

The best and worst employment cases of 2021

The cases that shaped the year in employment law (with a bit of color commentary)

By Andrew H. Friedman & Taylor Markey

Continuing what has become the new normal, the courts churned out an astonishing number of employment-law decisions during the past year – often multiple such decisions per day. This article attempts to "cherry-pick" and then briefly summarize not just the most significant employment cases but also those that are of the most utility to the plaintiff-employment practitioner.

Legislation

Although legislation falls outside the purview of this article, one piece of legislation in particular merits attention – the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021" ("EFASASHA"), long-championed by Senator Kirsten Gillibrand (D-NY). On February 7, 2022, the U.S. House of Representatives passed EFASASHA by a vote of 335 to 97 (only Republicans voted against the Act). On February 10, 2022, the Senate passed the Act by a voice vote. The Act has seismic consequences for employment law as it bars the enforcement of most pre-dispute forced arbitration provisions in cases alleging sexual assault or sexual harassment. Once President Joseph R. Biden Jr. signs the Act into law (as he has promised to do), it will apply to all pre-dispute arbitration clauses (including those in contracts executed before the law's enactment).

The law will also invalidate pre-dispute agreements that waive an employee's right to participate in a joint, class or collective action in court, arbitration or any other forum that relates to a sexual assault or sexual harassment dispute.

Moreover, if a dispute arises about whether a particular claim qualifies as a "sexual assault dispute" or "sexual harassment dispute," then a court, not an arbitrator, is to answer that question, even if a contractual term exists to the contrary. Unfortunately, EFASASHA is quite narrow in scope as it does not: (1) prohibit forced arbitration provisions outright; instead, it provides what amounts to an "election of remedies," through which alleged victims can either arbitrate their claims or instead proceed to court; nor (2) apply to forms of discrimination or harassment other than sexual assault and sexual harassment. Hopefully, Congress will eventually amend the Federal Arbitration Act to expressly provide that it does not cover employment or consumer disputes.

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U.S. Supreme Court

Unlike in past years, the Supreme Court issued just two employment-related decisions along with another decision that indirectly impacts employment practitioners.

***National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*, 2022 WL 120952 (2022)**

In perhaps the most consequential recent decisions affecting workers, the U.S. Supreme Court granted a stay of the Occupational Safety and Health Administration's ("OSHA") emergency temporary standard requiring all employers of 100 or more individuals to mandate either vaccination for COVID-19 or weekly testing and indoor masking for their employees. The federal agency estimated that over 6,000 lives would be saved within six months of implementing the rule, making the decision a life-and-death one for this nation's workers.

In a decision penned by Justice Gorsuch (who refuses to wear a mask during oral argument forcing some of his colleagues to appear remotely), the Court concluded that OSHA's mandate to protect workers from hazards on the job is limited to hazards that uniquely arise in the employment context. The Court indicated it was the proper role of Congress and the several states to implement such sweeping policies.

Just such a state-level mandate implemented by the California Occupational Safety and Health Standards Board was upheld in *Western Growers Association v. Occupational Safety and Health Standards Board*, 2021 WL 6426429 (2021) against attack by the Business Roundtable.

In a related decision, *Biden v. Missouri*, 2022 WL 120950 (2022), the Supreme Court found that the Secretary of Health and Human Services is empowered to condition the receipt of Medicare and Medicaid funds on requiring health care employers to implement a vaccine mandate for health care staff, finding that the safety of patients in this medical context was sufficient to justify mandatory vaccination regimes.

***Van Buren v. United States*, 141 S.Ct. 1648 (2021)**

Employers and their counsel routinely seek leverage against employees by arguing that they have engaged in criminal activity (a violation of the Computer Fraud and Abuse Act) if they have improper motives in obtaining information from their employers' computer systems even if that information is otherwise available to them. In *Van Buren*, the Supreme Court held that the Computer Fraud and Abuse Act covers only those who obtain information from particular areas in the computer – such as files, folders, or databases – to which their computer access does not extend.

