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IN THE
SUPREME COURT OF CALIFORNIA

GEORGE MELENDEZ, et al.,

Plaintiffs and Petitioner,

v.

SAN FRANCISCO BASEBALL ASSOCIATES, LLC

Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT
CASE NO. A149482

PETITION FOR REVIEW

Dennis F. Moss
15300 Ventura Blvd., Suite 207
Sherman Oaks, CA 91403
Telephone: (310) 773-0323
Facsimile: (310) 861-0389
dennis@dennismosslaw.com

Sahag Majarian II
18250 Ventura Boulevard
Tarzana, CA 91356
Telephone: (818) 609-0807
Facsimile: (818) 609-0892
sahagii@aol.com

Attorneys for Respondents

GEORGE MELENDEZ, et al.

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ISSUES PRESENTED FOR REVIEW

1. Are seasonal, temporary, indefinite and/or short-term layoffs "discharges" under Labor Code Section 201?
2. Can undisputed terms of a Collective Bargaining Agreement alter the immediate pay protections afforded Californians by Labor Code Sections 201 et seq.?
3. Are claims of violations of Labor Code 201 preempted by Section 301 of the Labor Management Relations Act in a context where laid off, out of work employees are subject to a collective bargaining agreement?

I. INTRODUCTION

This case is about vindication of an important public policy of the State of California that has existed for over 100 years, the policy requiring prompt payment of earned wages to working men and women who find themselves without work. See *Smith v. Superior Court (L'Oreal)* (2006) 29 Cal.4th 77. Contrary to the views set forth in the Court of Appeal decision that is the subject of this Petition, this case has nothing to do with rights and obligations under a collective bargaining agreement ("CBA").

Review of the Court of Appeal Decision herein (Slip Opinion Attached hereto) is warranted on both grounds for review authorized by California Rule of Court 8.500--uniformity of decisions and to settle important questions of law. Petitioner did not seek rehearing in the Court of Appeal.

In *Smith, supra,* this Court provided the roadmap for interpretation and application of the word "discharge" as it appears in Labor Code §201. This Court, in *Smith* painstakingly described and followed the steps necessary to determine whether the word "discharge", as it appears in Labor Code § 201, was applicable to the factual scenario presented to the court in that case. *Smith, supra* passim. The Court of Appeal in this case ignored those steps, that road map, and consequently misapplied the law. It is imperative that this Court honor the intent of the Legislature and the lesson of *Smith, supra* and assure proper application of the Labor Code by granting review in this case.

The Court of Appeal decision conflicts with *Smith's* holding that the end of a period of *assignment based employment* triggers application of Labor Code § 201. It conflicts with the Legislature's intent to treat "layoffs" as a form of "discharge", and it conflicts with

Court decisions and Administrative Opinions that, consistent with the definition of "layoff", contemplate "layoffs" to include contexts where laid off employees have, as in this case, ongoing contractual rights post-layoff.

The lower Court decision in this case sanctions a wage payment scheme that denies the protections of Labor Code §§ 201 and 203 to any Californians who may find themselves in the ranks of the unemployed through temporary layoffs or layoffs indefinite in length.

Aside from conflicting with *Smith, supra* and failing to properly interpret and apply Labor Code § 201, the Court of Appeal Opinion conflicts with firmly established United States Supreme Court, 9th Circuit, and earlier California Court of Appeal decisions that establish clear limits to the application of LMRA 301 (29 USC 185) preemption in the context of claims of violation of statutory rights.

Further, the Court of Appeal Opinion ignores the Labor Code § 219 prohibition of contract provisions that in "any way" undermine Labor Code § 201 rights.

All California workers are subject to the possibility of layoffs for indefinite periods of time, or for temporary periods for a variety of reasons (e.g. end of a growing season, baseball season, or ski season,

the need to retool a plant, a slowdown in business, a plant or stadium closure during certain time periods, a television show production hiatus). Some will be laid off indefinitely with a possible return to work, others with a pre-scheduled return date, others with no prospects of being recalled from layoff. They all share a need they have in common with their colleagues who are fired, or resigned, to take care of the "necessities" of life -- pay their bills and feed their families during their periods of unemployment. *Smith, supra* 29 Cal.4th at 82.

Laid off employees, whether or not subject to a collective bargaining agreement, are no less worthy of the protections provided by Labor Code §§201et seq. than employees like Ms. Smith when she worked for L'Oreal, or employees who are fired from or resign from employment. Their need for wages paid promptly when they are out of work is no less acute; and their need for the clout provided by Labor Code 203 is no less important.

Review here is critical. Collective Bargaining Agreements cannot undermine statutory rights. Laid off workers are entitled to the benefits of Labor Code § 201 and application of the principles and

holdings articulated in *Smith*, *supra*, irrespective of any contract terms.

II. STATEMENT OF THE CASE

George Melendez, as well as those he seeks to represent, have worked intermittently for Respondent San Francisco Baseball Associates LLC ("the Giants") for years. Melendez has worked off and on as a security guard since 2005. Security guards work during the baseball season when the team is in town. At times, depending on staffing needs, some guards are periodically employed at events during the off season. They are paid from several days up to two weeks after the end of each period of intermittent employment. (AA 0137, and 0140).

The guards are represented by a union that has a collective bargaining agreement ("CBA") with the Giants. The CBA gives the Giants absolute discretion in scheduling guards (AA 0165 Section 8).

The Giants recognize that the work of security guards is intermittent, subject to staffing needs with periodic breaks in service. In the Giants' Opening Brief in the Court of Appeal, the Giants acknowledged that, given the nature of stadium work, there are

periods when guards in the putative class will not be scheduled for work, are laid off in fact:

"While **the CBA** gives certain employee classifications scheduling priority, it **does not require that the Giants schedule any employee to work any specified number of hours, days, weeks, or months, or any specific number of games, homestands or seasons.**

* * * *

The facts will show that the Giants have exercised their discretion under the scheduling provisions of the CBA to not schedule Melendez (or other security guards) to work when AT&T Park is closed.

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Similarly, **the fact that Melendez is not scheduled to work any given event, game or homestand while AT &T Park is open does not, under the terms of the CBA, mean that he was "discharged"** [ignoring the question of whether he is "discharged" under the law]. **…[T]he Giants may have exercised its scheduling**

discretion consistent with the CBA to not schedule him[1]." AOB Ct. of Appeal. 25-26, 28. (Emphasis added)

Melendez filed a class action complaint on November 25, 2015, and a First Amended Complaint on January 13, 2016. He asserts a statutory claim on behalf of himself and a class of all persons who, since November 25, 2012 have at times been intermittently employed by the Giants for limited duration assignments who were not paid immediately at the end of such assignments. (AA 135-142) The class definition in the Complaint embraces all intermittently employed employees, not just security guards.

The First Amended Complaint alleges in part:

"1. This case arises out of the failure of defendant San Francisco Baseball Associates, LLC (San Francisco Giants) to pay intermittently employed individuals immediately upon discharge from employment periods of limited duration.

