopted.

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For example, it may be reasonable and equitable to assume that the employee earned an equal amount of bonus each week of the period to which the bonus relates, *and if the facts support this assumption* additional compensation for each overtime week of the period may be computed and paid in an amount equal to one-half of the average hourly increase in pay resulting from bonus allocated to the week, multiplied by the number of statutory overtime hours worked in that week...



# Payments Spanning Longer Periods (Cont'd)

Or, if there are facts which make it inappropriate to assume equal bonus earnings for each workweek, it may be reasonable and equitable to assume that the employee earned an equal amount of bonus each hour of the pay period and the resultant hourly increase may be determined by dividing the total bonus by the number of hours worked by the employee during the period for which it is paid.”

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29 CFR § 778.209(b) (emphasis supplied); *id.*, § 778.120(a)-(b) (analogous rule for commissions)

## *Alvarado v. Dart Container Corporation of California*, 4 Cal. 5th 542 (2018)

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In California, overtime on flat sums must be calculated by:

- (1) dividing the payment by straight-time hours worked (not all hours worked); and**
- (2) paying a 1.5 premium (not 0.5) for each overtime hour and a 2.0 premium (not 1.0) for each double-time hour**

# Flat Sums (Cont'd)

Example: An employee works 50 hours (40 straight-time hours and 10 overtime hours) in a workweek for which s/he receives a \$500 flat-sum bonus

## Federal Formula

Step 1: Bonus / (**ST + OT Hours** in Workweek) = RROP

$$\$500 / \mathbf{50} \text{ hours} = \$10$$

Step 2: RROP x **0.5** = OT Premium Rate

$$\$10 \times 0.5 = \$5$$

Step 3: OT Premium Rate x OT Hours in Workweek = OT Catch-Up

$$\$5 \times 10 \text{ hours} = \mathbf{\$50}$$

## Alvarado Formula

Step 1: Bonus / **ST Hours** in Workweek = RROP

$$\$500 / \mathbf{40} \text{ hours} = \$12.50$$

Step 2: RROP x **1.5** = OT Premium Rate

$$\$12.50 \times 1.5 = \$18.75$$

Step 3: OT Premium Rate x OT Hours in Workweek = OT Catch-Up

$$\$18.75 \times 10 \text{ hours} = \mathbf{\$187.50}$$



*Alvarado*, 4 Cal. 5th at 561 n.6

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“We limit our decision to flat-sum bonuses comparable to the attendance bonus at issue here. Other types of nonhourly compensation, such as a production or piecework bonus or a commission, may increase in size in rough proportion to the number of hours worked, including overtime hours, and therefore a different analysis may be warranted[.]”

**What is a flat sum?**

## 29 CFR § 778.217(a), (d)

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“Where an employee incurs expenses on his employer’s behalf or where he is required to expend sums by reason of action taken for the convenience of his employer[,]” the payments qualify for exclusion from the regular rate “if the amount of the reimbursement reasonably approximates the expense incurred[.]”

“If the employer reimburses the employee for expenses normally incurred by the employee for his own benefit, he is, of course, increasing the employee’s regular rate thereby. An employee normally incurs expenses in traveling to and from work, buying lunch, paying rent, and the like. If the employer reimburses him for these normal everyday expenses, the payment is not excluded from the regular rate as ‘reimbursement for expenses.’”

### *Clarke v. AMN Services, LLC*, 987 F.3d 848 (9th Cir. 2021)

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“In sum, a combination of factors—the tie of the per diem deductions to shifts not worked regardless of the reason for not working; the ‘banking hours’ system; the default payment of per diem on a weekly basis, including for days not worked away from home, without regard to whether any expenses were actually incurred on a given day; and the payment of per diem in the same amount, but as acknowledged wages, to local clinicians who do not travel—together indicate that the payments functioned as compensation for hours worked.”



# Multiple Hourly Rates

“Where an employee in a single workweek works at two or more different types of work for which different non-overtime rates of pay (of not less than the applicable minimum wage) have been established, his regular rate for that week is the weighted average of such rates. That is, his total earnings (except statutory exclusions) are computed to include his compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs.” 29 CFR § 778.115; see also *id.*, § 778.419.

# Multiple Hourly Rates (Cont'd)

“Where two rates of pay are paid during a workweek, the California method for determining the regular rate of pay for calculating overtime in that workweek mirrors the federal method, based upon the weighted average of all hourly rates paid.” DLSE Manual §§ 49.2.5–6.

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*Levanoff v. Dragas*, 65 Cal. App. 5th 1079 (2021), depublished Sept. 29, 2021

The background of the slide features a dark blue overlay. On the left, there are silhouettes of several people in an office setting; some are standing and talking on mobile phones, while others are seated. On the right, a dense city skyline with numerous skyscrapers is visible. A thin white horizontal line runs across the middle of the slide, positioned just below the main title.