Ninth Circuit

The Ninth Circuit decided seven employment cases of note; four involved gender discrimination/harassment, two concerned arbitration, and the last addressed wage and hour issues.

***Maner v. Dignity Health*, 9 F.4th 1114 (9th Cir. 2021)**

In *Maner*, the Ninth Circuit held that an employer does not violate Title VII's prohibition on sex discrimination by favoring a supervisor's sexual or romantic partner over another employee. Applying the test outlined in *Bostock v. Clayton County*,__ U.S__, 140 S. Ct. 1731 (2020) – that is, whether the employer intentionally relies in part on an individual employee's sex when taking an adverse employment action – the Ninth Circuit held that a plaintiff cannot assert a Title VII claim based on sexual favoritism. But favoritism based upon coerced sexual conduct may still constitute quid pro quo harassment.

***Fried v. Wynn Las Vegas*, 18 F.4th 643 (9th Cir. 2021)**

Fried deals with the circumstance where an employer will be held liable for a hostile work environment created by the conduct of third parties. Fried, a manicurist at a hotel nail salon, complained that he was sexually propositioned by a customer. His manager told him to continue to perform services for the customer and thereby exposed him to further sexual harassment. According to the appellate court, this response by the employer "discounted and effectively condoned the customer's sexual harassment and … went a step further by conveying that Fried was expected to tolerate the customer's harassment as part of his job." Thus, summary judgment was inappropriate based on this incident alone.

The court also opined on several gendered comments that were made during Fried's employment, including that he was in a "female job environment" and that he should consider wearing a wig to get more clients, concluding such comments, on their own, did not constitute severe or pervasive harassment.

***Freyd v. Univ. of Oregon*, 990 F.3d 1211 (9th Cir. 2021)**

In a case against a university employer alleging unequal pay based on sex under federal law, the Ninth Circuit reversed summary judgment. The plaintiff pointed to an average difference of $15,000 in annual salary between male and female professors, largely attributable to the employer's practice of awarding "retention bonuses" to professors who entertained interest from other universities and received offers to move to those schools.

The employer argued that the practice was a business necessity, required for its ability to retain top talent, but the plaintiff argued that the practice disproportionately affected female professors who are less likely to uproot their families and move to other cities. Because the university had not addressed the plaintiff 's contention that awarding an increase to all professors in a department when any one was awarded a retention bonus would serve the same business purpose, the trial court's award of summary judgment had been premature.

***Meland v. Weber*, 2 F.4th 838 (9th Cir. 2021)**

In 2018, the California legislature passed, and Governor Jerry Brown signed

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into law, Senate Bill 826 ("SB 826") which required all corporations headquartered in California to have a minimum number of women on their boards of directors based on board size. The law further provided that corporations that do not comply with SB 826 may be subject to monetary penalties. In this action, a shareholder of a California company who was responsible for voting for board members brought a section 1983 action alleging that the law required him to discriminate on the basis of sex in violation of the Fourteenth Amendment. The district court dismissed his claim for lack of standing, but the Ninth Circuit reversed, finding that being subjected to a law that "require[s] or encourage[s]" shareholders to vote in a discriminatory manner is an individualized harm sufficient to ground Article III standing. Having survived this preliminary challenge, the substantive decision regarding whether this corporate affirmative action scheme runs afoul of the Constitution remains to be decided in the district court.

***Chamber of Commerce of United States v. Bonta*, 13 F.4th 766 (9th Cir. 2021)**

Over the past few decades, the practice of employers mandating arbitration of employment disputes has proliferated, aided by a slew of decisions by the U.S. Supreme Court under the Federal Arbitration Act ("FAA") approving of the practice. Following the failure of several legislative attempts by the state of California to empower its workers against this system of mandatory arbitration, the Ninth Circuit upheld its latest effort, California Labor Code section 432.6, against an attack by employers.

The statute makes it an unlawful employment practice to condition employment or the receipt of employment benefits upon an employee's agreement to enter into an agreement to arbitrate employment disputes. By focusing on conduct that takes place *before* the formation of an agreement to arbitrate, the statute successfully skirted the ambit of the FAA. In affirming the law, the Ninth Circuit created a split with the First and Fourth Circuit, which may tempt Supreme Court intervention. Until that time, employees in California can still refuse to enter into arbitration agreements without risking their jobs.