2. Pursuant to Labor Code Section 201 and *Smith v. Superior Court* (2006) 39 Cal.4th 77, the San Francisco Giants employ a

[1] This conforms with reality. A baseball game with 40,000 fans is going to need more security guards at work than a private wedding at the stadium in the off-season when there may be only 400 guests, or a Cirque de Soleil show in a stadium parking lot tent where each show may have under 5,000 in attendance.

number of person (sic) (across of variety of job classifications) intermittently during the baseball season and throughout the rest of the calendar year. Defendants are required to pay such persons immediately at the end of each limited duration assignment. Defendants, in violation of Labor Code Section 201 paid these employees late, typically between five (5) and fifteen (15) days late. For himself and other similarly situated intermittent employees of the San Francisco Giants, Plaintiff seeks damages for continuation wages under Labor Code Section 203.

3.The San Francisco Giants' non-compliance with Labor Code Section 201 manifests itself in no less than three (3) ways. (1) At the end of the baseball season Defendants do not pay intermittently employed persons on the last day they work during the season. (2) During the baseball season, Defendants do not immediately pay intermittently employed employees on the last day they work during a home-stand. (3) Between baseball seasons, when intermittently employed persons are employed for events such as concerts, college football games, theatrical performances, fan appreciation days, a run of Cirque du Soleil shows, etc., Defendants do not immediately pay

intermittently employed employees at the end of their work at these events."

Significantly, nothing in the record refutes the foregoing allegations. There is no evidence establishing that guards are paid immediately upon layoff at the end of a baseball season, at the end of a home stand, or at the conclusion of an off-season event, whether a layoff lasts several months between the end of one baseball season and the beginning of another baseball season, or several weeks between off season events at the stadium.

Melendez asserted two causes of action: (1) A Class Claim for Violation of Labor Code § 201, seeking penalties pursuant to Labor Code § 203; and a (2) Claim for Penalties under Labor Code §§ 2698 and 2699, as a private attorney general (Labor Code Private Attorneys General Act of 2004; PAGA). (AA0134-142).

The Giants moved to compel arbitration arguing that Melendez was required to arbitrate his claims pursuant to the CBA between the Giants and the Union, and claiming LMRA section 301 (29 USC §185) preemption.

Following a hearing, the trial court issued a written ruling denying the Giants' motion to compel arbitration. The court first

found that the statutory claim did not have to be arbitrated under the terms of the CBA:

"[There is no language in the agreement [CBA] requiring arbitration of the claims in this case. The CBAs here require arbitration of claims involving the application or 'alleged violation of any of the terms of the Agreement' … The suit here claims a violation of state statutes not a violation of the CBA." (AA 0255).[2]

On the preemption issue, the Superior Court found, inter alia:

"Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985) makes the point that 'not every dispute concerning employment, or tangentially involving provisions of a collective bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law.' There is no 'suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation.' *Id.* at 212. 'Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional

[2] The Court of Appeal agreed with this ruling. Slip Op. pg.4-5

intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.' *Id." (AA0256)*

The Trial court then quoted the United States Supreme Court opinion in *Livadas v. Bradshaw* 512 U.S. 107, 123 (1994) "'In *Lueck* and in *Lingle* we underscored the point that § 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law, and we stressed that it is the legal character of a claim, as 'independent' of rights under the collective-bargaining agreement [citation] and not whether a grievance arising from 'precisely the same set of facts could be pursued [citation] that decides whether a state cause of action may go forward' ."

The Giants timely appealed.

III. THE DECISION OF THE COURT OF APPEAL

The Court of Appeal acknowledged the parameters of preemption doctrine, citing *Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 762-769 for the proposition that for Federal preemption to apply the need to interpret the CBA must inhere in the nature of the plaintiff's claim. Slip Op. at 5.

Without carefully assessing whether a need to interpret the

CBA existed here, the Court then turned to the collective bargaining agreement between the Giants and the guards' union in its analysis of whether the putative class members are "discharged" when they are laid off at the end of the baseball season, end of a home stand, or after an inter-season event. Slip Op. at 7. Emphasizing an ongoing contractual relationship between guards and the Giants during periods when guards are out of work, the Court of Appeal failed to consider whether the "layoffs" experienced by the guards are "discharges" under Labor Code § 201. The law requires a determination of whether or not employees who are involuntary laid off from a period of employment are "discharged" under Labor Code § 201, but the Court of Appeal focused on the question of whether the guards were hired for periods that extended beyond their periodic layoffs, and then concluding that since they were, their layoffs are not discharges. Slip Op. 7-9.

The Court of Appeal embraced a view that when an employer at times relegates employees to the ranks of the unemployed through layoffs, the employees are not "discharged" under the law, but that the nature of the employment relationship within which layoffs occur controls. Slip Op. 7-9. This deviation from *Smith* is not warranted.

The Court of Appeal Opinion focused on provisions of the CBA and facts that are completely irrelevant to the meaning of "discharge" under the law, and concluded based on those provisions and facts that guards who at times find themselves out on the street and not earning wages on account of layoffs occasioned by a lack of ongoing work, are not entitled to immediate pay pursuant to Labor Code 201.

Distilled to its essence, the Court of Appeal Opinion found that if security guards are laid off, out of work, and not earning money as an employee of the Giants, Labor Code § 201 does not require immediate payment to the security guards because of rights under a collective bargaining agreement the employees have, if and when the Giants exercise their scheduling discretion to put the guards back to work. (E.g. the right to return to work without reapplying, the right to use the badge and uniform utilized before the layoff, the right, if he or she had previously passed probation, to extra pay for work performed on a holiday, the right to future scheduling preference based on cumulative hours worked for the team, and the right not to be permanently fired without cause). Slip Op. pgs. 8-9. Pursuant to the Court of Appeal decision, the CBA trumped the harsh reality of

unemployment when it came to interpretation and application of the law.

The Court of Appeal held that, irrespective of the possibility of lengthy periods of unemployment between assignments, if an employment agreement contemplates off and on employment there is "no 'discharge' at the conclusion of a homestand, season or other event." Slip Op. at 7. As will be demonstrated infra, this holding is contrary to the letter and Legislative intent of Labor Code Section 201, an intent that recognizes "layoffs" as a form of "discharge".

IV. ARGUMENT

1. The Court of Appeal Opinion Conflicts with *Smith v. Superior Court* (2006) 29 Cal.4th 77

Labor Code § 201 provides:

(a) If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately. An employer who **lays off a group of employees by reason of the termination of seasonal employment** in the curing, canning, or drying of any variety of perishable fruit, fish or vegetables, shall be deemed to have made immediate payment when the wages of said employees are paid within a reasonable time as necessary for computation and payment thereof; provided, however, that the

reasonable time shall not exceed 72 hours, and further provided that payment shall be made by mail to any employee who so requests and designates a mailing address therefor.

Under Labor Code § 203, an employer's willful failure to pay wages to a "discharged" employee in accordance with Section 201 subjects the employer to penalties.