# COVID-19 and Remote Work

## Are trips to the office a “commute” for non-exempt employees who mostly work remotely?

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“Any employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in *ordinary* home to work travel which is a *normal* incident of employment. This is true whether he works at a fixed location or at different job sites. *Normal* travel from home to work is not work time.” 29 CFR § 785.35 (emphasis supplied).

“A problem arises when an employee who *regularly* works at a fixed location in one city is given a special 1-day work assignment in another city.... Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer’s benefit and at his *special request* to meet the needs of the particular and *unusual* assignment.” 29 CFR 785.37 (emphasis supplied).

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*Imada v. City of Hercules*, 138 F.3d 1294 (9th Cir. 1998)  
(travel need not occur “frequently” in order to be “normal” or “ordinary”:  
“The district court correctly concluded that the officers’ mandatory...  
training cannot be characterized as either ‘special’ or ‘unusual’  
because it is a normal, contemplated and indeed mandated incident  
of their employment.”).



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DLSE Op. Ltr. 04.22.2004 (Apr. 22, 2003) (non-exempt employees must be paid for time spent traveling “anything more than a *de minimis* distance to report to work at a place other than an employee’s usual workplace”).

## Mid-day travel for partially remote workers

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DOL Op. Ltr. FLSA2020-19 (Dec. 31, 2020) (employees who regularly work at company's offices, and choose to telework for a portion of the workday; the time spent traveling to work and back home during the middle of the workday is not compensable as long as telecommuting is voluntary and the "employee has sufficient time in between her telework and office work periods to use effectively for her own purposes.").

## Non-exempt employees who work remotely

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Maintaining accurate timekeeping records

*Peterson v. Nelnet Diversified Solutions, LLC*, 15 F.4th 1033 (10th Cir. 2021)

1–2 minutes per day not de minimis where it was administratively feasible to record

“When the amount of time at issue can be reasonably estimated, the practical administrative burden tends to be low and weighs against a de minimis finding.”

“Nelnet already monitors the actual time that the CCRs devote to booting up their computers and launching software. And importantly, ... that time is generally similar for all employees at a particular location, who are all performing the exact same set of tasks.”

## Exempt employees who work partial workdays

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“An employee will be considered to be paid on a ‘salary basis’... if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee’s compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.” 29 CFR § 541.602(a); *see also* DLSE Manual § 51.6.8.

### Exceptions

Partial-day deductions for employees on protected leaves of absence.  
29 CFR § 541.602(b)(7); DLSE Op. Ltr. 2009.11.23.

Substituting time from paid leave banks. DOL Op. Ltr. FLSA2005-7;  
*Rhea v. General Atomics*, 227 Cal. App. 4th 1560 (2014); DLSE Op. Ltr. 2009.11.23.



# Independent Contractors And Joint Employers

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# Independent Contractors and Joint Employers

*Taylor v. Financial Casualty & Surety, Inc.*, 67 Cal. App. 5th 966 (2021)

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Alleged joint employer lacked control over and responsibility for their work

Also did not participate in hiring, setting compensation, setting job duties, training, discipline, or providing tools

Plaintiff's subjective and conclusory declaration insufficient to defeat summary judgment

# Independent Contractors and Joint Employers (Cont'd)

## *Medina v. Equilon Enterprises, LLC*, 68 Cal. App. 5th 868 (2021)

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Company owned gas stations that were operated by separate companies and their employees

Indirect control of station managers' working conditions and wages

Did not apply the ABC test

Conflicts with two earlier decisions involving same employer, although court asserted there were meaningful factual distinctions

- ▶ ***Curry v. Equilon Enterprises, LLC*, 23 Cal. App. 5th 289 (2018)**
- ▶ ***Henderson v. Equilon Enterprises, LLC*, 40 Cal. App. 5th 1111 (2019)**

# Independent Contractors and Joint Employers (Cont'd)

## California Labor Code § 2810.3

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“A client employer shall share with a labor contractor all civil legal responsibility and civil liability for all workers supplied by that labor contractor for... the payment of wages[.]”

- ▶ **“Labor contractor” means an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer’s usual course of business**
- ▶ **“Usual course of business” means the regular and customary work of a business, performed within or upon the premises or worksite of the client employer**

# Independent Contractors and Joint Employers (Cont'd)

*Williams v. Costco Wholesale Corp.*, No. 20-16455 (9th Cir. Oct. 29, 2021)

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Defendant not liable under Labor Code section 2810.3 for wage and hour violations allegedly committed against employees of contractor because their work fell outside of its “usual course of business”

“Road shows are discrete events; account for no more than 0.5% of Costco’s warehouse sales in California; and, most importantly, operate through a different economic model than Costco’s other lines of business.”