***Ahlstrom v. DHI Mortgage Company, Ltd., L.P.*, 21 F.4th 631 (9th Cir. 2021)**

In this decision, the Ninth Circuit held that, notwithstanding the existence of an arbitration agreement's delegation clause that provided for issues of contract formation to be decided by the arbitrator, challenges to the very existence of the arbitration agreement must be decided by a court.

***American Society of Journalists and Authors, Inc. v. Bonta*, 15 F.4th 954 (9th Cir. 2021)**

To address the misclassification of employees as independent contractors, California passed Assembly Bill 5, and later AB 2257, which codified a more expansive test for determining a worker's status, albeit with certain occupational exemptions. Because freelance writers, photographers, and others received a narrower exemption than was offered to certain other professionals, the American Society of Journalists and Authors, Inc., and the National Press Photographers Association (collectively, ASJA) sued, alleging violations of the First Amendment and Equal Protection Clause.

The Ninth Circuit affirmed the dismissal of the lawsuit, finding that Labor Code section 2778 does not implicate either the First Amendment or the Equal Protection Clause, because it does not facially limit what someone can or cannot communicate and does "not restrict when, where, or how someone could speak," but instead is aimed at regulating the employment relationship.

California Supreme Court

The California Supreme Court issued two pro-employee decisions. The first, a blockbuster, substantially lowered the burden for plaintiff employees on summary judgment and at trial in Labor Code section 1102.5 cases. The second concerned attorneys' fees on appeal and the statute of limitations in FEHA claims that are based on failure-to-promote allegations.

***Lawson v. PPG Architectural Finishes, Inc.*, 2022 WL 244731 (2022)**

In this case the California Supreme Court addressed the proper standard for the evaluation of whistleblower-retaliation actions under Labor Code section 1102.5, finding that employees need *not* satisfy the *McDonnell Douglas* burden-shifting test to make out a case of unlawful retaliation. Instead, the Court held that Labor Code section 1102.6 lays out the proper burden-shifting analysis, as follows: "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."

***Pollock v. Tri-Modal Distrib. Servs., Inc.*, 11 Cal.5th 918 (2021)**

In this case, the Court found that an asymmetric standard regarding attorneys' fees applies on the appeal of an FEHA claim, i.e., unlike prevailing FEHA plaintiffs, who automatically recover fees, an employer can only recover fees following success on appeal if it can show that the employee's appeal was frivolous or groundless.

This case also clarified that in a failure-to-promote case, the statute of limitations begins to run when the plaintiff has actual or constructive knowledge of the failure to promote. Where the employer proffered the date on which it promoted another employee over the plaintiff as the date of the alleged failure to promote, but there was evidence casting doubt on whether the plaintiff was informed that she had not received the promotion until much later, the case was remanded for reconsideration of whether the claim was time-barred.

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California Courts of Appeal

The California Courts of Appeal issued a blizzard of employment decisions.

***De Leon v. Pinnacle Property Management Services, LLC*, 72 Cal.App.5th 476 (2021)**

Although this case involves an arbitration agreement entered into before the effective date of Labor Code section 432.6 (January 1, 2020), the court nevertheless found the agreement was procedurally unconscionable because it was made a condition of employment. The court also found that provisions reducing the statute of limitations to one year for employment claims and limiting discovery to only 20 interrogatories rendered the agreement substantively unconscionable, noting the informational imbalance between employers and plaintiffs in employment cases. Given the adhesive nature of the contract and its severe limitations on discovery, the court refused to sever the offending provisions, instead finding its "multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage."

***Bannister v. Marinidence Opco, LLC*, 64 Cal.App.5th 541 (2021)**

In another case focusing on arbitration contract formation, *Bannister* should serve as a warning to employers not to cut corners in employee onboarding and for the plaintiffs' bar to heavily scrutinize the circumstances under which plaintiffs electronically sign arbitration agreements. Where the plaintiff presented evidence that an arbitration agreement was signed on her behalf by the employer in a group onboarding process, the trial court found, and the appellate court upheld, that the employer had failed to authenticate the signature and could not compel the plaintiff to arbitration.