As firmly established by this Court:

> "California has long regarded the timely payment of employee wage claims as indispensable to the public welfare: 'It has long been recognized that wages are not ordinary debts, that they may be preferred over other claims, and that, because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due. [Citations.] An employer who knows that wages are due, has ability to pay them, and still refuses to pay them, acts against good morals and fair dealing, and necessarily intentionally does an act which prejudices the rights of his employee.' [Cites

> Omitted]…We recently identified sections 201 and 203 as implementing this fundamental public policy regarding prompt wage payment. (See *Smith v. Rae–Venter Law Group* (2002) 29 Cal.4th 345, 360.)." *Smith v. Superior Court (L'Oreal)* (2006) 39 Cal. 4th 77, 82

The Court of Appeal herein misapplied the lesson of *Smith, supra* by focusing on an irrelevant factual distinction, rather than the ultimate teaching that when assignment based employees are put out of work by their employer, they are "discharged" under Labor Code § 201. The lesson of *Smith* is that the end of a period of employment that transitions an employee into the ranks of the unemployed is the dispositive factor. Whether an employee was initially hired for long term employment, a single assignment, or intermittent periods of employment and unemployment, does not determine if the end of a period of work is a "discharge."

In *Smith, supra* an employer hired an employee for a one day assignment, and failed to pay her immediately at the end of the assignment. Smith's employer contended that Labor Code § 201 only applies to employees hired for ongoing employment who are

permanently let go from that ongoing employment.. This court rejected that contention. *Smith,* supra at passim.

Yet, the Court of Appeal in this matter glommed on to the nature of the hiring in *Smith, supra* as the distinguishing factor to warrant the conclusion that *Smith* is inapplicable here. Slip Op. pg. 7-8.

Nothing in *Smith* made the nature of the initial hiring dispositive. *Smith* did not rule out a definition of "discharge" that embraced the facts operative here, where an employee is hired initially for intermittent employment, and is subject to varying periods of unemployment on account of layoffs triggered by the intermittent nature of available work.

This Court's reliance on the public policy behind the law in addressing the meaning of “discharge” to address the need of out of work workers to receive their wages promptly, underscores the **insignificance** of the nature of an employee’s initial hiring to the meaning of “discharge” in Labor Code § 201. *Smith,* supra at 86-89.

Smith, supra makes the point that Labor Code § 201's immediate payment requirement applies to the facts operative here, "to employment terminations resulting from **completion of specified**

job assignments or periods of service." (Emphasis Added) *Id*, at 86. Completion of work at the end of a baseball season is "completion of a period of service", and completion of an assignment to work an inter-season event is "completion of a specified job assignment", yet the Court of Appeal found that the layoffs at issue here do not trigger application of the immediate payment requirements of Labor Code § 201.

The above quote from *Smith, supra*, is a follow-up to an earlier pertinent expression of the same sentiment:

"Relying in part on legal and non-legal dictionaries to ascertain the most commonly understood meaning of 'discharge,' the Court of Appeal concluded the term refers only to 'the affirmative dismissal of an employee by an employer from *ongoing* employment **and does not include the completion of a set period of employment** [like in this case] **or a specific task**.' (Italics added.) **We are not convinced."** (emphasis added) *Id*, at 84.

Summarizing its holding, at the end of the Opinion, the Court stated a conclusion that applies with equal force to this case as it does to *Smith*:

"As discussed, a discharge is commonly understood as referring both to an involuntary termination from an ongoing employment relationship **and to a release of an employee after completion of a specified job assignment or duration of time**." *Id*, at 92. (Emphasis Added)

2. *Smith, supra* (2006) 29 Cal.4th 77 Established the Framework for Analyzing Whether Particular Separations from Employment Constitute "Discharges", A Framework the Court of Appeal Ignored in This Case.

Even if the holdings of *Smith* were not directly applicable to the separations from employment that animate this case, *Smith, supra* established the framework that should have been used by the Court of Appeal in deciding this case. *Smith* established that the task of the Court is to ascertain Legislative intent, and in doing so, to look to the meaning of the words of the statute and read the statute "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness" *Id*, at 83.

This Court went on to point out, "If the statutory terms are ambiguous, we may examine extrinsic sources, including the ostensible objects to be achieved and the legislative history… In such circumstances, we choose the construction that comports most closely

with the Legislature's apparent intent, endeavoring to promote rather than defeat the statute's general purpose, and avoiding a construction that would lead to absurd consequences." *Id.*

Superimposed on determination of the meaning of any provisions of the Labor Code is the time-honored principle:

> "[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection."

Ramirez v. Yosemite Water Co. (1999) 20 Cal.4th 785, 794, quoting *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702.

It is patently clear, that the Court of Appeal did not "liberally construe" the statute, nor engage in any of the steps laid out in *Smith, supra,* nor heed *Smith's* findings regarding the "entire scheme of the law", the "legislature's apparent intent", and the "statute's general purpose" even though the meaning of "discharge" as used in Labor Code § 201 was the central issue in both cases.

Had the Court of Appeal followed *Smith*'s approach to Labor Code § 201, the outcome would have been different. The Court would

have found that the seasonal and other separations of employment/layoffs alleged herein are “discharges” under Labor Code § 201.

A. The Inclusion of A "Seasonal Layoff" Exception in Labor Code § 201 Makes “Layoffs” A Form Of “Discharge” That Triggers Labor Code § 201 Immediate Pay Obligations.

In addition to the Court of Appeal holdings and approach conflicting with *Smith, supra,* the Court of Appeal decision was wrongly decided because the legislature considers “layoffs” to be “discharges” under Labor Code § 201.

Smith teaches that we must look to the definitions of the words of a statute and “the entire scheme of law”. Given “the entire scheme of law” criteria, and the meaning of “layoff”, Labor Code § 201's express exception from the immediate payment requirement for "An employer who **lays off a group of seasonal employees”** in the “curing, canning and drying” industry, is of paramount importance in this case. This exception to Labor Code § 201’s immediate payment requirements establishes that the legislature that first enacted the exception in 1947 considered "layoffs" to be a form of "discharge" covered by Labor Code § 201. Had they not considered such to be the case, writing a “seasonal layoff” exception

in the seasonal curing, canning and drying industry into the statute would not be necessary. Consequently, the meaning of "layoff" should have been, but was not, central to the Court of Appeal analysis in this case.

If the Giants' release of guards at the end of intermittent periods of employment-- at the end of baseball seasons, after an inter season event, or at the end of a home stand are "layoffs", since the legislature has determined that layoffs are a form of "discharge", those layoffs would trigger application of Labor Code § 201.

B. "Layoffs" Include Temporary Separations from Active Employment, Such as Those Experienced by The Guards Employed by The Giants

"Layoffs" by definition contemplate breaks in service that can be temporary with the possibility or reality of eventual recalls from layoff that the guards experienced.

The United States Department of Labor Bureau of Labor Statistics' "Glossary" (www.bls.gov/bls/glossary.htm) defines "layoff" in a manner that contemplates temporary periods of unemployment:

" 'Layoff' A separation of an employee from an establishment that is initiated by the employer; an involuntary separation; a period of

forced unemployment."

The periods after baseball seasons, after off season special events, and after home stands, when an employee may not work for weeks or months, clearly are "involuntary separations" and "periods of forced unemployment".