Defendant also not liable as a joint employer where alleged control (including dress code guidelines and a requirement to staff booths) “consists entirely of activities in the areas of quality control and contract compliance”

The background of the slide features a dark blue, semi-transparent overlay. On the left, there are silhouettes of several people in business attire, some standing and some talking on mobile phones. On the right, a dense city skyline with numerous skyscrapers is visible. The overall aesthetic is professional and modern.

# Personal Liability



## California Labor Code § 558.1

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“Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation.”

“[T]he term ‘other person acting on behalf of an employer’ is limited to a natural person who is an owner, director, officer, or managing agent of the employer[.]”

## *Usher v. White*, 64 Cal. App. 5th 883 (2021)

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“We interpret the words ‘violates, or causes to be violated’ in section 558.1... to impose liability on an ‘owner’... if, when acting on behalf of an employer, the ‘owner’ has personal involvement in the enumerated violations...; or, absent personal involvement, has sufficient participation in the activities of the employer—including, for example, over those responsible for the alleged wage and hour violations—such that the ‘owner’ may be deemed to have contributed to, and thus have ‘cause[d]’ such violations.”



# Compensation Plans

# Compensation Plans

*Bernstein v. Virgin America, Inc.*, 3 F.4th 1127 (9th Cir. 2021)

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Block time compensation plan did not violate California law

*Certified Tire & Service Centers Wage & Hour Cases*, 66 Cal. App. 5th 190 (2021), depublished Oct. 13, 2021

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Employer guaranteed specific hourly wage higher than minimum wage for all hours worked, but also allowed possibility of earning higher hourly wage based on certain productivity measures

Court of Appeal concluded that employer did not violate “wage borrowing” rule set forth in *Oman v. Delta Airlines, Inc.*, 9 Cal. 5th 762 (2020)



The background of the slide features a dark blue, semi-transparent overlay. On the left, there are silhouettes of several business professionals in a modern office environment. Some are standing and talking on mobile phones, while others are holding documents. On the right, a dense city skyline with numerous skyscrapers is visible, suggesting a corporate or urban setting.

# Unlimited Vacation



# Unlimited Vacation

*McPherson v. EF Intercultural Foundation, Inc.*,  
47 Cal. App. 5th 243 (2020)

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Unlimited, no-accrual time off policies can comply with California law, depending upon the facts

Key considerations include whether the employer:

- ▶ **Clearly, and in writing, provides that employees' ability to take paid time off is not a form of additional wages for services performed, but part of the employer's promise to provide a flexible work schedule—including employees' ability to decide when and how much time to take off;**

# Unlimited Vacation (*Cont'd*)

## Key considerations (*cont'd*)

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- ▶ Spells out the rights and obligations of both employee and employer and the consequences of failing to schedule time off;
- ▶ In practice allows sufficient opportunity for employees to take time off, or work fewer hours in lieu of taking time off; and
- ▶ Administers the policy fairly so that it neither becomes a de facto “use it or lose it policy” nor results in inequities, such as where one employee works many hours, taking minimal time off, and another works fewer hours and takes more time off

# Unlimited Vacation (Cont'd)



“One would expect unlimited time off policies at least to afford employees the ability to take longer or more frequent periods of time off than a traditional accrual policy or allow employees to work fewer hours in lieu of having more vacation days.”

“[S]ubstantial evidence supports the court’s implicit finding that plaintiffs’ schedules precluded them from taking advantage of EF’s purported unlimited time off policy.”



# Pay Stub Requirements

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## *Magadia v. Wal-Mart Associates, Inc.*, 999 F.3d 668 (9th Cir. 2021)

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Pay stubs that did not show hours or rates associated with overtime catch-ups on quarterly bonuses did not violate Labor Code section 226(a)(9)

“[B]ecause Walmart must retroactively calculate the MyShare overtime adjustment based on work from six prior periods, we do not consider it an hourly rate ‘in effect’ during the pay period for purposes of § 226(a)(9).”



# Pay Stub Requirements (Cont'd)

## *General Atomics v. Superior Court*, 64 Cal. App. 5th 987 (2021)

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“We conclude the trial court erred by determining that General Atomics’ wage statements violate section 226. The wage statements show the applicable hourly rates in effect and the corresponding number of hours worked at each rate. In the wage statements provided by General Atomics, the applicable hourly rates are (1) the standard hourly rate determined by contract or other agreement between the employee and the employer and (2) the overtime premium hourly rate, determined by statute, that must be added to the employee’s standard wages to compensate the employee for working overtime. These rates are plainly shown, along with the hours worked at each rate.”