Had the plaintiff been assigned a unique, private username and password such that she was the only person who could have signed the agreement, the court indicated the signature would have survived scrutiny. The enforceability of electronically signed arbitration agreements is clearly a fact-intensive question; courts are willing to invalidate such "agreements" where the signature proffered by an employer cannot be linked to the voluntary act of the plaintiff.

***Jolie v. Superior Court of Los Angeles County*, 66 Cal.App.5th 1025 (2021)**

One of the central criticisms leveled at the system of private arbitration is its bias towards "repeat players," the defense firms and corporate clients who pay for the process. In this family law case involving A-list celebrities, the court clarified the ethical rules for all neutrals to disclose the identities of their "repeat players." When Angelina Jolie discovered that the temporary judge that she and Brad Pitt paid to adjudicate their divorce proceedings had handled several other matters involving Mr. Pitt's counsel which had not been disclosed, she sought to have the judge disqualified. The court agreed with Ms. Jolie, finding that the judge's failure to disclose business he received from Mr. Pitt's counsel created an appearance of impropriety and violated the California Rules of Civil Procedure and California Code of Judicial Ethics.

***Patterson v. Superior Court*, 70 Cal.App.5th 473 (2021)**

The California Fair Employment and Housing Act ("FEHA") sets up an "asymmetric standard" for the award of attorney's fees whereby prevailing plaintiffs can recover their fees, but prevailing defendants can only recover upon a further showing that the plaintiff's claims were frivolous or groundless when brought. In this FEHA case, an employer attempted to enforce a contractual fee-shifting provision in an arbitration agreement that would have allowed it to recover fees for successfully compelling the plaintiff to arbitration. The court found that such a provision could be enforced, but only upon the same asymmetric basis contemplated in FEHA, i.e., only upon a showing that the plaintiff's opposition to arbitration was frivolous or groundless.

***Guzman v. NBA Automotive, Inc.*, 68 Cal.App.5th 1109 (2021)**

In a decision which refused to elevate form over substance, the Court of Appeal held that a plaintiff adequately exhausted administrative remedies even though she failed to state her former employer's correct legal name in her administrative complaint. The plaintiff wrote "Hooman Enterprises, Inc. dba Hooman Chevrolet of Culver City" in her complaint to DFEH, although the employer's actual name was "NBA Automotive, Inc. dba Hooman Chevrolet of Culver City." Rather than allow employers to use the web of legal entities and confusing official titles to evade responsibility, the court held that: "[t]o allow NBA Automotive to escape liability for discriminatory conduct merely because Guzman identified her employer administratively with a name that was nearly the same as, but not quite identical to, her employer's actual fictitious business name would be contrary to the purposes of FEHA."

***Smith v. BP Lubricants USA Inc.*, 64 Cal.App.5th 138 (2021)**

This case clarified the limits of third-party liability for aiding and abetting violations of FEHA. Robert Smith, a Black man, alleged he was subjected to racial harassment and discrimination by his employer, Jiffy Lube. During his employment with Jiffy Lube, third-party vendor BP Lubricants USA, Inc. ("BP Lubricants") and its employee, Gus Pumarol, gave a presentation at Mr. Smith's worksite, during which Mr. Pumarol made several inappropriate racial remarks including referring to Mr. Smith as "Barry White" and "Banana Hands." Based upon this incident, Mr. Smith named BP Lubricants and Mr. Pumarol as defendants to his FEHA claim on an aiding and abetting theory. The appellate court affirmed the trial court's order sustaining BP Lubricants' and Mr. Pumarol's demurrer,

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finding that they could not have aided and abetted Jiffy Lube in its harassment of Mr. Smith, as they had no knowledge of the harassment and did not provide "substantial assistance or encouragement" to Jiffy Lube to violate FEHA. Nevertheless, BP Lubricants and Pumarol were potentially liable for intentional infliction of emotional distress and violation of the Unruh Act's prohibition on racial discrimination in public accommodations for their conduct.