The same Department of Labor Glossary, in the definition of "Unemployed Persons", expressly recognizes "layoffs" as applying to the circumstance at issue here where guards may have an expectation of reemployment after layoffs. It provides in relevant part that:

"… Persons who were waiting to be recalled to a job from which they had been laid off need not have been looking for work to be classified as unemployed"[3]

The American Heritage Dictionary 5th Edition, 2016 pg.997 defines "layoff" as "the act of suspending or dismissing an employee, as for lack of work or because of a corporate reorganization." This

[3] The California Unemployment Ins. Code provides in relevant part, irrespective of Collective Bargaining Agreements: (a) An individual is "unemployed" in any week in which he or she meets any of the following conditions: (1) Any week during which he or she performs no services and with respect to which no wages are payable to him or her." This code Section belies the fiction adopted by the Court of Appeal that temporarily laid off workers are not "discharged", and remain employed while laid off.

definition similarly describes what intermittently employed security guards experience.

An earlier edition of the American Heritage Dictionary also contained an apropos definition, defining "Layoff" to mean: "To suspend from employment, as during a slack period." The American Heritage Dictionary of the English Language, 1969, pg. 742.

Webster's 3rd New International Dictionary 1981, defined the verb "layoff" with an emphasis on temporary: "to cease to employ a worker usu. Temporarily because of slack in production and without prejudice to the worker—usu. distinguished from fire." The noun layoff, is defined in part, in the same dictionary as "a period of being away from or out of work." Webster's Third New International Dictionary, 1981, pgs. 1281-1282

The importance of definitions from older dictionaries arises from the fact that the "layoff exception" existed in Labor Code 201 since 1947. Dictionary definitions since 1947 defining "layoffs" in a way that includes temporary layoffs where employees have possible return rights (such as Giants' guards), necessarily must inform analysis of whether "layoffs" of the type at issue here are "discharges".

Case law dealing with “layoffs” also elucidates the fact "layoff" is not restricted to permanent separations from employment, and would apply to periods when intermittently employed workers such as the Giants’ guards are between assignments.

For example, the United States Supreme Court in *International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, and *Franks v. Bowman Transportation Company* (1976); 427 U.S. 747 used the word “layoff” to describe separations from employment covered by CBA’s with contractual rights to return to work that were not lost on account of layoff, like the Giants’ guards here. *First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666, at footnote 14 makes clear that layoffs with recall rights are mandatory subjects of bargaining under the NLRA.

Campos v. EDD (1982) 132 Cal.App.3d 961 describes seasonal *layoffs* during an ongoing contractual employment relationship where the employment relationship did not end at the time the *layoff* took place. The workers in *Campos*, including appellants, were, like the Giants’ guards, seasonal employees, members of a union who were covered by collective bargaining agreements who were periodically laid off. The agreements in *Campos* provided for a system of recalling

laid-off workers according to seniority, i.e., the first employees hired would be the last laid off and the first to be recalled. *Id,* at 965.

Layoffs with recall rights, did not prevent the Court in *Campos* from characterizing the seasonal intermittent loss of work as "layoffs". By analogy, the separations experienced by Giant's guards must also be considered "layoffs", and because they are "layoffs", "discharges" as the word is used in Labor Code Section 201.

The Labor Commissioner has also adopted a position that "layoffs" are not limited to permanent separations from employment.[4] The 2002 Update of the DLSE Enforcement Policies and Interpretations Manual, www.dir.ca.gov/dlse/DLSEManual provides:

> "3.2.2 Layoff. If an employee is laid off without a specific return date *within the normal pay period*, the

[4] As recently as late 2016, this Court noted that it will take account of interpretations of the Division of Labor Standards Enforcement ("DLSE") as the state agency that enforces labor laws and regulations. *Augustus v. ABM Security Services, Inc*. (2016) 2 Cal.5th 257, 262-263, 267. Further, when the Legislature amends a statute, it is presumed to be aware of the long-standing interpretation and practice followed by the administrative agency that enforces that statute. If when amending the statute, the Legislature does not modify the administrative agency's interpretation, the Legislature is regarded as accepting and adopting that interpretation. The California Legislature has amended Labor Code section 201 et seq. (and its predecessors) on a number of occasions.

> wages earned up to and including the layoff date are due and payable in accordance with Section 201. (*Campos v. EDD* (1982) 132 Cal.App.3d 961...If there is a return date within the pay period and the employee is scheduled to return to work, the wages may be paid at the next regular pay day." See also Labor Commissioner Opinion Letter 1996.05.

Since all forms of "layoffs" are "discharges" even if *Smith, supra* was never decided by this Court, the Court of Appeal decision is woefully off the mark.

Review is necessary because the Court of Appeal needed to decide the question of whether as a matter of law, "layoffs" are "discharges", and the Court of Appeal here evaded that question by improperly focusing on the nature of the initial hiring of the guards, and post-layoff contractual rights contained in a CBA, rather than the statutory meaning of "discharge". Slip Op. pg.8-9.

C. The Court of Appeal Failed to Apprehend the Entire Scheme of The Law

Smith, supra 39 Cal.4th at 83 explained that in interpreting a law Courts should look to the entire scheme of the law under consideration. It then pointed out that, with the Legislature creating

an exception to the "immediate payment" requirement for layoffs of seasonal workers in certain food industry jobs in Labor Code § 201, for oil workers laid off in Labor Code § 201.7, and laid off television and movie production employees in Labor Code § 201.5, without creating a like *exception* for people like Ms. Smith the "immediate payment" requirement clearly applied to her, people who work one day assignments when their work ends. *Id,* 85-86. That analysis applies with equal force here. The Legislature excepted some discharges/layoffs in certain industries from the immediate payment requirement, but it did not except discharges/layoffs in the professional sports industry.

In *Smith, supra* this court noted that as to the immediate payment exception for the Motion Picture industry, the exception applied specifically to *layoffs*.

"Similarly, section 201.5 provides that, in the motion picture industry, when the terms of employment are such as to require "special computation" to ascertain the wages due, an employer "*shall be deemed to have made immediate payment of wages within the meaning of Section 201* in a "***layoff***" situation if it pays wages by the

next regular payday following the **layoff**…." *Id*, at 86. (Emphasis added)

This Court then reached a conclusion applicable here:

> "Redefining what 'immediate payment' means, vis-à-vis section 201, and articulating justifications for an extended payment period in the context of these selected industries [layoffs in the television, canning and oil industries], makes little sense **if section 201's immediate payment requirement does not, in the first instance, generally apply to employment terminations resulting from completion of specified job assignments or periods of service."** *Id*, at 86. (Emphasis added)

In the wake of the decision in *Smith, supra*, more exceptions to the immediate payment requirement were enacted, albeit with specific conditions, one in the unionized concert production industry and one in the temporary agency industry. See Labor Code §§ 201.9 and 201.3.[5] No such exceptions were created for the baseball industry.

[5] The "Bill analysis" of the post-*Smith* exception enactments in 201.3, and 201.9 each specifically reference this Court's decision in *Smith, supra* as the impetus of the Legislation.

With the Legislature creating exceptions in specific industries, other than the live sporting event industry, even using the word "layoff" in two of the exception references (Labor Code Sections 201 and 201.5), the exception the Giants seek for sporting event employers cannot be implied.

The fact that the Legislature granted only limited exceptions, and even revised section 201 et seq. without making any change that eliminates "layoff" as a form of "discharge" even after *Smith* was decided, is clear evidence that the Legislature approves the application of "discharge" to embrace periods of employment that end in "layoff".

