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## Client Alert

*The California Court of Appeals has held that an employer did not violate the law when it fired an employee because she was pregnant, if other factors also motivated the employer's decision.*

### **Appeals Court Holds That Termination Based on Pregnancy Is Not Unlawful If Other Factors Also Motivated the Decision**

California law forbids firing an employee because she is pregnant. Yet in a recent opinion, *Harris v. City of Santa Monica*, the California Court of Appeal held that a pregnancy-based termination is not unlawful if the employer was also motivated by other reasons to fire the employee.

Harris was hired to drive Santa Monica's "Big Blue Bus." While still in the probationary phase of her employment, Harris had two minor accidents and was twice late for work. Harris told her supervisor that she was pregnant and was fired soon afterwards. She sued the City, claiming that she was fired because of her pregnancy. In response, the City claimed that it fired her because of the accidents and her tardiness.

At the trial, the court instructed the jury that it should find in favor of Harris if it concluded that her pregnancy "was a motivating reason/factor for the discharge." The court refused the City's request to instruct the jury that it should rule in the City's favor if it found that the termination "was actually motivated by both discriminatory and non-discriminatory reasons." After completing its deliberations, the jury found the City liable.

The California Court of Appeal held that the trial court's failure to give the City's requested instruction required reversal of the jury's verdict and a new trial. The



Russell I. Glazer

310.789.1216

[rglazer@troygould.com](mailto:rglazer@troygould.com)

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appellate court acknowledged that the most current version of California's standard jury instructions omitted the instruction that the City sought, and that "the law involving the mixed-motive defense is not stable and clear, but instead arguably in flux." Nonetheless, the appellate court ruled that the defense "remains good law available to employers in the right circumstances." The appellate court held that the jury should have been instructed to find in favor of the City if it determined that the City would have fired Harris whether or not she was pregnant, even if her pregnancy played a role in the City's decision.

Although the *Harris* opinion arose in the context of a pregnancy discrimination claim, the appellate court made clear that the same rule would apply in cases involving allegations of other forms of employment discrimination, such as race and gender. The decision is therefore an important victory for employers accused of unlawful discrimination.

The decision also illustrates the importance of keeping contemporaneous records documenting employees' performance. The City was able to obtain a new trial because it showed that the plaintiff's performance reviews — and in particular her accidents and her tardiness — supported the conclusion that it would have fired her for reasons unrelated to her pregnancy.

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### TROYGOULD PC

1801 Century Park East • Los Angeles 90067 • 310.553.4441  
[www.troygould.com](http://www.troygould.com)

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