***Jorgensen v. Loyola Marymount University*, 68 Cal.App.5th 882 (2021)**

In this case, the appellate court reversed a trial court's grant of summary judgment in favor of the university employer on a plaintiff's age-discrimination claim where the trial court had excluded a declaration showing that a university official had rejected a different job candidate, stating they wanted "someone younger." The employer argued the witness declaration containing this quote was hearsay, irrelevant, conjecture and speculation. The court found the statement fell under the hearsay exception for states of mind and could not be conjectural or speculative, given that it was a word-for-word quote of the university official's statement. The court also found that the statement was relevant under the "stray remarks doctrine" as articulated in *Reid v. Google, Inc.*, 50 Cal.4th 512 (2010) which found that an "age-based remark not made directly in the context of an employment decision or uttered by a non-decisionmaker may be relevant, circumstantial evidence of discrimination." Here, where there was evidence that the university official who had made the "someone younger" comment had influence over the decisionmaker who denied the older plaintiff a promotion, summary judgment was inappropriate.

***Zamora v. Security Indus. Specialists, Inc.*, 71 Cal.App.5th 1 (2021)**

In this case, a security guard injured his knee on the job. Shortly after his doctor released him back to work, he was laid off as part of a reduction in force, along with three other employees whose performance was similarly ranked. The employer found replacement positions for two of the other employees, but not plaintiff Mr. Zamora. The trial court found that the close temporal relationship between the termination and Mr. Zamora's disability leave, along with the evidence that non-disabled coworkers were reassigned rather than terminated, was insufficient to survive summary judgment on his disability-related claims.

The appellate court reversed, holding that a reasonable jury could find this evidence sufficient to conclude that the employer discriminated against Mr. Zamora, particularly where the employer had not provided a non-discriminatory explanation for its failure to reassign Mr. Zamora as it did for others lacking disabilities.

***Amaro v. Anaheim Arena Management, LLC*, 69 Cal.App.5th 521 (2021)**

In this wage-and-hour action, the court bemoaned the paucity of guidance on the approval of class-action settlements under state law and provided some further guidance beyond the basic formulation of "fair, adequate and reasonable." The court found that releases in class actions under state labor law can include all claims reasonably arising from the same operative facts alleged in the complaint. The court further promoted settlement of these claims by permitting plaintiffs to release PAGA claims beyond the one-year limitations period of their own claims and to settle FLSA claims without complying with the FLSA's opt-in requirements. Lastly, the court provided helpful guidance to those defending a settlement against allegations of a "reverse auction." Where class counsel engaged in a lengthy, arms-length negotiation process and sought a fee in line with counsel's lodestar, and where the objector had not provided any evidence of collusion beyond unsupported contentions that the settlement amount was inadequate, the appellate court affirmed the trial court's approval of the settlement against "reverse auction" allegations.

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

In this case dealing with the standard for joint-employer liability, the court held that an entity can be a joint employer without exercising direct control over the employee, refusing to apply the *Dynamex* ABC test in the joint-employer context. Instead, it applied the more plaintiff-friendly "suffer or permit" standard. This standard was developed in the context of the enforcement of laws against child labor, to make clear that employers had obligations towards every person who, as a matter of fact, was working at their worksites, whether or not such persons had been formally hired.

In this case, the plaintiff was working at a Shell gas station that was operated by another company who directly hired and managed the plaintiff. Despite the use of this intermediary company, Shell owned the gas station and had near-complete control over its "finances, day-to-day operations, facilities and labor practices." Further, Shell employees made statements to the plaintiff that they could have him fired and that they had caused employees to be fired by operator companies in the past. On these facts, Shell clearly "suffered or permitted" the plaintiff to work at its worksite and could face joint employer liability for labor violations against him.