In short, the statutory scheme of the California Labor Code makes clear that section 201 is intended to apply to employees who are "discharged" / "laid off" at the completion of a period of employment interrupted by a period of unemployment. We know this because the Legislature created limited *exceptions* to the general rule of immediate payment for "discharge" that results from, "lay off" after completion of 1) a vegetable or fruit-canning or packing season; 2) work on a movie or in television; 3) completion of an oil drilling project; or 4) at the end of a concert with unionized employees and a CBA with specific hiring provisions. Outside these exceptions,

California employees are entitled to be paid final wages immediately at the end of a season or other particular period of employment that ends with a layoff. *Smith, supra* at 86-87.

D. The Court of Appeal Decision Should Be Reviewed Because It Allows for An Interpretation of The Law Contrary to The Object of the Law.

In *Smith, supra* at 86-90, this Court detailed the origins of Labor Code § 201, ultimately concluding that Ms. Smith was entitled to immediate payment because the purpose of Labor Code § 201 is "**to ensure that discharged employees do not suffer deprivation of the necessities of life or become charges upon the public"** when the period of employment ends. *Id,* at 90.

The same analysis should have applied here--an out of work, laid off security guard has as much of a risk of suffering the deprivation of the necessities of life when becoming unemployed as a hair model hired for one show when she becomes unemployed. The Court of Appeal in this case, notwithstanding *Smith's* admonition to Courts to assess the object of the law in determining the meaning of words like "discharge," failed to do so here.

E. The "Absurdity" Analysis in *Smith, Supra* Should Have Resonated with The Court of Appeal Here.

In the concluding section of *Smith*, the Court, in part justified the result by pointing out the absurd consequence of an alternative holding:

"Excluding employees like plaintiff from the protective scope of sections 201 and 203 would mean that employees who fulfill their employment obligations by completing the specific assignment or duration of time for which they were hired would be exposed to economic vulnerability from delayed wage payment, while at the same time employees who are fired for good cause [e.g. showing up drunk at the hair show] would be entitled to immediate payment of their earned wages (§ 201) and many employees who quit without fulfilling their employment obligations would have a right to wage payment no later than 72 hours after they quit (§ 202)." *Id*, at 93

This observation of the Court in *Smith* would apply to the circumstances in this case as well. A Giants employee who shows up to work drunk on the last day of the season and gets fired would be entitled to immediate payment under 201, and penalties if not paid immediately. A Giants guard who fulfills employment obligations and is laid off would have to wait up two weeks for his check under the Court of Appeal decision and, even if the Giants did not pay him, he

would not be able to collect the penalties contemplated by Labor Code § 203.

3. Contractual Interference with Labor Code 201 Rights is Prohibited Pursuant to Labor Code 219

The Court of Appeal's overt disregard of Labor Code § 219 provides additional grounds for review.

The Legislature has, in specific Labor Code sections, allowed unions and employers to contract around the requirements contained in the Labor Code. See for example, provisions within Labor Code Sections 204, 227.3 and 512. Where the Legislature has not allowed for collective bargaining agreement exceptions, Labor Code § 219 is controlling:

Labor Code § 219 provides in relevant part: "[N]o provision of this article [which includes Labor Code § 201] can in any way be contravened or set aside by a private agreement, whether written, oral, or implied." See also *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1112 (9th Cir. 2000), and *Livadas v. Bradshaw,* 512 U.S. 107, at 110 (1994).[6]

[6] Both the 9th Circuit decision in *Balcorta, supra,* 208 F.3d 1102, and the Supreme Court decision in *Livadas, supra* 512 U.S. 107 addressed issue arising from application of Labor Code § 201.

" 'Under settled Supreme Court precedent, '[LMRA section] 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law.' [Citations.]' *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 695 (9th Cir.2001)." *Sciborski v. Pacific Bell* (2012) 205 CA 4th 1152,1172.

Here, the Court of Appeal decision ignores the foregoing, upholding a contract based de facto exception to the immediate payment requirements in Labor Code § 201. Contract provisions regarding scheduling, holiday pay, seniority based pay rates, contractual discharge for cause, initial hiring requirements, classifications and the rights different classifications enjoy, led the Court to infer that ***under the law*** "discharges" do not occur when guards experience layoffs. Slip Opinion pg. 8-9.

The Court of Appeal has clearly allowed the terms of a collective bargaining agreement to contravene and supersede Labor Code § 201. In doing so, the Court has ignored Labor Code § 219, *Sciborski, supra*, *Cramer, supra,* and *Livadas, supra.*

The Court of Appeal decision, on this issue, even runs afoul of the United States Supreme Court, which disdained the notion of bargaining over the wage payment timing provisions of the Labor

Code:

"The Commissioner and *amici* finally suggest that denying enforcement to union-represented employees' claims under §§ 201 and 203 (and other Labor Code provisions) is meant to encourage parties to bargain collectively for their own rules about the payment of wages to discharged workers. But with this suggestion, the State's position simply slips any tether to California law. If California's goal really were to stimulate such free-wheeling bargaining on these subjects, the enactment of Labor Code § 219, expressly and categorically prohibiting the modification of these Labor Code rules by 'private agreement' would be a very odd way to pursue it." *Livadas*, *supra* 512 U.S. at 128.

There are countless Californians whose employment is regulated both by statute and Collective Bargaining Agreements. If Review is not granted, the rights of these Californians will be profoundly impacted. To preserve statutory rights regarding the timing of wages upon layoff, rights they currently enjoy, they would be forced to bargain about them, and perhaps be forced to strike or compromise on other issues to achieve at the bargaining table what the law already provides. Such a necessity is contrary to Section 219

and the foregoing State and Federal authority.

4. The Court of Appeal Opinion Conflicts with Decades of Federal Preemption Jurisprudence, And the California Precedent that Has Embraced that Body of Federal Case Law.

The claims asserted in this action, having nothing to do with a collective bargaining agreement or its interpretation, are not, therefore, subject to Section 301 (29 USC 185) preemption.

> "Under section 301, federal preemption of a state wage protection statute occurs only where the enforcement of the state law requires the interpretation of a collective bargaining agreement. '[Section] 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law... it is the legal character of a claim, as 'independent' of rights under the collective-bargaining agreement, ... that decides whether a state cause of action may go forward." (*Livadas, supra,* 512 U.S. at pp. 123–124.) In this case, the claim arose from independent state law and no interpretation of the CBA was required." *Sciborski, supra*

205 CA 4th at 1172. See also *Levy, supra* 108 CA 4th 753, 762-770.

It does not take reference to or interpretation of a collective bargaining agreement to determine whether a Giants employee's layoff at the end of a baseball season, at the end of a one-day assignment, months into the off season, or between home stands is a "discharge" under Labor Code 201. In each of those instances, the operative question is, has a "discharge" occurred as contemplated by Labor Code 201? As referenced in detail above, interpretation of or reference to a CBA is not required for that determination.

If a temporary layoff, a permanent layoff or a layoff for an indefinite period are forms of "discharge" under Labor Code Section 201, which they are, even if a collective bargaining agreement treated the employees subject to layoff as permanent employees for life incapable of being contractually discharged, the statutory rights under Labor Code 201 to immediate pay upon a layoff would not be affected. The laser focus of the Court should have been directed at the statutory meaning of "discharge" and the meaning of the term "layoff" as used in the statute. The statutory rights at issue cannot be impacted by CBA's per Labor Code 219.