# Biden Department of Labor

## Rescission of Trump-era rules and programs

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### Policy changes

- Ended PAID program**

- Repealed internal policy limiting liquidated damages in pre-litigation DOL settlements**

- Information sharing agreement with NLRB**

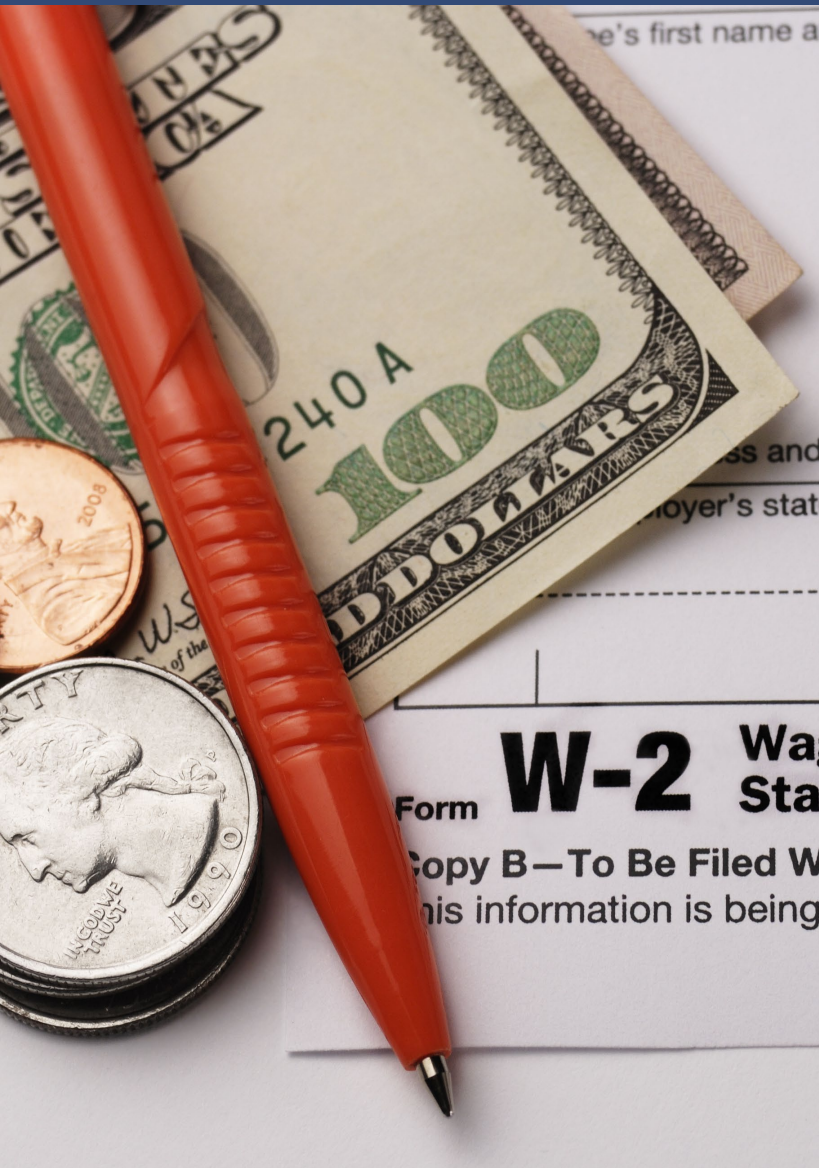
### Rule changes

- Withdrew independent contractor and joint employer rules**

- Reinstated 80/20 rule for tipped employees**



# Biden Department of Labor (Cont'd)



Minimum wage increase for federal contractors

Planned increase to minimum salary  
for exempt employees

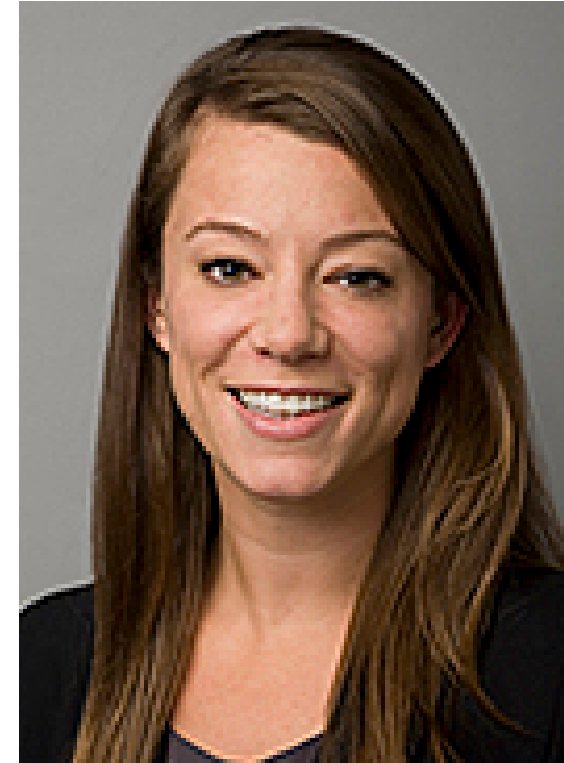
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