***Briley v. City of West Covina*, 66 Cal.App.5th 119 (2021)**

In this whistleblower-retaliation case, the appellate court reduced the jury's award of $3.5 million in emotional-distress damages to $1.1 million, finding the jury's award had been excessive where the plaintiff testified to only garden-variety emotional distress that any plaintiff would experience upon being wrongfully terminated. Although the plaintiff described sleep issues, financial distress and feeling "devastated," and his demeanor was credible and affecting to the jury, this could not overcome the fact that his symptoms of distress were not objectively severe and had lessened over time.

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***Morales v. Factor Surfaces LLC*, 70 Cal.App.5th 367 (2021)**

This case describes the correct method for calculating the regular rate of pay for commissioned workers. Usually, courts should calculate this rate by dividing the worker's total commissions in a given week by the number of hours worked, including overtime hours. Here, the employer failed to keep records of the amount of pay in each paycheck attributable to commissions, nor did it provide the court with any suggested method of accurately assessing the amount of the commission payments. As any prejudice caused by the employer's failure to keep accurate records should redound to the employer, the trial court's calculation of the employee's pay based on the number of non-overtime hours worked was a reasonable estimate that could be used as the employee's regular rate of pay.

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

In this case alleging meal-break violations, the California Supreme Court held that the employer practice of "rounding" time punches for meal breaks is not permitted under California Labor Code and Wage Orders. While the Court recognized that time rounding was, in general, permitted under federal law and prior California decisions, it decided not to follow that authority with respect to meal periods. Instead, citing the "health and safety concerns" that underlie meal period requirements, the Court distinguished "the meal period context from the wage calculation context, in which the practice of rounding time punches was developed" and noted that "even relatively minor infringements on meal periods can cause substantial burdens to the employee." The Court went on to endorse a concurrence by Justice Werdegar in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012), oft-cited by plaintiffs' lawyers, in which she suggested that if an employer's records did not reflect a compliant meal period, it would raise a rebuttable presumption that none was provided. However, the Court did provide helpful clarification about how employers could overcome such a presumption: "by presenting evidence that employees were compensated for noncompliant meals or that they had in fact been provided compliant meal periods during which they chose to work."

***Santos v. El Guapos Tacos, LLC*, 2021 WL 5626375 (Cal.App. 6 Dist., 2021)**

In this wage-and-hour case, the Court of Appeal reversed a trial court's dismissal with prejudice of the plaintiff's representative cause of action under PAGA for failure to satisfy the notice requirements under the Act. Relying on *Khan v. Dunn-Edwards Corp.*, 19 Cal.App.5th 804 (2018) and *Brown v. Ralphs Grocery Co.*, 28 Cal.App.5th 824 (2018), the employer argued that the plaintiff's PAGA notice was defective because she did not reference either a "group of others" or "other aggrieved employees."

The trial court accepted this argument and dismissed the PAGA claims. The Court of Appeal disagreed and reversed: "We do not see how a general reference to 'a group of others' or to 'other aggrieved employees' is necessary to inform the LWDA or the employer of the representative nature of a PAGA claim. While we appreciate that uniquely individual claims would not satisfy the statute, a prefiling notice is not necessarily deficient merely because a plaintiff fails to state that she is bringing her PAGA claim on behalf of herself and others. PAGA claims function as a substitute for an action brought by the government itself. Thus, PAGA claims, by their very nature, are only brought on a representative basis."

***Martinez v. Rite Aid Corp.*, 63 Cal. App.5th 958 (2021)**

In this case the Court of Appeal agreed with Rite Aid that the $140,840 the plaintiff earned from post-Rite Aid employment needed to be deducted from his economic-damages award in a wrongful-termination action. In so holding, court disagreed with the decisions in *Villacorta v. Cemex Cement, Inc.*, 221 Cal.App.4th 1425 (2013) and *Rabago-Alvarez v. Dart Industries, Inc.*, 55 Cal.App.3d 91 (1976), which cogently held that wages actually earned from an inferior job may not be used to mitigate damages, arguing that if they were so used, it would result in senselessly penalizing an employee who, either because of an honest desire to work or a lack of financial resources, is willing to take whatever employment he can find.


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