In addition to preempting claims founded directly on rights created by a CBA, the Supreme Court has established that § 301 preempts claims that are "substantially dependent on analysis" of a CBA. *Caterpillar Inc.* 482 U.S. 386 at 394; *see also Rameriz v. Fox Television Station, Inc.*, 998 F.2d 743, 748 (9th Cir.1993) ("A state-law claim is preempted by section 301 'if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement' ") (quoting *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 405–06 (1988)).

Thus, Courts must engage in a two-part inquiry. "[F]irst, an inquiry into whether the asserted cause of action involves a right conferred upon an employee by virtue of state law, not by a CBA. If the right exists solely as a result of the CBA, then the claim is preempted, and [the Court's] analysis ends there." *Burnside v. Kiewit Pacific Corp.*, 491 F.3d1053, 1059 (9th Cir.2007). "If, however, the rights exist independently of the CBA, [the Court] must still consider whether it is nevertheless 'substantially dependent on analysis of a collective-bargaining agreement.' If such dependence exists, then the claim is preempted by section 301; if not, then the claim can proceed under state law." *Id.*

To determine whether a state law claim is "substantially dependent" on the terms of a CBA, the Court must "decide whether the claim can be resolved by 'look[ing] to' versus interpreting the CBA. If the latter, the claim is preempted; if the former, it is not." *Id.* For example, "looking to" the CBA to determine that none of its terms is reasonably in dispute, or referring to the bargained-for-wage rates to compute a penalty, does not make a claim substantially dependent upon the CBA. *Id.; see also Livadas v. Bradshaw,* 512 U.S. 107, 124, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994) ("when the meaning of contract terms is not the subject of dispute, the bare fact that collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished"). As the Ninth Circuit has explained:

"If the plaintiff's claim cannot be resolved without interpreting the applicable CBA - as, for example, in *Allis–Chalmers,* where the suit involved the employer's alleged failure to comport with its contractually established duties - it is preempted. Alternatively, if the claim may be litigated without reference to the rights and duties established in a CBA - as, for example, in *Lingle,* where the plaintiff was able to litigate her retaliation suit under state law without

reference to the CBA - it is not preempted." *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 691 (9th Cir.2001), cert. denied 534 U.S. 1078. (2002)

"Moreover, alleging a hypothetical connection between the claim and the terms of the CBA is not enough to preempt the claim: adjudication of the claim must require interpretation of the CBA." *Id.*

With employers and unions lacking the power to displace state labor laws, *see Cramer, supra.* 255 F3d at 697 (9th Cir.2001); *Humble v. Boeing Co.*, 305 F.3d 1004, 1007 (9th Cir.2002); *Valles v. Ivy Hill*, (9th Cir. 2005) 410 F3d 1071, 1076, there is no argument here that the CBA needs to be interpreted to resolve this case.

The Court of Appeal failed to adhere to the foregoing precedent. Given that the rights and obligations at the foundation of this case are statutory rights designed for the protection of all Californians who find themselves discharged and unemployed, the trial court correctly analyzed preemption doctrine, and the Court of Appeal got it wrong. Review is necessary to address that grievous error.

V. CONCLUSION

For over 100 years, California workers have benefited from the protections of Labor Code section 201. The financial incentives designed to make these protections enforceable have been in existence since 1915. Eleven years ago, this court properly rebuffed an employer's effort to erode the protections of Labor Code Section 201. The time has come to do so once again. Unfortunately, the need for these labor protections has not diminished. Hard-working Californians who find themselves out of work depend on prompt payment of wages upon layoff to support themselves and their families. Baseball, to get a modest change in the requirements of Labor Code 201 must, as other industries were able to do, turn to the Legislature for an exception. We respectfully urge this court to grant review and reverse the Court of Appeal decision.

Dated: November 27, 2017 Respectfully Submitted,

_ /s/ Dennis Moss

DENNIS F. MOSS
Attorneys for Respondent
GEORGE MELENDEZ

RULE 14 CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.260(b)(1) of the California Rules of Court, the enclosed brief of Petitioner is produced using 14-point Roman type including footnotes and contains approximately 7,941 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: November 27, 2017

/s/

By: DENNIS F. MOSS
Attorneys for Plaintiff and Petitioner
GEORGE MELENDEZ

Filed 10/17/17

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

GEORGE MELENDEZ et al., Plaintiffs and Respondents, v. SAN FRANCISCO BASEBALL ASSOCIATES LLC, Defendant and Appellant.	A149482 (City & County of San Francisco Super. Ct. Nos. CGC-13-530672, CGC-15-549146)

Defendant San Francisco Baseball Associates LLC (the Giants)[1] appeals from the denial of its motion to compel arbitration of the wage and hour claims of plaintiff George Melendez.[2] Plaintiff, a security guard employed by the Giants at AT&T Park, contends that he and other security guards were employed "intermittingly" for specific job assignments (baseball games or other events) and were discharged "at the end of a homestand, at the end of a baseball season, at the end of an inter-season event like a fan fest, college football game, a concert, a series of shows, or other events," and that therefore under Labor Code section 201 were entitled to but did not receive immediate

[1] The Giants were erroneously sued as "San Francisco Giants Baseball Club LLC." The correct entity was originally San Francisco Baseball Associates LP, which has subsequently undergone restructuring and is now the San Francisco Baseball Associates LLC.

[2] Separate actions were brought by plaintiffs Wilfredo Rivas and George Melendez. Rivas having been terminated by the Giants for misconduct, the parties stipulated that the actions would be consolidated and that Melendez would be designated as the class representative of the putative class action. Melendez is the employee whose situation is addressed in the briefing in the trial court and this court. The claims of the two plaintiffs are identical.

payment of their final wages upon each such "discharge." The Giants contend that payment immediately after each such event is not required because under the terms of the collective bargaining agreement (CBA) between the Giants and the Service Employees International Union, United Service Workers West of San Francisco (the union), Melendez and all such security guards are not intermittent employees but are "year-round employees who remain employed with the Giants until they resign or are terminated pursuant to the CBA." The Giants moved to compel arbitration or to dismiss the action under the arbitration provision of the CBA and on the ground that the action is preempted by section 301 of the Labor Management Relations Act, 29 United States Code, section 185(a). The trial court rejected both grounds. We agree that the present dispute is not within the scope of the arbitration provision in the CBA but conclude that arbitration is required by section 301 of the Labor Management Relations Act.

Background

The following facts were established by declarations submitted in support of the Giants' motion and are largely undisputed.

AT&T Park in San Francisco is used by the Giants for baseball games and for concerts and other events during the off-season and between "homestands" (defined as between three and 10 or more consecutive games at the home ballpark). Numerous non-baseball events are held at the ballpark throughout the year.

Melendez has been employed by the Giants as a security guard at AT&T Park since March 2005. As required by the terms of the CBA he has at all times been a member of the union and the terms of his employment are governed by the provisions of the CBA.

The CBA confirms that the union is the sole collective bargaining agency for security personnel employed by the Giants at AT&T Park. The agreement defines several classifications of employees. "Regular" employees are the 13 employees who in 2012 worked the most total hours and who continue to work at least 1700 hours in succeeding years. These employees have priority in scheduling over other classifications of employees and receive benefits not provided to other employees. Any vacancy in these

13 positions "shall be filled by the person who worked the most hours in the previous year from among those employees not classified as 'regular employees.' " All other employees (other than "supervisory" employees and "probationary" employees) are labelled "seasonal" employees. The CBA also defines "senior seasonal" employees (seasonal employees who have worked a minimum of 300 hours each year for the last five years) and "super senior seasonal" employees (seasonal employees who have worked a minimum of 300 hours each year for the last 10 years), who receive increased hourly wages.

All security personnel are required to meet specified employment qualifications. These qualifications include obtaining a valid California Guard Card, which requires "enrolling in and completing necessary coursework and training, passing the required examination, passing the required background check" and meeting any other applicable requirements. The CBA also provides that "All new applicants for employment as security personnel shall be subject to pre-hire drug screening and background investigation." The Giants "have the right to discipline or discharge any regular, senior seasonal or seasonal employee for cause." The term of the CBA is from January 1, 2013, through December 31, 2017, and from year-to-year thereafter unless either party requests modification 60 days prior to the anniversary date.

The CBA contains a schedule of hourly wages for all classifications of employees. The agreement provides that the Giants "retain[] the right to establish what shall constitute a normal workday and to schedule employees at its discretion." All non-probationary employees "shall be entitled to overtime pay for Martin Luther King Jr. Day, President's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving, Christmas & New Year's Day."

According to the Giants' Senior Director of Security, "security guards do not turn in their uniforms or badges at the end of each homestand or baseball season." They "do not reapply for work or submit new hire paperwork at the beginning of each homestand or baseball season. Nor do they have to undergo security background checks at the beginning of each homestand or baseball season. [¶] . . . The Giants do not terminate their

security guards at the end of each homestand or baseball season. On the contrary, security guards remain on the Giants' payroll between homestands and baseball seasons, unless their employment otherwise ends (by resignation or pursuant to the CBA)." Many Giants' security guards "regularly work between baseball seasons or year-round. . . . Based on review of his payroll records, [Melendez] himself regularly worked between baseball seasons. In fact, he worked *every pay period* in 2015 and *each and every pay period* in 2016 to date, often working almost as many hours in the 'off-season' as those during the baseball seasons." (Italics in original.)

Without having invoked the grievance procedures specified in the CBA, plaintiffs filed their complaints with common allegations. Melendez alleges that he and other security guards are hired by the Giants "intermittently during the baseball season and throughout the rest of the calendar year" and that the Giants fail to comply with Labor Code section 201 "in no less than three (3) ways. (1) At the end of the baseball season defendants do not pay intermittingly employed persons on the last day they work during the season. (2) During the baseball season, defendants do not immediately pay intermittently employed employees on the last day they work during a home-stand. (3) Between baseball seasons, when intermittently employed persons are employed for events such as concerts, college football games, theatrical performances, fan appreciation days, a run of Cirque du Soleil shows, etc., defendants do not immediately pay intermittently employed employees at the end of their work at these events."

The Giants have timely appealed from the trial court's denial of its motion to compel arbitration of these claims as assertedly required by the arbitration provision of the CBA and by section 301 of the Labor Management Relations Act.

Discussion

1. *The dispute does not come within the arbitration provisions of the CBA.*

Section Fourteen of the CBA, entitled Grievance & Arbitration, requires an effort to resolve grievances informally and, failing informal resolution, arbitration of the grievance. A "grievance" is defined as "any dispute between the employer and an

employee or the union, regarding the interpretation, application or alleged violation of any of the terms of this agreement." The complaint is this action does not allege a violation of the terms of the CBA. The complaint is based solely on the alleged violation of Labor Code section 201. The trial court correctly ruled that the alleged statutory violation does not come within the scope of the contractual arbitration provision. (E.g., *Flores v. Axxis Network & Telecommunications, Inc.* (2009) 173 Cal.App.4th 802, 808-810.)

2. *Section 301 of the Labor Management Relations Act requires that the dispute be arbitrated.*

"[A] long line of United States Supreme Court cases hold[] that under section 301 [of the Labor Management Relations Act], although state courts have concurrent jurisdiction over controversies involving agreements between unions and employers, the substantive law governing union-management labor relations is exclusively a matter for arbitration under federal law. [Citations.] . . . [¶] The Ninth Circuit, sitting en banc, recently summarized section 301 preemption law as follows: 'If the plaintiff's claim cannot be resolved without interpreting the applicable CBA . . . it is preempted. . . . [T]he need to interpret the CBA must inhere in the nature of the plaintiff's claim,' however, in order for preemption to apply. [Citation.] '[I]f the claim may be litigated without reference to the rights and duties established in the CBA . . . [and] plainly is based on state law,' it is not preempted, even if 'the defendant refers to the CBA in mounting a defense.' " (*Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 762-763, fn. omitted.) As the Ninth Circuit recognized in *Newberry v. Pacific Racing Assn.* (9th Cir. 1988) 854 F.2d 1142, 1147, section 301 of the Labor Management Relations Act "does not preempt every employment dispute tangentially involving the labor agreement." The test of whether preemption applies is: "Does the application of state law 'require[] the interpretation of a collective-bargaining agreement,'[citation], or 'substantially depend[] upon analysis of the terms of the agreement made between the parties in a labor contract?' " (854 F.2d at p. 1147.)

Here, plaintiffs seek the recovery of penalties under Labor Code section 203 on the ground that the Giants' failure to pay security guards immediately after the termination of each instance of what they describe as "intermittent employment" violates Labor Code section 201.[3] Section 201, subdivision (a) begins: "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."[4] The Giants' position is that it does not "discharge" its security guards after every game, homestand, baseball season or event at which the guards work. Rather, it contends, the guards remain employed under the provisions of the CBA, subject to scheduling by the Giants, unless and until a guard resigns or is terminated for cause under the terms of the CBA.

Melendez's contrary position is based upon our Supreme Court's decision in *Smith v. Superior Court (L'Oreal)* (2006) 39 Cal.4th 77. In *L'Oreal*, the court concluded that "an employer effectuates a discharge within the contemplation of Labor Code sections 201 and 203, not only when it fires an employee, but also when it releases an employee upon the employee's completion of the particular job assignment or time duration for which he or she was hired." (39 Cal.4th at p. 90.) In that case, the plaintiff was hired to be a "hair model" at a single show featuring the employer's products, with the understanding that she would be paid $500 for the one day's work. (*Id.* at p. 81.) The employer waited over two months before paying the plaintiff, who successfully claimed that Labor Code

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[3] Labor Code section 203 provides that an employer's willful failure to pay wages to a discharged employee in accordance with Labor Code section 201 subjects the employer to penalties.

[4] Labor Code section 201, subdivision (a) continues with this exception: "An employer who lays off a group of employees by reason of the termination of seasonal employment in the curing, canning, or drying of any variety of perishable fruit, fish or vegetables, shall be deemed to have made immediate payment when the wage of said employees are paid within a reasonable time as necessary for computation and payment thereof; provided, however, that the reasonable time shall not exceed 72 hours . . . ." Other sections provide different final payment provisions for specified classes of employees, none of which apply here. (Lab. Code, §§ 201.3, 201.5, 201.7, 201.9.) Melendez argues that the absence of such a provision applicable to his employment emphasizes that the requirement of immediate payment applies in this case.

sections 201 and 203 "protect employees such as herself who are hired for a particular job assignment or time duration, and that the statutory discharge element is met when the employment relationship is terminated upon completion of the specified employment." (39 Cal.4th at p. 82.) Melendez asserts that *L'Oreal* applies to his situation, while the Giants contend the case is inapplicable because its security guards are not hired "for a particular job assignment or time duration."

Turning to the preemption issue, the trial court held that resolution of the controversy does not require interpretation of the CBA, but simply a determination of whether the security guards are discharged within the meaning of Labor Code section 201 at the conclusion of an event or series of baseball games. The court observed that the dispute can be resolved without interpretation of "any specific language in the CBA." It reasoned that none of the provisions in the CBA, such as those "relat[ing] to vacations; how employees are assigned work; and so on . . . [have] any connection . . . to whether plaintiffs here were or were not terminated, the core (if not only) factual issue pertinent to the statutory claims."

We disagree with this analysis. While resolution of the controversy may not turn on the interpretation of any specific language in the CBA, it does not follow that the meaning of the CBA is irrelevant to the outcome of the dispute. The underlying legal issue, as all parties recognize, is whether plaintiffs were "discharged" within the meaning of Labor Code section 201. But in order to determine whether the conclusion of a baseball game or season or other event constitutes a discharge as interpreted in *L'Oreal,* it is necessary to first determine the terms of employment. (*Smith v. Superior Court* (*L'Oreal*), *supra,* 39 Cal.4th 77.) In *L'Oreal* the plaintiff was hired for only a single day's work, so that when the day ended her employment terminated and she was therefore discharged within the meaning of the statute. Here, plaintiffs are union members and the terms of their employment are governed by the CBA. It is essential to determine, therefore, whether the CBA provides for employment of security guards for only a single game or homestand or season or other event, or whether the agreement contemplates extended employment from season to season, event to event, year to year, recognizing

that not every day will be a day of work. If the latter, there is no termination of employment, and therefore no "discharge," at the conclusion of each baseball game, homestand, season or other event.

Although no provision of the CBA provides an explicit answer, the duration of the employment relationship must be derived from what is implicit in the agreement. There are numerous provisions from which inferences may logically be drawn. The classification of employees is based on the number of hours worked in a year, itself suggesting that employment is considered to continue beyond the conclusion of each event. Continued classification as a "regular" employee requires at least 1,700 hours of work in a year. "All employees shall be probationary employees for their first five hundred (500) hours of work with the Giants." Employees rise to "senior" and "super senior" status by working a minimum of 300 hours each year for the last five or ten years, hardly possible if each event is deemed a separate employment. As indicated above, the CBA provides that "All new applicants for employment as security personnel shall be subject to pre-hire drug screening and background investigation"; the language seems to imply that such screening and investigation will occur only once prior to the start of a single employment, and practice under the agreement confirms this interpretation. The specification of holidays in the CBA certainly implies year-long employment. And under the CBA, the Giants have the right to discharge an employee only for cause. Other provisions may also support inferences as to the intended term of employment. We do not here purport to definitively interpret the CBA but simply emphasize that resolution of the controversy requires interpretation of the scope of employment under the CBA.

Other cases on which Melendez relies for the argument that mere reference to a collective bargaining agreement does not give rise to preemption under section 301 of the Labor Management Relations Act are distinguishable. In *Livadas v. Bradshaw* (1994) 512 U.S. 107, the plaintiff's claim under Labor Code sections 201 and 203 was not preempted because there was no need to look to the terms of the collective bargaining agreement under which plaintiff had been employed to determine whether section 201 had been violated. There was no dispute that plaintiff had been terminated and that final

payment had been delayed. "Beyond the simple need to refer to bargained-for wage rates in computing the penalty, the collective-bargaining agreement [was] irrelevant to the dispute (if any) between Livadas and [the employer]." (512 U.S. at p. 125.) The Commissioner of Labor in that case had erroneously concluded that she was prohibited from enforcing section 201 whenever the employee had worked under a collective bargaining agreement, even if there was no dispute as to the meaning of the agreement or need to interpret it to determine liability under the statute. Similarly, in *Balcorta v. Twentieth Century-Fox Film Corp.* (9th Cir. 2000) 208 F.3d 1102, 1110, "determining whether Balcorta was discharged [did] not require a court to interpret the collective bargaining agreement between Fox and Local 728, and thus [did] not render Balcorta's claims subject to complete preemption." The other cases cited by Melendez are to the same effect. (*Meyer v. Irwin Industries, Inc.* (C.D. Cal. 2010) 723 F.Supp.2d 1237, 1245 ["analysis [of plaintiff's Labor Code claims] can be accomplished without any reference to the CBA"]; *Avalos v. Foster Poultry Farms* (E.D. Cal. 2011) 798 F.Supp.2d 1156, 1162 ["Here, the CBA does not contain a complex wage structure that requires analysis to resolve the claims."]; *Bonilla v. Starwood Hotels & Resorts Worldwide, Inc.* (C.D. Cal. 2005) 407 F.Supp.2d 1107, 1112, 1113 ["Plaintiff's claims by themselves do not require an analysis of the CBA"; "Defendant does not demonstrate that the CBA must be 'interpreted' rather than simply referenced to determine unpaid compensation for missed breaks"].)

Since in this case application of Labor Code section 201 necessarily " 'require[s] the interpretation of [the CBA]' " and " 'substantially depend[s] upon analysis of [its] terms' " (*Newberry v. Pacific Racing Assn., supra,* 854 F.2d at p. 1147), federal preemption applies and the dispute must be resolved pursuant to the grievance procedure and arbitration under the CBA.

Disposition

The order denying the motion to compel arbitration is reversed.

_____
Pollak, J.

We concur:

_____
McGuiness, P. J.

_____
Siggins, J.

A149482

Trial court:	San Francisco County Superior Court
Trial judge:	Honorable Curtis E. A. Karnow
Counsel for plaintiff and respondent:	Dennis F. Moss Sahag Majarian II
Counsel for defendant and appellant:	SHEPPARD, MULLIN, RICHTER & HAMPTON LLP Nancy Pritikin Babak Yousefzadeh Brian S. Fong

A149482

PROOF OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 15300 Ventura Boulevard, Suite 207, Sherman Oaks, California 91403.
2. That on November 27, 2017 declarant served the PETITION FOR REVIEW by depositing a true copy thereof in a United States mail box at Sherman Oaks, California in a sealed envelope with postage fully prepaid and addressed to the parties listed on the attached service list.
3. That there is regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th day of November 2017 at Sherman Oaks, California.

/s/

By: Lea Garbe

SERVICE LIST

Clerk, California Court of Appeal
First District Court of Appeal
350 McAllister Street
San Francisco, CA 94102

Clerk, San Francisco Superior Court
400 McAllister St.
San Francisco, CA 94102

Via Federal Express

Attorney for Respondents and Defendants:

Nancy E. Pritikin
Babak Yousefzadeh
Brian S. Fong
SHEPPARD MULLIN RICHTER & HAMPTON LLP
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111-4109

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Case Number: **TEMP-WCRP6KCV**
Lower Court Case Number:

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